

ARTICLE

TIERS

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TIERS

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Procedure is a mechanism for expressing political and social relationships and is a device for producing outcomes. The purpose of this article is to clarify the value-laden aspects of courts' procedures, to survey interrelated changes in civil and criminal procedure over the past twenty years, and to analyze how the evolving procedural doctrines are linked to value choices.

I use the term procedure to include both the formulation of rules that govern litigants and the decisions to provide single or multiple opportunities to litigate. That procedures are used to obtain outcomes (in a narrow sense) in specific disputes is uncontroversial. But procedure also embodies deeply held, albeit often unarticulated, views of human relationships, of the importance and difficulty of passing judgments on individuals' conduct, and of the place of government in citizens' lives.¹

One example illustrates this point. Two years ago, when having to decide whether to incarcerate a convicted defendant for twenty or for thirty days, a trial judge flipped a coin. His audience was incensed, and the judge was subsequently censured.²

What was so offensive? The coin flip produced an outcome, inex-

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1. See P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 8-9 (1976) [hereinafter cited as JUSTICE ON APPEAL] (importance of ritual and "process imperatives" in procedure); R. COVER & O. FISS, THE STRUCTURE OF PROCEDURE (1979) (procedure as a social, cultural institution); 18 NOMOS: DUE PROCESS (J. Pennock & J. Chapman eds. 1977) (collection of essays exploring nature and rationale of procedural fairness); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49-52 (1976) (importance of dignity concerns); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172-77 (dignity, participation, deterrence, and effectuation as litigation values).

2. Shipp, *Friess Is Barred from Ever Being New York Judge*, N.Y. Times, Apr. 7, 1983, at B3, col. 1.

pensively and quickly. Moreover, the judge's critics did not claim that the decision itself incorrectly reflected either law or fact, or that the time ultimately to be served by the defendant was unjustly long or short.

The complaint was about process. The coin flip offended this society's commitment to rationality. The open embrace of chance as determinative was frightening.³ The decisionmaking procedure was also uncomfortably commonplace; people flip coins to decide who must wash dishes or go first in a game. State-backed orders to incarcerate are more seemly if made in a way that differentiates them from those involving dishwashing. The import of the judge's decision, that a person had to spend many nights in a cell, was not reflected in the procedure. The community's outrage expressed feelings that some decisions should be treated specially, perhaps garbed in ritual, and certainly made to appear rationally and carefully chosen.

But it was not only the citizenry that was outraged. It was a commission of judges and lawyers, as well as citizens, who censured the judge for undermining the appearance of rationality.⁴ Whether a judge's internal mental process, when pronouncing a sentence of twenty or thirty days, actually amounts to anything more than a coin flip, the community wishes judicial rulings at least to appear to be the product of contemplative, deliberative, cognitive processes.⁵ The commission punished the judge for breaking ranks, for undermining the function of procedure to legitimate and to maintain the coercive powers of the state.

While it is relatively easy to discern procedure's legitimating functions (after all, with only an odd set of behaviors denominated "trial" or "plea," the state incarcerates people or executes them—without intolerable social upheaval), it is more difficult to examine procedure's value-expressive functions. Given the heterogeneity of the United States and the multiplicity of traditions, it is even problematic to speak of shared cultural values.⁶ Moreover, there is constant change, both in

3. The commission that censured the judge concluded that "[a] court of law is not a game of chance." *Id.*

4. "Abdicating such solemn responsibilities, particularly in so whimsical a manner . . . is inexcusable. . . ." The commission report, quoted by Shipp, *id.*

5. "The public has every right to expect that a jurist will carefully weigh the matters at issue and, in good faith, render reasoned rulings and decisions." The commission report, quoted by Shipp, *id.*

6. See Cover, *The Supreme Court, 1982 Term—Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 7, 9-10 (1983) (meaning of law determined by differing "interpretive commitments");

society and in the operating rules of courts. Procedural rules are not crafted in a vacuum. Decisions about procedure are influenced by judgments about the disputants, the dispute, and the proper role of government in responding to conflicts.

With those substantial caveats in mind, I wish to explore the role procedure plays in this multifaceted society. I elaborate my views of procedure's normative content by first describing twelve valued features of procedure in this country. The relative weights assigned to these features determine the makeup of procedural models and of the structure for court decisionmaking. Thereafter, I relate these elements to diverse models of procedure. I discuss reasons for and against introducing complexity into procedure by adding layers of decisionmaking, by permitting reconsideration of decisions already rendered, and by authorizing different actors to make decisions afresh. I explore a range of procedural models, from a simple one, such as a single judge issuing a final decision, to a complex one, such as six courts, at different levels, each authorized to make or to remake decisions in particular cases.

All the models discussed find their counterparts within the United States, which is rich in examples of procedural diversity. The jurisdictions of state courts and federal courts sometimes overlap,⁷ at other times are mutually exclusive,⁸ and occasionally are in hierarchical formation.⁹ Administrative agencies and courts are also in varied relationships. Both may be available to litigants,¹⁰ agency determination may be a prerequisite to court review,¹¹ or agency decisionmaking may preclude court review.¹² Of the multiple examples possible, I concentrate upon procedural schemes involving either state and federal courts, courts and agencies, or repetitive court adjudication.

Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. (1985) (forthcoming).

7. See, e.g., 28 U.S.C. § 1332 (1982) (requirements for diversity jurisdiction in federal courts are that litigants be citizens of different states and amount in controversy be over \$10,000).

8. See, e.g., *id.* § 1333 (federal courts have exclusive jurisdiction over admiralty and maritime cases); C. WRIGHT, *HANDBOOK OF THE LAW OF FEDERAL COURTS* § 25, at 143-45 (4th ed. 1983) (states have exclusive jurisdiction over domestic law and probate matters).

9. See, e.g., *id.* § 2254 (prisoners convicted in state courts may, after exhausting state judicial remedies, file habeas corpus actions in federal courts).

10. See, e.g., 42 U.S.C. § 2000e-5 (1982) (Title VII claimant may complain to both state and federal agencies).

11. See, e.g., *McKart v. United States*, 395 U.S. 185, 193-96 (1969) (explaining the rationales for exhaustion of administrative remedies doctrine). Exhaustion is mandatory, for example, under the Federal Torts Claim Act, 28 U.S.C. § 2675(a) (1982).

12. See, e.g., 5 U.S.C. § 8128(b)(2) (1982) (Secretary of Labor's allowance or denial of worker's compensation not reviewable in federal court).

I discuss in detail the development of federal habeas corpus for state prisoners and habeas corpus for federal prisoners—two models of potential procedural redundancy that have recently been sharply limited. Habeas corpus is a genre of process that has long drawn the attention of commentators. The “Great Writ” places the tension among diverse values of dispute resolution systems in a poignant context. It is assumed by critics as well as supporters of habeas corpus review that some compromise of the oft-stated desire for finality is appropriate when a person claims illegal deprivation of liberty.¹³ The dispute is over what kinds of compromises should be made. The expansion and narrowing of habeas corpus provides insight into changing emphases on the various purposes of procedure.

Next, I examine how the value choices made in habeas cases are paralleled in other complex litigation schemes, such as civil rights litigation filed pursuant to 42 U.S.C. § 1983 and employment discrimination litigation brought under Title VII.¹⁴ 42 U.S.C. § 1983 prohibits those acting under color of state law from depriving citizens of civil rights. Since the Supreme Court has interpreted section 1983 actions as “supplementary” to remedies provided by states for such injuries,¹⁵ both federal and state courts are available for adjudication. Congress was more explicit about dual decisionmaking in Title VII of the Equal Employment Opportunities Act. That civil rights statute gives both state and federal agencies, as well as federal courts, responsibilities to enforce antidiscrimination laws.¹⁶

Finally, I review two purely federal schemes—magistrate adjudication and appeal in the federal courts. In recent amendments to the Magistrates Act, Congress gave magistrates greater independence to author decisions but also reserved an oversight role for federal judges.¹⁷ And, although Congress has long authorized federal appellate courts to review decisions of trial judges, even the relatively simple

13. See, e.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 446-48 (1963) (finality must sometimes give way to permit error correction); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045-46 (1977) (redundancy appropriate in protection of federal rights); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149-50 (1970) (finality should have less weight in criminal proceedings than in civil proceedings); Peller, *In Defense of Federal Habeas Corpus Rerelitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 582 (1982) (Burger Court unjustified in placing restrictions on scope of habeas review).

14. 42 U.S.C. § 2000e to 2000e-17 (1982).

15. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

16. 42 U.S.C. §§ 2000e-4, 2000e-5 (1982).

17. 28 U.S.C. § 636(b) (1982).

model of one appeal as of right may, of late, have been eroded by limitations placed upon the scope of appellate review.¹⁸

Recent Supreme Court discussions of all six of the foregoing statutory or rule-based schemes reveal the interrelationship between the procedural preferences and the value choices of the Justices. A majority of this Court seeks finality, defers to the authority of first tier decisionmakers, and is deeply concerned about resource conservation. Generally, the Court discusses procedure as if outcome production were its only purpose. Once an initial decision has been made, whether by an agency official, a magistrate, a trial judge, or a jury, a majority of the Court believes that the decision should be difficult to undo. The Court appears attracted to a simple model of procedure—a single judge issuing a final, authoritative decision. The Court's current value preferences, for closure, economy, and power-concentration, stand in contrast to the decisions of other eras. Other justices, legislators, and commentators, weighting the value features differently, favored duplicative decisionmakers to permit greater expression of their concerns, namely, supervision of first-tier decisionmakers, diffusion of judicial power among decisionmakers, and the use of procedure to underscore the promise of individual rights.

I. PROCEDURE: ITS PURPOSES, TECHNIQUES, AND VALUES

As demonstrated by the coin-flipping judge, government-empowered actors may not simply pronounce victory for one litigant over another. Rather, we deem legitimate and accord political authority only to those resolutions that comport with shared views about how to adjudicate.

What values inform the judgment to reject the coin flip? It is tempting to retreat to the two obvious overarching themes—justice and efficiency—to aid in identifying values. Such a formulation, however, would be at a level of abstraction that would obscure important concerns bearing heavily upon procedural modeling. Moreover, employing the justice/efficiency dichotomy may misleadingly suggest that the two themes are distinct and always at odds.

A second, superficially appealing delineation would be to distinguish those features of our procedural system embodying “instrumen-

18. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982) (limited appellate review available on questions of discriminatory intent).

tal" concerns from those relating to "intrinsic" concerns. The drawback here is that the instrumental/intrinsic distinction is usually accompanied by the assumption that procedural features are "instrumental" because they relate to outcome production. One could, however, easily describe as "instrumental" those features of a procedural system that further nonoutcome-related purposes, such as underscoring the dignity of individuals.

Rather than pursue a quest for neat packaging or take flight to the highest levels of abstraction, I think it more fruitful to identify basic aspects of procedure in the United States, aspects I have denominated "valued features." By that term, I mean to convey that these "features" are identifiable elements of the procedural terrain; they are particularized and readily recognizable aspects of institutional arrangements. In addition to their descriptive power, these "valued features" incorporate normative themes. That is, frequently, when judges, legislators, and commentators discuss whether to provide a given procedure, they make reference to values that the features embody or are used to express.

I set forth twelve "valued features" below. Although I believe that I have captured the major elements, I do not claim to have provided an exclusive or exhaustive list.¹⁹ Moreover, I do not insist on the boundaries between each. Rather, the features fall into clusters, which I have organized by first discussing those features relating to litigants, then to decisionmakers, and finally to the decisionmaking process. But there is some overlap, and each feature can be conceptualized at varying levels of abstraction.²⁰

A. THE VALUED FEATURES

1. *For Litigants*

a. *Litigants' autonomy*: Despite the multiple ways in which political activity in the United States is dependent upon organizations and despite the rise of the bureaucratic state, judicial procedures are rooted in the values of individualism. Courts still assume that the individual is

19. Compare my list to those values described by others. *See, e.g.*, JUSTICE ON APPEAL, *supra* note 1, at 8-11 (identifying "process" and "systemic" imperatives); 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 7-13 (R. Abel ed. 1982) (describing values of formal and informal legal institutions) [hereinafter cited as INFORMAL JUSTICE]; Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979) (finality, obedience, guidance, efficiency, availability, neutrality, conflict reduction, and fairness).

20. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY 93 (1977) ("background" rights and "institutional" rights or "abstract" versus "concrete" rights).

the relevant unit. Courts require that victims²¹ and harmdoers²² participate in lawsuits. Courts are deeply suspicious of claims made by groups, rather than individuals, and various procedural rules ignore the reality that insurance companies, governments, associations, and other entities are the "real" parties to many lawsuits.

Individuals command attention from judges. Unlike the requirements of substantial wealth or group action that are predicates to legislative or executive receptivity, even poor *pro se* litigants can obtain official responses from courts. Moreover, the judiciary itself incorporates the values of individualism. Single judges have an independence not permitted other members of complex, hierarchical institutions.²³

Courts are keyed to individuals, and we self-consciously praise our system for vesting decisionmaking power in individuals. Our process permits litigants to make their way alone²⁴ or to enlist advocates.²⁵ Further, litigants are relatively free to define the parameters of their disputes and to select the kinds of relief sought. Thus far, we have rejected a civil law model of state-controlled pretrial preparation in favor of an individualistic, party-initiated approach.²⁶ While we have procedural doctrines, such as election of remedies, forfeiture, and

21. See, e.g., *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1667 (1983) (showing of future injury required for standing); *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972) (injury in fact to party seeking review required as prerequisite for a "case" in federal court).

22. See, e.g., *Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980) (individual alleged to have engaged in tortious conduct, and not insurance company who would compensate the victim, is the requisite defendant).

23. See Fiss, *The Bureaucratization of the Judiciary*, — YALE L.J. — (1983) (forthcoming) (term "bureaucracy," in traditional sense, not fully applicable to federal courts); Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 767 (1982) (vertical structure of federal judiciary "does not function in the hierarchical fashion of a typical bureaucracy").

24. See *Faretta v. California*, 422 U.S. 806, 818 (1975) (the right to proceed *pro se*). Cf. *McKaskle v. Wiggins*, 104 S. Ct. 944, 950 (1984) (appointment and participation of standby counsel did not violate the right to appear *pro se*, which "exists to affirm the dignity and autonomy of the accused").

25. For some kinds of cases, litigants may be provided with attorneys paid by the state. *Gideon v. Wainwright*, 372 U.S. 335, 340, 344 (1963). Indigents represented by state-funded attorneys do not have much choice over which attorney represents them. *Morris v. Slappy*, 103 S. Ct. 1610, 1617 (1983). In other kinds of disputes, litigants must rely on their own resources. See, e.g., *Lassiter v. North Carolina*, 452 U.S. 18, 24-32 (1981) (no absolute right to free legal assistance when state seeks to terminate parental rights).

26. Cf. Resnik, *Managerial Judges*, 96 HARV. L. REV. 394, 424-31 (1982) (efforts to diminish party control of the pretrial process underway in federal courts); Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to Be Submitted in Written Form Prior to Trial*, 73 GEO. L.J. 73, 73-74 (trial judge requires submission of written direct examination questions in advance of trial).

waiver, that impose some constraints on litigants' choices,²⁷ we have generally remained loyal to litigants' autonomy.²⁸

Implicit in litigants' autonomy is concern about respect for individual dignity. To enhance dignity, government should provide individuals with choices about protection and assertion of their rights. But autonomy has purposes beyond valuing individuals. Since the individual is assumed to be the best able and the most appropriate voice of self-interest, litigants' autonomy is often justified as leading to more "accurate" or better outcomes.

Autonomy also provides a basis for legitimation of the coercive power of the state. As discussed in detail below,²⁹ litigants may not in fact have much control in lawsuits. Litigants who lack ability, opportunities, or resources are not, in any genuine sense, autonomous. The rhetoric of autonomy, however, serves to support an assumption of voluntary participation and control by individual litigants and then of consent to exercises of state power.³⁰ Individuals who protest are often told they are being unduly demanding: they have had their choices and they "deserve" the results.

b. *Litigants' persuasion opportunities*: Connected with litigants' autonomy is this second valued feature, which reflects a belief that dispute resolution should occur only after the parties have had an opportunity to be heard by a third party (or parties) authorized by the state to resolve the dispute. Over time, we have defined the "opportunity to be heard"³¹ notion; frequently, it is viewed as embodying so-called "rights" to present evidence and to cross-examine adverse parties.³² Upon occasion, persuasion opportunities also include state funding of attorneys for litigants engaged in specific kinds of disputes.³³ Whatever the constellation of associated rights, the basic premise of "an opportunity to be heard" has become talismanic.

27. See, e.g., Brillmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741, 759-60 (1982) (describing effect of waiver rules).

28. See *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (death-sentenced litigant's decision to decline review honored). *But see Commonwealth v. McKenna*, 476 Pa. 428, 439-40, 383 A.2d 174, 181 (1978) (validity of death penalty considered on appeal regardless of litigant's desires).

29. See *infra* notes 206-18 and accompanying text.

30. See M. EDELMAN, *THE SYMBOLIC FUNCTIONS OF POLITICS* 12 (1972) (discussing symbolic value of political institutions in democracies).

31. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Oredean*, 234 U.S. 385, 394 (1914)).

32. *Id.* at 260.

33. *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963).

Litigants' persuasion opportunities express many values. First, persuasion opportunities provide an information basis for case disposition. If one assumes the possibility of "correctness," of results that accurately reflect fact and law, then the information obtained through persuasion enhances decisionmakers' abilities to base their conclusions on the "true" facts, to apply the law "correctly," and to provide the "right" remedy. However, given the problematic task of reconstructing past events, the indeterminacy of social rules, and the lack of social consensus on appropriate outcomes, sanctions, or rewards, it is difficult for many, myself included, to embrace such a theory of "correct" decisions.

But one need not believe in determinate correctness to have a theory of error. That is, the coin-flipping judge was deemed "wrong" not because the outcome was incorrect but because the process was wrong. Further, had the judge, after solemn deliberation, sentenced the misdemeanant to forty years instead of twenty days, I could comfortably call the decision "wrong" or "inaccurate"—without any conviction that I could claim that twenty days would have been "correct." Thus, short of a belief in correctness, persuasion opportunities are still desirable if decisionmakers use the information provided to affect decisions and if, as a result, the decisions are "better"—that is, more rational, less arbitrary, and closer to social norms.

Litigants' persuasion opportunities are a valued feature not only because of their relationship to outcome production, but also because they express values about the relationship between individuals and government. Like autonomy, persuasion opportunities reflect concern about individual dignity; persuasion opportunities are occasions for individuals to participate in decisions that affect their lives.³⁴ Like autonomy, persuasion opportunities are linked to political theories—to a contractual basis of the polity and its dependence upon consent,³⁵ to a view that dialogue is an appropriate predicate for decisions and a prerequisite for compulsion.³⁶

Persuasion opportunities also serve a symbolic legitimating func-

34. See Michelman, *supra* note 1, at 1172, 1174 (discussing "participation values"); Tyler, *The Role of Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 L. & Soc'y REV. 51, 71 (1984) (major determinant of satisfaction with legal authorities was "perceived fairness").

35. See M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 104-33 (1982) (discussion of various theories of social contract).

36. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 374-78 (1980); Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 13-14 (1979).

tion. The ritual surrounding the instruments of persuasion (whether written brief or oral argument, both of which are shrouded in convention) assuages anxiety about the decisions made.³⁷ Some comfort is provided as we are led to believe in a participatory decisionmaking process.

Despite the many similarities in the ways they function, litigants' persuasion opportunities are distinct from litigants' autonomy. While the two features are linked in contemporary litigation schemes, they need not be. That is, we could deprive litigants of their autonomy, of their control over procedural choices from initiation through appeal, and yet we could still provide and insist upon litigants' persuasion opportunities.

2. *For Decisionmakers*

a. *Concentration of power*: The state vests judges and jurors with the power to act, and their acts have potent effects. Juries generally have final authority over most factual findings, and jury nullification stands as a possible check on government officials. Trial judges are also equipped with substantial powers: to make some types of decisions free from appellate review; to implement (absent a stay) even those decisions that are appealed; to find disobedient parties in contempt; to run courtrooms with little supervision; and in the federal system to enjoy life tenure.

Judicial decisionmakers—either individually or in very small groups—have power, and we value their possession of power. Power gives decisionmakers the ability to produce outcomes. Power may also make these outcomes “better,” in the sense that power may insulate decisionmakers from undue influence.

Particular power allocations are reflective of political theories. Giving power to jurors is a decision to democratize the decisionmaking process, to provide an alternative to the perceived autocracy of judges. Giving power to single judges is a bow to individualism; one person can have great force in the society. The power given by life tenure for

37. For discussion of the role of ritual in interpersonal relationships, see E. GOFFMAN, *INTERACTION RITUAL* (1967). See also Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391 (1971) (“[M]uch of what goes on in the trial . . . is partly ceremonial or ritualistic. . . .”); Tyler, Rasinski & Spodick, *The Influence of Voice upon Satisfaction with Leaders: Exploring the Meaning of Process Control*, paper delivered at the Midwestern Political Science Ass’n, April 1983 (on file at the Southern California Law Review).

federal judges reflects concern about the ability of Congress and the executive branch to undermine or to control the judiciary.

Power serves symbolic legitimacy purposes as well. Vesting power and authority in identifiable decisionmakers enables the state to personify its authority, thus making the state more readily understood, accepted, and obeyed. The grant of power to the jury gives meaning to a promise of democracy: the people are the state. Despite criticism that the jury is inefficient and life tenure for judges undesirable,³⁸ we remain committed to employing lay decisionmakers and to insulating federal judges.

b. *Diffusion and reallocation of power*: Concentration of authority is both linked to and in tension with a fourth valued feature, the diffusion and reallocation of authority. The very existence of the jury system is an example of the perceived desirability of circumscribing the power of the judiciary. A second example is the appellate system, the imposition of a second layer of judges empowered to review and to revise the lower tier's work. Yet another familiar illustration is the supremacy clause of the Constitution, limiting the authority of state judges by imposing federal law upon them.

In individual cases, we limit the authority of judges by restricting the permissible bases of their decisions. Although juries are free to render decisions without explanation and can be overridden only on very narrow grounds, judges are limited by the record (as the only source of decision), by the obligation on some occasions to provide reasons, and by the requirement that they act within public view. Thus, while we value giving decisionmakers the power to decide disputes, we also value controlling, limiting, and diffusing that power. We have constructed hierarchical and vertical dispute resolution systems, and have distributed authority for decisionmaking to a variety of different actors, including agency adjudicators, jurors, and many tiers of state and federal judges.

Not only do we diffuse power, in some instances we reallocate it. For example, when a second set of decisionmakers has the authority to make decisions afresh, or "de novo," power is reallocated from the first decisionmakers to the second, who may even be kept ignorant of the

38. See H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 194 (1972) (proposing compulsory retirement for all federal judges); H. KALVEN & H. ZEISEL, THE AMERICAN JURY 4 n.2 (1966) (a sampling of praise and criticism of the jury system).

first decisions. Power is also diffused because, generally, *de novo* consideration occurs only at the behest of a litigant.

Diffusion and reallocation have outcome-related functions. The division of power is aimed at the production of acceptable or "correct" results. The limitation on individuals' power, the shifting of that power to others, and the involvement of multiple decisionmakers are all linked to a belief that the involvement of more people will yield better results.

Diffusion and reallocation also serve to express political morality. Decentralized decisionmaking limits the amount of power vested in a single individual. State decisionmaking remains personified; identifiable individuals hold power but sometimes yield to politically superior judges, or in the case of juries, judges must yield to the voice of the "people." Once again, the coercion of the state is legitimated by the limitations on concentrations of power.

c. *Impartiality and visibility*: This feature also serves to constrain decisionmakers' power. Decisionmakers are obliged to reach conclusions impartially, free from bias against the parties and without pre-judgment of the issues, and to make their decisions public.

While impartiality has long been valued as the *sine qua non* of judicial decisionmaking, methods of ensuring impartiality have varied considerably. At some points in our history, the same judges were permitted to preside both at trial and on appeal.³⁹ Yet, at other times, be-

39. In its infancy, the federal system provided no review at all for some kinds of cases. When review was authorized, the very judge who issued the challenged decision could conduct the review. This self-review occurred when the district judge sat as a circuit judge in circuit court and the Supreme Court justice assigned to that court failed to attend the session. F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 87 (1927). *But see* *Moran v. Dillingham*, 174 U.S. 153, 158 (1899) (vacating Circuit Court of Appeals decision on grounds that same judge sat at both appellate and trial levels); The Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 75 (stating "[t]hat no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such decision"); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURT AND THE FEDERAL SYSTEM* 1 (2d ed. Supp. 1981) [hereinafter cited as *HART & WECHSLER*] (stating that the comment, in the Second Edition, that judges reviewed their own decisions was erroneous).

While the commentators disagree about whether district judges in fact reviewed their own decisions, it is not disputed that, when a Supreme Court justice participated in a circuit decision, the justice thereafter could and did sit on the case if it went to the Supreme Court. F. FRANKFURTER & J. LANDIS, *supra*, at 19. Unlike section 4 of the Judiciary Act, which prohibited district judges from voting in cases they had decided, no similar statutory bar precluded Supreme Court justices from sitting on the appeal of a prior, circuit court decision. In 1891, however, when the Everts Act was passed, the prohibition from sitting on the appeal of one's own decision was extended to embrace all federal judges and justices. Act of March 3, 1891, ch. 517, § 3, 26 Stat. 826.

cause of the fear of prejudgment flowing from prior exposure to the same disputes, judges have been barred from that practice.⁴⁰ Similarly, in different eras, we have both condoned and condemned jurors' extrajudicial knowledge of disputes.⁴¹ Finally, while we have condemned "star chamber proceedings," we are still struggling to define which judicial procedures must be open to the public and why.⁴² But, regardless of the technique for expression, we remain committed to impartiality and visibility as essential to the judicial system.

Our insistence upon impartiality and visibility is linked to several themes described earlier. We assume that bias disables judges and jurors from attending to the information litigants present; bias interferes with the issuance of "correct," acceptable, or just results. Openness, of the process and of the decision, serves to check bias and to limit the opportunities for corruption.⁴³ Impartiality and visibility help both to produce outcomes and to legitimate those outcomes.

Legitimation comes not only from beliefs that the outcomes achieved by impartial decisionmakers, functioning in view of the public, are better, but also from beliefs that impartiality and visibility make the process better. Only impartial decisionmakers can value individuals' claims and dignify them. Only if the process is public can we affirm decisionmakers' obligations to the participants and to the society.

d. *Rationality and norm enforcement*: Decisionmakers are also constrained by this fifth valued feature. As the example of the coin-flipping judge illustrates, we insist upon deliberate, rational dispute resolution.

40. See Ratner, *Disqualification of Judges for Prior Judicial Actions*, 3 How. L.J. 228, 229-38 (1957) (some state statutes provide that a judge's participation in one stage of a case precludes that judge, if reversed on appeal, from making additional decisions in the same case).

41. Kershon, *Vicinage*, 30 OKLA. L. REV. 1, 139-42 (1977).

42. The Supreme Court has not yet held that all court proceedings must be open, but the language mandating open criminal proceedings appears to embrace civil cases as well. See *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980) (discussing public's right of access to court proceedings). See also *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 823, 824 (1984) (*voir dire* in criminal trial must be open unless "closure is essential to preserve higher values and is narrowly tailored to serve that interest"); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34 (C.D. Cal. 1984) (balancing public access to civil pretrial materials against interests of confidentiality).

43. In *Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819, 823 (1984) (emphasis in original), the Supreme Court explained: "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known."

Our insistence upon rationality comes in part from concern about outcomes. We believe that the dispute resolution system should announce, enforce, and appropriately apply substantive norms. Individuals who obey the rules set forth by legislatures and courts are supposed to be rewarded, the disobedient sanctioned, and those considering deviance deterred. Courts are supposed to voice public values and to implement them in individual cases. The articulation and enforcement process is keyed to a rational system, making decisions self-consciously and in accordance with identified rules, principles, and politics.⁴⁴ Even without a belief that we can achieve "correctness," we still insist upon rationality.

Of course, the assumptions of rationality and of norm enforcement serve to legitimate courts' decisions. Courts' lawmaking powers are both constrained and masked as judges describe themselves as implementing normative decisions made by others, such as legislators and the founding fathers. Rationality also functions to underscore individual dignity. The objection to the coin-flipping judge was based both on the evident arbitrariness of his decisionmaking process and on his irreverent attitude towards the question of another person's incarceration. We value the judgment process itself.

e. *Ritual and formality*: This feature, like the preceding three, serves to constrain decisionmakers. This feature is also both a descriptive and a normative element of decisionmaking. To some extent, procedure is ritual—albeit of varying degrees of formality.

Rituals pervade the adjudicatory process. The participants are given special ("plaintiff," "defendant," "movant," "judge"), sometimes honorific ("your honor," "learned counsel," "my worthy opponent") titles. Decisionmakers often wear odd dress and sit on elevated platforms (the bench) or in segregated areas of courtrooms (the jury box). Commencements and conclusions of written and oral exchanges are delineated—from "greetings" and case captions to "respectfully submitted" or "it is so ordered,"—from "oyez, oyez" to the "court is now adjourned." In a country which has a decidedly casual style, and one in which political leaders often appear deliberately "folksy," the court system retains an austere, ceremonial pose. Although the veneer of ritual and formality thins in noisy, dirty criminal and family courts and thickens in the ornate halls of many appellate tribunals, the circus-like

44. See generally Fiss, *supra* note 36, at 12-17.

atmosphere of the former is deplored,⁴⁵ while the quiet solemnity of the latter is celebrated.

Ritual and formality serve multiple ends. To the extent ritual and formality dictate undertaking a certain, careful process in every case, better outcomes may result. Ritual and formality also give decision-making an appearance of "correctness," and thus legitimate the decisions rendered. Further, ritual dignifies those who undertake it.⁴⁶ The state confirms individuals' worth by employing its ritual in response to claims of wrongdoing; the moments of hearing and deciding are solemnized. In addition, ritual links past and future. For example, as we open court with words used decades ago, we associate ourselves with those who have said and those who will say the same words. In this way, ritual unites us with others who share the same ritual. When ritual is highly formalized, it serves to constrain individuals' power and, in some sense, to diffuse that power to the many persons who have created, observed, and enforced the ritual.

Although we are ambivalent about the degree of formality that legal ritual should entail, and too much pomp produces protest,⁴⁷ we do preserve some ritual, formality, and structure to remind ourselves of the import of the decisions made.

3. For Decisionmaking

a. *Finality*: The tension between concentration and diffusion of authority is mirrored in the tension between finality and revisionism. Finality is a normative conclusion that complements authority. We hold dear the notion that our dispute resolution system can, without undue delay, issue a decision that will close debate. Finality is an expression of a desire to limit the time between the eruption of a dispute,

45. See, e.g., Margolick, *In Search of Efficient Justice: Reforming the Criminal Court*, N.Y. Times, July 2, 1983, at A1, col. 1 (surveying suggestions for court reform); Shipp, *The Failure of Criminal Court: 8 Crucial Areas*, N.Y. Times, June 30, 1983, at A1, col. 3 (discussing backlogs and congestion in New York City criminal courts); *Turnstile Justice/The Breakdown of Criminal Court*, N.Y. Times, June 28, 1983, at B2, col. 1 (describing a typical work day for judges, prosecutors, and defense attorneys); *The Criminal Court: A System in Collapse*, N.Y. Times, June 26, 1983, at A1, col. 1 (describing a typical day in court); cf. Feron, *In an Upstate City Court, a Feeling of Quiet, Efficient Justice*, N.Y. Times, July 2, 1983, at B4, col. 1 (contrasting Saratoga Springs, New York, criminal courts that "work").

46. See generally M. EDELMAN, *supra* note 30, at 1-21 (role of ritual and symbolism in political life); B. MYERHOFF, *NUMBER OUR DAYS* 21 (1978) (role of religious ritual in daily life).

47. See, e.g., INFORMAL JUSTICE, *supra* note 19, at 8 (some evidence that people seek formal exercises of authority rather than informality); Ferguson, *To Robe or Not to Robe?—A Judicial Dilemma*, 39 J. AM. JUDICATURE SOC'Y 166, 170-71 (1956) (discussing controversy over whether state judges should wear robes).

its resolution, and the implementation of a solution. Practically, both the system and the litigants must be able to turn attention and energies elsewhere. Psychologically, there is a need for repose. Politically, there is a belief that state intervention in individuals' lives should generally come to an end. Further, there is a view that fluidity, flexibility, and open-endedness work injustice, lead to instability, and undermine the rule of law. Like the other features described, finality is linked both to outcome and non-outcome related purposes. Finality is the means of achieving an end, and the fact of ending is viewed as good not only for its ability to produce an outcome, but also because ends are desirable in themselves.

b. *Revisionism*: The importance placed on the ability to revise decisions comes from several sources: the hopes of correcting error; of altering outcomes based upon changed circumstances; of imbuing some decisions with more meaning by having them made repeatedly and sometimes by prestigious actors; of giving individuals a sense of having been fully and fairly heard. Thus, revisionism is related to outcome production but also serves other functions.

The perception that humans are fallible suggests that decisions rendered by the first person to rule on a dispute may be in error. The hope is that later, the same person or another person with a different vantage point, may be able to find and rectify errors.⁴⁸ Thus, under certain circumstances, finality bows to error correction.

Error correction is one reason for revisionism, but a problematic one. Given contemporary sensibilities about the indeterminate nature of law and fact, there may be little basis upon which to believe in "truth" and to assume a second decisionmaker "correct" and a first erroneous. We do, however, have a series of justifications for preferring second decisionmakers' views over those of the initial judge. First, the second individual, or group of individuals, may in fact possess or may be believed to possess special expertise, experience, wisdom, or clairvoyance that entitles their views to greater weight. Federal appellate judges, for example, obtain their presumed "correctness" from the

48. See Wald, *supra* note 23, at 771 (D.C. Circuit reverses district court about 18% of the time: "We see just enough cases where a mistake has been made at the trial court level, and a genuine injustice done, to reject any proposals to limit or forfeit any part of our appellate jurisdiction."). See also Roper & Melone, *Does Procedural Due Process Make a Difference?*, 65 JUDICATURE 136, 141 (1981) (of 1159 federal cases studied, in which all had been remanded after an appeal, 51.1% resulted in different decisions in a second proceeding; arguing from this data that "mistakes" uncovered by the appellate process result in more "correct" outcomes).

solicitude with which they are chosen, the tradition of quality associated with their work, and their practiced judgment in specialized areas of law, gained by virtue of their limited jurisdiction.⁴⁹ Appellate judges also lay claim to correctness through their numbers. The second judgment rendered by most appellate benches is a product of at least two views, that of the judge below and of the court above. Typically, the second judgment is a collective one, in which at least two appellate judges join. The intuition is that two thinkers are less likely to render poor decisions than is one.

Another reason for preferring a second decision to a first comes from the passage of time. In the interim between the first and second decision, the decisionmaker may, *sua sponte*, gain new insight. Alternatively, during the intervening period, the parties may produce more facts or the legislature or other courts more law that will lead to a "better" disposition.

A third possibility is that the decision to revise may be the product of a different process than that which produced the first; the new procedure may serve to legitimate the result. A second procedure could be more elaborate than the first; an informal evidentiary hearing may be replaced by a courtroom trial, or a litigant may gain the assistance of an attorney rather than making a *pro se* presentation. With additional process, the outcome may be better.⁵⁰

Correction of error is not the only explanation for revisionism. Another rationale is change. Legal decisions are made under dynamic circumstances; both the legal norms and factual premises may shift, be enlarged, or be reappraised over time. A first decision may have been correct when rendered but may subsequently need to be revised.

Yet another rationale is political. In a hierarchical system, some decisionmakers are preferred to others. Finality sometimes yields to revisionism simply because we prefer decisions authored by revising judges over those issued by a first judge, and the revising judge gets his or her authority by outranking others. Further, as noted above, revisionism is a mechanism by which to diffuse power; by giving one or

49. See Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974) (discussion of federal judges' expertise).

50. Another rationale for assuming that a revised decision is "correct" or better is finality itself. We are eager to perceive the system's final pronouncement as the "correct" one because we want to believe that our dispute resolution system "works," and that outcomes are related to facts and law. As Justice Jackson explained, "We [the Justices] are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

several individuals the power to overturn decisions of others, we diminish the authority of any single individual.

Revisionism also serves a psychological need not to “lock the door and throw away the key.” The rhetoric of cultural values, political campaigns, and the “land of opportunity” seeps into the courts via procedures that give chances for change and offer individuals hopes for a better future.

Finally, revisionism permits individuals to compel several government officials to consider allegations of other decisionmakers' mistakes or misdeeds. Revisionism thus is an expression of the state's taking an individual seriously, of valuing the claimed denial of rights, and of underscoring an individual's worth. In this way, revisionism is a measure of the society's resources—of its ability to fund the many state officials who spend time on individuals' problems.

c. *Economy*: A tenth procedural feature, in tension with revisionism and in tandem with finality, is that the system produce results with the least expenditure of dollars, energy, and time possible. Economy is that part of efficiency that relates to resource conservation and to the view that a functional system must produce results speedily and with minimal cost. Economy is used here in the narrow sense of low direct costs. At times, when courts appear either overused or underproductive, the concern for economy, often discussed as “administration of justice,” is heightened.⁵¹ In such times, efforts are made to deter litigation or to divert litigants to places other than courts. Court structure and case processing receive renewed attention—all in the hope of finding shortcuts, reducing caseloads, and rationalizing the system.

Economy, like all these valued features, is related to outcomes and serves other functions as well. Economy legitimates outcomes on the ground that the decisions are produced with both the individual's and society's needs in mind. Decisions about whether and how to economize often occur at points of tension between individuals' and the public's needs. For example, to reduce costs may mean sacrificing other valued features—such as eliminating jury trials and thereby concentrating power in professional decisionmakers, or dispensing with written appellate opinions and thereby reducing visibility of decisions and of judges. Symbolic valuing of the individual may be diminished in the name of economy. Of course, cost-control actions could be justified as

51. See, e.g., Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906); Resnik, *supra* note 26, at 395-99.

necessary to preserve the court system. When procedures are extravagant, no individuals will be valued because no one will be able to be heard.

d. *Consistency*: Procedural systems are supposed to treat like cases alike; consistency is the systematic analogue to the impartiality feature demanded of individual decisionmakers. The many sovereignties and the geographic expanse of the United States make consistency particularly problematic. Although the Supreme Court is envisioned as the unifying force, the Court reviews such a small fraction of the cases decided that the Court cannot impose uniformity. Moreover, doctrines such as the "independent and adequate state ground rule"⁵² presuppose enclaves of state law, insulated from higher authority. But even within the federal system, the obligation of consistent treatment has never resulted in circuit judges giving precedential weight to decisions rendered in other circuits. Consistency has never been so persuasive as to compel either the abolition of state sovereignties or the many federal appellate courts. Rather, we tolerate an impressive quantity of frank legal discord.

Despite its empirical absence, consistency remains a valued feature. It is deemed essential to planning and to assisting individuals and groups in conforming their behavior to legal norms. Consistency is also viewed as justifying and legitimating decisions. Uniform application of legal rules may prove their "correctness"; if the same result always appears, it may after all be "right." For the skeptics, consistency assuages anxiety about arbitrariness. Even if the result is not correct, at least everyone is treated the "same." Consistency promotes equal treatment of individuals, thereby expressing the rhetoric of democracy, of "equality before the law."

e. *Differentiation*: As alluded to in the discussion of consistency, we do not treat all disputes alike. Even though we espouse the notion that all litigants deserve equal access to the courts, we have long tolerated restricted access and different treatment for different kinds of disputes. Some cases are sent to administrative agencies, others to state or federal courts. Some disputes receive expedited review by the United States Supreme Court; others have little chance of ever being decided by any federal judge. Disputes are distinguished in terms of dollar value, legal claim, and possible remedy or sanction; criminal defendants have some rights that civil defendants do not. The enormous vari-

52. *E.g.*, *Michigan v. Long*, 103 S. Ct. 3469 (1983).

ation in decisionmaking procedures gives expression to a belief that not all disputes are of equal concern, not all decisions are of equal weight, not all norms are of equal importance, and not all decisionmakers are of equal competence. In effect, these different procedures reflect the varying degrees of seriousness that we accord the rights at stake.

Differentiation enables us to express how much we care about categories of disputes. Legitimacy is derived from conferring decision-making authority over certain issues to special subsets of decisionmakers. Differentiation helps both to identify important claims and to sanction the outcomes as either "correct" or better.

These twelve valued features of procedural systems in the United States—litigants' autonomy, litigants' persuasion opportunities, decisionmakers' power, the diffusion and reallocation of that power, decisionmakers' impartiality and visibility, rationality and norm enforcement, ritual and formality, finality, revisionism, economy, consistency, and differentiation—are not, indeed could not be, always viewed as equally important. There are tensions among features; giving expression to one often limits another. At times, some features are in ascendancy, and others in eclipse. Moreover, to say that the procedural system has these features and that the features are valued is not to claim that when fashioning procedural systems and rules, legislators and judges always refer specifically to these features and to the underlying norms.

Decisions about procedure are bound up with decisions about the particular individuals or disputes affected. For example, procedures for habeas corpus express views about what procedural features are important and also about the moral worthiness of prisoners; procedures for civil rights litigation embody value choices about the substantive outcomes as well as the structure for achieving those outcomes. Examining which features of process are employed and which are neglected illuminates the underlying political and social judgments.

B. MODELING PROCEDURES TO EXPRESS VALUES

A dispute, disputants, and a state-empowered decisionmaker are the necessary elements of a government-authorized dispute resolution system. Acceptable methods for resolving disputes depend upon which of the basic features predominate and how tensions among the features are resolved. Below, I describe six procedural models (all of which did or do exist somewhere in the United States) to illustrate how the selec-

tion of a procedural model is a choice among valued features and in turn among competing political and moral claims.

1. *The Single Judge/Finality Model*

This first, simple model provides disputants a single opportunity to present their claims before an individual who renders a final decision. I refer to this model as the Single Judge/Finality Model and to the first decisionmaker, whether trial judge, administrative law judge, magistrate, arbitrator, juror, or whomever, as the "first tier."

This model's most salient features are concentration of power, finality, and economy. The model centralizes power in its only tier of decisionmakers and implements their power by making their decisions final. The Single Judge/Finality Model is sleek; it conserves its resources by limiting the number of decisionmakers available to hear litigants. While persuasion opportunities prior to the entry of a decision may be minimal or generous, the issuance of a decision concludes the process; it is a "one shot" deal.

The Single Judge/Finality Model thus has limited techniques by which to differentiate among categories of cases. All the model can do is vary ritual and formality or the quantum of predecision persuasion opportunities. In this model, ensuring consistency, rational norm enforcement, and impartiality is difficult. The only mechanisms available are training of first tier members and obliging them to make public their process and decisions. The legitimacy of decisions produced by the Single Judge/Finality Model must rest upon one of five assumptions: that the first tier generally renders "correct" or acceptable decisions and therefore that additional decisionmaking is unnecessary; that additional decisionmaking would not significantly improve the quality of the first decisions and therefore that the costs of increasing the number of decisionmakers outweigh the benefits; that the procedures in the Single Judge/Finality Model are sufficient to express society's concern about the individuals and the disputes; that more decisionmakers do not provide a better process by which to value individuals; or that individuals and their disputes are not worth valuing more.

The federal judiciary used to have several examples of the Single Judge/Finality Model. The Judiciary Act of 1789 permitted review in civil cases only where the amount in controversy exceeded a specific sum,⁵³ and the Act made no provision for appeals in criminal cases.⁵⁴

53. The Judiciary Act of 1789, ch. 20, §§ 21-22, 1 Stat. 73, 83-84. To obtain review in the

Federal appellate courts, as we know them today, did not come into existence until 1891⁵⁵ and retained most of their original jurisdiction until 1911.⁵⁶ Some states still do not provide for appeals in every case.⁵⁷ As late as 1956, the Supreme Court declined to hold that the due process clause of the fourteenth amendment required appeals to be available in all cases.⁵⁸ Even in cases where appeal is available, many of the decisions of the first tier are given great deference.⁵⁹

Despite the absence of a stated "right to appeal," many of the procedural innovations of the last two hundred years in the United States have gradually moved the system away from the Single Judge/Finality Model to a form that includes a second tier that reviews, and thereby undermines the finality of, the first tier's decision. While not formally included in the Supreme Court's articulation of due process, appeal as of right has been a fixed feature of the federal system for almost one

circuit courts in an admiralty action, the matter in controversy had to exceed \$300. In most other cases, the amount in controversy had to exceed \$50.

The linking of the value of a case to the right to receive appellate court review was, in part, a response to the "excessive expense of appeals from colonial courts to the Privy Council" in England. Apparently, the transaction costs were thought in some cases to outweigh the worth of obtaining a second decision. R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 146-47 (1941). For later justifications of a jurisdictional amount on appeal, see Spear, *The Court of Appeals Bill*, 27 ALB. L. REV. 46, 48-49 (1882).

54. HART & WECHSLER, *supra* note 39, at 1265; F. FRANKFURTER & J. LANDIS, *supra* note 39, at 109.

55. See The Judiciary Act of 1891 (Evarts Act), ch. 517, § 2, 26 Stat. 826, *discussed in* Budd, *The United States Circuit Courts of Appeal*, 9 LAW Q. REV. 51, 56-59 (1893).

56. The Judiciary Act of 1911, ch. 231, 36 Stat. 1087, 1131. Federal appellate courts still have original jurisdiction for some kinds of actions. See, e.g., 28 U.S.C. § 2241(a) (1982) (any judge or justice may issue writ of habeas corpus).

57. See, e.g., W. VA. CONST. art. 8, § 3 (Supreme Court of Appeals; Jurisdiction and Powers) ("The court shall have appellate jurisdiction in civil cases at law where the matter in controversy . . . is of greater value or amount than three hundred dollars. . . ."). See also ASS'N OF MUN. COURT CLERKS OF CAL., SMALL CLAIMS MANUAL COMMITTEE, *MANUAL OF PROCEDURES IN SMALL CLAIMS CASES* 12-13 (1978) (judgment in small claims court is conclusive upon the plaintiff).

58. *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (holding that once states make appeals available, states must provide poor litigants with access to appeals).

59. See *infra* notes 719-67 and accompanying text. Appellate courts generally draw a distinction between "fact" and "law" and trial courts' factual findings are given greater deference. See FED. R. CIV. P. 52(a), *construed in* Pullinan-Standard v. Swint, 456 U.S. 273, 287 (1982) (findings of fact cannot be set aside unless clearly erroneous). Further, some decisions are within trial judges' discretion and can be overturned only if an abuse of discretion is shown. See, e.g., *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976) (per curiam) (holding no abuse of discretion by a trial judge who dismissed an action, because he found bad faith on plaintiffs' part for failure to comply with discovery requests). See generally, Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 636 (1971) (discussing numerous aspects of judicial discretion).

hundred years⁶⁰ and was written into some state constitutions drafted in the mid-nineteenth century.⁶¹ The fear of "judicial despotism"⁶² has resulted in the provision of review.

One variant of the Single Judge/Finality Model is the Several Judge/Finality Model, in which a group of judges, rather than a single individual, renders a final decision. This group model diffuses and limits the power of a single individual. Individual biases may also be mitigated, and a greater degree of impartiality thus ensured.⁶³ Although this model is more expensive than the Single Judge/Finality Model, the Several Judge/Finality Model is sometimes used to underscore the importance of state intervention in individuals' lives. Further, if the several judges are lay, rather than professional, their employment may also represent a democratization of the judgment process. The obvious example of the Several Judge/Finality Model is the jury trial.⁶⁴ While not every jury decision is final, some, such as acquittals in criminal cases, are.

60. See The Judiciary Act of 1891 (Evarts Act), ch. 517, 26 Stat. 826. For explanations of the need for an appellate court, see 13 CONG. REC. 3463, 3464-3466 (1882) (statement of Sen. Davis).

61. See, e.g., ARK. CONST. art. 7, § 4 (1874); CAL. CONST. art. 6, § 4 (1849).

62. Mr. Culberson, of Texas, 21 CONG. REC. 3404 (1890). Although a burdensome Supreme Court caseload was a major impetus to reform, the desire to diffuse power was also a factor. See Hill & Dent, *Report of Committee on Judicial Administration and Remedial Procedure*, 17 REP. A.B.A. 336, 339 (1894) ("Under the [pre-1891] system, the District Judge or Circuit Judge . . . was the anachronism of the century. . . . He was the depository of more arbitrary one-man power than any other official known to American public life."). See also REORGANIZATION OF THE JUDICIARY OF THE UNITED STATES, H.R. REP. NO. 45, 44th Cong., 1st Sess. 3 (1876) (describing "a policy concerning the right of appeal which has been long established, and which is justly regarded by the people as securing to them an important and valuable right").

63. The rationale for having a number of jurors and requiring them to be drawn from a "cross section" of the community is to mitigate against individual biases. See *Ballew v. Georgia*, 435 U.S. 223 (1978) (five-person jury unconstitutional); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (fair cross section of community required and systematic exclusion of women unconstitutional). See generally H. KALVEN & H. ZEISEL, *supra* note 38 (study on decisionmaking practices of judges and juries); Lempert, *Jury Size and the Preemptory Challenge*, 22 LAW QUADRANGLE NOTES (U. Mich.) 8 (1978), reprinted in R. COVER & O. FISS, *supra* note 1, at 351 (group decisionmaking ameliorates bias "as individuals with conflicting points of view call each other to account").

64. The three judge court system, created in the early part of this century and largely abandoned in 1976, is another example of the Several Judge/Finality Model, albeit with the possibility of appellate review by the United States Supreme Court. See 28 U.S.C. §§ 2281, 2282, repealed by Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119; 28 U.S.C. § 2284 (1982) (three judge court). The deployment of several judges was used to underscore the import of the decisions. Three judge federal courts were mandatory when litigants claimed state statutes were unconstitutional. See generally Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 2 (1964) (discussing when three judge courts had to be convened).

2. *The Single Judge Plus Same Judge Model*

Before turning to consideration of two-tier models of procedure, it is worth exploring a simple variant of the Single Judge/Finality Model. This variant gives the single judge one or several opportunities to revise, alter, or abide by the first decision issued. Examples occur in the Federal Rules of Civil and Criminal Procedure.⁶⁵ Both sets of rules authorize litigants to ask the judge who first issued the decision for reconsideration. In my lexicon, this model is the Single Judge plus Same Judge Model, which exists mostly in the context of other, more elaborate models, but may occur as a self-contained system.

In the Federal Rules of Criminal Procedure, for example, the single judge's authority to reduce or modify a sentence generally extinguishes after 120 days.⁶⁶ At that point, the sentencing decision is "final."⁶⁷ Since appellate review of sentencing is very limited;⁶⁸ for all practical purposes, within a short time a single judge has made a conclusive decision. In contrast, federal habeas corpus statutes currently permit federal prisoners to return to the same judge, on select grounds, without regard to any time limit.⁶⁹ In those cases, reconsideration and modification of the underlying judgment are always available, at least in theory.

The Single Judge plus Same Judge Model raises the question of when finality attaches.⁷⁰ Given the availability of this reconsideration, we could describe the first decisions as nonfinal and view the litigation as ongoing. Sometimes we expressly characterize decisions as nonfinal;

65. See, e.g., FED. R. CIV. P. 59, 60 (new trials may be granted); FED. R. CRIM. P. 35 (courts may correct illegal or illegally imposed sentences). See generally Moore & Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 627-53 (1946) (discussing application of FED. R. CIV. P. 60).

66. Rule 35 does, however, permit a court to modify an illegal sentence "at any time." FED. R. CRIM. P. 35(a).

67. The decision is final insofar as the judge is concerned. Members of the executive branch do, however, have opportunities to alter the decision. See, e.g., 18 U.S.C. § 4206 (1982) (Parole Commission may release prisoners before sentences expire); *id.* § 3570 (presidential remission of sentences).

68. See *Solem v. Helm*, 103 S. Ct. 3001, 3009-10 (1983) (appellate review of sentencing for proportionality may occur, but as a narrow exception to the general nonreviewability of sentencing decisions).

69. See 28 U.S.C. § 2255 (1982), discussed *infra* notes 296-324 and accompanying text.

70. In other eras, finality was tied to the conclusion of a court's term. R. MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 385 (1952). For recent Supreme Court discussion of the question of when finality attaches, see *Justices of Boston Mun. Court v. Lydon*, 104 S. Ct. 1805 (1984) (to decide whether a defendant was twice in jeopardy, the Court had to determine when, in a de novo trial system, finality attached).

for example, in so-called "public law" cases,⁷¹ involving school desegregation or prison reform, entry of final judgment may be called "conditional" or the court's jurisdiction described as "retained." The terminology takes account of the possibility of change, in either the factual circumstances or the law, and of the desirability of revision by the same judge who issued the initial ruling.

In contrast, our terminology describes the criminal process as formally concluding with the conviction and sentence (and appeal, if any). Prisoners who seek to renew litigation are "collaterally" attacking their convictions rather than "resuming" litigation. Use of the word "collateral" arises in part from the fact that some attacks on conviction occur in a different court than that which issued the first decree.⁷² In this respect, "collateral" indicates that the second proceeding may be independent of the first. But the term is also applied when federal prisoners return to the same court, indeed to the very same judge, who presided at the trial or guilty plea, to request either reconsideration of earlier decisions or to raise new claims based on changing facts or law.⁷³

The choice of terms is not value free. "Retention of jurisdiction" has a less disruptive connotation than does the phrase "collateral attack." Correspondingly, the barriers to renewed litigation are lower when courts have continuing jurisdiction and higher when courts' prior decisions are described as final. On the other hand, "collateral" may also indicate that the second proceeding is less constrained by presumptions of the first proceeding's correctness. In that sense, "collateral attacks" could provide a second judge with greater latitude to rethink earlier rulings.

The Single Judge plus Same Judge Model expresses some increased concern for litigants' autonomy and persuasion opportunities. We provide litigants with control over repetition, and we permit decisionmakers to entertain repeated cries for help. This model does burden one side of the lawsuit, the victor in the first round, and also burdens the system to some extent. In this model, the values that ani-

71. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing multiparty lawsuits in which judges attempt to fashion ongoing relief). In many such cases, despite the issuance of a decree, courts maintain jurisdiction so as to supervise implementation efforts and to modify the decree when appropriate. Resnik, *supra* note 26, at 386-413.

72. For example, state prisoners may request relief from the federal courts. 28 U.S.C. § 2254 (1982).

73. *Id.* § 2255; RULES GOVERNING SECTION 2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS, Rule 4 [hereinafter cited as Section 2255 Rules].

mate revisionism have some sway in that finality is postponed and economy compromised to permit renewed exercises of decisionmakers' power. But the possibilities of reconsideration are still limited in the Single Judge plus Same Judge Model. Unless it exists within a more complex procedural model, the model continues to centralize the state's authority in a single person. This model also provides limited mechanisms by which to ensure that person's impartiality, consistency, or rationality. The only constraints are ritual, formality, and visibility of the proceedings. In addition, the passage of time may provide new, and wiser, insight.

3. *The Single Judge Plus Limited Review Model*

Other models illustrate vertical rather than horizontal replication. These models are all more complex because they rely upon the addition of other decisionmakers atop the Single Judge. Additional personnel result in greater expense and in a longer duration from lawsuits' commencement to termination.

A common example of such complexity is an appellate court, in which a different judge or group of judges reviews the decisions of the first tier. Today, in federal and in most state courts, aggrieved parties have a right to appellate review of many decisions of the first tier. A series of doctrines, however, limit second tier judges from making decisions afresh; rather, appellate judges and parties are obliged to narrow their concerns to issues raised below on the record. Some first tier decisions are entitled to presumptions of correctness, while others receive more searching review.⁷⁴ I refer to this model as the Single Judge plus Limited Review Model and note that it has become the prevailing norm.

The Single Judge plus Limited Review Model increases litigants' persuasion opportunities by offering them a new audience. This model also values litigants' autonomy by allowing the parties to decide whether to appeal. The model is revisionist; it provides the possibility of redecision by individuals other than the author of the first decision. In addition, the Single Judge plus Limited Review Model diffuses the power of the first tier. The hierarchy informs us that the decisions of the second or third tier are determinative and that members of the su-

74. See, e.g., FED. R. CIV. P. 52(a) (the "clearly erroneous" rule, creating a presumption in favor of trial courts' factual findings). See also Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 A.B. FOUND. RESEARCH J. 543, 583-619 (discussing low reversal rates in criminal cases).

perior tiers are deemed better able to pronounce, interpret, or understand. The second tier provides a possibility for more ritual and for increased formality. Furthermore, differentiating the import of cases is possible because the second tier need not be empowered to review all first tier decisions. The Single Judge plus Limited Review Model may also ensure consistency; if the second tier itself works consistently, it can rectify disparities and inequities produced by the first. The second tier may supervise first tier decisionmakers and screen for impartiality and for rational norm enforcement. Justice may be enhanced. Alternatively, the problems of inconsistency, irrationality, and bias may only be moved from the first to the second tier, and possibly from individuals of lower social classes to those of higher status.

The Single Judge plus Limited Review Model compromises other concerns. Finality is delayed, although not ignored; once the appeal is concluded, *res judicata* precludes additional litigation. Economy is also affected under this model. Time and money are spent in deference to the perceived desirability of responding repeatedly to individuals' complaints. The first tier's power is diminished, but the degree of constraint varies with the kind and number of presumptions in favor of first tier decisions.

4. *The Single Judge Plus Unlimited Review Model*

An obvious alternative is the Single Judge plus *Unlimited* Review Model, in which the second tier is authorized to hear cases afresh. Such *de novo* decisionmaking may still be constrained in various ways by decisions rendered below. For example, when law and equity were distinct, appellate review in equity was described as being a *de novo* review. The appellate court, however, did not generally consider information beyond that adduced below and deferred, upon occasion, to the decisions of the first tier.⁷⁵

A contemporary example of the Single Judge plus Unlimited Review Model is the relationship between federal judges and magistrates. Congress has authorized magistrates to make dispositive decisions, but if the parties object, Congress has instructed trial judges to make determinations *de novo*.⁷⁶ Unlike equity appeals, trial judges may receive

75. R. POUND, *supra* note 53, at 226-27; Orfield, *Appellate Procedure in Equity Cases: A Guide for Appeals at Law*, 90 U. PA. L. REV. 563, 593-96 (1942).

76. 28 U.S.C. § 636(b)(1)(C) (1982). Since the 1979 amendments, magistrates may, with the parties' consent, conduct trials. *Id.* § 636(c)(1). See *Paceemaker Diagnostic Clinic of Am., Inc. v. Instrumedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983), *rev'd*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc);

information beyond that obtained by magistrates. Like the old equity appeals, some deference is accorded magistrates' decisions.⁷⁷

An alternative form of de novo decisionmaking occurs when a second decisionmaker is completely unconstrained by the first tier's decisions. Rather than obtaining a record from the first tier, the second decisionmaker is kept uninformed and instead repeats the first's process or follows its own. Some state court de novo trial systems operate in this fashion.⁷⁸

All variants of this model give litigants substantial persuasion opportunities. When the government dispatches multiple sets of decisionmakers, it indicates an increased willingness to entertain individuals' complaints and to permit individual participation. Further, where the second decision occurs only at the request of litigants, the Single Judge plus Unlimited Review Model respects the complaining litigants' autonomy; those litigants choose which tier will issue the final decision.⁷⁹ Of course, the litigants who emerge victorious in the first tier may experience the renewed state intervention as an incursion into their autonomy.

A de novo model can be consumptive of resources when the second tier replicates the first's work. But many de novo models are created to economize. The model is often put into place with the assumption, sometimes accurate, that with the employment of fewer and, therefore, less expensive decisionmakers, litigants will be satisfied with the first ruling and will never request a second decision.⁸⁰

5. *The Single Judge Plus Limited Review Plus Limited Review Model*

To elaborate the other alternatives, we can expand our models,

Wharton-Thomas v. United States, 721 F.2d 922, 924-30 (3d Cir. 1983) (both upholding the § 636(c)(1) grant of authority to magistrates).

77. 28 U.S.C. § 636(b)(1)(C) (1982). See also Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 337-42 (1973) (some judges in one federal district court adopted magistrates' recommendations in all cases).

78. See, e.g., the discussion of Massachusetts' two tier system in *Justices of the Boston Mun. Court v. Lydon*, 104 S. Ct. 1805, 1808 (1984). See also CAL. CIV. PROC. CODE § 1282 (West 1982) (decision in nonbinding arbitration not admissible at de novo trial), discussed in D. HENSTLER, A. LIPSON & E. ROLPH, *JUDICIAL ARBITRATION IN CALIFORNIA: THE FIRST YEAR* (1981).

79. The majority opinion in *Lydon* relied in part upon this aspect of the Massachusetts two-tier system to determine that the defendant's double jeopardy protection did not attach until after the second tier had issued its decision. 104 S. Ct. at 1814 (1984).

80. See *id.* at 1815 n.8 ("[T]housands of cases were disposed of by convictions at bench trials because many convicted defendants do not exercise their right to appeal to the jury trial session.") (citation omitted).

like tinkertoys, in a variety of directions. By adding a series of limited review possibilities after the first decision is rendered, we create a model that I label the Single Judge plus Limited Review plus Limited Review Model. Contemporary analogues are the three tiers of courts found in the federal system and in many states. The trial court has the greatest freedom in decisionmaking; the next two tiers are both limited review tiers, and the third tier typically has discretion to review or to let the second tier's result stand.⁸¹ Members of the second and third tiers often have distinct tasks.⁸² For example, the Supreme Court is generally thought to be in the business of law announcement rather than error correction. The intermediate appellate courts, in contrast, have both the "institutional" function of rule development and the obligation to review for correctness and appropriateness.⁸³

Like the Single Judge plus Limited Review Model, this model postpones finality and consumes more resources than do simpler models. This model offers litigants more occasions to persuade state officials and increases opportunities for revisionism. The existence of the multiple tiers permits greater differentiation among decisions and provides occasions for more ritual and formality to surround some cases. When the structure is the typical pyramid, the subset of decisions that reaches the highest tier becomes imbued with great importance—either because the litigants have raised critical issues or because, by being decided by the most prestigious decisionmakers, the cases become critical to other litigants.

This model both diffuses and concentrates power. The judges at the top have enormous authority and, like in all other models, there are few mechanisms by which to ensure that the highest tier does its work impartially, rationally, and consistently. On the other hand, the existence of a third tier, if small, may increase public scrutiny of that court, and the visibility of its proceedings may provide some constraints.

The power of the highest tier may also be limited by its size. If the number of judges is proportionately small as compared to the number

81. Although the Supreme Court has mandatory jurisdiction in some areas, proposals have been made to end such obligations and to have all of the Supreme Court's docket become discretionary. *See, e.g.*, S. 450, 96th Cong., 1st Sess., 125 CONG. REC. 7648 (1979); H.R. 2700, 96th Cong., 1st Sess. (1979); S. REP. NO. 142, 96th Cong., 1st Sess. (1979).

82. There is some overlap. Both the Supreme Court and the federal appellate courts retain some grants of original jurisdiction. *See, e.g.*, 16 U.S.C. § 839f(e)(5) (1982) (suits challenging constitutionality of Pacific Northwest Electric Power Planning and Conservation Act to be filed in court of appeals); 28 U.S.C. § 1251 (1982) (Supreme Court original jurisdiction).

83. JUSTICE ON APPEAL, *supra* note 1, at 2-4.

of cases, only a fraction of the disputes will reach the highest tier; other decisionmakers in the lower echelons will also wield substantial power. Moreover, while the highest court announces the law, the lower tiers must usually implement and enforce decisions. Finally, all the high court benches in the United States are multimembered; no single individual is all-powerful. Indeed, the highest tier is usually the court with the largest number of judges sitting together to decide outcomes, and this factor further diffuses individuals' power by obliging compromise, negotiation, and bargaining.

This model has costs. First, it is expensive to maintain three tiers. Second, one set of litigants, victors at the tier below, must participate in another round of the dispute. Third, the losers at the lower tiers may not have the money or experience to proceed onto the next rung. Fourth, the society may be impatient with the delay from initiation to disposition of a dispute.

6. *The Single Judge/Different Forum Plus Unlimited Review Model*

A sixth model depends upon redundant but independent decision centers, each authorized to look afresh at a dispute, to define its own scope of inquiry, and to render a decision. This model is parallel to the Single Judge/Unlimited Review Model but is distinct because this model occurs only when the second decision is made by individuals in a separate political structure. The Single Judge/Different Forum plus Unlimited Review Model is found either when interrelated sovereigns coexist or when two entities (agencies and courts, for example) share jurisdiction. Some kinds of family disputes were processed under this model; where jurisdiction was concurrent in several states, each court acted independently.⁸⁴ Two other examples include Title VII and the habeas corpus statutes, both of which give federal courts authority to consider issues already decided by either state agencies or courts. My shorthand for this arrangement is the Different Forum Model.

Variants of this model include those in which the single judge in the first forum is subject to limited review or repeated reviews, and the

84. The full faith and credit doctrine was of limited application in this area. See generally Ratner, *Procedural Due Process, Jurisdiction to Adjudicate: Effective-Litigation Values vs. the Territorial Imperative, the Uniform Child Custody Jurisdiction Act*, 75 Nw. U. L. Rev. 363, 383-85 (1980) (in any forum where an abducting parent and child reside, the issue can be relitigated and, after giving the prior decree respectful consideration, the forum may make a de novo determination). Of late, there has been increased cooperation among states under interstate child custody acts. *Id.* at 388-90. In 1980, modifications were made to the federal full faith and credit statute to require greater uniformity. 28 U.S.C. § 1738A (1982).

second decision center also provides for review of its first tier. That model gives my nomenclature its ultimate extension—the Single Judge (plus Limited Review plus Limited Review)/Different Forum plus Unlimited Review (plus Limited Review plus Limited Review) Model. This model permits duplication of efforts at three levels—at entry and at two appellate stages. Each forum is a self-contained tiered system with differentiation of functions at each level. Yet another form of this model requires that the new forum give deference to some of the decisions of the first forum.⁸⁵

The Different Forum Model limits the power of the first forum, increases litigants' persuasion opportunities, and enhances the possibility of revisionism. By allowing the different forum to undo the first forum's decisions, the model creates occasions for the second forum to supervise indirectly the first. If the second forum works consistently, rationally, and impartially, norm enforcement may be enhanced. But the model, like all the prior ones, has to rely upon training, visibility, and ritual to obtain consistency, rationality, and impartiality from decisionmakers at the highest tier. The Different Forum Model's very existence enhances differentiation because only select kinds of cases may be eligible to receive the elaborated procedures. At the same time, the Different Forum Model relies upon the expenditure of substantial resources and delays finality.

The Different Forum Model both diffuses and reallocates power. When some deference is accorded first forum decisionmakers, the first forum's judges retain substantial authority despite the second forum's power of revision. If litigants can choose whether to go to the second forum, litigants' autonomy is underscored by the choices offered. Because this model is one of the most expansive decisionmaking apparatuses currently available, its use indicates that the category of disputes worthy of it are very special and are deserving of or needing the resources committed.

C. THE RATIONALES FOR COMPLEX MODELS

Given contemporary sensibilities about limited resources, Congress' or the Supreme Court's decisions to create elaborate procedural models, involving the employment of several tiers (either vertically or horizontally), appear odd. The Single Judge/Finality Model and its

85. See 42 U.S.C. § 2000e-5(b)-(c) (1982) (the EEOC must accord state agency findings "substantial weight").

simplest variants (the Single Judge plus Same Judge Model or the Single Judge plus Limited Review Model) seem adequate to realize most of the goals of our procedural system. Why not have just a single opportunity to litigate? Does not one round, with or without reconsideration or appeal, provide litigants with sufficient opportunity to make and defend cases? Why go beyond this straightforward scheme to consider models that are costly and that postpone finality by enabling repetitive litigation?

These are the questions I explore in later sections, but some preliminary comments need to be made. First, different models come into being because no single model adequately expresses all concerns about how government dispute resolution systems should function. At various points in our history, some valued features have been perceived as having greater import than others. Finality and economy weigh heavily today, but they are only two of the several basic features of procedure, and the other features also reflect social concerns to which attention must be paid. For example, the constitutional requirement that the "writ of habeas corpus" not be "suspended"⁸⁶ is generally interpreted to mean that government must provide a procedure by which to reconsider some decisions to incarcerate⁸⁷—that something more than the Single Judge/Finality Model must be available for some deprivations of individual liberty.

A second reason for procedural complexity is that procedural designs express views about the appropriate allocation of power between the states and the federal government and between agencies and the courts. Redundancy exists in part because Congress or the Supreme Court is unwilling to divest states or agencies of adjudicatory power but is also uneasy about how states and agencies may perform their functions as derivative adjudicators of federal rights. Avenues to federal courts are open, but state court or agency adjudication remains either a prerequisite or an alternative. One example of such procedural duplication is contained in Title VII, which requires litigants first to seek assistance from state administrative agencies but thereafter permits a federal forum to make new findings.⁸⁸ A second example is federal jurisdiction to entertain state prisoners' claims that their state court

86. U.S. CONST. art. I, § 9, cl. 2.

87. Even narrow readings of the history of the writ indicate that some deprivations of liberty should be reviewable. *See* Bator, *supra* note 13, at 451. The possibility of reconsideration does not, of course, mandate federal reconsideration. *See* *Swain v. Pressley*, 430 U.S. 372, 385 (1977) (Burger, C.J., concurring) (the suspension clause does not require access to federal courts).

88. 42 U.S.C. § 2000e-5 (1982).

convictions were unconstitutional. Prisoners are first required to "exhaust" state judicial remedies.⁸⁹ A third illustration is the Civil Rights Act of 1871, which has been interpreted as providing a "supplementary" remedy; litigants may go to either state or federal court to seek redress for violations of federal rights by state actors.⁹⁰

All of the state/federal and agency/court schemes sacrifice the apparent economies of a single decisionmaker or single set of decisionmakers to other interests, such as diffusion of power, differentiation of labor to reflect the expertise of the respective bodies, and federal rights' enforcement by federal entities. Complex procedural schemes may also evidence beliefs about the importance or difficulty of a category of cases to be decided. In addition, elaborate procedures may help socialize us about "new" rights. By cloaking such rights in a good deal of process, those hostile to their implementation may be mollified by the many opportunities to contest. Ventilation of displeasure may dissipate the dislike, and the procedures may channel the aggression. Alternatively, those hostile to the rights may create so cumbersome a procedure as to make rights enforcement extraordinarily difficult.

A third reason for complex procedural models is a perceived need to empower more than one decisionmaker to issue dispositive rulings. Many observers of the dispute resolution process believe that members of the first tier, in state and federal courts and agencies, should be supervised. Some commentators report that first tier decisionmakers frequently fail in the task of norm application,⁹¹ and others express concern about individual decisionmakers' abuse of power.⁹² While we are cognizant of human fallibility at all tiers and aware that repeated adjudications do not necessarily produce correct results, we nevertheless have created opportunities to review, if not to rectify, some of those mistakes. We draw some measure of comfort from having many actors, and sometimes specific kinds of decisionmakers (perhaps better paid or more carefully selected), participate in the decisionmaking process. The decisions thus gain legitimacy.

A fourth rationale for procedural complexity is, somewhat ironi-

89. 28 U.S.C. § 2254(b) (1982).

90. *Monroe v. Pape*, 365 U.S. 167, 180 (1961); 42 U.S.C. § 1983 (1982).

91. See J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, *SOCIAL SECURITY HEARINGS AND APPEALS: A STUDY IN THE SOCIAL SECURITY ADMINISTRATION HEARING SYSTEM* 126-30 (1978) (description of Social Security Administration's case processing difficulties); Davies, *supra* note 74, at 586-87 (state trial judges' errors); Peller, *supra* note 13, at 643-61 (state trial and appellate court errors).

92. JUSTICE ON APPEAL, *supra* note 1, at 2-4; Resnik, *supra* note 26, at 424-31.

cally, economy itself. Throughout most of our history, judges have complained about being unable to accomplish all of their work.⁹³ Rather than always adding judges to the existing tiers, we have attempted a variety of diversionary tactics that take sets of cases away from juries, from article III and from state court judges, and from the Supreme Court. Courts and legislatures have crafted or condoned a wide variety of so-called "alternative" procedures, such as agency adjudication, mandatory arbitration, "mini" or summary trials, medical malpractice panels, and magistrate adjudication.⁹⁴ These approaches are all designed to be nonbinding and nonfinal, so as not to supplant the constitutionally required or politically valued jury or judge trial. In my lexicon, these procedures can be understood as tiers of decision-making, sometimes with unlimited review (the Single Judge plus Unlimited Review Model) and at other times with limited review (the Single Judge plus Limited Review Model).

Procedural modeling is, of course, animated by more than solicitude to theoretical views of what psychic or social benefits procedure may confer. Political power struggles are also at the heart of procedural choices. For example, Congress has expanded and contracted the Supreme Court's jurisdiction over habeas corpus—at times in hostile reaction to the Court's decisions. In the politically charged atmosphere shortly after the Civil War, the Court's ruling in a habeas case met with congressional displeasure.⁹⁵ In retaliation, Congress withdrew some of the Court's jurisdiction over habeas petitions,⁹⁶ and that withdrawal was sanctioned by the Supreme Court.⁹⁷ Years later, after passions cooled, Congress restored the Supreme Court's appellate habeas jurisdiction.⁹⁸

93. See, e.g., F. FRANKFURTER & J. LANDIS, *supra* note 39, at 80-93 (the Supreme Court's caseload too large).

94. See Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y.U. L. REV. 1297 *passim* (1975) (history of use of magistrates in the United States). For early so-called "dispute resolution alternatives," see R. POUND, ORGANIZATION OF COURTS 36-38 (1941) (use of arbitrators) *id.* at 202 (use of commissioners).

95. *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1867).

96. See Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 (repeal of a prior act that had authorized some appeals from judgments of the circuit courts to the Supreme Court). However, by virtue of the Judiciary Act of 1789, the Supreme Court continued to have original jurisdiction over habeas petitions. The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81. See also *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 96 (1868) (Supreme Court has original jurisdiction over habeas petitions).

97. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). See generally Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229, 236-44 (1973) (discussing that case's history and congressional power to remove appellate jurisdiction from the Supreme Court).

98. In 1885, Congress authorized Supreme Court review of trial judges' decisions on habeas petitions "as of right" by a "writ of error." Act of March 3, 1885, ch. 353, 23 Stat. 437. In 1897,

To summarize, there are no procedural designs in which all the features of procedure are maximized, because several are in tension and some are in direct conflict with each other. Further, the political structure of the United States, with its dual sovereignties, its insistence on lay participation, and its federal supremacy, makes procedural simplicity difficult to achieve. Our responses to these problems vary. At times, we appear to tolerate or to ignore the tensions; we seem uninterested in procedure. At other moments, the tensions among the features make procedural reform appear imperative, and many voices join in complaining about the inadequacies of current schemes and in advocating revision. One such moment was the 1960's, during which the Warren Court reevaluated procedural models in an effort to further the Court's values. I believe a majority of today's Supreme Court is engaged in a parallel effort. The Court is articulating its preferences among the features and the values that underlie them. Across all the procedural models I examine, one theme emerges: This Supreme Court, in the name of economy, seeks to resolve the tensions among the features by giving great weight to finality and deferring to the authority of first tier decisionmakers.

II. THE VALUE CHOICES: HABEAS CORPUS

A first example of the current Supreme Court's drive to enshrine finality, the authority of the first tier, and economy, is the new law of habeas corpus. It is ironic that habeas corpus is a prime illustration of the increased concern for the preservation of first tier decisions. A premise of the "Great Writ" is a willingness to look anew. Habeas corpus incorporates a possibility of revision long after such hope has been extinguished in many other kinds of cases.⁹⁹

But contemporary federal habeas corpus has become a law of closure, of complex procedural obstacles that preclude adjudication on the merits. Current case law is dominated by announcements of new procedural requirements or refinements of those already in place. Other

Congress altered the scheme by making Supreme Court review of habeas petitions discretionary. In addition, Congress limited state petitioners' appellate opportunities by requiring them to obtain, either from the judge who had denied the petition or from an appellate court, certification of "probable cause" to appeal. Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827; Act of Jan. 20, 1897, ch. 68, 29 Stat. 492; 28 U.S.C. § 2253 (1976).

99. For discussions of the history of habeas corpus, see Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978); Oakes, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966). Most commentators agree that the original purpose of the writ was to remedy executive detention, but in the United States that the writ's purpose evolved to embrace claims of allegedly wrongful judicial detention.

commentators have chronicled the arguments about the validity of habeas corpus review.¹⁰⁰ My task here is to review its evolution to determine what animated both the Warren Court's expansionist construction and the current Court's narrow reading of the habeas statutes. I will examine the two genres of habeas cases that federal judges decide—lawsuits filed by state prisoners seeking to invalidate their convictions, and lawsuits filed by federal prisoners also claiming invalid convictions or sentences. Statutes govern both types of habeas claims, and the reach of both statutes has been sharply limited.

A. STATE PRISONERS' EFFORTS TO OBTAIN HABEAS REVIEW IN FEDERAL COURT

1. *The Statutory Framework*

In 1867, Congress authorized federal judges to review the detention of state prisoners.¹⁰¹ That statute's modern day counterpart is 28 U.S.C. § 2254, which gives federal judges jurisdiction to entertain state prisoners' claims that their custody is "in violation of the Constitution or laws or treaties of the United States."¹⁰² In terms of the models with which I began, the statute creates an opportunity for repeated reviews of a first tier decision and, in some circumstances, for unlimited review by a second, autonomous decision center. The congressional grant of jurisdiction to federal courts for state habeas claims reallocates and diffuses power. Further, it provides additional opportunities for revisionism, for rational and impartial implementation of constitutional norms, and for consistent federal law enforcement. By authorizing unusual procedures and by giving them uncommon ritual, Congress differentiated claims of unconstitutional confinement from other kinds of cases.

The original decisions, a judgment of guilt and imposition of sentence, are made by a jury or judge in a state court. Thereafter, if the state system provides review mechanisms, state prisoners must challenge their convictions in state courts and exhaust the remedies available.¹⁰³ If, however, a state provides no opportunity for reconsideration when the prisoner seeks habeas relief, then the prisoner

100. *E.g.*, Bator, *supra* note 13, at 499-519; Cover & Aleinikoff, *supra* note 13, at 1037-54; Friendly, *supra* note 13, at 151-57.

101. One reason for the statute was to enable federal courts to free ex-slaves illegally imprisoned by states trying to avoid emancipation decrees. Oakes, *supra* note 99, at 452.

102. 28 U.S.C. § 2254 (1982).

103. *Id.* § 2254(c); see *Rose v. Lundy*, 455 U.S. 509, 515-18 (1982) (discussing the history of the exhaustion doctrine). The exhaustion requirement is not, however, jurisdictional. *Strickland v. Washington*, 104 S. Ct. 2052, 2063 (1984).

may proceed to federal court.¹⁰⁴

The habeas statute is a complex procedural model. In the state forum, a judge or jury's decision may be subjected to limited review by one or two tiers and then again, under state collateral remedies, by the same courts. Thereafter, federal trial judges may undertake unlimited review of some claims of illegality, and their work may also be subjected to one or two tiers of limited review.

But my description needs some immediate modification. Federal judges' review of state prisoners' claims is in one sense "unlimited," and in another, *very* limited. The statutory habeas model is one of "unlimited" review in the sense that, when federal constitutional questions are raised, federal courts have the authority to go beyond state court records, to hold evidentiary hearings, to consider new information, and to make their own decisions, unconstrained by the state courts' rulings.¹⁰⁵

Federal courts' habeas jurisdiction, however, is in another sense limited. First, federal courts may entertain only complaints of "constitutional" or "fundamental" error; other kinds of claimed illegalities, such as breaches of state law, are insufficient to invoke federal jurisdiction.¹⁰⁶ Second, as previously noted, state prisoners must initially raise their claims of federal constitutional error in state courts, to "exhaust" this first decision center before the second, federal decision center will consider the claim.¹⁰⁷ Third, since 1908, the congressional scheme has permitted federal appellate review of state prisoners' cases only after either the federal district court that denied the habeas petition or an appellate court grants a certificate of "probable cause." This document certifies that the appeal raises "substantial" or at least "debatable" issues.¹⁰⁸ The many other limitations on federal review will be chronicled shortly.

With the enactment of a habeas statute, Congress gave lower federal courts substantial opportunities to review state court processes. In the 1960's, the Warren Court exploited those opportunities and authorized federal trial courts to use the habeas statute as a vehicle for super-

104. *Fay v. Noia*, 372 U.S. 391, 398-99 (1963).

105. 28 U.S.C. § 2254(d) (1982). *See Townsend v. Sain*, 372 U.S. 293, 312-18 (1963) (new evidentiary hearing permissible in federal court).

106. 28 U.S.C. § 2254(a) (1982).

107. *Id.* § 2254(b).

108. *Id.* § 2253; FED. R. APP. P. 22. Discussion of the standard for such certification is provided in *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394 n.4 (1983).

vising state criminal procedures. The Court relied upon the habeas statute's rich procedural possibilities to articulate and enforce federal norms for the criminal convictions process. In the 1980's, however, the Burger Court has employed the same statute to very different ends: the Burger Court uses habeas cases as occasions to announce the importance of simple process and of limiting review of the first tier's work.

2. *The Warren Court's Approach: The Single Judge/Different Forum Plus Unlimited Review Model of Fay v. Noia*

An expansionist interpretation of the habeas corpus statute was suggested in *Brown v. Allen*¹⁰⁹ and arrived in full force with the Warren Court's 1963 decisions of *Townsend v. Sain*¹¹⁰ and *Fay v. Noia*.¹¹¹ *Fay v. Noia* illustrates the value preferences underlying the Warren Court's procedural choices.

In 1942, Charles Noia and two codefendants, Santo Caminito and Frank Bonino, were convicted of felony murder and sentenced to life in prison.¹¹² The trio's confessions provided the only evidence of their guilt.¹¹³ The police obtained those confessions after holding the three incommunicado and interrogating them continuously for more than 24 hours.¹¹⁴ All three sought unsuccessfully to have their confessions suppressed at trial. Upon conviction, however, only Caminito and Bonino appealed, and both lost.¹¹⁵ Years later, Caminito was granted habeas corpus relief by the Court of Appeals for the Second Circuit on the grounds that the admission of a coerced confession violated the fourteenth amendment.¹¹⁶ Thereafter, Bonino submitted a motion for reargument to the New York Court of Appeals. Because that court had no time limit for filing motions to reargue, it granted Bonino's motion—despite the fact that the motion was filed some thirteen years after the

109. 344 U.S. 443 (1953). For discussion of that case, see Peller, *supra* note 13, at 583-92.

110. 372 U.S. 293 (1963).

111. 372 U.S. 391 (1963).

112. *United States ex rel. Noia v. Fay*, 300 F.2d 345, 347 (2d Cir. 1962), *aff'd*, 372 U.S. 391 (1963).

113. *United States ex rel. Noia v. Fay*, 300 F.2d at 347; *People v. Caminito*, 3 N.Y.2d 596, 598, 170 N.Y.S.2d 799, 802 (1958). *But see People v. Noia*, 4 A.D.2d 698, 698, 163 N.Y.S.2d 796, 797 (1957) (Noia's case may not have been identical to that of Caminito and Bonino).

114. Judge Frank, writing for the Court of Appeals for the Second Circuit, described how one of Noia's codefendants had been treated: "The police interrogated him almost continuously for 27 hours. . . . During this long period, the police, in effect, kidnapped him: They kept him incommunicado, refusing to allow his lawyer, his family, and his friends to consult with him." *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 701 (2d Cir. 1955).

115. 372 U.S. at 394-95 n.1.

116. *United States ex rel. Caminito v. Murphy*, 222 F.2d at 700.

original appeal had been denied.¹¹⁷

Noia then returned to New York state courts, and like his codefendants, asked that his conviction be overturned. Although the trial court granted his motion to vacate,¹¹⁸ the appellate court reversed, concluding that New York courts lacked jurisdiction to hear Noia's claim because neither had he appealed nor was he advancing claims based upon previously unavailable information.¹¹⁹ Noia eventually succeeded in the federal courts; both the Second Circuit and the United States Supreme Court held that his confinement was unconstitutional.¹²⁰

The Supreme Court couched its decision in classic habeas terms; the Court granted the writ and mandated that the prisoner be retried or freed. The Court's unspoken conclusion, however, was that New York's procedures, in which finality and economy concerns reigned supreme, were unconstitutional. Tradition, comity, and the fear of opening the floodgates to prisoner litigation constrained the Court; it did not directly invalidate or enjoin New York procedures.¹²¹ Instead, the Court declined to be bound by New York's preclusion rules and interpreted the federal habeas statute to offer what New York courts would not—an opportunity to revise earlier rulings.

Justice Brennan, writing for the majority, rejected New York's contention that its refusal to entertain Noia's claims should preclude federal court review—in the jargon, that New York's decision was an “independent and adequate” state ground.¹²² Justice Brennan ex-

117. 372 U.S. at 395 n.1.

118. *People v. Noia*, 3 Misc. 2d 447, 450, 158 N.Y.S.2d 683, 687 (Kings County Ct. 1956).

119. *People v. Noia*, 4 A.D.2d 698, 698, 163 N.Y.S.2d 796, 797 (1957), *aff'd*, 3 N.Y.2d 596, 601, 148 N.E.2d 139, 142-43, 170 N.Y.S.2d 799, 804 (1958).

120. *United States ex rel. Noia v. Fay*, 300 F.2d 345, 365 (2d Cir. 1962), *aff'd*, 372 U.S. 391, 441 (1963).

121. The remedy when a petition for habeas corpus is granted is to release a prisoner but not to enjoin the unconstitutional acts that formed the basis for the illegal conduct. The release, however, is conditional. The state has the choice of freeing a petitioner or retrying that person in a constitutional manner. As discussed by Cover & Aleinikoff, *supra* note 13, at 1035-45, federal habeas is thus less intrusive than a civil injunction. In their view, habeas has served as an important mechanism by which federal courts affect state criminal procedures. In a sense, habeas relief can be understood as the functional analogue of a declaratory judgment.

122. When a state court decides a case on federal and nonfederal grounds, and the reversal of the federal ground will not invalidate the judgment, the United States Supreme Court generally declines to decide whether the state court's ruling on the federal issue was correct. *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 634-36 (1875). By distinguishing state “procedural” grounds from other state grounds, *Fay v. Noia* established a distinct “independent and adequate” rule for habeas corpus proceedings. *Fay v. Noia*, 372 U.S. at 431. *Henry v. Mississippi*, 379 U.S. 443, 446-47 (1965), applied the *Fay* test on direct appeal. The *Fay v. Noia* approach has been

plained that the “breadth” of federal court jurisdiction to entertain state prisoners’ habeas petitions was essential to maintenance of “due process.”¹²³ In response to the contention that, by procedural default, Noia had forfeited his opportunity to claim constitutional error in the federal courts, Justice Breiman stated: “a forfeiture of remedies does not legitimize the unconstitutional conduct by which . . . [a] conviction was procured.”¹²⁴ In other words, Justice Brennan believed that the state procedural system had failed to implement important values and that, given the congressional mandate, federal courts could appropriately supersede state decisions.

In reaching his conclusion, Justice Breiman relied repeatedly upon the notion that federal habeas review was “independent”¹²⁵ of state court proceedings—that a second decision center had authority to undertake unlimited review of federal constitutional issues. The majority did not, however, ignore the state’s express concern that the availability of a second, independent federal procedure would undermine states’ abilities to conclude their criminal process. The Court ruled that in the event a prisoner “deliberately by-passed the orderly procedure of the state courts,”¹²⁶ federal judges had discretion to deny habeas relief. A deliberate bypass or waiver was to be tested under the standard set forth in *Johnson v. Zerbst*,¹²⁷ “whether there was an intentional relinquishment or abandonment of a known right or privilege.”¹²⁸ In the majority’s view, Noia’s case was not an example of a deliberate bypass.¹²⁹

Given the record in Noia’s case, that conclusion is not obvious. Noia, represented by counsel, had known of and made the claim of an unconstitutionally coerced confession at trial. Further, he had known of the possibility of appeal but declined to seek review. In his postconviction proceedings, Noia offered two explanations for his failure, almost twenty years earlier, to appeal. He stated that he had lacked funds to pay an attorney for the appeal and that he had feared a successful appeal could have resulted in retrial, conviction, and the impo-

greatly eroded by *Wainwright v. Sykes*, 433 U.S. 72 (1977), discussed *infra* notes 206-19 and accompanying text.

123. 372 U.S. at 427.

124. *Id.* at 428.

125. *Id.* at 422, 424.

126. *Id.* at 438.

127. 304 U.S. 458 (1938).

128. *Id.* at 464.

129. 372 U.S. at 440.

sition of the death sentence.¹³⁰ Without much explanation, the Court decided that Noia's "grisly choice" did not constitute a knowing relinquishment.¹³¹ However, the Court also described itself as ruling that some defendants who had refused to utilize state procedures due to fear of heavier penalties, "even the death penalty," could be found to have deliberately bypassed state procedures and thus to have lost their opportunity for federal court review.¹³²

Noia's "grisly choice" did not abate with the passage of the time in which to appeal. State prisoners who succeed on federal habeas corpus, like those prisoners who succeed in state appellate or *coram nobis* proceedings, face the possibility of retrial. Noia's "choice" on appeal was identical to that in his later postconviction attempts: at all times, he faced the threat of retrial and resentencing. But, there were critical differences between Noia's 1942 choice and his 1962 choice. First, time had passed, and the likelihood of retrial diminishes in proportion to the length of time between an initial conviction and its later invalidation. Second, the possibility of retrial was almost nil because both codefendants' convictions had been invalidated and their indictments dismissed.¹³³ As a result, one could argue that Noia had made a "strategic or tactical" decision. Having "deliberately by-passed" appeal when vulnerable, the prisoner then moved for relief when the risks

130. 372 U.S. at 397 n.3, 439-40. These facts were developed in a federal court hearing on Noia's habeas petition. *United States ex rel. Noia v. Fay*, 183 F. Supp. 222, 225 (S.D.N.Y. 1960), *rev'd*, 300 F.2d 345 (2d Cir. 1962), *aff'd*, 372 U.S. 391 (1963).

A few years after it decided *Fay v. Noia*, the Supreme Court decided that courts could not burden the right to appeal with such a "grisly choice." In *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969), the Court concluded that "the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." Trial judges could impose greater sentences only if they could provide reasons, based upon new information developed after the first sentencing. *Id.* at 726.

Pearce has not made appeals totally risk-free. See *Chaffin v. Stynchcombe*, 412 U.S. 17, 22-35 (1973) (no *Pearce* problem if new jury, uninformed of earlier sentence, imposes more severe penalty); *Colten v. Kentucky*, 407 U.S. 104, 114-20 (1972) (greater sentence after de novo trial permissible). Nor has the Court held all defendants' choices unconstitutional. See *North Carolina v. Alford*, 400 U.S. 25, 39 (1970) (to avoid risk of death penalty, criminal defendant may enter guilty plea while affirming innocence).

The other factor that Noia claimed had influenced his choice, the difficulty of paying for counsel on appeal, has also been eliminated. In the same term as *Fay v. Noia*, the Court held that indigent criminal defendants had to be provided counsel on appeal. *Douglas v. California*, 372 U.S. 353, 357-58 (1963).

131. *Fay v. Noia*, 372 U.S. at 440. *Daniels v. Allen*, 344 U.S. 443 (1953), provides a better example of an unintentional bypass. In *Daniels*, the attorney of one of the petitioners had filed appeal papers one day after the deadline. The state court denied leave for late filing, and federal review was refused.

132. 372 U.S. at 440.

133. *Id.* at 441.

of retrial were almost negligible.¹³⁴

But Noia's case also presented unusually compelling facts. In the majority's view:

[S]urely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. . . . [Therefore] [i]f the States withhold effective remedy, the federal courts have the power and the duty to provide it.¹³⁵

The Court's procedural model enabled it to respond to the "duty" it perceived in light of the poignant facts presented. However, if the Court was correct that "no just and humane system" could condone such an outcome, it is difficult to understand the relevance of the deliberate bypass test. If the system's integrity, its basic values, are at stake, why should it matter that this litigant did not perform adequately, that he made autonomous choices that might have been misguided at the time and in hindsight prove ill-advised? In retrospect, because the deliberate bypass standard of *Fay v. Noia* calls into question a litigant's moral worthiness to request revision of earlier decisions, *Fay v. Noia* provided an avenue for the demise of the habeas model that the opinion crafted.

Fay v. Noia exemplifies the operation of the two independent decision centers model, the Single Judge plus Limited Review/Different Forum plus Unlimited Review Model. New York courts justified differential treatment of three codefendants on the grounds of litigant autonomy, finality, and economy. The state courts decided that Noia did not qualify for release because he had not pursued his claims in the state appellate courts. To respect Noia's decisionmaking power, to conserve resources, and to enforce closure, the state courts determined that Noia should be bound by his choices—regardless of how his codefendants had been treated. The federal appellate courts chose differently.

134. Justice Harlan made this argument in his dissent. *Id.* at 475-76 (Harlan, J., dissenting). Justice Harlan also argued that New York had a "vital interest in requiring that appeals be taken on the basis of facts known at the time, since the first assertion of a claim many years later might otherwise require release long after it was feasible to hold a new trial." *Id.* at 473 (Harlan, J., dissenting).

While other states might lay claim to such an interest, New York's posture was less clear. New York, as noted, had no time limit on motions to reconsider appeals; under New York procedure, Bonino had succeeded in invalidating his conviction thirteen years after he had appealed. Given the availability in New York of such late "reopenings," it is difficult to find compelling that state's interest in quick retrials.

135. *Id.* at 441.

Concerned about equal treatment, those courts opted for revisionism, consistency, and federal substantive norm enforcement, and they refused to legitimate *Noia's* continued incarceration. *Fay v. Noia* illustrates that, by differently valuing procedural features, two independent systems can provide diverse outcomes on the same facts.¹³⁶

What if the values of the second procedural system had been duplicative of the first, or were different from those embraced by the *Noia* Court? What if, for example, the federal courts had affirmed New York State's rulings or, on the merits, had ruled the confession uncoerced? Is there still a justification for a procedural model that incorporates independent, redundant decision centers?

At the theoretical level, the attraction of the duplicative model persists. The two decision centers each have the opportunity to assess the case and to determine whether to adjudicate the merits. Given that the Different Forum Model presupposes politically distinct decision centers, consistent replication would be improbable. At a structural level, the two fora may engage in a dialogue, of sorts, about their valuation process.¹³⁷ If the only advantage is the possibility of difference, such an advantage remains regardless of which decision center's rulings are supreme or whether the decision centers in fact reach different results. Further, in ritualistic and symbolic terms, the more individuals of respected status who "sign off" on a decision, the greater the legitimacy of that decision. Finally, individuals subject to the decision are, by virtue of a duplicative model, given more opportunities to persuade and thereby to express their personal dignitary interests. Thus, even where revisionism results only in replication, it may still serve symbolic legitimating functions.

On a functional level, by permitting the duplication, Congress presumably believed that the two decision centers were not fungible, that the states would not value federal rights as the federal courts would, and that federal decisions about facts and law were likely to be "better" insofar as both related to federal constitutional norms.¹³⁸ Hence, Con-

136. The *Fay v. Noia* opinion expressly linked procedure to substantive outcomes. "Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty." *Id.* at 401.

137. See Cover & Aleinikoff, *supra* note 13, at 1046-64 (procedural redundancy results in "dialectical federalism"). But see Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286, 291-93 (1966) (state court judges feel only indirectly affected by Supreme Court decisions about federal questions).

138. It is difficult to ascertain the 1867's Congress' views on this issue. The legislative history of the Habeas Corpus Act of 1867 is sparse. It is summarized in Mayers, *The Habeas Corpus Act*

gress gave federal courts the last word on federal constitutional claims. The lowest level federal judge has, in a sense, appellate jurisdiction over the decisions of the highest state court, while state courts are forbidden to order release of federal prisoners.¹³⁹

Modern critics of federal habeas jurisdiction, and especially of *Fay v. Noia*, denounce habeas corpus procedures and their underlying assumptions.¹⁴⁰ *Fay v. Noia* defenders believe in the continued utility of federal courts' oversight.¹⁴¹ The views of more recent Congresses are difficult to divine. The fact that Congress has failed to revise the habeas statute in ways relevant here¹⁴² is arguably evidence of the legislators' continued belief that states cannot be totally entrusted with all federal rights enforcement.¹⁴³ The language of the statute makes federal courts available as second, independent decision centers for all claims of constitutional error in state criminal proceedings. That same statute, however, has been reinterpreted substantially by the Court

of 1867: The Supreme Court as Legal Historian, 33 U. CHI. L. REV. 31 (1965) (arguing that Supreme Court's claim in *Fay v. Noia* and other cases that the Act of 1867 was intended to provide broad remedies for state prisoners is not supported by congressional records; Mayers suggested that Congress wanted, primarily, to provide a federal forum for ex-slaves detained by states after the Civil War). *Id.* at 33-48. Cf. W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 192-93 (1980) (purpose of 1867 Act was to protect "all those imprisoned," and specifically, state prisoners).

See also Hass, *The "New Federalism" and Prisoners' Rights: State Supreme Courts in Comparative Perspective*, 34 W. POL. Q. 552, 569 (1981) (state supreme courts generally hostile to implementation of prisoners' right of access to courts); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (institutional disparities between federal and state courts make the two decision centers different in fact).

139. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 409 (1872). But see M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 116-24 (1980) (*Tarble* wrongly decided and not constitutionally compelled); Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1386-93, 1401-02 (1964) (historical precedents for permitting state court jurisdiction over persons in federal custody).

140. E.g., Bator, *supra* note 13, *passim*; Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 612-16 (1981).

141. Cover & Aleinikoff, *supra* note 13, at 1067-68; Peller, *supra* note 13, at 666-69; Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 606, 616-17 (1983). See also Lay, *Problems of Federal Habeas Corpus Involving State Prisoners*, 45 F.R.D. 45, 67 (1969); McMillian, *Habeas Corpus and the Burger Court*, 28 ST. LOUIS U. L.J. 11 (1984) (both federal judges endorsing federal review in habeas cases).

142. Congress did alter section 2254 in response to one of *Fay v. Noia's* companion cases, *Townsend v. Sain*, 372 U.S. 293 (1963). *Townsend* authorized federal court de novo factfinding. *Id.* at 312-18. In 1966, Congress ordered federal courts to accord a "presumption of correctness" to state court findings; federal factfinding is permissible only if the statutory conditions are met. Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2(d), 80 Stat. 1104, 1105-06 (1966) (codified as amended at 28 U.S.C. § 2254(d) (1982)).

143. But, of course, the language of the statute is "open textured," and Congress has not overturned recent Supreme Court decisions that have substantially abrogated the *Fay v. Noia* interpretation.

since *Fay v. Noia*, and Congress has, thus far, also resisted efforts either to reaffirm *Fay v. Noia* or to adopt the subsequent reinterpretation.¹⁴⁴

3. *The Burger Court's Alternative: The Single Judge/Different Forum Plus Limited Review Model of Stone v. Powell and Wainwright v. Sykes*

Fay v. Noia had a relatively short life. Efforts to revise substantially *Noia's* doctrine showed strength first in *Stone v. Powell*¹⁴⁵ and emerged, in full force, with the Burger Court's ruling in *Wainwright v. Sykes*.¹⁴⁶ In my lexicon, the Court opted in both cases for a Single Judge plus Limited Review plus Limited Review/Different Forum plus Very Limited Review Model, with only a minimal chance of unlimited review in the background. *Stone v. Powell* and *Wainwright v. Sykes* took analytically distinct routes to limit the second forum's reach. The Court in *Stone v. Powell* relied upon the fact that the state courts had already decided an issue once; the *Sykes* Court rested its decision upon a litigant's failure to raise an issue earlier in state courts.

Stone v. Powell established the principle that state prisoners who have received an "opportunity for full and fair litigation" of fourth amendment claims in state courts may not obtain federal habeas corpus review of those claims.¹⁴⁷ Despite opinions by the Court of Appeals for the Ninth Circuit that the arrest of Lloyd Powell for vagrancy and the subsequent search had been unconstitutional,¹⁴⁸ and by the Eighth Circuit that the warrantless police search of David Rice's home was illegal,¹⁴⁹ the Supreme Court decided to uphold the decisions of the state trial judges, who had first heard the arguments of unconstitutionality and had ruled against them. The Supreme Court did not affirm the

144. Two bills are pending before Congress. Both would impose, *inter alia*, a one-year statute of limitations on habeas corpus, and a "cause and prejudice" rule. S. 1763, 98th Cong., 1st Sess. § 2 (1983); H.R. 2238, 98th Cong., 1st Sess. § 2 (1983) [hereinafter cited as Habeas Corpus Legislation of 1983]. See also S. REP. NO. 226, 98th Cong., 1st Sess. 110-11 (1983) (explaining intent of Senate bill 1763). S. 1763 was passed by the Senate on February 2, 1984 and is before the House Judiciary Committee, as is H.R. 2238. For a discussion of proposed amendments to section 2254 and of proposals rejected in the past, see Yackle, *supra* note 141, at 610-11 n.12. For discussions of earlier legislative proposals to amend section 2254, see Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221 (1973).

145. 428 U.S. 465 (1976).

146. 433 U.S. 72 (1977). For a view that in narrow circumstances, *Fay v. Noia* survived *Wainwright v. Sykes*, see *Holcomb v. Murphy*, 701 F.2d 1307 (10th Cir.), *cert. denied*, 103 S. Ct. 3546 (1983).

147. 428 U.S. at 494.

148. *Powell v. Stone*, 507 F.2d 93, 96 (9th Cir. 1974), *rev'd*, 428 U.S. 465 (1976).

149. *Rice v. Wolf*, 513 F.2d 1280, 1289 (8th Cir. 1975), *rev'd*, 428 U.S. 465 (1976).

trial judges on the merits. Rather, the Court held that, because the prisoners had had opportunities to litigate "fully and fairly" the fourth amendment claims in state courts, no federal review was available.¹⁵⁰

In light of *Fay v. Noia's* express concern that habeas petitioners not deliberately bypass state courts, the ruling in *Stone v. Powell* seems ironic. In the later case, the habeas applicants had made the correct procedural moves, both under *Fay v. Noia* and under the habeas corpus statute. The prisoners had not bypassed the state systems; rather, they had raised the fourth amendment violations first in the state courts. In *Stone v. Powell*, however, the very procedural posture lauded in *Fay v. Noia* was used to preclude habeas corpus petitioners from obtaining federal decisions on the merits. Moreover, the Court refused federal review even though, in the two companion cases, the opinions of six judges of United States appellate courts had disagreed with the state courts' judgments and had found constitutional error.¹⁵¹ The Court disregarded the discrepancies between the first and second decision centers' outcomes and stated its preference for more limited procedural opportunities: once a state judge has given a defendant an opportunity for "full and fair litigation"¹⁵² of a fourth amendment claim, and appeal of that decision has been afforded, no federal review is permitted.¹⁵³

Stone v. Powell evinces the current Supreme Court's preference for a very different procedural model from that adopted in *Fay v. Noia*. The *Stone v. Powell* Court chose a single decision center (and perhaps a single judge¹⁵⁴) model—although without complete abandonment of a role for the second decision center. Under *Stone*, the federal courts

150. 428 U.S. at 494.

151. *Rice v. Wolff*, 513 F.2d 1280 (8th Cir. 1975), *rev'd*, 428 U.S. 465 (1976), and *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974), *rev'd*, 428 U.S. 465 (1976), were both unanimous.

152. Under case law development after *Stone v. Powell*, "opportunities for full and fair litigation" have been interpreted to include instances in which state courts have "employed an incorrect legal standard, misapplied the correct standard, or erred in finding the underlying facts." Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 COLUM. L. REV. 1, 17-18 (1982) (footnotes omitted). Further, all that states need provide are "opportunities"; actual litigation on the merits is not generally held to be a prerequisite to the imposition of a *Stone v. Powell* bar. *Id.* at 21.

153. *Fay v. Noia* and *Stone v. Powell* might be rationalized as meaning that every habeas claimant gets only one decision on the merits, and that the Supreme Court is indifferent to whether the merits decision is made in state or federal court. However, *Wainwright v. Sykes*, under which federal habeas corpus review could be precluded without the state court ever issuing a decision on the merits, belies this reading. See *infra* notes 161-91 and accompanying text.

154. Where fourth amendment claims are made and lost on motions or at trial and no appeal is taken, a single trial judge makes the final ruling.

have an independent decision to make. Did the petitioner have an opportunity to litigate fully and fairly in the first forum? This decision occasionally yields the answer "no"¹⁵⁵ and permits the federal courts to make other independent decisions.¹⁵⁶ However, if a petitioner has a full and fair first round, no second opportunity is available.¹⁵⁷ Presumably, the Supreme Court weighed the costs of repetition against the benefits of occasional federal court revision of state court judgments. The *Stone v. Powell* Court either found the costs too onerous or counted the benefits as insignificant.¹⁵⁸

The question after *Stone v. Powell* was whether that decision heightened a new habeas model for all cases or only for those involving the fourth amendment. *Stone v. Powell* might have been pigeon-holed as an aberration in habeas corpus law reflective of the Court's growing ambivalence towards the exclusionary rule.¹⁵⁹ Indeed, the Court later rejected an attempt to extend *Stone v. Powell*'s "opportunity for full and fair litigation" standard to claims of discrimination in grand jury selection.¹⁶⁰

The greater import of *Stone*, however, became clear with the

155. See, e.g., *Gamble v. Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978) (state court willfully refused to apply correct and controlling constitutional standards; fourth amendment issue may therefore be reviewed in federal habeas proceeding).

156. Surmounting the *Stone v. Powell* bar does not necessarily result in a merits review. See, e.g., *Gates v. Henderson*, 568 F.2d 830, 842-44 (2d Cir. 1977) (en banc) (Oakes, J., concurring) ("cause and prejudice" bar of *Wainwright v. Sykes* also applies to fourth amendment claims), *cert. denied*, 434 U.S. 1038 (1978).

157. *Stone v. Powell* is frequently assumed to be a citadel of comity and of respect for state interests. Yet, in some sense, the state courts are at greater risk under *Stone v. Powell* because it authorizes a broad inquiry into the soundness of their procedures. The alternative question, of whether a case was correctly decided, seems less intrusive. However, because few inmates have the resources necessary to mount a comprehensive challenge to state procedures, in practice *Stone* has limited federal review of state convictions. Halpern, *supra* note 152, at 1.

158. The Court expressly relied upon a utilitarian approach, but described itself as weighing the costs and benefits not of federal norm enforcement, but of the exclusionary rule, whose deterrent force the Court believed diminished as the interval between conviction and review grew. 428 U.S. at 489-94. For the argument that some federal habeas fourth amendment review is worth the cost, see Halpern, *supra* note 152, at 31-34.

159. See *Nix v. Williams*, 104 S. Ct. 2501 (1984) (authoring an exception to the application of the exclusionary rule); *United States v. Calandra*, 414 U.S. 338, 354 (1974) (allowing grand jury questioning based upon illegally obtained evidence).

160. *Rose v. Mitchell*, 443 U.S. 545, 560-61 (1979); Peller, *supra* note 13, at 596-602. See *Cardwell v. Taylor*, 103 S. Ct. 2015, 2016 (1983) (holding that *Stone* does not apply to involuntary confession claims based on the fifth amendment); *White v. Finkbeiner*, 687 F.2d 885, 888-91 (7th Cir. 1982) (interpreting *Stone* as inapplicable to *Miranda* claims). The Court has, however, limited the applicability of the exclusionary rule in fifth amendment cases. *New York v. Quarles*, 104 S. Ct. 2626 (1984).

Court's 1977 decision in *Wainwright v. Sykes*.¹⁶¹ There, the Court chose a somewhat different procedural mechanism and adopted a test that it had flirted with in prior years.¹⁶² Consistent with its decision in *Stone v. Powell*, the Court set up another roadblock to federal review of habeas claims by reiterating its preference for simpler adjudication models and for the primacy of first tier decisions.

John Sykes argued that the admission at his trial of statements made to the police violated his fifth amendment rights because the state court had failed to hold a preadmission hearing on voluntariness, as required by *Jackson v. Denno*.¹⁶³ Neither Sykes nor his attorney had raised that claim at Sykes's 1972 trial. Rather, Sykes made the argument for the first time in a motion filed in the Florida courts to vacate his conviction.¹⁶⁴ Because the Florida system declined to consider his claim,¹⁶⁵ Sykes sought federal habeas review. A federal district judge agreed that the state court should have held a *Jackson v. Denno* hearing

161. 433 U.S. 72 (1977).

162. *E.g.*, *Francis v. Henderson*, 425 U.S. 536 (1976); *Estelle v. Williams*, 425 U.S. 501 (1976); *Davis v. United States*, 417 U.S. 333 (1974) (all employing "cause and prejudice" test in more limited contexts).

163. 378 U.S. 368 (1964).

164. *Wainwright v. Sykes*, 433 U.S. 72, 75 (1977). This statement needs some qualification. Justice Rehnquist stated that although Sykes had appealed his conviction, he "apparently did not challenge the admissibility of the inculpatory statements." *Id.* (emphasis added). Justice Rehnquist noted, however, that the Florida District Court of Appeals, Second District (ruling against Sykes's *pro se* application for habeas relief in the state courts) did conclude that "the admissibility of the post-arrest statements had been raised and decided on direct appeal." 433 U.S. at 75 n.3 (citing *Sykes v. State*, 275 So. 2d 24 (Fla. Dist. Ct. App. 1973)). Justice Rehnquist construed the statement in the Florida case that "[o]n direct appeal this court affirmed because the record amply supported the findings," 275 So. 2d at 24, to indicate that Florida had been presented with a challenge on admissibility. However, to substantiate his conclusion that no challenge had been made, Justice Rehnquist relied instead upon the undisputed "findings" of the United States district court, which "explicitly found to the contrary"; that is, that Sykes had not raised an objection to admissibility earlier. 433 U.S. at 75 n.3.

165. Once again, there is some ambiguity. Justice Rehnquist stated that the Florida courts did not rule on the merits because Sykes's attorney had failed to comply with the contemporaneous objection rule. 433 U.S. at 85-86. Justice Rehnquist then found that such a failure to obey a state rule, absent "cause and prejudice," would serve as an "independent and adequate state ground" to support the denial of federal review. *Id.* at 86-87.

The Florida courts, however, said little when denying Sykes's habeas application. The opinion of the Florida District Court of Appeal stated only: "This petition for writ of habeas corpus raises questions as to admissibility of a confession which was allowed in the trial court against Sykes. On direct appeal this court affirmed because the record amply supported the findings. Petition denied." 275 So. 2d at 24. It is unclear whether the "findings" to which the Florida court referred were based on the appellate court's consideration of the claimed errors, deemed "harmless," as Justice White concluded, 433 U.S. at 97-98 (White, J., concurring), or whether, as Justice Rehnquist assumed, Florida declined to review the claim of error because it had not been raised earlier.

on whether Sykes's statements to the police were voluntary, and the Fifth Circuit affirmed.¹⁶⁶

The Supreme Court reversed, but not because it disagreed with the merits of the holdings of the federal judges below. The Court did not decide the merits. Instead, a majority of the Court announced that the "simple legal question"¹⁶⁷ before it was to interpret the habeas corpus statute, 28 U.S.C. § 2254(a), to determine whether the statute's language precluded federal courts from reaching the merits of Mr. Sykes's application. The Court held that Mr. Sykes's claim was not within the congressional grant to federal courts to entertain applications from state prisoners "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."¹⁶⁸ Federal habeas review of the merits was unavailable because Sykes's attorney had failed to object contemporaneously as required by Florida law,¹⁶⁹ because, in his postconviction attack, Sykes had failed to demonstrate "cause" for his attorney's failure to object at trial to the admissibility of the statements,¹⁷⁰ and because Sykes had not shown how the admission of the statements had "prejudiced" his trial.¹⁷¹

That "cause" could not be established in Mr. Sykes's case is debatable. Little conceivable strategic advantage could be gained by a decision not to object to the admissibility of two prior inculpatory statements.¹⁷² The most likely "cause" for the absence of a contemporaneous objection was that Mr. Sykes's attorney did not recognize, and therefore did not raise, the available evidentiary objection based on *Miranda v. Arizona*¹⁷³ and *Jackson v. Denno*.¹⁷⁴ The Chief Justice implicitly suggested this explanation in his concurrence,¹⁷⁵ Justices Bren-

166. *Wainwright v. Sykes*, 528 F.2d 522 (5th Cir. 1976), *rev'd*, 433 U.S. 72 (1977).

167. 433 U.S. at 77.

168. *Id.* (citing 28 U.S.C. § 2254(a) (1982)).

169. *Id.* at 86-87.

170. *Id.* at 91.

171. *Id.* This decision about prejudice is a threshold assessment. A court could determine that "cause and prejudice" has been shown and then turn to the merits and decide that a conviction was constitutional. Moreover, to adjudicate the merits of some constitutional claims, judges must make a second inquiry about prejudice. *See, e.g.*, *Strickland v. Washington*, 104 S. Ct. 2052, 2067 (1984) (to establish a sixth amendment violation, a petitioner must show counsel's serious errors and that the "deficient performance prejudiced the defense").

172. *Wainwright v. Sykes*, 528 F.2d at 527. *But see* 433 U.S. at 94-97 (Stevens, J., concurring) (there may have been a tactical reason for not objecting to admissibility).

173. 384 U.S. 436 (1966).

174. 378 U.S. 368 (1964).

175. 433 U.S. at 93 (Burger, C.J., concurring).

nan and Marshall assert such "cause" in dissent,¹⁷⁶ and the Fifth Circuit found that there had been no deliberate bypass relating to trial tactics.¹⁷⁷ In the Supreme Court majority's view, however, the prior failure to raise the claim was dispositive, whatever the explanation.¹⁷⁸

The Supreme Court's test of "prejudice" derives from its view of the petitioner's guilt. The majority found the trial record sufficiently persuasive to render its own culpability judgment. In the Court's view, given the "other evidence of guilt," the admission of Mr. Sykes's statements did not result in any "actual prejudice."¹⁷⁹ The Court's conclusion excluded the possibility that Sykes's statements themselves were so damning that the Court's view of guilt might have been unduly influenced by its knowledge of Sykes's admissions. The *Jackson v. Denno* rule, which mandates that the admissibility decision be made outside the jury's presence, is premised upon a belief that after listening to defendants' questionable admissions, factfinders cannot easily disregard them.¹⁸⁰

To complain about the majority's assessment of whether Mr. Sykes met the threshold "cause and prejudice" standard and was therefore eligible for a review of the merits of his claim is to play in the Court's ballpark. My principal concern is not whether the facts of *Sykes* fit the law the Court created. Rather, I am concerned with what animates the model of habeas corpus that *Sykes* created.

In support of his opinion for the Court, Justice Rehnquist explained his views of procedure, his concerns about economy, finality, ritual, norm enforcement, first tier authority, and litigant autonomy. First, the Justice explained the obvious economy and finality rationales of the contemporaneous objection rule. Bringing claims of error to the attention of a trial judge may, if the trial judge rules correctly, avoid the possible necessity of retrial.¹⁸¹ Further, Justice Rehnquist referred to the importance of preserving the "perception of the trial of a criminal case in state court as a decisive and portentous event."¹⁸² The

176. 433 U.S. at 104-05 (Brennan & Marshall, JJ., dissenting).

177. *Wainwright v. Sykes*, 528 F.2d at 527.

178. 433 U.S. at 91.

179. *Id.*

180. The intuition behind the *Jackson v. Denno* rule is that the "vividness" of a defendant's inculpatory statements cannot easily be ignored, even if factfinders are instructed to disregard the statements. See generally R. NISBETT & L. ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 43-62 (1980) (review of relationship between kinds of information and cognitive inferences and errors).

181. 433 U.S. at 88.

182. *Id.* at 90.

state's opportunity to enforce its norms and to exercise its authority should, the Justice claimed, be as unfettered as possible.

Underlying the Justice's economy/finality concerns was a fear that litigants would exploit their autonomy and engage in "sandbagging," as Justice Rehnquist labeled it.¹⁸³ The majority saw the contemporaneous objection rule as a deterrent to litigants who might prefer to permit errors at trial to go unchallenged in order to learn whether the trial outcomes are favorable and, if subsequently dissatisfied, to protest.¹⁸⁴

Justice Rehnquist did not discuss any need to diffuse the first tier's power, nor did he express concern about revisionism. Labeling the criminal trial as the "main event,"¹⁸⁵ he claimed that the contemporaneous objection rule worked "within the limits of human fallibility"¹⁸⁶ to resolve correctly the question of a defendant's guilt or innocence. The procedural world envisioned by the opinion is one in which trial judges are unambivalent about enforcing federal norms and are rarely inept. Implicitly, Justice Rehnquist assumed that any needed supervision would come from state courts and that, in cases like *Sykes*, a state appellate court's refusal to review the first tier should suffice for all time.¹⁸⁷

The Court's opinion is almost silent about the legal import of Sykes's attorney's failure to object. Justice Rehnquist did not directly answer the question of whether Sykes would have had a sixth amendment claim for ineffective assistance of counsel if his attorney had not been aware of the *Jackson v. Denno* claim. Justice Rehnquist ignored the problem by stating that Sykes "expressly waived 'any contention or allegation as regards ineffective assistance of counsel' at his trial."¹⁸⁸

183. *Id.* at 89.

184. *Id.*

185. *Id.* at 90.

186. *Id.*

187. There may remain a slim possibility for federal review. Brillmayer, *supra* note 27, at 758. But even if state courts review the merits of cases, "norms of affirmance" substantially protects first tier decisions. Davies, *supra* note 74, at 612.

188. 433 U.S. at 75 n.4. The docket entry that Justice Rehnquist cited was signed November 20, 1973, some six months after Sykes filed his *pro se* habeas petition in federal court. According to Justice Brennan's dissent, counsel at oral argument explained that Sykes had waived an ineffective assistance claim "solely" because the federal habeas court had informed him that a sixth amendment challenge would have necessitated a return to state court to exhaust state judicial remedies. *Id.* at 105 n.6 (Brennan, J., dissenting).

The Court did not discuss whether such a waiver could be viewed as "knowing and voluntary" under the *Johnston v. Zerbst*, 304 U.S. 458 (1938), standard. Sykes evidently had not known of the impact of counsel's failures at the time of the waiver. Cf. White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67, 68 (1972) (to

Justice White, in his concurrence, did face the issue of ineffective assistance. He viewed the failure to object as "harmless error" and thus concluded that an ineffective assistance claim could not succeed.¹⁸⁹ Justice White went further and stated that attorneys' mistakes would not sustain federal habeas claims of sixth amendment violations absent record errors qualifying for the appellation of "egregious" error or demonstrable incompetence.¹⁹⁰

Wainwright v. Sykes stands for the proposition that failures by criminal defense attorneys to follow state court contemporaneous objection rules may, absent something deliberately not fully defined by the opinion but labeled "cause and prejudice,"¹⁹¹ make state first tier rulings unassailable in federal court. *Wainwright v. Sykes* signals a renaissance of the Single Judge/Finality Model for criminal convictions, a category of cases that, just fifteen years earlier, had been deemed to require an elaborate, layered procedural model permitting federal courts to reach the merits of constitutional claims. Be the judgments of defense attorneys, judges, prosecutors, or police good or bad; be the processes by which state courts and their police, judges, prosecutors, and defense attorneys arrive at decisions constitutional or unconstitutional; federal courts today are generally not permitted to consider a state prisoner's claim of constitutional error unless the prisoner had the foresight or luck to be represented by an informed attorney who raised a claim of illegality at trial. For those prisoners whose claims arise under the fourth amendment, even prompt objections do not help because once a state court has provided adequate opportunities for fourth amendment litigation, a federal court must stay its hand. In sum, the Burger Court has almost eliminated the second decision center's review. Unlimited review is available only if a litigant passes the very substantial tests of "full and fair litigation" (for fourth amendment claims) and of "cause and prejudice" (for constitutional claims not raised contemporaneously).

assess validity of waiver, consider social value of vindicating particular claim, the likelihood that the claim is frivolous, and the benefit received by defendant in exchange for the waiver).

189. 433 U.S. at 98 (White, J., concurring).

190. *Id.* at 99 (White, J., concurring). Justice Stevens, also concurring, eliminated any possible ineffective assistance of counsel claim by explaining how Sykes' counsel's "strategy" might have been aided by not challenging the admission of the alleged inculpatory statements. *Id.* at 96 (Stevens, J., concurring).

191. *Id.* at 87. Justice Rehnquist stated, "[w]hatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here." *Id.* at 91. For subsequent explanations of the doctrine, see *United States v. Frady*, 456 U.S. 152 (1982), discussed *infra* notes 326-58 and accompanying text, and *Engle v. Isaac*, 456 U.S. 107 (1982), discussed *infra* notes 222-79 and accompanying text.

4. *Some Explanations of the Contemporary Preferences*

In *Stone v. Powell* and *Wainwright v. Sykes*, the Supreme Court provided independent rationales to explain its contraction of the layered *Fay v. Noia* model and its reliance, with only narrow exceptions, on a single decision center model. *Stone v. Powell* is premised upon great deference to the first decision center. Unless the state courts have failed to function as courts, their decisions on fourth amendment issues stand. *Sykes* rests on a limited view of litigant autonomy. Unless defendants' attorneys comply with many (if not all) state procedural rules, defendants' convictions stand. Subsequent Supreme Court decisions on habeas claims articulate other justifications for preferring a single decision center, but all the decisions support the underlying theses: this Court's dominant procedural concerns are finality and economy; this Court is sanguine about granting authority to state courts in general and to the first tier in particular, and this Court has largely rejected the procedural models approved by its predecessor.

a. *The power of the first tier: Stone v. Powell* sounds like a restatement of the law of res judicata and collateral estoppel.¹⁹² In *Stone v. Powell*, the Court announced that, for fourth amendment claims at least, one bite at the apple is enough. If the second decisionmaker (the federal court) concludes that the first decisionmaker (the state court) provided a facially respectable procedure for making decisions, the second decisionmaker must bow out as superfluous.

Stone v. Powell is confusing, however, because it evokes the doctrine of res judicata in an arena previously thought immune from such a defense. The oft-stated "rule" is that habeas corpus is *the* remarkable exception to res judicata.¹⁹³ Why did *Stone v. Powell* import res judicata finality concerns into a field relatively free from such constraints—especially on a record where the lower federal courts had found state courts insensitive to federal constitutional norms?

Several explanations provide partial answers. First, the Burger Court has displayed a lack of interest in enforcing the exclusionary

192. It is unclear which doctrine the Court is invoking. The opinion does not directly answer the following question: Must the fourth amendment claim have been *actually* litigated and decided, as in *Stone v. Powell* and as collateral estoppel law requires, or is only an *opportunity* for full and fair litigation required, as res judicata would demand? See generally Halpern, *supra* note 152, at 17-24 (examining federal courts' interpretation of the "opportunity for full and fair litigation" standard).

193. See, e.g., *Sanders v. United States*, 373 U.S. 1, 8 (1963) (inapplicability of res judicata to habeas corpus is inherent in the purpose of the writ).

rule;¹⁹⁴ jettisoning fourth amendment claims from those cognizable on habeas corpus fits within a pattern of decisions diluting the rule. Further, in *Stone v. Powell* the Court was explicit about its view of the exclusionary rule's limited utility in postconviction proceedings.¹⁹⁵ This exclusionary rule interpretation of *Stone v. Powell*, however, glosses over the basis of the Court's opinion. The Court founded preclusion upon a prior opportunity for full and fair litigation and not upon the raising of a fourth amendment claim *per se*. Moreover, by virtue of *Wainwright v. Sykes*, we know that fourth amendment claims are not the only category precluded from receiving a merits review on habeas corpus. Decreased interest in the exclusionary rule, while undoubtedly important to the *Stone v. Powell* Court, fails to explain the Court's consistent pattern in fashioning preclusion rules that go far beyond the fourth amendment.

Second, it could be claimed that *Stone v. Powell* only reformulates fourth amendment rights. The right to have evidence excluded on the basis of the fourth amendment could be understood to extinguish after one court system has found no constitutional deficiencies—in part because of an assumption that the deterrence value of the exclusionary rule diminishes over time. The Supreme Court's holding in *Stone v. Powell*, however, does not permit this interpretation, because procedural failures (other than those of defendants or their attorneys) in state courts "revive" the federal right to have the fourth amendment enforced. That is, if a trial judge does not provide a "full and fair" opportunity to litigate the fourth amendment claim, the federal court can hear the merits.

A third explanation of *Stone v. Powell*, also insufficient, is that the case is indicative of the Court's desire to provide habeas review only to the "colorably innocent" and not to the guilty. Since claims of illegal search and seizure are unrelated to the guilt of defendants, *Stone v. Powell* might have meant that the Court would require, as a precondition for federal habeas corpus review, that petitioners make colorable claims of innocence.¹⁹⁶ Indeed, the Court stated that the issue in the

194. See *supra* note 159.

195. *Stone v. Powell*, 428 U.S. 465, 482-89 (1976).

196. See, e.g., Friendly, *supra* note 13, at 142 (collateral attack should be available only when prisoner establishes colorable claim of innocence). The perception that the claims advanced in many habeas petitions do not implicate guilt is undermined by Professor Shapiro's study of 257 petitions filed in federal district court in Massachusetts during the years between 1970 and 1972. Only 24 involved fourth amendment claims, and "a maximum of 42 others might conceivably have involved claims which were not guilt related." Shapiro, *supra* note 77, at 372.

typical fourth amendment case “has no bearing on the basic justice of [the defendant’s] incarceration,”¹⁹⁷—presumably because the petitioner’s guilt is unquestioned.

The Court in *Stone v. Powell*, however, did *not* adopt “colorable innocence” as its test. Instead it authorized lower federal courts to consider the litigation opportunities in state courts, an inquiry not coextensive with the question of colorable innocence. Further, when later asked to demand colorable innocence as a precondition to habeas relief, a majority of the Court expressly declined to do so. In *Rose v. Mitchell*,¹⁹⁸ for example, two black defendants sought to have their convictions overturned because of allegations that the indicting grand jury had been selected in an unconstitutionally discriminatory manner. The United States Court of Appeals for the Sixth Circuit agreed.¹⁹⁹ Despite the attenuated relationship between the composition of a grand jury and the guilt of individuals convicted by an untainted petit jury, the Supreme Court concluded that “[f]ederal habeas review is necessary to ensure that constitutional defects in the state judiciary’s grand jury selection procedure are not overlooked,”²⁰⁰ and decided the case on its merits.²⁰¹ Thus, federal habeas corpus remains viable, at least in theory, for challenges to some as of yet unspecified subset of alleged constitutional violations in state courts—even when such violations do not undermine conclusions about defendants’ factual guilt.²⁰² *Stone v. Powell* must therefore mean something other than that only the arguably innocent deserve a Single Judge plus Limited Review/Different Forum plus Unlimited Review Model of decisionmaking.

A fourth possible explanation is that *Stone v. Powell* assumes that no principled reason exists to prefer a federal court decision to that of a state court.²⁰³ *Stone v. Powell*, however, is not a good example of the difficulty of ascertaining which courts provide more “correct” decisions, because the issues in *Stone v. Powell* were questions of the mean-

197. 428 U.S. at 491-92 n.31.

198. 443 U.S. 545 (1979).

199. 570 F.2d 129, 136 (6th Cir. 1978), *rev’d*, 443 U.S. 545 (1979).

200. 443 U.S. at 563.

201. The Court held that the grand jury foreman had not been selected unconstitutionally. *Id.* at 574.

202. See also Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 483-501 (1980) (arguing that concern about crime control, and not about innocence, animates the Burger Court’s decisions on criminal procedure).

203. See Bator, *supra* note 13, at 526-27 (assuming state gave full corrective process, habeas as “mere repetition” is institutionally unjustified); Bator, *supra* note 140, at 615 (claims of preference for federal forum outweighed by disadvantage of redundancy).

ing of federal law. We do have a principled basis upon which to prefer federal decisionmaking—a *raison d'être* of the federal courts is expertise in federal law.²⁰⁴ Federal courts specialize in announcing and implementing federal norms. Yet, when presented with the “right” answer on the merits of the fourth amendment violation question, the Supreme Court mandated a retreat to the “wrong” answer because it believed the “costs” of rightness—the dual litigation system, the postponing of the finality of convictions, and the application of the exclusionary rule—outweighed the “benefits.” In its calculus, the Court did not appear to count as a cost *Stone v. Powell*'s likely byproduct—state courts' diverse interpretations of what the fourth amendment requires.²⁰⁵

In my opinion, one explanation that reconciles the Court's choices in *Stone v. Powell* and its pronouncements in subsequent cases is that *Stone v. Powell* is about procedural modeling. The Court held that when a decision is rendered in a state court via a process that is familiar, federal courts may not probe that decision for its congruence with federal law, even when those who challenge the decision are incarcerated. To prefer state adjudication despite federal decisions that state courts have erred, yet not to overturn those federal rulings on the *merits*, is to give scant weight to consistent enforcement of federal rights.

b. *Litigants' autonomy*: In *Wainwright v. Sykes*, there was no unambiguous state court decision on the merits of Mr. Sykes's claim that statements had been admitted at trial in violation of the fifth amendment. Nevertheless, the Court declined to inquire into the constitutionality of Mr. Sykes's incarceration because Mr. Sykes had delayed raising the constitutional claim and had shown neither “cause” to excuse the failure nor “prejudice” resulting from the statements' admission.

The *Sykes* Court created more preclusion opportunities than had existed under *Fay v. Noia*. Under *Noia*, a court was permitted to find “deliberate by-pass” only when the defendant personally had decided to withhold a claim,²⁰⁶ in *Wainwright v. Sykes*, defense attorneys' deci-

204. See Eisenberg, *supra* note 49, at 511 (lower federal courts are “primary vindicators” of federal rights); Sager, *Foreword: Congressional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42-60 (1981) (lower federal courts have important role in federal rights enforcement).

205. The Supreme Court's appellate jurisdiction is inadequate to impose consistency. Sager, *supra* note 204, at 28-29.

206. 372 U.S. at 439.

sions also "counted" as bases for preclusion.²⁰⁷ The concurring opinions of both Chief Justice Burger and Justice Stevens assumed that Sykes played no role in the decision not to object contemporaneously. In the Chief Justice's words, such "trial decisions are of necessity entrusted to the accused's attorney."²⁰⁸ Thus, when a litigant's autonomy is transferred to an attorney, the attorney is free to make binding decisions for the client although the client may never be consulted and might not have concurred in the choices made.²⁰⁹ Given that the Court took at face value Sykes's so-called "express waiver" of any ineffective assistance of counsel claim he might have had, attorneys' mistakes can be completely insulated from challenges or review.²¹⁰

Why should attorneys' choices, inadvertence, or errors bar federal review of the constitutionality of convictions? While acknowledging the role played by Sykes's attorney, part of the Court's answer envisioned defendants, as well as their attorneys, as the critical actors. The Court argued that a rule that permits litigants two avenues of redress encourages them to misuse the first by "sandbagging,"²¹¹ deliberately withholding claims of error in hopes of acquittals, and if the "initial gamble does not pay off,"²¹² playing a second card.

The sandbag argument, not unique to *Sykes*,²¹³ is unpersuasive for

207. 433 U.S. at 89. The concurring opinions make this assumption explicit. *Id.* at 93, 96, 98-99 (Burger, Stevens & White, JJ., each concurring separately). For discussion of the constraints, both in time and information, on defense counsel, see Note, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981, 996-98 (1982).

208. 433 U.S. at 94 (Burger, C.J., concurring).

209. Further, as we learned some six years later, even when criminal clients explicitly object to attorneys' decisions, defendants may nevertheless be bound. *See Jones v. Barnes*, 103 S. Ct. 3308, 3312 (1983) (refusal by state-appointed lawyer to press nonfrivolous claims on appeal of indigent criminal defendant's case did not violate the defendant's sixth amendment rights). *See also Estelle v. Williams*, 425 U.S. 501 (1976) (criminal defense attorney's refusal to object to trial while defendant was dressed in prison garb constituted waiver of that due process claim, even though record indicated that defendant had complained to attorney about going to trial in prison clothes).

210. Justice Brennan, dissenting in *Sykes*, complained that "in light of the prevailing standards, or lack of standards, for judging the competency of trial counsel, it is perfectly consistent for even a lawyer who commits a grievous error—whether due to negligence or ignorance—to be deemed to have provided competent representation." 433 U.S. at 105 n.6 (citation omitted). In 1984, the Supreme Court set forth the test for sixth amendment challenges. *See Strickland v. Washington*, 104 S. Ct. 2052 (1984), discussed *infra* text accompanying notes 274-75.

211. 433 U.S. at 89.

212. *Id.*

213. *E.g.*, *Spalding v. Aiken*, 103 S. Ct. 1795, 1797 (1983) (Burger, C.J., statement concerning denial of certiorari), *denying cert.* to 684 F.2d 632 (9th Cir. 1982); *United States v. Frady*, 456 U.S. 152, 154 (1982); *Engle v. Isaac*, 456 U.S. 107, 109 (1982), discussed *infra* notes 221-79, 326-57 and accompanying text.

several reasons. First, it assumes a fantastically risk-prone pool of defendants and attorneys.²¹⁴ Given that the success rate at trial and on appeal,²¹⁵ while low, is greater than the success rate on habeas corpus,²¹⁶ the odds are against being able to “sandbag” in a first procedure and emerge victorious in a second. Moreover, because appeals and habeas decisions occur many months and often years after conviction, defendants must discount the odds of victory by the years of incarceration pending adjudication.²¹⁷ Further, the sandbagging argument is based upon the unrealistic premises that criminal defendants or their attorneys know of all the possible legal claims and that criminal defendants have control over their attorneys.²¹⁸

Second, the sandbagging argument assumes that attorneys sometimes take such gambles without conferring with their clients—an assumption of lawyers free from ethical constraints. If the majority of criminal defense attorneys are in fact so liberated, it would be odd for the Court to endorse and, by refusing sixth amendment claims, to insulate that behavior. Finally, even if the Court believed “sandbagging” to be a frequent phenomenon, the Court did not explain why *Fay v. Noia*’s “deliberate by-pass” standard, or a deliberate bypass standard encompassing attorneys’ decisions, was not sufficient deterrence for such a practice. The Court never articulated why the test it crafted,

214. See generally Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 *passim* (1982) (modeling the risk factors and the circumstances under which litigants will go to trial rather than settle).

215. Data on the federal system suggest that criminal defendants succeeded in obtaining acquittals or dismissals in 18% of all federal criminal cases disposed of in 1982-83. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 340 table D-4 (1983) [hereinafter cited as 1983 ANNUAL REPORT] [hereinafter all Annual Reports of the Director of the Administrative Office of the United States Courts will be cited by their year as 19xx ANNUAL REPORT].

Appellate reversal rates vary. While Davies (describing the California Court of Appeals for the First Appellate District) indicates that more than 95% of all criminal cases are affirmed, and the Director of the Administrative Office of the United States Courts (describing federal appellate rates) indicates that approximately 87% of all criminal cases are affirmed, Judge Wald reports only an 82% affirmation rate in the United States Court of Appeals for the District of Columbia. Compare Davies, *supra* note 74, at 577 and 1983 ANNUAL REPORT, *supra*, at 243 table B-1A with Wald, *supra* note 23, at 767.

216. See P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 4(a) (1979) (only 3.2% of petitions studied resulted in any relief).

217. Release on bail pending decision is unusual. See, e.g., *Calley v. Callaway*, 496 F.2d 701 (5th Cir.) (bail while habeas petition pending only in exceptional circumstances), *application for stay of mandate denied*, 418 U.S. 906 (1974).

218. See, e.g., *Morris v. Slappy*, 103 S. Ct. 1610 (1983) (public defender’s decision to go to trial over client’s objections—because prior public defender had become ill—not grounds for vacature of conviction).

which snared inadvertence and error as well as deliberate choice, was the necessary prophylactic.

But the Court uses its odd version of litigant autonomy to justify the Court's endorsement of finality. First, the Court assumes either that litigants make knowledgeable choices and exercise control over their attorneys, or that litigants cede all control to attorneys and are appropriately bound by lawyers' decisions or actions. Then, by implying that litigants or their lawyers have chosen to sandbag, the Court concludes that litigants "deserve" the outcomes of their first, and only, shot.

c. *Revisionism and the relevance of guilt*: At first blush, *Wainwright v. Sykes*, like *Stone v. Powell*, might appear to be a case in which the Court's procedural rule of "cause and prejudice" is a surrogate for a deeper concern, the guilt or innocence of the petitioner. Inquiries about "prejudice" seem very close to questions about guilt; reviewing courts are invited to make independent determinations of petitioners' moral worthiness for habeas relief. While the Court declined to adopt a straightforward "colorably innocent" test in *Sykes* and *Stone v. Powell*, the two cases could be seen as transitional, paving the way for a case in which the Court will announce that "custody in violation of the Constitution" means "custody of colorably innocent individuals."²¹⁹

The difficulty with the thesis that guilt was the *Sykes* Court's underlying concern is that the "cause and prejudice" test applies to the possibly innocent as well as the guilty.²²⁰ Many criminal defendants may be represented by misguided or unsophisticated counsel who fail to make timely claims of unconstitutional error. The Supreme Court's choice to require both "cause *and* prejudice" presumably precludes those who can show prejudice but have no excuse for a failure to raise a claim earlier. Colorable innocence might be necessary, but it is not sufficient.

A reading of *Sykes*'s cause and prejudice test to catch the possibly

219. The Court has come close to this formulation in some cases. See, e.g., *United States v. Frady*, 456 U.S. 152, 171 (1982) (the majority stated that Frady had "malice aplenty" and denied his habeas petition). Guilt is not, of course, irrelevant. See generally Ponsoldt, *When Guilt Should Be Irrelevant: Government Overreaching as a Bar to Reprosecution Under the Double Jeopardy Clause After Oregon v. Kennedy*, 69 CORNELL L. REV. 76 *passim* (1983) (prosecutorial misconduct should bar reprosecution after a mistrial, regardless of defendant's possible guilt).

220. Whether *Sykes*'s claim was one of innocence is unclear. Although he predicated his claim for exclusion of his admission on grounds of intoxication, the opinion does not indicate whether *Sykes* claimed his intoxicated state caused him to admit to a crime he did not commit, or to speak with the police about a crime he did commit.

innocent as well as the likely guilty is substantiated by more recent cases. In *Engle v. Isaac*,²²¹ for example, the Court expressly concluded that arguably innocent petitioners may be precluded under the *Sykes* test. *Isaac* also gave new definition to the meaning of "cause."

In 1975, a jury in Ohio convicted Lincoln Isaac of aggravated assault. Isaac had defended by claiming that he had beaten his former wife's boyfriend in self-defense.²²² In accordance with the then common interpretation of an Ohio statute that the "burden of going forward with the evidence of an affirmative defense is upon the accused,"²²³ the trial judge had instructed the jury that Isaac had the burden of proving self-defense by a preponderance of the evidence, and Isaac's attorney made no objection to the instruction.

After Isaac's conviction, but prior to his appeal, the Ohio Supreme Court interpreted the statute to require that defendants provide sufficient evidence to raise an affirmative defense, but not to place the burden of proving such defenses on defendants.²²⁴ Relying on that interpretation, Isaac argued in his appeal that the trial court's jury instructions had been erroneous. Although the Ohio Supreme Court had previously held that its new interpretation of Ohio's self-defense statute was to be applied retroactively,²²⁵ the Ohio court dismissed Isaac's appeal because Isaac's attorney had failed to object contemporaneously to the instruction.²²⁶ Yet, on the very day the Ohio court denied Isaac's appeal, the court concluded that another appellant, Barbara Meyer, who had also had the burden of proving self-defense, had not lost her claim because of the contemporaneous objection rule. Unlike Isaac, Meyer had been tried by a judge. Because Ohio's contemporaneous objection rule was phrased to require objections "before the jury retires,"²²⁷ the Ohio Supreme Court concluded that the contemporaneous objection rule had no application to bench trials like Meyer's and up-

221. 456 U.S. 107 (1982).

222. *Id.* at 114-15.

223. OHIO REV. CODE ANN. § 2901.05(A) (Page 1975). In 1978, the Ohio legislature amended section 2901.05(A) to read: "The burden of going forward with the evidence of an affirmative defense and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused." *Id.* § 2901.05(A) (Page Supp. 1980) (emphasis added).

224. *State v. Robinson*, 47 Ohio St. 2d 103, 110, 351 N.E.2d 88, 93 (1976).

225. *State v. Humphries*, 51 Ohio St. 2d 95, 103, 364 N.E.2d 1354, 1359 (1977).

226. *Isaac v. Engle*, 646 F.2d 1129, 1132 (6th Cir. 1980), *rev'd*, 456 U.S. 107 (1982).

227. At the time, OHIO R. CRIM. P. 30 stated:

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

held the intermediate court's reversal of her conviction.²²⁸

Isaac succeeded on federal habeas review in the Sixth Circuit, which first issued a panel decision and then heard his case en banc.²²⁹ Reviewing Ohio law, both the panel and en banc opinions concluded that, prior to the new case interpretation, defendants' burden of proof of affirmative defenses had been so well settled that defense attorneys could not reasonably have been expected to challenge instructions in accordance with that rule.²³⁰ Thus, Isaac had "cause" for his failure to object to the jury instructions.²³¹ Moreover, the "resulting prejudice" was "clear" because the misallocation of the burden of proof "profoundly" affected the "basic fairness of the trial" and called the defendant's legal guilt into question.²³²

After determining that Isaac met the threshold "cause and prejudice" test of *Wainwright v. Sykes*, the Sixth Circuit granted his petition. In that court's view, the state had a due process obligation to prove all elements of crimes and could not constitutionally shift any of its burden to a defendant. Once Ohio had accused Isaac of aggravated assault, and defined the absence of self-defense as an element of the crime, Ohio could not require him to prove self-defense.²³³

In the panel and en banc decisions, nine judges issued five opinions, each with different theories of how Ohio courts had violated the Constitution.²³⁴ The multiplicity of opinions demonstrates the diffi-

228. *State v. Meyer*, 51 Ohio St. 95, 364 N.E.2d 1354 (1977). See also *State v. Humphries*, 51 Ohio St. 2d 95, 1359, 364 N.E.2d 1354, 1354 (1977) (ruling that Humphries, who had been tried by a jury and had failed to object contemporaneously, was barred from appeal).

229. *Isaac v. Engle*, 646 F.2d 1122 (6th Cir.) (panel), *aff'd*, 646 F.2d 1129 (6th Cir. 1980) (en banc), *rev'd*, 456 U.S. 107 (1982).

230. 646 F.2d at 1126 (panel); 646 F.2d at 1133 (en banc).

231. 646 F.2d at 1133-34 (en banc plurality).

232. *Id.* at 1134.

233. *Id.* at 1135-36. See also *Koehler v. Engle*, 707 F.2d 241 (6th Cir. 1983), *aff'd by an equally divided Court*, 104 S. Ct. 1673 (1984) (impermissible shift of burdens of proof).

234. The majority in the panel's opinion held that Ohio could not, consistent with due process, apply its contemporaneous objection rule in a manner that precluded Isaac from obtaining the benefits of the *Robinson* ruling. In the majority's view, there was no rational relationship between the contemporaneous objection rule and Isaac's counsel's failure to object to a well-settled practice. Thus Ohio's "selective retroactivity claim" was a violation of due process. 646 F.2d at 1126-27 (panel). The concurrence concluded that retroactive application of *Robinson* was constitutionally required. 646 F.2d at 1129 (en banc).

The plurality opinion for the en banc court held that the cause and prejudice test of *Wainwright v. Sykes* was met. Thereafter, relying on *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the en banc court decided that Ohio's burden of proof rule, as applied to Isaac, was unconstitutional. 646 F.2d at 1135-36 (en banc). The two concurring opinions, however, offered different rationales. *Id.* at 1136 (Edwards, C.J., concurring); *Id.* at 1137 (Jones, J., concurring). As one concurring judge

culty of the case for the court.²³⁵ Although disagreeing about the precise nature of Isaac's right, most of the judges agreed that Ohio courts had used procedural rules in an offensive manner. These judges believed that the contemporaneous objection rule had been misapplied to Isaac's case, since any objection that might have been made would have been "futile"²³⁶ or "vain."²³⁷ The federal judges were also troubled by the Ohio court's decision to make its new understanding of the burden of proof retroactive, but to give the benefits of its ruling only to those defendants tried by judges or to those represented by attorneys who had raised "futile" objections at trial.²³⁸

Isaac's case is reminiscent of *Fay v. Noia*. In both cases, federal judges' disapproval of state courts criminal process flowed from concern about uneven application of legal rules resulting in disparate treatment of criminal defendants. In both cases, the procedurally disadvantaged had claims of legal innocence that state courts refused to hear. Unlike *Fay v. Noia*, however, the Supreme Court in *Engle v. Isaac* did not share the federal appellate court's criticism of a state court's uneven use of preclusion rules. Rather, the Court ordered federal courts not to intervene.²³⁹

The Supreme Court agreed with the Sixth Circuit that Ohio's burden of proof rules had been well established. "For over a century," defendants had borne the burden of proving self-defense, and most courts in Ohio had agreed that the 1974 legislative codification of burdens "worked no change in Ohio's traditional burden-of-proof rules."²⁴⁰ Further, the Supreme Court agreed with the Sixth Circuit that Isaac had raised a "colorable constitutional claim" in arguing that Ohio's burden of proof rule violated due process.²⁴¹ The Supreme

explained, "A majority of the en banc Court agrees on only one point: that Isaac's imprisonment is in violation of due process of law." *Id.* at 1136 (Jones, J., concurring).

235. Chief Judge Edwards stated that "few cases in the history of this court have resulted in as much soul-searching thought and debate as has this case." 646 F.2d at 1136.

236. 646 F.2d at 1133 (en banc).

237. 646 F.2d at 1126 (panel).

238. *Id.* at 1127.

239. The Supreme Court ruling applied to Isaac's case and to two other Sixth Circuit opinions that had been consolidated with *Isaac* and that were also reversed. 451 U.S. 906 (1981). *Hughes v. Engle*, 642 F.2d 451 (6th Cir. 1980); *Bell v. Perini*, 635 F.2d 575 (6th Cir. 1980).

240. 456 U.S. at 110-11 (footnote omitted).

241. *Id.* at 122. For other Supreme Court discussions about the import of errors flowing from jury instructions, and specifically of an erroneous instruction in a criminal trial that "the law presumes a person intends the ordinary consequences of his voluntary acts," see *Connecticut v. Johnson*, 103 S. Ct. 969 (1983). In *Johnson*, a direct appeal, a plurality opinion upheld the reversal of a conviction based upon such an instruction.

Court disagreed, however, about whether Isaac had overcome the preclusion rule of *Wainwright v. Sykes*. Holding that Isaac had not shown "cause" for his failure to comply with the state's contemporaneous objection rule, the Court reversed.²⁴²

Most of the rationales provided in Justice O'Connor's majority opinion were familiar. "The Great Writ entails significant costs";²⁴³ the "writ undermines the usual principles of finality of litigation";²⁴⁴ the writ "degrades" the trial;²⁴⁵ the "writs . . . cost society the right to punish admitted offenders";²⁴⁶ federal intrusion frustrates "[s]tates' exercise of their sovereign powers to punish offenders."²⁴⁷ Some of the arguments, however, had novel twists. The majority claimed that the existence of habeas corpus relief was bad for defendants. Implicitly rejecting the commonplace assumption that the threat of review inspires care, Justice O'Connor stated that "participants" (presumably state prosecutors, judges, and defense counsel), safe in the knowledge of federal habeas review, would be more casual in their adherence to constitutional rules.²⁴⁸

Isaac resolved two questions that had been debated after *Wainwright v. Sykes*. First, the Court confronted the question of whether the *Sykes*'s preclusion rule should apply only to claims unrelated to innocence.²⁴⁹ The Court concluded that "the principles of *Sykes*" did not "lend" themselves to "this limitation."²⁵⁰ Whether or not habeas petitioners claim unconstitutional distortions of truthfinding, all petitioners whose attorneys fail to comply with state contemporaneous objection rules must show "cause and actual prejudice."²⁵¹ Second, *Isaac* defined "cause" as a requirement of monumental proportions. "[T]he futility of presenting an objection to the state courts cannot alone constitute

242. 456 U.S. at 129.

243. *Id.* at 126 (footnote omitted).

244. *Id.* at 127 (footnote omitted).

245. *Id.*

246. *Id.* Justice O'Connor did not explain what relevance this concern had to Isaac's case, as he was not an "admitted offender."

247. *Id.* at 128.

248. *Id.* at 127.

249. *Id.* at 129. Sykes had argued that his confession had been improperly admitted at trial. 433 U.S. at 74. While that claim could have been understood as related to innocence, Isaac sought to distinguish his claim from that of Sykes by arguing that innocence was directly implicated. The *Isaac* Court agreed with Isaac that Sykes's claim "did not affect the determination of guilt at trial." 456 U.S. at 129.

250. 456 U.S. at 129.

251. *Id.*

cause for a failure to object at trial.²⁵² Nor can counsel's malfeasance, whether due to "simple ignorance or the pressure of trial,"²⁵³ constitute cause. "The defendant's counsel, *for whatever reasons*, has detracted from the trial's significance by neglecting to raise a claim in that forum."²⁵⁴

Under *Isaac*, criminal defense lawyers are well advised to raise all and any claims, whatever the state of the law on any given issue. Given Ohio case law and the fact that part of Isaac's claim did not arise until ten months after trial, his lawyer could hardly have been expected to have raised the argument at trial.²⁵⁵ Justice O'Connor conceded that many "astute" lawyers would not have done so.²⁵⁶ Nevertheless, she blocked Isaac's access to federal court. Given the absence of "cause," the Court declined to address Isaac's argument about "prejudice."²⁵⁷

The "cause" requirement can thus function to preclude habeas review based upon changes in constitutional law. The desire of some members of the Court to use "cause" to achieve this goal became clear when, two years after *Isaac*, a four-person plurality placed one narrow limitation on *Isaac's* broad definition of "cause." In *Reed v. Ross*,²⁵⁸ Justice Brennan, writing for the plurality, held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel,"²⁵⁹ a defendant has established "cause" for a prior failure to claim the error.

Reed v. Ross is very similar to *Engle v. Isaac*. Defendant Ross was convicted in 1969 of first degree murder. The trial judge had instructed the jury that the defendant bore the burden of proving several affirma-

252. *Id.* at 130.

253. *Id.* at 129 n.34. See *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983) (defense attorney's alleged incompetence in failing to raise timely objection to erroneous jury instructions insufficient to establish "cause"), *cert. denied*, 104 S. Ct. 1608 (1984); *Marks v. Estelle*, 691 F.2d 730, 735 (5th Cir. 1982) ("cause" could not be ineffective assistance of counsel, because then allegations of ineffectiveness would render "that prong of *Sykes* meaningless"). Cf. *Alston v. Garrison*, 720 F.2d 812, 816 (4th Cir. 1983) (ineffective assistance of counsel satisfies "cause" since allegedly ineffective counsel could not "have been expected to assert his own incompetence"); *Tague, Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1, 25 n.123 (1978) (relationship between ineffective assistance and "cause" not settled).

254. 456 U.S. at 128-29 (emphasis added).

255. Justice Brennan, joined in dissent by Justice Marshall, argued that the "claim *did not even exist* until after *Isaac* was denied relief on his last direct appeal." *Id.* at 137-38 (Brennan, J., dissenting) (emphasis in original).

256. *Id.* at 133.

257. *Id.* at 134 n.43.

258. 104 S. Ct. 2901 (1984).

259. *Id.* at 2910.

tive defenses, including the absence of malice and self-defense.²⁶⁰ Unlike *Isaac*, the state in *Ross* "conceded" that Ross had suffered "actual prejudice"²⁶¹ because of the trial judge's instructions. One year after Ross's trial, the Court decided *In re Winship*,²⁶² which began a line of cases culminating several years later with *Mullaney v. Wilbur*²⁶³ and *Hankerson v. North Carolina*.²⁶⁴ These cases held that "due process requires the prosecution to bear the burden of persuasion with respect to each element of a crime"²⁶⁵ and that such principles were to be applied retroactively.

Thus, the dissenters (Justices Rehnquist, O'Connor, and Blackmun and Chief Justice Burger) in *Ross* accurately described that case as one "tried properly by then-prevailing constitutional standards and being set aside because of legal developments that occurred long after."²⁶⁶ For these Justices, who formed part of the majority in *Isaac*, *Reed v. Ross* is but another example of an unreasonable waste of "[t]ime and energy spent relitigating trials long final and completely fair."²⁶⁷ The dissenters would handle cases like *Ross* with a blanket rule: new constitutional principles should, "with rare exception, not be given retroactive application on habeas review."²⁶⁸ Moreover, the dissenters had thought that with the stringent definition of "cause" in *Isaac*, such a rule had been put into place. They protested that *Ross* was simply another in the *Isaac* line.²⁶⁹

Although the *Ross* plurality found a crevice in the seemingly impregnable "cause" requirement of *Isaac*, the aperture is narrow. The assumption, even of the *Ross* plurality, is the same, ever-haunting spectre of litigant autonomy, played out as "sandbagging." When criminal defendants are represented by counsel who do not present constitutional claims at trial, the plurality was prepared to assume that counsel had knowledge of the claims and made deliberate tactical decisions to

260. *Id.* at 2905.

261. *Id.* at 2908.

262. 397 U.S. 358 (1970).

263. 421 U.S. at 684 (1975).

264. 432 U.S. 233 (1977).

265. According to Justice Brennan, summarizing the cases in *Reed v. Ross*, 104 S. Ct. at 2904.

266. *Id.* at 2913.

267. *Id.* at 2915-16 n.3.

268. *Id.* Justice Powell concurred in *Reed* because the state had not challenged the retroactive application of *Mullaney v. Wilbur*. However, Justice Powell reiterated his view that "new constitutional rules [should be applied] retroactively on collateral review only in exceptional cases." *Id.* at 2912. See also *Hankerson v. North Carolina*, 432 U.S. 233, 246-48 (1977) (Powell, J., concurring to make the same argument).

269. 104 S. Ct. at 2915.

withhold claims. Therefore, habeas review would be barred.²⁷⁰ Under *Ross*, the hurdle of "cause" can only be surmounted in rare instances—when a claim is "truly novel"²⁷¹ so that a court can be sure that a "procedural failure is not attributable to an intentional decision by counsel."²⁷² Further, the plurality instructed lower courts to impute deliberate withholding of claims without taking the obvious step of conducting factfinding hearings to determine what defendants' attorneys knew. Presumably the plurality assumed that defense attorneys would be unavailable, would not be able to remember, would not accurately report their memories, or that the expenses of asking were too great.

After *Isaac* and *Ross*, whether colorable innocence is a condition of the "cause and prejudice" test remains unclear. The Supreme Court has had other opportunities to discuss "prejudice,"²⁷³ but has declined to equate it with innocence. For example, in *Strickland v. Washington*,²⁷⁴ which set forth the standard for sixth amendment ineffective assistance of counsel claims, the Court held that "prejudice," in that context, was whether a defendant could show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁷⁵ A quick translation of that rule is that convicted defendants must establish that they could have been acquitted. But as the Court has reminded us in other cases,²⁷⁶ defendants could be acquitted but not necessarily be able to establish innocence. Thus, although evidently flirting with the idea of linking prejudice to innocence, the Court still shies away from explicitly equating the two.

Engle v. Isaac is consistent with the vision of *Stone v. Powell* and *Wainwright v. Sykes*: one decision is enough. In all three cases, lower federal judges were willing to engage in revisionism, to implement federal constitutional protections at the expense of the finality of state con-

270. *Id.* at 2909-10.

271. *Id.* at 2910.

272. *Id.* at 2909. The plurality elaborated that such claims would not be "reasonably available" to attorneys when the claims were based upon Supreme Court cases overruling prior precedents or widespread practices of lower courts or upon Supreme Court disapproval of a practice arguably sanctioned by prior cases. *Id.* at 2911. The third category will involve the most difficult determinations.

273. *E.g.* *United States v. Frady*, 456 U.S. 152, 170 (1982); *United States v. Morrison*, 449 U.S. 361 (1981).

274. 104 S. Ct. 2052 (1984).

275. *Id.* at 2068.

276. *See, e.g.*, *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1104 (1984) ("[A]n acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt.")

victions. The Supreme Court, however, chose deference to state judges, and the Court seemed unperturbed about states' erratic enforcement of federal rights.²⁷⁷ The Court's valuations of finality, economy, and the first tier's decisionmaking powers are determinate in its modeling of habeas corpus;²⁷⁸ innocence is insufficient.²⁷⁹

d. *The role of federalism*: Perhaps recent habeas corpus case law can be explained as responsive to federalism concerns. *Stone v. Powell*, *Wainwright v. Sykes*, and *Engle v. Isaac* are all cases in which state prisoners sought relief from the federal courts. Perhaps these cases, and the model of habeas corpus they created, indicate that the Court believes state adjudication rarely should be disturbed by federal judges. Principles of comity, invoked in many other areas,²⁸⁰ may explain the results. As the Court remarked in *Isaac*: "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."²⁸¹

277. Professor Brillmayer, in an article that predated *Engle v. Isaac*, argued that commentators were too quick to criticize the "cause and prejudice" standard for giving too much weight to state courts' preclusion rules. She claimed that, since cause and prejudice is a federally formulated preclusion rule, no undue deference had been given to the states. Brillmayer, *supra* note 27, at 754-55.

A footnote in *Engle v. Isaac* undercuts her argument. Justice O'Connor stated that had Ohio "exercised its discretion to consider respondents' claims, then [respondents'] initial default would no longer block federal review." 456 U.S. at 135 n.44. Thus, federal preclusion rules depend directly upon state rules. See also *Smith v. Kemp*, 715 F.2d 1459, 1470-71 (5th Cir.) (one codefendant who had failed to object contemporaneously not barred from federal habeas corpus because state had declined to enforce its procedural rule, while other codefendant barred because state had enforced its rule in his case), *cert. denied*, 104 S. Ct. 510 (1983).

278. The Court might have been concerned that a favorable decision in *Isaac* would have mandated the retrial of hundreds of defendants. Justice White expressed such a fear in *Hankerson v. North Carolina*, 432 U.S. 233, 239 (1977), which had given retroactive effect to the ruling on burden of proof in *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Justice White suggested that states "may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." 432 U.S. at 244 n.8. Justice O'Connor quoted this comment in her opinion in *Isaac*. 456 U.S. at 134 n.43.

279. The Supreme Court has declined to hear other habeas cases in which the petitioners have claimed innocence. See, e.g., *Rose v. Lundy*, 455 U.S. 509 (1982), discussed *infra* notes 576-78 and accompanying text, and *Sumner v. Mata*, 455 U.S. 591 (1982); *Sumner v. Mata*, 449 U.S. 539 (1981) (deference to state court findings required remanding claim of allegedly impermissibly suggestive identification of the defendant).

280. See, e.g., *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1670 (1983) (principles of equity, comity, and federalism limit federal courts when reviewing the actions of state law enforcement agencies); *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 110-13 (1981) (as a matter of comity, federal courts should not adjudicate claims, brought pursuant to 42 U.S.C. § 1983, that state tax systems violate individuals' civil rights).

281. 456 U.S. at 128 (citation omitted). The majority opinion also expressed concern that federal courts' habeas corpus decisions undermined the "morale" of state court judges. *Id.* at 128

The difficulty with a federalism explanation, however, is that the principles and the procedural preferences announced extend beyond cases filed by state prisoners. Not only have the new rules been applied to federal habeas petitioners,²⁸² but concerns for finality, economy, and first tier decisionmakers' authority have also influenced results in lawsuits unrelated to criminal law.²⁸³ My point is not that federalism is irrelevant, but rather that federalism is used only as a justification for decisions made for other reasons.

On the same day that the Court announced its decision in *Engle v. Isaac*, the Court held in *United States v. Frady*²⁸⁴ that the "cause and prejudice" test applied with full force to federal prisoners' habeas applications filed under 28 U.S.C. § 2255.²⁸⁵ Further, in *Frady* the Supreme Court erected barriers to habeas for federal prisoners that are greater than those state prisoners face. *Frady* provides additional insight into the meaning of "prejudice" and demonstrates that the Single Judge plus Limited Review Model now has preclusive force in habeas claims filed within a single decision center, the federal system.

B. FEDERAL PRISONERS' EFFORTS TO OBTAIN HABEAS REVIEW

1. *The Statutory Framework*

Prior to 1948, federal prisoners, like state prisoners, requested

n.33. Federalism, as a theme, has a long history in habeas corpus. See *Ex parte Royall*, 117 U.S. 241, 251-53 (1886) (judicial creation of exhaustion of state remedies doctrine).

282. See, e.g., *United States v. Frady*, 456 U.S. 152 (1982) (applying the *Sykes* rule to federal prisoners' claims). The Supreme Court has not decided a federal prisoner's fourth amendment claim since its decision on state prisoners' claims in *Stone v. Powell*. In *Kaufman v. United States*, 394 U.S. 217 (1969), however, the Court mandated that federal prisoners' fourth amendment claims receive treatment similar to that of state prisoners. *Id.* at 228. Since *Stone v. Powell*, lower federal courts have barred federal prisoners' fourth amendment habeas petitions if the prisoner had had a prior "opportunity for full and fair litigation." E.g., *Tisnado v. United States*, 547 F.2d 452, 457 (9th Cir. 1976).

283. See, e.g., *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 478 (1982) (employment discrimination claim), discussed *infra* notes 644-77 and accompanying text.

284. 456 U.S. 152 (1982).

285. *Id.* at 167. Although *Frady* was a District of Columbia offender, the Court's interpretation of section 2255, the habeas statute for federal prisoners, embraces all federal prisoners' complaints. 456 U.S. at 162.

The "cause and prejudice" standard had been applied previously in habeas petitions filed by federal prisoners. For example, in *Davis v. United States*, 411 U.S. 233 (1973), the defendant failed to object at trial to the composition of the jury. The Supreme Court held that *Davis* had not established "cause" for his failure to comply with FED. R. CRIM. P. 12(b)(2), which requires such objections to be made contemporaneously. Because *Davis* involved a statutory issue, it was unclear until *United States v. Frady* whether the "cause and prejudice" test extended to all federal prisoners' habeas claims.

habeas relief from the federal court in the jurisdiction in which they were confined.²⁸⁶ When that habeas procedure was formulated, no federal prisons existed. Rather, the federal government paid the states, on a *per diem* basis, to house federal inmates in prisons across the country.²⁸⁷

Federal reliance upon state prisons began to decline in the early 1900's with the opening of the federal penitentiaries at Leavenworth and Atlanta.²⁸⁸ By 1930, when Congress created the United States Bureau of Prisons, seven federal prisons were in existence, and by 1943, most federal prisoners were housed in those penitentiaries.²⁸⁹ This concentration of prisoners in specific jurisdictions became a major factor in what the judiciary began to recognize as the habeas corpus "problem."

Federal district courts in which federal penitentiaries were located—such as the Northern District of Georgia, the Northern District of California, the Western District of Washington, the Western District of Missouri, and the District of Kansas—received most federal prisoners' habeas petitions. The number of those petitions grew, as did the ranks of federal prisoners, and the numbers of Supreme Court decisions redefining the scope of habeas review.²⁹⁰ According to a federal judges' committee report, the average number of federal petitions filed in 1936 and 1937 was 310. Seven years later, the number had grown to 845.²⁹¹

In 1943, a committee of judges headed by Judge John Parker concluded that the workload imposed by federal prisoners' petitions was

286. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (expanding power to all cases where any person may be restrained of his or her liberty in violation of the Constitution); The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (granting the judiciary the power to issue writs of habeas corpus for those in custody of the United States); Federal prisoners may still bring some claims of illegal confinement in the jurisdiction where confined. See *Wolfish v. Levi*, 573 F.2d 118, 122 (2d Cir. 1978) (federal pretrial detainees, confined in New York City, filed pursuant to 28 U.S.C. § 2241 (1982) a habeas petition in the Southern District of New York), *rev'd on other grounds sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979).

287. There had been some federal prisons in the territories. During the 1880's, Congress was repeatedly requested to authorize the construction of a federal penitentiary. *E.g.*, 1889 ATT'Y GEN. ANN. REP. XI.

288. U.S. DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM—FACILITIES '82, at 19, 45 (1983).

289. *Id.* at 3.

290. See, *e.g.*, *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942) (federal habeas corpus review not restricted to cases in which judgments are void for lack of jurisdiction); *Frank v. Mangum*, 237 U.S. 309, 331-38 (1915) (allegations of mob violence during the course of a trial may be considered on federal habeas corpus). See generally *Peller*, *supra* note 13, at 608-10 (discussing why the Supreme Court expanded habeas jurisdiction in *Frank v. Mangum*).

291. *United States v. Hayman*, 342 U.S. 205, 212 n.13 (1952).

sufficiently great to justify jurisdictional changes. Judge Parker's committee drafted a proposed statute requiring federal prisoners to file complaints about conviction in the courts that had convicted them.²⁹² The judges on the committee were not unanimous in their views,²⁹³ but some proposed that such a shift in locus from the district of confinement to the district of conviction would be desirable for two reasons. First, these judges believed that obtaining information from the judges who had presided at trial or guilty plea was essential to promote accuracy.²⁹⁴ Second, committee members also sought to conserve resources. A judge already familiar with a case would presumably spend less time deciding its merits than would a judge fresh to the problem. Further, some committee members believed a relocation of habeas proceedings to the sentencing court would avoid the necessity of having a trial judge testify "as an ordinary witness" before another judge at a habeas corpus hearing.²⁹⁵

In 1948, Congress passed legislation that embodied some of the Parker Committee's proposals and that is now codified at 28 U.S.C. § 2255.²⁹⁶ Section 2255 sets out the procedure by which federal prisoners today seek habeas corpus redress.²⁹⁷ Section 2255, a variant of the

292. Report of the Committee on Habeas Corpus Procedure Submitted to the Judicial Conference of the United States (June 7, 1943) (available from the Administrative Office of the United States Courts, habeas corpus microfiche subject file, fiche 1) [hereinafter cited as Parker Committee Report]. See also Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 173 (1949) (discussing state prisoners' habeas litigation).

293. Two alternative statutes were drafted. The commentary to the proposals specify which of the six judges declined to endorse a given recommendation. Parker Committee Report, *supra* note 292, at 6-10. Judges Stephens, Underwood, and Wyzanski objected to the proposed restrictions on habeas corpus; they argued in a separate letter to the Chief Justice: "No trouble or inconvenience to officials of our government, or cost to it, can justify the withdrawal of the right to a free, open and adequate official investigation into an imprisonment where the prisoner . . . asserts, as facts, statements which, if true, would establish its illegality." Letter from Judges Stephens, Underwood, and Wyzanski to the Chief Justice and the Senior Circuit Judges in Conference (Feb. 20, 1947).

294. Parker Committee Report, *supra* note 292, at 4-5, 8-10.

295. *Id.* at 4. The Committee was also concerned about the problems of state court judges, faced with having to testify in federal court proceedings. *Id.* See also Parker, *supra* note 292, at 172-73 (the "unseemly spectacle . . . of state trial judges appearing as witnesses in defense of the proceedings" in their courts). In the meantime, the Parker Committee urged all judges to make complete contemporaneous records so as to provide more information to reviewing courts. Parker Committee Report, *supra* note 292, at 9-10. See also Letter from Circuit Judge Stone, on behalf of the Judicial Conference, to Congress (March 2, 1944) (discussing potential inconvenience to sentencing judges who had to travel to site of habeas hearings), *quoted in part in* United States v. Hayman, 342 U.S. at 217-18 n.25 [hereinafter cited as Circuit Judge Stone's Letter].

296. Judicial Code and Judiciary Act, ch. 646, § 1, 62 Stat. 869, 967 (1948).

297. Section 2255 is not a verbatim replica of 28 U.S.C. § 2254 (1982), the state prisoners'

Single Judge plus Same Judge Model,²⁹⁸ permits litigants to receive a second review from the judge who made the initial decision and thereafter to receive limited review from a second tier.²⁹⁹ In a sense, section 2255 reinstates a procedural model disavowed for the federal courts by the Evarts Act of 1891—the prohibition against any judge sitting “on appeal from his own court.”³⁰⁰

2. *Interpreting the Meaning of Section 2255*

Section 2255 is an offshoot of other habeas corpus enactments and contains the concept common to all—prisoners can attack custody claimed to be “in violation of the Constitution or laws of the United States.”³⁰¹ However, section 2255 contains language not found in the earlier habeas corpus statutes nor in the contemporaneously reenacted habeas legislation. The statute authorizes litigation against unconstitutional or illegal sentences as well as those “otherwise subject to collateral attack.” Moreover, section 2255 contains language permitting challenges to illegal *sentences*, as distinct from unlawful custody. Finally, although describing itself as authorizing “collateral” attack, section 2255 returns prisoners not to new or independent courts but to the courts where they were convicted and sentenced.

The repetitive, dense language of the statute caused substantial judicial confusion during the first decade of section 2255's existence. One might have been tempted to describe the section simply as federal prisoners' “habeas corpus.” Such an approach was discouraged, however, by a phrase of the statute that a court is not to entertain an “application

habeas corpus statute. The confusion generated by section 2255's language was quieted by Supreme Court interpretations of section 2255. See *infra* notes 304-24 and accompanying text.

298. Section 2255 sometimes mixes models. For example, when a defendant is tried, appeals, and then files for habeas relief, the procedure followed is the Single Judge plus Limited Review plus Same Judge Model. If no appeal is taken and a challenge is subsequently filed, however, section 2255 proceeds under the Single Judge plus Same Judge Model. In both cases, appellate review of the second decision is available.

299. In 1976 the Supreme Court promulgated special rules to govern section 2255 proceedings. Those rules mandate that all section 2255 motions be sent to the judge who imposed sentence. Section 2255 Rules, *supra* note 73, at Rule 4. The statute itself states only that a petitioner must return to the same “court.” Prior to the promulgation of the Section 2255 Rules, and due to concern about possible bias, the First Circuit interpreted section 2255 as requiring return to the same court but not to the same judge. *Halliday v. United States*, 380 F.2d 270, 273 (1st Cir. 1967). Under Rule 4, a judge who presided at trial or guilty plea can be disqualified only upon a showing of bias, claimed pursuant to 28 U.S.C. § 144 or 28 U.S.C. § 455.

300. Although the rhetoric is that “*habeas corpus* will not be allowed to do service for an appeal,” *Sunal v. Large*, 332 U.S. 174, 178 (1974) (emphasis in original), habeas corpus is often functionally equivalent to a belated appeal, albeit one limited to a narrow set of grounds.

301. 28 U.S.C. §§ 2241, 2254-2255 (1982).

for a writ of habeas corpus” unless a prisoner first files a section 2255 motion. Judges consequently assumed that section 2255 was something other than habeas corpus. Legislative acts of the 1948 Congress bolstered that notion; in addition to creating section 2255, Congress enacted a habeas statute, 28 U.S.C. § 2241, called “Power to grant writ.” Section 2241 provides that “[w]rits of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions,” if a prisoner is in federal custody “in violation of the Constitution or laws or treaties of the United States.”³⁰² Section 2241’s applicability to federal prisoners, coupled with principles of parsimony, suggested that section 2255 was not a habeas statute, but only a step along the way. Perhaps section 2255 was a predicate to habeas corpus, an exhaustion of judicial remedies requirement paralleling that imposed upon state prisoners.³⁰³

Under this reading of section 2255, after trial and appeal (the Single Judge plus Limited Review Model), a prisoner would have to return to the sentencing judge but thereafter would be entitled to a different forum (e.g., another federal judge) who could undertake unlimited review of certain claims. Although layered, such a model would have both concentrated and diffused power. The first judge would have had two opportunities to exercise power but a different judge would have had a right of review—thereby providing a check on that power, protecting against partiality, and giving the litigant a new audience to persuade. This model would have also built in some economies; if the first judge satisfied the litigant, no other judge would have to become familiar with the case. In short, such an interpretation would have resulted in a complex balancing of values.

However, when first interpreting section 2255 in 1952,³⁰⁴ the Supreme Court announced a rule that incorporated a simpler procedural model—the Single Judge plus Same Judge plus Limited Review Model. A federal prisoner, Herman Hayman, incarcerated at McNeil Island Penitentiary in Washington, filed under section 2255 in the Southern District of California, where he had been convicted. Mr. Hayman sought to vacate his 1947 conviction and twenty-year sentence on the ground that his sixth amendment right to counsel had been denied. Specifically, Hayman claimed that the principal witness who had testified against him was also a client of Hayman’s defense attorney

302. *Id.* § 2241(a), (c)(1).

303. *Id.* § 2254(b).

304. *United States v. Hayman*, 342 U.S. 205 (1952).

and that such conflict of interest had corrupted the attorney's loyalty and prejudiced the defense.³⁰⁵

The district judge in California held a three-day hearing to resolve the factual questions raised by the motion. Hayman, incarcerated at McNeil Island, did not attend. Despite Hayman's absence, the judge concluded that Hayman had known of the joint representation and consented to it. The motion to vacate was denied.³⁰⁶

The Ninth Circuit, *sua sponte*, raised the issue of the constitutionality of section 2255.³⁰⁷ A few years earlier, the Supreme Court had held that district courts had "habeas corpus jurisdiction" only within "their respective jurisdictions",³⁰⁸ thus, only inmates within the territorial boundaries of a federal court could petition that court for habeas relief. As a consequence, the Ninth Circuit believed that, even if the trial judge had wanted Hayman to testify, the judge had lacked authority by which to order Hayman's appearance. The court reasoned that, since section 2255 appeared to sanction *ex parte* proceedings, it had, in Hayman's case, worked an unconstitutional suspension of the writ of habeas corpus.³⁰⁹ The appellate court therefore vacated the section 2255 ruling, remanded Hayman to file a "regular" habeas under section 2241 in the district of confinement, and ruled that section 2255 could only be used when "the court of the prisoner's conviction is of the district where he is confined."³¹⁰

Chief Justice Vinson, writing for the Supreme Court, reversed. The Court held that section 2255 did not authorize *ex parte* hearings, and thus was not unconstitutional.³¹¹ To interpret section 2255, the Court relied heavily upon the Judicial Conference Statement which argued the utility of section 2255. As a consequence, the Chief Justice read section 2255 as intending a remedy "as broad as habeas corpus."³¹² Section 2255 could not, however, *be* habeas corpus because the Court was unprepared to discard its prior ruling that federal judges' habeas jurisdiction reached only as far as the boundaries of their dis-

305. *Id.* at 208.

306. *Id.* at 208-09.

307. *United States v. Hayman*, 187 F.2d 456, 457-58 (9th Cir. 1951), *vacated*, 342 U.S. 205 (1952).

308. *Ahrens v. Clark*, 335 U.S. 188, 189-90 (1948), *overruled in part*, *Braden v. 30th Judicial Court*, 410 U.S. 484, 497-500 (1973).

309. *United States v. Hayman*, 187 F.2d at 462-64.

310. *Id.* at 464.

311. *United States v. Hayman*, 342 U.S. at 219-20.

312. *Id.* at 217 (quoting Circuit Judge Stone's Letter, *supra* note 295).

tricts.³¹³ But the Court found authority in another statute³¹⁴ for federal judges to order prisoners outside a district to appear, and the Court thereby sanctioned the use of section 2255 for all federal prisoners.³¹⁵

Between Congress and Chief Justice Vinson, section 2255 became a unique and odd entity. It was not habeas corpus because at that time habeas corpus was territorially bounded and section 2255 was not. Section 2255 was not less than habeas corpus, since the statute had been created as an economical counterpart to habeas corpus for federal prisoners. Section 2255 did not totally displace habeas corpus because, by its own terms, the statute permitted habeas corpus as an alternative when a section 2255 motion was "inadequate." Finally, section 2255 contained language not found in the habeas corpus statutes. It suggested two new grounds for attacking a conviction—a sentence in violation of the Constitution or laws of the United States and convictions or sentences that might be "otherwise subject to collateral attack." The extra verbiage and Chief Justice Vinson's description of section 2255 as an "independent and collateral inquiry into the validity of the conviction" lent support to the hypothesis that section 2255 might be *more* than habeas corpus.

Had that possibility been borne out, federalism might have more explanatory power for our understanding of the limits that the Supreme Court has placed on habeas corpus for state prisoners. In the years of litigation since *Hayman*, however, the Supreme Court has retreated from an expansive interpretation of section 2255, and has, by denying the ordinary sense of some of section 2255's phrases, read the language of the statute narrowly. For example, in *Hill v. United States*,³¹⁶ a federal prisoner had established that he had been sentenced in violation of Rule 32(a) of the Federal Rules of Criminal Procedure, which requires a sentencing judge to afford a defendant a personal opportunity to speak prior to the imposition of sentence.³¹⁷ The issue presented in *Hill* was whether, if claimed under section 2255, a judge's failure to provide a defendant with an opportunity to speak required that the sentence be vacated and the prisoner resentenced.

At one level, the answer appeared obvious. The Court did not

313. See *supra* note 308 and accompanying text.

314. 28 U.S.C. § 1651 (1982) (All Writs Act, permitting courts to issue all writs necessary in "aid of their respective jurisdictions").

315. 342 U.S. at 220-23.

316. 368 U.S. 424 (1962).

317. *Id.* at 425; *Green v. United States*, 365 U.S. 301, 304-05 (1961).

state that Rule 32(a) was not a "law" of the United States.³¹⁸ Nor did the Court suggest that section 2255 referred only to the laws in existence when it was enacted. Further, the facts were undisputed: the judge who had sentenced Hill had not followed the dictates of the rule; he had not asked Hill to speak before imposing sentence. Hill's conviction and sentencing had occurred in 1954, before the 1961 ruling that a Rule 32(a) error required vacature of the sentence. Hill had not appealed, and the Court did not raise a deliberate bypass problem.

Nevertheless, the five-person majority concluded that collateral relief was not available for Mr. Hill. The trial judge's failure to request a personal statement from Hill prior to imposition of sentence was deemed an error of neither "jurisdictional nor constitutional" dimensions. "It is not a fundamental defect which inherently results in a complete miscarriage of justice," nor an exceptional "circumstance where the need for the remedy afforded by the writ of habeas corpus is apparent."³¹⁹ The *Hill* Court did not preclude all Rule 32 claims. Since Hill had not explained how personal allocution would have altered the outcome, the Court deferred the question of "[w]hether section 2255 relief would be available if a violation of Rule 32(a)" occurred with "aggravating circumstances."³²⁰ Ignoring the language in *Hayman* differentiating section 2255 from habeas corpus and implying that section 2255 could be broader, *Hill* held that section 2255 was a remedy "exactly commensurate with . . . habeas corpus."³²¹

Subsequent Supreme Court pronouncements have reiterated that to the extent possible,³²² federal prisoners' section 2255 claims are to be subject to the same requirements as state prisoners' claims.³²³ With that approach, the Court has applied its "cause and prejudice" standard to cases brought by both federal and state prisoners.³²⁴

318. Some form of that argument was available. The Federal Rules of Criminal Procedure, unlike statutes, are not "laws" enacted by Congress; rather, the Rules are promulgated by the Supreme Court and, if Congress does not act within 90 days of the Rules' promulgation, they become effective. See 18 U.S.C. §§ 3771, 3772 (1982); 28 U.S.C. § 2071 (1982).

319. 368 U.S. at 428.

320. *Id.* at 429.

321. *Id.* at 427.

322. There are statutorily created distinctions between the remedies for state and federal prisoners. See, e.g., 28 U.S.C. § 2254(b)-(c) (1982) (exhaustion requirement), construed in *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(d) (1982) (state factfinding presumptively correct), construed in *Sumner v. Mata*, 455 U.S. 591 (1982); *Sumner v. Mata*, 449 U.S. 539 (1981).

323. See, e.g., *Kaufman v. United States*, 394 U.S. 217, 228 (1969) (fourth amendment claims to be treated the same for federal prisoners as for state prisoners).

324. The "cause and prejudice" test was first articulated in a federal prisoner's belated claim of an unconstitutional grand jury selection. *Davis v. United States*, 411 U.S. 233, 238 (1973). The

3. *Narrowing the Meaning of Section 2255*

The Supreme Court's decision to conform its interpretation of section 2255 to its rules for habeas corpus petitions filed by state prisoners might be understood as embracing federalism. Federalism may simply oblige federal courts to accord equal deference to federal and state court judgments.³²⁵

The Supreme Court, however, has not mandated equal deference to federal and state court judgments. Rather, in *United States v. Frady*,³²⁶ the Court imposed even greater strictures on federal prisoners who claim constitutional error but who have failed to object contemporaneously than the Court has placed on state prisoners. In addition, *Frady* both clarified the stringency of the "prejudice" prong of the "cause and prejudice" test and illustrated the central role of finality in the Court's work.

In 1963, Joseph Frady was convicted of first degree murder in the Federal District Court for the District of Columbia. Frady appealed the conviction on various grounds and succeeded in overturning the death sentence imposed but not the conviction itself.³²⁷ In 1979, Frady filed a section 2255 motion. He claimed for the first time that the trial

test resurfaced in a state prisoner's case, *Frances v. Henderson*, 425 U.S. 536, 539 (1976), and gained universal application to all kinds of claims made in violation of contemporaneous objection rules, *United States v. Frady*, 456 U.S. 152 (1982); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). For Judge Posner's suggestion that the "cause and prejudice" test should apply in the absence of a contemporaneous objection rule, see *Norris v. United States*, 687 F.2d 899, 901 (7th Cir. 1982).

325. Federalism principles could also support making access to collateral review either broader or narrower for federal prisoners than for state prisoners. Access to postconviction review could be easier because no state court "morale" problem exists; federal postconviction review revises federal judgments. The expansive language of section 2255 supports this thesis.

Access to collateral review for federal prisoners could also be narrower, at least for claims raised at trial or on appeal, because those claims have, by definition, received one federal airing. To the extent that habeas corpus is supposed to provide criminal defendants with the federal bench's expertise on points of federal law, federal defendants have already had the benefit of such expertise. Echoes of this thesis can be heard in Justice O'Connor's majority opinion in *Frady*. She stated that Frady "already has had a fair opportunity to present his federal claims to a federal forum." 456 U.S. at 164. The challenge made in the 1982 case, however, had not been presented—indeed had not existed—at the time of trial.

Taken to its logical extreme, a single federal hearing rule would preclude all federal prisoners from habeas review, and perhaps even from appeal. Equality problems between state and federal prisoners might then arise because state prisoners would, presumably, still have access to a second, federal review.

326. 456 U.S. 152 (1982).

327. 348 F.2d 84 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 909 (1965). Justice O'Connor, writing for the Court in Frady's 1982 case, noted that, in 1965, "Frady escaped electrocution" by a 5-4 vote. 456 U.S. at 156-57.

judge had given a defective jury instruction³²⁸—the trial judge had equated specific intent with malice.³²⁹ The judge had instructed the jury that “the law infers or presumes from the use of such weapon [part of a table top and Frady’s boots] in the absence of explanatory or mitigating circumstances the existence of malice essential to culpable homicide.”³³⁰

Frady is a variant of the *Engle v. Isaac* problem. In 1963, when Frady was convicted, the instructions given were “standard.”³³¹ A few years later, however, the Court of Appeals for the District of Columbia invalidated such instructions.³³² Therefore, when reviewing Frady’s section 2255 petition in 1980, the court of appeals concluded that, at the time of Frady’s trial and appeal, objections to such instructions would have been “futile.”³³³ Thus, Frady had shown sufficient “cause” for his failure to complain contemporaneously. The court of appeals also held that Frady had been “prejudiced” in that he “may, in fact, have been convicted of the wrong crime.”³³⁴ The appellate court further concluded that Frady’s claim should be tested under the “plain error” standard of Rule 52(b) of the Federal Rules of Criminal Procedure.³³⁵ Deciding that the error undermined the “integrity of the judicial process,”³³⁶ the court proceeded to decide the merits. The court held that Supreme Court decisions mandated retroactive application of new constitutional doctrine addressing issues which impair the “truth-finding

328. Frady claimed that his trial judge, the Honorable George Hart, Jr., had erred in the 1965 jury instructions. As Rule 4 of the Section 2255 Rules, *supra* note 73, requires, Judge Hart also decided the merits of Frady’s 1979 section 2255 motion. Judge Hart denied relief on the grounds that Frady did or should have raised his claim earlier. Petition for Certiorari at 29a app. D, *United States v. Frady*, 456 U.S. 152 (1982). The Court of Appeals, however, found “no evidence in the record to support the finding of the trial judge that Frady raised the issue of erroneous jury instructions in any motions or appeals.” *United States v. Frady*, 636 F.2d 506, 508 n.3 (D.C. Cir. 1980), *rev’d*, 456 U.S. 152 (1982).

329. 636 F.2d at 508.

330. *Id.*

331. *Id.* at 512.

332. *See, e.g.*, *United States v. Wharton*, 433 F.2d 451, 455-56 (D.C. Cir. 1970) (malice cannot be inferred from use of a deadly weapon).

333. 636 F.2d at 512. “To rule otherwise would be to suggest that trial counsel should object to *all* jury instructions in anticipation of changes in the constitutionality of jury instructions. Such a suggestion borders on the absurd.” *Id.* (emphasis in original) (footnote omitted).

334. *Id.* at 513.

335. The court believed that, because “comity and federalism” were not at issue, *id.* at 509, the standard of review should be that of FED. R. CRIM. P. 52(b): “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” 636 F.2d at 510-12. The court made clear, however, that under the “cause and prejudice” test of *Sykes*, Frady’s claim was also cognizable. *Id.* at 513 n.17.

336. 636 F.2d at 513.

function" of criminal trials³³⁷ and granted Frady's motion. Given the lengthy interval between the trial and the collateral proceeding, the appellate court suggested that, with the government's consent, the district court enter a verdict of manslaughter.³³⁸

The Supreme Court rejected the appellate court's view that, since no "problems of comity and federalism"³³⁹ were present, Frady's failure to object contemporaneously should be tested under the plain error standard.³⁴⁰ Once again writing for the majority, Justice O'Connor concluded that the test chosen in *Engle v. Isaac*, "cause and actual prejudice," should be applied to Frady's claim³⁴¹ and ruled that he had not established "actual prejudice."

Despite the invocation of the identical "cause and actual prejudice" test in both federal and state habeas cases, federal prisoners have less access to collateral review than do state prisoners. As Justices Blackmun and Brennan noted in separate opinions,³⁴² state courts have discretion to ignore prisoners' failures to follow contemporaneous objection rules. When state courts do not enforce those rules but hear the merits of petitions, federal courts are also permitted to decide the merits of state prisoners' claims.³⁴³ But, under *Frady*, federal judges have no similar discretion to disregard failures by federal prisoners to object contemporaneously. *Frady* prohibits federal judges, when they are deciding section 2255 motions, from exercising discretion to ignore procedural errors and consider the merits. Rather, federal prisoners must either object contemporaneously or meet the stringent cause and prejudice test of *Sykes*, *Isaac*, and *Frady*.³⁴⁴

337. *Id.* (quoting *Hankerson v. North Carolina*, 432 U.S. 233, 241 (1977), which in turn quotes *Williams v. United States*, 401 U.S. 646, 653 (1971) ("Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require [only] prospective application in these circumstances.")).

338. *Id.* at 514.

339. *Id.* at 509.

340. *United States v. Frady*, 456 U.S. at 164-66.

341. *Id.* at 167.

342. Justice Blackmun concurred in the judgment because he believed Frady could not establish "plain error." *Id.* at 178 (Blackmun, J., concurring). Justice Brennan dissented but also indicated he might have joined the Court's opinion, had it not rejected the plain error test. *Id.* at 187 (Brennan, J., dissenting).

343. If state courts decide the merits of federal constitutional challenges, then no "independent and adequate" state ground supports the judgment and no procedural bar to federal review exists. *See, e.g.*, *Ulster County Court v. Allen*, 442 U.S. 140, 147-49 (1979) (when state decision is based on federal law, federal court may also decide the merits).

344. 456 U.S. at 167-68.

Moreover, "cause and prejudice" is more exacting than "plain error." The plain error doctrine assumes that an objection was not raised below, makes no inquiry into the "cause" for the failure to object, and instead focuses only upon the harm resulting from the "plain error."³⁴⁵ A more difficult question is whether, "cause" aside, there is any substantive difference between the "actual prejudice" test of *Sykes-Isaac* and the plain error rule. Under the plain error rule, courts are only allowed to correct errors "both obvious and substantial" in "exceptional circumstances . . . to avoid a miscarriage of justice."³⁴⁶ Can there be no "actual prejudice" where there has been no plain error? Probably not, and one would have been tempted to equate the two concepts. But the Supreme Court appeared in *Frady* to assume that there can be plain error and yet no "actual prejudice."

Under *Frady*, "actual prejudice" requires that a habeas corpus petitioner show "*actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."³⁴⁷ According to the Supreme Court, Frady could not meet such a test because he had, in fact, acted with "malice aplenty."³⁴⁸ That finding is somewhat curious in light of the circuit court opinion that Frady might have acted without malice.³⁴⁹ The disagreement between the courts raises questions about how to decide whether prejudice exists. Can a court rely upon a wrongly instructed jury's verdict? Should a court review the evidence itself and decide? The Supreme Court implicitly made its own finding of guilt to conclude that no actual prejudice had occurred, and therefore that it need not decide whether the jury instruction was constitutionally defective.³⁵⁰

A second distinction the Court made between plain error and "actual prejudice" relates to time. In the majority's view, plain error is reserved exclusively for direct appeals because retrial is relatively easy. In contrast, "actual prejudice" is required when the interval between trial and reconsideration is long. The *Frady* Court referred repeatedly

345. FED. R. CRIM. P. 52(b) Advisory Committee Note.

346. 456 U.S. at 163 n.14 (quoting *United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981)).

347. *Id.* at 170 (emphasis in original).

348. *Id.* at 171.

349. 636 F.2d at 511.

350. *Cf. Connecticut v. Johnson*, 103 S. Ct. 969, 977 (1983) (plurality opinion):

To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.

to the years between Frady's original 1963 trial and his 1979 claim of error.³⁵¹ Given the improbability of retrial, the Court imposed a higher burden.

Frady reflects the centrality of finality in the Court's consideration of criminal prosecutions and postconviction proceedings. "Once the defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. . . . [A] final judgment commands respect."³⁵² In an unexplained reference, Justice O'Connor hinted that her finality concerns have a constitutional basis: "[T]he federal interest in finality is as great as the States', and the relevant federal *constitutional* strictures apply with equal force to both jurisdictions."³⁵³

Of course, finality has always been important in criminal cases. Defendants' finality interests are explicitly recognized in the constitutional protection against double jeopardy.³⁵⁴ The Constitution's one-sided protection of defendants has been explained, primarily, by the inequalities in resources and power between the parties in criminal cases.³⁵⁵ Defendants' revisionism interests are also constitutionally recognized in the habeas corpus clause.³⁵⁶ The case law debate has been about what expectations of revisionism are to be legitimated.

The *Frady* majority shifted the focus from defendants to the public. Justice O'Connor's reference to a "federal interest in finality"³⁵⁷ suggests some concept of a right to finality. It is unclear, however to whom such a "right" belongs. Perhaps the theory is that once the government undertakes a prosecution and prevails, it is entitled to rest upon its laurels and not be questioned about the techniques employed to obtain the conviction.³⁵⁸ Perhaps, as suggested in another recent

351. 456 U.S. at 159-63.

352. *Id.* at 164-65.

353. *Id.* at 169 n.17 (emphasis added).

354. U.S. CONST. amend. V.

355. See Westin & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81 (double jeopardy serves three interests: systemic finality, defendants' rights to avoid double punishment, and the right of juries to nullify the power of the prosecution).

356. U.S. CONST. art. I, § 9.

357. 456 U.S. at 169 n.17.

358. *Cf.* Kaufman v. United States, 394 U.S. 217, 225 (1969) (fourth amendment error can be grounds for section 2255 motion because of concern about systemic integrity); *People v. Germany*, 674 P.2d 345 (Colo. 1983) (holding state statute of limitations in habeas cases unconstitutional because state has no legitimate interest in finality of unconstitutional convictions).

opinion,³⁵⁹ "finality interests" belong to victims, "entitled" not to participate in a second trial. Perhaps finality is only a surrogate for economy—a systemic need to conserve resources.

Whatever its sources, the Court's emphasis on finality calls into question the very existence of collateral proceedings and, perhaps, of direct appeals. If all convictions were presumed fair once a period of time had elapsed, postconviction review would become an empty exercise. *Fraday* may foreshadow the elimination of collateral review of federal convictions and the reliance instead upon either the Single Judge plus Limited Review or the Single Judge/Finality Models.

C. RULEMAKING AS A DEVICE TO ENSHRINE FINALITY

Thus far, I have examined Supreme Court case law on the availability of postconviction relief in federal court. I have mapped the expansive role the federal courts played in the 1960's and the contraction of that role in the 1970's and 1980's. In addition to writing opinions, the Court has another technique by which it can express its value choices. The Court has the power to make rules governing the conduct of habeas and other litigation. The rules by which habeas cases are litigated, like the cases interpreting the habeas statutes, illustrate how value choices have changed.

1. *The Practice*

Prior to 1977, federal habeas petitions, whether filed by state or federal prisoners, were treated as new civil actions and were literally collateral to the first conviction proceeding.³⁶⁰ Although habeas corpus has its roots in the criminal law, habeas actions were denominated "civil in nature."³⁶¹ However, while the Supreme Court had promulgated rules governing the practice for the rest of the civil docket, Congress wrote the habeas practice rules into the habeas statutes themselves.³⁶²

First drafting habeas rules in 1867, Congress ordered that habeas

359. See *Morris v. Slappy*, 103 S. Ct. 1610, 1617 (1983) (victims' interests relevant to denial of habeas).

360. A petitioner commenced a new lawsuit, complete with its own docket number and filing fee or, more often, waiver of the filing fee. 28 U.S.C. §§ 1915, 2254, 2255 (1982). Despite section 2255's reference to a "motion," most litigants filed "petitions for habeas corpus." Interview with Prof. Dennis Curtis, University of Southern California Law Center (April 1983).

361. *Harris v. Nelson*, 394 U.S. 286, 293 (1969).

362. Claimants had to submit a written petition verified by affidavit. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385 [hereinafter cited as 1867 Act]. If the facts set forth a prima facie case of

petitions be decided with rapidity; within three days of the order to show cause from the court, the custodian was to file a "return," unless "good cause [was] shown" for more time to be allowed.³⁶³ The prisoner could add information via a "traverse" and, within five days, the court was to "proceed in a summary way to determine the facts of the case."³⁶⁴

The recodification of the habeas statutes in 1948 confused the practice somewhat. As noted, three habeas statutes were delineated: 28 U.S.C. § 2254 for state prisoners, 28 U.S.C. § 2255 for those convicted in federal courts, and 28 U.S.C. § 2241 as a general habeas provision. Congress set specific procedures for habeas corpus "petitions,"³⁶⁵ and distinct procedures for section 2255 "motions."³⁶⁶ Over time, section 2255 "motions" came to be understood as federal prisoners' "habeas corpus." The practice developed to ignore the statutory appellation "motion"³⁶⁷ and to commence civil actions (akin to section 2254 petitions) invoking section 2255 as the jurisdictional base.

Questions about how to practice under the federal habeas statutes reached the Supreme Court in 1969. In *Harris v. Nelson*,³⁶⁸ the Court

unlawful detention, a judge issued a habeas writ "forthwith." The writ ordered the petitioner's custodian to file a "return," justifying continued custody. *Id.*

Within five days of the "return," a hearing was to be held, at which a judge took testimony, heard oral argument, and made a prompt decision. The remedy, for the victorious prisoner, was supposed to be speedy—"forthwith be discharged and set at liberty." *Id.* at 386.

Compliance with writs of habeas corpus was insured by the potential for criminal sanctions. *Id.* If the custodian failed to make the "return" promptly, lied in the return, or refused to set the prisoner free, criminal charges could be lodged. If prosecuted successfully, a misdemeanor conviction could result, and a fine of up to \$1000 and/or one year of imprisonment could be imposed. *Id.*

The legacy of the 1867 congressional procedures remains: the format—filing with the court, court review prior to custodial response, and prompt judicial consideration—has been included in the habeas statutes since 1867, including those in effect today. The words of the 1867 Act, "restrained of his or her liberty in violation of the Constitution, laws and treaty of the United States," have survived, with slight modification, as the centerpiece of habeas legislation.

363. Under the 1867 Act, the exact time limits depended upon the distance from courthouse to prison. If a prison were 20 miles from the courthouse, the custodian had three days in which to respond. A distance of 100 miles permitted the jailor 20 days to respond. *Id.* The 1948 recodification deleted the details about distance. 28 U.S.C. §§ 2241-2249 (1982).

364. 1867 Act, § 1, 14 Stat. at 386. Similar language appears today in 28 U.S.C. § 2243 (1982).

365. See 28 U.S.C. § 2243 (1982) ("Issuance of the writ" procedures applicable to sections 2241 and 2254).

366. *Id.* § 2255. Those procedures are similar but not identical to those proscribed for petitions under sections 2241 and 2254.

367. See Section 2255 Rules, *supra* note 73, at Rule 1 Advisory Committee Note (discussing the desirability of the then new requirement of motions, rather than separate court actions).

368. 394 U.S. 286 (1969).

announced that, although habeas actions were "civil in nature," the Federal Rules of Civil Procedure did not apply with full force: habeas petitioners had no automatic right to undertake discovery.³⁶⁹ Rather, federal judges were to make case-by-case decisions about the need for discovery.³⁷⁰ The source of authority for habeas discovery orders was not the federal rules but the "All Writs Act," authorizing courts to act "in aid of their respective jurisdictions."³⁷¹

The *Harris v. Nelson* approach to habeas actions, like that of *Fay v. Noia*, gave federal judges substantial authority over habeas adjudication. *Harris* reflected a preference for case-by-case sculpting of procedures to fit the needs of lawsuits and an assumption that such an effort would not place undue demands on federal judges.³⁷² But the forces that brought section 2255 into being, concerns about the increase in habeas applications and economical solutions to their claims,³⁷³ quickly made the *Harris v. Nelson* approach obsolete. Within a few years after *Harris*, the Advisory Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States Courts drafted special rules to regulate habeas corpus practice.³⁷⁴ In 1976, the Supreme Court promulgated the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings in the United States District Courts.³⁷⁵ These Rules, effective in 1977, sought to impose uniformity in habeas corpus practice and created new substantive limits on the availability of habeas review.

369. *Id.* at 293.

370. *Id.* at 298-300.

371. 28 U.S.C. § 1651 (1982). For the pre-*Harris v. Nelson* practice, see Note, *Civil Discovery in Habeas Corpus*, 67 COLUM. L. REV. 1296 (1967).

372. *Cf.* 394 U.S. at 305-07 (Harlan, J., dissenting) (proposing the adoption of rules for habeas corpus). For discussion of *Harris v. Nelson*, see Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 736-40 (1975).

373. See Parker Committee Report, *supra* note 292, at 3-5. For the history of habeas practice from 1953-1963, see *Habeas Corpus and Post-Conviction Reviews*, 33 F.R.D. 363, 367-86 (1963); Carter, *Pre-Trial Suggestions for Section 2255 Cases*, 32 F.R.D. 391, 393-97 (1963). *Cf.* FEDERAL JUDICIARY CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 7-28 (1980) (discussion of need for special rules for prisoners' lawsuits filed under 42 U.S.C. § 1983).

374. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Criminal Procedure, Proposed Rules Governing Habeas Corpus Proceedings, Proposed Rules Governing § 2255 Proceedings for the United States District Courts, and Proposed Amendments to the Federal Rules of Appellate Procedure 3-124 (1973) (preliminary draft). See also H.R. REP. NO. 1471, 94th Cong., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2478, 2478 (legislative history of the Rules).

375. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS [hereinafter cited as Section 2254 Rules]; Section 2255 Rules, *supra* note 73.

2. *The 1977 Rules*

In some respects, the 1977 Rules continue the procedures fashioned by the 1867 Congress. Prisoners must first apply to the courts for screening of their applications. Unless “plainly” apparent from the prisoners’ papers that applicants are not entitled to relief, courts must ask the prisoners’ custodians for answers documenting the validity of continued incarceration.³⁷⁶ The Rules provide for hearings when evidence needs to be taken.³⁷⁷ The *Harris v. Nelson* approach to discovery is incorporated,³⁷⁸ and courts are mandated to appoint counsel “[i]f necessary for [the] effective utilization of discovery procedures”³⁷⁹ or if an “evidentiary hearing is required.”³⁸⁰

The Rules are also innovative. First, despite the Supreme Court’s case law efforts to equate section 2255 proceedings with those brought by state prisoners under section 2254, the Rules differentiate between the two proceedings. No longer a “civil action,” a section 2255 motion is now “a further step in the movant’s criminal case.”³⁸¹ Describing an action as civil or criminal has significant consequences. For example, the Advisory Committee Notes indicate that the rules of criminal discovery, which are more limited than the rules of civil discovery, may be applied to section 2255.³⁸² The Rules do not, however, lay to rest the ambiguities surrounding the “nature” of section 2255 proceedings. The Rules still expressly authorize judges to apply either civil or criminal rules, where appropriate,³⁸³ and the time to file an appeal is that allowed in civil cases.³⁸⁴

376. Section 2254 Rules, *supra* note 375, at Rule 4; Section 2255 Rules, *supra* note 73, at Rule 4(b).

377. Section 2254 Rules, *supra* note 375, at Rule 8(a); Section 2255 Rules, *supra* note 73, at Rule 8(a).

378. Section 2254 Rules, *supra* note 375, at Rule 6 Advisory Committee Note.

379. *Id.*; Section 2255 Rules, *supra* note 73, at Rule 6(a).

380. Section 2254 Rules, *supra* note 375, at Rule 8(c); Section 2255 Rules, *supra* note 73, at Rule 8(c).

381. Section 2255 Rules, *supra* note 73, at Rule 1 Advisory Committee Note.

382. *Id.* The Advisory Committee added that, simply because a section 2255 proceeding is a postconviction motion, “does *not* mean” that a movant has the same rights as a defendant—such as “counsel, presence, confrontation, self-incrimination, and burden of proof.” *Id.* (emphasis in original).

383. Section 2255 Rules, *supra* note 73, at Rule 12. *See, e.g.,* *Browder v. Director, Dep’t of Corrections*, 434 U.S. 257, 270 (Federal Rules of Civil Procedure Rules 59 and 60 may apply to habeas actions), *reh’g denied*, 434 U.S. 1089 (1978). *Cf. United States v. Frady*, 456 U.S. 152, 166 (1982) (Federal Rules Criminal Procedure Rule 52(b) (plain error rule) inapplicable to section 2255 proceedings, discussed *supra* notes 335-53 and accompanying text).

384. Section 2255 Rules, *supra* note 73, at Rule 11.

Second, the Rules require that prisoners use either the model forms appended or forms drafted by local district courts.³⁸⁵ While such a requirement appears trivial, it has functioned to delay, if not to preclude, the filing of some applications. The Rules permit judges to refuse to file prisoners' forms that do not "substantially comply" with the authorized format.³⁸⁶ While the Rules specifically permit refusals only "if a judge of the court so directs,"³⁸⁷ habeas corpus practitioners report that, in some districts, clerks enforce these provisions.³⁸⁸ One habeas claimant, alleging that prison officials had seized all pens and paper so as to impede his access to the courts, filed an application he carved onto styrofoam cups. After file-stamping the paper bag in which the cups were sent, the district court clerks returned the cups as not conforming to the required format.³⁸⁹

The forms also impose substantive limits on the structure and substance of habeas cases. For example, some federal prisoners' habeas applications may be characterized as federal question lawsuits, filed under 28 U.S.C. § 1331.³⁹⁰ Some cases may also properly invoke federal courts' mandamus jurisdiction.³⁹¹ Most federal courts' habeas forms, however, do not provide for allegations of alternative jurisdic-

385. Section 2254 Rules, *supra* note 375, at Rule 2(e); Section 2255 Rules, *supra* note 73, at Rule 2(b). For examples of forms that had been used prior to the rules in some local district courts, see *Applications for Writs of Habeas Corpus and Post-Conviction Review of Sentences in the United States Courts*, 33 F.R.D. 363, 399-408 (N.D. Ill. 1963).

386. Section 2254 Rules, *supra* note 375, at Rule 2(e); Section 2255 Rules, *supra* note 73, at Rule 2(d). *Cf.* *Ono v. United States Parole Comm'n*, No. 82-5800 (9th Cir. July 28, 1983) (overturning district judge's rejection of a form). See generally Ziegler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157, 179 (1972) (in late 1960's and early 1970's, some courts required forms and rejected noncomplying submissions).

387. Section 2254 Rules, *supra* note 375, at Rule 2(e); Section 2255 Rules, *supra* note 73, at Rule 2(d).

388. See, e.g., D.C. Okla., Information and Instructions for Motion to Reduce or Correct Sentence Pursuant to Rule 35 of the Fed. R. Crim. P., Petition for a Writ of Habeas Corpus by a Person in Federal Custody, Petition for a Writ of Habeas Corpus by a Person Attacking a State Detainer at 2 ("Petitions or motions which do not conform to these instructions will not be filed, but will be returned by the clerk with a notation as to the deficiency.") [hereinafter cited as Oklahoma Form].

389. Interview with Prof. William Genego, University of Southern California Law Center (Oct. 1983) (regarding habeas practice in the Central District of California) [hereinafter cited as W. Genego].

390. 28 U.S.C. § 1331 (1982). *E.g.*, *Bell v. Wolfish*, 441 U.S. 520, 526-27 n.6 (1979); *Green v. Carlson*, 581 F.2d 669, 671 (7th Cir. 1978), *aff'd*, 446 U.S. 14 (1980); *Walker v. McCune*, 363 F. Supp. 254, 255 (E.D. Va. 1973). For a discussion of the overlap between claims under section 2254 and under 42 U.S.C. § 1983, see *Lee v. Winston*, 717 F.2d 888, 892-93 (4th Cir. 1983), *cert. denied*, 104 S. Ct. 1924 (1984).

391. 28 U.S.C. § 1361 (1982). *E.g.*, *United States v. Huss*, 520 F.2d 598, 604-05 (2d Cir. 1975); *Stover v. Carlson*, 413 F. Supp. 718, 721 (D. Conn. 1976).

tional bases.³⁹² In addition, the forms demand answers to a series of questions, some of which are irrelevant to many claims.³⁹³ Further, the forms direct applicants to order the information in an unsympathetic light, and even when prisoners are represented by counsel, some courts require that the forms, rather than or in addition to documents drafted by lawyers, be filed.³⁹⁴

Finally, the forms do not explain the import of the questions posed, and the small space provided for answers limits prisoners' opportunities to explain themselves. One circuit court recently disapproved of a trial court's dismissal of a habeas petition based upon an answer on a form. Noting that the forms' instructions require "brief" responses and that space limitations are imposed, the Seventh Circuit concluded that summary dismissal, predicated upon the meager information elicited by the form, was improper.³⁹⁵

The Rules, combined with amendments to the Federal Magistrates Act, have also changed the personage of the decisionmaker in many habeas cases; magistrates are now authorized to discharge the "duties" of judges in rendering habeas decisions.³⁹⁶ By this curious twist, some magistrates sit to review the prior work of both state and federal judges. Congress and the Court have thus developed a radical procedural model; hierarchically inferior actors may review and correct the work of their superiors, with the limitation that magistrates' habeas recommendations and proposed findings are not final until filed by district judges.³⁹⁷ But the authority granted to magistrates in habeas corpus cases is disproportionate to that granted in the rest of their work, most of which reflects the traditional hierarchy. Magistrates are exceedingly dependent upon federal judges, who select, appoint, and discharge magistrates, and who determine what kinds of cases magistrates decide and whether to adopt magistrates' recommendations.³⁹⁸ Authorizing review of judges' work by magistrates, the lowest tier available, de-

392. *E.g.*, Section 2255 Rules, *supra* note 73, at appendix of forms.

393. For example, the question, "Did you testify at the trial?", *id.* at question 7, has no relevance to claims about a conviction by a guilty plea or to claims about alleged sentencing errors.

394. *See* C.D. CAL. R. 26.1 (requiring petition for writ of habeas corpus or motion filed under 28 U.S.C. § 2255 to be submitted on the forms approved and supplied by the court); W. Genego, *supra* note 389.

395. *Robinson v. Fairman*, 704 F.2d 368, 371 (7th Cir. 1983). *See also* Oklahoma Form, *supra* note 388 (disallowing extra pages, briefs, or arguments).

396. Section 2254 Rules, *supra* note 375, at Rule 10; Section 2255 Rules, *supra* note 73, at Rule 10; Act of Oct. 21, 1976, Pub. L. No. 94-77, 90 Stat. 2729, 2729 (current version at 28 U.S.C. § 636(b) (1982)).

397. 28 U.S.C. § 636(b)(1)(B) (1982).

398. *Id.* §§ 631, 636(b)(1).

creates the stature of the task and implicitly assumes that corrections will occur infrequently.³⁹⁹

3. *The Growing Relevance of Time*

a. *Revisionism*. A last innovation of the Rules parallels recent caselaw developments. The Rules provide two additional grounds for dismissal of habeas claims: delayed filings causing "prejudice" to the government, and "successive" petitions.⁴⁰⁰ Although the Advisory Committee Note to Rule 9 states that the Rule only codifies prior habeas case law,⁴⁰¹ lower courts have interpreted Rule 9 as authorizing further restrictions on the availability of the writ.⁴⁰² These new limitations are congruent with the concerns that dominate Supreme Court case law. Finality is prized, first tier decisionmaking is protected from reconsideration, and litigant autonomy is invoked to justify findings of waiver or forfeiture of a merits review.

Rule 9(a) permits a dismissal if three conditions are met: (1) the petition is filed belatedly; (2) "it appears that the government has been prejudiced in its ability to respond"; and (3) the petitioner shows that the petition "is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circum-

399. Habeas petitioners succeed less often when magistrates, rather than federal district judges, review prisoners' habeas filings. Allen, Schachtman & Wilson, *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 726-27 (1982) [hereinafter cited as RUTGERS STUDY]. See also Hayes v. Cowan, 547 F.2d 42, 43 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (a case dismissed initially by a magistrate as "patently without merit" but ultimately decided on the merits by the Supreme Court), *reh'g denied*, 435 U.S. 918 (1978).

400. Section 2254 Rules, *supra* note 375, at Rules 8(b), 9(a); Section 2255 Rules, *supra* note 73, at Rules 8(b), 9(a).

401. Section 2254 Rules, *supra* note 375, at Rule 9 Advisory Committee Note; Section 2255 Rules, *supra* note 73, at Rule 9 Advisory Committee Note.

402. See Pacelli v. United States, 588 F.2d 360, 365 (2d Cir. 1978) (laches not specifically applicable to section 2255 motions, but delays can be taken into account), *cert. denied*, 441 U.S. 908 (1979). But see Section 2255 Rules, *supra* note 73, at Rule 9 Advisory Committee Note (precedent for the inclusion of the laches concept); Davis v. Adult Parole Authority, 610 F.2d 410, 415 (6th Cir. 1979) (doctrine of laches had previously existed in habeas law but had not been so labeled).

Several Supreme Court cases conclude that delayed habeas filings do not preclude relief. See Heflin v. United States, 358 U.S. 415, 420 (1959) (Stewart, J., concurring) (in section 2255 proceedings, "as in habeas corpus, there is no statute of limitations, no *res judicata*, and . . . the doctrine of laches is inapplicable.") (emphasis in original); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 123 (1956) (citing several cases in which filings were made seven, eight, or eighteen years after conviction and reversing Pennsylvania's refusal to entertain a claim of coerced confession filed eight years after conviction). See also McKinney v. United States, 208 F.2d 844, 847 (D.C. Cir. 1953) (delay of 15 years not excessive because "tardiness is irrelevant").

stances prejudicial to the state occurred.”⁴⁰³ The Rule is deliberately ambiguous on several counts. First, Rule 9(a) is unclear about the length of time that constitutes a delay. The drafters of the Rule had included a presumption of prejudice after five years, but, according to a committee report, Congress concluded that it was “unsound policy to require [that] the defendant . . . overcome a presumption of prejudice.”⁴⁰⁴ As a result, Congress deleted the specifics about what interval constitutes a “delay.” But the refusal to specify has not obviated the problem of determining which time periods count as “delay.”

The Rule has also prompted a problem of measurement. Some state prosecutors have claimed that the time begins to run as soon as a criminal defendant is convicted.⁴⁰⁵ A few courts have rejected the flat inclusion of all time between conviction and the filing of a habeas. Instead, courts have counted as “delay” only the interval from the date a new legal right was announced (such as the right to counsel in certain misdemeanor offenses) to the time the habeas petition was filed.⁴⁰⁶ Other courts have been faced with requests to count only the years after a defendant learned that a conviction could cause harm, such as when a suspended sentence is revoked, or a prior conviction is to be used for enhancement of punishment for a subsequent offense.⁴⁰⁷

Many Rule 9(a) opinions have not carefully examined the circumstances surrounding the “delay in filing” to determine which years may justly be counted against a claimant.⁴⁰⁸ To the extent that, by eliminating a specific time figure, Congress thought it had avoided a “presumption of prejudice,” case law has not borne out its aspiration. Further, given the documentation on the number of years consumed in exhaust-

403. Section 2254 Rules, *supra* note 375, at Rule 9(a); Section 2255 Rules, *supra* note 73, at Rule 9(a) [hereinafter cited as Rule 9(a)].

404. HOUSE COMM. ON THE JUDICIARY, RULES ON HABEAS CORPUS, H.R. REP. NO. 1471, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2478, 2481 (footnote omitted).

405. *Marks v. Estelle*, 691 F.2d 730, 732 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 3090 (1983).

406. *Alexander v. Maryland*, 719 F.2d 1241, 1245-46 (4th Cir. 1983) (time to consider when reviewing challenge to conviction is not from time conviction became final to time of filing but from time new legal right was announced); *Marks v. Estelle*, 691 F.2d at 732-33.

407. *E.g.*, *Arnold v. Marshall*, 657 F.2d 83 (6th Cir. 1981) (sentence enhancement), *cert. denied*, 455 U.S. 922 (1982).

408. *See, e.g.*, *Tippett v. Wyrick*, 680 F.2d 52, 54 (8th Cir.) (entire ten year period from conviction to filing included), *cert. denied*, 103 S. Ct. 350 (1982). In *Tippett*, the petitioner's counsel had died three years after the conviction, and, since the claim involved a guilty plea coerced by the attorney, the attorney's death, not the elapsed time, was the source of the “prejudice” to the government. *Id.* at 53. Although the delay itself did not cause the prejudice, as required by Rule 9(a), the court nevertheless dismissed the petition under Rule 9(a). *Id.* at 54.

ing state remedies,⁴⁰⁹ Congress may have been shortsighted in not providing greater guidance.⁴¹⁰

The second ambiguity in the Rule relates to the question of prejudice. The Rule requires a court that finds delay to ask a second question: whether, because of the delay, the government has been "prejudiced in its ability to respond." Once again, respondents to habeas petitions have offered diverse interpretations of what constitutes prejudice. Some have argued that "prejudice in its ability to respond" should be interpreted to include situations in which the government can show it would have difficulty retrying an individual. The Ninth Circuit flatly rejected this interpretation as contrary to the "plain meaning" of "ability to respond."⁴¹¹ Chief Justice Burger, commenting upon the denial of certiorari in that case, argued that, with narrow exceptions, Rule 9(a) should be construed to allow summary dismissal of habeas petitions when a state can establish that the "lapse of time has made reprosecution impossible."⁴¹²

The Chief Justice persuaded drafters of the Habeas Rules of the merits of his position. In August of 1983, the Advisory Committee proposed an amendment to Rule 9(a).⁴¹³ That amendment would authorize the dismissal of a habeas petition if a state could show prejudice in its ability "to retry" the petitioner.⁴¹⁴ The proposal incorporates

409. See Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 27 (1977) (typical to spend five years or more exhausting state remedies in Iowa). For an example of a four year delay in processing transcripts for appeal, see *Connecticut v. Johnson*, 103 S. Ct. 969, 973 (1983). Further, the "total exhaustion" rule, as construed in *Rose v. Lundy*, 455 U.S. 509, 522 (1982), obliges federal courts to send prisoners who submit partially exhausted claims back to state court—thereby taking more time.

410. Cf. Habeas Corpus Legislation of 1983, *supra* note 144, at 2 (proposed one year statute of limitations would exclude from the statute the time spent exhausting state judicial remedies).

411. *Spalding v. Aiken*, 684 F.2d 632, 633-34 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1795 (1983).

412. 103 S. Ct. at 1797 (Burger, C.J., statement concerning the denial of certiorari).

413. In August of 1983, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States circulated the proposals for comments. 98 F.R.D. 337 (1983) [hereinafter cited as 1983 Proposed Amendment to Rule 9(a)]. The Advisory Committee met in the spring of 1984 to review the proposal. In the summer of 1984, the Advisory Committee sent its recommendations about rule changes to the Standing Committee for review. The Standing Committee recommends rule amendments to the Judicial Conference, which, in turn, sends its recommendations to the United States Supreme Court. The Court promulgates final rules that become effective absent congressional action. 18 U.S.C. §§ 3771, 3772 (1982); 28 U.S.C. § 2072 (1982).

The proposed amendment discussed here is the Advisory Committee's preliminary draft circulated in August of 1983. That proposal was under reconsideration as this article went to press.

414. 1983 Proposed Amendment to Rule 9(a), *supra* note 413, 98 F.R.D. at 413.

“sandbagging” concerns. As the Chief Justice explained: “a prisoner has an incentive to ‘store up’ technical challenges to his conviction and then press his claims seriatim when reconsideration of his allegations is difficult and when reprosecution is impossible. . . .”⁴¹⁵

Such a rule could presumably have barred Charles Noia from ever having his claim heard on the merits, for Rule 9(a)’s concern regarding “prejudice” relates solely to the injury suffered by the government. Even under the current Rule, judges have no mandate to weigh the balance of hardships. Rather, the only defense to government prejudice claims is that the prisoners “could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.”⁴¹⁶ Thus, Rule 9, like the *Sykes-Isaac* test, could provide the basis for dismissal regardless of the nature of the claims. The factually or legally innocent, as well as the guilty, may be precluded, and the risk of error is placed upon the petitioners.⁴¹⁷

Cases interpreting Rule 9 have found delay, prejudice, and no “excuse” in a wide variety of circumstances, many of which are beyond prisoners’ control, if not their imaginations. It seems unlikely that inmates would wait to file habeas petitions until after a building with relevant records has burned or an attorney’s files have been lost.⁴¹⁸ Not only are these events uncertain, they are frequently beyond prisoners’ knowledge. An assumption that such events are the predicates to filing habeas claims is troublesome, for it not only assumes knowledge of occurrences outside of prison but also sophistication about legal claims. The sandbag theory simply does not explain many cases—such as one in which an inmate filed an ineffective assistance of counsel claim *seven* years after the death of the allegedly inadequate lawyer.⁴¹⁹ If the in-

415. *Spalding v. Aiken*, 103 S. Ct. at 1797 (Burger, C.J., statement concerning the denial of certiorari) (footnote omitted).

416. Section 2254 Rules, *supra* note 375, at Rule 9(a); Section 2255 Rules, *supra* note 73, at Rule 9(a). The provision appears to protect those petitioners seeking habeas relief based upon a change in law or upon newly discovered evidence. Section 2254 Rules, *supra* note 375, at Rule 9 Advisory Committee Note. That Note also states that Rule 9(a) dismissals are “permissive rather than mandatory.”

417. *Cf. Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1148-63 (1980) (risk of error analysis in death penalty cases).

418. *See, e.g., Moore v. Smith*, 694 F.2d 115, 118 (6th Cir. 1982) (destroyed records), *cert. denied*, 103 S. Ct. 1442 (1983); *Tippett v. Wyrick*, 680 F.2d 52, 54 (8th Cir.) (absent witnesses, lack of records because no appeal taken, and futility of appeal no excuse), *cert. denied*, 103 S. Ct. 350 (1982); *Cotton v. Mabry*, 674 F.2d 701, 705 (8th Cir.) (lost file), *cert. denied*, 103 S. Ct. 374 (1982); *Mayola v. Alabama*, 623 F.2d 992, 999-1000 (5th Cir. 1980) (lost *voir dire* transcripts), *cert. denied*, 451 U.S. 913 (1981).

419. *Tippett v. Wyrick*, 680 F.2d at 54.

mate had been waiting until a retrial would be difficult or his claim uncontradicted, why did he wait *so many* years after the death of his attorney?

When Rule 9(a) is applied in section 2255 cases, it provides yet another example of how the language of that section is ignored and the barriers to habeas relief are raised. Congress' choice of words in section 2255 indicates that it rejected both legal and equitable statutes of limitations for federal prisoners seeking relief under that section. The statute states that a section 2255 motion "may be made at any time." Rule 9(a)'s application in section 2255 cases, however, seems to ignore the literal meaning of these words.⁴²⁰

If Rule 9 is revised to authorize dismissals because of prejudice to the state's ability to retry petitioners, almost every habeas case will be eligible for dismissal. After trial and before habeas review, prisoners need time to obtain transcripts, exhaust state remedies, and gather information of alleged illegalities. The proposed Rule amendment makes no mention of exempting any of this time from a "delay" calculation. Since "delay" will exist by definition, and since "prejudice in its ability to retry" could be defined as states' difficulties in relocating witnesses, marshalling evidence, and recommitting resources to prosecutions already completed, prejudice may fairly be alleged in most cases. Habeas corpus will be confined, indeed obliterated, by a statute of limitations constructed to cover almost every case.

What is the logic behind such a rule? That the right to reconsideration of allegedly unconstitutional convictions extinguishes over time? That the alleged unconstitutionality itself diminishes over time? That inept litigants and a slow court system provide the appropriate rationales for refusals to review convictions? Adding "prejudice in the state's ability to retry" will exacerbate arbitrariness in determining which inmates receive a merit review.

b. *Differentiation*: Dismissal for a belated first filing is not the only obstacle Rule 9 places before habeas applicants. In a second subdivision, Rule 9 states that courts may dismiss "successive" petitions if

420. The literal meaning of section 2255 is ignored in other situations. See discussion of *Hill v. United States*, *supra* notes 316-21 and accompanying text. See also *Sanders v. United States*, 373 U.S. 1, 12-15 (1963) (interpreting the "at any time" language of section 2255 not to require courts to entertain a second or successive motion for relief and concluding that "§ 2255's language cannot be taken literally"; but holding that section 2255 would be ineffective if it imported res judicata principles into federal prisoners postconviction remedies).

the first has been decided "on the merits."⁴²¹ Further, even if "new and different grounds" are alleged, courts may dismiss upon a finding that the failure to assert such grounds earlier constituted an "abuse of the writ."⁴²²

The innovation of Rule 9(b) is not that it permits dismissal of claims previously decided on the merits; that principle had been established by case law⁴²³ and statutes.⁴²⁴ Rule 9(b)'s innovation is that it authorizes dismissal of claims *never before* litigated; dismissal is permissible if a judge finds that the failure to raise "new and different claims" was an "abuse of the writ."⁴²⁵

What is the abuse? The underlying assumption is, once again, that prisoners recognize but withhold viable claims because over time, either respondents will have difficulty establishing the invalidity of their claims or the possibility of retrial diminishes. Since many habeas applicants are *pro se*,⁴²⁶ Rule 9(b) also assumes that the litigants them-

421. Section 2254 Rules, *supra* note 375, at Rule 9(b); Section 2255 Rules, *supra* note 73, at Rule 9(b) [hereinafter cited as Rule 9(b)].

422. *Id.*

423. *Sanders v. United States*, 373 U.S. 1, 15 (1963) held that "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application," could relief under section 2255 be denied. The *Sanders* principle has been applied to section 2254 cases as well. *Paprskar v. Estelle*, 612 F.2d 1003, 1005 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980).

424. 28 U.S.C. § 2255 states "the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." *Id.* § 2244(a) provides for finality in state habeas cases; it authorizes dismissal of a prior determination of the "legality" of detention has been made, no new ground "not heretofore presented and determined" is presented, and the "ends of justice" do not require another inquiry. *See also id.* § 2244(b)-(c).

425. Rule 9(b), *supra* note 421. Rule 9(b) permits judges to include *res judicata* concepts when defining "abuse of the writ." *See, e.g., Jones v. Estelle*, 722 F.2d 159, 165-67 (5th Cir. 1983) (en banc) (abuse of the writ because petitioner, represented by counsel, had not raised all claims earlier; inadequate counsel no excuse). *Cf. Price v. Johnston*, 334 U.S. 266, 291 (1948) (dismissal of three petitions does not justify dismissal of a fourth, raising a new claim, if there was justification not to raise that claim earlier).

Courts have also relied on Rule 9(b) to dismiss cases in which no prior evidentiary hearing was held. *See United States v. Kearney*, 682 F.2d 214, 217-18 (D.C. Cir. 1982) (upholding denial of section 2255 petition when denial was based solely upon consideration of files, record of case, and district court opinion). *Cf. Morgan v. United States*, 696 F.2d 1239, 1240 (9th Cir. 1983) (Rule 9(b) dismissal proper only if first decision to dismiss made after an evidentiary hearing). *But see Paprskar v. Estelle*, 612 F.2d 1003, 1005 (5th Cir.) (interpreting Rule 9(b) as not changing habeas corpus standard), *cert. denied*, 449 U.S. 885 (1980).

426. P. ROBINSON, *supra* note 216, at 9-10 (79.2% of cases reviewed in the study were filed *pro se*); RUTGERS STUDY, *supra* note 399, at 714. *See also Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 611 (1979) (majority of prisoner civil rights litigants also *pro se*). *But see Shapiro, supra* note 77, at 343 (counsel was appointed or present in 45% of the habeas actions studied). Most of the Habeas Rules implicitly

selves, and not attorneys, are the "sandbaggers" who have decided that the chances of late success outweigh the disadvantages of waiting, usually in prison,⁴²⁷ for the payoff.⁴²⁸ The frequent absence of counsel, however, makes other assumptions plausible: that failures to include all allegations in first petitions are due to prisoners' lack of legal knowledge or to inadvertence.

To the extent that sandbagging is a realistic concern, the Rule might have been drafted to penalize the sandbagger and not the unwitting litigant. Deliberate bypass could have been the standard for "abuse of the writ." The Rule, however, provides no such constraints and, under its mandate, courts have dismissed petitions without making findings that the prisoners actually recognized but deliberately withheld claims.⁴²⁹

Rule 9(b) received Supreme Court approval in *Barefoot v. Estelle*,⁴³⁰ a recent death penalty case exhibiting the Burger Court's concerns for finality. In 1978, a Texas jury found Thomas Barefoot guilty of murdering a police officer, and Barefoot was sentenced to death. In 1980, the Texas Court of Appeals affirmed the lower state court, but the

assume that habeas petitions and section 2255 motions are filed *pro se*. See, e.g., Section 2254 Rules, *supra* note 375, at Rule 2; Section 2255 Rules, *supra* note 73, at Rule 2 (mandating the use of forms designed for nonlawyers); Section 2254 Rules, *supra* note 375, at Rules 6(a), 8(c); Section 2255 Rules, *supra* note 73, at Rules 6(a), 8(c) (providing for appointment of counsel to conduct discovery and evidentiary hearings).

427. Not all habeas petitioners are incarcerated. The Supreme Court has interpreted the "in custody" requirement to include those on bail and on parole. *E.g.*, *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (petitioner released on own recognizance "in custody" for purposes of habeas corpus); *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963) (state prisoner under custody and control of state parole board "in custody" pursuant to section 2241). Some petitioners' claims, however, have been mooted by their release from the custody of a correctional department. *E.g.*, *Lane v. Williams*, 455 U.S. 624, 631 (1982).

428. The Supreme Court has created one incentive for state prisoners to withhold claims deliberately. Under the Supreme Court's recent interpretation of the exhaustion requirement, state prisoners' petitions cannot be decided in federal court unless all claims raised have first been presented to state courts. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). Thus, rather than waiting in prison until all claims have been exhausted, a prisoner may want to withhold unexhausted claims in the hopes of winning release on exhausted claims. *Id.* at 529 (Blackmun, J., concurring). On the other hand, Rule 9(b) can be applied to penalize such an approach. See *Jones v. Estelle*, 722 F.2d 159, 168-69 (5th Cir. 1983) (en banc) (*Rose v. Lundy* cannot be avoided by withholding unexhausted claims; Rule 9(b) dismissal proper).

429. See, e.g., *Jones v. Estelle*, 699 F.2d 793, 794 (5th Cir.) (district court finding of intentional withholding of claim unsupported by evidence), *rev'd en banc*, 722 F.2d 159 (5th Cir. 1983); *Mays v. Balkcom*, 631 F.2d 48, 51 (5th Cir. 1980) (petitioner contended sole reason certain claims were not included in first petition was that he had learned of new grounds after filing first application; district court found abuse of writ); *Frazier v. Harrison*, 537 F. Supp. 17, 21 (E.D. Tenn. 1981) (inmate might have deliberately withheld claim), *aff'd*, 698 F.2d 1219 (6th Cir. 1982).

430. 103 S. Ct. 3383, *reh'g denied*, 104 S. Ct. 209 (1983).

United States Supreme Court stayed Mr. Barefoot's execution pending its decision on a writ of certiorari, which was subsequently denied.⁴³¹ The execution was stayed a second time while Mr. Barefoot first sought state and then federal habeas corpus relief. After losing in the federal district court, Mr. Barefoot requested permission to appeal.⁴³² The district court granted certification, and Mr. Barefoot's lawyers filed a notice of appeal in the Fifth Circuit in November of 1982. Texas set January 25, 1983 as the new date for execution.⁴³³

On January 14, eleven days prior to the scheduled execution, Mr. Barefoot's attorneys requested a stay pending determination of the habeas appeal. On January 17th, the Fifth Circuit responded by informing the parties that they would have "unlimited opportunity to brief and argue the merits"⁴³⁴ on January 19th. The day after oral argument, the Fifth Circuit denied the stay and stated that, upon a review of the claims, the petition had no "substantial merit."⁴³⁵

Mr. Barefoot thereafter obtained a stay from the Supreme Court, which agreed to consider the procedural adequacy of the Fifth Circuit's actions. On July 6, 1983, the Supreme Court concluded that the Fifth Circuit's "course" was "within the bounds of our prior decisions"⁴³⁶ and affirmed the district court's denial of habeas relief. The Court did not entirely endorse the Fifth Circuit's behavior; Justice White's majority opinion noted that the preferable route for the circuit would have been to have affirmed the lower court on the merits as well as deny the stay. But a majority of the Justices declined to insist upon such formalism.

Barefoot is notable because the Court used it as an occasion to instruct federal courts about the "proper procedures" for entertaining habeas applications from the "increasing number of death-sentenced petitioners."⁴³⁷ First, the Court cautioned against leniency in granting habeas appeals filed by death row petitioners: "the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certifi-

431. *Barefoot v. Texas*, 453 U.S. 913 (1981).

432. 28 U.S.C. § 2253 (1982); FED. R. APP. P. 22(b). For interpretation of the certificate requirement, see *Davis v. Jacobs*, 454 U.S. 911, 917 (1981) (Rehnquist, J., dissenting) (congressional purpose in requiring certificate of probable cause as prerequisite to appeal in habeas proceeding is to terminate frivolous appeals).

433. 103 S. Ct. at 3390.

434. *Id.*

435. *Barefoot v. Estelle*, 697 F.2d 593, 600 (5th Cir. 1983).

436. 103 S. Ct. at 3392.

437. *Id.* at 3393.

icate [of probable cause]."⁴³⁸ Second, while the Court insisted that courts must decide the merits of appeals, the Court approved expedited appellate procedures, including the consolidation of decisions on stays and the merits. Third, the Court invoked Rule 9(b) and invited lower courts to deny some death-sentenced habeas petitioners' "second and successive"⁴³⁹ federal habeas corpus petitions. "[E]ven where it cannot be concluded that a petition should be dismissed under Rule 9(b), it would be proper for the district court to expedite consideration of the petition."⁴⁴⁰ Finally, the Court warned that, in ruling on requests for stays filed concurrently with writs of certiorari, the Court itself would place "considerable weight" on the decisions of the appellate courts regarding stay applications.⁴⁴¹

Barefoot, and several subsequent death penalty cases,⁴⁴² illustrate the same concerns that animate both Rule 9 and the rest of the Supreme Court majority's view of habeas corpus—exasperation with revisionism. *Barefoot* is not, however, a redundant example of Supreme Court efforts to narrow procedural opportunities. *Barefoot* is within a category of cases formerly thought unique and, in some sense, immune from the value decisions made in other parts of the docket. *Barefoot* is a death penalty case, and this country has a long history of differentiating such cases, of providing extra process to protect the sentenced prisoner.⁴⁴³ In *Barefoot*, however, only a shadow of special concern remains; Justice White's majority decision in *Barefoot* has a slightly moderated tone. Unlike Justice O'Connor in *Frady* and Justice Rehnquist in *Sykes*, who saw the trial as the definitive event, Justice White discussed appeals as an important part of the decisionmaking process: "direct appeal is the primary avenue for review of a convic-

438. *Id.* at 3394.

439. *Id.* at 3395.

440. *Id.*

441. *Id.* Cf. A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standards 21-2.5(c) (Supp. 1982) (execution should be stayed automatically when an appeal is instituted).

442. *E.g.*, Woodard v. Hutchins, 730 F.2d 953 (4th Cir.), stay vacated, 104 S. Ct. 752 (1984) (per curiam); *id.* at 752-53 (Powell, J., concurring) (arguing that the lower courts need not have entertained the petition because it was a successive petition, constituting an abuse of the writ); *id.* at 755 (Brennan, J., dissenting), (concerned about the "indefeasible . . . rush to judgment"); Autry v. Estelle, 706 F.2d 1394 (5th Cir. 1983), cert. denied sub nom. Autry v. McKaskle, 104 S. Ct. 1458, 1459 (1984) (Marshall & Brennan, JJ., dissenting) ("[T]his case . . . is part of a pattern of recent decisions in each of which the Court has shown an unseemly desire to bring litigation in a capital case to a fast and irrevocable end."), stay denied, cert. denied, 104 S. Ct. 1462 (1984) (Brennan & Marshall, JJ., dissenting).

443. See Radin, *supra* note 417, at 1150 (special consideration should be undertaken in death penalty cases).

tion or sentence, and death penalty cases are no exception."⁴⁴⁴ But, with the conclusion of appellate proceedings and the denial of certiorari, "a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited."⁴⁴⁵

After *Barefoot*, death penalty cases still command special treatment. To the degree that differentiation remains, however, it cuts against extra protection for the death-sentenced prisoner.⁴⁴⁶ In non-capital habeas appeals and in most civil appeals, appellants typically do not need quick appellate decisionmaking and do not request stays. As a consequence, appellants are given time, including occasional extensions, to compile information from often voluminous records and to prepare briefs. Death row appellants, however, have no such luxury. If states set execution dates before the expiration of the ordinary appellate briefing schedule, death penalty petitioners must request stays and risk losing the time for thorough appellate presentation. Capital punishment habeas litigants may now have less time to prepare their appeals than other litigants.⁴⁴⁷

c. *Litigants' autonomy*: As in other habeas cases, the *Barefoot* majority implicitly assumed that many capital petitions are frivolous, are filed to stall for time, and include claims deliberately withheld from previous habeas petitions.⁴⁴⁸ Litigant autonomy is once again twisted into sandbagging, and this sandbagging argument is premised on the belief that death-sentenced prisoners have even greater incentives to sandbag than do other prisoners. To substantiate this belief, one must assume that (a) the probability of retrial diminishes over time; (b) death-sentenced prisoners believe that, if retried, they are likely to be

444. 103 S. Ct. at 3391.

445. *Id.*

446. *See, e.g.,* *Wainwright v. Adams*, 104 S. Ct. 2183, 2183-84 (1984) (vacature of stay) (Marshall, J., dissenting) (arguing against the Court's granting an application to vacate a stay of execution "after having had less than a day to consider the judgment of the Court of Appeals The haste and confusion surrounding this decision is degrading to our role as judges"; and describing the Court's denial of his own "motion to defer its action for 24 hours" so that the Justice could "write a more elaborate dissent"); *Autry v. McKasle*, 104 S. Ct. 1458, 1459 (1984) (denial of certiorari) (Marshall, J., dissenting) ("[T]he Court is dramatically expediting its normal deliberative processes to clear the way for an impending execution.").

447. The trend, begun in *Barefoot*, to treat capital cases like other kinds of cases, continued when the Court decided *Strickland v. Washington*, 104 S. Ct. 2052 (1984) (sixth amendment claims of ineffective assistance of counsel at capital sentencing subjected to the same standard as those made against trial counsel in noncapital cases).

448. *Barefoot v. Estelle*, 103 S. Ct. at 3405.

reconvicted, but not sentenced to death; (c) death-sentenced prisoners would prefer to spend a life in prison rather than be executed; (d) death-sentenced prisoners have knowledge of several possible claims and of the likelihood of the success of each; (e) death-sentenced prisoners have control over their (usually) volunteer counsel and direct their attorneys as to which claims to file and in what order; and (f) death-sentenced prisoners are able to predict the interval from sentencing to execution so as to decide when to file the "best" claims. Under such conditions, it would indeed be possible to demonstrate that a rational, utilitarian death-sentenced prisoner would be more likely to "sandbag" than would a utilitarian prisoner not sentenced to death. However, many of the foregoing assumptions are highly problematic if not false. Gary Gilmore's case alone casts doubt upon at least two of these assumptions: that such prisoners prefer life in prison and exercise great control over their attorneys.⁴⁴⁹

Moreover, the case law on death-sentenced prisoners suggests that the underlying premise, that most claims filed are frivolous, is itself untrue. As Justice Marshall's dissent noted, of the thirty-four capital habeas cases decided on the merits by federal appellate courts since 1976, petitioners prevailed in twenty-three, or seventy percent of the cases.⁴⁵⁰ In the Fifth Circuit alone, fifteen of twenty-one prisoners succeeded on appeal.⁴⁵¹ But arguments about probabilities, like moral claims about the special nature of death penalty cases, did not move the *Barefoot* majority, which insisted that "the administration of justice ought not to be interfered with on mere pretexts."⁴⁵²

d. *Finality*: When the strictures of Rule 9 are read in conjunction with the *Sykes*, *Isaac*, and *Frady* holdings, time or "delay" emerges as central to the habeas decisionmaking process. *Sykes* and *Isaac* mandate that objections be made at trial or on appeal, even when the claims appear far fetched under governing law. Under *Frady*, the penalty for failure to raise such claims is the almost insurmountable test of "actual and substantial prejudice." Rule 9(a) demands that

449. *Gilmore v. Utah*, 429 U.S. 1012, 1015 n.4 (1976) (death-sentenced prisoner withdrew request for Supreme Court review and fought his attorneys, who wanted to pursue the litigation despite the client's wishes). See also *Jones v. Barnes*, 103 S. Ct. 3308, 3314 (1983) (nothing in the Constitution requires appointed counsel for an indigent defendant "to raise every colorable claim suggested by the client").

450. *Barefoot v. Estelle*, 103 S. Ct. at 3405 (Marshall, J., dissenting) (relying on research by the NAACP Legal Defense and Education Fund, Inc.).

451. *Id.*

452. *Id.* at 3391 (citation omitted).

postconviction claims be made promptly, while Rule 9(b) counsels that claims not raised in a first postconviction effort may be precluded.

Since delay is generally understood as "bad,"⁴⁵³ the attempted elimination of delay in habeas proceedings might be understood as "good," as appropriately installing finality in an arena previously impervious to such concerns. As Chief Justice Burger, a principal proponent of limiting habeas applications, maintains, the "privileges of the writ of habeas corpus are not unlimited."⁴⁵⁴ The Chief Justice has criticized habeas because it "undermines . . . [finality], degrades the importance of trials, frustrates penological goals and drains the resources of the judicial system."⁴⁵⁵ He has also argued that the lack of finality of convictions prevents prisoners from ever "making peace" with society,⁴⁵⁶ and he has proposed time limits and other preclusion rules as ameliorative.

But the difficulty with the various delay-based preclusion rules is that they instill enormous arbitrariness into the postconviction process. A poignant example of that arbitrariness and of the distance between the Warren and Burger Courts' procedural models is a recent Eleventh Circuit case, *Smith v. Kemp*.⁴⁵⁷ In *Smith*, three individuals were involved in a murder-for-hire scheme that resulted in two deaths. The state prosecutor apparently offered the individual against whom it had the strongest case a bargain in exchange for his agreement to testify against the others.⁴⁵⁸ He accepted the deal, testified against the others, and received a prison term of several years with parole eligibility.⁴⁵⁹ The "mastermind" of the crime, Machetti, went to trial and lost.⁴⁶⁰ However, in her state habeas petition, her attorneys argued that the

453. Commentators have begun to understand the issue of delay as more complex; the new nomenclature is "pace," and questions are raised about how long cases "should" take. See, e.g., J. ADLER, W. FELSTINER, D. HENSLER & M. PETERSON, *THE PACE OF LITIGATION: CONFERENCE PROCEEDINGS v-xiii* (1982) (reporting proceedings on conference regarding the pace of legal proceedings and society's dissatisfaction with "delay"); Church, *The "Old and the New" Conventional Wisdom of Court Delay*, 7 JUST. SYS. J. 395, 396 (1982) (analyzing and evaluating recent studies of court delay).

454. *Spalding v. Aiken*, 103 S. Ct. 1795, 1796 (1983) (Burger, C.J., statement concerning the denial of certiorari).

455. *Id.* at 1797.

456. *Id.* See also *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting) (also claiming that finality of convictions was necessary for prisoners to make peace with society).

457. 715 F.2d 1459 (11th Cir.), *cert. denied*, 104 S. Ct. 510 (1983).

458. *Id.* at 1463-66, 1473-76.

459. *Id.* at 1476.

460. *Id.* at 1462; *Machetti v. Linahan*, 679 F.2d 236, 237 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 763 (1983).

jury pool from which her jury had been selected was unconstitutional; the custom had been to accept automatically requests by women for exclusion.⁴⁶¹ Although Machetti lost in state court,⁴⁶² she succeeded in her federal habeas claim because of the Supreme Court rule that, when a state habeas court decides the merits of a claim not raised at trial, the federal court may do likewise.⁴⁶³

The third defendant, Smith, was not so lucky. He had also gone to trial in the same county, at about the same time as Machetti, and the same jury selection procedures were in effect. Although five days before his trial, the Supreme Court had held per se exclusions of women from jury pools unconstitutional,⁴⁶⁴ Smith's attorneys failed to object to the jury's composition at trial and failed to raise the claim in state habeas corpus proceeding or in the first federal habeas proceeding.⁴⁶⁵ As a result, relying on *Sykes, Isaac*, and Rule 9(b), the Eleventh Circuit held that Smith had properly been precluded from arguing the issue in his second habeas petition.⁴⁶⁶ As the dissent described the outcome: "because his lawyers did not timely raise the unconstitutionality of the jury pool, he faces death by electrocution. . . . Judicial economy . . . dictate[s] that we not reach the [issue]. . . ."⁴⁶⁷ On December 15, 1983, Smith was executed.⁴⁶⁸

Smith is a replay of *Fay v. Noia*, twenty years later. Codefendants had identical claims about why convictions were constitutionally invalid. One codefendant had and used an open procedural avenue and succeeded, while the other did not. Twenty years ago, the United States Supreme Court found that a state's refusal to treat codefendants consistently was offensive. Now, under new Supreme Court case law, the federal courts are authorized to make such distinctions, even when the "grisly choice"⁴⁶⁹ is that one codefendant lives and another dies.

When discussing *Fay v. Noia*, I asked: what if the second decision center had values no different from the first? Is a procedural model

461. 715 F.2d at 1469; 679 F.2d at 238.

462. *Smith v. State*, 236 Ga. 12, 16, 222 S.E.2d 308, 313, *cert. denied*, 428 U.S. 910, *reh'g denied*, 429 U.S. 874 (1976), *reh'g denied*, 429 U.S. 1055 (1977).

463. 679 F.2d at 238 n.4. *Cf.* *United States v. Frady*, 456 U.S. 152, 183-84 (1981) (Brennan, J., dissenting) (complaining of majority's refusal to permit the same collateral review possibilities for federal prisoners).

464. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

465. 715 F.2d at 1469.

466. *Id.* at 1469-71.

467. *Id.* at 1476 (Hatchett, J., concurring in part and dissenting in part).

468. *N.Y. Times*, Dec. 16, 1983, at A23, col. 1.

469. *Fay v. Noia*, 372 U.S. 391, 440 (1963).

that permits duplication still worthwhile? My affirmative answer assumed that the second forum would reconsider the merits of the first's decision. However, if the federal courts rubber stamp most state court decisions without deciding the constitutional claims, the ritual begins to look grotesque. My criticism is that recent Supreme Court procedural pronouncements so narrow the federal inquiry that any semblance of coherence about who wins and loses on the merits of federal constitutional claims is obliterated. Arbitrariness becomes pervasive; rationality, norm enforcement, and consistency are all lost.

D. TWENTY YEARS: A RETROSPECTIVE

1. *Documentation of the Changes*

During the years between *Fay v. Noia* and *Sykes, Isaac, and Frady*, federal courts' concern for prisoners peaked and is now abating. Sympathy has been replaced by judges' coldness, if not hostility.⁴⁷⁰ And the "principle that there must be some end to litigation," a principle "relegate[d] to the back seat" in 1963,⁴⁷¹ is now up front.

Explanations of the changes can be found in events in the courts and in society as a whole. First, the composition of the Court has changed; new members, now a majority, have different views, reflecting in part the concerns of the executive branch. The legislature has also played some role—although for the most part, Congress has sat silently, neither confirming nor disapproving the major innovations in the interpretation of the "scope" of habeas corpus.⁴⁷²

Another critical difference is the increase in prisoner cases in relation to other types of cases in the federal courts. In 1944, there were

470. See, e.g., *Hudson v. Palmer*, 104 S. Ct. 3194, 3202 (1984) (prisoners have no expectation of privacy in their cells, and therefore no fourth amendment protections); *Boyce v. Alizaduk*, 595 F.2d 948, 953 (4th Cir. 1979) (reprimanding district court that too quickly found prisoner's complaint frivolous).

471. *Sanders v. United States*, 373 U.S. at 22 (Harlan, J., dissenting).

472. Congressional acceptance (with some modification) of the Section 2254 Rules, *supra* note 375, and the Section 2255 Rules, *supra* note 73, and congressional authorization of an expanded role for magistrates suggest that Congress has been at least a limited partner in the retrenchment. But the legislative history of congressional response to the Section 2254 Rules and the Section 2255 Rules states that the "legislation is intended neither to approve nor to disapprove" of *Stone v. Powell*, 428 U.S. 465 (1976), reauthorized the previous year. See HOUSE JUDICIARY COMM., RULES ON HABEAS CORPUS, H.R. REP. NO. 1471, 90th Cong., 3d Sess. (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2478, 2479.

As of this writing, the Senate (but not the House) has substantially adopted many of the Burger Court's rules. See Habeas Corpus Legislation of 1983, *supra* note 144. For a discussion of legislative proposals in the 1980's, see generally Yackle, *supra* note 141.

1,312 prisoner cases (constituting 3.4% of the federal civil docket), filed by state and federal prisoners in federal district court.⁴⁷³ Those cases included suits filed under habeas corpus statutes as well as other kinds of claims. In the years from 1944 to 1959, prisoners' cases constituted an average of approximately 2% of the total civil filings.⁴⁷⁴

By 1963, the year in which *Fay v. Noia* was decided, the number of all prisoner filings had increased to 4,254, or 6.7% of the civil docket.⁴⁷⁵ From 1961 to 1967, the rate of growth of prisoner filings, as a percentage of the total federal docket, was fairly constant, increasing approximately 1.5 to 2.7% a year. By 1968, prisoner filings comprised 15.6% of the federal civil docket.⁴⁷⁶

In 1971, the Administrative Office of the United States Courts began attempts to tally separately habeas cases and prisoners' civil rights cases. That decision was made because prisoners were filing increasing numbers of complaints about conditions of confinement, as contrasted with habeas challenges to convictions. In that year, there were 11,378 "habeas" actions (12.2% of the federal civil docket), and 3,129 "civil rights" actions (3.4% of the civil docket). Prisoner litigation as a whole, including "parole board review" and "mandamus" actions, represented

473. 1944 ANNUAL REPORT, *supra* note 215, at 82 table C-2. State prisoner habeas petitions constituted 1.6 percent of the total civil docket for federal district courts, while federal prisoner habeas petitions constituted 1.8 percent. *Id.*

474. See Appendix B. These figures were derived from the 1945-1960 ANNUAL REPORTS, *supra* note 215, at table C-2.

Then, as now, "United States as defendant" denotes federal prisoner petitions, and "Private cases" denotes state prisoner petitions. Over the years, however, new categories of petitions have been added.

In 1949, the year after 28 U.S.C. § 2255 was enacted, the Administrative Office began to count section 2255 cases separately, in a "motions to vacate sentence" category applied to federal prisoners. Compare 1948 ANNUAL REPORT, *supra* note 215, at 132-33 table C-2 with 1949 ANNUAL REPORT, *supra* note 215, at 130-31 table C-2. In 1960, the Administrative Office added a category of "parole board reviews" for federal prisoners. Compare 1959 ANNUAL REPORT, *supra* note 215, at 184-85 table C-2 with 1960 ANNUAL REPORT, *supra* note 215, at 231-32 table C-2. The Office added a parallel category for state prisoners in 1961. Compare 1960 ANNUAL REPORT, *supra* note 215, at 230-31 table C-2 with 1961 ANNUAL REPORT, *supra* note 215, at 238-39 table C-2. In 1963, the Office delineated a category of "prison officials mandamus" for both federal and state prisoners. Compare 1962 ANNUAL REPORT, *supra* note 215, at 197 table C-2 with 1963 ANNUAL REPORT, *supra* note 215, at 199 table C-2. Beginning in 1971, the Office added a "civil rights" category for both state and federal prisoners. Compare 1970 ANNUAL REPORT, *supra* note 215, at 232 table C-2 with 1971 ANNUAL REPORT, *supra* note 215, at 263 table C-2.

475. See 1963 ANNUAL REPORT, *supra* note 215, at 199 table C-2.

476. From a total federal district court civil docket of 71,449 cases in 1968, prisoners' cases numbered:

17.4% of the caseload.⁴⁷⁷ The absolute number of prisoner filings rose in 1983 to a total (for both federal and state prisoners and including all kinds of claims) of 30,775 cases, or 12.7% of the civil docket.⁴⁷⁸ However, the peak for total prisoner claims as a percentage of the total civil docket was reached more than a decade earlier: in 1970, there were 15,997 filings, constituting 18.3% of the federal civil caseload.⁴⁷⁹

The increase in the absolute number of cases over the last thirty

| Category of petitions filed | | Number of petitions | Percent of total federal civil docket |
|----------------------------------|--------------------------------------|---------------------|---------------------------------------|
| Federal prisoners' petitions: | Motion to vacate sentence and habeas | 2,144 | 3.0 |
| | Parole board review | 131 | 0.2 |
| | Mandamus | 576 | 0.8 |
| Federal prisoners' total filings | | 2,851 | 4.0 |
| State prisoners' petitions: | Habeas | 6,488 | 9.1 |
| | Parole board review | 33 | 0.0* |
| | Mandamus | 1,780 | 2.5 |
| State prisoners' total filings | | 8,301 | 11.6 |
| Prisoners' total filings | | 11,152 | 15.6 |

* Less than one-half of one percent.

1968 ANNUAL REPORT, *supra* note 215, at 194-95 table C-2.

477. From a total federal district court civil docket of 93,396 in 1971, prisoners' cases numbered:

| Category of petitions filed | of petitions | Number | Percent of total federal civil docket |
|----------------------------------|--------------------------------------|--------|---------------------------------------|
| Federal prisoners' petitions: | Motion to vacate sentence and habeas | 3,006 | 3.2 |
| | Civil rights | 214 | 0.2 |
| | Parole board review | 202 | 0.2 |
| | Mandamus | 699 | 0.8 |
| Federal prisoners' total filings | | 4,121 | 4.4 |
| State prisoners' petitions: | Habeas corpus | 8,372 | 9.0 |
| | Civil rights | 2,915 | 3.1 |
| | Parole board review | 6 | 0.0* |
| | Mandamus | 852 | 0.9 |
| State prisoners' total filings | | 12,145 | 13.0 |
| Prisoners' total filings | | 16,266 | 17.4 |

* Less than one-half of one percent.

1971 ANNUAL REPORT, *supra* note 215, at 263 table C-2. Cf. Shapiro, *supra* note 77, at 328 n.40. Shapiro counted habeas filings in the clerk's office for the Federal District Court of the District of Massachusetts. His personal tallies differed, by three to five applications per year for 1970-1972, from those for Massachusetts set forth in the ANNUAL REPORTS.

478. 1983 ANNUAL REPORT, *supra* note 215, at A-7 table C-2.

479. 1970 ANNUAL REPORT, *supra* note 215, at 232 table C-2. See Appendix B.

years has been substantial. Assuming a relationship between case law developments and filing rates, commentators speak about the flood of prisoners' cases and the need to change the law to stem the tide.⁴⁸⁰ However, numbers other than filing rates and factors other than changes in legal doctrine are necessary to understand the reasons for the increase in absolute filings and the impact such filings have on the federal judiciary.

First, the number of prisoners has also grown dramatically.⁴⁸¹ In 1944, the prison population was estimated to be 132,456.⁴⁸² In 1963, the number of prisoners had increased to 217,283.⁴⁸³ By 1982, the

480. See BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEDERAL REVIEW OF STATE PRISONER PETITIONS HABEAS CORPUS 2 (1984) (700% increase in filings of state prisoners petitions in past 20 years) [hereinafter cited as BJS SPECIAL REPORT]. See also Parker Committee Report, *supra* note 292, at 3-6 (some members of that committee, at work in the early 1940's, were concerned about limiting the number of habeas filings; in those years, both the absolute numbers and percentages of filings were at much lower levels than currently); Smith, *Title 28, § 2255 of the U.S. Code*, 40 NOTRE DAME LAW. 171, 175-76 (1964) (listing the rise in number of filings to demonstrate "abuse" of the writ).

Many other commentators have bemoaned the rising number of filings. These authors have assumed a causal link between "liberal" case law and filings. Typically, when discussing the increase in filings, these commentators do not analyze any factors other than changes in legal doctrine. See, e.g., Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660, 667 (1970) (new federal constitutional protections increase burden); Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740, 745-51 (1972) (complaining about the number of filings, considering only absolute numbers and attributing increases in filings to Supreme Court decisions; proposing that counsel be provided for inmates, that they be required to file promptly, and that, absent the discovery of new evidence, they be permitted only one postconviction application); Documentary Supplement, *State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 149, 159-70 (1970) (comparing case law changes and filing rates). Cf. Shapiro, *supra* note 77, at 346-48 (noting that only 12 of the 257 petitions filed in the federal District Court for Massachusetts from 1971 to 1973 raised a *Fay v. Noia* issue and that, of the 12, not a single claim would have been decided differently had *Fay v. Noia* come out the other way; suggesting, however, that the indirect impact of *Noia* might be to increase federal courts' general willingness to consider petitions' merits and to overlook procedural defaults); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 921 n.77 (1966) (number of hearings held does not indicate whether amount is appropriate or not).

481. See Olsen, *Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Consideration of the Claims of State Prisoners*, 31 BUFFALO L. REV. 301, 306 n.27 (1982) (comparing numbers of state prisoner federal habeas petitions with New York state prisoner populations and concluding that the number of petitions filed was small compared to the prisoner population); BJS SPECIAL REPORT, *supra* note 480, at 3 (habeas corpus filings peaked in 1970 and have decreased since then; prison populations in years from 1970 to 1982 have increased 117%).

482. U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1973, at 350 (1973) [hereinafter cited as SOURCEBOOK 1973].

483. *Id.*

prison population was at a record high of almost 400,000,⁴⁸⁴ and the figures for 1983 demonstrate that the population surge is unabated.⁴⁸⁵ A comparison of the number of prisoner filings to the number of incarcerated prisoners is thus in order.

Because some prisoners are "repeat players,"⁴⁸⁶ who file many claims, it is not accurate to assume that each lawsuit is filed by a different inmate. Further, not all habeas claims are filed by prisoners. Contemporary interpretations of the "in custody" requirement permit individuals on bail, parole, and probation to seek habeas relief.⁴⁸⁷ Moreover, neither the figures on prison populations nor those on the number of prisoner cases filed are completely accurate.⁴⁸⁸ For simplicity, however, I have ignored these limitations and have assumed that all prisoners file only one claim, that only prisoners file claims, and that the numbers on prisoners' filings and on prison populations are accurate.

With these assumptions, I have calculated an estimate of the number of filings of state and federal habeas and civil rights claims per 100 inmates. Thus, some 0.99 prisoners per hundred filed federal actions in 1944,⁴⁸⁹ and some 1.96 prisoners per hundred filed in

484. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN 2 table 2 (1982) [hereinafter cited as 1982 STATISTICS BULLETIN].

485. The prison population in 1983 exceeded 438,000. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN 1 (1984) [hereinafter cited as 1984 STATISTICS BULLETIN].

486. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 149 (1974).

For a discussion of repeat filings by the same prisoner, see Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313, 315 (1947) (increases in prison filings largely due to successive petitions filed by the same prisoners). See also Avichai, *Collateral Attacks on Convictions (I): The Probability and Intensity of Filing*, 1977 AM. B. FOUND. RESEARCH J. 319, 347 (1977) (review of filings in three states; "high activity of collateral attacks perceived by the various authorities stems from a high number of filings generated by a small proportion of prisoners"); BJS SPECIAL REPORT, *supra* note 480, at 6 (30% of all state prisoners filings in federal court had previously filed one or more habeas petitions).

On the other hand, many prisoners are not repeat filers; "nearly half of the filers *do not* ever file again." Avichai, *supra*, at 336 (emphasis in original).

487. See *supra* note 427; Justices of Boston Mun. Court v. Lydon, 104 S. Ct. 1805, 1810 (1984) (petitioner "in custody" even though his first conviction had been vacated and he was released on his own recognizance).

488. See *infra* notes 510-13 and accompanying text. See, e.g., U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1981, at 474 (1982) (noting the changes in numbers as prison officials update records) [hereinafter cited as SOURCEBOOK 1981].

489. My calculations assume a total of 132,456 prisoners (114,317 state and 18,139 federal) and thus .530 petitions per hundred state prisoners, 3.892 petitions per hundred federal prisoners, .458 state prisoner petitions per hundred total prisoners, and .533 federal prisoner petitions per hundred total prisoners for 1944.

To arrive at these estimates, I have used the 1945 ANNUAL REPORT, *supra* note 215, at 82

1963.⁴⁹⁰ The rates from 1961 to 1970 rose from 1.19 to 8.14, at a pace of about an additional one petitioner per hundred per year.⁴⁹¹ In 1971, the rates began to level off, decreasing from 8.21 in 1971 to 8.03 in 1975.⁴⁹² Thereafter, the rates dropped to 7.33 per hundred inmates in 1979,⁴⁹³ rose to 7.51 in 1981,⁴⁹⁴ and dropped to 7.01 in 1983.⁴⁹⁵

table C-2 for the number of prisoner petitions and the SOURCEBOOK 1973, *supra* note 482, at 350 for the prison populations figure. As a result, additional caveats are in order. First, the statistics in the ANNUAL REPORTS are compiled by fiscal years ending June 30th, while the SOURCEBOOK uses the calendar year ending December 31st.

Second, other commentators have provided somewhat different data on prisoner populations. *See, e.g.*, Turner, *supra* note 426, at 626 n.86 (total number of prisoners in state institutions was 254,961 in 1976, 229,685 in 1975, and 196,105 in 1974; the numbers were derived from data from the National Criminal Justice Information Service, Law Enforcement Assistance Administration, Prisoners in State and Federal Institutions on December 31, 1976 (advance report Mar. 1977), and National Criminal Justice Information Service, Law Enforcement Assistance Administration, Prisoners in State and Federal Institutions on December 31, 1975 (1977)).

490. 1963 ANNUAL REPORT, *supra* note 215, at 199 table C-2 (the number of prisoner petitions); SOURCEBOOK 1973, *supra* note 482, at 350 (prisoner populations). The filings for a total of 217,283 prisoners, 194,155 state and 23,128 federal, in 1963 are:

| Number of petitions filed by state prisoners | State prisoners' petitions filed per 100 state prisoners |
|---|---|
| 2106 | 1.085 Habeas |
| 48 | 0.025 Parole board review |
| <u>470</u> | <u>0.242</u> Mandamus |
| 2624 | 1.352 Total |
| | |
| Number of petitions filed by federal prisoners | Federal prisoners' petitions filed per 100 federal prisoners |
| 1457 | 6.300 Habeas and motions to vacate |
| 50 | 0.216 Parole board review |
| <u>123</u> | <u>0.532</u> Mandamus |
| 1630 | 7.048 Total |
| | |
| Total number of petitions filed by both state and federal prisoners | State and federal prisoners' petitions filed per 100 prisoners in the total prisoner population |
| 3563 | 1.640 Total habeas and motions to vacate |
| 98 | 0.045 Total parole board review |
| <u>593</u> | <u>0.273</u> Total mandamus |
| 4254 | 1.958 Total |

491. *See* Appendix D.

492. 1971 ANNUAL REPORT, *supra* note 215, at 263 table C-2; 1975 ANNUAL REPORT, *supra* note 215, at 347 table C-2; SOURCEBOOK 1973, *supra* note 482, at 350 for prison populations in 1974 and 1975.

493. 1979 ANNUAL REPORT, *supra* note 215, at 362 table C-2; SOURCEBOOK 1981, *supra* note 488, at 474.

494. 1981 ANNUAL REPORT, *supra* note 215, at 367 table C-2; 1982 STATISTICS BULLETIN, *supra* note 484, at 2.

When habeas claims are considered separately, as they can be from 1971 on, the rates are 5.74 per hundred prisoners filing habeas actions in 1971,⁴⁹⁶ 4.66 per hundred in 1975,⁴⁹⁷ 2.89 per hundred in 1981,⁴⁹⁸ and 2.68 for 1983.⁴⁹⁹ In short, by considering the ratio of filings to the number of people in prison, the increase in the absolute number of cases becomes less surprising. Moreover, while there has

495. 1983 ANNUAL REPORT, *supra* note 215, at 246 table C-2; 1984 STATISTICS BULLETIN, *supra* note 485, at 1.

496. 1971 ANNUAL REPORT, *supra* note 215, at 263 table C-2; U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1976, at 686 (1977). In 1971, the Administrative Office designated prisoner civil rights actions as a category distinct from habeas corpus. *See supra* note 474. The 1971 numbers for 198,061 prisoners, 177,113 state and 20,948 federal, are:

| Number of petitions filed | Petitions filed per 100 prisoners |
|---------------------------|---|
| 8372 | 4.727 Habeas petitions per hundred state prisoners |
| 3006 | 14.350 Habeas petitions and motions to vacate per hundred federal prisoners |

Cf. Avichai, *supra* note 486, at 338 (habeas corpus filings per hundred prisoners in four state courts in 1971: 14.0 in Illinois, 26.4 in California, 7.5 in Texas, and 46.0 in Colorado). Avichai's numbers compare to my estimates of 5.8 federal habeas petitions filed in 1971 by both state and federal prisoners. *See supra* note 477.

497. 1975 ANNUAL REPORT, *supra* note 215, at 347 table C-2; U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1975, at 617 (1976). The numbers for 240,593 prisoners, 216,462 state and 24,131 federal, are:

| Number of petitions filed | Petitions filed per 100 prisoners |
|---------------------------|---|
| 7843 | 3.623 Habeas petitions per hundred state prisoners |
| 3372 | 13.974 Habeas petitions and motions to vacate per hundred federal prisoners |

498. 1981 ANNUAL REPORT, *supra* note 215, at 367 table C-2; 1982 STATISTICS BULLETIN, *supra* note 484, at 2. The numbers for 368,772 prisoners, 340,639 state and 28,133 federal, are:

| Number of petitions filed | Petitions filed per 100 prisoners |
|---------------------------|---|
| 7790 | 2.287 Habeas petitions per hundred state prisoners |
| 2877 | 10.226 Habeas petitions and motions to vacate per hundred federal prisoners |

Cf. Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U.L. REV. 485, 496 n.33 (1974) (referring to the ANNUAL REPORTS, which showed number of habeas petitions declining from 1671 to 1368, but describing an increase in filings and an estimated one filing per six federal prisoners in 1972, or 17 per hundred prisoners).

In a preliminary report, Avichai found that less than ten percent of state prisoners in the four states he reviewed sought collateral relief. Avichai, *supra* note 486, at 325. He concluded that the probability of filing increased over the time of incarceration. *Id.* at 328-34.

499. 1983 ANNUAL REPORT, *supra* note 215, at 246 table C-2; 1984 STATISTICS BULLETIN, *supra* note 485, at 1. The numbers for 438,830 total prisoners, 406,904 state and 31,926 federal, are:

| Number of petitions filed | Petitions filed per 100 prisoners |
|---------------------------|---|
| 8532 | 2.097 Habeas petitions per hundred state prisoners |
| 3225 | 10.101 Habeas petitions and motions to vacate per hundred federal prisoners |

been an increase in the rate of filings per hundred prisoners since 1944, the rate of *habeas* filings per hundred inmates has declined since 1971.

A second relevant set of numbers is that of federal trial judges. In 1944, there were 185 authorized federal district court judges;⁵⁰⁰ in 1963, 306 judges;⁵⁰¹ in 1971, 394 judges;⁵⁰² and in 1983, 515 judges.⁵⁰³ Since the 1976 amendments to the Magistrates Act, magistrates may also make initial decisions in *habeas* claims, so their numbers are also relevant. As of the spring of 1983, there were 238 authorized full-time magistrates,⁵⁰⁴ yielding a total of 753 first tier decisionmakers able to respond to prisoners' complaints.

The figures on judges and magistrates permit consideration of the number of claims proportionate to the number of decisionmakers. In 1944, the 185 judges handled 1,312 claims, or about 7.1 each. In 1963, the 306 judges handled 3,563 claims, or 11.6 each. In 1971, the 394 judges handled 11,378 *habeas* cases, or 28.9 each, and 3,129 civil rights cases, or 7.9 each. In 1981, the 724 judges and magistrates had 10,667 *habeas* cases, or 14.7 each, and 16,473 civil rights cases, or 22.8 each.⁵⁰⁵ In 1983, the 753 judges and magistrates heard 11,757 *habeas* cases, or 15.6 each, and 18,477 civil rights cases, or 24.5 each. When magistrates are excluded from the 1981 and 1983 calculations, each federal judge decided 20.7 *habeas* and 31.9 civil rights cases in 1981, and 22.8 *habeas* and 35.9 civil rights cases in 1983.

Of course, prisoners' cases are not evenly distributed among the judges. While section 2255 was enacted to alleviate the disproportionate impact of federal prisoners' filings and has in large measure accomplished its purpose, some federal courts have more criminal cases than others, and therefore may have more section 2255 cases. Further, those judges who sit in districts in which state prisons are located continue to receive a disproportionate number of state prisoners' filings.⁵⁰⁶

500. Act of Dec. 22, 1944, ch. 663, 58 Stat. 887, 887.

501. Act of July 30, 1962, Pub. L. No. 87-562, § 3, 76 Stat. 247, 248.

502. Act of Dec. 18, 1971, Pub. L. No. 92-208, § 3(d), 85 Stat. 741, 742.

503. 1983 ANNUAL REPORT, *supra* note 215, at 119 table 15.

504. *Id.* at 47 table 25 (also noting 225 part time magistrates and 13 "combination positions").

505. These numbers include filings by both federal and state prisoners. These figures were calculated on the assumption that judges spend very little or no time reviewing magistrates' reports and recommendations in *habeas* cases. *But see* BJS SPECIAL REPORT, *supra* note 480, at 6 (only 45% of all *habeas* cases filed were referred to a magistrate for review).

506. *See* BJS SPECIAL REPORT, *supra* note 480, at 3 table 3 (state prisoners' *habeas corpus* filings, as percent of civil filings per circuit, range from .8 (D.C. Circuit) to 5.9 (Eleventh Circuit)).

My calculations include "motions to vacate" as "*habeas*" cases. If Zeigler & Hermann's 1971 figures are readjusted to reflect that addition, the disparity in filings within a state can be ex-

The growth in prison litigation must also be viewed in the context of the federal docket as a whole. The number of civil actions filed in 1944, 1953, 1963, 1973, and 1983, respectively, were 38,499, 64,001, 63,630, 98,560, and 241,842.⁵⁰⁷ Thus, in the last twenty years alone, the federal civil docket increased by 380.1%. Although prisoner cases have risen disproportionately since the mid 1970's, prisoners' filings have stabilized and in 1983 constituted approximately 13% of the federal court's civil docket.

Not all cases, of course, are equally time-consuming. Hearings are held less frequently in habeas applications than in other kinds of cases. In 1982, 2.4% of habeas cases reached trial, as compared with 6.1% of all civil cases.⁵⁰⁸ Thus, even though habeas claims comprised roughly 5% of the civil caseload, these cases took less than five percent of a court's trial time.

Finally, the increases in prison populations, in the number of federal judges, and in the federal docket do not capture many other changes during the last twenty years. I have not described a host of variables, both internal and external to the courthouse, such as changes in substantive law, availability and funding of attorneys, the civil rights

amined. In the Northern District of New York, each federal district judge handled 40.5 "habeas" cases, in the Eastern District, 42.0, in the Southern District, 19.2, and in the Western District, 46.7—all compared with the 28.9 average nationwide. Zeigler & Hermann, *supra* note 386, at 172 n.53 table 2.

For analysis of filings in another federal district court, see Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. U. CHI. L.J. 527, 557 (1975) (in 1973, some judges in the Northern District of Illinois had as few as three state prisoners' habeas petitions while others had as many as 22). The national average, as I estimated it for that year, was about 20 per judge.

For the number of state habeas applications in the District of Massachusetts in 1970, 1971, and 1972, see Shapiro, *supra* note 77, at 329 table I. In all three years, there were six authorized federal judges in Massachusetts. Pub. L. No. 91-272, 84 Stat. 294, 295 (1970). Using Shapiro's tally, the average of these cases per judge was 12.5 in 1970, 16.7 in 1971, and 13.7 in 1972. These figures compare with a nationwide average (assuming 394 authorized judgeships) of 23.0 in 1970, 21.2 in 1971, and 20.2 in 1972. See also Turner, *supra* note 426, at 614 n.27 (Western District of Virginia had 156 section 1983 prisoner cases per authorized judgeship, as contrasted to a national average of less than 21 per judgeship).

507. 1944 ANNUAL REPORT, *supra* note 215, at 4; 1953 ANNUAL REPORT at 148, table C-2; 1963 ANNUAL REPORT at 198 table C-2; 1973 ANNUAL REPORT at 324 table C-2; 1983 ANNUAL REPORT at 4 table 5.

508. 1982 ANNUAL REPORT, *supra* note 215, at 60 table 28. See Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 146 (1981) (calculations, derived from the 1980 ANNUAL REPORTS, showing 99% of federal prisoners' civil litigation in federal district court terminated without trial, and 97% of state prisoners' civil litigation terminated without trial). But see BJS SPECIAL REPORT, *supra* note 480, at 7 ("some type of hearing" conducted in 6% of the cases studied).

movement, and litigants' altered expectations of the courts.⁵⁰⁹ While I do not underestimate the impact of these factors, even a long article has its limits.

2. *The Meaning of the Numbers*

The statistics on prisoner filings are helpful to our understanding of litigation trends. One caveat, however, is appropriate: these numbers must be understood as estimates, because the reporting agencies do not have the capacities to collect information directly.

A principal source of statistics on case filings by prisoners is the Administrative Office of the United States Courts, which, since its creation in 1939, has been compiling data on the federal courts' caseloads. Information on prison populations comes from data collections compiled by the Department of Justice, while the National Center for State Courts is the source for statistics on the workload in state courts. The Administrative Office, the Department of Justice, and the National Center do not generate their own data; rather, the information comes from other sources.

For example, the Administrative Office relies upon district court clerks and litigants to respond to the Administrative Office's cataloguing requests. For simplicity, the Administrative Office requires that each case be counted under one category, for example as a "habeas" case or as a "civil rights" case, but not as both.

The difficulty with that approach is that prisoners' lawsuits may include both habeas and civil rights challenges.⁵¹⁰ The insistence on allotment of all cases to one pile or the other sometimes results in misidentification, either by the individuals filing the cases or by court clerks. One researcher, examining all prisoner files in a single federal district court, found that "less than 60% of the [cases denoted as] state prisoners' habeas applications were attacks on the validity of state criminal convictions."⁵¹¹

509. See Turner, *supra* note 426, at 627-37 (noting that states with high prison populations were not necessarily those in which prisoners filed the most civil rights cases; other factors included prison conditions, overcrowding, prison regulations, substantive law, availability of lawyers and of alternative dispute resolution mechanisms).

510. See *supra* text accompanying notes 390, 391. See also Preiser v. Rodriguez, 411 U.S. 475, 499 (1973) (distinguishing state prisoners' section 2254 and section 1983 filings and noting possible overlap).

511. Shapiro, *supra* note 77, at 330. Shapiro criticized other data gathered by the Administrative Office and the Federal Judicial Center. *Id.* at 335-36. Problems with Administrative Office record keeping were also described in Eisenberg, *Section 1983: Doctrinal Foundations and an Em-*

The categories delineated for federal prisoners' cases are also problematic. Since 1949, federal prisoners' "habeas corpus petitions" have been listed separately from "motions to vacate," filed under section 2255. But the Supreme Court has interpreted section 2255 to be habeas corpus for federal prisoners. Therefore, section 2255 claims should be included in the "habeas" category. Further, it is unclear which federal prisoner cases are labeled "civil rights," although a number have been so designated since 1971.⁵¹² In short, because of the coding and categorization problems, there are identifiable weaknesses in the numbers generated by the Administrative Office. Comparable difficulties exist with the other data sources.⁵¹³

As a consequence of the categorization problems, I have altered the Administrative Office's numbers in one respect; my estimates of federal prisoners' habeas filings combine those petitions listed in the "habeas" category and those tabulated as "motions to vacate." Thus, my estimates of federal prisoners' habeas filings are generous. For the most part, however, I rely upon the major contributions of data sources, like the Administrative Office, for providing insight into the question of volume. While recognizing that the delineation between prisoners' habeas and civil rights cases is a rough one, I have adopted it. Statistics are an important part of an evaluation of whether the federal courts' weariness with habeas cases and the Supreme Court's concerns for economy and finality stem from overwork.

Unquestionably, the numbers indicate that over the past forty years, prisoner litigation has grown to occupy far more of the federal docket than the 1,312 cases considered burdensome in 1944. Judges are correct in perceiving that many more prisoners' cases are filed now than were filed years ago. But the rhetoric of the boom has outlasted

pirical Study, 67 CORNELL L. REV. 482, 533-36 (1982); Mayers, *Federal Review of State Convictions: The Need for Procedural Reappraisal*, 34 GEO. WASH. L. REV. 615, 630 n.62 (1965-66); Zeigler & Hermann, *supra* note 386, at 170 n.43.

512. Cases coded as "civil rights" actions by federal prisoners are "those cases with the U.S. as the defendant. . . . There is no definition provided to the courts on what is or is not 'civil rights.' If the case is filed and the prisoner or his or her counsel alleges a civil rights violation and specifies the nature of the violation then the clerk indicates this on the statistical card." Letter from James A. McCafferty, Chief of Statistical Analysis and Report Division of the Administrative Office to Judith Resnik (Oct. 20, 1983) (on file with Southern California Law Review). Further, the Administrative Office counts cases filed under 28 U.S.C. § 2241 as "habeas cases," *id.* at 2, but those cases may include federal prisoners' civil rights claims. See *supra* note 390 and accompanying text.

513. *E.g.* NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1980, at 3-8 (1984) (discussion of limitations on court data collection and the variation in reporting periods).

the reality. Even with inclusive calculations, prisoners' habeas petitions have declined, and that decline began in the early 1970's, long before the major cases and rules restricting habeas relief were in place. Habeas cases, at their peak in 1971, occupied 12.2% of a federal judge's civil docket, or 28.9 cases per judge. In 1983, habeas cases were about 5% of the civil docket.

The volume of prisoners' *civil rights* litigation now overwhelms that of *habeas* claims. Of the roughly 470 civil cases per federal district judge in 1983, 22.8 were habeas cases and 35.9 were prisoner civil rights cases.⁵¹⁴ Many civil rights cases are filed *pro se*, and some involve factual disputes and necessitate hearings. Civil rights cases may also be filed as class actions, challenging system-wide conditions of confinement. By 1981, some 30 state prison systems were under federal court order, and hundreds of local jails were also involved in federal litigation.⁵¹⁵ Such "public law" cases are time-consuming.⁵¹⁶ The blurring of civil rights cases with habeas cases may give rise to an impression of prisoners' "litigiousness."

Habeas cases themselves may also present particular difficulties for federal judges. Like prisoners' civil rights cases, the vast majority of habeas actions are litigated *pro se*.⁵¹⁷ Because the petitions are not drafted by lawyers, the information presented may be incomplete. Judges, magistrates, or law clerks must often search through habeas petitions to decide if a "case" exists, and they must sometimes employ special mechanisms to obtain additional relevant information.⁵¹⁸ In addition, more prisoner cases conclude by adjudication than do other kinds of cases. In contrast to the high settlement rates in criminal and civil cases, prisoner cases are a subset in which settlement is virtually nonexistent. Thus, unlike the rest of the docket, judges have to make decisions in an inordinately large percentage of prisoner cases.⁵¹⁹

514. 1983 ANNUAL REPORT, *supra* note 215, at 119 table C-2.

515. *New Report on Prison Conditions Shows More Tragedies Possible*, CORRECTIONS DIG., Dec. 14, 1983, at 1.

516. *See* Chayes, *supra* note 71, at 1284 (judge plays central role in fashioning and supervising implementation of remedy). *But see* Turner, *supra* note 426, at 638 (out of five district courts studied, court personnel in only two districts believed prison cases were a "serious burden").

517. *See* RUTGERS STUDY, *supra* note 399, at 733 (79.2% of petitions studied were filed *pro se*).

518. *See, e.g.*, Section 2254 Rules, *supra* note 375, at Rule 6(a); Section 2255 Rules, *supra* note 73, at Rule 6(a) (appointment of attorneys to conduct discovery).

519. *See* BJS SPECIAL REPORT, *supra* note 480, at 4 (only 56% of civil cases require judicial action whereas about "88% of all state prisoner habeas corpus case terminations involved some type of court action") (footnote omitted).

Moreover, habeas cases may be emotionally draining. These lawsuits often pose painful choices between fidelity to process values and the desire to keep unlikable, if not evil, individuals in confinement. Some judges may experience habeas cases as taking a good deal of their time, even if, on either an absolute or a proportionate basis, the cases do not account for a large percentage of the judges' work. Judges who do not distinguish habeas claims from civil rights complaints may regard all prisoner cases as a mass (or morass) and feel overwhelmed by the accumulation of complaints. Finally, judges may suspect prisoners' motives and thus find the resulting work especially troubling. Some judges have expressed concern about prisoners' incentives for filing.⁵²⁰ With little or no work, many prisoners have time to draft documents. With no resources, most prisoners file in forma pauperis; with few other avenues of recourse,⁵²¹ many prisoners turn to the federal courts.

To summarize, the numbers do not reveal the dynamics of the cases but do permit some generalizations. In 1983, habeas cases occupied "as much" or "as little" as five percent of the federal courts' docket. In 1983, "only" or as "many" as approximately 2.68 per 100 state or federal prisoners filed for habeas relief in federal district court.

3. *The Normative Questions*

Is it objectionable that federal judges devote 5% of their docket to prisoners' habeas claims? An easy answer is no; since prisoners seek adjudication of federal claims, why not obtain answers from the experts—federal judges? But the pervasive tone of disapproval in the case law demands that the more difficult, affirmative answer be explored. What is the source of the objection to federal judges spending as much time as they do on habeas corpus?

One possibility is that devoting time to prisoners' cases takes federal judges away from other, presumably more important, cases. Yet no clear statement emerges from the case law about what these other, more important cases are. A view does emerge, however, that many prisoner cases are frivolous and therefore that the quantity distracts

520. See, e.g., Friendly, *supra* note 13, at 150 (prisoners file habeas petitions "as matter of course during long incarceration").

521. Administrative grievance systems have been instituted in some institutions but not all are effective. Breed & Dillingham, *Dispute Resolution in Corrections*, in II PRISONERS RIGHTS SOURCEBOOK 139, 143 (I. Robbins ed. 1980).

from meritorious claims of all kinds.⁵²²

Frivolous claims exist in all parts of the docket, however, and even if judges are aware of many prisoners' lack of success,⁵²³ failure rates alone do not sufficiently explain judges' disdain. First, some prisoners have had some extraordinary successes.⁵²⁴ Justice Marshall cited a 70% reversal rate in death penalty cases,⁵²⁵ that figure contrasts dramatically with what one researcher calls "norms of affirmance" in most criminal appeals.⁵²⁶ Second, prisoners' civil rights litigation has produced a remarkable number of court-ordered changes in conditions of confinement.⁵²⁷ Third, some individual habeas cases stand as landmarks of our constitutional history—*Gideon v. Wainwright*,⁵²⁸ for example. Although a large proportion of prisoners' cases do end by dismissal or default,⁵²⁹ the same is true for the rest of the docket.⁵³⁰

But perhaps the vantage point is wrong. The perception may not be that prisoner filings have a negative impact on other cases but that prisoner cases are per se objectionable because prisoners simply do not deserve federal court attention. The notion that prisoners as a group are unworthy was commonplace not so long ago, when prisoners were barred from litigating civil actions and many judges said "hands off" to

522. See, e.g., Friendly, *supra* note 13, at 149 (the volume also interferes with judges' ability to find meritorious prisoner claims).

523. See BJS SPECIAL REPORT, *supra* note 480, at 5 (of 1899 cases studied, 3.2% were granted in whole or part; "1.8% . . . resulted in any type of release of the petitioner") (footnote omitted). Cf. Olsen, *supra* note 481, at 307 n.28 (most commentators describe success rates of habeas corpus filings as under 5%).

524. For example, although Shapiro's study found that only 16 out of 247 petitioners were released, Shapiro concluded that those numbers did not "mean that at least 247 petitioners during the period studied wasted their own time and that of the court. There were a number of cases in which a petitioner made a significant gain even though the matter prayed for was not granted." Shapiro, *supra* note 77, at 340. His examples of gains included the resumption of state postconviction remedies, decisions to drop charges, the provision of counsel and intangible benefits. *Id.* at 341-42.

525. *Barefoot v. Estelle*, 103 S. Ct. 3383, 3405 (1983) (Marshall, J., dissenting).

526. Davies, *supra* note 74, at 591. See also Kanner & Uelmen, *Random Assignment, Random Justice*, L.A. LAW., Feb. 1984 at 10, 14-15 (1984) (California's reversal rate on appeal was 5.8 percent in 1981-82, with a "remarkable variance" in reversal rate from appellate court to appellate court; civil cases had a much higher reversal rate than criminal cases).

527. See Bronstein, *Offenders Rights Litigation: Historical and Future Developments*, in II PRISONERS RIGHTS SOURCEBOOK: THEORY, PRACTICE, LITIGATION 10-25 (I. Robbins ed. 1980) (a number of federal courts have provided "sweeping relief").

528. 372 U.S. 335 (1963).

529. RUTGERS STUDY, *supra* note 399, at 756 n.369.

530. See 1981 ANNUAL REPORT, *supra* note 215, at 390 table C-5A (of 148,046 civil cases disposed of by the federal district courts, only 10,607 were disposed of by trial).

prisoners' complaints.⁵³¹ Perhaps it is time to reject the revolution of the sixties, with its conception of prisoners as persons who retain dignitary rights.⁵³² Perhaps courts should stop considering conditions of confinement or remedying occasional misbehavior by police officers, district attorneys, or judges. Even the most ardent opponents of prisoners' litigation, however, do not go that far. They concede that prisoners should have some access to courts to correct prison officials' failures to provide adequate air, food, and minimal health care or to remedy grave miscarriages of justice that may result in the wrongful confinement of individuals.⁵³³

To assume a moral consensus that all prisoners' problems cannot be ignored, however, is not to conclude that *federal* courts should respond. Prisoners could bring their claims of unlawful confinement or of unconstitutional conditions of confinement to state courts. Of course, few would suggest that federal prisoners seek redress in state courts. Federal sovereignty interests have long limited the authority of state judges over federal officials.⁵³⁴ But, insofar as 10.8% of the federal court docket in 1983 was devoted to habeas and civil rights claims by state prisoners, perhaps the simple solution is to send all of these cases to state courts.

That argument has been made explicitly for some categories of prisoners' claims. In *Swain v. Pressley*,⁵³⁵ Justice Powell wrote that the constitutional prohibition of "suspension of the writ of habeas corpus"⁵³⁶ mandated only that *some* court be available to review claims of unlawful confinement; nowhere was it required that the *federal* courthouse doors be open.⁵³⁷ In *Parratt v. Taylor*,⁵³⁸ the Supreme

531. Bronstein, *supra* note 527, at 6-9. Cf. D. RUDENSTINE, *THE RIGHTS OF EX-OFFENDERS* 155 (1979) (ex-prisoners have also been shunned by the legal system).

532. See, e.g., *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) (prisoners are not persons protected by the fourth amendment from searches or destruction of personal, noncontraband items in their cells; Justice Stevens, in dissent, described the majority's view as declaring "prisoners to be little more than chattels, a view I thought society had outgrown long ago." *Id.* at 3215).

533. See, e.g., *Spalding v. Aiken*, 103 S. Ct. at 1797-98 (Burger, C.J., statement concerning the denial of certiorari) (habeas claims should be permitted if "the petitioner can make a colorable claim of innocence, demonstrate that a significant miscarriage of justice has occurred or show that his claim is based on grounds that, with the exercise of reasonable diligence, could not have been discovered earlier"); *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (plurality opinion) (Burger, C.J.) ("It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights.")

534. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1872).

535. 430 U.S. 372 (1977).

536. U.S. CONST. art. I, § 9, cl. 2; 430 U.S. at 381.

537. Cf. Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607 (Constitution, of its own force, vests jurisdiction in federal and state courts for habeas review).

Court concluded that not all claims of due process violations should be heard in federal court. Rather, when deciding whether a prisoner has been deprived of rights without due process of law, federal courts must assess the adequacy of state court procedures. Where state courts offer adequate remedies, no due process violations can exist.⁵³⁹ *Swain* and *Parratt*, when read in light of other rulings about exhaustion of state remedies,⁵⁴⁰ the distinctions between torts and constitutional violations,⁵⁴¹ and the degree of deference to be accorded prison officials,⁵⁴² suggest a Supreme Court heading towards a consensus that federal courts are not the proper forum for presentation of complaints by prisoners and other civil rights claimants.⁵⁴³ Perhaps, then, we are moving towards an era when no federal court review will be available for prisoners. While we understand that incarcerated populations produce a certain number of claims,⁵⁴⁴ and while we believe that some avenues of redress are necessary, perhaps we will soon conclude that prisoners should be sent elsewhere—to prison grievance systems, mediation, and state courts.

But are we actually prepared to leave all prisoners' rights enforcement to alternative process, to administrative decisionmaking, and to state courts? Incarceration and the imposition of the death penalty are the most severe sanctions this society imposes. Prison, in which the minutiae of inmates' lives are controlled, is the quintessential example of state action. Once we are committed to the propositions that states are limited by the Constitution in the ways they treat individuals, that prisoners are people, and that courts function as a buffer to constrain states' treatment of individuals, must it not follow that the federal courts have some role to play? Are we prepared either to leave all federal norm enforcement to the state courts and suffer the resulting disparity or to conclude that prisoners are not individuals entitled to

538. 451 U.S. 527 (1981).

539. *Id.* at 543-44.

540. *See* *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (district courts required to dismiss habeas petitions containing both exhausted and unexhausted claims).

541. *See* *Baker v. McCollan*, 443 U.S. 137, 142 (1979) (distinguishing violations of constitutional rights from violations of duty of care arising out of tort law).

542. *See* *Bell v. Wolfish*, 441 U.S. 520, 540 (1979) (prisoners' due process rights subject to reasonable limitations because of institutional security concerns, as defined by prison administrators).

543. *See* *City of Los Angeles v. Lyons*, 103 S. Ct. 1660 (1983) (household victim lacks standing to enjoin police officers' conduct).

544. As do other populations; *see* Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86-87 (1983) (civil lawsuits filed at a rate of 50 suits per 1000 disputes).

constitutional treatment?⁵⁴⁵

It might be helpful to return to the numbers and look at them differently. Instead of complaining that seven prisoners per hundred filed a federal lawsuit in 1983, and that 2.68% of prisoners filed habeas claims, we might perceive that quantity of cases as relatively small. Given the myriad and incessant ways in which prisons exercise control over prisoners, the fact that only some seven per hundred file lawsuits is reassuring. Furthermore, because all prisoners have been convicted and could, in theory, frame a challenge of constitutional dimensions to their convictions, we might find substantial solace in the statistic that fewer than three per hundred sought habeas relief in federal court in 1983 or that, even in the heyday of prisoner claims, only some 5.7 per hundred filed federal habeas actions. Thus, we could conclude that prisoner cases are not such a "burden" on federal courts, and that the number of applicants, in contrast to the number of possible disputes, is not very great. Rather than perceive a problem, we might see the prisoner caseload as reasonably under control.

This perspective, however, does not address several other arguments. First, to the extent that federal habeas corpus is understood as "intruding" upon states' affairs, saying there is not much habeas work only means that federal courts' "intrusions" are infrequent. Yet there are arguments to be made for "intrusion," if that label is correct. Pursuant to the supremacy clause, federal courts have authority to correct state courts that make federal constitutional errors. Moreover, state representatives—senators and members of Congress—created the statutes that give federal courts jurisdiction over habeas cases, and these representatives have not seen fit to retract them. Finally, the "intrusion" is minimal; when a habeas petitioner is successful, no general injunction is issued, only an individual is freed.

But perhaps the harm from federal "intrusion" is not to the states, but to society. Opponents of habeas corpus argue that its availability results in declining respect for the criminal process.⁵⁴⁶ That proposition, however, is made problematic by the fact that few habeas corpus cases ever succeed; many are dismissed, and rarely is an individual freed.⁵⁴⁷ As a result, habeas corpus cases do not undermine the finality

545. The holding in *Hudson v. Palmer*, 104 S. Ct. 3194 (1984) (prisoners have no fourth amendment protection in their cells) suggests that the answer, at least for five members of the Court, may be "yes."

546. Smith, *The Abuse of Habeas Corpus Statutes Must Be Stopped*, JUST. ASSISTANCE NEWS, Apr. 1982, at 2-3.

547. See BJS SPECIAL REPORT, *supra* note 480, at 5 (1.8% of petitions filed resulted in any

of criminal convictions, although the availability of habeas corpus does make possible the perception of unending litigation.

The fact that few prisoners succeed in their habeas applications raises another complaint against the practice. Given the rarity of success, does the expenditure of resources justify the effort? Judge Friendly has argued that federal judges are spending time on meritless claims instead of addressing genuine problems, and therefore that habeas is simply a waste of resources.⁵⁴⁸ Because petitioners have neither external fiscal constraints, nor lost opportunity costs, courts must constrain them. Further, some believe that the very existence of habeas corpus may have a negative impact. Justice O'Connor believes that habeas review demoralizes state judges,⁵⁴⁹ while, in the Chief Justice's view, habeas delays prisoners' rehabilitation by keeping open the promise of a key to the prison gate.⁵⁵⁰ Given these possible detrimental effects and that so very few cases ever succeed, why not give habeas up?

The counterargument is that the rare occasion in which a habeas applicant succeeds makes the resource expenditures and the intrusion on the states (or, in the case of federal prisoners, the reappraisal of federal judges' decisions) worthwhile; the possibility of revisionism remains alive for cases involving an individual's liberty or life. The adherents of this view believe that review curbs tendencies to relax constitutional safeguards and serves to strengthen the integrity of the legal process.⁵⁵¹ The procedural redundancy differentiates and symbolizes the importance accorded incarceration decisions; the added ritual legitimates the decisions. As suggested at the outset, one's approach to this question depends upon one's value preferences.

type of release of the petitioner); P. ROBINSON, *supra* note 216, at 4(c) (less than 5% of district court petitioners obtained any relief on appeal).

548. See Friendly, *supra* note 13, at 148-49 (the most serious evil of the proliferation of collateral attack is the drain on the time of judges, lawyers, and prosecutors).

549. See *Engle v. Isaac*, 456 U.S. at 128-29 (issuance of habeas writs undercuts states' ability to enforce procedural rules and frustrates states' power to punish criminals).

550. See *Spalding v. Aiken*, 103 S. Ct. at 1797 (Burger, C.J., statement concerning the denial of certiorari) (because courts entertain belated habeas claims, prisoners do not reconcile themselves to imprisonment).

551. See *Strickland v. Washington*, 104 S. Ct. 2052, 2077 (1984) (Marshall, J., dissenting) (constitutional guarantees and collateral review serve "to ensure that convictions are obtained only through fundamentally fair procedures") (footnote omitted); *Kaufman v. United States*, 394 U.S. 217, 226 (1969) (adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief).

4. *The Court's Implementation of Its Own Values*

The current Supreme Court has made plain its interpretation of the changing numbers of prisoner cases. Has the Court's majority succeeded in structuring a litigation system that reflects its views? Have the recent rulings decreased the workload of the federal courts, preserved the finality of the initial decision, and enhanced the power of first tier decisionmakers?

a. *Economy*: Deciding whether court resources are economically utilized is difficult. At least four criteria are relevant: (1) the interval from filing to disposition of cases; (2) the number of hours spent by the court in deciding cases; (3) the time and expense invested by litigants; and (4) the accuracy of decisionmaking.⁵⁵² At present, we have insufficient data to determine whether federal courts are more economical in processing habeas claims than they were prior to the doctrinal developments of *Stone v. Powell*, *Wainwright v. Sykes*, *Engle v. Isaac*, the other recent cases, and the new Rules. But with the available data and some educated guesses, I can offer some assessments of the impact of the new doctrines.

In 1974, the median time from filing to disposition of most (80%) federal prisoners' habeas actions was one month; the median time from filing to disposition of most state prisoners' habeas claims was two months.⁵⁵³ Ten percent of the cases had a median time to disposition of less than one month, while 10% had a median time to disposition of more than eleven months.⁵⁵⁴ In 1983, the median time from filing to disposition for most state prisoners' habeas claims was 5 months,⁵⁵⁵ while in 10% of the cases, the median time to disposition was greater than 20 months.⁵⁵⁶ Thus, if causal connections can be shown,⁵⁵⁷ recently imposed restrictions on habeas have not made for speedier dispositions.

To my knowledge, few studies directly address the question of the

552. See generally Resnik, *supra* note 26, at 417-25 (discussing efficiency measures in federal courts).

553. 1974 ANNUAL REPORT, *supra* note 215, at 432-33 table C-5b.

554. *Id.*

555. 1983 ANNUAL REPORT, *supra* note 215, at 285 table C-5b.

556. *Id.*

557. Attribution problems are great because of the multiple factors that affect disposition rates. See generally Luskin, *Building a Theory of Cases Processing Time*, 62 JUDICATURE 115 (1978) (criticizing models of court case processing because of the failure to consider the variety of factors involved, such as individual case characteristics, motives of participants, and reward structure of court).

number of hours judges and magistrates spend deciding habeas cases.⁵⁵⁸ It is possible, however, to consider the decisions that a judge must make and to extrapolate how long those issues might take a jurist to decide. A trial judge or magistrate who receives a habeas petition performs a number of preliminary inquiries to determine whether review on the merits is permissible. First, the petition must be scrutinized for its compliance with the format prescribed by Rule 2 of the Habeas Rules. Researchers report that petitions are returned with some frequency⁵⁵⁹—indicating that the liberal pleading rules for *pro se* litigants⁵⁶⁰ have not been applied to habeas claimants. In cases in which forms are rejected and prisoners never file again, decisions have been rendered in a minimal amount of time. In a sense then, the mandatory forms are economical. On the other hand, we have no way of knowing whether prisoners who fail to file a second form are those who are undeserving of a decision on the merits. Because accuracy is relevant to economy, and accuracy in this context is defined as permitting prisoners with constitutional claims to be heard, we do not know whether the forms are economical.

Assuming that a prisoner has filed a form properly in the first instance, or completes it successfully a second time, the trial court must then make several other determinations. In state prisoners' cases, prisoners must "totally exhaust" state court remedies; federal courts must reject petitions if any claims are presented to them that had not been

558. The Federal Judicial Center (FJC) and the Administrative Office (AO) have asked selected judges to keep time records to achieve a "weighted" caseload index, which distinguishes time consuming cases from less time consuming ones. See generally 1962 ANNUAL REPORT, *supra* note 215, at 118-24 (discussing the development of weighted caseload statistics). From those records, the FJC and the AO have classified cases and weighted "prisoners petitions, including habeas corpus." The 1964 weight of these cases was a ".3" on a .05 to 8.0 scale. 1971 ANNUAL REPORT, *supra* note 215, at 167-79 table 35. The 1971 time study described prisoner petitions in various categories and valued them at .55 to 1.0 on a scale of .29 to 3.89. *Id.* at 174-75 table 33.

Subsequent weighted caseload studies are described in the 1980 ANNUAL REPORT, *supra* note 215, at 290. Federal prisoners' "habeas" petitions were .1767, on a scale of 0 to 33.7115. Federal prisoners' "motions to vacate" were .5831; state prisoners' habeas petitions were .3412 and state prisoners' civil rights cases were .4103. *Id.* at 626 table X-2. For a more detailed discussion, see THE FEDERAL JUDICIAL CENTER, 1979 FEDERAL DISTRICT COURT TIME STUDY (1980). A much earlier study by another researcher reported that judges spend 3.8 hours per federal habeas petition, and 4.8 hours per state habeas petition. Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337, 338 (1949).

559. P. ROBINSON, *supra* note 216, at 13 (noting local district court clerks' rejections of forms). See also Zeigler & Hermann, *supra* note 386, at 176-81 (study of district court for the Southern District of New York found that *pro se* applications were frequently returned for failure to comply with technical requirements).

560. See, e.g., Haines v. Kernes, 404 U.S. 519 (1972) (*pro se* complaints should be read favorably to the pleader).

made first to state courts.⁵⁶¹ To decide the exhaustion question, courts sometimes request copies of state court decisions (if any were published or written), of briefs filed, or of transcripts.⁵⁶² Delay in the transcription of testimony and prisoners' lack of access to records and photocopiers hinders the provision of information. Evidence of these difficulties comes from empirical research. In one study of almost 1,900 habeas petitions filed in the federal courts, 55% were rejected because of procedural failures, 67% of which were dismissed because of failure to exhaust.⁵⁶³

Evaluating the economy of the exhaustion rule is difficult. In theory, exhaustion offers states an opportunity to correct errors; in practice, it is difficult to learn whether state courts revise judgments on postconviction collateral attack.⁵⁶⁴ Furthermore, the "total exhaustion" rule obliges prisoners to scurry back and forth between state and federal court. At each instance, some federal judge time is spent determining whether more federal judge time must be spent or whether federal review must await the investment of state judges' time. Some potential habeas applicants are probably deterred from filing because of the ex-

561. *Rose v. Lundy*, 455 U.S. 509, 522 (1982). See generally Note, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. CHI. L. REV. 354-56 (1983) (discussion of circuit courts' views on whether a state may waive or forfeit the exhaustion requirement).

562. See *Daye v. Attorney Gen.*, 663 F.2d 1155, 1156 (2d Cir. 1981) (attempting to provide district courts with guidance about how to decide if claims have been presented to state courts), *vacated*, 696 F.2d 186 (2d Cir. 1982) (en banc), *reheard*, 712 F.2d 1566, 1572 (2d Cir. 1983) ("[T]he trial judge's conduct approached but did not cross the line that permits us to rule that the Constitution has been violated.")

563. P. ROBINSON, *supra* note 216, at 13. In other words, 37% of all petitions were dismissed for failure to exhaust. Robinson examined a total of 1,899 habeas cases filed from 1975 to 1977 by state prisoners in six federal district courts and one appellate court. See also RUTGERS STUDY, *supra* note 399 (analyzing the same data); *id.* at 694 n.73.

Shapiro's study of state habeas corpus petitions filed from 1970-1972 in the Massachusetts Federal District Courts reached similar conclusions. He found that 40 of the 72 cases dismissed in 1970, 51 of the 96 cases dismissed in 1971, and 44 of the 75 cases dismissed in 1972 were dismissed, either in whole or in part, because of failure to exhaust. Shapiro, *supra* note 77, at 334. In Shapiro's view, state remedies were not always "easy" to exhaust, and the exhaustion requirement generated a fair amount of wasted effort. *Id.* at 358. On balance, however, he favored the exhaustion rule because he believed it had a salutary effect on state court postconviction proceedings. *Id.*

564. There are few studies available on this issue. Davies, *supra* note 74, does, however, provide a summary of "interventions" (reversals or modifications) in the California Court of Appeal for the First Appellate District. Of 396 habeas cases decided, that court intervened in 20 (5%). *Id.* at 574 table 6. Davies provided extensive data on the low reversal rate on direct appeal in criminal cases. *Id.* at 591-95. In his view, appellate judges review cases to see if trial courts' decisions were within acceptable bounds. I assume that Davies' so-called "norms of affirmance," *id.* at 591, apply on collateral attack as well. Cf. Oliver, *Post-Conviction Applications Viewed by a Federal Judge—Revisited*, 45 F.R.D. 199, 208-15 (1969) (praising Missouri for revision of its postconviction remedy process to include evidentiary hearings).

haustion requirement, while others, whose petitions are refused for failure to comply with the exhaustion requirement, may never return. Whether the number of persons deterred or the number of cases finally decided by state courts is worth the costs of the exhaustion search is unknown. If exhaustion cannot be justified on economy grounds, however, it may be justified on others, such as giving power to state court judges.

Once a petition complies with the formal requirements and passes the exhaustion test, courts must decide other threshold matters. If the petitioner filed some time after conviction, the petition could be dismissed under Rule 9(a) for a belated filing causing prejudice to the government.⁵⁶⁵ If the petitioner has filed previously, dismissal might occur under Rule 9(b) for "abuse of the writ." Assuming that a petitioner avoids these obstacles, the court must then consider a series of other issues: whether, if state court findings were made, the "presumption of correctness" precludes further review;⁵⁶⁶ whether, if a fourth amendment claim has been raised, an opportunity for a "full and fair" hearing was provided;⁵⁶⁷ whether, in the absence of a contemporaneous objection, "cause and prejudice" has been shown,⁵⁶⁸ and so on.⁵⁶⁹ In other words, given the doctrinal developments of the last few years, federal judges and magistrates must do a substantial amount of work prior to consideration of the merits. In a vast number of cases, courts do not reach the question of whether a trial or conviction occurred in

565. Cf. P. ROBINSON, *supra* note 216, at 9 (belated filings were rarely a problem; most cases filed within one and one-half years of conviction, although the average interval from conviction to filing was just over two years); RUTGERS STUDY, *supra* note 399, at 702 n.97, 703 (analysis of same data, but concluding time interval from conviction to trial was approximately two years); Avichai, *supra* note 486, at 340 (finding half of those filing a first petition had been incarcerated for more than a year).

566. See, e.g., *Sumner v. Mata*, 449 U.S. 539, 547, *on remand*, 649 F.2d 713 (9th Cir. 1981), *vacated and remanded*, 455 U.S. 591 (1982) (per curiam), *on remand*, 696 F.2d 1244 (9th Cir.), *vacated and remanded*, 104 S. Ct. 386 (1983) (with directions to dismiss the appeal as moot) (presumption of correctness also applies for state appellate court "findings of fact").

567. *Stone v. Powell*, 428 U.S. 465, 494 (1976).

568. *United States v. Frady*, 456 U.S. 152, 167 (1982); *Engle v. Isaac*, 456 U.S. 107, 129 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977); See, e.g., *Roland v. Mintzes*, 554 F. Supp. 881, 887 (E.D. Mich. 1983) (after examining case to determine Rule 9(a) questions, the court decided that the petition had to be dismissed under "cause and prejudice" test).

569. Other legal issues that could be the basis for dismissals include *Lane v. Williams*, 455 U.S. 624, 631 (1982) (holding prisoners' habeas claims moot); *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973) (inmates who seek release may not pursue claims under 42 U.S.C. § 1983 but must file such claims under 28 U.S.C. § 2254). See generally Haar, *A Research Proposal for Studying Federal Habeas Corpus Review of State Court Criminal Convictions*, 1983 INST. OF JUD. AD. 4 (proposed analysis of what courts actually do in habeas cases) (on file with the Southern California Law Review).

violation of the Constitution and whether such violation constituted a fundamental miscarriage of justice.

Can all this spade work be justified as economical? Once again, it is virtually impossible to know. We have no control group, no world in which the doctrinal developments have not occurred. We do know that the proportionate decline in habeas filings predated both the Burger Court's innovations and the 1977 Habeas Rules, but that information may not tell us very much. Legal doctrine may be but one of many determinants of litigation rates.⁵⁷⁰ Perhaps the decline in filings is due to better performance by the first tier, in which case the Burger Court is correct to perceive habeas as an unnecessary use of resources. But the improvement, if extant, in performance by the first tier may be dependent upon the threat of habeas supervision. Furthermore, while we could assume that the many procedural obstacles erected by the Burger Court deter some filings, we do not know whether those deterred are prisoners who have meritorious claims.

My own guess is that the time saved by virtue of the cases not filed is far outweighed by the time spent picking through the cases filed to decide whether to think about the merits.⁵⁷¹ While the Court has constricted the number of applications that may be considered on the merits, the Court has not made the search for those rare petitions easier or quicker.

There is another argument embedded in the economy rationale; federal courts' economy may be equated with their avoidance of constitutional claims and of so-called "advisory" opinions. This premise is used to justify the Supreme Court's mandate to trial courts to decide whether a prisoner has met the "cause and prejudice" test or other threshold requirements before deciding whether any constitutional violation has occurred;⁵⁷² if no cause and prejudice is found, then a court need never determine the validity of a conviction.⁵⁷³

570. See, e.g., Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 131 (1977) (state supreme courts' caseload has decreased, reasons behind change complex).

571. See also *Sumner v. Mata*, 455 U.S. 591, 600 (1982) (Stevens, J., dissenting) ("Once again the Court's preoccupation with procedural necessities has needlessly complicated the disposition of a federal habeas petition."). See generally Goodman & Sallett, *Wainwright v. Sykes: The Lower Courts Respond*, 30 HASTINGS L.J. 1683, 1689 (1979) (discussing the difficulty lower courts have applying Supreme Court habeas doctrine).

572. *United States v. Frady*, 456 U.S. 152, 170 (1982).

573. In addition to the threshold cause and prejudice determination, the Supreme Court has also authorized lower courts to make other prejudice determinations prior to deciding whether a constitutional deprivation has occurred. See, e.g., *Strickland v. Washington*, 104 S. Ct. 2052, 2069

But questions of cause and prejudice or of other "threshold" issues can be as knotty and as time consuming to decide as the question of whether a constitutional violation has occurred. And, if no violation is found, the inquiry into the "threshold" questions is a wasted, in some sense "advisory," effort. Given that there are at least two questions to be determined (such as whether a petitioner can establish cause and prejudice and whether a constitutional error occurred), there is no way to decide in advance which question can be adjudicated more quickly, or to determine the economical ordering of the questions.⁵⁷⁴ There is, however, a reason to prefer a decision first on the constitutional question: determining the merits of those issues helps illuminate what kinds of errors are cognizable on habeas corpus and which errors fall below the requisite level of injury.⁵⁷⁵ Placing questions such as cause and prejudice first stunts the development of criminal constitutional law. Although lower federal judges are busy working on habeas cases and the number of reported habeas opinions is large, the effort gives us little information about public norms other than the desire for first tier power and finality.

b. *Finality*: The Supreme Court has had somewhat more success in its efforts to enshrine finality, but that success is far from absolute. The Court's procedural modeling has worked in the sense that first tier decisions are rarely revised, but the Court has not yet succeeded in leaving the first decision unquestioned. Instead, habeas litigation is now litigation about finality. In the fourth amendment context, and in those instances in which state court rulings rest upon factual findings, habeas litigation centers around the question of whether the first opportunity to litigate was adequate. If the opportunity was adequate, the outcome may not be reconsidered. In many other kinds of habeas cases, the issue is whether petitioners have forfeited their rights to review because of failures to complain at trial, soon after conviction, or thereaf-

(1984) ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of alleged deficiencies.").

574. The Supreme Court explicitly recognized this ordering problem in a related context. In *Strickland v. Washington*, the Court held that, to decide the merits of a sixth amendment ineffective assistance of counsel claim, a court must establish (1) whether counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment" and (2) whether the "deficient performance prejudiced the defense." *Id.* at 2064. The Court authorized lower courts to decide the questions in whatever order was easiest to avoid "burdensome" inquiries. *Id.* at 2069.

575. See Bice, Anderson and the Adequate State Ground, 45 S. CAL. L. REV. 750, 760-61, 764-65 (1972) (discussing why such opinions would not violate the constitutional requirement that federal courts decide only "cases" or "controversies").

ter. The Court has not stopped habeas litigation, it has only reshaped and diluted the utility of the questions litigated.

c. *The power of the first tier*: The Court has had its clearest success in making first tier decisions authoritative. First tier decisions now have enduring, almost unshakable consequences. The Court has not, however, altered the process by which the first tier reaches its decisions; rather, the Court has simply instructed federal courts not to think about whatever problems may have occurred.

Take, for example, *Rose v. Lundy*, in which the Court announced its "total exhaustion" rule.⁵⁷⁶ The lower federal courts that had reviewed Lundy's trial and conviction had determined that the state judge had so mishandled the trial that it could not be considered "fair."⁵⁷⁷ The Supreme Court concluded that the federal courts should not have decided that question because Lundy had filed a "mixed" petition, that is, some of his claims had not been presented to the state courts.⁵⁷⁸ Lundy must remain incarcerated while he exhausts his claims. Assuming that the lower federal courts were correct in their evaluation of Mr. Lundy's trial, he is now serving time that federal judges have determined to be unconstitutionally imposed. His current incarceration flows, in some sense, from his inexperience as a litigator. The first tier's power has been preserved, and federal court review postponed, if not precluded, but to what purpose?

What impact will the absence or marked decrease of federal review have on state criminal court proceedings? Given the constriction of habeas corpus, the existence of other doctrines that virtually prevent

576. 455 U.S. 509, 522 (1982).

577. *Lundy v. Rose*, 624 F.2d 1100 (6th Cir. 1980) (mem.), *rev'd*, 455 U.S. 509 (1982) (discussed at 455 U.S. 509, 511-13). Finding numerous instances of "flagrant prosecutorial misconduct," of judicial limitations of cross examination of the rape victim, and of misinstructions to the jury, the district court concluded that Lundy had not received "a fair trial, his Sixth Amendment rights were violated and the jury poisoned." 455 U.S. at 513. The Court of Appeals for the Sixth Circuit affirmed the judgment, *Lundy v. Rose*, 624 F.2d at 1100, but the Supreme Court reversed, *Rose v. Lundy*, 455 U.S. at 522. Justice Blackmun concurred in the judgment but argued that a "total exhaustion" rule was a grave mistake; "it operates as a trap for the uneducated and indigent *pro se* prisoner-applicant; . . . it delays the resolution of claims that are not frivolous; and . . . it tends to increase, rather than to alleviate, the caseload burdens on both state and federal courts." *Id.* at 522.

578. 455 U.S. at 518-19. For an argument for strict interpretation of the *Rose v. Lundy* rule, see Justice O'Connor's dissent to the denial of certiorari in *McKaskle v. Vela*, 104 S. Ct. 736, 738 (1984) (O'Connor, J., dissenting) ("[H]abeas petitioners, and not the state court judges, bear the burden of severing the bad from the good and of raising those errors supportive of an alleged constitutional claim.").

federal courts from enjoining state criminal proceedings,⁵⁷⁹ and the rarity of direct review by the Supreme Court,⁵⁸⁰ state courts have been left to their own devices.⁵⁸¹ Does such absence of review improve "morale," as Justice O'Connor claims,⁵⁸² or does it make trial and intermediate appellate judges less concerned about rights enforcement?

Providing opportunities for revision, be they on direct appeal or on collateral review, is premised upon the concern that, absent such oversight, first tier decisionmakers will be sloppy. Besides concerns about "judicial despotism," revision is animated by a more sympathetic view of first tier actors. The assumption is that first tier actors are very busy people, beset by too many cases, many of which are litigated by harried district attorneys and overloaded public defenders. Additional tiers permit revision, not so much to supervise or "demoralize" but to provide some backup for overstressed systems that cannot be expected to function very well at least some of the time. The current Court's presumption of a well functioning lower tier⁵⁸³ does not create well run trial courts. Rather, this presumption simply insulates the lower tier from scrutiny, as well as from help.

III. THE VALUE CHOICES: THE REST OF THE DOCKET

The developments detailed above could be categorized as peculiar to "habeas corpus cases" and, therefore, as necessarily somewhat deviant. As a consequence, it is worth enlarging the scope of the inquiry. In other areas of law, a majority of the Burger Court has shown its willingness to limit examination of first tier decisions by new applica-

579. See, e.g., *Younger v. Harris*, 401 U.S. 37, 43 (1971) (comity and equity requires federal courts not to intervene in state criminal proceedings absent exceptional circumstances).

580. In the 1982-83 term, the Supreme Court reviewed 21 state court criminal convictions. In 1978, 13,734,879 criminal prosecutions were begun in state courts. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1978, at 450 table B [hereinafter cited as 1978 STATE STATISTICS].

581. Proportionately, it appears that federal convictions reach the Supreme Court more frequently than do state convictions. In 1978, 34,624 criminal cases were commenced in federal district courts. 1978 ANNUAL REPORT, *supra* note 215, at 236 table 47. As noted, *supra* note 580, state criminal prosecutions are in the millions. During its 1982-83 term, the Court decided 7 federal criminal cases and 15 state criminal cases. *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 302 table III (1983).

582. *Engle v. Isaac*, 456 U.S. at 128-29 n.33.

583. This presumption, as applied to defense counsel's performance, was stated, repeatedly, in *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984) ("Judicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

tions of preclusion doctrines, by expansive interpretation of magistrates' authority, and by narrowing the scope of appellate review.

There are, of course, some instances in which the Supreme Court has refused to let first tier decisions stand.⁵⁸⁴ Several of the cases I examine are parts of other pictures—ones in which the Court has diminished access to federal courts by restrictive construction of justiciability doctrines,⁵⁸⁵ by narrow interpretation of what constitutes constitutional violations,⁵⁸⁶ by stringent proof requirements,⁵⁸⁷ and by reduction of permissible remedies.⁵⁸⁸ But the import of viewing the development of a trend throughout diverse areas is not diminished by finding other trends or exceptions. Although habeas corpus provides the clearest example of the Court's use of procedure to implement its values, habeas corpus is not unique. The Supreme Court has been installing the Single Judge/Finality and Single Judge plus Limited Review Models across the litigation spectrum.

A. RES JUDICATA AND COLLATERAL ESTOPPEL: THE REFUSAL TO DIFFERENTIATE

Res judicata instructs us that litigants may not repeatedly bring the same claim to court; once a final judgment has been entered, it may not be disturbed by renewed litigation.⁵⁸⁹ In my terminology, res judicata is a strong endorsement of the Single Judge plus Limited Review

584. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (state agency provided inadequate procedures, and plaintiff's fourteenth amendment claim was therefore cognizable), discussed in Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company*, 1982 U. ILL. L. F. 831.

585. See, e.g., *City of Los Angeles v. Lyons*, 103 S. Ct. 1660, 1670 (1983) (no standing for injunctive relief against the police when an individual had suffered past injury but could not demonstrate a sufficient likelihood of future injury).

586. See, e.g., *Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (no fourteenth amendment claim when state court procedures provide adequate process). *Parratt's* holding (that federal courts cannot hear claims when state procedures are adequate) parallels *Stone v. Powell*, 428 U.S. 465, 495 (1976) (federal relief unavailable where state "has provided an opportunity for full and fair litigation" of a constitutional claim). For criticism of the *Parratt* decision, see Travis & Adams, *The Supreme Court's Shell Game: The Confusion of Jurisdiction and Substantive Rights in Section 1983 Litigation*, 24 B.C.L. REV. 635 (1983).

587. See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 103 S. Ct. 3221, 3236 (1983) (Powell, J., concurring in the judgment) (proof of discriminatory intent required for violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d to 2000d-6).

588. See, e.g., *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (no implied cause of action for damages under the Investment Advisors Act of 1940). See also *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 512 (1982) (habeas corpus provides neither federal court jurisdiction nor remedy for child custody disputes).

589. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 529 (2d ed. 1977).

Model.⁵⁹⁰

Res judicata, or "claim preclusion,"⁵⁹¹ is applied only if the same parties or their "privies" seek to relitigate claims that have been or that *could have been* brought before. Under old forms of action, the reach of the doctrine was fairly narrow because the definition of what "could have been brought" in round one was restrictive. For example, in some jurisdictions equitable actions could not be joined with legal actions; therefore, parties who had brought an equitable action would not have been precluded from bringing a second, legal action.⁵⁹²

By comparison, the related doctrine of collateral estoppel, or "issue preclusion,"⁵⁹³ permits a former judgment to preclude additional litigation on related matters. For collateral estoppel to apply, the issues to be precluded must in fact have been litigated, decided by the tribunal, and necessary to the merits of the decision.⁵⁹⁴ In its traditional form, collateral estoppel applied only if "mutuality of estoppel" was possible—that is, if both parties to the second litigation were bound by the outcome of the first.⁵⁹⁵ For example, a litigant who had lost an effort to establish the validity of a patent would have been precluded from claiming the patent's validity in a second action only if the party against whom the claim was made was also a litigant in the first round.⁵⁹⁶

Liberal rules of pleading and of joinder (of both claims and parties) have expanded the definition of what "could have been brought" in the first round.⁵⁹⁷ Further, the opportunities for representative litigation have grown; class actions and similar devices permit individuals, either court-appointed, statutorily-designated or self-selected, to come

590. See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (res judicata bars relitigation of unappealed adverse judgment even when other plaintiffs in similar actions against common defendants successfully appeal judgments).

591. F. JAMES & G. HAZARD, *supra* note 589, at 532-33.

592. *Id.* at 530-32.

593. *Id.* at 563.

594. *Id.* at 563-73.

595. See *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912) ("principle of general elementary law that estoppel of a judgment must be mutual").

596. This formulation was not rejected until *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 350 (1971) (abrogating mutuality of estoppel for patent actions). See also *infra* notes 602-38 and accompanying text.

597. See, e.g., *Los Angeles Unified School Dist. v. Los Angeles Branch NAACP*, 714 F.2d 935, 941 (9th Cir. 1983), *reh'g granted*, 725 F.2d 1257 (9th Cir. 1984) (claims of de jure segregation from 1968 to 1981 could have been coupled with claimed de facto segregation from 1963 to 1968, and, as a result, renewed litigation is barred).

forward on behalf of absentees.⁵⁹⁸ Statutory rights have also increased the claims available and the number of eligible claimants. Technological innovations have produced toxic torts and mass disaster litigation. In short, the possibility of multiple lawsuits on similar or the same claims is substantial.⁵⁹⁹ New questions have thus arisen about the reach of res judicata and collateral estoppel doctrines.⁶⁰⁰ The Supreme Court's answers have generally⁶⁰¹ expanded those doctrines so as to preclude renewed litigation on claims or issues litigated elsewhere.

1. *Expanding the Reach of Collateral Estoppel*

A few years ago, the Supreme Court settled a question that had been open for some thirty years: whether litigants in a second case, who had not been parties to a first action, could use their opponents' prior losses against them. The California Supreme Court had been the first to decide that "mutuality of estoppel" was not required when the

598. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310 (1950) (court-appointed representative on behalf of beneficiaries of pooled trusts); Civil Rights of Institutionalized Persons Act § 3, 42 U.S.C. § 1997a (Supp. V 1981) (United States Attorney General authorized to sue on behalf of institutionalized populations); FED. R. CIV. P. 23 (self-appointed individual may pursue representative litigation on behalf of similarly situated members of a class).

599. See, e.g., *Cooper v. Federal Reserve Bank*, 104 S. Ct. 2794, 2801 (1984) (after EEOC had brought an action in which private plaintiffs had intervened and a class had been certified, and the classwide claims lost, individual plaintiffs were permitted to proceed); *General Tele. Co. of Northwest v. EEOC*, 446 U.S. 318, 333 (1980) (EEOC need not obtain class action certification to pursue Title VII claims on behalf of individuals who may also litigate such claims on their own behalf).

600. A spate of law review articles and a new edition of the Restatement of Judgments have followed these changes. See RESTATEMENT (SECOND) OF JUDGMENTS *passim* (1980) (reflecting the increasingly restrictive nature of the law of res judicata and collateral estoppel and the inverse relationship between restrictive rules governing preclusion of a second action and liberal rules governing procedures at initiation). Compare Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U.L. REV. 383, 439 (1983) (advocating limited use of preclusion) with Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 465 (1981) (*Restatement* did not go far enough in its preclusion rules). See also Gunn, *The Offensive Use of Collateral Estoppel in Mass Tort Cases*, 52 MISS. L.J. 765, 782 (1982) (advocating limited use of offensive issue preclusion). See generally *Symposium on the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 401 (1981) (discussing the *Restatement (Second) of Judgments'* treatment of preclusion).

601. *But see Cooper v. Federal Reserve Bank*, 104 S. Ct. 2794, 2801 (1984); *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1107 (1984) (gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent forfeiture proceeding to obtain the firearms); *United States v. Mendoza*, 104 S. Ct. 568, 571 (1984) (government is not collaterally estopped from litigating an issue adjudicated against it in another lawsuit brought by a different party); *Standefer v. United States*, 447 U.S. 10, 25 (1980) (declining to apply collateral estoppel to preclude the government's effort to convict a criminal defendant for giving a bribe that another defendant had been found not guilty of receiving); *Brown v. Felsen*, 442 U.S. 127, 138 (1979) (where debtor asserts new defense of bankruptcy, res judicata does not bar creditor from introducing new evidence).

party sought to be estopped had had a "day in court."⁶⁰² The United States Supreme Court gave its support to the proposition in 1971, but in the limited context of a patent case.⁶⁰³ In 1979, in *Parklane Hosiery Co. v. Shore*,⁶⁰⁴ the Court conclusively ended the mutuality of estoppel requirement in the federal courts and authorized the use of nonmutual offensive collateral estoppel.

Parklane occurred in the context of a single system, the federal courts. The Securities and Exchange Commission (SEC) initiated a lawsuit, accusing Parklane Hosiery of filing misleading proxy statements. After a four-day bench trial, a judge found Parklane liable and enjoined it from continuing its misleading practices.⁶⁰⁵ In a separate action for damages, Leo Shore, representing dissatisfied shareholders of Parklane, asserted that Parklane should be estopped from relitigating the defense it had unsuccessfully made in the SEC action.⁶⁰⁶ The Supreme Court concluded that, given what it deemed to be the equality of procedural opportunities afforded in the SEC case and in the damage action,⁶⁰⁷ Parklane had had "its day in court." Despite the fact that, had the SEC lost, Shore would not have been estopped from relitigating alleged misrepresentations by Parklane, the company was precluded from relitigating questions already adjudicated in the SEC suit. In general, the Court concluded that nonmutual preclusion was appropriate in a case where: (1) the litigant against whom the doctrine is asserted has had a full and fair opportunity to litigate the claim in a prior action; (2) the litigant against whom the doctrine is asserted has had ample incentives to litigate fully in the first round; (3) the first court has decided the question; and (4) no reasons exist to distrust the first decision.⁶⁰⁸

A second case to address the question of mutuality of estoppel is

602. *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

603. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Found.*, 402 U.S. 313, 340 (1971).

604. 439 U.S. 322 (1979).

605. *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

606. *Shore v. Parklane Hosiery Co.*, 565 F.2d 815, 818 (2d Cir. 1977) (on interlocutory appeal from the Southern District of New York), *aff'd*, 439 U.S. 322 (1979). Shore had filed his action before the SEC filed its lawsuit, but the SEC case went to trial and judgment first. 439 U.S. at 332 n.18.

607. Parklane argued that a procedural inequality existed because the first case had been tried by a judge, while in the second case, Parklane had the right to a jury trial. The majority termed the availability of the jury a "neutral" factor. 439 U.S. at 332 n.19.

608. *Id.* at 331-33.

Allen v. McCurry,⁶⁰⁹ but this case arose in a context more complex than *Parklane* and diverged from *Parklane* on several points. In his Missouri criminal prosecution, Willie McCurry had unsuccessfully sought to suppress evidence of his illegal possession of heroin. After a hearing on the suppression issue, the state trial judge ruled that the police, who had searched McCurry's home without a warrant, had illegally seized evidence from inside McCurry's dresser drawers. Other evidence found "in plain view," however, was deemed lawfully seized and therefore admissible. Thereafter, McCurry was convicted.⁶¹⁰

Subsequently, McCurry filed a *pro se* civil suit against the police officers involved. He alleged that the officers had conspired to violate his constitutional rights by illegally searching his home and assaulting him.⁶¹¹ The Supreme Court, per Justice Stewart, held that McCurry could not be heard on his illegal search claims.⁶¹² The state court decision, upholding the search in part, precluded McCurry's federal civil rights lawsuit.

Preclusion issues such as the one raised in *Allen v. McCurry* had given judges, commentators, and the drafters of the Second Restatement of Judgments grounds for pause. Although believing that most state court decisions should be given preclusive effect by federal courts, many considered federal civil rights actions special.⁶¹³ After all, Congress had given the federal courts a "supplementary" role in civil rights cases.⁶¹⁴ That grant of jurisdiction reflected a concern about the special *federal* nature of the problem—that state officials might not pay adequate attention to federal rights. Given the purpose of providing federal jurisdiction in section 1983 claims,⁶¹⁵ some federal courts were

609. 449 U.S. 90 (1980).

610. *State v. McCurry*, No. 77-862 (Mo. Cir. Ct. Jan. 6, 1978), *aff'd*, *State v. McCurry*, 587 S.W.2d 337 (Mo. Ct. App. 1979).

611. *McCurry v. Allen*, 466 F. Supp. 514 (E.D. Mo. 1978), *rev'd*, 606 F.2d 795 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980).

612. The question of the legality of the assault had not been raised in the suppression hearing and was not before the Supreme Court. 449 U.S. at 93 n.2.

613. See, e.g., Comment, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions*, 27 UCLA L. REV. 177 (1979) (proposing that civil rights actions, like habeas actions, be an exception to res judicata doctrine). But see Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 327-32 (1978) (civil rights actions are not exceptional for res judicata purposes). For a general discussion of the problems of preclusion in the criminal context, see Vestal, *Issue Preclusion and Criminal Prosecutions*, 65 IOWA L. REV. 281 (1980).

614. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

615. See Neuborne, *supra* note 138, at 1109-10 (federal jurisdiction provided due to "thinly disguised assumptions of nonparity between state and federal courts"); Peller, *supra* note 13, at 666-68 (disparity between state and federal court treatment of constitutional claims).

reluctant to accord preclusive weight to state court decisions on civil rights issues. They argued that section 1983 actions, like habeas corpus actions, demanded special treatment.⁶¹⁶

Cases like *Allen v. McCurry* pose additional problems. First, in such cases, the constitutional issues are raised involuntarily, as defenses in criminal prosecutions.⁶¹⁷ Second, because of the criminal proceedings, defendants have had no opportunity to cross-claim for damages, a remedy typical of many civil rights actions.⁶¹⁸ Third, the procedural opportunities in the criminal proceedings are not equivalent to those provided in civil cases. For example, more discovery is available in civil actions.⁶¹⁹ Fourth, the issues decided in suppression hearings are whether searches were so bad as to compel exclusion of damning evidence. Given qualms about the exclusionary rule, judges' decisions in suppression hearings may well be affected by the thought that finding seizures illegal will yield a sanction so many dislike. Had the state judge in *McCurry* been able to admit the information and yet assess damages against the government (as has been suggested by some dissatisfied with the exclusionary rule),⁶²⁰ we do not know how the judge would have ruled. Finally, in *McCurry*, the fourth amendment claim could not, by virtue of the Supreme Court's decision in *Stone v. Powell*, receive federal habeas review. Absent the minute chance of direct review of McCurry's criminal conviction by the Supreme Court, a federal judge would hear McCurry's claim of state officials' violations of his constitutional rights in the section 1983 case or not at all. These were the arguments that persuaded the Eighth Circuit not to apply collateral estoppel to McCurry's case.⁶²¹

Reversing, the Supreme Court held that the collateral estoppel doctrines enunciated in non-civil rights cases apply with full force in section 1983 litigation.⁶²² Further, the Court expanded the preclusion

616. *E.g.*, *Lombard v. Board of Educ.*, 502 F.2d 631 (2d Cir. 1974).

617. *Parklane Hosiery* was also a defendant, forced to litigate at a time not of its choosing.

618. For discussion of the role of remedy in *McCurry*, see *The Supreme Court, 1980 Term*, 95 HARV. L. REV. 17, 280-90 (1981).

619. Compare FED. R. CIV. P. 26(b)(1), 34(a) (any document, not privileged, relevant to subject matter of action discoverable) with FED. R. CRIM. P. 16(a)(1)(C) (documents may be discovered only if material to the preparation of the defense, intended to be introduced into evidence by the government, or obtained from or belonging to the defendant).

620. *E.g.*, *Stone v. Powell*, 428 U.S. 465, 500-01 (1976) (Burger, C.J., concurring); *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388, 422-23 (1971) (Burger, C.J., dissenting).

621. 606 F.2d at 798-99.

622. The Court did not decide the more limited question of the preclusive effect of suppression hearings on subsequent damage actions predicated on the fourth amendment. Rather, the Court's holding applies to all civil rights litigation. Further, the Court twice relied upon Mc-

doctrine by assuming that the police officers, not in privity with the state, could use the state's prior victory. A single state court judge's ruling on a suppression question thereby precluded the federal system from considering a damage action for claimed unconstitutional acts of state officials.

Like the doctrines emanating from the habeas cases, the *Parklane-McCurry* preclusion rules succeed in ensuring finality but do not prevent all litigation about whether finality should attach. Courts must spend substantial time investigating what was decided in a first lawsuit to determine the propriety of estoppel. Moreover, as recognized by the Court, these preclusion rules may increase trial judges' work in two ways. First, *offensive* collateral estoppel, unlike defensive collateral estoppel, permits a possible plaintiff to "wait and see"⁶²³ how one case goes and to proceed if a decision could be advantageously used. To discourage such uneconomical practices (a form of reverse "sandbagging"), the Court authorized lower courts to decline to give collateral estoppel effect "where a plaintiff could easily have joined in the earlier action."⁶²⁴ Of course, that solution results in a second full litigation, with its attendant costs. But the approach does sanction the putative plaintiff by prohibiting reliance upon a defendant's prior loss and does give a defendant additional persuasive opportunities.

Second, the possible collateral use of a decision by nonparties inevitably "ups the stake" of the first action, thereby providing incentives for parties to invest heavily in the first round. Although such investment may be an appropriate reflection of the value of an action,⁶²⁵ the fear of collateral use of decisions may artificially increase investments, which in turn may waste parties' resources and courts' time. To minimize the possible inflationary aspect of its ruling, the Court provided another exception to the application of collateral estoppel: where a first action involves small stakes and future cases are not foreseeable, collateral estoppel should not be applied.⁶²⁶

Curry's "opportunity" to litigate rather than the fact of actual litigation—thereby spawning the confusion it later resolved in *Haring v. Prosis*, 103 S. Ct. 2368 (1983), discussed *infra* notes 631-35 and accompanying text. Justice Blackmun, in dissent, complained of the unnecessary breadth of the majority's decision. 449 U.S. at 112-13 (Blackmun, J., dissenting). The majority disclaimed such a problem. *Id.* at 94 n.5.

623. *Parklane Hosiery Co. v. Shore*, 439 U.S. at 330.

624. *Id.* at 331.

625. For example, in *Parklane*, Shore had filed a stockholder's class action damage suit before the SEC sought injunctive relief. *Id.* at 324.

626. *Id.* at 330.

In *McCurry*, the Court discussed its concern for resource conservation and its belief in the importance of federal courts' according finality to first tier, state court decisionmakers.⁶²⁷ Rejecting the opportunity for differentiating particular categories of cases (civil rights claims against state officials, or criminal litigation followed by civil rights litigation, or fourth amendment claims in which habeas review is unavailable), the Court held that, regardless of the kind of case, collateral estoppel was to apply.⁶²⁸

The Court in *McCurry* did purport to leave open one exception to its rule: the Court said that preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."⁶²⁹ But the Court rejected *McCurry's* arguments that a fourth amendment suppression hearing was not a "full and fair" opportunity in which to litigate an issue central to the damage claim under section 1983. Reiterating its confidence in the first tier, the Court concluded that preclusion was proper.

The Court's value choices should not be overstated. Some ambivalence about the preclusion rule was evident in *McCurry*, the Court stated that it had reserved "questions as to the scope of collateral estoppel."⁶³⁰ To the surprise of some lower courts,⁶³¹ in 1983, a unanimous Court held that a criminal defendant's guilty plea did not have preclusive effect on a subsequent civil damage action that raised issues which had not actually been litigated in the criminal case. In *Haring v. Prosise*,⁶³² as in *McCurry*, a convicted criminal defendant had filed a section 1983 damage action and had alleged that the search of his apartment by police officers had violated the fourth amendment. However, unlike *McCurry*, *Prosise* pleaded guilty. Further, when taking the guilty plea, the state court entertained some discussion of the search but held no suppression hearing and made no decisions about its

627. *Allen v. McCurry*, 449 U.S. at 95-96 ("[R]es judicata and collateral estoppel . . . promote the comity between the state and federal courts that has been recognized as a bulwark of the federal system.").

628. *Id.* at 101-05. The Court has decided that, although nonmutual offensive collateral estoppel may be used against private defendants, *e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979), nonmutual collateral estoppel may not be used against the United States. *United States v. Mendoza*, 104 S. Ct. 568, 571-74 (1984).

629. 449 U.S. at 95 (citations omitted).

630. *Id.* at 93 n.2.

631. *E.g.*, *Prosise v. Haring*, 667 F.2d 1133 (4th Cir. 1981), *rev'd*, 103 S. Ct. 2368 (1983); *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978); *Nathan v. Tenna Corp.*, 560 F.2d 761 (7th Cir. 1977).

632. 103 S. Ct. 2368 (1983).

legality.⁶³³

The *Prosise* Court justified its ruling of no preclusion by invoking concerns largely ignored in *McCurry* and, in turn, by ignoring some of the concerns that weighed heavily in *McCurry*. This time, little mention was made of court resources.⁶³⁴ Instead, the Court spoke of the "important interests in preserving federal courts as an available forum for the vindication of constitutional rights."⁶³⁵

But *Prosise* is not a return to the discarded values of dual forum decisionmaking, differentiation, revisionism, and diffusion of power. *Prosise* and *McCurry* together stand for the proposition that criminal defendants must choose between litigating claims in the course of their criminal defense or litigating claims after conviction or acquittal by means of a second, civil action. The criminal case remains a preclusive threat; in essence, these opinions result in an election of remedies rule. *Prosise* does not authorize consideration of the same issue by two fora. Rather, it adheres to a Single Judge plus Limited Review Model but declines to force all possible issues into a first action.

To summarize, in recent Supreme Court cases discussing collateral estoppel, the Court has generally opted for expansive preclusion rules.⁶³⁶ Furthermore, despite the usual characterization in hornbooks and the Court's own descriptions of collateral estoppel as a "discretion-

633. *Prosise v. Haring*, 667 F.2d at 1142 n.16.

634. Those issues were relegated to a footnote. 103 S. Ct. at 2377 n.11.

635. *Id.* at 2378. As in *Allen v. McCurry*, the Court considered the impact of 28 U.S.C. § 1738, the Full Faith and Credit statute. Because the statute required federal courts to give a state court judgment the same effect it would be accorded by the state in which the judgment was rendered, the Court examined Virginia's collateral estoppel rules. Although Virginia had not decided the question, the Court concluded that Virginia would not treat the entry of a guilty verdict as preclusive in this situation. 103 S. Ct. at 2373-75. Further, the Court determined that, apart from full faith and credit concerns, *Prosise* should not be found, by virtue of his guilty plea, to have waived a civil action. *Id.* at 2376-77. *Cf. Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973) (guilty pleas preclude habeas claims relating to the deprivation of constitutional rights that occurred before the defendant pleaded guilty).

A guilty plea can, however, have impact beyond a criminal case. For example, a guilty plea constitutes an admission of responsibility that may be used in later civil actions against a defendant. Hazard, *Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems*, 66 CORNELL L. REV. 564, 577 (1981).

636. See also *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892, 898 (1984) (preclusion of section 1983 claims due to prior state court contract action); *United States v. Stauffer Chem. Co.*, 104 S. Ct. 575, 578-80 (1984) (doctrine of mutual collateral estoppel applied to the United States); *Montana v. United States*, 440 U.S. 147, 162-64 (1979) (United States estopped from challenging judgment when it had financed and controlled the first litigation). *But see Limbach v. Hooven & Allison Co.*, 104 S. Ct. 1837, 1843 (1984) (no collateral estoppel in tax litigation due to prior litigation involving different years). See generally Pielemeier, *supra* note 600 (arguing that preclusion of nonparties is permissible in certain circumstances but not if justified

ary" doctrine,⁶³⁷ the Court has overturned lower courts' refusals to preclude litigation.⁶³⁸ In this area of law, as in habeas corpus, the message is clear: finality and the preservation of resources are paramount, and the technique by which to achieve those goals is endorsement of first tier decisionmaking.⁶³⁹

2. *Extending Res Judicata*

Over the past few years, the Supreme Court has generally enforced and extended the classic embodiment of finality concerns—*res judicata*. The Court has limited the role for the second set of decisionmakers in another arena of possible dual forum decisionmaking, Title VII of the 1964 Civil Rights Act. Under that Act, state agencies must first decide questions of alleged job discrimination. Thereafter, a federal agency, the Equal Employment Opportunities Commission (EEOC), may review those decisions.⁶⁴⁰ Finally, federal trial courts are given the

only by judicial economy); Shapiro, *The Application of State Claim Preclusion Rules in a Federal Civil Rights Action*, 10 OHIO ST. U. L. REV. 223 (1983) (arguing for less preclusion).

637. *E.g.*, *McCurry*, 449 U.S. at 94; *Parklane*, 439 U.S. at 331. *See generally* F. JAMES & G. HAZARD, *supra* note 589, at 583.

638. For example, in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), the Court reversed a circuit court decision declining to apply *res judicata* on the grounds of "public policy." Seven sets of plaintiffs had filed virtually identical private antitrust actions, five in federal court and two in state court. Defendants removed the two state actions to the federal court and then won dismissal of all seven actions on the grounds of no cognizable injury. *Weinberg v. Federated Dep't Stores, Inc.*, 426 F. Supp. 880 (N.D. Cal. 1977). Five plaintiff groups appealed the district court decision to the Ninth Circuit and won reversal. *Moitie v. Federated Dep't Stores, Inc.*, 608 F.2d 1374 (9th Cir. 1979). The two sets of plaintiffs who had originally filed their lawsuits in state court brought new actions, again in state court, and attempted to frame the lawsuits as involving violations of state law. Once again, defendants removed and requested dismissal, but this time put forth *res judicata* as their justification. Defendants won in the district court, but the Ninth Circuit reversed. *Moitie v. Federated Dep't Stores, Inc.*, 611 F.2d 1267 (9th Cir. 1980). That court reasoned that, since the case upon which the preclusion was based had itself been decided under an erroneous legal premise, and since the seven cases were so interwoven, "strict application" of *res judicata* violated "simple justice." *Id.* at 1269-70.

The Supreme Court reversed. Justice Rehnquist, writing for the Court, invoked finality as preeminently important. Justice Rehnquist chastised the Ninth Circuit and ordered that "any litigation in a predicament . . . of his own making," (more accurately, of their lawyers' making) cannot expect a court "to upset the general and well-established doctrine of *res judicata*." 452 U.S. at 401 (emphasis in original) (quoting *Reed v. Allen*, 286 U.S. 191, 198-99 (1932)).

639. In *Tower v. Glover*, 104 S. Ct. 2820, 2827 (1984), the Court, *sua sponte*, suggested that the lower court consider whether the plaintiff, who had lost in a criminal trial, was collaterally estopped from litigating a claim of conspiracy to violate his civil rights. The Court raised the possibility for collateral estoppel, "[a]lthough the issue was never raised by the parties, and . . . has absolutely no bearing on the disposition of the case." *Id.* (Brennan, J., joined by Marshall, Blackman & Stevens, JJ., concurring in part and concurring in the judgment).

640. 42 U.S.C. § 2000e-5(b) (1982). The EEOC must give "substantial weight" to state agency findings.

power to decide the cases again.⁶⁴¹ In my terms, Congress authorized first tier decisionmaking in states' administrative agencies and then in two different fora, a federal agency and a federal court.

This model of diffused decisionmaking is a complicated scheme devised to divide authority between agencies and courts and between the state and federal systems. Congress adopted this allocation to obtain enforcement of federally protected rights while distributing responsibility for implementation between the states and the federal government.⁶⁴² Congress was not explicit about what, if any, role state courts were to play in its scheme. The EEOC, however, assumed that Title VII was an example of a Single Judge (the state administrative agency hearing officer) plus Limited Review (state courts) plus a Different Forum, with somewhat Limited Review (the EEOC, which must give "substantial weight" to the state agency's findings) plus a Different Forum with Unlimited Review (the federal courts that are to make de novo decisions) Model.⁶⁴³

Thus, when Rubin Kremer went to the EEOC in May of 1976 to ask its assistance in resolving a discrimination claim against his former employer, Chemical Construction Corporation (Chemico), the EEOC sent him to the New York State Division of Human Rights (NYHRD), the agency charged in New York with responding to discrimination claims.⁶⁴⁴ After an "investigation" in which no witness was heard, no discovery taken, and no official record made,⁶⁴⁵ the NYHRD decided that there was "no probable cause" to believe that Chemico's refusal to rehire Mr. Kremer was based upon discrimination.⁶⁴⁶

Mr. Kremer received notice of the NYHRD's decision on a form, which also advised him that an appeal of the NYHRD ruling should be made to the New York State Human Rights Appeal Board. Mr. Kremer followed that route and, when he lost, relied upon the agency's

641. 42 U.S.C. § 2000e-5(f)(1) (1982). The EEOC decision may be admissible in Title VII lawsuits, *see, e.g.*, *Chandler v. Roubeshush*, 425 U.S. 840, 863 n.39 (1976) (admissible via FED. R. EVID. 803(8)(C)), but the civil action is to be "a trial de novo," *id.* at 845.

642. H.R. REP. NO. 914, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2391, 2401. Congress may also have been acting at the behest of employers, who perceived state agencies as unfair in their enforcement of nondiscrimination rules. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 474 (1982).

643. Brief for the United States and the Equal Employment Opportunities Commission as Amici Curiae at 7-8, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

644. N.Y. EXEC. LAW §§ 295(6), 296(1)(a) (McKinney 1982).

645. Petitioner's brief at 4, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). Respondent's brief did not dispute these facts.

646. 456 U.S. at 464.

form, which instructed him that "ANY COMPLAINANT . . . AGGRIEVED . . . MAY OBTAIN JUDICIAL REVIEW. . . . *Such proceedings shall be brought in the Appellate Division of the Supreme Court of the State. . . .*"⁶⁴⁷ Mr. Kremer, unaided by counsel, went to the Appellate Division, which concluded that the agency's decision had not been "arbitrary, capricious or an abuse of discretion."⁶⁴⁸ Thereafter, Mr. Kremer returned to the EEOC, which, relying upon the NYHRD conclusions, found "no reasonable cause to believe that the charge of discrimination was true."⁶⁴⁹ The EEOC also issued Mr. Kremer a "right to sue" letter.⁶⁵⁰ Following the path mapped out by the EEOC, Mr. Kremer, still *pro se*, filed a federal lawsuit in which he alleged that Chemico had fired him and would not rehire him because he was a Polish Jew.⁶⁵¹ That lawsuit was eventually dismissed by the Supreme Court, which held that, because Mr. Kremer had appealed to a state court, he could not have access to the federal courts.⁶⁵²

The Court's holding seems to conflict with the Congressional authorization of federal court decisionmaking atop state and federal agency decisions. The majority reconciled Title VII's mandate of federal court jurisdiction, the Court's own previous interpretation that such a grant authorized federal judges to make *de novo* findings,⁶⁵³ and the *Kremer* holding by noting that Mr. Kremer had not simply obtained a state *agency* finding. Rather, he had appealed that judgment to a state *court*, which had affirmed the ruling as neither arbitrary nor capricious.⁶⁵⁴ The Court interpreted Title VII's silence on what role, if any, state court judgments were to play as dispositive; because Congress had not expressly exempted Title VII from the "full faith and credit" statute and from *res judicata* doctrine, the Court held Mr. Kremer barred.⁶⁵⁵ The Court concluded that Title VII permitted un-

647. Notice of Order, State of New York Executive Department, *reprinted* in Joint Appendix at 17, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

648. 456 U.S. at 464. That standard is provided by N.Y. CIV. PRAC. LAW § 7803 (McKinney 1981); N.Y. EXEC. LAW § 298 (McKinney 1982).

649. *Kremer v. Chemical Constr. Corp.*, 623 F.2d 786, 787 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

650. 456 U.S. at 465. *See also* Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae at 3, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982) (arguing to the Court that, despite Mr. Kremer's unsuccessful state court litigation, Title VII permitted federal court decisionmaking).

651. *Kremer v. Chemical Constr. Corp.*, 477 F. Supp. 587 (S.D.N.Y. 1979), *aff'd*, 623 F.2d 786 (2d Cir. 1980), *aff'd*, 456 U.S. 461 (1982).

652. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

653. *Chandler v. Roudebush*, 425 U.S. 840, 845 (1976).

654. 456 U.S. at 476-78.

655. *Id.* at 468-69.

limited review in the new federal forum only if an individual had not sought state court review of a state agency decision. In other words, the Court's reading means that the "single judge" of the first forum consists solely of an agency decision rather than of a bipartite decision made by an agency and a court.⁶⁵⁶

Under the Supreme Court's interpretation, Title VII claimants can avoid preclusion only if they decline to seek review of state agency rulings in state courts.⁶⁵⁷ If Kreiner had ignored the form provided by NYHRD and promptly filed a federal lawsuit, he would not have had the "state court judgment affirming that a claim of employment discrimination is unproved,"⁶⁵⁸ and would, presumably, have been eligible for federal adjudication.

While the Court's statement suggests that it was the state *court's* judgment that functioned to preclude federal adjudication, the rest of the Court's discussion indicates that state *court* judgments may not always be critical to a finding of preclusion—agency decisionmaking alone might suffice. In the Court's words, it adopted its preclusion rule with "no hesitation" because of the "panoply of procedures," both *administrative* and judicial, offered to Mr. Kremer.⁶⁵⁹ When describing the procedures sufficient to provide Mr. Kremer with constitutionally

656. Other than the Second Circuit, the appellate courts that had addressed the question had reached the opposite conclusion. Jackson, Matheson & Piskorski, *The Proper Role of Res Judicata and Collateral Estoppel in Title VII Suits*, 79 MICH. L. REV. 1485, 1487-88 (1981).

657. Because the Supreme Court's rule provided an incentive for litigants to avoid state courts, the ruling is at odds with federalism concerns. 456 U.S. at 504 (Blackmun, J., dissenting). The majority claimed federalism was important to its holding. *Id.* at 472.

658. *Id.* at 485.

659. *Id.* at 484. The Court interpreted Title VII's silence about its interaction with the Full Faith and Credit statute, 28 U.S.C. § 1738, to mean that section 1738 applied and that, therefore, Kremer was precluded. *Id.* at 476.

Section 1738's impact on Mr. Kremer's problem was not as straightforward as the majority suggested. Section 1738 provides that all federal courts give preclusive effect to "[t]he records and judicial proceedings of any court of any . . . State . . . as they have by law or usage in the court of such State . . . from which they are taken." However, Title VII claims are not brought in state courts after state employment discrimination claims are unsuccessful. Therefore, New York State court's *res judicata* opinions do not directly indicate what effect New York would give state employment rulings if it were asked to consider them in the context of a subsequent, federal Title VII claim.

Further, Title VII provides a scheme of state and federal remedies. At the only points at which the statute addresses the question of preclusion, Title VII permits additional determinations—by the EEOC and the federal courts. 42 U.S.C. § 2000e-5 (1982). In addition, the legislative history is silent on congressional views of what impact state court judgments should have in Title VII cases. 1964 U.S. CODE CONG. & AD. NEWS 2405-06.

The majority did express some concern because New York's factfinding was done by an administrative agency, rather than a court. Section 1738 says that the proceedings of state *courts* should be given preclusive effect in federal court; the statute is silent on the effect of state agency

adequate opportunities to be heard, however, the Court relied almost exclusively upon the procedures provided by the NYHRD and not upon the minimal review provided by the New York State courts. And, as is typical of *res judicata* discussions, the Court's emphasis was on what might have occurred and not on what had occurred in fact. "Opportunities" in the agency proceeding, not actualities, counted.⁶⁶⁰ *Kremer* suggests a future in which agencies, not courts, will issue decisions that bar future litigants.⁶⁶¹

Preclusion by agency decisionmaking is not extraordinary. The procedural model of agency factfinding plus very limited court review is commonplace. For example, social security applicants denied benefits may seek agency redress and, if unsuccessful, may ask federal courts to overturn agency decisions. The courts, however, will affirm the agency's factual findings if they are supported by "substantial evi-

factfinding in federal court, and understandably so, because it was first enacted in 1790, prior to the emergence of agency adjudication.

The Supreme Court, however, interpreted section 1738 to apply to "state proceedings" (emphasis added) and concluded that those "proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." 456 U.S. at 481. In the Court's view, the state agency's factfinding, which permitted a claimant a "full opportunity to present on the record, *although informally*, his charges," coupled with the appellate review by a state court was "adequate" to meet the fourteenth amendment standards. *Id.* at 485 (emphasis added). The Supreme Court's interpretation of the full faith and credit clause is explored in Atwood, *State Court Judgments in Federal Litigation: Mapping the Contours of Full Faith and Credit*, 58 IND. L.J. 59 (1982).

660. Apparently, "opportunities" in the NYHRD were not great. In 1981, a New York State Bar Association task force issued a report concluding that the agency was "not satisfactorily discharging its responsibilities under the Human Rights Law in large part due to inadequate budgetary appropriations." COMM. ON CIVIL RIGHTS OF THE N.Y. STATE BAR ASSOC., REPORT OF THE NEW YORK STATE BAR ASSOC. JOINT TASK FORCE ON THE PRACTICES AND PROCEDURES OF THE N.Y. STATE DIV. OF HUMAN RIGHTS AND THE N.Y. STATE HUMAN RIGHTS APPEAL Bd. 9 (1981) [hereinafter cited as TASK FORCE REPORT]. "Shortcomings observed by the Task Force include poorly conducted investigations, inadequate retention of notes, and the absence of sufficient information to enable the Appeal Board to conduct an adequate review of no-probable-cause findings. . . ." *Id.* at 17. This report was submitted to the Supreme Court but is not mentioned by the majority, which stated "[t]he fact that Mr. Kremer failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." 456 U.S. at 485.

661. See Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 463 (1983) (although litigation "before an agency tribunal simply is not the equivalent of litigation in court," nonjudicial bodies currently bar subsequent litigation in courts; criticism of that rule for its failure to consider agencies' limitations). Cf. McDonald v. City of West Branch, 104 S. Ct. 1799, 1804 (1984) (unappealed arbitration award not preclusive in section 1983 claim); Thomas v. Washington Gas Light Co., 448 U.S. 261, 286 (1980) (no full faith and credit bar to a second action in the District of Columbia for additional compensation following a Workman's Compensation award in Virginia); Lee v. Winston, 717 F.2d 888 (4th Cir. 1983) (no full faith and credit given to state proceedings because the proceedings denied due process), cert. denied, 104 S. Ct. 1924 (1984).

dence.”⁶⁶² Other agency decisions are subjected to standards set forth in the Administrative Procedure Act; court review is limited to determinations of “whether the agency action was arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole.”⁶⁶³ Thereafter, the rulings of the agency *cum* court prevent aggrieved individuals from re-litigating or contesting the agency action in any other proceedings. Perhaps *Kremer* is only another application of this model—Agency Decisionmaking plus Very Limited Review.

Kremer, however, arose under Title VII, a statute distinct from many that authorize agency decisionmaking. Title VII expressly grants authority to lower federal courts to hear cases and imposes no limitations on that activity.⁶⁶⁴ Therefore, the Court’s preclusion rule in *Kremer* should not be analogized to congressional statutes that envision a very limited judicial role. Rather, Title VII is more aptly compared to congressional litigation schemes like habeas corpus for state prisoners and section 1983 civil rights claims, both of which endow federal courts with authority to decide the case on its merits and evidence congressional concern that state courts should not alone enforce federal rights. The Supreme Court’s decision in *Kremer* never quite confronted these distinguishing features of the Title VII litigation scheme.

The Court did, however, interpret the possibilities for dual decisionmaking under Title VII litigation to be parallel to those that the Court permits in habeas corpus and civil rights cases.⁶⁶⁵ In all three areas, the Court has adopted a similar, restrictive model of procedure. As in a habeas case governed by *Stone v. Powell*, a federal court reviewing employment discrimination claims previously presented to state agencies and not overturned by state courts may undertake only one inquiry: whether the procedures in the first forum provided an adequate opportunity for full and fair litigation.⁶⁶⁶ As in a habeas action under *Wainwright v. Sykes*, a federal district judge in a Title VII case

662. 42 U.S.C. § 405(g) (1982); see generally B. SCHWARTZ, ADMINISTRATIVE LAW § 210, at 591, 592 (1976).

663. *Villa View Community Hosp. Inc. v. Heckler*, 720 F.2d 1086, 1090 (9th Cir. 1983) (citing 5 U.S.C. § 706(2)); 5 U.S.C. § 706(2) (1982).

664. Congress’ “intent” is fictional and not known. Congress’ language permitted dual decisionmaking, but the Court read that language narrowly so as to limit decisionmaking opportunities.

665. 456 U.S. at 485 n.27.

666. Occasionally, this inquiry yields a negative answer. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (agency failure to hold hearing within time prescribed by statute renders state procedure inadequate and therefore relief under section 1983 is available).

must not ask what *was* litigated but what *could have been* litigated. Any failure to raise claims (or, in *Kremer's* case, to use the investigation possibilities described in the NYHRD regulations) is seen by the Court as flowing naturally from a system that relies upon litigant autonomy. Litigants who do not pursue all avenues are described as "sandbaggers"⁶⁶⁷ or are seen as misguided. Under either formulation, opportunities missed are forfeited. Further, lower courts are neither invited to inquire into the adequacy of counsel nor to make excuses, as one might, for individuals who proceed *pro se*.⁶⁶⁸ Finally, in *Kremer*, as in *Allen v. McCurry*, the Court declined to announce different rules concerning the role of either collateral estoppel or res judicata under unique federal statutory schemes. Rather, the Court imposed "transubstantive" rules⁶⁶⁹ across the litigation spectrum.

In sum, most of the Court's choices in recent civil preclusion cases mirror those made in its interpretation of habeas review.⁶⁷⁰ Finality commands unlimited respect, and first tier decisionmaking is preferred. Just as Justice O'Connor claimed in *Isaac* that habeas review by federal courts would result in reduced state court enforcement of federal norms,⁶⁷¹ so Justice White commented in *Kremer*:

[S]tripping state court judgments of finality would be far more destructive to the quality of adjudication by lessening the incentive for full participation by the parties and for searching review by state officials. Depriving state judgments of finality . . . would reduce the incentive for States to work towards effective and meaningful antidiscrimination systems.⁶⁷²

To keep state incentives high, the decision of the sole NYHRD hearing

667. Although the Court in *Kremer* did not use the term "sandbaggers," the Court did state that, if litigants were given alternatives to the state procedure, they might not participate fully in the state adjudication. 456 U.S. at 478. The dissent raised doubts about the utility of such a strategy. *Id.* at n.19.

668. *E.g., Kremer*, 477 F. Supp. at 593 n.10. *Kremer* has been applied to bar litigation even when the allegedly aggrieved employees did not choose to go to state court but were "forced" into state court by their employer's appeal of an adverse agency ruling. *Gonsalves v. Alpine Country Club*, 727 F.2d 27, 27-28 (1st Cir. 1984).

669. The term is Robert Cover's. See Cover, *supra* note 372, at 718 (tension between an unyielding code of procedure, and one inalleable and shaped to the needs of particular cases). In the 1984 term, the Court did carve out one exception. See *McDonald v. City of West Branch*, 104 S. Ct. 1799, 1802 (1984) (unappealed arbitration awards do not preclude section 1983 litigation).

670. *But see* cases cited *supra* note 601; *Cooper v. Federal Reserve Bank*, 104 S. Ct. 2794, 2800 (1984) (judgment in a class action establishing that employer did not engage in practice of discrimination against employees of minority group did not bar class member from bringing subsequent action alleging individual claim of racial discrimination); *McDonald*, 104 S. Ct. at 1799.

671. *Isaac*, 456 U.S. at 128.

672. *Kremer*, 456 U.S. at 478.

officer, reviewing Mr. Kremer's claim of a civil rights deprivation, can be subjected to no more searching consideration than whether it was "arbitrary and capricious."

In Title VII litigation, as in civil rights and habeas corpus litigation, the Court has narrowly interpreted the procedural model created. The dual decisionmaking centers that are possible under the legislation have been ousted and replaced by a single decision center—at present, state courts, perhaps in the future, state agencies. Moreover, in *Kremer*, the Court applied the "usual rule" of collateral estoppel, with a novel twist. As the Court described, the "usual rule" is that the "merits of a legal claim once decided in a *court* of competent jurisdiction are not subject to redetermination in another forum."⁶⁷³ In *Kremer*, however, the "merits of a legal claim" were not decided by a state *court* but by a state agency. The state courts decided only that the state agency had been neither arbitrary nor capricious in its decisionmaking. Further, the statute authorized three fora as competent and entitled litigants to a succession of adjudications. *Kremer* demonstrates that the Court prefers the decision of the first tier across a variety of litigation schemes, both civil and criminal, including those in which Congress has expressly authorized some form of duplicative decisionmaking.⁶⁷⁴

There are two central points. First, all of the preclusion cases discussed above involved genuine value choices. The majority opinions, conforming to a long tradition, recited their holdings as if the answers were dictated by previous opinions.⁶⁷⁵ Not so. All these cases were "hard."⁶⁷⁶ The issues had prompted substantial discord among courts and commentators, and in all the cases except *Prosisie*, dissenters filed opinions, some of which were quite vigorous.⁶⁷⁷

673. *Id.* at 485 (emphasis added).

674. One window remains. *See* *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 421 (1964) (a plaintiff may "reserve" federal issues for a federal court), *discussed in* *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892 (1984). For a case applying what it described as "a hybrid of the *England* and full-and-fair-opportunities exceptions" and declining to apply the doctrine of res judicata, see *Howell v. State Bar*, 674 F.2d 1027, 1031 (5th Cir. 1982). *See also* *Quarles v. Sager*, 687 F.2d 344, 346 (11th Cir. 1982) (escaped prisoner not precluded from resuming section 1983 claims that had been dismissed because of escape).

675. *See, e.g., Parklane*, 439 U.S. at 333 ("[C]ontemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question. . . .").

676. R. DWORKIN, *supra* note 20, at 81 (discussion of how to decide problematic cases). The difficulties were apparent in *Nilson v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983) (en banc split over res judicata in a Title VII case).

677. *See, e.g., Kremer*, 456 U.S. at 494 (Blackmun, J., dissenting) ("The Court's decision also flies in the face of Title VII's legislative history.").

Second, the value choices made were not easy. The majority opinions read as if differentiation, diffusion of power, deliberate norm enforcement, additional persuasion opportunities, and revisionism command little or no respect. Yet these valued features of procedural models are the very reasons that the Court has had to decide these cases. Almost all the lawsuits arose because Congress or the courts had created litigation schemes that incorporated those features. The Supreme Court's decisions to eliminate them do not address why such complex procedures were made available in the first place.

B. CONCENTRATION OF POWER IN THE FIRST TIER

1. *The Problem Posed by Article I Judges*

As illustrated by *Kremer*, many first tier decisionmakers are not judges. Federal and state agency hearing officers and judicial surrogates such as magistrates and bankruptcy judges find facts for the first and sometimes the only time in a wide variety of disputes.

The increasing authority of both surrogate judges and agency adjudicators has altered the conception of what duties may be performed only by specially situated federal judges. Because the drafters of article III of the Constitution were concerned about political pressure and corruption,⁶⁷⁸ they insisted that federal judges be safeguarded. Article III mandates that federal judges have life tenure and never face diminution of salary.⁶⁷⁹ At the time of the creation of lower federal courts and for years thereafter, article III judges possessed unique authority in the federal judiciary.⁶⁸⁰

However, life tenure and the guarantees against diminution of salary are not attributes necessary for an individual to be recognized as a judge in the United States. In the First Judiciary Act, Congress implicitly acknowledged the authority of state judges, who are not article III judges. State courts were then, and remain today, responsible for most of the country's adjudication, and judges in many of these courts serve

678. 2 J. MADISON, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428, 429 (M. Farrand ed. 1937). THE FEDERALIST NOS. 78 & 79 (A. Hamilton).

679. U.S. CONST. art. III, § 1.

680. From the federal judiciary's inception, there were other federal "judges," such as those who presided in territorial and in military courts. *See American Ins. Co. v. Canter*, 26 U.S. 685, 690-91, 1 Pet. 511, 546 (1828) (nonarticle III territorial judges may decide admiralty questions). Further, there were court personnel, called United States Commissioners, who assisted judges. Silberman, *supra* note 94, at 1297-98. But none of these "judges" adjudicated cases in courts created by Congress pursuant to article III.

for limited terms and at risk of pay cuts.⁶⁸¹

Since the First Judiciary Act, the federal government has expanded enormously and consequently has required more decisionmaking from its adjudicatory branch. Congress has added federal adjudicators but, for a variety of reasons,⁶⁸² Congress has been reluctant to augment generously the ranks of article III judges. Instead, Congress has developed a series of auxiliary personnel—magistrates, bankruptcy judges, and agency hearing officers.⁶⁸³ All of these “article I judges”⁶⁸⁴ are, in a sense, under the aegis of the “real” article III judges. The questions of what relationships are appropriate between article I and article III judges, of how much decisionmaking to superimpose after surrogate judges reach their judgments are, in my lexicon, questions of which models of procedure to choose.

Not surprisingly, no uniform answer has been provided. Diverse models of procedure are evident in the relationship between article I and article III judges. Some article I judges’ decisions are not reviewable by courts (the Single Judge/Finality Model),⁶⁸⁵ some decisions are subjected to limited review (the Single Judge plus Limited Review Model),⁶⁸⁶ and others are subject to de novo review (the Single Judge plus Unlimited Review Model).⁶⁸⁷

I am not interested, here, in the efforts of the Court and commen-

681. The 1789 Judiciary Act did not give federal judges authority to decide all cases within the jurisdiction authorized by article III of the Constitution. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, 76-77 (1789). A notable gap, that of federal question jurisdiction, was not conveyed until 1875. See Act of Mar. 3, 1875, ch. 137, 18 Stats. 470. Thus, state judges did the bulk of the adjudication in the country, and in most states, judges were not given life tenure. See generally L. BERKSON, S. BELLER & T. GRIMALDI, *JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS* (1981).

682. See Posner, *Will the Federal Courts Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 764-65 (1983) (arguing that increasing the number of federal appellate judges “seriously degrades the quality of federal appellate justice”). See generally F. FRANKFURTER & J. LANDIS, *supra* note 39, at 230-40 (providing historical examples in which Congress refused, mostly due to political disputes, to provide additional judgeships).

683. For a history of the increased reliance upon such surrogates, see Silberman, *supra* note 94, at 1297-1300.

684. Article I judges are those created by Congress, pursuant to article I; such judges lack the article III attributes of life tenure and no diminution of salary.

685. See, e.g., *Addonizio v. United States*, 442 U.S. 178, 184-90 (1979) (article III judges may not review an agency decision about when to release an individual on parole).

686. The manner in which the Parole Commission makes decisions, however, is reviewable. See, e.g., *Drayton v. McCall*, 584 F.2d 1208, 1214 (2d Cir. 1978) (Parole Commission must accord procedural opportunities to prisoners subject to parole rescission).

687. See, e.g., Title VII, 42 U.S.C. § 2000e-5 (1982) (after federal agency decision about whether employment discrimination occurred, federal judges to make decisions again).

tators to delineate the boundaries between decisions appropriately made by article III judges and those permitted article I judges.⁶⁸⁸ Rather, I am concerned with the hierarchical arrangements between article I and article III judges. These arrangements are based upon the premise that article I actors are inferior to article III judges and therefore cannot make all adjudicatory decisions in the federal system.

The problem is illustrated by examining the allocation of decision-making power between magistrates and article III judges. Over the past fifteen years, Congress has enlarged the authority of magistrates to approximate more closely the functions of article III judges—albeit with constraints on magistrates' power to issue final judgments.⁶⁸⁹

The enlargement of magistrates' authority poses an interesting dilemma for the Court, which over the past fifteen years has so vigorously endorsed the power of the first tier and valued the finality of its decisions. The conflict is one of self-interest. If the Court were to give magistrates final authority over decisions, the Court would make article III judges nonessential. The Court has been unwilling to take this position. In their official capacities and in some extrajudicial activities, members of the Court have insisted that the line between article I and article III judges must be maintained. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁶⁹⁰ the Court rejected an extension of bankruptcy judges' authority. Since the *Northern Pipeline* decision, members of the Court have also lobbied vigorously to prevent the wholesale transformation of bankruptcy judges into article III judges.⁶⁹¹ Yet, to promote its preferences for first tier authority and

688. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (Bankruptcy Act of 1978 unconstitutionally conferred article III judicial power on article I judges); accord Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts Are Unconstitutional*, 70 GEO. L.J. 297, 299-311 (1981).

689. See Act of Oct. 21, 1976, Pub. L. No. 94-577, 90 Stat. 2729, 2729-30 (codified at 28 U.S.C. § 636(b) (1982)) (permitting the assignment of additional duties to magistrates) [hereinafter cited as 1976 Magistrates amendments]; Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (codified at 28 U.S.C. §§ 631, 633, 634, 636 (1982)).

See generally *The Federal Magistrates System: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 98th Cong., 1st Sess. 59-129 (1983) (presenting a report by the Judicial Conference of the United States on the operation of the Federal Magistrate System); C. SERON, *THE ROLES OF MAGISTRATES IN FEDERAL DISTRICT COURTS passim* (1983) (survey of 191 full time magistrates in 82 federal district courts); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 YALE L.J. 1023, 1040-54 (1979) (arguing that the 1979 amendments to increase magistrates' powers violate article III).

690. 458 U.S. 50 (1982).

691. Chief Justice Burger's efforts to defeat legislation that would have given article III status to all bankruptcy judges is chronicled in King, *Unmaking of a Bankruptcy Court: Aftermath of*

finality, which in turn are supposed to beget economy, the Court must cede a good deal of decisionmaking power to magistrates. The Court finessed this conflict in *United States v. Raddatz*,⁶⁹² the next example of procedural modeling.

2. *Expanding Magistrates' Power*

Since the 1976 amendments to the Magistrates Act, federal judges may designate magistrates to "hear and determine" some nondispositive pretrial matters.⁶⁹³ District courts review these magistrates' orders by deciding whether the magistrates' decisions were "clearly erroneous or contrary to law."⁶⁹⁴ Thus, for such nondispositive matters, Congress adopted the Single Judge plus Limited Review Model. Magistrates may also decide some specified dispositive issues, such as suppression motions and some prisoners' claims.⁶⁹⁵ In these cases, magistrates provide "reports and recommendations" to which parties may file written objections within ten days. If objected to, these magistrates' decisions are subjected to "de novo determination" by a district judge, who is free to receive new information.⁶⁹⁶ For these cases, Congress chose the Single Judge plus Unlimited Review Model—at least in theory.

Literally, a charge to make a "de novo determination" requires a judge to make a decision "anew, again,"⁶⁹⁷ and perhaps as if the first ruling had not occurred. De novo review, however, is also a legal term of art. The phrase was used to describe appellate review in equity and admiralty practice.⁶⁹⁸ Unlike the limited "writ of error" review available to those defeated in cases tried by juries,⁶⁹⁹ litigants dissatisfied by

Northern Pipeline v. Marathon, 40 WASH. & LEE L. REV. 99 *passim* (1983). For the subsequent legislative response, see Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, 336-46 (bankruptcy judges have 14-year terms and are appointed by federal judges).

692. 447 U.S. 667 (1980).

693. 28 U.S.C. § 636(b)(1)(A) (1982) (magistrates are not authorized, under this section, to hear and decide summary judgment and preliminary injunction motions).

694. *Id.*

695. *Id.* § 636(b)(1)(B). The 1976 Magistrates amendments, *supra* note 689, were enacted, in part, in response to *Wingo v. Wedding*, 418 U.S. 461, 469-73 (1974) (holding that magistrates lacked statutory authority to decide habeas cases).

696. 28 U.S.C. § 636(b)(1) (1982). See, e.g., *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 604-05 (1st Cir. 1980) (a district judge is not required to make a de novo determination unless written objections are filed).

697. WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY 602 (1966).

698. Orfield, *supra* note 75, at 564-70 (describing the appellate practice in English equity courts). See R. POUND, *supra* note 94, at 269-70 (describing the shift away from this type of review).

699. The seventh amendment provides that "no fact tried by a jury, shall be otherwise reex-

judges' decisions in equity or admiralty could "appeal."⁷⁰⁰ The difference was explained by Chief Justice Ellsworth: "An appeal is a process of civil law origin, and removes a cause entirely; subjecting the facts as well as the law, to a review and retrial; but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law."⁷⁰¹ The one limitation on de novo "appeal" was that appellate judges did not typically receive new evidence. Thus, when Congress chose the de novo test for review of decisions by magistrates and empowered trial judges to "receive further evidence or recommit the matter to the magistrate with instructions,"⁷⁰² Congress authorized trial judges to undertake a kind of review akin to but broader than the old equity appellate practice.

The Supreme Court interpreted the phrase "de novo determination" in *United States v. Raddatz*.⁷⁰³ In 1977, in a motion to the district court, criminal defendant Herman Raddatz asked that incriminating statements he had made be suppressed because, he claimed, the statements were based upon an agreement, subsequently breached, that the charges against him would be dismissed.⁷⁰⁴ Pursuant to the Magistrates Act and over Mr. Raddatz's objections, the district judge referred the suppression motion to a magistrate. The magistrate heard testimony from Mr. Raddatz and from the two Bureau of Alcohol, Tobacco and Firearms agents who had questioned Mr. Raddatz. The magistrate found that Mr. Raddatz had "knowingly, intelligently, and voluntarily made inculpatory statements,"⁷⁰⁵ and recommended that the suppression motion be denied. In support of his report, the magistrate stated that he had found the testimony of the federal agents "more credi-

amined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

700. See R. POUND, *supra* note 53, at 290-304 (discussion of nineteenth-century review in equity proceedings). On appeal, even with the de novo standard, it was not customary for the reviewing court to accept new evidence. Orfield, *supra* note 75, at 594.

There was a brief time from 1789 to 1803 when Congress limited review, even in equity and admiralty, to writs of error. See The Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 72, 84; Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244 (restoring "appeals" in equity and admiralty). An analysis of the changes is provided in Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 194-97 (1937); Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 508-10 (1963).

701. *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 327 (1796).

702. 28 U.S.C. § 636(b)(1) (1982).

703. 447 U.S. 667 (1980).

704. *Id.* at 670-71; 592 F.2d 976, 978-79 (7th Cir. 1979), *rev'd*, 447 U.S. 667 (1980).

705. 447 U.S. at 671.

ble.”⁷⁰⁶ Mr. Raddatz objected to the report and recommendation of the magistrate—thereby obliging the district judge to make a “de novo determination.”⁷⁰⁷ The district judge informed the parties that he had considered the transcript of the magistrate’s hearing, the parties’ written submissions, and counsels’ arguments, and that he had “accepted” the magistrate’s report and recommendation.⁷⁰⁸

Having been found guilty, Mr. Raddatz appealed to the Seventh Circuit, which reversed. The court concluded that when credibility of witnesses was in issue, the district judge was obliged as a matter of due process to hear the witnesses.⁷⁰⁹ The issues for the Supreme Court were: (1) whether a review in which the trial judge took no testimony satisfied the statutory requirement of the “de novo determination” and (2) if so, whether Congress could have authorized such a procedure consistent with the demands of article III and the due process clause of the fifth amendment. In a decision in which five opinions were filed,⁷¹⁰ a majority of the Court decided both questions in the affirmative. Once again, in an arena where a congressional statute made possible (or, depending upon one’s reading, mandated) repeated, independent decisionmaking, the Court opted for a minimalist model of procedure—a Single Judge plus Limited Review Model.

All nine members of the *Raddatz* Court agreed that the Magistrates Act required federal judges to make new decisions. The dispute was over technique. The majority believed that it was cognitively possible for a judge to make a de novo decision without repeating the tasks performed by the first tier judge. Therefore, a trial judge could “accept” a magistrate’s decision without hearing the witnesses whose cred-

706. *Id.* at 671-72. The information adduced at the hearing and the contrary inferences that might have been drawn are detailed in the Seventh Circuit’s opinion, 592 F.2d at 978-79.

707. 28 U.S.C. § 636(b)(1) (1982).

708. 447 U.S. at 672.

709. 592 F.2d at 986.

710. The majority opinion was authored by Chief Justice Burger. Justice Blackmun filed a concurrence, stating he would preclude district judges who had not heard testimony from *rejecting* magistrates’ reports. 447 U.S. at 684 (Blackmun, J., concurring). The majority declined to decide that question. *Id.* at 681 n.7.

Justice Powell filed an opinion in which he concurred in part and dissented in part; he too would have reached the question addressed by Justice Blackmun. *Id.* at 686. Justice Stewart, in a dissent joined by Justices Brennan and Marshall, argued that the 1976 Magistrates amendments mandated that evidence be taken by the district judge in Raddatz’ case. *Id.* at 689 (Stewart, J., dissenting). Justice Marshall, in a separate dissent in which Justice Brennan joined, maintained that the 1976 amendments, as construed by the Court, violated both the fifth amendment and article III. *Id.* at 694 (Marshall, J., dissenting).

ibility was in issue.⁷¹¹

The idea that reviewing judges can make some decisions de novo without listening to testimony is not novel. Appellate judges regularly decide afresh the legal issues determined below, and they do so without any presumptions in favor of trial judges' decisions. Further, de novo decisions about factual findings can also be made without hearing witnesses. If the evidence is based upon documents, undisputed stipulations, or (as was generally the case in equity practice) written statements of witnesses, the first tier judge has no special insight into the facts. Because of this parity, some appellate judges have described themselves as free to reach their own determinations about the validity of such findings of fact.⁷¹²

The problem takes on a different cast, however, when the first tier decisionmaker must assess the credibility of information given orally. If witnesses disagree about what transpired, the factfinder must decide whom to believe. Because no generally agreed upon objective techniques are available,⁷¹³ we have relied upon factfinders' intuitions about which witnesses to credit. Under the Magistrates Act, Congress gave magistrates a factfinding role but mandated that, upon a party's request in some cases, trial judges were to make a de novo determination—to substitute their own intuitions for those of the magistrates. How could such substitution, whether ending in acceptance or rejection of magistrates' reports, genuinely occur without rehearing the testimony? Without any independent indicia of credibility, the assessment of witnesses' testimony comes through the eyes and the ears of the beholder.⁷¹⁴

The *Raddatz* majority did not determine (as a concurrence and one dissent proposed) that trial judges could make "de novo determinations" without retaking evidence only in situations when witness credibility was not determinative.⁷¹⁵ Rather, the Court concluded that

711. *Id.* at 675-76.

712. See, e.g., *Orvis v. Higgins*, 180 F.2d 537, 539 (2d Cir.) (Frank, J.) ("[W]e are as able as he to determine credibility, and so we may disregard his finding."), *cert. denied*, 340 U.S. 810 (1950).

713. See generally R. HARPER, A. WIENS & J. MATARAZZO, *NONVERBAL COMMUNICATION: THE STATE OF THE ART 2-18* (1978) (no consensus exists concerning correct research approaches or theories); R. ROSENTHAL, J. HALL, M. DIMATTEO, P. ROGERS & D. ARCHER, *SENSITIVITY TO NONVERBAL COMMUNICATION: THE PONS TEST passim* (1979) (review of research on individuals' ability to comprehend nonverbal clues) [hereinafter cited as R. ROSENTHAL].

714. Hence, the oft-stated "rule" that the person "who decides must hear." *E.g.*, *Morgan v. United States*, 298 U.S. 468, 481 (1936).

715. This reading of the 1976 Magistrates amendments, *supra* note 689, has a logical basis because they require de novo "determinations" (as contrasted with de novo "hearings"). 28

trial judges could render “de novo determinations” without replicating much of magistrates’ work.⁷¹⁶ The majority interpreted “de novo” as a state of mind—a perceived independence from the first tier’s conclusions, combined with the absence of any formal doctrines, such as presumptions of correctness, that mandate deference. Moreover, by reserving the question of whether trial judges may *reject* magistrates’ reports without hearing testimony, the Court created incentives for busy trial judges to agree with magistrates and thereby avoid rehearing witnesses.⁷¹⁷

With this interpretation of “de novo,” the *Raddatz* Court continued its search for economy by augmenting the power of the first tier.⁷¹⁸ By defining “de novo” as an internal process that occurs within a district judge’s head, the Supreme Court conformed its interpretation of the Magistrates Act to its interpretation of the other congressional litigation schemes reviewed herein. In all instances, the Court had the opportunity to craft litigation structures rich with the possibility of revisionism. In all these cases, the Court could have opted for differentiation, for some procedural schemes more expansive than others. In each case, the Court might have construed congressional language to permit multiple decisions on the same questions. But, in each instance, the Court chose to employ as few decisionmakers as possible.

In contrast to the Court’s efforts in the habeas corpus area, the Court’s interpretation of the Magistrates Act is likely to achieve its goals. Economy will be enhanced because witnesses need not be reheard. Given the incentives for affirmance, magistrates’ power will grow as more of their decisions endure. District courts also retain their

U.S.C. § 636(b)(1)(A) (1982). The choice of words permits the statute to embrace situations, such as summary judgment motions, in which no oral testimony is taken.

716. The Court further concluded that, because the district judge is the formal author of the opinion, article III requirements were met. *Cf.* *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (bankruptcy judges’ statutory authority to issue final judgments in some cases is unconstitutional under article III).

717. 447 U.S. at 681 n.7. Justice Marshall argued that economy concerns were overstated because suppression hearings occur in fewer than 4% of all federal criminal cases. *Id.* at 701-02 & n.5 (Marshall, J., dissenting).

718. The Court did, however, add one unclear caveat. In a footnote, the Court left open the possibility that litigants, dissatisfied with magistrates’ rulings, could renew their suppression motions at trial. *Id.* at 678 n.6. If such actions were permitted, the Court’s de novo interpretation would only conserve resources in the many cases that do not reach the trial stage. Moreover, by suggesting some reconsideration possibilities, the Court ignored the “law of the case” doctrine, under which judges decline to reconsider prior decisions made in the course of a lawsuit. F. JAMES & G. HAZARD, *supra* note 589, at 535-36.

distinct article III status; trial judges delegate rather than relinquish decisionmaking to magistrates.

3. *Increasing Trial Judges' Power*

In a series of recent decisions as well as a proposed rule amendment, both the Supreme Court and the drafters of federal rules have sought to restrict the role of intermediate appellate courts and, thereby, to augment the power of first tier decisionmakers. Unlike some of the cases described above, in which the Court has acknowledged the limits it has placed upon revisionism, the Court's new constraints on appellate courts are cast as applications of long-held precepts. Yet, when the "old" rules are applied to the evolving case law, a "new" message becomes clear. Appellate courts are to defer, generally,⁷¹⁹ to trial judges' views.

a. *The clear error rule*: The drafters of the 1938 Federal Rules of Civil Procedure combined the law and equity sides of federal court jurisdiction and created a single "form of action to be known as a 'civil' action."⁷²⁰ As noted, prior to that joinder there had been two distinct forms of review, one for cases at law and the other for cases at equity.⁷²¹ With joinder, the drafters precipitated questions about the standard and form of review to be applied to trial judges' decisions made under the new, unified system.

i. *"Writs of error" at law; "appeals" in equity*: Different standards of appellate review stem, in part, from the Constitution. The seventh amendment decrees that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law."⁷²² Historians explain this provision as intended, in part, to protect the citizens' decisionmaking from potentially "imperialist" judges.⁷²³ To insulate juries, the seventh amendment gave litigants at law only one round for fact determinations; jury decisions followed the Single Judge/Finality Model.⁷²⁴ However, dis-

719. *But see* Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949, 1965 (1984) (in cases raising first amendment issues, appellate court has an obligation to make an independent examination of the whole record).

720. FED. R. CIV. P. 2.

721. *See generally* Clark & Stone, *supra* note 700, at 192-207 (tracing historical development); Orfield, *supra* note 75, at 586-96 (comparing appellate procedures in courts of law and equity).

722. U.S. CONST. amend. VII.

723. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 708-10 (1973).

724. Review of jury decisions was possible if courts characterized factual issues as legal ones.

satisfied litigants who claimed that presiding judges at jury trials had made legal errors could obtain limited review—by filing “writs of error” before a superior court.⁷²⁵ The reviewing court was free to reconsider the legal conclusions of the trial judges because no presumption of correctness attached to those decisions.⁷²⁶

When the Bill of Rights was drafted, judges sat as *factfinders* in equity. The seventh amendment, however, gave their rulings no protection.⁷²⁷ An unhappy litigant in equity could take an “appeal” from lower court rulings. An “appeal” empowered the reviewing court to engage in a wider range of activities than it could when acting upon a “writ of error.” Appellate courts could reexamine the first tiers’ factual and legal conclusions “de novo,” so as to “do justice” in individual cases.⁷²⁸ Equity exemplified a form of the Single Judge plus Unlimited Review Model. Although limited to issues and facts raised below, the second court had no formal obligation to defer to the first judge’s views on either legal or factual matters.

Logic, as well as the Constitution, supported the difference in standards of review for law and equity. In the two types of cases, litigants presented evidence in different ways. For much of the period from 1789 to 1912, judges sitting in equity received written evidence, taken in deposition form and either read by or read to the trier of fact.⁷²⁹ On appeal, the entire written record went to the reviewing court.⁷³⁰ In con-

Orfield, *supra* note 75, at 579. Further, since the issue of whether the jury’s verdict was supported by substantial evidence was considered a “legal” question, courts could occasionally reverse jury verdicts. *Id.* at 592.

725. Until 1928, the term “writ of error” was used. By the Act of January 31, 1928, Congress ordered that any requests for review, whether at law or in equity, be called “appeals.” Act of Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54, 54. The standards on review, however, remained distinct until 1938. See Clark & Stone, *supra* note 700, at 204-06 (discussing the period from 1928-1938); Payne, *The Abolition of Writs of Error in the Federal Courts*, 15 VA. L. REV. 305, 314-20 (1929) (contemporary account of the debate surrounding the passage of the Act of January 31, 1928).

726. The reviewing courts could, however, only consider issues raised below. Orfield, *supra* note 75, at 578-79.

727. The Constitution refers to factfinding twice. The seventh amendment protects juries’ verdicts, and article III, § 2 provides for the Supreme Court’s appellate jurisdiction of both “law and fact, with such exceptions and regulations as Congress shall, from time to time, make.” For an argument that the exceptions and regulations clause was written to protect juries’ factual findings, see Merry, *Scope of the Supreme Court’s Appellate Jurisdiction: Historic Basis*, 47 MINN. L. REV. 53, 57-68 (1962).

728. R. POUND, *supra* note 53, at 298-303; Orfield, *supra* note 75, at 565-66.

729. A detailed description of the techniques for presenting evidence in equity and the transmittal of the record to the appellate court is provided in Griswold & Mitchell, *The Narrative in Federal Equity Appeals*, 42 HARV. L. REV. 483 (1929).

730. *Id.* at 487. Between 1842 and 1912, the record was sometimes reduced to a narrative. *Id.* at 488-89. The narrative technique was twice instated and then discarded but, with the 1912 Eq-

trast, at law, witnesses gave oral testimony, and the "record" sent to the reviewing court on a writ of error consisted, generally, of the pleadings and judgment.⁷³¹ Greater deference to the factfinder at law followed in part from the more limited knowledge possessed by the reviewing court.

Over time, the line between law and equity became blurred in two respects: the identity of the factfinder and the techniques for receiving evidence. In 1865, Congress permitted litigants at law to waive jury trials.⁷³² Under this new procedure, the judge was substituted as the factfinder. By statute, Congress gave such judges the protection that the Constitution had given to jurors; "the findings of the Court upon the facts . . . shall have the same effect as the verdict of a jury."⁷³³ A reviewing court could decide only whether the evidence was sufficient to support the judgment.⁷³⁴ Between 1789 and 1912, Congress also reformed evidentiary rules in equity proceedings. For some periods of time, judges sitting in equity could not only receive written evidence but could also hear witnesses' testimony.⁷³⁵ Thus, the twin rationales for distinguishing the role of reviewing courts in law and equity—the special nature of the jury as factfinder and the differing evidentiary practices—were undermined.

Not only were the theoretical distinctions shaken, but there was some dispute about whether, in practice, reviewing courts actually behaved very differently when reconsidering legal as opposed to equitable decisions. Given the state of technology and the logistics of judges' riding circuit, written records on appeal in equity might not always have been available and read. Absent archival and quantitative data,⁷³⁶

uity rules, was once again adopted. *See* Sup. Ct. R. 76, 226 U.S. 629, 672 (1912) [hereinafter cited as 1912 Equity Rules]; Griswold & Mitchell, *supra* note 729, at 489-93.

731. Orfield, *supra* note 75, at 574. Sometimes judges certified various rulings against a party; those rulings were included in a "bill of exceptions" and were part of the record. J. HALL & J. ANDREWS, *AMERICAN LAW AND PROCEDURE* 378 (1913).

732. Act of Mar. 3, 1865, ch. 86, § 4, 13 Stat. 500, 501.

733. *Id.*

734. *Boogher v. Insurance Co.*, 103 U.S. 90, 97 (1880). To underscore the novelty of a judge as the factfinder at law, the Court quoted an earlier opinion that, when the parties stipulate to a judge in lieu of a jury, the judge "does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator." *Id.* at 95-96 (citation omitted).

735. Orfield, *supra* note 75, at 587-88. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88-90 (equity and law cases have same method of receiving evidence). That evidentiary reform was altered by the Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244. In 1912, equity judges were once again permitted to hear evidence, and that rule remained until the union of law and equity in 1938. 1912 Equity Rules, *supra* note 730, Rule 46, 226 U.S. at 661.

736. Clark and Stone undertook a limited empirical project. They reviewed 55 cases decided

we can only speculate whether the practice mirrored the rhetoric of judges and legal commentators. With an occasional dissent,⁷³⁷ commentators have described the two reviews as methodologically distinct.⁷³⁸ However, the dimensions of the differences are difficult to determine, in part because reviewing judges often described themselves as undertaking, in the same case, degrees of review understood today as mutually exclusive.

For example, after new equity rules were promulgated for the federal courts in 1912,⁷³⁹ the Seventh Circuit addressed the question of whether those rules had altered the standard of review on appeal. A litigant had argued that under the new rules, trial judges' factual findings had become binding upon the reviewing court. Rejecting that view, the per curiam appellate court said it had

the right, and owes to itself and to the parties the duty, of trying the questions of fact *de novo*. . . . [T]he findings of the trial court were entitled to be treated as very persuasive, and such findings were not to be disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. . . . [I]f the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration of the evidence *de novo* is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand.⁷⁴⁰

Some of this mixing of standards, the *de novo* statements coupled with pronouncements of great deference to trial court findings, resulted from differences in the kinds of evidence taken in equity. When trial judges in equity heard witnesses, reviewing courts apparently paid greater attention to their findings than when the evidence was written.⁷⁴¹ On appeal, reviewing courts also distinguished between conflicting evidence, for which they gave substantial deference to trial courts' conclusions, and undisputed evidence, the validity of which reviewing courts perceived themselves as equally able to assess.⁷⁴²

between 1900 and 1934 and concluded that reversals in equity because of errors of fact were "comparatively rare" during that period. Clark & Stone, *supra* note 700, at 208.

737. *Id.* at 207-10.

738. *E.g.*, Maxwell, *Should Appellate Courts Review the Facts in Actions at Law?*, 22 AM. L. REV. 262 (1888); Orfield, *supra* note 75, at 590.

739. 1912 Equity Rules, *supra* note 730.

740. *American Rotary Valve Co. v. Moorehead*, 226 F. 202, 203 (7th Cir. 1915).

741. Clark & Stone, *supra* note 700, at 208; Orfield, *supra* note 75, at 594.

742. Orfield, *supra* note 75, at 594; Note, *supra* note 700, at 510-11.

ii. *The 1937 compromise*: When equity and law were merged, the drafters of the rules had a major goal—uniformity of procedure, regardless of the kind of case. As a result, the group rejected the suggestion to retain different standards of appellate review for law and equity.⁷⁴³ However, the question of what single standard to adopt was problematic. Given uncertainty about the actual scope of equity review, a proposal to incorporate the equity test directly into the Federal Rules was unappealing.⁷⁴⁴ Yet a majority of the drafters was unwilling to insulate trial judges' decisions to the degree the Constitution protected jury verdicts.⁷⁴⁵ The compromise was expressed in then draft Rule 68, now Rule 52, entitled "Findings by the Court," which reads: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."⁷⁴⁶ The original commentary to the Rule belied some of the compromise: the Advisory Committee Note described the Rule as adopting equity practice, with its more searching reconsideration of the whole case—including factual matters.⁷⁴⁷

Given the wording and the history of Rule 52, questions about its interpretation arose quickly. When trial judges heard witnesses, the Rule specifically mandated "due regard," which was understood as obliging the reviewing court to accord "substantial deference" to trial judges' findings. But the Rule's reference to live testimony and its silence about documentary evidence prompted questions about whether appellate courts could give less deference to trial judges' findings predicated upon either undisputed or documentary evidence.

743. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, in SUPREME COURT RULES OF CIVIL PROCEDURE 120-21 Rule 68 *Note to the Supreme Court* (1936) [hereinafter cited as 1936 ADVISORY COMMITTEE NOTE]. See also L. YANKWICH, NEW FEDERAL RULES OF CIVIL PROCEDURE 66-68 (1938) (the new rules authorize appellate courts to review factfinding in all civil actions as courts had formerly reviewed findings of fact in equity).

744. 1936 ADVISORY COMMITTEE NOTE, *supra* note 743, at 120-21; Note, *supra* note 700, at 512-14.

745. See 1936 ADVISORY COMMITTEE NOTE, *supra* note 743, at 120 (jury verdicts are binding on reviewing court, but cases tried without a jury are fully reviewable on appeal). The discussion is chronicled in Ilse & Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 24 MINN. L. REV. 1, 32-35 (1939).

746. FED. R. CIV. P. 52(a).

747. FED. R. CIV. P. 52 Advisory Committee Note (1938). See also H. BALTER, FEDERAL RULES OF CIVIL PROCEDURE 108 (1938) ("[T]he equity practice appears to be retained although the verbiage of the law practice is also used."). For criticism of the proposed rule, see Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A. J. 533, 540-41 (1936) (urging uniformity by requiring trial judges' findings to be final when supported by substantial evidence).

That issue sparked a considerable controversy in which some of the major proceduralists of the day participated. Judge Jerome Frank and Professor James W. Moore took the stance that appellate courts could make de novo determinations of documentary evidence and were not required to apply presumptions in favor of trial judges' views.⁷⁴⁸ Judge Charles Clark, with whom Professor Charles Alan Wright agreed, viewed such a "gloss" as an incorrect interpretation; they argued that the "clearly erroneous" rule should be applied to all trial courts' factual findings.⁷⁴⁹

There are other, intermediate positions. Courts and commentators have distinguished between "ultimate facts," which are described as approximating legal conclusions and thus are appropriately reviewed more extensively,⁷⁵⁰ and "subsidiary facts," about which trial judges' opinions weigh more heavily. Some courts varied the review with the nature of the legal proceedings and the kind of relief ordered. For example, on occasion the Second Circuit has appeared more willing to reappraise district court findings when preliminary injunctions are granted than in other circumstances.⁷⁵¹ Commentators also claim that many appellate courts reiterate presumptions in favor of trial courts' findings but make independent assessments of the facts.⁷⁵²

The differing views about the appropriate level of appellate scrutiny reflect value choices. Judge Clark and Professor Wright justified their preference to give power to the first tier on the grounds that finality was critical and that, in light of the many demands on appellate courts, resource conservation was imperative. Both claimed that trial judges' morale and public respect for courts rested on limited appellate

748. *Orvis v. Higgins*, 180 F.2d 537, 539 (2d Cir. 1950) (Frank, J.), *cert. denied*, 340 U.S. 810 (1950); 5A J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 52.04 (2d ed. 1962) [hereinafter cited as 5A MOORE'S].

A more radical stance was argued by Professor Blume, who believed that the equity standard of review should be applied in all judge-tried cases—whether or not credibility of testimony was at issue. Blume, *Review of Facts in Nonjury Cases: Proposed Federal Rule 68*, 20 J. AM. JUD. SOC'Y 68, 71 (1936).

749. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 505-06 (1950); Wright, *The Doubtful Omniscience of the Appellate Courts*, 41 MINN. L. REV. 751, 764 (1957).

750. For the range and details of the debate, as of 1963, see Note, *supra* note 700, at 516-30. See also *Pullman-Standard v. Swint*, 456 U.S. 273, 273 (1982), discussed *infra* notes 768-87, 794-808 and accompanying text.

751. Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 ST. JOHN'S L. REV. 68, 86 (1977).

752. *Id.* at 90-91.

review.⁷⁵³ Clark also opposed differentiation of the kind of review based upon the nature of the evidence presented. With uniformity of procedure and resource conservation as his goals, he argued that the "right of appeal should be restricted."⁷⁵⁴

Judge Frank and Professor Moore agreed that public respect for the courts was at issue but concluded that such respect hinged upon making review available. Believing that opportunities for revision were important, that the power of the first tier should be confined, and that different standards of review were not inherently undesirable, they argued that Rule 52 was intended to and did permit reviewing courts substantial flexibility in norm enforcement.⁷⁵⁵

iii. *Current rule reform efforts:* The intensity of the debate about federal appellate courts' authority has varied considerably. Initially, the issue was much discussed. In 1955, the Advisory Committee proposed amending Rule 52 to incorporate the Clark-Wright view,⁷⁵⁶ but the Supreme Court declined to promulgate such an amendment.⁷⁵⁷ Thereafter, interest in the question subsided. In 1957, Professor Wright wrote of the "doubtful omniscience"⁷⁵⁸ of appellate courts and bemoaned their tendency to increase their own power by giving less deference to trial judges' findings. Subsequently, very occasional law review articles, almost all student notes and comments,⁷⁵⁹ discussed the issue. Circuit courts bickered a bit with each other,⁷⁶⁰ and trial judges occasionally complained about the eagerness of overbearing appellate courts to "do justice" by ignoring the work of the first tier.⁷⁶¹ Yet, in

753. Clark & Stone, *supra* note 700, at 217; Wright, *supra* note 749, at 778-79.

754. In one of Clark's advocacy articles, he compared review at law and in equity and claimed that there were few differences in fact; he argued for the test on review at law to be applied to all cases. However, Clark did not address the question of testimonial versus documentary evidence. Clark & Stone, *supra* note 700, at 216-17.

755. See *supra* note 748.

756. ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE OF THE UNITED STATES DISTRICT COURTS 51-54 Rule 52 (1955).

757. 5A MOORE'S, *supra* note 748, at ¶ 52.02.

758. Wright, *supra* note 749, at 751.

759. E.g., Comment, *An Analysis of the Application of the Clearly Erroneous Standard of Rule 52(a) to Findings of Fact in Federal Nonjury Cases*, 53 MISS. L.J. 473 (1983); Note, *Federal Rules 52(a) and 60(b)—A Chinese Puzzle*, 21 SW. L.J. 339 (1967); Note, *supra* note 700.

760. Compare *Marcom v. United States*, 621 F.2d 142, 144-45 (5th Cir. 1980) (written evidence permits appellate court more leeway in reviewing findings) with *Maxwell v. Sumncr*, 673 F.2d 1031, 1036 (9th Cir.) (findings of fact, even if based solely on documentary evidence, will be set aside only if clearly erroneous), *cert. denied*, 103 S. Ct. 313 (1982).

761. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U.L.Q. 409, 426-27 (1981).

the forty plus years since the Rule's enactment, the Supreme Court did not perceive the problem to be of sufficient magnitude to require resolution, either by case law or by rule amendment.

In the last few years, however, quiet efforts to amend and to reinterpret the Rule have occurred. In the summer of 1983, the Advisory Committee on the Federal Rules of Civil Procedure of the Judicial Conference drafted rule amendments, which were circulated for comments.⁷⁶² The Committee suggested extending the reach of Rule 52 by amending the Rule to state that trial judges' factual findings, "whether based on oral or documentary evidence," cannot be set aside unless clearly erroneous.⁷⁶³ Further, the Committee proposed to add that "due regard" must be paid to trial judges not only because of their opportunity to assess credibility of witnesses, but also because of "the need for finality."⁷⁶⁴

I am not suggesting that the proposed amendments work a major change. As noted, some courts already apply the "clearly erroneous" rule to all judges' findings.⁷⁶⁵ But the proposed amendments reflect and confirm prevailing value choices about the desire for closure and an unwillingness to permit revisionism. The Committee was straightforward about the choices it was making. In the notes that accompanied its first proposals, the Advisory Committee acknowledged the arguments of supporters of a broader role for appellate courts when trial judges' inferences are based upon documentary evidence; no need for deference exists when equal information is available to both tiers.⁷⁶⁶ But the Committee believed that "these considerations" were outweighed by "the public interest in . . . stability and judicial econ-

762. Advisory Committee on the Federal Rules of Civil Procedure of the Judicial Conference of the United States Courts, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 338 (1983) [hereinafter cited as *1983 Preliminary Draft, Civil Rules*]. The Standing Committee on Rules of Practice and Procedure circulated those proposals for comments. *Id.* at 345. After receiving reactions, the Advisory Committee met in the spring of 1984 and sent its revised proposals to the Standing Committee. The Standing Committee reviewed the proposals in the summer of 1984 and made recommendations for rule changes to the Judicial Conference which meets in the fall of 1984. The Judicial Conference, in turn, sends proposed amendments to the United States Supreme Court, which promulgates final rules that become effective absent Congressional authorization. 28 U.S.C. § 2072 (1982).

The proposed amendments discussed here are the Advisory Committee's preliminary drafts, circulated in the summer of 1983. These proposals were under consideration for revision as this article went to press.

763. *1983 Preliminary Draft, Civil Rules, supra* note 762, 98 F.R.D. at 359-60.

764. *Id.*

765. *E.g., Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 (1st Cir. 1980) ("clearly erroneous" rule applied to documentary evidence of insolvency).

766. *1983 Preliminary Draft, Civil Rules, supra* note 762, 98 F.R.D. at 361.

omy⁷⁶⁷ and therefore recommended the narrowing of appellate review, thus promoting the growth of the Single Judge/Finality Model.

b. *Fact or law*: The Supreme Court has been less forthright in its efforts to delineate the scope of appellate courts' authority when factual disputes involve documentary evidence. In 1982, the Court decided *Pullman-Standard v. Swint*,⁷⁶⁸ which dealt with appellate review of district court findings of discriminatory intent under Title VII of the Civil Rights Act.⁷⁶⁹ *Pullman-Standard* may have imposed the "clearly erroneous" rule on appellate court review of documentary evidence; the Court's opinion is sufficiently opaque that its reach is difficult to discern. But its value choices are transparent: in an oddly formalistic opinion, the Court held that first tier decisions were preferable.

In 1971, a group of black employees of Pullman-Standard, a division of Pullman, Inc., that manufactures railway cars, filed a class action against the company, the United Steelworkers of America (U.S.W.), the local union that represented most of the production and maintenance workers, and the International Association of Machinists (I.A.M.), the bargaining representative of other Pullman employees. The employees claimed that the job assignment and seniority system agreed to by the union and employer discriminated against them. In 1974, after a trial, the district court denied the plaintiffs' claims. On appeal, a Fifth Circuit panel vacated the decision.⁷⁷⁰ The panel concluded that the trial judge had reached his decision on legal standards that "did not fit this case."⁷⁷¹ The court ordered further hearings on the questions of whether job assignments, the selection of work supervisors, and the seniority system were discriminatory.⁷⁷²

After the district court retried the case, the Supreme Court issued new interpretations of Title VII's application to seniority problems.⁷⁷³ The trial judge therefore agreed to a third trial, after which he concluded that Pullman-Standard's assignment and seniority systems were lawful.⁷⁷⁴ The Fifth Circuit reviewed the case for a second time in 1980.⁷⁷⁵ The questions presented were (1) whether after the effective

767. *Id.*

768. 456 U.S. 273 (1982).

769. 42 U.S.C. § 2000e to 2000e-17 (1982).

770. *Swint v. Pullman-Standard*, 539 F.2d 77 (5th Cir. 1976).

771. *Id.* at 82.

772. *Id.* at 95-96.

773. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

774. *Swint v. Pullman-Standard*, 17 Empl. Prac. Dec. (CCH) ¶ 8604 (N.D. Ala. 1978).

775. *Swint v. Pullman-Standard*, 624 F.2d 525 (5th Cir. 1980).

date of Title VII, Pullman-Standard continued to make department assignments with discriminatory intent, (2) whether the company had a "bona fide" seniority system under section 703(h) of Title VII, and (3) whether the company had succeeded in rebutting the prima facie showing of racially discriminatory selection of foremen.⁷⁷⁶

Are these questions of "law" or "fact"? That Pullman-Standard assigned employees to departments is "a thing done," "something that has actual existence,"⁷⁷⁷ a "fact." However, describing Pullman-Standard's motives when making such assignments is more problematic. Legal commentators⁷⁷⁸ have long been uneasy about describing motivation as "objective reality." Even if one could posit an individual's motivation as having an "actual existence," we would have difficulty conceptualizing Pullman-Standard's motivation. The company itself cannot form a motive; a corporation is a creature of papers. If one turns to the motivation of the managers of the company, one enters the complex tangle of ascertaining and aggregating individuals' motives and then projecting them onto the fictional entity, Pullman-Standard.

But Congress has enacted legislation prohibiting employees from making job assignments based upon impermissible motives; to ascertain whether such violations have occurred, courts must therefore assess motivations. One way to approach the question of whether Pullman-Standard's motives are "facts" is to examine the nature of the information relied upon by the judges who decided whether a breach of the law had occurred.

Both the trial and appellate courts thought the company's history was relevant. Both traced the job assignments of whites and blacks from the 1940's to 1973, and both studied carefully the assignments made from 1965 to 1973.⁷⁷⁹ To clarify for himself the massive data presented, the trial judge constructed a chart of Pullman-Standard's subdivisions.⁷⁸⁰ In this document, however, the judge did not include all of Pullman-Standard's departments; he selected only those he believed relevant. The judge also ranked the divisions he included so as to develop standards, thereby enabling a comparison of job assignments in terms of desirability.⁷⁸¹

776. *Id.* at 528.

777. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 298 (1963).

778. Brest, *Reflections on Motive Review*, 15 SAN DIEGO L. REV. 1141, 1143 (1978).

779. 624 F.2d at 527-28; 17 Empl. Prac. Dec. (CCH) at ¶ 8604, 539 F.2d at 82-84.

780. The chart is reproduced in the first opinion of the appellate court, 539 F.2d at 86.

781. *Id.* at 85-89.

When the case was first on appeal, the Fifth Circuit described the trial judge's chart as "the heart"⁷⁸² of his conception of the case. The appellate court determined that, although the chart's factual content was not "clearly erroneous," its structure—the ranking and the selective exclusion of some departments—was legally deficient.⁷⁸³ On remand, once again relying on a chart of his own making,⁷⁸⁴ the trial judge concluded that the company's past practices of having "white only" and "black only" jobs had not affected the company's post-Title VII decisionmaking.⁷⁸⁵ When the Fifth Circuit reviewed the case in 1980, the appellate court again referred to the trial judge's chart.⁷⁸⁶ This time, the appellate court did not criticize the construction of the document but instead concluded that the data revealed the continuation of impermissible discrimination. "[T]he total employment picture indicates that department assignments continued to be infected with racial considerations, albeit to a lesser degree than during the pre-Act period."⁷⁸⁷ In short, while the two tiers considered the same "objective reality"—what numbers of workers of which race were assigned to what departments from 1966 through 1973—they each drew opposite inferences about the meaning of the patterns discerned.

We then reach the problems faced by the United States Supreme Court. Is the decision about whether to prefer the conclusions of the trial judge or the appellate court enlightened by a characterization of either's task as "factfinding"? What does the notion of factfinding have to do with the acts of interpreting a series of events over several years, of deciding the comparability of jobs in diverse departments, and of determining the motivation of the many people who assigned jobs to hundreds of employees? Is the Supreme Court's decisionmaking informed by constitutional and statutory protections accorded jury and judge as factfinder at law, by the history of the different techniques for the taking of evidence at law and in equity, or by a rule that commands

782. *Id.* at 85.

783. *Id.* at 89. The opinion is not completely clear; the court rejected the plaintiff-appellant's claim that the descriptions in the chart were clearly erroneous—apparently because the trial judge called the chart a "rough index." Nevertheless, the appellate court found "valid" the plaintiffs' attacks on the structure of the chart. The court concluded that those defects did "impugn the credibility" of the trial judge's "ultimate conclusions." *Id.*

784. From the printed opinions and briefs in the case, it is unclear whether the trial judge constructed a new chart or relied upon the one reproduced *id.* at 86.

785. 17 Empl. Prac. Dec. (CCH) at ¶ 8604.

786. *See Swint v. Pullman-Standard*, 624 F.2d at 529 ("Although the district court did not reproduce the chart in its Memorandum Opinion, the court interpreted from the chart. . .").

787. *Id.*

appellate courts to give "due regard" to the trial judge's opportunity to assess witnesses' credibility?

My view is that the labels, "law" or "fact," formerly used to delineate the spheres of responsibility of juries and other first tier decisionmakers at law, have little current relevance to fashioning models for decisionmaking in cases such as *Pullman-Standard*. To decide what role to afford appellate courts in such cases, we ought to examine whether, by virtue of their distinct processes for obtaining information, either trial or appellate judges can bring different and better insights into the disputes and whether, for reasons unrelated to information access, one or the other tribunal is to be preferred. Thus, I would abandon inquiry into what is law, fact, subsidiary fact, ultimate fact, undisputed fact, and historical fact. Instead, I would ask questions about power concentration and diffusion, rationality, norm enforcement, and economy.

There are two principal reasons for discarding the fact/law quest. First, when the distinction was originally drawn, the world was very different. Until recently, factfinding was an activity that probed the memory of individuals, who provided oral recollections or had recorded events on paper. As a consequence, the Constitution and the 1865 Congress gave special deference to factfinders, to the individuals who heard the stories of what had been said, felt, and understood. To some extent, those factfinders were assumed to have special insights because they heard firsthand the relevant tales.

In contrast, today, in cases like *Pullman-Standard*, judges need not assess individuals' abilities to reconstruct the past. The answers to the question of whether *Pullman-Standard* discriminated on the basis of race are beyond the memories of individuals. Twentieth century technology, by providing means for amassing quantitative information, has created both the questions and some answers. Decisions about legal violations can depend in large measure upon data compilations, constructed and stored by computers. As a result, the trial judge in *Pullman-Standard* (unlike the magistrate in *United States v. Raddatz*⁷⁸⁸), could make few, if any, claims to special knowledge.⁷⁸⁹ Rather, he compiled a chart summarizing the data that others had provided in an

788. In *Raddatz*, the question was the credibility of witnesses. The magistrate and trial judge had different information bases from which to decide that question. The magistrate had heard the witnesses while the trial judge had not. 447 U.S. at 667.

789. As the court of appeals noted, the trial judge did hear testimony of some witnesses. 624 F.2d at 525; 539 F.2d at 77. But the witnesses testified for the plaintiffs, against whom the district court found, and the Supreme Court did not rely upon the fact that witnesses had testified when

effort to capture what might have happened in the Pullman-Standard Company from 1965 to 1973.

Second, even during eras when "objective reality" resided within the minds of witnesses, so that first tier listeners might have been preferable to second tier reviewers,⁷⁹⁰ many were troubled by the difficulties of distinguishing "facts" from legal conclusions. Both judges and legal commentators admitted that the two forms of decisionmaking shaded into each other.⁷⁹¹ Some writers bemoaned the necessity of drawing those distinctions and applauded equity for its freedom from such endeavors.⁷⁹² Others poked gentle fun at their contemporaries' efforts to prove the validity of delineating "dry, naked, actual fact" from legal conclusions.⁷⁹³

Nevertheless, when deciding *Pullman-Standard*, the Supreme Court claimed that the law/fact question was *the* issue.⁷⁹⁴ Writing for the majority, Justice White concluded that trial judges' views about motivations were preferable to views of appellate judges because the question of "whether the differential impact of the seniority system reflected an intent to discriminate on account of race . . . is a pure question of fact. . . . It is not a question of law and not a mixed question of law and fact."⁷⁹⁵ While "naked, dry facts" may be out of vogue, courts

the Court held the trial judge's findings were to be preferred to those of the appellate court. See 456 U.S. at 301-02 n.6 (Marshall, J., joined by Blackmun, J., dissenting in part).

790. There is some dispute about whether seeing a witness enables one to better judge the "truth" of what is said. See R. HARPER, A. WIENS & J. MATARAZZO, *supra* note 713, at 171-234 (variety of interpretations of nonverbal messages possible); R. ROSENTHAL, *supra* note 713, at 171-234 ("We have just begun to learn about the ways in which our nonverbal behavior affects other people, about differences among people in their abilities to understand and convey nonverbal messages. . . ."). See generally R. NISBETT & L. ROSS, *supra* note 180, at 65-89, 113-38 (discussing cause of cognitive errors). For a view skeptical of the value of first tier listeners, see Blume, *supra* note 748, at 69-70.

791. See Cook, "Facts" and "Statements of Fact," 4 U. CHI. L. REV. 233, 234 (1936) ("It is impracticable if not impracticable to make a pure fact statement."); Sunderland, *Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived*, 4 U. CHI. L. REV. 218, 226 (1936) ("[N]o safe test has ever been devised by which to distinguish between" facts, ultimate facts, and legal conclusions).

792. Orfield, *supra* note 75, at 593-96.

793. Cook, *supra* note 791, at 236.

794. 456 U.S. at 286 n.16, 287-88. The Court stated that all it had to decide was whether the federal appellate courts were "bound by the 'clearly erroneous' rule . . . of Rule . . . 52 . . . in reviewing a district court's findings of fact, arrived at after a lengthy trial, as to the motivation of the parties who negotiated a seniority system." *Id.* at 276. Compare the Court's more sensitive approach to the complexities of appellate review in *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1959 (1984) (application of Rule 52(a)'s clearly erroneous standard to first amendment cases does not eliminate the appellate court's obligation to undertake an independent assessment of the record).

795. 456 U.S. at 287-88.

still are in the business of identifying “pure . . . fact”⁷⁹⁶ and allocating decisionmaking responsibilities upon that basis.

The Supreme Court’s opinion is weak. The majority admitted that it knew of no “rule or principle that would unerringly distinguish a factual finding from a legal conclusion.”⁷⁹⁷ Yet, it deemed the question of racially impermissible intent a “fact” because it, and other courts, had in the past treated questions of intent as “essentially factual.”⁷⁹⁸ Having thus “clarified” the distinction between law and fact, the Supreme Court examined the standard of review that the Fifth Circuit had employed and, in the process, engaged in some “factfinding” of its own. The appellate court had stated that, to the extent the trial court’s decisions were findings of fact, the trial judge had been “clearly erroneous.”⁷⁹⁹ The Supreme Court was convinced, however, that the Fifth Circuit had not truly applied Rule 52’s “clear error” test.⁸⁰⁰

How did the Supreme Court know what really motivated the judges of the Fifth Circuit? First, Justice White explained that, while the Fifth Circuit had referred to and correctly stated the Rule 52 clear error standard, the appellate court’s “acknowledgement came late in the court’s opinion. . . . [T]he paragraph in which the court finally concludes that the . . . seniority system is unprotected . . . strongly suggests that the outcome was the product of the court’s independent consideration of the totality of the circumstances it found in the record.”⁸⁰¹ The second and “more fundamental” criticism, in the Court’s view, was that, once the Fifth Circuit had stated its conviction that a “mistake” had been made, the appellate court also “identified . . . the source of the mistake,” rather than remanding the case to the district

796. *Id.*

797. *Id.* at 288. For struggles over the question of delineating law from fact, see *United States v. Stauffer Chem. Co.*, 104 S. Ct. 575, 578-79 (1984); *Brantley v. McKaskle*, 722 F.2d 187, 188-89 (5th Cir. 1984).

798. 456 U.S. at 288. *See also* *Rogers v. Lodge*, 458 U.S. 613, 621-23 (1982) (whether county system of at-large election was maintained for discriminatory purposes is factual; lower court’s findings tested under “clearly erroneous” rule upheld); *id.* at 631 (Powell, J., dissenting) (stressing need for “objective” evidence, rather than subjective thought processes and arguing the objective factors were “too attenuated as a matter of law to support an inference of discriminatory intent”).

799. 624 F.2d at 533 n.6.

800. 456 U.S. at 286 n.16. The Fifth Circuit had not been very artful in its use of language in the *Pullman-Standard* case. In determining what standard the Fifth Circuit had applied, the Supreme Court relied on other Fifth Circuit opinions (also cited by the circuit court in *Pullman-Standard*) which had described appellate courts as freer when reviewing “ultimate” facts than when reviewing “subsidiary” facts. *See East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975) (appellate court may make independent determination of validity of allegations of discrimination).

801. 456 U.S. at 290-91.

court for a fourth trial.⁸⁰²

Employing words that reveal its own "factfinding," the Court concluded that the decision of the Fifth Circuit "seems to us incredible."⁸⁰³ According to Justice White, the only explanation was that the appellate court had made an "independent evaluation" of the "ultimate facts"⁸⁰⁴ and thus had undertaken an unlimited review of the case. Because the appellate court had applied a standard of review appropriate only for legal issues, and because "facts," not "law," were in dispute, the Supreme Court reversed and remanded.⁸⁰⁵

This case is not, at least in the short run, about economy; it is about power. In *Pullman-Standard*, as in the many other cases reviewed in this paper, the Supreme Court allocated power to the first tier and diminished, if not abolished, opportunities for revision. The Court relied upon an arcane formula to achieve its goals and embraced the very formalism it had disdained in *Barefoot v. Estelle*.⁸⁰⁶

Further, as I suggested at the outset of this section, the Court may also, sub silentio, have decided the question of whether the "clearly erroneous" rule applies when appellate courts consider documentary as well as testimonial evidence. Although not so described by the Advisory Committee's draft proposal to amend Rule 52,⁸⁰⁷ nor expressly discussed in the majority's opinion,⁸⁰⁸ *Pullman-Standard* is a case in which much of the evidence considered by the appellate court was documentary. Given the Court's sweeping order of deference to trial judges, *Pullman-Standard* may signal the Court's view that, whether information is documentary or testimonial, trial judges rather than reviewing courts should decide its value.⁸⁰⁹

802. *Id.* at 291.

803. *Id.* at 293.

804. *Id.* at 285-86.

805. See also *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855-56 (1982) (Supreme Court reprimanded an appellate court for reversing a trial court's findings without using the "clearly erroneous" standard. The Supreme Court then determined that the findings were not clearly erroneous).

806. *Barefoot v. Estelle*, 103 S. Ct. 3383, 3393 (1983).

807. *1983 Preliminary Draft, Civil Rules*, *supra* note 762, 98 F.R.D. at 361 ("The Supreme Court has not resolved the issue. . . .") (citing *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982)).

808. The Court did state that it had not decided the "much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact—*i.e.*, questions in which the historical facts are admitted or established." 456 U.S. at 289 n.19.

809. *But see Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1958 (1984) (appellate courts to review the record independently in first amendment cases).

Pullman-Standard is not the only case in which the Supreme Court has endorsed trial judges' decisionmaking powers and has constrained appellate courts. In general, in cases raising questions of when an appeal may be taken,⁸¹⁰ of how much "deference" need be given to trial judges' rulings on discovery,⁸¹¹ and of when, in habeas claims, state courts have made factual findings rather than legal conclusions,⁸¹² the Court has insisted upon limiting the role of the second tier. With the exceptions of expanding review when indictments are dismissed,⁸¹³ occasionally when sentences are challenged,⁸¹⁴ and when first amendment claims are raised,⁸¹⁵ the Court has increased the power of the first tier.

IV. CONCLUSION

A. THE POSSIBLE EXPLANATIONS

Interpreting a range of statutory schemes and rules, the Court has determined to limit decisionmaking as much as possible to a single forum, to dismantle models involving two fora by interposing multiple procedural obstacles to the second forum, and to lodge substantial power in the first tier by contracting the scope of review. Several approaches might explain the return to the Single Judge/Finality and the Single Judge plus Limited Review Models of procedure. First, a majority of the Court might have a theory of correctness—that the first tier generally produces substantively correct outcomes and that outcome production is the only purpose of procedure. Alternatively, the justices

810. See *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545-57 (1949), *limited*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (decisions appealable only after final judgment unless they fall within "small class" of cases). *But see* *Moses H. Cone Memorial Hosp. v. Mercury Constr.*, 103 S. Ct. 927, 933-35 (1983) (district court's order to stay suit, pending hearing in state court on same issue, appealable).

811. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642 (1976) (trial judge's discovery decisions may not be overturned unless an abuse of discretion).

812. See *Wainwright v. Goode*, 104 S. Ct. 378, 382-83 (1983) (state court factual findings must be accorded presumption of correctness); *Marshall v. Lonberger*, 103 S. Ct. 843, 850 (1983) (to overturn, federal court on habeas review must determine that state court's factual findings lacked even "fair support").

813. See, e.g., *United States v. Morrison*, 449 U.S. 361, 365 (1981) (absent demonstrable prejudice, or threat thereof, dismissals of indictments are inappropriate sanctions for government misconduct). See generally *Ponsoldt*, *supra* note 219 (critical of Court's willingness to permit second trials after mistrials).

814. *Solem v. Helm*, 103 S. Ct. 3001 (1983) (proportionality review of sentence). *But see* *Pulley v. Harris*, 104 S. Ct. 871, 875 (1984) (declining to undertake a proportionality review because claim was "perceived error of state law" and therefore inappropriate for review on federal habeas corpus).

815. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949, 1959-60 (1984).

might believe that (a) despite an absence of correctness, the cost of additional procedural possibilities is not worth a marginal gain in correctness, or (b) even if additional procedural possibilities enhance correctness, they are unnecessary because achieving correct outcomes is not particularly important. Another view the majority could hold is that the procedures in the Single Judge/Finality and Single Judge plus Limited Review Models are sufficient to express society's concerns about individuals and their disputes. Finally, the majority may believe that, although more procedural opportunities do express increased societal concern, individuals and their disputes are not worth valuing more.

1. *Correct Outcomes*

If one were confident that the first tier produced correct outcomes in all, or in a substantial percentage of cases, and if one perceived that correct outcome production was the only purpose of procedure, then it would be sensible to eliminate the "waste" of extra, "unnecessary" procedures.

To explore this possibility, some definition of correctness is needed. Leaving aside indeterminacy problems and my reservations about "correctness," decisions could be termed "correct" if the "law" is properly understood, if the "true facts" are found, and if the appropriate remedy or sanction is applied.

A majority of the Court appears to care little about the first sense of correctness, that the law be properly applied. In cases like *Stone v. Powell* and *Wainwright v. Sykes*, the Court ignored conflicts between federal and state holdings; it refused to allow consideration of whether constitutional rules were "correctly" employed. The second aspect of correctness, the search for facts, may be of greater importance for the Court. The Court has devoted many of its habeas opinions to the question of "prejudice"—whether, even if legal violations have occurred, the outcome would have been different. The Court may well be convinced that all criminal defendants are factually guilty and, therefore, that outcomes and sanctions are "correct" whenever the guilty remain incarcerated. Similarly, the Court may believe that the other first tier decisions discussed above were the "right" outcomes: that Mr. Kremer had not suffered discrimination, that Mr. McCurry's constitutional rights were not violated, and that Pullman-Standard had not engaged in illegal employment practices. Thus, by permitting only minimal procedures, the Court enables "correct" decisions to survive.

Both explanations—that the Court cares little for legal correctness

and that the Court believes additional procedures decrease factual correctness—seem odd. Given that the Supreme Court is in the business of law announcement, must not the Court believe that implementation of legal rules is important? Moreover, should not the Court, of all institutions, perceive correctness as tied to legality? And what could be the basis for the Court's view that Mr. Kremer was not discriminated against, that Isaac was guilty, and that Raddatz was to be disbelieved? Does a majority have some general biases against discrimination claimants and criminal defendants and in favor of the government? For a Court whose charge is to adjudicate, generalized hunches are suspect bases for decisions. In short, I have some skepticism about whether the Court has such a theory of correctness. A majority of the Court has opted for the contraction of procedural opportunities without endorsing first tier decisions as substantively correct. In the many cases examined above, the Court has not concluded that the first tier rulings were rational, impartial, consistent, or correct applications of law. Nor has the Court disagreed on the merits with lower federal court opinions that have overturned first tier rulings as violative of federal norms. Rather, the Court has forbidden inquiry into the merits.

But to rely upon the Court's judgments and holdings is to oversimplify the interpretation of what animates procedural reductions. Some language in the majority's decisions does suggest that the first tier produces correct outcomes. Some Supreme Court decisions imply that the first tier is always staffed by able decisionmakers who render judgments on the basis of information provided by autonomous, competent, fully informed litigants and their attorneys, who in turn make well-considered choices as they wend their way through well-delineated procedural paths. I believe, however, that the Court well knows the falsity of such depictions.

The view that litigants are rational, deliberate participants is descriptively accurate for only a small but highly visible subset of litigants, such as commercial or institutional litigants. For example, the assumption that the Parklane Hosiery Corporation's officers were able to evaluate ample information provided by counsel is consistent with what is known about sophisticated clients, the career choices of talented law students, and the role of money in the litigation marketplace. When clients possess both economic resources and information, clients can obtain allegiance from their lawyers and exercise some degree of control over their attorneys' decisions. Further, such clients may need constraints because they may be tempted to abuse decisionmaking

processes. In short, such clients may not only be theoretically autonomous; they may, in fact, be "competent."

However, the Supreme Court could not genuinely believe that all clients, including the poor and the uneducated, possess such "litigation competency." Nevertheless, the Court has declined to inquire into litigant competency as a prerequisite to the application of preclusion rules. Instead, the Court has relied upon litigant autonomy without checking for competency. Indeed, the Court has discarded one of its few "competency checks," the "deliberate by-pass" rule of *Fay v. Noia*.

On the other hand, in some of its opinions, the Court has relied heavily upon the role of attorneys. Perhaps the Justices assume that lawyers are "competent," adequately protect the interests of the diverse litigants represented, and thereby bring about correct outcomes. There are, however, two difficulties with such assumptions, both of which are well known to the Justices. First, attorneys and clients have distinct and sometimes conflicting interests. Second, even when attorneys wish to further their clients' interests, not all are competent to do so.

Professors Cover and Aleinikoff have exposed the fallacies of viewing attorneys and their criminal defendant clients as "moral units."⁸¹⁶ Most criminal defendants are indigent. They do not choose their attorneys, and the attorneys provided are usually burdened by too many other clients. Resource constraints on the public side and market incentives on the private side result in the divergence of attorneys' and clients' interests at discrete and identifiable points. The Supreme Court knows this. A few years ago, it allowed appointed defense attorneys to ignore and contradict nonfrivolous requests made by their clients.⁸¹⁷

Moreover, although a majority of the Court has displayed its willingness to be "highly deferential" to defense counsel and to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,"⁸¹⁸ members of the Court know

816. Cover & Aleinikoff, *supra* note 13, at 1078-86. See also Comment, *Client Services in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448, 456 (1956) (voluntary defender association spent little time per client); Note, *supra* note 207, at 996-98 (time and work pressures on public defender's office cause attorney mistakes).

817. *Jones v. Barnes*, 103 S. Ct. 3308, 3312-14 (1983). See also *Morris v. Slappy*, 103 S. Ct. 1610, 1615 (1983) (over objection of defendant, appointed counsel replaced previously appointed attorney who had taken ill); *The Criminal Court: A System in Collapse*, N.Y. Times, June 26, 1983, at 1, col. 1 (the caseload of courts, prosecutors and public defenders is so large that much unfairness results). See generally D. ROSENTHAL, *LAWYER/CLIENT: WHO'S IN CHARGE passim* (1977) (clients have minimal control over attorneys).

818. *Strickland v. Washington*, 104 S. Ct. at 2066.

that all defense attorneys are not competent. The "strong presumption" that inept trial counsel did not render a criminal trial fundamentally unfair stems from the Court's efforts to rebuff postconviction collateral attacks.⁸¹⁹ To protect "finality concerns," the Court has refused to impose performance standards on defense attorneys and has made "unreasonable," "unprofessional" conduct by defense attorneys insufficient grounds for reversals of conviction.⁸²⁰ However, from the Court's own experiences with cases claiming ineffective counsel,⁸²¹ from lower court opinions, and from the information generated by researchers,⁸²² the Justices have been made aware of many criminal defense attorneys who do minimal or no work on behalf of their clients.⁸²³ As a recent American Bar Association survey of the implementation of *Gideon v. Wainwright's* guarantee of lawyers for felony defendants demonstrates, not even minimally adequate defense services are being provided in many locales.⁸²⁴

Furthermore, even when lawyers are available, criticism of their courtroom performance, in both criminal and civil cases, has been robust. Indeed, the Chief Justice has led the way.⁸²⁵ The great outpouring of concern has prompted proposals for more restrictive bar admission requirements and for greater supervision of trial attorneys.⁸²⁶ In short, although no data base provides figures by which to

819. See *id.* at 2064 (habeas petitioner must show both that counsel committed serious error and that error prejudiced the defense).

820. *Id.* at 2071.

821. See, e.g., *United States v. Cronin*, 104 S. Ct. 2039, 2041 (1984) (court-appointed defense counsel, a young real estate lawyer who had never before tried a jury case and was permitted only a short time to prepare for trial); *Cuyler v. Sullivan*, 446 U.S. 335, 353 (1980) (presumption of ineffective assistance by counsel because of conflict of interest).

There are also many lower court cases chronicling ineffective assistance of counsel. E.g., *United States v. Tucker*, 716 F.2d 576, 595 (9th Cir. 1983); *Vela v. Estelle*, 708 F.2d 954, 965 (5th Cir. 1983); *Mylar v. Alabama*, 671 F.2d 1299, 1300 (11th Cir. 1982). See generally Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AM. CRIM. L. REV. 29, 30-31 (1983) (advocating emphasis upon counsel's assertion of defendant's rights rather than upon outcome of trial).

822. See N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 19 (1982) (survey of criminal defense programs; inadequate compensation for appointed defense attorneys led to attorneys' unwillingness to "put forth all necessary efforts on behalf of their clients").

823. See, e.g., *Strickland v. Washington*, 104 S. Ct. at 2073 n.3 (Breunan, J., concurring in part) (citing *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984), in which the Ninth Circuit concluded that "unconscious or sleeping counsel is equivalent to no counsel").

824. N. LEFSTEIN, *supra* note 822, at F1-F68.

825. Burger, *Annual Report on the State of the Judiciary*, A.B.A.J. 66 (1980) at 295.

826. See Final Report of the Committee to Consider Standards for Admission to Practice in the Federal Court to the Judicial Conference of the United States, 83 F.R.D. 215, 218 (1979) (recommending several measures to improve federal trial practice) [hereinafter cited as *Devitt Report*]. See also Lempert, *Pilot Court Districts, Bar Split on Attorney Testing*, Legal Times of Wash.,

approximate the frequency, some attorneys commit egregious errors.⁸²⁷ The client-attorney unit does not always work as it is theoretically supposed to, and the Court cannot rely unquestioningly upon that unit's decisions, or lack of decisions, to validate outcomes.

Finally, a third species of litigants remains to be considered. Included here are litigants like Mr. Kremer, who appeared *pro se* and found that, through a procedural error, he had forfeited his opportunities to receive a federal court decision on the merits. The Court treated Mr. Kremer, who was obviously naive about procedure, as if he were a sophisticated litigator.⁸²⁸ The Court declined to apply relaxed rules to the *pro se* litigant—despite extant legal doctrines that recognize the utility of lenient rules for unrepresented individuals.⁸²⁹

But litigant and attorney shortcomings may not be decisive for the Justices. The Court could assume that a third category of actors, the decisionmakers of the first tier, compensate sufficiently for the errors of both litigants and attorneys so that the outcomes are correct. Some of the Supreme Court's opinions strongly suggest this explanation. In *Strickland v. Washington*, a major opinion on assistance of counsel, the Court concluded that defense attorneys' failures need not "undermine confidence in the outcome" of cases.⁸³⁰ Even when lawyers have been constitutionally inadequate, the Court is prepared to sustain first tier decisions. The assumption is that decisionmakers "reasonably, conscientiously, and impartially"⁸³¹ apply legal standards.

Once again, the Court's endorsement of outcome rings hollow. First, there is history. Procedural developments of the last century, including the growth of statutory rights of appeal, the congressional grants to federal courts of jurisdiction over state judges' decisions, and the increased reviewability of jury decisions, all indicate that first tier

Apr. 4, 1983, at 2, col. 1 (discussing implementation of Devitt Committee proposals by 14 United States federal court districts). An increase in judicial supervisory activities, justified partially by a need to protect clients from attorney failures, is yet another indication of the uneven performance of the bar. See, e.g., Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 636 (1980) (arguing desirability of direct intervention by trial judges).

827. See also J. KNITZER & M. SOBIE, *LAW GUARDIANS IN NEW YORK STATE, A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN* 13 (1984) ("[A]ll the data point to extensive inadequacies in the general level of representation accorded to children.").

828. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982).

829. See *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (reversing award of fees to defendants because prisoner's *pro se* claim, although unsuccessful, was not frivolous); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (liberal reading of *pro se* complaints).

830. 104 S. Ct. 2052, 2068 (1984).

831. *Id.*

decisions are not always consistent, impartial applications of legal norms.

Second, nothing has occurred on the empirical or anecdotal fronts in the last twenty years to lend support to the Court's apparent sanguinity. Commentators have detailed jurors' lack of comprehension of legal rules.⁸³² Reports on trial courts describe the many burdens and pressures under which trial judges labor,⁸³³ and the enormous variety among judges in all aspects of their functioning—from selection and salaries to the quality of decisions rendered.⁸³⁴ Similarly, investigations of agencies, such as the New York Human Rights Division (NYHRD) and the Social Security Administration, reveal inadequate processes, erratic decisionmaking, lack of resources, and administrative malfunctioning.⁸³⁵

Perhaps, however, the Court's confidence about outcomes comes from a belief that the procedures inherent in first tier decisionmaking compensate for the inadequacies and limitations of the participants. The notion could be that litigants' autonomy and persuasion opportunities, coupled with power concentration and finality, yield correct results. But the Court could not genuinely rely upon such procedural features as the equivalent of correct outcomes. The Court must acknowledge that procedures are mediated by participants, that Mr. Kremer's autonomy and persuasion opportunities could have led to correct results only if Mr. Kremer had, in fact, known of his options and had the resources to exercise them. The availability of procedures per se does not provide a sufficient basis to believe that procedures compel correctness. If litigants, attorneys, and first tier decisionmakers fail, procedures (whether marvelously crafted or crudely worked) cannot ensure results in which one can have confidence.

Moreover, very similar procedures, such as those in federal and state courts, sometimes yield different results. Recall that in *Stone v.*

832. See generally A. ELWORK, B. SALES & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982).

833. See V. FLANGO, R. ROPER & M. ELSNER, NATIONAL CENTER FOR STATE COURTS, THE BUSINESS OF STATE TRIAL COURTS 67 (1983) (civil court filings outstripping population growth).

834. See, e.g., *Daye v. Attorney Gen.*, 712 F.2d 1566, 1572 (2d Cir. 1983) (although not unconstitutional, extent and nature of state trial judge's intervention created risk that jurors thought judge believed defendant guilty); L. BERKSON, S. BELLER & M. GRIMALDI, *supra* note 681, at 6 (survey of state judicial selection procedures); Neuborne, *supra* note 138, at 1115-16 (resources and other institutional factors making federal district courts preferable to both state trial and appellate courts for certain categories of litigants).

835. TASK FORCE REPORT, *supra* note 660; J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, *supra* note 91.

Powell a state court approved a state statute as constitutional, but the federal appellate court found the very same statute illegal under the same test. Procedure alone does not reveal which answer to the federal constitutional question is correct or desirable. Additional concepts are necessary, such as a theory that state judges' decisions are always to be preferred because of deference to states, or that federal judges' decisions are preferable because federal judges are more expert in federal law, are more committed to the implementation of federal rights, or are sufficiently removed from the front lines so as to be able to apply federal law even when litigants seem unsympathetic or undeserving.

To summarize, I do not believe that the Supreme Court's procedural modeling is propelled by the Court's belief that the first tier consistently produces legally "correct" outcomes. Neither the Court's judgments nor the litigation world, as the Court must understand it, supports that proposition. Further, I do not think the Court is committed to the proposition that the only goal of procedure is to produce correct outcomes. Much of the Court's discussion of other concerns—finality, the import of the ritual of the trial, and the role of state judges' decisions—suggests the Court's awareness of procedure's other purposes. On the other hand, lack of interest disinterest in legal correctness and beliefs about the relative merits of categories of claims may well explain why the Supreme Court is in the business of dismantling complex procedural models.

2. *The Utility of Revisionism*

The Court may not believe that the Single Judge/Finality or Single Judge plus Limited Review Models yield correct outcomes. The Court may, however, assume that additional opportunities for revision will yield no better, or only marginally better, outcomes and that the cost of the improvements are not worth the benefits. Professor Mashaw has identified this utilitarian approach in the Court's due process modeling in the administrative context.⁸³⁶ Perhaps this "marginal return" theory has explanatory force here as well. After all, reducing procedural opportunities promises speedy dispute resolution, the rendition of numerous decisions, and the possibility of inexpensive process. The complicated, redundant model, embodied in *Fay v. Noia* and contemplated by Title VII, is a development of the 1960's, a decade when resources seemed plentiful and federal rights enforcement imperative. The current retrenchment is consistent with the reductionist leitmotif of

836. Mashaw, *supra* note 1, at 47.

the 1970's and early eighties—to spend less money and to provide fewer social services.

The difficulty is that the Court has no information about the actual costs of any procedural models.⁸³⁷ The Court's utilitarian calculus is only pseudoscientific. All the relevant variables are blanks, filled in by intuition. For example, consider the procedural modeling in state habeas corpus cases. In *Wainwright v. Sykes*, the Court claimed that its Single Judge/Different Forum plus Very Limited Review Model was preferable to the *Fay v. Noia* Single Judge/Different Forum plus Unlimited Review Model. The *Sykes* majority argued that the decision would improve trials because sandbaggers would be deterred. In essence, the Court claimed that fewer procedural opportunities would yield better results.

But the Court had no concrete information on any of the critical factors—the incidence of sandbagging, the effectiveness of the deterrence based on the “cause and prejudice” rule of *Sykes*, the number of corrected outcomes under the *Fay v. Noia* rule, the operating costs under either the *Noia* or *Sykes* rule, or the costs of the transition from one rule to the other. Further, the Court's rulings in *Sykes* and other cases have made habeas decisionmaking complex. The majority cannot be certain that its rules protect federal judicial resources. Thus, the majority's theory that “some procedure is enough” and that “less is better” cannot be based upon economic concerns alone.

Yet another possibility is that a majority of the Court believes that, even if additional procedures would decrease the number of incorrect decisions, correct outcomes are themselves not particularly important. As described above, I have some concern that the Court is not interested in trying to insure legally correct decisions.

3. *The Valuation of Individuals*

Whether or not a majority of the Court believes the outcomes are factually correct, the Justices may believe that the Single Judge/Finality and Single Judge plus Limited Review Models are “better” for other reasons. The Court may prefer those models because those challenging first tier decisions are members of disfavored groups or are seeking to enforce rights in which the Justices have little interest.

The Court cannot be oblivious to the political implications of its

837. *Id.* at 48.

“procedural” decisions. With a few exceptions,⁸³⁸ the “losers” under the “new” procedural rules are prisoners, criminal defendants, and civil rights claimants. In the occasional situation in which the Court has declined to apply procedural limitations, the “winners” are almost always federal and state governments, which obtain new opportunities to retry criminal defendants despite claims of double jeopardy⁸³⁹ and which survive motions to dismiss based on collateral estoppel.⁸⁴⁰ In fact, the Court recently created a special exception to collateral estoppel rules when the United States is the party to be estopped.⁸⁴¹ Further, notwithstanding all of the Court’s discussions of federalism and its consequent enforcement of state contemporaneous objections rules,⁸⁴² the Court has assumed the *absence* of an “independent and adequate” state ground to assert jurisdiction and to reverse a Michigan state court’s opinion that had extended search and seizure protections beyond that afforded under the federal Constitution.⁸⁴³ Perhaps the return to procedural simplicity is a vehicle by which the Court expresses its views on the worth of the individuals denied opportunities for review.

Two recent opinions substantiate this view. In one, *Patton v. Yount*,⁸⁴⁴ Justice Stevens’ dissent frankly noted the political import of the Court’s opinions. He described *Patton v. Yount* as one of a series of cases in which “the Court made sure that an apparently guilty defendant was not given too much protection by the law.”⁸⁴⁵ As the Justice explained, the “string of consecutive victories for the prosecution now stands at 20.”⁸⁴⁶

838. See, e.g., *Cooper v. Federal Reserve Bank*, 104 S. Ct. 2794, 2800-04 (1984) (employment discrimination claimants not precluded after class-wide discrimination action unsuccessful).

839. See *Tibbs v. Florida*, 457 U.S. 31, 47 (1982) (retrial not barred by the double jeopardy clause when reversal is based upon the weight of the evidence).

840. *United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099 (1984); *Standefer v. United States*, 447 U.S. 10 (1980).

841. See *United States v. Mendoza*, 104 S. Ct. 568, 574 (1984) (nonmutual collateral estoppel not enforceable against federal government). Cf. *United States v. Stauffer Chem. Co.*, 104 S. Ct. 575, 578 (1984) (no special estoppel rule for the United States when estoppel is mutual).

842. E.g., *Wainwright v. Sykes*, 433 U.S. 72, 87-90 (1977).

843. *Michigan v. Long*, 103 S. Ct. 3469, 3477, 3483 (1983).

844. 104 S. Ct. 2885 (1984).

845. *Id.* at 2900 n.8 (Stevens, J., dissenting).

846. *Id.* See also *Florida v. Meyers*, 104 S. Ct. 1852, 1855 (1984) (per curiam) (Stevens, J., joined by Brennan & Marshall, JJ., dissenting) (Court’s recent history indicates that it is “primarily concerned with vindicating the will of the majority and less interested in its role as a protector of individual’s constitutional rights”).

A second case is *Tate v. Rose*.⁸⁴⁷ The Sixth Circuit held that a prisoner's conviction was unconstitutional and then denied Ohio's request for a stay of the habeas relief ordered. Thereafter, Ohio requested a stay from Justice O'Connor. Despite the Supreme Court's announcement in *Barefoot v. Estelle* that the Court would give great weight to appellate court decisions on stays,⁸⁴⁸ Justice O'Connor granted the stay pending the Court's consideration of the state's petition for certiorari.⁸⁴⁹ She held that the "stay equities," the balance of hardship between the prisoner and the state, favored the state: "[g]ranteeing the stay for the time necessary to consider the petition should not cause a significant incremental burden to respondent, who has been incarcerated for several years, but doing so will relieve the State of Ohio of the burden of releasing respondent or retrying him."⁸⁵⁰ In other words, an individual's (or at least a prisoner's) interest in liberty, in being set free once a court has held a conviction is unconstitutional, is outweighed by a state's "burden" of release or retrial.⁸⁵¹ Individual liberty appears to count for little in Justice O'Connor's view. Incarceration, however achieved, may be the goal, and hostility to the rights of individuals, and particularly of criminal defendants, could well explain much of the Court's work.⁸⁵²

4. *Preferences Among Valued Features*

A final explanation is that the Court believes that the procedures afforded in the Single Judge/Finality and Single Judge plus Limited Review Models are sufficient to express society's concerns about individuals.

In many of the cases chronicled above, the majority's discussion of procedure centers on three features—finality, economy, and power concentration. The Court may believe that the other purposes of procedure—the affirmation of individual dignity, the legitimization of government control, and the ritual that symbolizes the importance of

847. *Rose v. Engle*, 722 F.2d 1277 (6th Cir. 1983), stay granted *sub nom.* *Tate v. Rose*, 104 S. Ct. 2186 (O'Connor, Circuit Justice 1984).

848. *Barefoot v. Estelle*, 103 S. Ct. at 3393.

849. *Tate v. Rose*, 104 S. Ct. 2186, 2187 (O'Connor, Circuit Justice 1984).

850. *Id.*

851. Justice O'Connor had an obvious alternative—staying the retrial, but not the release, pending the Court's consideration of the certiorari petition.

852. See also *Schall v. Martin*, 104 S. Ct. 2403 (1984) (New York statute authorizing pretrial detention of juveniles upheld). See generally Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, 17 SUFFOLK U. L. REV. 549, 616 (1983) ("[T]he Burger Court can be best understood in political rather than traditional 'legal' terms.").

the decisions rendered—are all adequately accomplished by procedural models that rely heavily upon the Court's three favored features.

If this is the majority's assumption, I think that it is wrong. I do not believe the last hundred years of increased opportunities for revisionism should be jettisoned so abruptly. We have created opportunities for revision because we do not want all decisions by individual judges to endure. We have differentiated the kinds of process available based upon the rights at stake because we wish to delineate issues of importance. The Court's refusal to confront the reasons behind the evolution of models other than the most restrictive ones does not make the need for complexity disappear.

Finality in a dispute resolution system is a normative conclusion, not an objective reality. The distribution of power in a procedural system is not only a decision about procedure, it is also about political authority. Economy is not the sole purpose of a court system, nor is it the hallmark of court systems as contrasted to other forms of decision-making. Thus, it is an error for any court, Congress, or the drafters of the Federal Rules to model procedural systems without acknowledging the impact of those decisions on the distribution of power. This Court has failed to justify why first tier decisionmakers should be given more, and in many instances unreviewable, power.

B. SOME ALTERNATIVE APPROACHES

I would be the first to admit that the Supreme Court is not alone in its ignorance about the political, social, and economic costs of revisionism and of complex versus simple procedure. As I have noted, empirical information in these areas is almost nonexistent. But the Court can be faulted for claiming to know that which is or may be unknowable.

Notwithstanding the absence of information, however, we are in the business of maintaining courts. Decisions must be made about how much process we can afford. In my view, the chronic cries of despair about the viciousness of crime, the exploitation of procedure by litigants, and the costs and volume of caseloads do not sufficiently justify the contraction or expansion of procedural opportunities. Creators of procedural systems should consider the realities of litigation opportunities, the abilities of both litigants and decisionmakers, the techniques by which to legitimate and to contain the exercise of state power, and the symbolic and political role of the courts in the United States. With these concerns in mind, I believe that compelling arguments can be

made for the deployment of procedural schemes other than the Single Judge/Finality and Single Judge plus Limited Review Models.

It should be understood, however, that to argue for more complex decisionmaking is not to suggest that second or third tier decisionmakers necessarily have deeper insights. To realize that litigants are sometimes ill-informed or poorly represented in the first round is not to claim that they will necessarily be better equipped in a second or third proceeding. And to suggest that more procedure should be provided is not to urge a return to the perspectives of the 1960's and the Age of Aquarius.

The first step in developing a theory of procedural adequacy, I believe, is to return to the purposes of court procedure in the United States: producing acceptable outcomes in individual cases, legitimating government decisionmaking in the absence of a guarantee of correctness, delineating the social and political import of different kinds of disputes, cherishing individuals and responding to their complaints of wrongdoing, and demonstrating the core values of equality, fairness, democracy, and justice. Procedural features must be evaluated with the goal of maximizing the possibility of accomplishing these purposes. While I cannot, at this juncture, set forth a complete description of how such a procedural system would operate, I can sketch some of its contours.

1. *Criminal Cases and Habeas Corpus Petitions*

a. *Diminishing litigants' autonomy and deemphasizing finality:* A first step is to improve events in the first tier. Because many criminal defendants and their attorneys do not merit the description "competent," I suggest we reassess our current emphasis on litigant autonomy and reduce its scope. The belief that first tier participants "sandbag" proceedings is tied to the perception that attorneys, on behalf of litigants, are free to choose whether and when to dispute results. Fear of "sandbagging," in turn, results in preclusion and forfeiture doctrines. In my view, sandbagging is mostly a mirage. I do not think that criminal defendants are aware of and "save" viable defenses to use after conviction and incarceration. Others, however, think that sandbagging is a serious problem. The difference in opinions reflects diverse perceptions about how the world operates, and the likelihood of reconciliation is slim.

Various perceptions also exist about the ability of members of the first tier to enforce legal norms. I believe state court judges and agency

decisionmakers do not always implement legal rights. I make that claim not because I think that most state judges are inept, biased, or uncaring; rather, I think that the crush of cases, the minimal resources, and the harshness of the conflicts result in erratic rights enforcement. In my view, judges need some kind of an ivory tower as an emotional retreat to enable them to insist on systemic integrity, especially when despicable individuals may sometimes triumph as a result.⁸⁵³ Federal courts, with greater resources and fewer cases, insulate judges more than do state courts. The entire federal judiciary handled 35,983 federal criminal cases in 1978;⁸⁵⁴ in contrast, the criminal caseload of the state courts for that year was about 13 million.⁸⁵⁵

But there are those who claim that state courts consistently implement federal law.⁸⁵⁶ Although I do not understand how these judges and commentators reconcile their views with data from the federal habeas case law (70% reversal on capital cases alone since 1976),⁸⁵⁷ I am prepared to believe that they will be as unpersuaded by me as I am by them. Rather than engage in a futile dispute, I would minimize the factual discord by altering the choices available.

I recommend constraining litigants, lawyers, and trial judges in criminal cases. Autonomy could be decreased either by giving trial judges more supervisory obligations in the criminal trial process or by permitting judges to intervene in the attorney-client relationship to give clients information about what kinds of choices their attorneys should be making. I would not permit litigants and lawyers to continue to make unsupervised choices about whether to contest the admissibility of evidence, the *voir dire*, or the grand jury selection process. One approach would be to prescribe a minimum set of procedures to be followed in all criminal defendants' trials and oblige the participants to implement them. Another would be to educate clients in the hopes that

853. See *Patton v. Yount*, 104 S. Ct. 2885, 2900 (1984) (Stevens, J., dissenting) (criticizing the majority for considering the case and reversing the grant of habeas relief because the petitioner was, it seemed, "guilty of a heinous offense").

854. 1979 ANNUAL REPORT, *supra* note 215, at 129.

855. 1978 STATE STATISTICS, *supra* note 580, at 450 table B. The figures may be high; not all cases filed are prosecuted.

856. Justice O'Connor has emerged as a principle spokesperson on the Court for deference to state court decisions on federal issues. See, e.g., *Engle v. Isaac*, 456 U.S. at 128 ("The States possess primary authority for defining and enforcing the criminal law."). See also Bator, *supra* note 13, at 481 ("State courts often decide questions which 'involve the construction of the Constitution and the 'determination of rights asserted under it.'"); Bator, *supra* note 140, at 636-37 (arguing that state courts will and should continue to play a substantial role in the elaboration of federal constitutional principles).

857. *Barefoot v. Estelle*, 103 S. Ct. 3383, 3405 (1983) (Marshall, J., dissenting).

increased knowledge would improve advocacy. Yet a third alternative would be to increase clients' control over attorneys by providing greater resources for defendants. In the current political climate, however, additional resource commitments are unlikely. The first two suggestions are thus more feasible.

Neither of these two options is as radical or as economically burdensome as might first appear. The model for judicial supervision of criminal trials comes from the ritual that now surrounds the taking of guilty pleas. Trial judges must assess defendants' pleas of guilty to determine whether there have been "knowing" and "voluntary" waivers of a variety of rights.⁸⁵⁸ Judges must ask a litany of questions about whether defendants understand that, were they to go to trial, the prosecution bears the burden of proof beyond a reasonable doubt and must establish the elements of the crime. Judges must make sure defendants know about their rights to a jury and to the provision of counsel, about fifth amendment protections, and about the direct consequences of pleas, the maximum length of sentences, and the possibility of fines. Guilty plea proceedings occur in open court; transcripts are made, and certain kinds of errors in the taking of guilty pleas are grounds for vacating convictions.⁸⁵⁹

Moreover, federal and state courts have already mandated that judges take charge of other aspects of criminal trials. For example, if a federal trial judge learns of a defendant's confession, the judge must inquire into the voluntariness of the statement prior to its submission to the jury.⁸⁶⁰ Some states have also imposed substantial duties on trial judges. In California, concern about attorney conflicts of interest in criminal cases led the state's Supreme Court to decide that each indigent criminal codefendant must have his or her own attorney appointed.⁸⁶¹ A codefendant may only waive that right after independent counsel has been appointed and has given the client advice.⁸⁶² The California court made its decision because it believed that defendants would be "unlikely to understand the potential risks" that defense attorneys engaged in joint representation would be unable to provide

858. *E.g.* FED. R. CRIM. P. 11.

859. *McCarthy v. United States*, 394 U.S. 459, 468, 469 (1969) (such errors include failure to address the defendant directly when determining the voluntariness of the guilty plea and failure to determine that there was a factual basis for the guilty plea).

860. *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964).

861. *People v. Mroczko*, 35 Cal. 3d 86, 115, 672 P.2d 835, 853, 197 Cal. Rptr. 52, 70 (1983). *Cf.* *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978) (federal constitution requires appointment of separate counsel only if requested by defendant).

862. *Mroczko*, 35 Cal. 3d at 110-11, 672 P.2d at 849-50, 197 Cal. Rptr. at 66-67.

“unbiased” advice, and that, given attorney-client privilege rules, the trial court would not be able to obtain the information necessary to decide whether to permit joint representation. Further, the court was concerned about trial courts’ incentives to make records invulnerable to later attacks.⁸⁶³

I suspect that the California solution is economical; it avoids inquiry into possible conflicts of interest, and it minimizes reconstruction of the decisions made. Although the California rule constricts litigants’ choices and requires that more attorneys be provided, it is an appropriate accommodation in light of the record of conflicts among criminal defendants, the possible pressures (by codefendants or by attorneys) to share an attorney, and the costs of thinking a lot about whether to allow joint representation.

Another example of inroads into litigant autonomy is provided by those states which mandate automatic appeals in cases where criminal defendants are sentenced to death.⁸⁶⁴ In these states, litigants may not choose whether to die under possibly invalid sentences. Once again, restrictions on litigant autonomy are relatively inexpensive ways to insure consistent applications of legal norms and to avoid second-guessing whether the actors are competent to make choices.

Installing trial judges as supervisors is not, however, problem-free. First, judges may go through the ritual of checking into attorney adequacy, but may do so only to protect themselves from reversal. Thus, the records may look impressive while the process remains unimproved. Second, judicial supervision of the trial process enhances judges’ power, and, as I have argued elsewhere,⁸⁶⁵ judges have many techniques for coercing litigant and attorney “cooperation” to speed cases to disposition. Unless the duties of trial judges were carefully delineated, the behavior of judges recorded, and a vigorous appellate system authorized to supervise closely trial judges’ exercises of authority, this suggestion would only achieve further insulation of first tier powers. Third, the contraction of litigant autonomy may have negative symbolic effects; it surely diminishes the theoretical freedom and equality of a subset of litigants. But because I believe that the vast majority of criminal defendants already have little freedom and even less equal-

863. *Id.* at 115, 672 P.2d at 853, 197 Cal. Rptr. at 70.

864. *E.g.*, *Commonwealth v. McKenna*, 476 Pa. 428, 439, 383 A.2d 174, 180 (1978). *See also* CAL. PENAL CODE § 1239(b) (West 1982) (when such sentence imposed, “an appeal is automatically taken”).

865. Resnik, *supra* note 26, at 376.

ity, I am prepared to reduce their theoretical autonomy in the hopes of better outcomes, improved process, and greater supervision by and of the first tier. I could, however, be accused of inappropriate maternalism; I must admit that my view of the tradeoffs may not be shared by those whom I hope would benefit under such a system.

An alternative would be to educate criminal defendants and their attorneys about the trial process in an effort to enhance the ability of clients to monitor their attorneys' work and to improve the level of services provided. Because most defendants are poor, they cannot retain attorneys and have no purse strings to pull. The provision of dollars and thus of economic clout would be one option, but, as already noted, a politically unlikely one. In lieu of dollars, however, clients could be equipped with information. The government might give criminal defendants detailed information, describing the kinds of defenses available and the decisions attorneys should be making upon consultation with their clients. Defendants who are unhappy about their attorneys' decisions could complain to trial judges, who would be obliged to hold hearings about the alleged inadequacies. This approach respects litigant autonomy; absent defendants' complaints, the attorney-client relationship remains unexamined. This suggestion is an effort to give indigent defendants more control over their attorneys' behavior—a direction opposite to that taken by the Supreme Court.⁸⁶⁶

Constraining criminal defendants, defense attorneys, prosecutors, and trial judges in the pretrial and trial process and providing defendants with information and avenues for redress would not be unduly burdensome. The vast bulk of all criminal cases end in settlement; the relatively small number that are tried would be subjected to these new procedural limitations, which are already partially in place when criminal defendants plead guilty. On the other hand, these suggestions also have implications for cases currently being settled; if clients had more information, trial rates might not remain constant.

Another option, again reducing litigant autonomy, is to contract the number of procedural avenues available. Litigants' tales of innocent mistakes can too frequently be borne out. Rather than leave so much to discretion or chance, the appropriate paths could be plain, and some procedural steps could be made mandatory. For example, we might mandate automatic review in every criminal case, whether resolved by trial or plea bargain. Such mandatory review would diffuse

866. *E.g.*, *Jones v. Barnes*, 103 S. Ct. 3308, 3312-14 (1983); *Morris v. Slappy*, 103 S. Ct. 1610 (1983).

the power of the first tier and provide supervision in a systematic fashion. Increased review might also cause judges to be more careful when implementing rules. If judges' behavior were recorded, and if appellate standards of review were more demanding, overreaching members of the first tier would have a greater fear of detection and sanction, while those who perform properly would be rewarded by increased visibility. Litigants, served poorly or not at all by counsel, might be comforted by the prospect of the availability of a new opportunity to persuade, and we might achieve more consistent application of legal norms.

I do not recommend abandoning litigant autonomy or interfering with the attorney-client relationship across the litigation spectrum.⁸⁶⁷ Rather, I believe in differentiating among kinds of cases, and I am comfortable with selective incursions into litigant and attorney autonomy. Given the defendants' lack of resources, the crush of business, and most importantly, the extent of state control over individuals, the criminal process merits special litigating rules. Given the political context of the contact between the state and the criminal defendant, why not distinguish it from other instances of state intervention in individuals' lives? Differentiation is appropriate; autonomy and finality should be less compelling in criminal cases.⁸⁶⁸

867. See Resnik, *supra* note 26, at 440-41 (judges should be hesitant to intervene in the pre-trial preparation of civil cases unless litigants so request).

868. The Supreme Court should be sympathetic to the request for differentiation. The Supreme Court has, in other areas, carved out small pockets of differentiation. See, e.g., *Bose Corp. v. Consumer Union of United States, Inc.*, 104 S. Ct. 1949, 1967 (1984) (special appellate rules for first amendment cases); *United States v. Mendoza*, 104 S. Ct. 568, 574 (1984) (special collateral estoppel rules for the United States).

Moreover, while the Court has insisted upon uniformity of procedures in the cases described in the text, the Court has taken the opposite tack in many cases. Based upon the issues in litigation, the Court has drawn distinctions among the kinds of procedures afforded. The Court's "due process formula," set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and now reiterated in almost every case evaluating the adequacy of process, states that the quantum of procedure must vary depending upon the nature of the private and government interests and the current decision-making framework. *Id.* at 332-35. I recommend taking that language seriously. In arenas where private and public interests are great, such as in criminal prosecutions, greater procedural protections are appropriate.

Support for increased differentiation also comes from contemporary understanding about what procedures "work." Uniformity of procedure, regardless of the kind of case, was a notion very much in vogue when the Federal Rules of Civil Procedure were written in the 1930's. The drafters aimed to install one set of procedures across the diversity of cases in the federal courts. Cracks in support for that uniformity are becoming visible. The special rules for habeas litigation are but one example of the deterioration of uniformity. There is also a manual for complex litigation, and special rules for bankruptcy proceedings. *MANUAL FOR COMPLEX LITIGATION* (5th ed. 1982); 11 U.S.C. app. Rules 501-515 (1982). Further, many federal district courts have local rules that deviate substantially from the federal rules. *E.g.*, Dist. S.C. R. 16(b) (obliging plaintiffs to answer interrogatories adopted by the Court). *Cf.* FED. R. CIV. P. 16 (no mention of interrogato-

b. *Increasing revisionism*: Increased revisionism can also serve to emphasize the special nature of criminal cases. The use of procedure to underscore the importance of state deprivations of liberty is not innovative; many constitutional guarantees distinguish the criminal from the civil process. With its recent opinions, however, the Court erodes the legitimacy of the criminal justice system by erecting procedural obstacles to a review of the merits and by ignoring systemic failures.

Habeas corpus review in federal courts should be available as of right upon the demand of any criminal defendant because providing many tiers in criminal cases underscores the value we place on liberty. This suggestion would not be unduly burdensome, and it would have great symbolic import. The estimate is that, in 1983, fewer than 3 per 100 prisoners requested habeas review. Given that the vast majority of convictions are obtained by settlement and that many of those convicted are not sentenced to prison,⁸⁶⁹ the federal courts would not, I believe, have difficulty responding to the habeas petitions presented. Further, I would simplify judges' tasks by abolishing all doctrinal limitations on habeas merits review.

I would discard the quasi-res judicata doctrine of *Stone v. Powell*, the forfeiture rules of *Sykes, Isaac, and Frady*, the total exhaustion requirements of *Rose v. Lundy*, and Rule 9's authorization to dismiss petitions on grounds of delay or abuse. Instead, courts would have to decide whether constitutional violations rendered convictions "miscarriage[s] of justice."

What benefits would flow from this suggestion? First, I believe some judges' time would be saved because the obstacles to decisions on the merits would be eliminated. Second, litigant autonomy, and the arbitrariness that it begets, would be less determinative of outcomes. Third, courts would need to develop standards by which to measure reasonable convictions. Judges would have to decide directly, rather than by avoidance, whether and how the requirements of a constitu-

ries propounded by the Court); Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A.L. REV. 213 (1981). Moreover, amidst complaints about discovery "abuse," some commentators propose reforms that differentiate the amount of discovery permitted by the kind of case. E.g., Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 VAND. L. REV. 1295, 1349 (1978).

869. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1982, at 4 (for defendants convicted in the federal system, 46.3% receive either probation or a fine).

tional conviction differ after conviction.⁸⁷⁰ Given the evident discomfort caused by releasing or retrying those perceived as factually guilty,⁸⁷¹ the "harmless error" doctrine might grow.⁸⁷² But such a development is preferable to making merits decisions under the guise of finding procedural errors. We would have to confront whether our standards of legality vary according to the nature of the crime, other indicia of culpability, or simply the volume of cases. In short, I would replace the current minimally useful activity—elaboration of the contours of forfeiture, waiver, and exhaustion doctrines—with decision-making based upon the validity of convictions. Once again, this is not a suggestion beyond the pale of contemplation. In several opinions,⁸⁷³ Justice Stevens has urged that the Supreme Court decide the merits rather than erect yet another procedural obstacle.

What about the downside risks? Chief Justice Burger believes that finality is important so that prisoners will make "peace" with life in prison.⁸⁷⁴ While I do not claim that the proposed habeas system, with its postponement of finality, would result in internal "peace" for prisoners, many of us outside of prison would gain some comfort in knowing that those behind bars remain there not only because they are inexperienced litigators.

Will first tier judges, both federal and state, feel demoralized because of the possibility of review in federal court? I doubt it. Almost all of the hierarchical arrangements inside and outside courts are premised upon the belief that supervision and review enhance the quality of both the work and the results. There is no evidence that federal appellate judges write poor opinions because the United States Supreme Court might reverse or revise their decisions. Trial judges will not abandon their oaths of constitutional loyalty because of occasional scrutiny and reversals.

What about safety? Would review of the merits mean a glut of

870. *Strickland v. Washington*, 104 S. Ct. 2052, 2065 (1984) begins such an effort; the adequacy of counsel, after conviction, is tested by a highly deferential standard.

871. *E.g.*, *Patton v. Yount*, 104 S. Ct. 2885, 2893 (1984) (Stevens, J., dissenting).

872. *See* R. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* (1970) (analyzing various tests for appellate courts to employ when attempting to ascertain the gravity of the errors committed below); Carrington, *Crowded Dockets and the Courts of Appeal: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 554 (1969) (time pressures may create tendency to give greater deference to initial decisionmakers).

873. *E.g.* *United States v. Frady*, 456 U.S. at 175 (Stevens, J., concurring); *Rose v. Lundy*, 455 U.S. at 538 (Stevens, J., dissenting).

874. *Spalding v. Aiken*, 103 S. Ct. at 1797 (Burger, C.J., statement concerning the denial of certiorari).

criminals on the streets? Once again, the past suggests that few individuals are released by virtue of habeas corpus. There may, however, be some people freed or retried who are now barred from being heard on the merits. That is the price of enforcing constitutionality, and the benefits are worth the cost. If we are unprepared to pay it, we should stop pretending that our conviction processes are bound by constitutional limitations.

What about federal court resources? Will federal judges spend all of their time on habeas cases? My guess is that the time saved by the demise of inquiries into preclusion questions will exceed the increase, if any, in the time expended as a result of a growth in the number of filings. Given that many individuals who are convicted are not incarcerated and that most prisoners do not petition for redress, a system that makes review available is preferable, at least until we obtain information that it is unworkable.

What about criminal trial court resources? Will criminal defendants or their attorneys defer claims until the postconviction process? Again, my guess is no. There are sufficient disincentives to forestall such problems. Prisoners who file repeatedly, however, could be restrained. In a number of instances, courts have identified such prisoners and have enjoined these abusive litigants from using court processes absent specific authorization.⁸⁷⁵ That solution is far preferable to general deterrence; specific injunctions are neither overinclusive nor underinclusive.

What would happen in instances where trial or guilty plea records were unavailable, or witnesses dead? Rather than a "dismissal of the writ" because of some notion of litigant culpability for belated filing, judges should make explicit decisions about who bears the risk of error in such situations. Let federal courts follow the language of the habeas statute and do "as law and justice require"—which would sometimes result in continued incarceration and sometimes result in freedom.

A third purpose of this proposed habeas system is that it limits the power of individual decisionmakers. The availability of a habeas merits review means that no single individual (an overly aggressive prosecutor, an inept defense attorney, or an unconcerned trial judge) could lock the door on another individual without the possibility of reconsid-

875. See *Green v. Warden, United States Penitentiary*, 699 F.2d 364, 370 (7th Cir.) (injunction against filing lawsuits absent court permission), *cert. denied*, 103 S. Ct. 2436 (1983). See also Shapiro, *supra* note 77, at 354 (of 257 petitions studied, only two petitioners had filed four habeas action or more).

eration. Diffusion of power is essential when liberty is at stake. Given my values, the expenditure of resources to accomplish that goal is worth the costs.⁸⁷⁶

Finally, when individuals are sentenced to death, I would not give them the choice of whether to invoke reconsideration; rather, I would mandate both automatic appellate processes and federal habeas review. Given the hostility of state legislatures to *Furman v. Georgia*⁸⁷⁷ and the myriad of statutes found unconstitutional under that decision,⁸⁷⁸ federal habeas corpus should be a precondition to the execution of anyone sentenced to death.

I make these suggestions not because I believe that the second or third look is "better" in that it produces a more "correct" result; rather, additional review is desirable because it involves more people, all of whom have been specially selected. While more people may not get a more "correct" answer, the more individuals involved, the less power resides in a single person, and the greater the perception of legitimacy of the decisions rendered.

2. *The Rest of the Docket*

Criminal cases and habeas corpus petitions are the "easy" cases for me. Not only are the decisions of evident importance, but the categories are more or less coherent;⁸⁷⁹ by definition, liberty is at stake. When I shift to the rest of the docket and the other cases in which the Court has retreated to simple procedural models, my ability to make recommendations diminishes because categories are much more difficult to delineate. While I believe the same concerns about the purposes of procedure and the deployment of procedural features to accomplish such ends should guide procedural decisionmaking on the civil side, I can provide fewer firm suggestions.

First, there are difficulties in categorizing. *Parklane Hosiery* was a "private civil dispute," but like all other cases, it involved both sides'

876. *But see* *Tate v. Rose*, 104 S. Ct. 2186, 2187 (O'Connor, Circuit Justice, 1984) (too burdensome for state to release prisoner pending Supreme Court's consideration of habeas petition).

877. 408 U.S. 238 (1972).

878. *See, e.g.*, *Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976) (holding Louisiana's death penalty statute unconstitutional); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding North Carolina's mandatory death penalty statute for first-degree murder unconstitutional).

879. *But see* *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (difficulty in distinguishing habeas corpus and 42 U.S.C. § 1983 litigation). Moreover, in making a distinction between criminal and civil cases, I include all kinds of commitment proceedings, including civil contempt and mental health proceedings, on the "criminal" side.

invocations of legal norms, and society therefore had some interest in the outcome. Still, private civil disputes seem of least concern, not because of any intrinsic unimportance but because the concentrations of power among litigants is not as consistently disparate in civil cases as in the criminal context. Given resource constraints, I am less willing to look again at the results of cases like *Parklane Hosiery* and am most comfortable with the Single Judge plus Limited Review Model for these disputes.⁸⁸⁰

Trouble arises when deciding how to characterize cases like Mr. Kremer's conflict with his employer. Should a Title VII case be called a private civil dispute? Or should there be a special category called "civil rights cases" that are processed differently? Ideally, Congress, which created the right, should also define the remedial structure. But, in light of the ambiguity or silence in the statute, the Court must decide how to allocate court resources. My own view of the Title VII scheme is that Congress gave those who claim employment discrimination two discrete opportunities to persuade two kinds of factfinders, agency hearing officers and judges. Thus, I would have had some sympathy with a decision by the Court to preclude Mr. Kremer if he had received a *factfinding* hearing in state court. However, I believe the Court erred when it precluded Mr. Kremer's access to a second factfinder when the state court had determined only that a state agency's conclusion was not "arbitrary and capricious."⁸⁸¹

The question of the distribution of power between magistrates and federal judges turns on their relative competency. If magistrates are as competent as federal judges, their decisions should be appealable only to the circuit courts. There is no need for an additional layer of review, and the obligation of trial judges to make "de novo determinations" should be withdrawn. On the other hand, if magistrates are the inferiors of article III judges, then magistrates should be assistants to judges,

880. Cf. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339, 349-50 (1948) (whether res judicata precludes a second action should be decided with reference to the purposes for preclusion, rather than by theories of what a cause of action is). I do not mean to suggest that civil litigants always possess equal resources and power. The United States as a civil litigant may indeed deserve to be dealt with differently, as the Court did in *United States v. Mendoza*, discussed *supra* note 601. Congress has also recognized the propriety of special rules for the United States as litigant in the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982) (permitting awards of costs and attorneys' fees against the United States, subsection (d) to be repealed, unless extended, on Oct. 1, 1984). Moreover, because of the SEC's presence in the first *Parklane* case, even *Parklane Hosiery* is a problematic example.

881. *Kremer*, 456 U.S. at 484-85.

decisions of magistrates should not be substituted for those of judges, and *Raddatz* was wrongly decided.

Limiting the scope of appellate review to questions of law is also a question of competency. I have no reason to assume that trial judges are more competent than appellate judges. Given my concerns about the provision of opportunities for individuals to be heard, the propriety of differentiating among kinds of cases and issues, and the desirability of limiting individuals' authority, I would opt for granting appellate court review, unencumbered by presumptions of correctness, when trial judges render decisions on the basis of data equally available to the reviewing judges. Both tiers of judges can understand such information, and I would rather have more than one appraisal of its import.

My choices give relatively little weight to the need to conserve judicial resources by curbing the volume of issues presented to the federal appellate courts. In my view, the federal judiciary's budget is too small, as compared to other federal expenses,⁸⁸² and more dollars should be spent on the court system. I am skeptical about claims that the federal courts are overworked,⁸⁸³ and I believe quick closure is less compelling than the comfort derived from believing that the government can be responsive to claims of judicial error. I do not insist that my value choices are the only appropriate ones to make. I am, however, at ease with the claim that the decision about whether to provide extensive second tier review in cases like *Pullman-Standard* should not turn upon the characterization of the company's discriminatory intent as "law" or "fact."⁸⁸⁴

3. *The Question of Appeal*

The other side of the arguments made in these last pages has already been set forth in the many Supreme Court decisions described above. Given the Court's emphasis on the need for finality, the conservation of resources, and the appropriate degree of deference afforded first tier decisionmakers, the logical conclusion to be drawn is that the Court would prefer the simplest of procedural systems—the Single Judge/Finality Model. The end of automatic rights of appeal may be

882. In 1982, the Federal Judiciary spent only \$700 million. In contrast, the Department of Education spent \$14.1 billion, and the Department of Defense \$185.9 billion. EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND THE BUDGET, THE UNITED STATES BUDGET IN BRIEF, FISCAL YEAR 1984, at 79 (1983).

883. Complaints against courts are longstanding. *E.g.* C. DICKENS, BLEAK HOUSE 5-10 (1853).

884. *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982).

the Court's next goal. Indeed, one Supreme Court Justice has just proposed considering the elimination of appeals "as of right" in the federal courts.⁸⁸⁵

The termination of appellate rights is not inconceivable. Appeal as of right is a relatively recent innovation that, like habeas corpus, may be an excess of an age in which resources appeared plentiful. Given current sensibilities, why permit every aggrieved individual to command the labors of both a trial judge and also a panel of three appellate judges? Why not narrow appeal to only a subset of cases? After all, there is still at least one state in the union that has no appeal for certain kinds of disputes.⁸⁸⁶ Additionally, empirical studies of appellate courts reveal that some state appellate courts have "norms of affirmance," making the right of appeal almost illusory.⁸⁸⁷

Of course, my suggestion that a majority of the Court is moving towards elimination of appeal as of right has a rhetorical function. Some of us believe that appeal as of right is as much a part of "due process" as is the right to cross-examine adverse witnesses. We have come to take for granted the idea that United States citizens can compel the attention of government officials and can do so repeatedly. Even though historically inaccurate, this notion has normative power. Whatever the Supreme Court cases may say, the intuition about a "right of appeal" reflects widely-held conceptions about the function of courts.

Appellate rights embody revisionism, the basic premise that an individual (no matter how wise or knowledgeable) should not, without constraints, act on behalf of the state. Such power concentration is particularly troubling in a country politically committed to democratic, rather than autocratic, decisionmaking. Since their inception, courts in this country have included tiers—levels of decisionmaking. Just as the triad—the judge and two participants—is definitional of courts, so are tiers. When we chip away at the tiers, we decrease courts' legitimacy. Many litigants will experience a single decisionmaker as having

885. Greenhouse, *Rehnquist Asks Limit to Automatic Appeals*, N.Y. Times, Sept. 16, 1984, at 15, col. 1 (at a speech at the University of Florida Law School, the Justice was quoted as saying "Perhaps the time has come to abolish appeal as a matter of right from the district courts to the courts of appeal. . .").

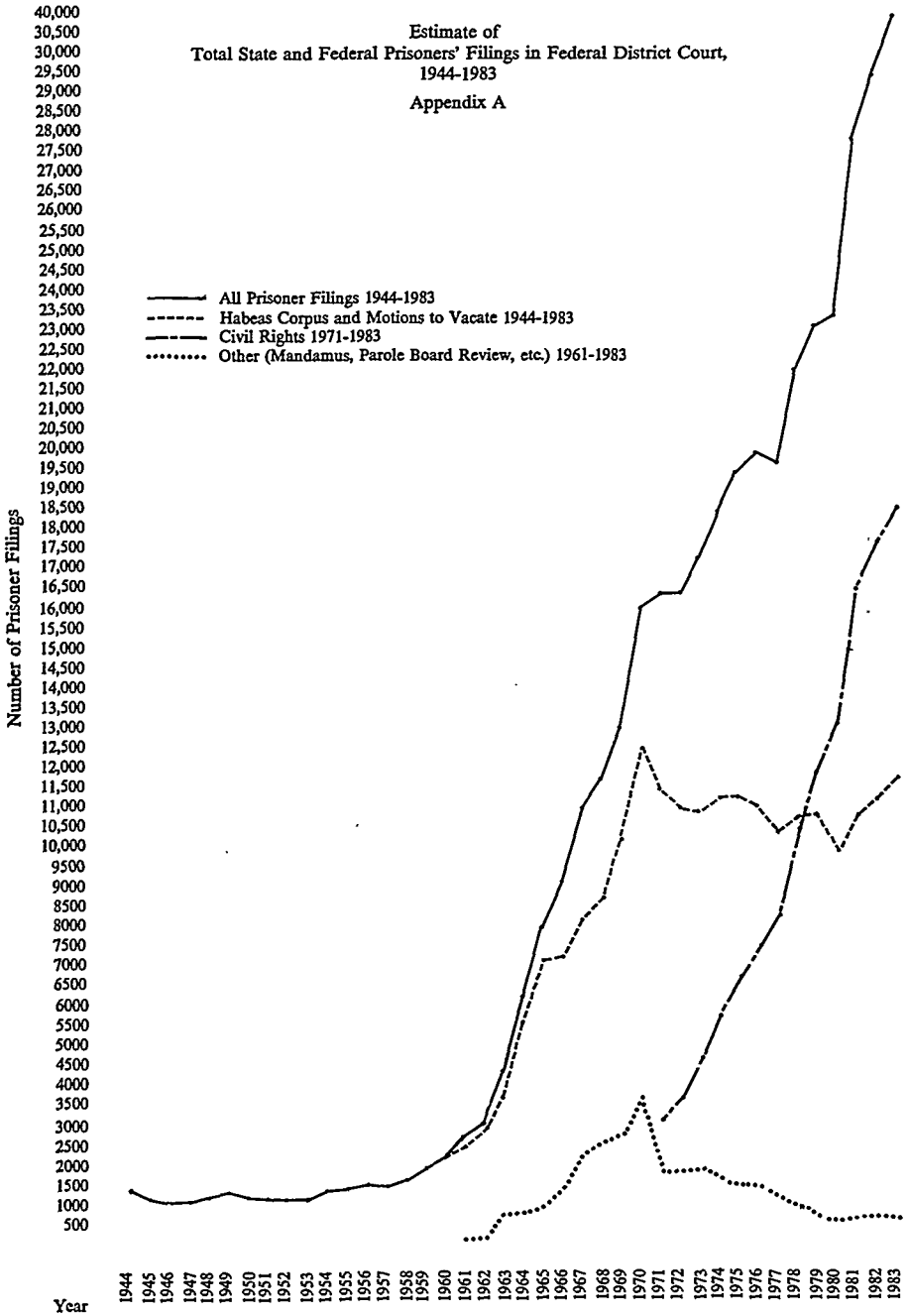
886. W. VA. CONST. art. 8, § 3 (jurisdictional amount a prerequisite to appeal). Cf. ARK. CONST. art. 7, § 4; CAL. CONST. art. 6, § 4 (mandating appeal as of right).

887. See Davies, *supra* note 74, at 573-77 (criminal appeals in California have very little chance of success). Cf. Wald, *supra* note 23, at 771 (18% reversal rate, all kinds of cases, U.S. Court of Appeals, District of Columbia).

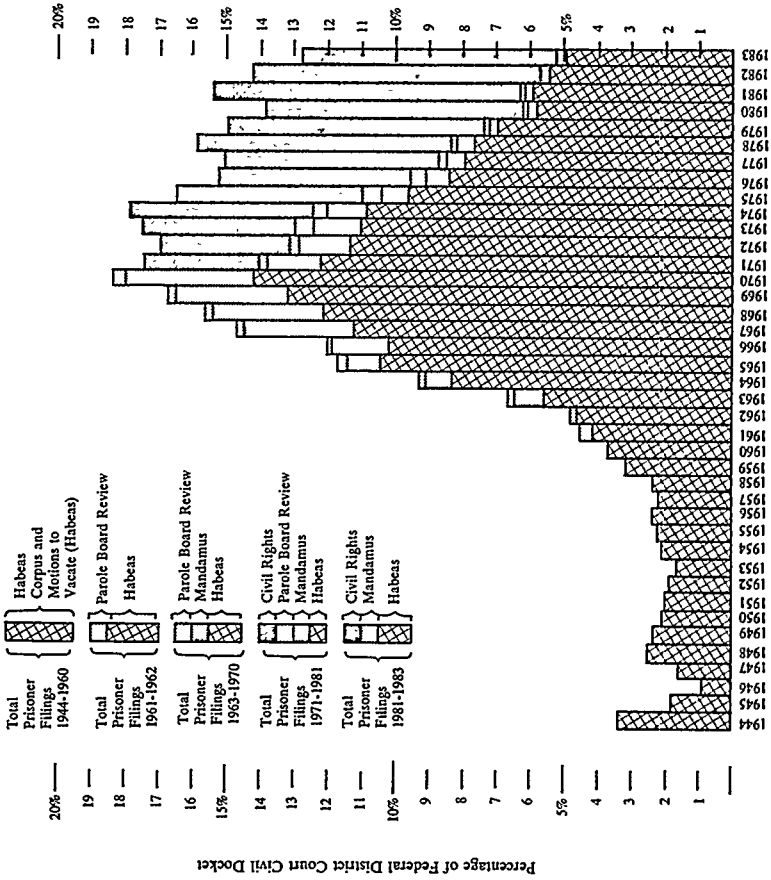
“kingly power.”⁸⁸⁸ And, in some instances, that impression will be accurate. Only when litigants can command the attention of more than a single state official can individual decisionmakers’ ruling be legitimated.

There are no simple, inexpensive answers or any solutions that come problem free. The history of procedure is a series of attempts to solve the problems created by the preceding generation’s procedural reforms. Any set of decisions made will produce unforeseen results that, in turn, will need to be addressed. However, the current “solution” of finality, achieved by deeming first tier decisions legitimate and by precluding review, is premised upon the fiction that first tier evaluations of disputes are sufficient to fulfill all the purposes of procedure. Those close to the courts know that, while there are many first tier successes, there are also many failures. To maintain that the system is generally functioning as it should is to undermine the special ability of courts to inquire into claims of individual errors, misdeeds, and lack of concern. If we really want speedy, inexpensive decisions, we should shift to coin-flipping. If, however, we are committed to features of court procedure other than power concentration, finality, and economy, we must permit opportunities for revision. We must construct procedural models that diffuse power and provide differentiation among the various types of disputes to be resolved.

888. 21 CONG. REC. 3404 (1890) (statement of Mr. Culberson of Texas) (debating the Evarts Act).



Estimate of State and Federal Prisoners' Filings as Percentage of Total Federal District Court Civil Docket, 1944-1983
Appendix B



State and Federal Prison Populations, 1944-1983
Appendix C

