VOLUME 76 JANUARY 1963 NUMBER 3

HARVARD LAW REVIEW

FINALITY IN CRIMINAL LAW AND FEDERAL HABEAS CORPUS FOR STATE PRISONERS

Paul M. Bator *

In examining the circumstances under which the habeas corpus jurisdiction of the federal courts should be used to redetermine the merits of federal questions decided in state criminal proceedings, Professor Bator argues that institutional considerations support taking jurisdiction when the state courts fail to provide a satisfactory process for deciding federal questions, but that this justification is not clearly present when the challenge is not to the state courts' decisional processes, but rather to the correctness of their results. Finding support for this contention in the history of federal habeas corpus until 1953, the author then analyzes the decision in Brown v. Allen, which made at least federal constitutional questions redeterminable on habeas corpus even if fully and fairly litigated in the state courts, and concludes that that decision has not been, and probably cannot be, justified in terms of the proper institutional role of the federal courts.

THE problem of finality in criminal law raises acute tensions in our society. This should not, of course, occasion surprise. For the processes of the criminal law are, after all, purposefully and designedly awful. Through them society purports to bring citizens to the bar of judgment for condemnation, and those condemned become for that reason subject to governmental power exercised in its acutest forms: loss of property, of liberty, even life. No wonder that our instinct is that we must be sure before we proceed to the end, that we will not write an irrevocable *finis* on the page until we are somehow truly satisfied that justice has been done.

But the general tendency to hesitate before pronouncing a final judgment [1] in a criminal case is, I think, reinforced today by some

* Professor of Law, Harvard Law School. A.B., Princeton, 1951; A.M., Harvard, 1953, LL.B., 1956.

The author wishes to express his thanks to Mr. Charles R. Nesson, of the Harvard Law School class of 1963, for his invaluable assistance in research bearing on this article.

[1] In this context "final judgment" refers to the end of all judicial proceedings

rather special currents in our thought. Partly, our century has peculiarly sensitized us to and made us fearful of abuses of power exercised through the legal process; we find the claims of liberty, of our residue of autonomy, particularly sweet in an age of dictators, political prosecutions and concentration camps. More crucial, even, is our general and deep-seated uneasiness about the ethical and psychological premises of the criminal process itself. The notion that a criminal litigation has irrevocably ended may have been an acceptable one in an age with a robust confidence in (or, if you prefer, complacency about) the rationality and justice of the basic process itself. But no such confidence or complacency can be said to exist today. For some decades the purposes and methods of our penal law have been the subject of sustained and intensive criticism and debate. The general line of the challenge need not be detailed here; in summary we are told that the criminal law's notion of just condemnation and punishment is a cruel hypocrisy visited by a smug society on the psychologically and economically crippled; that its premise of a morally autonomous will with at least some measure of choice whether to comply with the values expressed in a penal code is unscientific and outmoded; that its reliance on punishment as an educational and deterrent agent is misplaced, particularly in the case of the very members of society most likely to engage in criminal conduct; and that its failure to provide for individualized and humane rehabilitation of offenders is inhuman and wasteful.[2]

Although many lawyers — I daresay most lawyers — would disagree with many of these contentions, it cannot be doubted that the challenge has caused profound concern. And the response among many sensitive lawyers, judges and scholars has been, it seems to me, a peculiar receptivity toward claims of injustice

with respect to the conviction of the accused. Of course the criminal process is by no means necessarily at an end, even with such a "final" judgment of conviction. Executive clemency always still remains, as well as administrative decisions with respect to parole, etc., which bear on the severity of punishment.

[2] My summary merely paraphrases the admirable survey of the situation made by Professor Wechsler some ten years ago in *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952), particularly at 1102–04. The literature representing fundamental criticism of the traditional criminal law is, of course, huge; for two random illustrations of a "popular" nature, one by a distinguished lawyer and judge, the other by a leading psychiatrist, see BOK, STAR WORMWOOD (1959), and Karl Menninger, *Verdict Guilty — Now What?*, Harper's, August 1959, p. 60. For contrary views, see Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958), and MOBERLY, RESPONSIBILITY: THE CONCEPT IN PSYCHOLOGY, IN THE LAW, AND IN THE CHRISTIAN FAITH (1956). See also Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L., C. & P.S. 226 (1959).

which arise within the traditional structure of the system itself; fundamental disagreement and unease about the very bases of the criminal law has, inevitably, created acute pressure at least to expand and liberalize those of its processes and doctrines which serve to make more tentative its judgments or limit its power. In short, our fear (and, in some, conviction) that the entire apparatus of the criminal process may itself be fundamentally unjust makes us peculiarly unwilling to accept the notion that the end has finally come in a particular case; the impulse is to make doubly, triply, even ultimately sure that the particular judgment is just, that the facts as found are "true" and the law applied "correct."

It is thus not surprising to find that turbulence surrounds the doctrines of the criminal law which determine when, if ever, a judgment of conviction assumes finality. One of the areas of acutest controversy, namely, the proper reach of the federal habeas corpus jurisdiction for state prisoners, is the subject of this essay. The problems created by this jurisdiction are peculiarly difficult because underlying dilemmas with respect to finality in criminal cases are here compounded by the complex demands of a federal system with its two sets of courts applying law derived from two sovereignties. Imbedded in this often murky and technical field of law are fundamental problems about justice: what processes and institutions in a federal system can best assure that the exercise of the powers invoked by a judgment of conviction will be based on premises acceptable politically and morally? When *has* justice been done?

The ultimate issue I propose to treat is this: under what circumstances should a federal district court on habeas corpus have the power to redetermine the merits of federal questions decided by the state courts in the course of state criminal cases?

Let us briefly review the structure within which this problem arises. A defendant is tried in a state court for an offense against state law. A variety of federal questions may arise in the course of the litigation; thus the accused may claim that the federal constitution precludes the state from introducing a confession which, he alleges, was forcibly extracted from him. It is, of course, the duty of the state court conscientiously to decide this federal question in accordance with the governing federal law, which the command of the supremacy clause [3] makes applicable to the case. Let us assume that the state court does so: its decision will turn on

[3] U.S. CONST. art. VI.

findings of fact as to what phenomena existed or occurred bearing on the making of the confession, and on the application of federal legal standards to these facts. Alleged error in the disposition of the federal question may be and is, I further assume, properly raised for appellate review in the state system. On affirmance, the federal issue is subject to direct review by the United States Supreme Court, usually on certiorari, sometimes on appeal. In case of affirmance by that Court or a denial of the writ, the judgment, in the normal operations of the legal system, becomes final and binding. Should then a federal district court, in the face of such a judgment, have jurisdiction in a collateral habeas corpus proceeding to redetermine the federal question which the state court has already decided and which the Supreme Court has had an opportunity to review? The law today seems squarely to answer "yes"; the reigning principle is the striking one that a state prisoner may seek and automatically obtain federal district court collateral review of the merits of all federal (at least constitutional) questions, no matter how fully and fairly these have been litigated in the state-court system.[4]

One word of reservation: I assume, in this article, that the defendant in the state case has not forfeited his right to litigate his federal claim by procedural default; in other words, I do not propose to deal with the vexing question whether a state prisoner who fails to raise his federal contentions in accordance with state procedural law loses his right to raise them on federal habeas corpus.[5]

I. Some General Considerations

A. Finality in Criminal Litigation

The federal writ of habeas corpus has its roots in the common law.[6] Its function, in the great phrase, is to test "the legality of the

[4] Brown v. Allen, 344 U.S. 443 (1953), made the principle explicit. In part II of this article I survey the question whether the pre-1953 law supports the decision in *Brown*.

[5] This question has recently been the subject of debate among Professors Henry M. Hart and Curtis R. Reitz and Mr. Justice William J. Brennan. See Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 84 (1959) [hereinafter cited as Hart, *Foreword*]; Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 Harv. L. Rev. 1315 (1961) [hereinafter cited as Reitz, *The Abortive State Proceeding*]; Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423 (1961). Hopefully, some light will be shed on it in a case to be argued at the Supreme Court's 1962 Term, Fay v. United States *ex rel.* Noia, 300 F.2d 345 (2d Cir.), *cert. granted*, 369 U.S. 869 (1962).

[6] The Constitution itself (art. I, § 9) guarantees against suspension of the

detention of one in the custody of another." [7] In our constitutional context this refers, of course, to detentions made illegal by *federal* law. Power to issue the writ is conferred, and this limitation made explicit, in section 2241 of the Judicial Code:

> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .
>
> . . . .
>
> The writ of habeas corpus shall not extend to a prisoner unless —
>
> . . . .
>
> He is in custody in violation of the Constitution or laws or treaties of the United States . . . .[8]

When is a state prisoner held in "violation" of federal law? I suppose that the answer that may first suggest itself is that one is held in violation of federal law whenever the state courts have erroneously decided a federal question bearing dispositively on the judgment authorizing the detention. And if this is the case, the proper reach of the jurisdiction can be tersely summarized: the writ should test the merits of every dispositive federal question in the case.[9]

I do not claim that such a *result* is necessarily unsound. The conclusion that a federal court should, at some point, have the power to decide the merits of all federal constitutional questions arising in state criminal proceedings (with a habeas court doing so if the Supreme Court has failed to review the issue) may be a sound one, resting on the specific institutional and political premises of our constitutional federalism. The fourteenth amendment does, after all, direct supervening commands to the states in

"privilege of the Writ of Habeas Corpus"; and from the time of the first Judiciary Act certain federal courts and judges have been authorized under certain circumstances to issue the writ. Neither Constitution nor statute, however, defines the term "habeas corpus," and from the beginning the Supreme Court has recognized that "to ascertain its meaning and the appropriate use of the writ in the federal courts, recourse must be had to the common law, from which the term was drawn . . . ." McNally v. Hill, 293 U.S. 131, 136 (1934). On the other hand, it was also early made clear that the jurisdiction of the federal courts to issue the writ must be conferred by statute and is not part of their inherent power. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

[7] McNally v. Hill, *supra* note 6, at 136.

[8] 28 U.S.C. § 2241 (1958).

[9] There would seem to be no constitutional objection to any such sweeping jurisdiction if Congress should want explicitly to create it; at least Hamilton thought it very clear that the Congress could provide for appeal from state courts to lower federal courts with respect to questions of federal law. THE FEDERALIST No. 82, at 515–16 (Lodge ed. 1888) (Hamilton).

the management of their criminal law; the Constitution does not accept the state process as "complete." The creation of a remedial framework to ensure effective implementation of these commands is, therefore, one of the important tasks of our system. It is the purpose of the main body of this essay to analyze habeas corpus in terms of this task, to weigh the strength of the claim that federal rights should be tested by federal courts.

In these introductory pages, however, I want to ignore the special demands for a specifically federal forum to which habeas corpus may be responsive, and direct my attention more generally to the problem of finality as it bears on the great task of creating rational institutional schemes for the administration of the criminal law. More particularly, consider some of the general premises which may underlie the demand for relitigation of constitutional questions on habeas corpus. The fundamental assumption often seems to be a generalized version of the notion adverted to above: a prisoner is obviously held in violation of law if the decision to detain was "wrong." It would follow that a detention may not be considered lawful unless the proceedings leading to it were, in some ultimate sense, free of error, unless the facts as found were "really" true and the law "really" correctly applied. If a tribunal finds that the prisoner was not whipped in order to procure a confession, but, in fact, he actually was whipped, he is detained illegally. If the court determines that on the facts as found the confession was admissible, but the "correct" view of the law is that such a confession is not admissible, he is detained illegally. Underlying all the processes is the ultimate reality that he was wrongly condemned.[10] And thus to determine the legality of the detention one must, evidently, determine whether the committing tribunal fell into error.

What must be noted, however, is that on this underlying premise the conclusion is inescapable that no detention can ever be finally determined to be lawful; for if legality turns on "actual"

[10] For an illustration which seems to me to reflect this line of assumptions, see Note, 68 YALE L.J. 98, 101 n.13 (1958):

> The doctrines of collateral estoppel and res judicata subordinate the search for truth to the policy of ending litigation. . . . The policy against incarcerating or executing an innocent man, however, should far outweigh the desired termination of litigation.

And herewith Professor Pollak:

> [C]oncepts [of finality], like stare decisis, stem from the principle that "in most matters it is more important that the applicable rule . . . be settled than that it be settled right." But where personal liberty is involved, a democratic society employs a different arithmetic and insists that it is less important to reach an unshakable decision than to do justice.

Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956).

freedom from errors of either fact or law, whenever error is alleged the court passing on legality will necessarily have to satisfy itself by determining the merits whether in fact error occurred. After all, there is no ultimate guarantee that *any* tribunal arrived at the correct result; the conclusions of a habeas corpus court, or of any number of habeas corpus courts, that the facts were X and that on X facts Y law applies are not infallible; if the existence *vel non* of mistake determines the lawfulness of the judgment, there can be no escape from a literally endless relitigation of the merits because the possibility of mistake always exists.

In fact, doesn't the dilemma go deeper? As Professor Jaffe has taught us, if the lawfulness of the exercise of the power to detain turns on whether the facts which validate its exercise "actually" happened in some ultimate sense, power can never be exercised lawfully at all, because we can never absolutely recreate past phenomena and thus can never have final certainty as to their existence:

> A court cannot any more than any other human agency break down the barrier between appearance and reality. In short, the court can be wrong.[11]

Precisely the same point can be made about rulings of law. Assuming that there "exists," in an ultimate sense, a "correct" decision of a question of law, we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether the right rule was applied, whether a new rule should not have been fashioned.

Surely, then, it is naive and confusing to think of detention as lawful only if the previous tribunal's proceedings were "correct" in this ultimate sense. If any detention whatever is to be validated, the concept of "lawfulness" must be defined in terms more complicated than "actual" freedom from error; or, if you will, the concept of "freedom from error" must eventually include a notion that some complex of institutional processes is empowered definitively to *establish* whether or not there was error, even though in the very nature of things no such processes can give us ultimate assurances:

> [L]aw is not a simple concept . . . consisting as it does of rules distributing authority to make decisions as well as rules that govern the decisions to be made. There is a sense, therefore, in which a prisoner is legally detained if he is held pursuant to the judgment

[11] Jaffe, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 966 (1957).

> or decision of a competent tribunal or authority, even though the decision to detain rested on an error as to law or fact.
>
> That there must be some room for limiting conceptions of this kind seems clear enough: the writ [of habeas corpus] cannot be made the instrument for re-determining the merits of all cases in the legal system that have ended in detention.[12]

Our analysis of the purposes of the habeas corpus jurisdiction must, thus, come to terms with the possibility of error inherent in any process. The task of assuring legality is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be "true" and the law applied "correct." To use, from another context, Professor Jaffe's illuminating formulation,

> the question then is not whether the fact exists in any absolute sense but whether the evidence is adequate to justify the exercise of power: ultimately, whether the evidence is a sufficient moral predicate in the sense that society will accept it as sufficient for the exercise of the power in question.[13]

Now of course none of this tells us that it is not a valid function of a collateral jurisdiction to redetermine the merits of questions of law or fact previously decided in a litigation. The verity that the lawfulness of the exercise of power must eventually turn on institutional arrangements which provide, through their findings and judgments, an assurance of justice deemed acceptable by society, does not define what these arrangements should be. Just because a court of appeals cannot assure us that ultimate justice has been done does not mean that trial court determinations should not be reviewed. Perhaps we should say that state-court decisions of federal questions fairly litigated in the state system

---

[12] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1238–39 (1953). And see H.L.A. HART, THE CONCEPT OF LAW 139 (1961): "It is impossible to provide by rule for the correction of the breach of every rule."

I should at this point make it explicit that my argument in no sense assumes or requires any so-called relativization of "truth." Our fallibility in perceiving phenomena or making judgments of value does not logically mean that the phenomena had no existence or that values may not be "absolute"; the possibility of error does not belie — indeed it assumes — the existence of truth. Similarly, the fact that society allocates competences to make final decisions in no sense deprives us, from the "outside" as it were, of the power to make judgments about the correctness of any decision. As H.L.A. Hart has told us, the umpire is not necessarily correct just because there is no recourse from his ruling. *Id.* at 138–39. The general point is an elementary one in the literature of philosophy; it has recently been made by Popper in his essay, *On the Sources of Knowledge and of Ignorance*, Encounter, Sept. 1962, p. 42.

[13] Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 244 (1955).

and subject to Supreme Court review should finally establish the lawfulness of a detention; but there is no a priori reason why we should not decide that the most acceptable arrangement for the decision of such questions is that all such state-court determinations should be reviewed by a federal district court on collateral attack. What is important, however, is that the choice between the two arrangements must be made on the basis of functional, institutional and political considerations; and that *neither arrangement can be validated by the assertion that it is logically necessary if "truth" is to be established.* And does this not hint tentatively at a further insight: that an inquiry whether an exercise of power such as detention is "lawful" could meaningfully address itself, *at least initially*, not so much to the substantive question whether truth prevailed but to the institutional or functional one, whether the complex of arrangements and processes which previously determined the facts and applied the law validating detention was adequate to the task at hand?

These generalities will not, I know, give us the answer to difficult issues of policy. But confusion about them has led to overly easy assumptions and conclusions. This is particularly so in talk about "constitutional rights." Prisoners have a "right," we are told, not to have a coerced confession introduced against them. From this it is easy to slip into the assumption that the right has a kind of ultimate reality or existence apart from the institutional processes which we create to determine whether the right has been violated in a particular case. And the next step is to see a particular institutional arrangement as logically necessary and validated, *because* it has in a particular case *found* that the right has been violated. *Leyra v. Denno* [14] will serve as a classical illustration. The question was the admissibility of several confessions made by a defendant in a New York murder trial. After conviction, one confession was ruled inadmissible by the New York Court of Appeals,[15] and Leyra was retried. The remaining confessions were found voluntary and admissible, seriatim, by the state trial court, the jury, the New York Court of Appeals, and (after denial of certiorari) on habeas by the federal district court and the Court of Appeals for the Second Circuit.[16] At this point

[14] 347 U.S. 556 (1954).

[15] People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951).

[16] Leyra's first confession had been elicited through blatant trickery and psychological pressure by a police psychiatrist. The question on retrial was whether these practices infected subsequent confessions made to a police captain and to Leyra's own business partner. The issue was, in accordance with standard New York practice (see Stein v. New York, 346 U.S. 156 (1953)), first canvassed

the Supreme Court, 5 to 3, held the confessions inadmissible; and, after retrial, it was held that the evidence apart from the confessions was inadequate to support the conviction.[17]

Now Professor Reitz sees the *Leyra* case as conclusive justification for the habeas jurisdiction; after all, Leyra's rights had "in fact" been violated and if institutional arrangements had permitted the original judgment to stand we would have had an example of a man convicted in violation of his constitutional rights.[18] "The purpose of the guarantees of due process and equal protection in the ultimate is to prevent conviction of the innocent," he says. "In [*Leyra* and one other case] . . . that fundamental truth is brought home in the most dramatic fashion. . . . But for federal habeas corpus, these two men would have gone to their deaths for crimes of which they were found not guilty." Thus, he says, the case "demonstrate[s] the urgent necessity for the present federal habeas corpus jurisdiction."[19] Quite apart from the confusion created by the implication that Leyra was "innocent,"[20] the reasoning seems to me to illustrate the fundamental epistemological error which I have been discussing. The existence of institutions cannot be validated on the ground that in a particular case they arrived at a result correct in an absolute sense. All kinds of considerations — in particular, those derived from federalism — may have made it sound to relitigate Leyra's federal claim on habeas corpus, but the relitigation cannot be supported on the ground that habeas was "logically" necessary in order to vindicate rights which exist as an ultimate reality.

We see, then, that *if* a criminal judgment is ever to be final, the

by the trial judge, who, finding the subsequent confessions not coerced, then submitted them to the jury conditionally, instructing it to disregard the confessions if it found coercion. The state affirmance of the conviction so obtained is found in 304 N.Y. 468, 108 N.E.2d 673 (1952), *cert. denied*, 345 U.S. 918 (1953); the denial of habeas in 113 F. Supp. 556 (S.D.N.Y.), *aff'd*, 208 F.2d 605 (2d Cir. 1953).

[17] People v. Leyra, 1 N.Y.2d 199, 134 N.E.2d 475 (1956).

[18] See Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 496–97 (1960) [hereinafter cited as Reitz, *Federal Habeas Corpus*]. See also Pollak, *supra* note 10, especially at 60–61. Professor Pollak points out that but for the existence of habeas in its present reach, Leyra "would have been dead long since." The statement is, no doubt, accurate, but I fail to see how this justifies the jurisdiction. As Mr. Justice Jackson once suggested, if there were a Super Supreme Court, the convictions of many men "dead long since" which were affirmed by the Supreme Court would have been in turn reversed; does this mean we ought to create such an institution?

[19] Reitz, *Federal Habeas Corpus*, 108 U. PA. L. REV. 461, 496–97 (1960).

[20] The mere fact that apart from the confessions there was insufficient evidence to convict does not, in the absence of reason to doubt the trustworthiness of the confessions, prove Leyra's innocence of the underlying crime.

notion of legality must at some point include the assignment of final competences to determine legality. But, it may be asked, why should we seek a point at which such a judgment becomes final? Conceding that no process can assure ultimate truth, will not repetition of inquiry stand a better chance of approximating it? In view of the awesomeness of the consequences of conviction, shouldn't we allow redetermination of the merits in an *attempt* to make sure that no error has occurred?

Surely the answer runs, in the first place, in terms of conservation of resources — and I mean not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system. The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice. If one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it. The challenge really runs the other way: if a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding "count"? Why should we duplicate effort? After all, it is the very purpose of the first go-around to decide the case. Neither it nor any subsequent go-around can assure ultimate truth. If, then, the previous determination is to be ignored, we must have some reasoned institutional justification why this should be so.

Mere iteration of process can do other kinds of damage. I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else. Of course this does not mean that we should not have appeals. As we shall see, important functional and ethical purposes are served by allowing recourse to an appellate court in a unitary system, and to a federal supreme court in a federal system. The acute question is the effect it will have on a trial judge if we then allow still further recourse where these purposes may no longer be relevant. What seems so objectionable is second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the "truth."

Another point, too, should be remembered. The procedural

arrangements we create for the adjudication of criminal guilt have an important bearing on the effectiveness of the substantive commands of the criminal law. I suggest that finality may be a crucial element of this effectiveness. Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all. A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands.[21] Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders.[22] The first step in achieving that aim may be a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.

One further point should be made in this canvass of the general policies which support doctrines of finality in the criminal law. It is a point difficult to formulate because so easily twisted into an expression of mere complacency. Repose is a psychological necessity in a secure and active society, and it should be one of the aims — though, let me make explicit, not the sole aim — of a procedural system to devise doctrines which, in the end, do give us repose, do embody the judgment that we have tried hard enough and thus may take it that justice has been done. There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but

[21] It is of course a commonplace of classical criminal-law theory that certainty and immediacy of punishment are more crucial elements of effective deterrence than its severity.

[22] I do not mean to imply that in fact our contemporary systems of penal punishment do serve effectively to rehabilitate offenders. But insofar as we purport to undertake a task of rehabilitation, the question is a relevant one.

merely anxiety and a desire for immobility.[23] Somehow, somewhere, we must accept the fact that human institutions are short of infallible; there is reason for a policy which leaves well enough alone and which channels our limited resources of concern toward more productive ends. I want to be careful to stress that I do not counsel a smug acceptance of injustice merely because it is disturbing to worry whether injustice has been done. What I do seek is a general procedural system which does not cater to a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system.

B. Limitations on the Policies of Finality

I am aware that my argument may seem to go too far. Nobody contends, and I would not do so either, that the legal system would be better served if all courts of original jurisdiction had final competence to decide all cases. The possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjecting decisions to review of some kind answers a felt need: it would simply go against the grain, today, to make a matter as sensitive as a criminal conviction subject to unchecked determination by a single institution.[24]

But it is also important to note that a system of appellate review serves a fundamental institutional purpose quite apart from the correction of "error" in findings of fact or law in a particular case. In a unitary jurisdiction appellate review provides authoritative and uniform pronouncements on the law of that jurisdiction; similarly, recourse in our federal system to the Federal Supreme Court provides the state courts with authoritative and uniform pronouncements of federal law.[25] (It is for this reason

[23] The problem is most acute and most obvious in cases where the death penalty has been imposed; I would be surprised if receptivity toward endless reopening and delay of death cases were not sometimes masking underlying hostility to the use of the penalty in any case.

[24] We should note, however, that our sensitivity in this regard is of relatively recent origin. Until about the turn of the century, for instance, federal criminal cases were not generally appealable. See note 75 *infra*.

[25] [T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions.

THE FEDERALIST No. 82, at 515 (Lodge ed. 1888) (Hamilton). The point was, of course, explicitly made in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), which first upheld the power of the Supreme Court to review decisions of state courts respecting federal rights. See also Jackson, J., concurring in Brown v. Allen, 344 U.S. 443, 541 (1953).

that I do not view direct Supreme Court review of state cases as in any sense "collateral.") Appeal, then, serves that aspect of justice which tells us that the same law ought to apply to different people similarly circumstanced, and, curiously, in this sense does not subvert repose but creates it. True, in answering that need, appellate courts, state and federal, do redetermine the merits of legal issues and thus help satisfy the search for assurance of correctness which no judge or court acting alone, unchecked, can do. Yet even here notions of institutional competence and conservation of resources play an important role. Relitigation of facts is not usually permitted on appellate review; the explanation is surely, at least in part, that the institutional purposes served by such review do not call for the redetermination of facts, so that the mere possibility that error of fact has occurred is thought insufficient in itself to justify repetition of inquiry. The point illustrates that we must be careful not to use the existence of and felt need for appellate review (including Supreme Court review of federal questions in state cases) to validate collateral jurisdictions whose existence does not serve needs served by appellate review. Collateral attack may be needed, but the need for appeal does not prove it; federal habeas corpus remains to be justified even if we concede the necessity for direct Supreme Court review of federal questions in state cases.

Let me repeat, then, that the point is not that no court should review any other court. Nor do I suggest at this stage that a federal habeas corpus court should not review the merits of all federal questions litigated in the state court, that valid justifications, rooted in our federalism, of such a jurisdiction may not be forthcoming. All I say is that it is not enough to validate the jurisdiction to assert that some error of fact or law as to the federal question may in fact occur in a state litigation. The point can be put in terms of a limiting (rather than defining) principle: if one set of institutions has been granted the task of finding the facts and applying the law and does so in a manner rationally adapted to the task, in the absence of institutional or functional reasons to the contrary we should accept a presumption against mere repetition of the process on the alleged ground that, after all, error *could* have occurred.

I should like now to set forth certain limiting principles at the other extreme: general categories where it seems to me plain that the first go-around, whether in a unitary or a federal system, should not count, and where relitigation serves obvious and appropriate ends.

1. Failure of Process. — The first category has been implicit throughout the discussion. I have said that, presumptively, a process fairly and rationally adapted to the task of finding the facts and applying the law should not be repeated. This suggests that it is always an appropriate inquiry whether previous process was meaningful process, that is, *whether the conditions and tools of inquiry were such as to assure a reasoned probability that the facts were correctly found and the law correctly applied.* At the very least if no opportunity at all was provided to litigate a question which the applicable law makes relevant to the disposition of the case, it is just and useful to have a subsequent "supervisory" jurisdiction, as it were, to furnish such an opportunity. Similarly, if the conditions under which a question was litigated were not fairly and rationally adapted for the reaching of a correct solution of any issue of fact or law, there would seem to be no reason of principle to immunize the solution reached; that issue should be redetermined. Suppose that well-supported allegations are made on collateral attack that the trial judge in a criminal trial was bribed to convict (and that the prisoner did not discover this until the time for appeal had expired). The appropriateness of exercising a collateral jurisdiction would seem beyond question: a "trial" under such circumstances is not a rational method of inquiry into questions of fact or law, and no reason exists to respect its conclusions. The same would be true of a case where a mob is alleged to have dominated the trial court and jury, and no remedy was provided on appeal to test this allegation itself. Again, suppose a prisoner alleges that he was, through torture, forced to plead guilty. Such a finding of "guilt" manifestly should not "count" as a full and fair litigation which forecloses further inquiry; and, if no remedy exists by appeal (as it would not if the coercion was "successful" enough), it is plainly appropriate to test it on collateral attack.

What binds these cases together is that in all of them the inquiry is, initially directed, not at the question whether substantive error of fact or law occurred, but at whether the processes previously employed for determination of questions of fact and law were fairly and rationally adapted to that task. Thus note that, in all of the cases, I assumed that the basic procedural question raised — that is, whether the judge was in fact bribed, or the guilty plea in fact extorted by torture — was not *itself* canvassed by a fair litigation not itself subject to the alleged flaw. If it was, if a full opportunity to test the integrity of the processes of the committing court was furnished on appeal, collateral

inquiry might again constitute mere repetition. What does seem clear, however, is that, at the minimum, some kind of supervisory jurisdiction should exist to test the question whether the processes furnished by the previous tribunal were meaningful and rational.[26]

Let me now put the point specifically in terms of due process and the federal habeas corpus jurisdiction. We have seen that it is, initially, the duty of the state courts to determine federal questions arising in state criminal cases, and that Supreme Court review of the merits of such determinations is justified by our need for one authoritative voice pronouncing uniform federal law. What further role is left for a federal collateral jurisdiction such as habeas corpus? When should state determinations, subject to direct Supreme Court review, not be final? I suggest that one answer, at least, fits into the very category we have been discussing: cases where the state has, in effect, failed itself to provide process. It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case: the state must provide a reasoned method of inquiry into relevant questions of fact and law (including, of course, all federal issues applicable to the case). If a state, then, fails in fact to do so, the due process clause itself demands that its conclusions of fact or law should not be respected: the prisoner's detention can be seen as unlawful, not because error was made as to a substantive federal question fairly litigated by the state tribunals, but because the totality of state procedures did not furnish the prisoner with a fair chance to litigate his case. Thus if a state fails to give the defendant any opportunity at all to test federal defenses relevant to his case, the need for a collateral jurisdiction to afford this opportunity would seem to be plain, and federal habeas is clearly an appropriate remedy: the

[26] I am aware that a doctrine which would allow a subsequent tribunal to test the integrity of the processes of a previous tribunal could itself, theoretically, lead to a perpetual reopening of criminal convictions. Thus if the prisoner is convicted by tribunal *A*, and then alleges that judge *A* was bribed, this question would be determined by tribunal *B*; but the prisoner would then be free to allege that judge *B* was himself bribed (or dominated by a mob), so that his decision should not count; tribunal *C* would then have to be furnished to test the integrity of the *B* proceedings; and so on. Note, however, that this kind of infinite regress is root and branch different from the case where tribunals *B* and *C* are asked to *repeat* the inquiry made by *A*, that is, where the question before all three is the same one. In my situation there has to be a *new* allegation in each case. All I seek, in other words, is *one* forum concededly unbiased using procedures concededly rational. (As a practical matter, it is unlikely in the extreme that a prisoner will be able to make allegations with respect to the integrity of process more than once.)

state has furnished no process, much less "due" process, for the vindication of an alleged federal right. Similarly, if the state furnishes process, but it is claimed to be meaningless process — if the totality of state procedures allegedly did not provide rational conditions for inquiry into federal-law (or, indeed, state-law) questions, it seems to me clear that the federal habeas jurisdiction may appropriately examine the allegation.[27] Thus, to revert to my previous examples, if it is alleged on habeas corpus that the trial judge was bribed or that a mob dominated the trial or that the prisoner was tortured to plead guilty (or, to give another instance, that there was knowing use of perjured testimony by the prosecution), and the state provided no fair process, direct or collateral, for the testing of these allegations themselves, the habeas court should proceed to inquire into them and, if it finds the allegations true, set aside the trial court's conclusions.

Notice that I have again assumed that the question at issue — that is, the meaningfulness of the state's trial process — was not itself made the subject of a meaningful inquiry by the state courts. If a state appellate or collateral court determines on the basis of a fair investigation that the judge was not bribed or the court not dominated by a mob or the guilty plea not extorted by torture, then federal collateral investigation of these questions might constitute mere repetition of inquiry, and further institutional justification for such repetition would be called for.[28]

[27] Compare the holding in Tot v. United States, 319 U.S. 463 (1943), that the due process clause forbids the creation of evidentiary presumptions where there is no rational connection between the fact proved and the fact presumed therefrom.

[28] The point is made a tricky one by the fact that there are several categories of claims of violations of federal right. Thus there are what might be called double-level claims and single-level claims. Claims of violations of due process because the state trial judge was bribed or dominated by a mob are "double-level" not only in the sense that, if true, they invalidate all of the findings of the trial court (including findings with respect to other federal constitutional rights, *e.g.*, admissibility of a confession), but also because the findings of the trial court itself with respect to these very allegations should not be deemed conclusive: an allegedly mob-dominated court's finding that it is not mob-dominated should surely not immunize that question from subsequent inquiry; and, I submit, the due process clause requires that the question of mob domination should be passed on by at least *one* tribunal (state or federal) which is concededly free of that flaw.

On the other hand, the prisoner may claim that a confession offered by the prosecution was coerced, or the jury discriminatorily selected. These questions can be seen as "single-level." Nothing in the nature of these issues prevents the state trial court from constituting an unbiased and rational tribunal with respect to their decision, so that, in the absence of an allegation of some *other* procedural flaw or absence of state remedy which prevented the fair and rational litigation of these issues, we do not have here a failure of process. If, then, *arguendo*, federal collateral inquiry is to be restricted to the category of cases exhibiting a failure of state process, an allegation on habeas that the state violated the

One more example which seems to fit under this rubric should be mentioned because of its cardinal importance. This is the case where a prisoner alleges that the failure of the state to provide counsel deprived him of a fair chance to make his defense. Many commentators agree that it is the problem of assistance of counsel which lies at the heart of the great issue of creating fair procedures in the states' administration of criminal justice.[29] Deprivation of counsel in cases where the demands of fairness embodied in the due process clause call for representation by counsel is, I submit, precisely the kind of error which should deprive a state litigation of sanctity. It casts doubt on the meaningfulness of the process provided by the state for the resolution of all the issues in the case: we cannot say that any question in the case, state or federal, has had a fair and full litigation, for purposes of finality, if the defendant is found to require the assistance of counsel because in the circumstances of the case he was incapable of making an adequate defense himself.

Of course we must be careful. The question whether the defendant was entitled to counsel (or, just as frequent, whether he waived the right) is itself a federal question which, arguably, a state has, for better or worse, decided, and for this determination itself finality may be claimed. The difficulty is that, as in our other examples, the very same failure of process which colors the rest of the proceedings may, and often does, affect the determination of whether there was failure of process: if it is found that fairness required representation, a determination that it didn't so require based on a litigation in which the very same flaw existed cannot be conclusive, any more than a finding by the judge himself that

---

defendant's federal constitutional rights would always lead initially to this inquiry: viewing the state processes in totality, did the state at any time provide meaningful process for the testing of the question whether there was such a violation? If the underlying substantive issue was litigated at trial and does not bear on the integrity of the trial court's decision of the issue itself (*e.g.*, admissibility of a confession or jury discrimination), habeas would not lie. If the issue was not fairly litigated at trial, either because the question was simply unavailable at the time (*e.g.*, a later discovery of prosecution perjury, or a coerced guilty plea) or because the issue is of a type invalidating the trial court's own decision of it (*e.g.*, mob domination, or bribery of the judge), but the state provided a concededly unflawed tribunal to test it on appeal or collateral attack, habeas again would not lie. But if the state provides no process at all (as where there is no state post-conviction remedy to test the question whether there was prosecution perjury), or provides only meaningless process (as where the allegation of mob domination is not canvassed by any state tribunal concededly free of such domination), habeas would be available.

[29] See, *e.g.*, Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

he wasn't bribed.[30] In other words, collateral or other supervisory proceedings are always needed to rule on allegations where the allegations go to the integrity of the processes of the previous tribunal which, *inter alia*, ruled on these allegations themselves.

A further ambiguity must be explored. I have said that a federal collateral jurisdiction is necessary to give the prisoner an opportunity to test federal claims for the vindication of which a state afforded either no forum at all or inadequate process. In fact, logically, there is no necessity even for this; the need for *a* collateral or supervisory jurisdiction to make inquiries not previously made at all or under meaningful circumstances does not prove that such a jurisdiction has to be a federal one. The very failure of a state to provide adequate process could itself be deemed "error" subject to reversal by the Supreme Court on direct review. Thus if a state refuses to furnish a defendant with a meaningful procedure for the litigation of federal questions at trial, we might conclude that a sound system would void the conviction on direct appeal, rather than provide a habeas corpus court to inquire into the merits of such questions. Similarly, if there are questions which could not fairly be raised at all until after final judgment (as, for instance, may be the situation in our case of a coerced guilty plea, or where it is later discovered that the judge was bribed or the prosecution knowingly used perjured testimony), there is no logical necessity for a doctrine that these questions be tested in a federal collateral jurisdiction: again we could say that the state itself must provide a postconviction forum for the canvassing of these questions, and that the refusal

[30] The question of representation by counsel is, in other words, typical of what I have referred to as "double-level" issues of due process of law. See note 28 *supra*. Deprivation of counsel itself may be a violation of federal constitutional rights, and also may undermine the sanctity of the state's determination with respect to other constitutional rights, *e.g.*, admissibility of a confession. Possible problems of circularity are, however, particularly acute here. If a state has provided a fair litigation, *with* counsel, of the question whether due process required the appointment of counsel at trial, it would seem clear that state corrective process has been furnished even if the state's answer was wrong. But must the state always provide counsel for the determination of whether counsel was needed at trial? Such a rule would surely be foolish; indeed, it would undermine the very purpose of the rule that counsel need not always be furnished. If it is perfectly clear that, on the merits, the Constitution did not require the state to afford counsel at trial, the trial court's own determination of that issue cannot necessarily be deemed to lack integrity. As I suggest later, what we have here is a situation where the habeas court's determination as to whether the state furnished corrective process with respect to the issue of the prisoner's federal right to have counsel will have to turn on its judgment on the merits, and problems of circularity can be solved only by varying the *scope* of collateral review. See p. 494 and note 142 *infra*.

of a state to do so is simply "error" subject to reversal by the Supreme Court.

We must therefore be wary before assuming too easily that the absence of state process should be cured by using the federal habeas jurisdiction as a backstop, as it were, rather than exercising a more direct control by an affirmative command that the state may not imprison the defendant without itself providing such process. What we have is a question, to be answered in light of the political, institutional and functional considerations, as to which route we should take.[31]

One more caution should be added. Even if we conclude that we should have a federal collateral jurisdiction to test the integrity of previous state proceedings, this does not mean that such a jurisdiction should assume the precise form which has been associated traditionally with the writ of habeas corpus. Most significantly, we should be aware that the policies we have been discussing do not support the notion that federal collateral attack should be available without limit of time. The fact that a forum is called for to test an allegation of coercion of a guilty plea or prosecution perjury does not tell us that a prisoner should be free to wait to raise these at his pleasure. The policies of finality and repose must surely play a role even when there has been failure of process, though the role may be the more limited one of placing on the prisoner the obligation to make his allegations within a reasonable time after they have become available to him.

2. Failure of Jurisdiction. — The second category which furnishes appropriate limitation on notions of finality in the criminal law is the most traditional one of all, involving the concept, so vexing and difficult on its edges, yet so useful at the core, of "jurisdiction." It is black-letter in civil as well as criminal law that the judgment of a court without at least colorable jurisdic-

[31] The problem is discussed pp. 491–93 *infra*. It can, of course, arise at several levels. Suppose that a prisoner alleges that he has recently discovered that in the proceeding to determine the admissibility of his confession the prosecution knowingly used perjured testimony. We could say that a state must itself provide post-conviction procedures for canvassing the perjury issue, so that a refusal by the state to afford a hearing on the ground that such procedures do not exist under state law would be simply subject to reversal on certiorari by the Supreme Court. On the other hand, we can provide a federal habeas court to test the issue of knowing use of perjured testimony. Now, however, on the second level, comes this question: if the habeas court finds that there was perjury, should it then proceed to determine the subsidiary federal question (as to the admissibility of the confession) itself, or, as to *this* issue, should the state be forced to grant corrective process through an unflawed adjudication? See, in this regard, the discussion of the *Rogers* case, pp. 514–16 *infra*.

tion or competence to deal with the issue it is purporting to decide enjoys no immunity from collateral attack.[32] The reason must be plain: it is not that the decision may be erroneous, but that allowing it to "count" would violate the political rules allocating institutional competences to deal with various matters. It is thus no surprise that it is one of the historic functions of a court on habeas corpus to pass on the jurisdiction of the committing tribunal; [33] and, in our federal-state context, it would be appropriate for the federal habeas court to deny conclusive effect to a state judgment of conviction where the state is made wholly incompetent by federal law to deal with the case.

Again, however, care is called for. Whether or not a court has jurisdiction is itself a question to be determined, and one which can turn on close issues of fact or law. In many cases, where a strong, or even colorable case can be made for the existence of jurisdiction, the original tribunal should be deemed competent to decide that question itself, so that its decision, if based on full and fair litigation of the question, should at least presumptively be immune from collateral attack.[34] On the other hand, no matter how fully the question has been litigated, if there is a gross absence of competence no subsequent tribunal needs to accept the decision: no one would argue that a law professor could set himself up to grant divorces or convict of crime, no matter how fairly the questions at issue — including his own jurisdiction — were argued before him. The lines obviously cannot be drawn sharply; decision must turn on the felt appropriateness of allowing the previous determination by the allegedly incompetent tribunal to "count." [35] And, in fact, this is how courts have tended to draw

---

[32] RESTATEMENT, JUDGMENTS § 7 (1942).

[33] See *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830); Bowen v. Johnston, 306 U.S. 19 (1939).

[34] Suppose, for instance, that a man is tried by Vermont for an offense which, the defendant claims, occurred just over the state line in New Hampshire. If the issue of where the act took place is fairly and fully litigated before the Vermont court, its decision of that question should probably not be subject to collateral attack.

[35] See RESTATEMENT, JUDGMENTS § 10 (1942):

(1) Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.

(2) Among the factors appropriate to be considered in determining that collateral attack should be permitted are that

(a) the lack of jurisdiction over the subject matter was clear;

. . . .

the lines: not every question of competence is automatically open on collateral attack if it has been litigated in the original forum; but if the question is sufficiently grave or goes to the heart of the political rules allocating competences, collateral attack will be allowed.[36]

Let me now summarize my conclusions. It has not been my purpose to set up hard and fast touchstones for the habeas corpus jurisdiction. More particularly let me again warn the reader explicitly that what has gone before does not purport to be an analysis of the possible roles which such a jurisdiction can play in a constitutional federalism. It may be entirely justified and appropriate that the question whether a defendant has been deprived of federal constitutional rights should always be decided by a federal constitutional court. That is the question which I will treat in detail in the latter parts of this essay. What I have tried to do so far is simply to canvass some of the underlying general problems of finality, without reference to the special institutional and functional claims of federalism, and to establish a set of limiting notions. In these terms, then, I see the need for a tentative presumption that questions fairly and fully canvassed by institutions with general competence to deal with such questions and making use of processes fairly and rationally adapted to the function of deciding them should not be relitigated *unless* felt functional or institutional requirements call for the repetition. On the other hand, as the proposition implies, subsequent jurisdictions should be free to ignore decisions previously made by institutions without colorable competence in the premises; and should in any event be free to direct inquiry into the question whether the totality of previous proceedings furnished the defendant with a full and fair opportunity to litigate his case.

With this general introduction I turn now to a study of the law of federal habeas corpus itself. The next section of this article describes and analyzes the development of the jurisdiction up to the decision in *Brown v. Allen*,[37] which explicitly enthroned the principle that all federal constitutional questions decided in state criminal cases may be redetermined on the merits on federal habeas corpus. The remainder of the article is then devoted to an analysis of the doctrine of that case.

(c) the court was one of limited and not of general jurisdiction;

. . . .

(e) the policy against the court's acting beyond its jurisdiction is strong.

[36] See p. 469 and note 65 *infra*.

[37] 344 U.S. 443 (1953).

II. The Development of the Habeas Corpus Jurisdiction, 1789–1952

Perhaps the most striking aspect of the current discussions of habeas corpus is how easily it is taken for granted that it is the proper function of the writ to provide a determination of the merits of all federal constitutional claims arising in state criminal proceedings, no matter how fully these have been canvassed in the state system.[38] Professor Reitz sees this in fact as a "fundamental purpose" of the jurisdiction,[39] and he characterizes a Sixth Circuit decision,[40] holding that the admissibility of a confession in a state case may not be relitigated on habeas, as "preposterous on its face," since "to deny that so basic a deprivation of due process as conviction by the use of a coerced confession can be made the subject of a collateral attack is in effect to destroy the federal habeas corpus jurisdiction." [41]

Yet it is, as far as I know, a unique principle in our law that final judgments rendered by competent tribunals should be reopened on collateral attack.[42] And it is at most doubtful whether any such principle existed before *Brown v. Allen* established it in 1952.[43] For what was understood to be the law just before the

[38] Debate has been cast in terms of the question whether state procedures are adequate enough to justify dispensing with the jurisdiction entirely, rather than whether habeas is justified if state process is concededly adequate. See, *e.g.*, Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50 (1956); Reitz, *Federal Habeas Corpus*, 108 U. Pa. L. Rev. 461 (1960); Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1 (1956); *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 6 (1955).

[39] Reitz, *The Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1316 (1961).

[40] Wooten v. Bomar, 267 F.2d 900 (6th Cir.), *cert. denied*, 361 U.S. 888 (1959).

[41] Reitz, *Federal Habeas Corpus*, 108 U. Pa. L. Rev. 461, 462 (1960). The opinion of the court was, of course, inconsistent with *Brown v. Allen*. As an alternative ground it stated, however, that the prisoner had not exhausted his state remedies.

[42] In fact, in a different setting Professor Reitz acknowledges the extraordinary nature of the situation:

> The . . . [habeas corpus] structure of interrelated federal and state adjudication is unparalleled in our federal system. . . . [E]lsewhere . . . the state courts' decisions are accepted as final, subject only to possible review in the Supreme Court of the United States. The federal habeas corpus proceeding alone presents to the lower federal courts questions which, in many instances, will have been considered by a whole hierarchy of state courts.

Reitz, *The Abortive State Proceeding*, 74 Harv. L. Rev. 1315, 1330–31 (1961).

[43] In 1951, the Court of Appeals of the District of Columbia, in an opinion which surveyed with painstaking care the functions and reach of the federal habeas jurisdiction, at least for federal prisoners, found that the courts of appeals "have ruled uniformly" that the admissibility of confessions "is not a ground for collateral attack," and held that "where the alleged error . . . is in the admission of evidence subject to correction on appeal, and there is representation by counsel,

Brown decision, we may turn to the authority of the late Judge Learned Hand. In *Schechtman v. Foster*[44] (decided in 1949) a prisoner complained on federal habeas corpus that his conviction was obtained by New York through testimony known by the prosecution to be perjured. Now this is a claim of fundamental procedural error which by its nature is almost always unknown and cannot be litigated at trial or on appeal, so that, in the absence of state postconviction corrective process, it should plainly constitute appropriate grounds for federal collateral attack. Here, however, the allegations had in fact been considered on the merits in state postconviction coram nobis proceedings (in which the defendant was assisted by counsel), and the state court had held them insufficient. The Court of Appeals for the Second Circuit, by Judge Hand, held that the petitioner was not held in violation of federal law:

> If the judge who denied that petition did in fact consider the evidence as a whole, and if he decided that it was not, even prima facie, sufficient to make out a case of deliberate presentation by the prosecution of perjured testimony, Schechtman was accorded the full measure of his constitutional rights. It must be remembered that upon habeas corpus a federal court does not in any sense review the decision in the state courts. Here, for example, the District Court could not properly have issued the writ, no matter how erroneous the judge had thought the state judge's conclusion that the evidence did not make out a prima facie case of the deliberate use of perjured testimony. The writ was limited to the assertion of the relator's rights under the Fourteenth Amendment; and due process of law does not mean infallible process of law. If the state courts have honestly applied the pertinent doctrines to the best of their ability, they have accorded to an accused his constitutional rights.[45]

---

habeas corpus is not the appropriate remedy." Smith v. United States, 187 F.2d 192, 197 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 927 (1951). See also Note, 61 HARV. L. REV. 657, 668 (1948):

> [T]he availability of habeas corpus is determined by whether the particular question of unfairness has previously been litigated in the light of all information presently available. . . . Wherever all evidence of alleged unfairness was fully litigated before a competent tribunal, subsequent collateral attack by means of habeas corpus is not ordinarily permissible. Such complete litigation of the alleged unfairness is itself the fairness to which the defendant was entitled.

[44] 172 F.2d 339 (2d Cir. 1949), *cert. denied*, 339 U.S. 924 (1950).

[45] 172 F.2d at 341. Judge Hand then proceeded to state as alternative grounds of decision that the prisoner had not exhausted his state remedies, and that the Supreme Court had denied certiorari after the state postconviction proceeding. The latter ground would not be considered proper today in view of the holding of Brown v. Allen, 344 U.S. 443 (1953), that denial of certiorari by the Supreme Court is not to be taken as an expression of views on the merits.

Surely this makes clear that it was not in 1949 thought to be the task of the federal court on habeas to test for error the disposition of all federal constitutional questions made in previous state adjudications. The understanding seemed to be much nearer to the guideposts set out above: a prisoner is not held in "violation" of federal law if a state court of competent jurisdiction has through fair process — though perhaps erroneously — decided that question on the merits. Yet a scant three years later the Supreme Court could take for granted that a federal court's determination that there was federal error automatically made a state detention illegal, and we are told that this is an obvious and necessary cornerstone of the habeas jurisdiction.

What led up to this situation? What were the lines established for the jurisdiction in the previous 150 years? What is the command of the authoritative statutes? To these inquiries we now turn.

A. The Early "Federal" Cases

We look for guidance first to statutory and case law dealing not with state but with federal prisoners. For until 1867 (and with exceptions not relevant here[46]) there was no federal habeas jurisdiction to inquire into detentions pursuant to state law.[47] Further, even after the act of 1867 established such a jurisdiction,[48] the Supreme Court could make no pronouncements in cases of state detention because the Court's appellate jurisdiction under the act of 1867 was removed in 1868 and not reestablished until 1885.[49] Thus during the first century of the Constitution the Court had no occasion to deal with the scope of the habeas jurisdiction for state prisoners.

The original statutory authorization for habeas corpus in the Judiciary Act of 1789 did not define the writ's substantive reach;

[46] Statutes passed in 1833 and 1842 authorized federal judges to grant the writ to state prisoners in custody on account of acts done pursuant to the authority of the United States or of any foreign power. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1236–37 (1953).

[47] See *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[48] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[49] The jurisdiction was removed (see Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44) in order to prevent the Supreme Court from passing on the constitutionality of reconstruction legislation in McCardle's case. See *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), upholding the validity of and honoring the ouster of jurisdiction. The Court continued, however, to consider original habeas petitions from prisoners under the act of 1789. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869). The Court's power to hear appeals in the case of state prisoners was restored by the Act of March 3, 1885, ch. 353, 23 Stat. 437.

it merely stated that the courts of the United States "shall have power to issue writs of . . . *habeas corpus* . . . ." [50] It is thus not surprising that we soon find the Supreme Court accepting the black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction.[51] *Ex parte Watkins* [52] is the great case. The Court there refused, on habeas, to reach the merits of the allegation that the prisoner was convicted pursuant to an indictment which failed to state a crime against the United States:

> A judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case. The judgment of a Court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this Court would be. . . . It puts an end to inquiry concerning the fact, by deciding it. . . . An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous.[53]

The principle is clear: substantive error on the part of a court of competent jurisdiction does not render a detention "illegal" for purposes of habeas corpus, because, to use Chief Justice Marshall's striking phrase, "the law trusts that court with the whole subject." [54] But limitations on this principle began later to appear.

---

[50] Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81. The limitation added was that the writ "shall in no case extend to prisoners in gaol, unless they are in custody, under or by colour of the authority of the United States . . . ."

[51] The principle that a person convicted by a court of general criminal jurisdiction is not entitled to habeas corpus derives from the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, which expressly excepted "persons convict or in Execution by legal process." It has been suggested that this act did not purport to deny habeas to convicted persons but, rather, left their rights to be worked out through the preexisting common law writ, and that the contrary view derives from a curious misreading of the act by early legislatures and judges due to a misplaced parenthesis. See Brief of Professor Paul A. Freund for Respondent, pp. 30–32, United States v. Hayman, 342 U.S. 205 (1952).

[52] 28 U.S. (3 Pet.) 193 (1830). *Watkins* was preceded by *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822), where the petitioner had been judged guilty of contempt for failure to answer questions on the witness stand. On habeas the Court refused to reexamine the contention that the refusal was privileged under the fifth amendment, since the writ is not "a proper remedy, where a party was committed for a contempt by a Court of competent jurisdiction." *Id.* at 44–45. Oddly enough, the Court did not refer to the famous Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670) (which was cited at argument), where the Common Pleas, on habeas corpus, discharged a juryman who had been imprisoned for contempt at the Old Bailey on the ground that he returned an improper verdict.

[53] 28 U.S. (3 Pet.) at 202.

[54] *Id.* at 206.

In *Ex parte Lange*, decided in 1873, the Court first announced the rule that habeas corpus may be used to reexamine, not substantive errors going to the conviction, but alleged illegality in the sentence: if the committing court imposed two sentences where only one is authorized by the statute, and the valid sentence has been carried out, release will be ordered.[55] This rule was held to be applicable in the case of *Ex parte Wilson*, where the petitioner had allegedly been sentenced to hard labor for an "infamous" crime within the meaning of the fifth amendment without indictment by a grand jury; the Court on habeas held the sentence illegal after an inquiry into the merits of whether indictment was required in the case.[56] Similarly, in *In re Snow* [57] and again in *Nielsen, Petition-*

[55] 85 U.S. (18 Wall.) 163 (1873). Lange was convicted under a statute authorizing a sentence of imprisonment *or* a fine. The judge sentenced him to one year *and* a fine of $200. He paid the fine and, having served five days of his prison sentence, sought habeas. The sentencing judge forthwith vacated the former sentence and resentenced Lange to one year's imprisonment. The Supreme Court held the second sentence void, stating that

> when the prisoner . . . by reason of a valid judgment, had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone. . . . [A]t the moment the second sentence was rendered . . . the prisoner had fully performed, completed, and endured one of the alternative punishments which the law prescribed for that offence . . . . Unless the whole doctrine of our system of jurisprudence . . . for the protection of personal rights . . . [is] a nullity, the authority of the court to punish the prisoner was gone.

Id. at 176. The Court carefully emphasized its special concern with the sentence:

> If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgement that he be hung, it would simply be void. Why void? Because he had no power to render such a judgment.

Ibid.

It is, of course, clear that the sentencing court's erroneous assumption that it was entitled to vacate the previous erroneous sentence and resentence the prisoner did not make its judgment "void" in the sense that it had no competence to deal with this issue. *Lange* thus clearly goes beyond the rule laid down by *Watkins*. The extension was prefigured by *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855), where the Court had, on habeas, upheld on the merits the legality of a sentence of life imprisonment, imposed under a presidential commutation of a death sentence, against the allegation that the Constitution does not authorize the President to grant conditional pardons.

[56] 114 U.S. 417 (1885). The underlying substantive issue, whether the fifth amendment required indictment in the case, was seen by the Court as bearing on the legality of the *sentence*, rather than the judgment of *conviction*, because in its view what constitutes an "infamous" crime within the meaning of the amendment is itself a function of the type of sentence authorized: "[A] crime punishable by imprisonment for a term of years at hard labor is an infamous crime" (*id.* at 429), and indictment is therefore a condition precedent for the valid imposition of such a sentence. *Wilson* was followed in *Ex parte* Bain, 121 U.S. 1 (1887), where the Court held that a federal circuit judge has no power to amend an indictment, so that an imprisonment on the basis of such an amended indictment is void and the prisoner may be released on habeas corpus.

[57] 120 U.S. 274 (1887). Petitioner was convicted (in the territory of Utah)

er,[58] the imposition of consecutive sentences where the indictment was found to charge but one offense was deemed illegal on habeas and the prisoner was released after serving the legal sentence.

Another line of doctrine emerged from *Ex parte Siebold*,[59] where a federal prisoner alleged on habeas that his conviction was void because the statute creating the offense for which he was tried was unconstitutional. Mr. Justice Bradley did not question the general rule that a conviction by the judgment of a competent court may not be tested for error on habeas; but he concluded that, since "an unconstitutional law is void, and is as no law," "a conviction under it is not merely erroneous, but is illegal and void." "[I]f the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes." [60]

On the other hand, the Court continued to enforce the rule that habeas will not test the question whether the indictment states an offense.[61] And in *Ex parte Bigelow* it held that the

---

of cohabiting with more than one woman on the basis of three indictments charging the same offense during three separate periods of time. The Court held that but one continuing offense was charged, and that the fifth amendment therefore prevented the imposition of more than one sentence. In holding that habeas was available the Court relied on an English case, Crepps v. Durden, 2 Cowper 640, 98 Eng. Rep. 1283 (K.B. 1777), holding that a court in a collateral trespass action could question the validity of multiple fines imposed for one offense.

[58] 131 U.S. 176 (1889). This, too, was a case from Utah, charging the petitioner with (i) unlawful cohabitation and (ii) adultery, both with the same woman. Having served the sentence under the former indictment, he was released on habeas on the ground that only one offense was charged and he could therefore not be punished under the second indictment. Justice Bradley used expansive language in describing the reaches of the habeas jurisdiction, see p. 472 *infra*, but the holding follows squarely from *Snow*.

[59] 100 U.S. 371 (1879). The extensions of the habeas corpus jurisdiction announced in *Siebold* and *Lange* cannot, of course, be explained by the existence of the new habeas corpus act of 1867, since both were necessarily decided under the old act of 1789. See note 49 *supra*.

[60] 100 U.S. at 376, 377. The Court discussed *Bushell's Case*, see note 52 *supra*, but reserved the question of "how far this case may be regarded as law for the guidance of this court." On the merits, the Court upheld the constitutionality of the provisions of the Civil Rights Acts under which the indictments were brought.

[61] *Ex parte* Parks, 93 U.S. 18 (1876). See also *Ex parte* Yarbrough, 110 U.S. 651 (1884), where the Court, following *Watkins* and *Parks*, refused on habeas to inquire whether the acts alleged in the indictment (conspiracy to prevent Negroes from voting) constituted an offense under the Civil Rights Act, but did, in accordance with *Siebold*, pass on and uphold the constitutionality of the act. The anomalous result of the rules of *Yarbrough* and *Siebold* was, of course, that on habeas the Court had jurisdiction to pass only on the abstract *constitutional* issue in the case; presumably it had to assume that the acts charged in the indictment were in fact forbidden by the statute, even if it thought that they plainly were not so forbidden. One may question the wisdom of so shaping a jurisdiction that the Court is prevented from passing on possibly dispositive nonconstitu-

merits of a claim of double jeopardy will not be reached where the alleged error did not result in cumulative sentences.[62] *In re Belt* [63] held that the question whether a federal statute permitting a criminal defendant to waive trial by jury was constitutional would not be reexamined on habeas corpus; and in *Matter of Moran* Mr. Justice Holmes stated that an allegation that the defendant in a federal criminal case was forced to incriminate himself in violation of the fifth amendment could not be examined on habeas, because even if there was error, "it did not go to the jurisdiction of the court." [64] Finally, the Court limited even the rule that the jurisdiction of the committing court could be examined on habeas corpus: if there was colorable jurisdiction, and its existence turned on close questions of fact or law, the committing court's decision as to its own jurisdiction will be final except when reversed on appeal.[65]

---

tional questions and is compelled to decide as to the constitutionality of statutes construed, hypothetically, in a manner deemed by the Court to be erroneous.

[62] 113 U.S. 328 (1885). Fourteen indictments for embezzlement were returned against the petitioner. The court ordered them consolidated and tried together; but after the jury was sworn and the prosecutor made his opening, it rescinded the order of consolidation, discharged the jury from further consideration of the fourteen indictments, and ordered the defendant tried before the same jury on one of the indictments. On habeas the petitioner alleged that the empaneling of the jury and the statement by the district attorney put him in jeopardy as to all fourteen indictments so that he could not be tried again for any of these offenses. The Court on habeas refused to consider the merits of the claim, holding it an ordinary matter of defense which the trial court had jurisdiction to determine. It explicitly rejected the contention that the fact that the issue was one of constitutional law made it automatically a jurisdictional one. And it distinguished the *Lange* case on the ground that there "the prisoner, having been tried, convicted, and sentenced . . . and having performed the sentence as to the fine, the authority of the Circuit Court over the case was at an end, and the subsequent proceedings were void," whereas here "no verdict, nor judgment was rendered, no sentence enforced, and it remained with the trial court to decide whether the acts on which he relied were a defence to any trial at all." *Id.* at 331.

[63] 159 U.S. 95 (1895).

[64] 203 U.S. 96, 105 (1906).

[65] The rules laid down by the Court with respect to examination on habeas of the jurisdiction of the committing court are in accord with the rationale suggested above, see pp. 460–62 *supra*. In Callan v. Wilson, 127 U.S. 540 (1888), the Court passed on a jurisdictional issue, holding that the power of the police court of the District of Columbia, which sits without a jury, "does not extend to the trial of infamous crimes or offences punishable by imprisonment in the penitentiary." *Id.* at 556. *In re* Coy, 127 U.S. 731 (1888) involved the question whether a failure of Indiana officials to perform certain duties in connection with elections constituted federal or merely state offenses, that is, whether the federal courts had jurisdiction in the premises. The Court on habeas stated that it need not decide this issue, since it was properly before the trial court. It recognized that it would go too far to say that "because every court must pass upon its own jurisdiction, such decision is itself the exercise of a jurisdiction which

It would be useless to try to show that these decisions establish clear and sensible guidelines for the scope of the habeas corpus jurisdiction. Once the concept of "jurisdiction" is taken beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner, it becomes a less than luminous beacon. How is one to tell which errors cause a court to lose jurisdiction and which do not, which render a judgment void and which do not? [66] Surely there is no reason of principle, if we are to "trust" a competent trial court with "the whole subject," why it should not be trusted to decide the issue of the constitutionality of the statute creating the offense together with all

---

belongs to it, and cannot, therefore, be questioned in any other court." The cases do not hold

> that because a federal court tries a prisoner for an ordinary common law offence . . . with no averment or proof of any offence against the United States, or any connection with a statute of the United States, and punishes him by imprisonment, he cannot be released by *habeas corpus* because the court which tried him had assumed jurisdiction.
>
> In all such cases, when the question of jurisdiction is raised, the point to be decided is, whether the court has jurisdiction of that class of offences. If the statute has invested the court which tried the prisoner with jurisdiction to punish a well defined class of offences, . . . its judgment . . . is not reviewable on a writ of *habeas corpus*.

Id. at 757–58. In *In re* Mayfield, 141 U.S. 107 (1891), the Court on habeas passed on the jurisdiction of the committing court over an offense allegedly within the exclusive jurisdiction of an Indian national court, but in Rodman v. Pothier, 264 U.S. 399 (1924), it refused to deal with a similar issue since "whether the *locus* of the alleged crime was within the exclusive jurisdiction of the United States demands consideration of many facts and seriously controverted questions of law," which "must be determined by the court where the indictment was found." *Id.* at 402. The law and the considerations underlying it are extensively reviewed in Bowen v. Johnston, 306 U.S. 19 (1939), where the Court said:

> The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. It has special application where there are essential questions of fact determinable by the trial court. . . . It is applicable also to the determination in ordinary cases of disputed matters of law . . . . But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent. Among these exceptional circumstances are those indicating a conflict between state and federal authorities on a question of law involving concerns of large importance affecting their respective jurisdictions.

Id. at 26–27.

[66] The Court's own attempts to articulate the distinctions are sometimes worthy of inclusion in *Uncommon Law*. Thus in *Lange*, the Court said: "But it has been said that . . . the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void. But we do not concede the major premise in this argument. A judgment may be erroneous and not void, and it may be erroneous *because* it is void. The distinctions . . . are very nice . . . ." 85 U.S. (18 Wall.) at 175.

the other questions of fact and law in the case. Similarly it is hard to see the sense in the rule which made the availability of habeas turn on whether the error related to the sentence rather than the judgment of conviction itself, and even the usefulness of that principle was undermined as soon as the Court expanded it to pass not only on the validity of the sentence as such but to reach questions such as the need for indictment (as in *Wilson* and *Bain*).[67]

Yet I suggest that it would be a mistake to throw up one's hands and to see the history as reflecting merely a steady softening and expansion of the concept of "jurisdiction" so as to allow collateral attack on an open-ended basis wherever the courts deemed it appropriate. Certain guideposts must be kept in mind:

1. The Court never abandoned, in this period, paying at least lipservice to the principle that the legality of detention may not be tested simply in terms of whether error occurred in previous proceedings. It carefully adhered to the concept of institutional competence as bearing on and involved in the problem of the lawfulness of a detention. The essential touchstone continued to be that the writ of habeas corpus was not to be used as a writ of error, and that decisions of competent tribunals as to issues of fact or law bearing on conviction should be final.[68]

2. The strict jurisdictional test in fact continued to govern except in two categories of cases: where the allegation was that the conviction was had under an unconstitutional statute, and where the Court viewed the problem in terms of the illegality of the sentence rather than that of the judgment. Now I do not claim that these categories are easily justified today; but viewed in a historical context they are not completely unintelligible. In an era when the law was not "made" but "found," unconstitutional statutes were thought of as "void," as nonexistent, in a rather literal way: they created no law at all. It was an easy step in this intellectual climate to come to the conclusion that a judgment under such a statute, too, has a nonexistent quality, as if there were no competence in the premises at all. Again, it is possible that the sanctity of a "judgment" of conviction was not ascribed to the sentence because it was felt that the judge's sentencing function is not "judicial" in the same sense as his decision of the issues bearing on the substantive outcome of the

[67] See note 56 *supra*. It is also hard to see a principled distinction between *Lange* and *Bigelow*, both ultimately involving questions of double jeopardy. See notes 55 and 62 *supra*.

[68] See, *e.g.*, Harlan v. McGourin, 218 U.S. 442 (1910).

case; [69] reexamination of the validity of the sentence was regarded in the same light as reexamination of pretrial judicial decisions of questions such as the existence of probable cause to arrest or the right to be enlarged on bail, traditionally available on habeas corpus.[70]

In any event, we should not engage in the anachronism of taking categories intelligible to their propounders and regarded by them as meaningful and useful, and using them today — when we no longer accept them — in support of an indiscriminate and open-ended expansion of the habeas corpus jurisdiction. The fact is that the nineteenth century judges plainly did not feel that their distinctions were verbal fictions under the cover of which they could produce such an expansion, and we should not regard their cases as authorizing us to do so. Maybe it is well to abandon the old rubrics, but it would be unhistorical to gain comfort from cases which were decided on the assumption that these rubrics were meaningful and useful.

3. The cases definitely do not establish the proposition that collateral inquiry was thought appropriate whenever the committing tribunal ruled on an issue of constitutional law. True, passing expressions of Mr. Justice Bradley in *Nielsen* did hint at such a development: "It is difficult to see," he said, "why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law." Such a case is not one of "mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged . . . . And why should not such a rule prevail *in favorem libertatis*?" [71] But the facts of the *Nielsen* case were clearly governed by the holding in *Snow* and fitted squarely into the category of unconstitutional cumulative sentences imposed on but one offense. And in any event, the suggestion that habeas automatically reached all constitutional questions had been explicitly rejected by Mr. Justice Miller in *Bigelow* [72] and was thereafter repudiated in cases such

[69] This is particularly the case with respect to questions involving the physical conditions of detention, *i.e.*, whether the prisoner may be sentenced by a federal judge to imprisonment in a state prison, or whether sentence to penitentiary rather than jail is proper. See *In re* Bonner, 151 U.S. 242 (1894); *In re* Mills, 135 U.S. 263 (1890).

[70] See, *e.g.*, United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

[71] 131 U.S. at 183–84.

[72] See pp. 468–69 and note 62 *supra*.

as *In re Belt* and *Matter of Moran*,[73] and also in the post–1900 cases which held (repudiating *Siebold*) that the constitutionality of the statute defining the offense may not be tested on collateral attack.[74]

4. Finally, one overwhelming fact must be kept in mind in trying to rationalize the cases: throughout most of this period *federal criminal convictions were not appealable*.[75] This, of course, placed tremendous expansive pressure on the habeas corpus jurisdiction. There can be no doubt that it offends a felt sense of justice that a single judge, no matter how wrong (or even malicious), should have both first and final say on all questions before him no matter how crucial the rights involved. Further, lack of appeal not only fed the natural fear of error and malice, but also deprived the country of a great institutional need for authoritative and uniform pronouncements on important questions of federal criminal law. The Supreme Court could not make such rulings except through use of the habeas writ; and it must not surprise us, then, that the writ was sometimes used for purposes (as in passing on the constitutionality of, say, the Civil Rights Acts) which are easily validated in the absence of appeal, but which would be difficult to justify had the possibility of appeal existed.[76] Indeed, it is striking that after appeal in federal criminal cases was authorized the Court repudiated the doctrine of *Siebold*, that

[73] See p. 469 *supra*.

[74] See pp. 473–74 and note 77 *infra*.

[75] Until 1889 federal criminal cases were reviewable by the Supreme Court only when there was a division of opinion in the circuit court on a question of law. Act of April 29, 1802, ch. 31, § 6, 2 Stat. 159; Act of June 1, 1872, ch. 255, § 1, 17 Stat. 196. A writ of error to the Supreme Court was made available in capital cases by the Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 656. This was extended to all cases of "infamous" crime by the Act of March 3, 1891, ch. 517, § 5, 26 Stat. 827. The latter also provided for appeals in criminal cases to the newly created courts of appeals, with review by the Supreme Court on certiorari or in case of certification of a question of law by the court of appeals. See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1313–17 (1953).

[76] The influence of the fact that there was no possibility of appeal and thus no supervision of the lower courts in their decisions on important issues of federal law was made plain in Mr. Justice Bradley's opinion in *Ex parte Siebold*, first holding that on habeas the Court will examine the constitutionality of the statute creating the offense:

> A conviction under [an unconstitutional statute] . . . cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an *inferior* court affecting it is not deemed so conclusive but that . . . the question of the court's authority to try and imprison the party may be reviewed on *habeas corpus* by a *superior* court or judge having authority to award the writ.

100 U.S. at 376–77. (Emphasis added.)

the constitutionality of the statute creating the crime is appropriately tested on habeas corpus: without trouble it ruled that such a question should be tested in the ordinary course of litigation by writ of error.[77] Insofar, then, as the Court in the nineteenth century departed on occasion from the ancient doctrine that the merits of substantive issues decided by a court of competent jurisdiction are not open on habeas corpus, we can fairly ascribe the departure chiefly to circumstances which are irrelevant to our situation.

B. The Act of 1867

Habeas corpus for prisoners held under state authority was first made generally available by the Habeas Corpus Act of 1867, which stated that

> the several courts of the United States . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .[78]

It is sometimes asserted that it was the explicit purpose of this statute to give the federal courts jurisdiction to redetermine the merits of all federal questions decided in a state criminal litigation, that the act compels the rule of *Brown v. Allen*.[79] The as-

[77] *In re* Lincoln, 202 U.S. 178 (1906); Glasgow v. Moyer, 225 U.S. 420 (1912); Henry v. Henkel, 235 U.S. 219, 229 (1914) ("disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based . . . are for the determination of the trial court"). The connection between the availability of appeal and the scope of review on habeas was explicitly acknowledged by the Court in Salinger v. Loisel, 265 U.S. 224, 231 (1924) ("when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on *habeas corpus* came to be relatively narrowed").

[78] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, presently codified in 28 U.S.C. § 2241 (1958) (see p. 445 *supra*). The statute also prescribed the procedure to be followed on habeas and authorized appeals from lower courts in habeas cases.

[79] The assertion is repeatedly made, though without any supporting analysis or argumentation, in Mr. Justice Frankfurter's opinion in Brown v. Allen, 344 U.S. 443, 488 (1952) (see pp. 500–01 *infra*), and is repeated again without any real analysis of either the language, history, or purpose of the act, by Justice Walter V. Schaefer in his Oliver Wendell Holmes Lecture, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 19–21 (1956). Justice Schaefer sees the *Nielsen* case (see pp. 467–68, 472 & note 58 *supra*) as holding that the 1867 act broadened the substantive reaches of the writ from jurisdictional to all constitutional issues. Yet the *Nielsen* opinion does not advert to the 1867 act in any way, and contains no suggestion that the Congress at any time

sumption is that the Congress in 1867 must have meant that a person is held in "violation of the constitution . . . or [any] law of the United States" whenever a committing tribunal falls into error with respect to federal law. But such an assumption flies directly in the face of the basic and well-understood principle deeply imbedded in the law of the time that a detention pursuant to the judgment of a competent tribunal is not illegal and does not, for purposes of collateral attack, "violate" the "law" even if error occurred. (1867 was six years before the *Lange* case even started the process of softening this jurisdictional criterion.) Note, further, that the suggested interpretation would mean that habeas corpus would lie to redetermine *all* legal questions in *all* federal cases ending in detention as well as *all* federal questions in state cases; certainly there could be no reason on such a reading to restrict the language to *constitutional* questions raised in *state* cases. How likely is it that the Congress by this statute should have intended to work such a revolutionary change in the scope of review afforded by habeas corpus? The language is, after all, not compelling. As we have seen, a detention need not *necessarily* be deemed on habeas corpus to be in "violation" of "law" merely because a court of competent jurisdiction commits error of fact or law in its proceedings. And it *was* habeas corpus that the Congress was legislating about — a writ well known and well understood to serve purposes quite different from appeal or writ of error. (It should not, after all, be forgotten that the classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or the military without any court process at all, not to provide postconviction remedies for prisoners.) It would, then, require rather overwhelming evidence to show that it was the purpose of the legislature to tear habeas corpus entirely out of the context of its historical meaning and scope and convert it into an ordinary writ of error with respect to all federal questions in all criminal cases.

The strikingly sparse legislative history does not seem to me to furnish such evidence.[80] The act of 1867 received only the most

authorized an expansion of the classes of questions appropriately tested on habeas corpus; in fact it relies for support on the *Lange* and *Siebold* cases, both decided under the old act of 1789.

[80] There is no clear indication what moved the Congress to take up general revision of the habeas corpus jurisdiction (though surely the underlying concern was the enforcement of the reconstruction legislation). In reporting what was to become the act of 1867 to the House on behalf of the House Judiciary Committee, Congressman Lawrence explained that the bill was drafted pursuant to a resolution passed on December 19, 1865. CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866). That resolution had instructed the Committee to report

perfunctory attention and consideration in the Congress; indeed, there were complaints that its effects could not be understood at all.[81] Neither house made any inquiry into the scope or purposes of review to be afforded on habeas corpus.[82] And there is no

what legislation is necessary to enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States under the joint resolution of Congress of March 3, 1865, and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery.

CONG. GLOBE, 39th Cong., 1st Sess. 87 (1865). The reference to the joint resolution of March 3, 1865, is somewhat mysterious, for there does not appear to be any resolution passed (or bill enacted) that day which is in any manner apposite to the problem. The reference may have been to the *Act* of March 3, 1863, ch. 81, §§ 4, 5, 12 Stat. 756, which had provided that a presidential order would constitute a defense in any proceeding or prosecution for a wrong pursuant to such order, and provided for removal from state to federal court of any case where the defendant pleaded the existence of such an order. I surmise that this might have been the intended reference because the resolution of December 19, 1865, was followed by the reporting and passage of a bill which greatly widened the Act of March 3, 1863, extending the substantive defense to orders by all military superiors, and strengthening the removal provisions. Act of May 11, 1866, ch. 80, 14 Stat. 46. For the debates in connection with this act, see CONG. GLOBE, 39th Cong., 1st Sess. 1387–90, 1423–26, 1523–30, 1880–82, 2017–23, 2052–66 (1866); there was some evidence that the removal provisions of the earlier statute were not being honored by the state courts. See, *e.g.*, *id.* at 2054. The Act of May 11, 1866, was in turn amended some months later to provide that where a case has been removed to federal court but the defendant continues in state custody, the federal court may issue a writ of habeas corpus *cum causa*. Act of Feb. 5, 1867, ch. 27, 14 Stat. 385.

[81] The bill was reported to the House on July 25, 1866, and immediately passed with virtually no debate at all. Congressman LeBlond complained "that it is exceedingly difficult for us to determine the scope of the bill," and stated: "I am compelled to object, from the fact that we have no opportunity to consider and understand the bills that are brought in here." CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866). When the bill was brought up again in the House to consider a Senate amendment, this was the debate:

> Mr. COOK. I move that the House concur in the amendment.
>
> Mr. WRIGHT. I would ask whether anybody in this House, when he gives his vote on these amendments, knows what he is voting upon? [Laughter.]
>
> The SPEAKER. The gentleman from New Jersey is not in order. The question is on the motion to concur.
>
> The motion was agreed to.

CONG. GLOBE, 39th Cong., 2d Sess. 899 (1867).

[82] In the House, when the bill was reported, Congressman LeBlond suggested that it would not cover certain civilians seized by the military. In response, Congressman Lawrence offered this explanation of the bill:

> On the 19th of December last, my colleague [Mr. SHELLABARGER] introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which is to enlarge the privilege of the writ of *hobeas* [*sic*] *corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the

indication whatever that the bill intended to change the general *nature* of the classical habeas jurisdiction: that is, that it intended to expand the classes or categories of questions which were thought to be appropriately tested on collateral attack.

Read in the context of its time, the statute may at most be regarded as ambiguous with respect to what matters would be deemed to render a detention unlawful under federal law.[83] Indeed, it is interesting as evidence of at least reasonably contemporaneous understanding that in 1884 the House Committee on the Judiciary reported (in connection with the bill to restore the Supreme Court's appellate jurisdiction under the act of 1867) that in its view the act was not "contemplated by its framers or . . . properly . . . construed to authorize the overthrow of the final judgments of the State courts of general jurisdiction, by the inferior Federal judges . . . ." [84]

---

largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all.

CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866). This constituted the entire discussion of the bill in the House.

The claim that the habeas jurisdiction was to become coextensive with "all the powers" conferrable by article III of the Constitution seems to me to be largely meaningless. After all, constitutionally the jurisdiction could be expanded to make the district courts ordinary courts of appeals with respect to all federal questions in all state cases (see note 9 *supra*). And the statement thus does not tell us anything about how far Congress intended to change the general nature of the inquiry made on habeas corpus as then understood.

In the Senate, the debates were also cursory; in the only statement about the purpose of the bill the problem was put solely in terms of the failure of the existing law to allow any inquiry on habeas when the detention was not pursuant to federal law:

> [T]he *habeas corpus* act of 1789, to which this bill is an amendment, confines the jurisdiction of the United States courts in issuing writs of *habeas corpus* to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States.

Statement of Senator Trumbull, CONG. GLOBE, 39th Cong., 1st Sess. 4229 (1866). For further action on the bill, see *id.*, 2d Sess. 730, 790 (1867).

[83] See Wyzanski, J., in Geagan v. Gavin, 181 F. Supp. 466, 468 (D. Mass. 1960), *aff'd*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962):

> Congress did not use language, and there was nothing in the avowed purpose or legislative history of the 1867 statute, which compelled the Supreme Court of the United States to interpret the statute as conferring upon United States District Judges authority to inquire whether a state court judgment by a jurisdictionally competent court rested upon any procedural step or substantive ruling involving a violation of the United States Constitution.

[84] H.R. REP. No. 730, 48th Cong., 1st Sess. 5 (1884). The Committee complained about the extent of the authority claimed by federal judges under the 1867 act, though all the cases cited involved review of jurisdictional questions. It concluded, however, that it would, for the present, not propose changes in the

C. *The Early "State" Cases*

It was not until 1886 that the Supreme Court first had occasion to deal with the scope and purposes of the habeas corpus jurisdiction for state prisoners created in 1867. The case was *Ex parte Royall.*[85] The petitioner had been indicted for violation of a Virginia statute and was detained awaiting trial. Alleging that this statute was unconstitutional, he sought habeas corpus in the federal district court, which dismissed the writ. On appeal the Supreme Court affirmed, announcing the famous doctrine of exhaustion of state remedies: though the district court has power in advance of trial to inquire into the allegation, it need not and should not do so pending consideration of the question in the normal course of trial by the state court.[86] The holding of *Royall* thus did not address itself to the problem of what questions are properly cognizable on habeas: it held merely that federal courts, as a matter of sound discretion and in the absence of exceptional circumstances,[87] would not assume jurisdiction before state trial courts have had an opportunity to decide federal ques-

---

1867 act, since, with the restoration of Supreme Court supervision under the act, "the true extent of the act of 1867, and the true limits of the jurisdiction of the Federal courts and judges under it, will become defined, and it can then be seen whether further legislation is necessary." *Id.* at 6.

[85] 117 U.S. 241 (1886).

[86] We cannot suppose that Congress intended to compel . . . [the federal] courts . . . to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in State courts . . . . The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

Id. at 251.

[87] Mr. Justice Harlan suggested in *Royall* that federal interference prior to exhaustion of state remedies might be justified in "cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with foreign nations." *Ibid.* For cases involving such special circumstances see *In re* Loney, 134 U.S. 372 (1890); *In re* Neagle, 135 U.S. 1 (1890); Ohio v. Thomas, 173 U.S. 276 (1899); Boske v. Comingore, 177 U.S. 459 (1900); Hunter v. Wood, 209 U.S. 205 (1908).

It soon became apparent that the "discretionary" nature of the trial courts' power to postpone habeas was rather illusory, for whenever the trial court granted the writ prior to exhaustion of state remedies (and where none of these so-called exceptional circumstances involving interference with the operations of federal officials existed), the Supreme Court reversed. See, *e.g.*, New York v. Eno, 155 U.S. 89 (1894); Baker v. Grice, 169 U.S. 284 (1898); Fitts v. McGhee, 172 U.S. 516 (1899); Minnesota v. Brundage, 180 U.S. 499 (1901); Urquhart v. Brown, 205 U.S. 179 (1907).

tions at issue.[88] Similarly, subsequent cases held that habeas should be denied while a prisoner seeks to vindicate his federal rights in the state appellate courts [89] and through state postconviction procedures.[90] And still another line of cases established that even after all state remedies were exhausted, habeas corpus should be denied and the prisoner put to his writ of error in the United States Supreme Court.[91]

Some language in the early cases does suggest that the requirement that state remedies be exhausted was thought of as involving a mere postponement of habeas corpus, that it was assumed that the writ would be available to redetermine the federal question once it had been litigated in the state system. Thus in *Royall* itself the Court said that once

> the State court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States.[92]

This seemingly equates the substantive scope of the habeas jurisdiction with ordinary review on the merits. What must be remembered, however, is that *Royall* (and the other cases containing such language) in fact involved *issues* which were concededly open to collateral attack under the ordinary rules of habeas corpus.[93] The question in *Royall* was the constitutionality of the statute creating the offense. As we have seen, this was by 1886 considered

[88] The exhaustion requirement announced in *Royall* was enforced, subsequently, in many cases. See, *e.g.*, Cook v. Hart, 146 U.S. 183 (1892); New York v. Eno, 155 U.S. 89 (1894); Whitten v. Tomlinson, 160 U.S. 231 (1895); Baker v. Grice, 169 U.S. 284 (1898); Fitts v. McGhee, 172 U.S. 516 (1899).

[89] *Ex parte* Fonda, 117 U.S. 516 (1886); *In re* Duncan, 139 U.S. 449 (1891); Minnesota v. Brundage, 180 U.S. 499 (1901); Reid v. Jones, 187 U.S. 153 (1902).

[90] Pepke v. Cronan, 155 U.S. 100 (1894).

[91] *In re* Frederich, 149 U.S. 70 (1893); Bergemann v. Backer, 157 U.S. 655 (1895); Tinsley v. Anderson, 171 U.S. 101 (1898); Markuson v. Boucher, 175 U.S. 184 (1899); Urquhart v. Brown, 205 U.S. 179 (1907).

[92] 117 U.S. at 253.

[93] See, *e.g.*, *In re* Frederich, 149 U.S. 70 (1893), where the issue was the constitutionality of a state statute permitting an appellate court itself to enter the proper verdict and sentence which the trial court should have entered. The Court, affirming dismissal of habeas, relied on *Royall* in indicating that as to such a question it is the "better practice . . . to put the prisoner to his writ of error" rather than inquire into the merits on habeas (*id.* at 77–78); but it also stressed that habeas "is not a proceeding for the correction of errors" and that it will issue only to test the jurisdiction of the committing court (*id.* at 75–76).

a "jurisdictional" issue open on collateral attack; and the Court, in announcing that there was *power* on habeas to deal with the case, relied heavily on the holding of *Siebold* that a conviction under an unconstitutional statute is "void," not merely erroneous, and thus cannot constitute a lawful cause of imprisonment.[94] And the Court also relied on and quoted from a decision by Mr. Justice Bradley on circuit [95] where he had carefully distinguished between the power of the federal courts under the act of 1867 in cases where the state judgment is merely erroneous and where it is void for want of jurisdiction.[96] *Royall* thus by no means indicates an understanding that the courts on habeas corpus would, under the 1867 act, reach and relitigate a different and wider class of questions than were supposed under the previous law to be subject to collateral review.

Similarly, in cases of this period where the Court on habeas corpus reached the merits of a state prisoner's federal contention, either because it seemingly overlooked the requirement of exhaustion of state remedies or because those remedies had been exhausted, the contention so canvassed was one reachable on collateral attack under the traditional law of habeas corpus.[97]

---

[94] 117 U.S. at 248. Similarly, in Minnesota v. Brundage, 180 U.S. 499 (1901), where habeas was ordered dismissed "without prejudice to renewal of the same after the accused had availed himself of such remedies as the laws of the State afforded for a review of the judgment" (*id.* at 500–01), the issue was the constitutionality of the statute creating the offense.

[95] *Ex parte* Bridges, 4 Fed. Cas. 104 (No. 1862) (C.C.N.D. Ga. 1875).

[96] *Bridges* involved a conviction by Georgia for perjury before a United States Commissioner, an offense over which, "it was obvious," the state had not even colorable jurisdiction under the applicable federal statutes. Mr. Justice Bradley ruled that Bridges was properly released on habeas and did not have to raise his contention on appeal. But he was careful to point out that:

> If it were a case in which the state court had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States. The judgment might be wrong, but the imprisonment under it would be right until the judgment was reversed. But, as before shown, the state court had not jurisdiction of the offense.

Id. at 106.

[97] In Wo Lee v. Hopkins, *reported sub nom.* Yick Wo v. Hopkins, 118 U.S. 356 (1886), petitioner was discharged on habeas corpus on the ground that he was convicted pursuant to an unconstitutional state statute; no reference was made to the exhaustion requirement although a companion case clearly indicated that state habeas would have been available. The constitutionality of state statutes was similarly tested on the merits without reference to the exhaustion requirement in Minnesota v. Barber, 136 U.S. 313 (1890) (disapproved in Minnesota v. Brundage, 180 U.S. 499 (1901)), and *In re* Rahrer, 140 U.S. 545 (1891). In Crowley v. Christensen, 137 U.S. 86 (1890), the Court also reached the merits of the question of the constitutionality of the statute defining the offense, but it appears that state remedies were in fact exhausted and there appeared to be no effective way of

Finally, some cases decided during this period seem to hold explicitly that the act of 1867 did not empower the federal courts on habeas corpus to redetermine the merits of federal questions — even constitutional questions — which did not go to the jurisdiction of the committing court. *In re Wood*[98] is the earliest[99] and leading case. Wood, a Negro, was convicted by a New York court of murder, and his conviction affirmed by the Court of Appeals.[100] After his conviction he allegedly discovered that the grand jury which returned his indictment and the petit jury which tried him were drawn from lists from which Negroes were systematically excluded. This flaw was made the subject of a motion for new trial, which was denied, and Wood then sought habeas in the federal court. Dismissal of the writ was affirmed by the Supreme Court. Mr. Justice Harlan pointed out that there was no contention that the New York *statute* regulating the selection of juries was unconstitutional. As to the practice of discrimination in jury selections, he affirmed the established principle that it violates the Constitution.[101] But whether such discrimination existed here "was a question which the trial court was entirely competent to decide, and its determination could not be reviewed . . . upon a writ of *habeas corpus*, without making that writ serve the purposes of a writ of error. No such authority is given to the Circuit Courts . . . by the statutes defining . . . their jurisdiction." State courts often decide questions which "involve the construction of" the Constitution and the "determination of rights asserted under it." "But that does not justify an interference with its proceedings . . . upon a writ of *habeas corpus* . . . either dur-

bringing the case to the Court on writ of error. See also McElvaine v. Brush, 142 U.S. 155 (1891) (upholding on habeas constitutionality of state statute providing for the solitary confinement of a prisoner pending execution of sentence of death; no mention of need for exhaustion of or availability of state remedies).

[98] 140 U.S. 278 (1891).

[99] The ruling in *Wood* was foreshadowed by *Ex parte* Crouch, 112 U.S. 178 (1884). There is, however, some obscurity about the jurisdiction of the Supreme Court in that case. The decision was certainly not one under the old act of 1789, since the detention was pursuant to state, not federal, law. The Court implied that the petition lay under the act of 1867; but it seemed to overlook the fact that its appellate jurisdiction under that act was still under suspension.

[100] 123 N.Y. 632 (1890). It is unclear whether the appeal was decided before or after the denial of the motion for new trial.

[101] The Court quoted from the opinions in Neal v. Delaware, 103 U.S. 370 (1880), and Virginia v. Rives, 100 U.S. 313 (1879), to the effect that the fourteenth amendment guarantees an accused selection of grand and petit jurors without racial discrimination. 140 U.S. at 284–85.

ing or after the trial in the state court." [102] And the Court continued:

> If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial . . . and erroneously decided against the appellant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. . . . Nor would that error, of itself, have authorized the Circuit Court . . . upon writ of *habeas corpus*, to review the decision or disturb the custody . . . . The remedy . . . was to sue out a writ of error from this court . . . .[103]

Wood was followed by opinions denying the competence of the court on habeas to decide the questions of inadequacy of counsel and discrimination in selection of jurors in *In re Jugiro*,[104] the latter question in *Andrews v. Swartz*,[105] and the question of alleged federal constitutional flaw in the indictment in *Bergemann v. Backer*.[106] Similarly, the Court declined to pass on habeas on the question of the constitutionality of Wisconsin procedure with respect to jury verdicts on the ground that the allegation was of "error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ . . . ." [107]

---

[102] 140 U.S. at 285–86. It may be argued that the result in *Wood* rests on the fact that the petitioner failed to secure a decision of his federal claim in the state courts and it was consequently forfeited for purposes of habeas. But the language of the opinion is plainly and wholly inconsistent with the notion that habeas would have been proper to test the federal issue had the state courts decided it: the entire thrust of the opinion is that the issue is not cognizable on habeas at all.

[103] *Id.* at 287. The Court also had to meet the allegation that the state had failed to give the prisoner a meaningful opportunity to raise his constitutional claim in the state courts. As to this, the Court disagreed with the petitioner's reading of New York law (*id.* at 287–89), and added as an independent ground that, under *Royall*, the prisoner should have tested this question (that is, the availability of state corrective process) in the state courts. *Id.* at 289–90. The Court's disposition of this point would certainly be considered questionable today in view of the fact that Wood was not represented by counsel.

[104] 140 U.S. 291 (1891):

> The alleged assignment . . . of one as his counsel who . . . had not been admitted or qualified to practice . . . ; the misdescription in the indictment . . . ; and the exclusion from the list of grand and petit jurors of citizens . . . of the same race with appellant, were all matters occurring in the course of the proceedings and trial in a court of competent jurisdiction, proceeding under [constitutional] statutes . . . . The errors, if any . . . did not affect its jurisdiction . . . and cannot be reached by *habeas corpus*.

Id. at 296–97.

[105] 156 U.S. 272 (1895). This case seems to ignore the possible appropriateness of testing a "nonjurisdictional" federal question on the merits if the totality of state process fails to provide a defendant with a meaningful opportunity to do so in the state system.

[106] 157 U.S. 655 (1895).

[107] *In re* Eckart, 166 U.S. 481, 483 (1897). The Court relied on cases involving federal prisoners such as *In re Belt* and *Ex parte Bigelow*.

None of these cases even suggests that as to these federal constitutional questions denial of the writ constitutes mere discretionary postponement; as the question was phrased in *Harkrader v. Wadley*, it involves the lack of "authority" of the federal courts to issue habeas to a state prisoner under custody ordered by a competent tribunal and pursuant to a constitutional statute.[108] Plainly, then, it was not the law at this time, and not the understanding of the 1867 act, that a detention "violates" the Constitution whenever the state courts commit error as to an issue of federal constitutional law relevant to the case.

In fact the requirement that, even as to "jurisdictional" questions, state remedies be exhausted prior to resort to habeas, itself becomes entirely intelligible only in terms of a principle or presumption that a court which has jurisdiction of a case should be allowed to *decide* all the questions in the case under all of the applicable law, state or federal, and that such a decision should, indeed, "count"; that in the ordinary course supervision of such a court should be by appeal and not through independent collateral proceedings. It would make little sense to encourage the use of state remedial processes through a requirement of exhaustion only in order to ignore these processes on collateral attack. The point is, of course, underscored by the decisions holding that even after all state remedies have been exhausted, a prisoner must test his federal claim not by habeas but on writ of error in the Supreme Court; the requirement makes sense not because such review is part of the state's remedies but because the institutional needs calling for federal supervision of state decisions are adequately met through such direct review. As the Court said in *Matter of Spencer*, "the rule [requiring exhaustion] would be useless except to enforce a temporary delay if it did not compel a review of the question in the state court and, in the event of an adverse decision, the prosecution of error from this court." [109]

D. The Doctrine of Frank v. Mangum

We can summarize the law as of 1915 in this way: if a court of competent jurisdiction adjudicated a federal question in a criminal case, its decision of that question was final, subject only to appeal, and not subject to redetermination on habeas corpus. There existed a few classes of issues (principally the constitutionality of the statute creating the offense) which were labeled jurisdictional though they did not really bear on the competence of

[108] 172 U.S. 148, 163 (1898) (passing on question of state court's jurisdiction).
[109] 228 U.S. 652, 660 (1913).

the committing court; these were, however, strictly limited and their creation was probably grounded on the lack of appeal in federal criminal cases. Further, in state criminal cases, pursuant to the exhaustion doctrine even "jurisdictional" issues had to be litigated in the state courts and tested by the Supreme Court on appeal in the ordinary course, so that, as a practical matter, there would be no further occasion for use of the writ.[110]

To this situation the great case of *Frank v. Mangum*[111] added some crucial insights. Frank was convicted of murder in Georgia and sentenced to death. His petition for a new trial alleged that the proceedings had been completely dominated by a mob which made impartial adjudication by judge and jury impossible. This petition was denied, and appeal was taken to the Supreme Court of Georgia. That court made an independent inquiry, based not only on the record but on extensive affidavits, into the merits of the question whether in fact there had been mob disorders which affected the possibility of an impartial trial; in careful findings it concluded that the evidence did not warrant the conclusion that there was prejudicial interference with the course of justice.[112] After various postconviction proceedings and the denial of a writ of error by the Supreme Court, Frank unsuccessfully sought habeas corpus in the federal district court. On appeal the Supreme Court affirmed, Mr. Justice Holmes and Mr. Justice Hughes dissenting.

Mr. Justice Pitney's opinion for the Court is a highly sophisticated analysis of the complex nature of the concept of due process. He found it easy to agree that

> if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law . . . .[113]

But he saw that the question whether "a trial is in fact dominated

---

[110] If I understand him correctly, Professor Reitz is in agreement with my view of the situation at this time. See Reitz, *The Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1327 (1961). I have found only two cases whose holdings may be thought to shade these principles. *In re* Converse, 137 U.S. 624 (1891), seemingly passes on the merits of a state prisoner's nonjurisdictional due process allegations; the opinion does not discuss the problem of habeas jurisdiction at all. The opinion in Felts v. Murphy, 201 U.S. 123 (1906), denying habeas to a state prisoner, is a confusing and ambiguous mixture of the points that the state court did not lack jurisdiction and that there was no denial of due process.

[111] 237 U.S. 309 (1915).

[112] Frank v. State, 141 Ga. 243, 280, 80 S.E. 1016, 1034 (1914).

[113] 237 U.S. at 335.

by a mob" is, after all, a *question*, and that decision of that question against the petitioner by a competent and unbiased tribunal through fair process may, on collateral inquiry, itself be deemed the process that is "due." It is, in other words, relevant to the question of the unlawfulness of a detention for purposes of habeas corpus whether the state has supplied "corrective process" for the very purpose of determining the federal question raised.[114] Here the prisoner's allegations were considered by the Georgia supreme court under conditions which were concededly free from any suggestion of mob domination, and found by that court, on independent inquiry, to be groundless.[115] It need not be held, continued the Court, that the Georgia court's decision was, technically, res judicata; [116] but

> this does not mean that that decision may be ignored or disregarded. To do this . . . would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the State, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case . . . .[117]

Therefore, said the Court,

> we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial . . . cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination . . . .[118]

---

[114] [I]f the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict . . . produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

But the State may supply such corrective process as to it seems proper. *Ibid.* See also *id.* at 327–28, 332–33.

[115] *Id.* at 333.

[116] *Id.* at 333–34.

[117] *Id.* at 334.

[118] *Id.* at 335–36. The Court pointed out that the doctrine of exhaustion of state remedies is intelligible only upon such a basis:

It follows as a logical consequence [of the exhaustion principle] that where, as

The *Frank* case is often seen as restrictive with respect to the habeas jurisdiction.[119] Yet the importance of the case derives as much from what the Court said the federal courts *could* do on habeas as what it held they could *not* do. For the first time the Court explicitly added a crucial weapon to the arsenal of the habeas corpus court: if that court finds that a state tribunal has failed to supply "corrective process" with respect to the full and fair litigation of federal questions, *whether or not "jurisdictional,"*

---

here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments.

Id. at 329.

[119] See, *e.g.*, Reitz, *The Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 (1961): *"Frank v. Mangum* . . . earlier threatened to stifle growth of the fourteenth amendment by an amalgam of the exhaustion requirements and the substance of the concept of procedural due process of law." Does this suggest, perhaps, that Professor Reitz sees *Frank* as a holding with respect to the meaning of due process even for purposes of direct review, that is, as a decision that even on direct review the Supreme Court may not correct state-court errors as to federal questions if the state has supplied a "corrective process" in the form of a fair adjudication of the question? Although not without its ambiguities, I do not think the Court's opinion will bear such a reading. Mr. Justice Pitney makes clear that his entire reasoning is in the context of habeas corpus, which he carefully differentiates from ordinary appeal. (See 237 U.S. at 325–26.) And his statement of the holding is directed in terms at the scope of the review "in this collateral inquiry." *Id.* at 336. Certainly any holding that on direct review the Supreme Court does not have plenary jurisdiction to review on the merits all dispositive questions of federal law (including, as to federal issues, the sufficiency of the evidence and the inferences to be drawn from the facts, *cf.* Norris v. Alabama, 294 U.S. 587 (1935)), would have been a startling reversal of the law established by Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). The important point to remember about *Frank* is its insight that there comes a point at which previous determinations, themselves fairly arrived at, *settle* the question whether due process was in fact afforded, and that in our legal system that point is usually where a judgment has become final and immune from direct review. There is, in other words, nothing radical about the notion that a judgment has accorded due process even though there remains a theoretical possibility — which possibility, it is the whole thrust of the doctrine, will not be explored — that error has occurred as to a due process question.

Similarly, I see no basis in *Frank v. Mangum* for an argument that it applies only to findings of *fact* made by the state courts; the opinion is wholly inconsistent with the notion that, if a state supplies adequate corrective process, its rulings as to the application of federal standards to the facts are nevertheless reviewable on habeas. In fact *Frank* itself presented a question of federal law — whether the facts as found by the state appellate court were consistent under federal constitutional standards with a fair trial; the Supreme Court did not even hint that review on habeas was open as to this question, though there can be no doubt that on direct appeal it would have been the central issue before the Court.

in a state criminal proceeding, a court on habeas may appropriately inquire into the merits in order to determine whether the detention is lawful.[120] From this aspect of *Frank v. Mangum*, I suggest, derive all the great and beneficient expansions of the writ we have witnessed in the past fifty years. (Of course expansion created problems of its own. As long as habeas was narrowly restricted to jurisdictional issues, the fact that it was available without limit of time did not create intolerable delays in the administration of justice by the states. But the effect of the widening of the writ in *Frank* was to import the time problem into a much larger category of cases, and this has made the problems of delay in the criminal process much more acute.)

On the other hand the *Frank* opinion does, concededly, state what I conceive to be simple common sense but which others may regard as restrictive: that the fact that an unbiased court of competent jurisdiction has previously adjudicated, through a full and fair litigation, the merits of whether a defendant's federal rights were violated is crucially relevant to the question whether his detention may on habeas corpus be considered unlawful because he was denied due process of law. I regard this as common sense because it *directs* the inquiry on habeas corpus to the meaningful question whether the totality of state process assures us of a reasoned probability that justice was done, rather than whether in some ultimate sense the truth was in fact found.[121]

---

[120] This "expansive" aspect of *Frank v. Mangum* was made possible procedurally by the fact that the new habeas corpus procedure created by the act of 1867 for the first time plainly authorized the federal courts to inquire *dehors* the state-court record; previously the prisoner had to show *on the face of the record* that the committing court lacked jurisdiction. See Frank v. Mangum, 237 U.S. at 329–30. As the Court stated in *Frank*, these procedural changes "substitute for the bare legal review that seems to have been the limit of judicial authority . . . a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'" *Id.* at 330–31. The adequacy of a state's corrective process will, of course, often raise questions not determinable on the face of the state record; such an inquiry was thus first made possible by the new act. The expansive procedure authorized by the statute may in turn also explain the widened substantive scope the Court was ascribing to the writ.

[121] Mr. Justice Holmes' dissent in the *Frank* case seems to me striking predominantly because of his refusal to come to grips with the issue posed by Mr. Justice Pitney. He stated that the "single question . . . is whether a petition alleging that the trial took place in the midst of a mob savagely and manifestly intent on a single result, is shown on its face unwarranted . . . ." and declared that it is the "duty" of the Court on habeas to declare "lynch law as little valid where practiced by a regularly drawn jury as when administered by one elected by a mob intent on death." 237 U.S. at 349, 350. And he argued:

Whatever disagreement there may be as to the scope of the phrase "due

Was *Frank v. Mangum* "discredited" a mere eight years later in *Moore v. Dempsey*? [122] Professor Hart has so stated; [123] and Mr. Justice McReynolds' dissent in *Moore* [124] accuses the majority of overruling *Frank*.[125] On the other hand, Mr. Justice McKenna and the meticulous Mr. Justice Van Devanter, who had been with the majority in *Frank*, joined the Holmes opinion for the majority in *Moore*.[126] And in fact that opinion neither purports to be nor necessarily needs to be interpreted as a departure from *Frank*. *Moore*, like *Frank*, was a case involving allegations of mob domination of trial court and jury. A motion for new trial on this ground had been overruled, and an appeal taken to the state supreme court, which affirmed the convictions.[127] What is striking is that in *Moore*, unlike in *Frank*, the state supreme court did not conduct any proceeding or make any inquiry into the truth of the

process of law," there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard. . . . We are not speaking of mere disorder . . . but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ. The fact that the state court still has its general jurisdiction and is otherwise a competent court does not make it impossible to find that a jury has been subjected to intimidation in a particular case.

Id. at 347. But as Mr. Justice Pitney saw, this is really beside the point:

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the Supreme Court. . . . [This] begs the question of the existence of such disorder . . . ; which should not be assumed, in the face of the decision of the reviewing court, without showing some adequate ground for disregarding that decision.

Id. at 336. Mr. Justice Holmes in fact provides no reason why it should be disregarded, other than the general proposition that "when the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts." *Id.* at 347. But this proposition, too, is beside the mark if, as Mr. Justice Pitney holds, the question on habeas is not whether error of fact or law occurred as to a federal question but rather whether the state supplied a fair and rational process for its litigation.

[122] 261 U.S. 86 (1923).

[123] Hart, *Foreword*, 73 HARV. L. REV. 84, 105 (1959).

[124] 261 U.S. at 92. The dissent (which Mr. Justice Sutherland joined) seems to me to exhibit a complete failure to understand *Frank v. Mangum* in its "expansive" aspect: that the federal habeas court does have the duty to inquire whether the state did supply "corrective process."

[125] Professor Reitz asserts that the dissent, in arguing that *Frank* was being overruled, "recognizes the realities." Reitz, *The Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 n.53 (1961).

[126] These two, together with Holmes (who dissented in *Frank* and wrote *Moore*) and McReynolds, were the only members of the *Frank* court still sitting when *Moore* was decided.

[127] Hicks v. State, 143 Ark. 158, 220 S.W. 308, *cert. denied*, 254 U.S. 630 (1920). For a detailed analysis of the facts and proceedings in *Moore v. Dempsey*, see the two articles on the case by Waterman and Overton, *The Aftermath of Moore v. Dempsey* and *Federal Habeas Corpus Statutes and Moore v. Dempsey*, both published originally in 1933 and both reprinted at 6 ARK. L. REV. 1 (1951).

allegations of mob domination, and made no findings with respect to them; [128] its opinion refers to the charge that fair trial was impossible in the trial court solely by commenting, laconically, that it could not say "that this must necessarily have been the case." [129] On these facts Mr. Justice Holmes, allowing that under *Frank v. Mangum* "the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed," held that "if the case is that the whole proceeding is a mask . . . and that the State Courts failed to correct the wrong," then "perfection in the machinery for correction" will not bar habeas jurisdiction. And the Court, reciting the course the case took in the state courts, concluded:

> We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void.[130]

Though the opinion is admittedly far from clear, all *Moore v. Dempsey* may be saying, then, is that a conclusory and out-of-hand rejection by a state of a claim of violation of federal right, without any process of inquiry being afforded at all, cannot insulate the merits of the question from the habeas corpus court: if the state's findings are to "count," they must be reasoned findings rationally reached through fair procedures. So viewed, the case is entirely consistent with *Frank*.[131] And so, I suggest, is *Mooney*

[128] It is in fact possible that under Arkansas practice the state court felt it was precluded from examining the merits of the contention on appeal. See Waterman & Overton, *supra* note 127, at 14.

[129] The state court continued: "The trials were had according to law, the jury was correctly charged . . . and the testimony is legally sufficient . . . . We cannot, therefore, . . . assume that the trial was an empty ceremony . . . ." 143 Ark. at 162, 220 S.W. at 310. Of course nobody asked that the court "assume" that there had been no fair trial; the question was whether any unbiased forum would make an inquiry into the question.

[130] 261 U.S. at 91, 92. The entire thrust of the last paragraph of the opinion is directed at the inadequacy of the process furnished by Arkansas for determining whether a fair trial had been had.

[131] The contrary view, that *Moore* held that the habeas court must automatically redetermine the merits of the contention of mob domination, derives from Mr. Justice Holmes' statement that, though corrective process may be so adequate as to preclude habeas, "if the case is that the whole proceeding is a mask — that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights." *Id.* at 91. The crucial question is, of course, what the Justice meant by the phrases

v. Holohan,[132] which established the substantive principle that a conviction procured through testimony known by the state authorities to be perjured results in a deprivation of liberty without

---

"failed to correct the wrong" and "perfection in the machinery for correction." If these are read to mean that if *in fact* there was mob domination and if the state failed to correct the wrong by correctly *finding* that fact, and if perfection in the machinery for correction is irrelevant even if in this very case there was corrective process in the sense of a full and fair inquiry, then *Moore* surely does overrule *Frank* and compel the habeas court automatically to inquire into the merits. But it is possible, and far more consistent with the rest of the opinion (though admittedly not with the dissent in *Frank*), to read the phrases to mean that "failure" to "correct the wrong" means not failure correctly to discover the ultimate truth but failure to conduct a fair and rational inquiry with regard to the facts; and that perfection in the "machinery" for correction is irrelevant if, as in this very case, the machinery never went into operation: that is, if there *was* no fair state inquiry into the merits of the federal claim.

Professor Reitz disagrees with my reading; he sees *Moore* as holding that the habeas court "could not escape the duty of examining the facts for itself since, if true, they entitled the applicants to relief. . . . Instead of being merely a secondary alternative to the state-court channel of litigation, federal habeas corpus was thereby recognized as an available sequel. A case which had completely run the state channel could then be taken into federal court for independent reexamination of the federal contentions previously passed upon by the state courts." Reitz, *The Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 (1961).

Professor Reitz acknowledges that "the opinion of the Court does not discuss the radical change being worked in the role of federal habeas corpus," but he ascribes the revolution assertedly wrought by *Moore* directly to the fact that in 1916 Congress abolished appeal as of right to the Supreme Court from state decisions involving federal questions and substituted a discretionary certiorari jurisdiction; presumably he sees *Moore* radically extending habeas to provide automatic federal review in view of its withdrawal from the Supreme Court. *Id.* at 1328–29. The trouble with this analysis is that it is awfully hard to extrapolate it from Mr. Justice Holmes' short and ambiguous little opinion, an opinion which in its language — and on the facts of the case — does not *have* to be read as making a "radical change" at all, but indeed can be viewed as entirely consistent with previous law. And even if one can see Mr. Justice Holmes as having intended to accomplish, sub silentio, the rather highhanded tour de force of expanding the habeas jurisdiction to replace the Supreme Court's lost jurisdiction on writ of error, it is hard to visualize judges as meticulously aware of the duty of the Court to state what it is doing and the reasons therefor as Mr. Justice Brandeis and Mr. Justice Van Devanter joining him.

I also find the notion that Mr. Justice Holmes intended in *Moore* to overrule *Frank* and make habeas automatically available to redetermine federal constitutional questions decided in state criminal cases hard to reconcile with the opinion of the Court, two years after Moore, in Knewel v. Egan, 268 U.S. 442 (1925), which Mr. Justice Holmes joined, and where the Court held:

> It is the settled rule of this Court that *habeas corpus* calls in question only the jurisdiction of the court whose judgment is challenged [citing, *inter alia*, *Frank v. Mangum*].
>
> A person convicted of crime by a judgment of a state court . . . may proceed by writ of *habeas corpus* on constitutional grounds summarily to determine whether he is restrained of his liberty by judgment of a court acting without jurisdiction. . . . But . . . he may not use it as a substitute for a writ of error. . . .
>
> [T]he ultimate question presented is whether the procedure established by the statutes of South Dakota . . . is a denial of a constitutional right. With

due process of law. Therefore, stated the Court in a habeas case involving such an allegation, the state is "required" under *Frank* and *Moore* to afford corrective process, and in its absence federal habeas will be available.[133]

The suggestion in *Mooney* that a state is "required" to afford corrective process raises a problem to which I have referred before,[134] and which the Supreme Court did not really consider in its elaboration of the reaches of habeas corpus in *Frank v. Mangum* and the subsequent cases. I have suggested that it would be logically possible to have a system whereby a state's failure to provide corrective process would itself be deemed "error" subject to reversal on direct review by the Supreme Court; that is, the due process clause could be interpreted as imposing on the states the affirmative duty to provide a full system of remedies for the meaningful litigation of all federal questions relevant to the case. Thus in *Moore v. Dempsey* the Supreme Court could have held on direct review that the failure of the state courts to conduct a full inquiry into the allegation of mob domination was itself federal error which would lead to reversal of the conviction rather than investigation of the allegation on habeas corpus. And if *Mooney* is taken literally in the language that corrective process is "required," the result would be, not that the failure of the state to afford a collateral postconviction forum would lead to federal inquiry into the allegation of knowing use of false testimony, but a reversal on direct review on the ground that the state is itself required to furnish such a forum.[135]

Of course there are situations where a state's refusal to furnish process would clearly be considered simple error. I take it as common ground that if a state court should hold that a defendant in a state trial may not at any time question the admissibility

respect to that question, we hold . . . that the *judgment of state courts in criminal cases will not be reviewed on habeas corpus merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted.* The proper remedy is by writ of error. *Id.* at 445–47. (Emphasis added.)

See also Mr. Justice Holmes' own opinion for the Court in Ashe v. United States *ex rel.* Valotta, 270 U.S. 424 (1926).

[132] 294 U.S. 103 (1935).

[133] The actual holding of the Court in *Mooney* was that petitioner must seek habeas corpus in the state courts before resorting to federal habeas, so that leave to file the petition was denied, "but without prejudice." *Id.* at 115.

[134] See pp. 459–60 *supra.*

[135] There would be no procedural obstacle to the enforcement of such a principle; if a prisoner sought state postconviction relief on the basis of a federal constitutional claim not raisable at trial or appeal and the state failed to grant relief on the ground that there is no remedy under state law, that very denial, if final, would be a judgment subject to Supreme Court review.

of a confession on the ground that it was coerced, it would be subject to reversal in the ordinary course (this would be a classical example of an "inadequate" state ground), so that the principle of *Frank v. Mangum* would not of itself justify a federal collateral jurisdiction simply to furnish a forum for the litigation of that question. At the other extreme, however, we encounter obvious difficulties. If a state litigation has ended, and historically the state has never provided a system of remedies for raising questions (federal or state) on postconviction proceedings, and further given the fact that statutory authorization for federal collateral proceedings does exist (the question would be far more acute if it didn't) it is far from clear that the sound solution calls for the rather sweeping supervision and molding of state procedures required by a doctrine that every state must itself provide a full system of remedies. Historically the question may never have been explicitly canvassed at the time of *Frank* and *Moore* and *Mooney* because state postconviction processes were so rudimentary that the notion of deeming their very existence to be part of "due" process would never seriously have presented itself. But beyond that, it may be that there are political and institutional considerations which counsel conservatism in requiring the states themselves always to furnish process. It is, after all, one of the advantages of a dual system of courts that we can deal with the abrasions possible in a federal system in a flexible manner. Is there not political wisdom in using a federal collateral jurisdiction as a "backstop" for inadequacies of state process, rather than having the Supreme Court on direct review undertake the task of forcing the states to fashion procedural systems adequate to the reasoned litigation of all federal questions? The federal habeas jurisdiction has the added convenience that the very question of the adequacy of the state's process can be canvassed in a trial court which can conduct a hearing as to the facts and otherwise clarify situations clouded by inadequate records presented on direct review. And once the habeas court determines that state corrective process has been inadequate, it is the less abrasive (if the less heroic) path to proceed to a determination of the federal claim (and, if it is discovered to be groundless, to leave the state detention undisturbed) rather than to force the state to undertake positive rectification on its own.

In any event, the cases (without ever providing a rounded and systematic analysis of the problem) have proceeded on the assumption that a state's failure to provide corrective process will often be left undisturbed on direct review and the federal ques-

tion determined on federal collateral review; [136] only occasionally are there intimations, as in *Mooney*, that the state may itself be "required" to afford corrective process.[137]

E. From Mooney to Brown v. Allen

The decisions of the three decades following *Frank*, *Moore*, and *Mooney* did not produce major changes in the general principles of the habeas jurisdiction. We review first a trio of cases dealing with federal prisoners, for these continued to be relied on in the state prisoner cases. *Johnson v. Zerbst* [138] has been denominated "pathbreaking." [139] There the Court held that the sixth amendment "withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel," [140] and ordered

---

[136] See, *e.g.*, White v. Ragen, 324 U.S. 760 (1945) (state failed to reach merits of claims of denial of counsel and knowing use of perjured testimony; certiorari dismissed with opinion stating that federal habeas is available if no corrective process is afforded by the state); Woods v. Nierstheimer, 328 U.S. 211, 217 (1946) ("if the State of Illinois should at all times deny all remedies . . . the federal courts would be available to provide a remedy"). Compare cases such as New York *ex rel.* Whitman v. Wilson, 318 U.S. 688 (1943); Loftus v. Illinois, 334 U.S. 804 (1948); and Jennings v. Illinois, 342 U.S. 104 (1951). In all of these the Court sought clarification from the state as to whether the refusal to afford state postconviction relief was grounded on the merits of the federal question or the unavailability of the remedy under state law. In the last-named case the Court made clear that "where the state does not afford a remedy, a state prisoner may apply for a writ of habeas corpus in the United States District Court . . . ." *Id.* at 111.

Of course if a state court denies a hearing on a properly presented federal question, not on the ground that the state lacks a remedy, but on the basis of an erroneous holding as to the federal law, it is subject to reversal on direct review. See Smith v. O'Grady, 312 U.S. 329 (1941) (reversing a holding on state habeas that an allegation of a coerced plea of guilty does not state a claim under the fourteenth amendment); Williams v. Kaiser, 323 U.S. 471 (1945); Hawk v. Olson, 326 U.S. 271 (1945).

[137] See Young v. Ragen, 337 U.S. 235 (1949); Woods v. Nierstheimer, 328 U.S. 211 (1946). See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 395–99, 474–77, 512–17 (1953); Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960); Note, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 COLUM. L. REV. 1143 (1953).

The extent to which the Court on direct appeal will normally defer to the state's remedial law in testing a federal question (leaving to habeas the question whether the state's corrective remedies are *adequate*) is exemplified in Carter v. Illinois, 329 U.S. 173 (1946). Here the Court on direct review limited its inquiry (into the question whether counsel should have been provided) in accordance with the *state* rule that review is on the so-called common law record; it stated that facts not appearing in that record could be considered on federal habeas corpus.

[138] 304 U.S. 458 (1938).

[139] Hart, *Foreword*, 73 HARV. L. REV. 84, 104 (1959).

[140] 304 U.S. at 463.

the federal court on habeas corpus to determine on the merits whether the defendant had made an effectual waiver of his right to counsel. The reason was made plain in the very first sentence of the Court's opinion dealing with the habeas question:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.[141]

The Court's language makes clear that in these counsel cases the habeas court's jurisdiction must necessarily turn on an adjudication of the merits. If it is found that the defendant did not, due to ignorance, youth or the like, make an effective waiver of counsel, surely the habeas court cannot hold that a previous determination that he has waived his right, made in circumstances subject to the very same procedural flaw, is binding. Similarly, if the defendant has unwittingly failed to seek counsel, the very same ignorance will normally prevent him from testing the effectiveness of such a "waiver" on appeal, so that the theoretical right to appeal from the judgment of conviction will rarely serve as adequate corrective process with respect to this question. Habeas turns out to be, as the Court insists, the only legal remedy for the safeguarding of the underlying right.[142] The same is true, as was held in *Walker v. Johnston* [143] and *Waley v. Johnston*,[144] of the allegation that the defendant was coerced to plead guilty at trial. The whole point of such coercion, if it "works," is to prevent all further inquiry at trial and on appeal — the more successful it is, the less likely that the original proceeding or direct appeal therefrom will pro-

[141] *Id.* at 465. The Court in *Johnson* buttressed its holding with language to the effect that failure to provide counsel ousted the trial court of "jurisdiction."

[142] I do not mean to indicate that I would *automatically* disregard a previous adjudication that a prisoner has waived his right to counsel merely because in that adjudication itself the prisoner had no counsel: any such doctrine would really undermine the very possibility of waiver. The problem of circularity must, it seems to me, be solved by varying the *scope* of review. If the original record makes a rather clear showing that waiver was intelligently based on fair choice, and no reason is suggested why that record ought to be suspect, I would see no reason why the court on habeas should proceed to a de novo inquiry: it could take the facts as found in the original court. But if the record itself indicates great doubt whether waiver could fairly be implied, I would think it unfair to take the matter as concluded by a proceeding where the defendant did not have counsel. I see, in other words, no escape from the need to make some judgment about the merits. See pp. 458–59 and note 30 *supra*.

[143] 312 U.S. 275 (1941).

[144] 316 U.S. 101 (1942).

vide a fair forum for the litigation of any question whatever, much less the issue of coercion itself. It is thus not surprising that the Court held that such an allegation must be litigated in postconviction collateral proceedings if it is ever to be litigated. The basis of the decisions was made clear in *Waley*, which finally dispensed with the fiction of "jurisdiction" as applicable to this kind of case:

> The issue here was appropriately raised by the *habeas corpus* petition. The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, *and where the writ is the only effective means of preserving his rights.*[145]

The notion that the basic function of the habeas jurisdiction is to afford a remedy where there is no other way to vindicate a prisoner's constitutional rights is also emphasized in the cases dealing with state prisoners. In the famous per curiam in *Ex parte Hawk*,[146] which formulated governing procedural rules for the guidance of state prisoners, the Court made this quite explicit. Stating that federal habeas may not be sought before the prisoner has exhausted presently available state remedies, it continued:

> Where the state courts have considered and adjudicated the merits of . . . [the prisoner's] contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the questions thus adjudicated. . . . But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the

[145] *Id.* at 104–05. (Emphasis added.) See also Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942), and United States *ex rel.* McCann v. Adams, 320 U.S. 220 (1943), which held habeas available to determine whether a defendant may and did waive his right to trial by jury where special circumstances frustrated the possibility of litigating these questions on direct review. The cases illustrate the flexibility of the writ in assuring that a defendant should have a *meaningful* opportunity to test his federal contentions at some point. Note how meticulously the Court in the latter case made sure that in fact there had not previously been a chance to raise the question whether there was waiver.

[146] 321 U.S. 114 (1944).

> federal district court before resorting to this Court by petition for habeas corpus.[147]

And in *House v. Mayo*,[148] where the Court held that federal habeas will lie to determine whether the state should have afforded the petitioner counsel and whether a plea of guilty was coerced, the opinion is meticulous in emphasizing that these questions may be reached only in the absence of state corrective remedies.[149] Similarly, in *White v. Ragen*,[150] where the Court dismissed a petition for certiorari to the Illinois supreme court on the ground that the judgment rested on an adequate state ground, namely, the unavailability of state habeas corpus, the Court's opinion makes clear that the availability of federal habeas turns on the failure of the state itself to provide a fair process for the litigation of federal claims; if a state does fail to provide a remedy, the prisoner may proceed without more (notably without having to seek certiorari from the Supreme Court to review the decision denying the remedy) to apply for federal habeas, because

> the allegations of fact in the petitions [as to denial of counsel and knowing use of perjured testimony] are sufficient to make out prima facie cases of violation of these constitutional rights of petitioners, sufficient to invoke corrective process in some court, and in the federal district court if none is afforded by the state.[151]

I do not mean to give a picture of the law of this time which is neater than it actually was. The Court did not, after *Frank*, give any rounded consideration to the reaches and purposes of the habeas jurisdiction. Most of the cases of the period are explicitly concerned not with the problem of relitigation of federal questions already canvassed in state courts, but with the complications cre-

---

[147] *Id.* at 118. The Court cited *Moore v. Dempsey* as an example of a case where "the remedy afforded by state law proves in practice unavailable or seriously inadequate."

[148] 324 U.S. 42 (1945).

[149] The district court in *House* denied the writ on the ground that the federal questions had been litigated in the state courts. The Supreme Court pointed out that in fact all the state decisions were grounded not on the merits but on the unavailability of state remedies, so that the case met the test of *Waley*, namely, that habeas is the only effective means of preserving the prisoner's rights. The Court added: "It is true that where a state court has considered and adjudicated the merits of a petitioner's contentions, and this Court has either reviewed or declined to review the state court's decision, a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. . . . But that rule is inapplicable where, as here, the basis of the state court decision is that the particular remedy sought is not one allowed by state law . . . ." *Id.* at 48.

[150] 324 U.S. 760 (1945).

[151] *Id.* at 764. See also Hawk v. Olson, 326 U.S. 271, 276 (1945).

ated by the exhaustion doctrine and with the vexing question whether a prisoner must seek direct Supreme Court review of a state judgment as a condition of the right to seek habeas corpus.[152] Several times the Court stressed that technically res judicata does not apply in habeas proceedings; [153] and it will have been noticed that its dicta state that state-court adjudications of the merits of federal questions reviewed or left undisturbed by the Supreme Court will not "ordinarily" be redetermined on habeas.[154] And there are some opinions which could be taken to intimate that the writ automatically reaches the merits of all federal constitutional questions.[155] Furthermore, there can be no doubt that, by

[152] See *Ex parte* Botwinski, 314 U.S. 586 (1942); *Ex parte* Davis, 317 U.S. 592 (1942); *Ex parte* Williams, 317 U.S. 604 (1943); *Ex parte* Abernathy, 320 U.S. 219 (1943); *Ex parte* Hawk, 321 U.S. 114 (1944); Marino v. Ragen, 332 U.S. 561 (1947) (especially the concurring opinion of Mr. Justice Rutledge, *id.* at 563); Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Jennings v. Illinois, 342 U.S. 104 (1951); Sweeney v. Woodall, 344 U.S. 86 (1952).

Problems as to the requirement of seeking certiorari were canvassed in White v. Ragen, 324 U.S. 760 (1945); Wade v. Mayo, 334 U.S. 672 (1948); and Darr v. Burford, 339 U.S. 200 (1950). The latter case disapproved the softening of the requirement which had been announced in *Wade*.

It should again be mentioned that these requirements themselves become at least partly unintelligible if considered to be merely timing devices, if securing decision of the federal question in the state system and subjecting it to supervision by the Supreme Court on direct review is seen as a mere prelude to collateral inquiry automatically available to redetermine the issue. True, the exhaustion doctrine does allow a state to correct its own errors before federal interference is authorized; but is this a sufficient rationale? If the state makes a conscientious effort to do so by providing full and fair corrective process, should the result be ignored? And what is the point of forcing the litigant to apply for certiorari if there is automatically to be federal review through habeas corpus in any event?

[153] See Salinger v. Loisel, 265 U.S. 224 (1924), stating that a refusal to discharge on habeas is not, technically, res judicata, but that prior refusals to issue the writ may be given weight in the sound discretion of the court. See also Darr v. Burford, 339 U.S. 200, 214–15 (1950).

[154] See the passages cited from *Ex parte Hawk* and *House v. Mayo*, p. 495 and note 149 *supra*. The Court never explained what circumstances would be sufficiently extraordinary to justify collateral inquiry even after the question has been decided by the state courts and review declined or afforded by the Supreme Court; nothing suggests that the Court was not referring to questions of jurisdiction traditionally subject to relitigation on collateral attack.

[155] Some of the language in Mr. Justice Reed's opaque opinion in Darr v. Burford, 339 U.S. 200 (1950), suggests that he assumed that this was the function of the writ.

In Wade v. Mayo, 334 U.S. 672 (1948), the Court held habeas available to test the question whether the defendant had been denied the assistance of counsel at trial in violation of the Constitution, and this in spite of the fact that the question was litigated in a state habeas proceeding in which the defendant was in fact represented. The Court's opinion makes clear, however, that at the time the state habeas petition was denied it was wholly unclear whether the decision was grounded on the merits of the federal question or on a holding that state habeas was unavailable in view of the defendant's failure to appeal from his conviction. (The

1952, the integrity and continuing authority of the doctrine of *Frank v. Mangum* had been endangered, as it were, on several occasions. They were endangered first by the ambiguities introduced by the *Moore* case, which had never been explained or clarified. They were endangered further by the abandonment, in *Waley*, of the language of "jurisdictional" error; psychologically, at least, this may have served as an invitation to further widenings of the writ. Finally, we should note that the Court never — not even in the course of its procedure lesson to state prisoners in *Ex parte Hawk* — strengthened the *Frank* doctrine by requiring prisoners on habeas to plead explicitly that the state's corrective processes had been inadequate to the task of protecting their federal rights.[156]

On the other hand, what is equally clear is that at no time did the Court hold that the habeas jurisdiction is appropriately exercised in cases where a federal question has been fully considered by the state, where there has been adequate corrective process. And the essential purpose of the writ as affording a forum where

state supreme court wrote no opinion.) If the state denial was based on the latter ground, under *Johnson v. Zerbst* it would seem clear that federal habeas would be available since the uncounseled defendant's theoretical right to appeal on the issue of denial of counsel is plainly not adequate corrective process. Further, although *later* Florida cases were deemed by Mr. Justice Murphy to show that under Florida law the state habeas case must have been decided on the merits, the ambiguity of the decision at the time it was rendered was held to excuse the prisoner from the requirement of making a probably fruitless attempt to seek direct Supreme Court review of the state habeas decision. But the same ambiguity may arguably be seen as rendering the state corrective process inadequate under *Frank v. Mangum*, because in effect it precluded direct Supreme Court review of the state holding as to the federal question. (This problem, that is, the bearing on the "adequacy" of state corrective process of ambiguous state decisions which effectively foreclose the possibility of direct Supreme Court supervision, is discussed in detail at pp. 519–21 *infra*.)

Dicta in Jennings v. Illinois, 342 U.S. 104 (1951), can also be read as indicating that habeas corpus is automatically available to redetermine a federal question (here the admissibility of a confession) after it has been litigated in the state system, without reference to the adequacy of the state's corrective process. But here, too, the "adequacy" of state corrective process with respect to this question may be doubted in view of the fact that defendant's indigence made it impossible for him under Illinois law to raise the question on appeal. Nevertheless, it would seem that, if the state denies to indigents corrective process equally as effective as it grants to those with funds, under *Frank v. Mangum* the correct result may be, not to make federal habeas available to the indigent but, on direct review, to deny the state the power to make such a distinction. Eventually this is the result which was reached in Griffin v. Illinois, 351 U.S. 12 (1956).

[156] It may be significant that the author of one of the opinions of the Court in *Brown v. Allen*, Mr. Justice Frankfurter, in his dissent in Jennings v. Illinois, *supra* note 155, stressed the requirement of such a pleading (see note 170 *infra*); he may have regarded the failure of the Court to accept this in *Jennings* as a justification for *Brown*.

the state fails to provide such process was, as we have seen, stressed again and again. There can be no doubt that when *Brown v. Allen* reached the Court in 1952, the central thrust of the law was as Judge Learned Hand described it: [157] for purposes of habeas corpus a detention was not to be deemed "unlawful" if based upon the judgment of a competent state court which had afforded full corrective process for the litigation of questions touching on federal rights.

III. *Brown v. Allen* AND ITS JUSTIFICATIONS

A. The Decision and Its Problems

Brown v. Allen [158] reached the Supreme Court in the 1951 Term and was decided in 1953. It involved three proceedings: Brown's, Speller's, and Daniels'; only the first two need concern us here. Brown was convicted of rape by a North Carolina court and sentenced to death. In his appeal to the state supreme court he claimed his conviction violated the federal constitution because of the admission of a coerced confession and racial discrimination in the selection of grand and petit juries. These issues had been fully litigated, with the aid of counsel, in the trial court through procedures not themselves alleged to have been in any way unfair. The state supreme court affirmed the conviction, rejecting the defendant's federal contentions on the merits in a reasoned opinion.[159] Certiorari was denied.[160] The prisoner then sought federal habeas corpus. The district court denied the writ without holding a hearing, and the court of appeals affirmed.[161]

Speller, also a capital case, likewise involved a claim of racial discrimination in jury selections which had been fully litigated in the state system. (Indeed, the state courts had twice previously reversed Speller's convictions, first on the ground that such discrimination was shown, and then after retrial because his counsel had not been furnished adequate opportunity to test the question; [162] this was, therefore, Speller's third trial.) The state supreme court rejected the allegation on the merits, and certiorari was denied.[163] Now Speller, too, sought habeas. The district

[157] See pp. 464–65 *supra*.

[158] 344 U.S. 443 (1953).

[159] State v. Brown, 233 N.C. 202, 63 S.E.2d 99 (1951).

[160] 341 U.S. 943 (1951).

[161] 192 F.2d 477 (4th Cir.), *affirming* 98 F. Supp. 866 (E.D.N.C. 1951).

[162] State v. Speller, 229 N.C. 67, 47 S.E.2d 537 (1948); 230 N.C. 345, 53 S.E.2d 294 (1949).

[163] 231 N.C. 549, 57 S.E.2d 759, *cert. denied*, 340 U.S. 835 (1950).

court took testimony on the discrimination issue in addition to considering the state record, and denied the writ. Again, the court of appeals affirmed.[164]

The Supreme Court granted certiorari in both cases and affirmed the convictions. It did so, however, not on the basis of *Frank v. Mangum*, that the state had provided adequate corrective process, but by reaching and rejecting on the merits the federal claims presented which had been previously adjudicated by the state courts. The Court did so without any explicit discussion of the question of jurisdiction or any apparent understanding of how radical this step was: with only Mr. Justice Jackson disagreeing, eight of nine Justices assumed that on habeas corpus federal district courts must provide review of the merits of constitutional claims fully litigated in the state-court system. As Professor Hart says, the decision thus "manifestly broke new ground." It seems to say

> that due process of law in the case of state prisoners is not primarily concerned with the adequacy of the state's corrective process or of the prisoner's personal opportunity to avail himself of this process . . . but relates essentially to the avoidance in the end of any underlying constitutional error . . . .[165]

And ever since *Brown v. Allen* the Supreme Court has continued to assume, without discussion, that it is the purpose of the federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings.[166]

What is the basis of *Brown v. Allen*? The opinions do not cast much light on that question. Mr. Justice Frankfurter, in one of the two opinions of the Court in the case, repeatedly asserts, without discussion, that the act of 1867 compels the conclusion that state consideration "cannot foreclose" federal determination of the merits of constitutional claims; [167] he says that as to all legal issues (such as the admissibility of a confession) the district judge "must" exercise his own judgment,[168] that Congress has

---

[164] 192 F.2d 477 (4th Cir.), *affirming* 99 F. Supp. 92 (E.D.N.C. 1951).

[165] Hart, *Foreword*, 73 HARV. L. REV. 84, 106 (1959).

[166] See, *e.g.*, Irvin v. Dowd, 366 U.S. 717 (1961); United States *ex rel.* Jennings v. Ragen, 358 U.S. 276 (1959); Cicenia v. Lagay, 357 U.S. 504 (1958); Thomas v. Arizona, 356 U.S. 390 (1958); Leyra v. Denno, 347 U.S. 556 (1954).

[167] 344 U.S. at 500 ("else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have").

[168] *Id.* at 507. The Justice continues:

> Although there is no need for the federal judge, if he could, to shut his eyes to the State consideration of such issues [of federal law], no binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on

"seen fit" to "give to the lower federal courts power to inquire into federal claims, by way of habeas corpus," and that it would be "inadmissible to deny the use of the writ merely because a State court has passed on a federal constitutional issue." [169] But these are mere statements of conclusion; they ignore completely that such a purpose cannot be derived automatically from either the language or history of the 1867 act, and that the act was not so understood in the first eighty years of its history; they ignore, too, the explicit ruling in *In re Wood* [170] that at least the question of jury discrimination in violation of the Constitution is not a question open on collateral attack if opportunity to litigate it was afforded in the state system and on direct review.

Oddly enough, much of the discussion in the two majority opinions in *Brown* deals not with the question why a state's adjudication of the law should be disregarded, but why the state's adjudication of the facts should not necessarily be disregarded. Mr. Justice Reed states that no new hearing as to the facts is necessary if the district court is satisfied that the state process has given

---

fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Id. at 508.

[169] *Id.* at 508–09, 513. Mr. Justice Frankfurter asserts that the rule (as he states it in *Brown*) is *less* liberal than the English practice; under the federal statute (28 U.S.C. § 2244 (1958)) a judge may take into account previous refusals to issue the writ, whereas in England the prisoner may, in the famous phrase, "go from judge to judge" repeatedly, any one decision to discharge being final. 344 U.S. at 509. Professor Pollak, too, sees the federal writ as narrow compared to the "extraordinary liberality" of the English practice. Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 65 (1956). But this ignores the crucial fact that, though it is true that in England *if* a prisoner has a claim cognizable on habeas corpus, he may then make repeated applications, the category of such cognizable claims is extremely narrow compared to our law as defined in *Brown v. Allen*. It is thus misleading to speak of the English practice as more liberal than ours in the context of the rule of *Brown v. Allen*. (In fact, the right under English law to go from judge to judge was itself later somewhat curtailed by the judgment in *In re* Hastings (No. 2), [1959] 1 Q.B. 358 (1958), and substantially restricted by the Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 14(2).)

[170] 140 U.S. 278 (1891); see pp. 481–82 *supra*.

Mr. Justice Frankfurter's opinion in *Brown* is particularly surprising in light of his own dissent, two years before, in Jennings v. Illinois, 342 U.S. 104, 112 (1951). There the Justice had argued that a writ of certiorari to the Supreme Court of Illinois should be dismissed for want of a properly presented federal question:

> It is true that petitioners allege they were convicted on the basis of coerced confessions . . . in violation of the Fourteenth Amendment. But so far as appears from the record, these issues were fully litigated and determined at the trials. Until the cases came to this Court, no showing was made, or sought to be made, that circumstances were such as to warrant a new and independent inquiry into those determinations as a matter of federal right.

Id. at 115.

them "fair consideration" and resulted in a "satisfactory conclusion," if no "unusual circumstances" are present and the record "affords an adequate opportunity" to test the merits of the claim.[171] The taking of new evidence by the district court is "in its discretion." [172] Mr. Justice Frankfurter says that as to the facts, the state's conclusions "may" be accepted by the district judge "unless a vital flaw be found in the process of ascertaining such facts." [173] These ambiguous formulations have created vexing problems as to the scope of review on habeas corpus which I need not canvass here.[174] I do suggest, however, that the basic reason why the courts have had such difficulties in defining the scope of review on habeas is that the Court in *Brown* did not provide a principled rationalization of the purpose being served by affording the federal court the right to review the determination of the state court in the first instance. If it is the purpose of the habeas jurisdiction to assure that no error has been made, then there is no reason why the state courts' determinations of fact should be any more sacred than their conclusions of law. In view of the function of appellate courts to make pronouncements of law, it is manifestly sensible to restrict their review to issues of law. But district court jurisdiction on habeas certainly does not serve that purpose; and if the purpose is to assure "correct" determinations, that purpose should not be disregarded when the allegation is that the state court has erred in finding the facts bearing on a constitutional claim. On the other hand, if meaningful process serves as an adequate guarantee of the probability of the correctness of factfindings, we are entitled to some explanation why it does not satisfy us with respect to legal conclusions.[175]

---

[171] 344 U.S. at 463.

[172] *Id.* at 478.

[173] *Id.* at 506.

[174] The problems of the scope of review of questions of fact under the rule of *Brown v. Allen* is the subject of a comprehensive and wholly admirable paper written for my seminar in Remedies Against the Government by Mr. Richard Posner, LL.B. 1962, entitled The Trial of Fact De Novo in Federal Habeas Corpus Proceedings, April 1962, on file in the Harvard Law School Library. See also Note, 53 NW. U.L. REV. 765 (1959); Note, 68 YALE L.J. 98 (1958).

[175] The point is really implicit in one of Mr. Justice Reed's formulations in *Brown*:

> As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of postconviction remedies.

344 U.S. at 465. On its face this sounds like an argument for *Frank v. Mangum.*

There is another aspect of this question which should be noticed. The Court in *Brown* made much of the notion that the integrity of a state's process with respect to factfinding should be respected. But it made clear that this is solely a matter of discretion, that the district judge may redetermine the facts even where there is no "unusual circumstance" or "vital flaw" which casts doubt on the adequacy of those findings; and the Court went out of its way to reaffirm this grant of discretion a few years later.[176] But if the federal judge has an impeccable record before him, that is, he has no reason to believe that the factfinding processes of the state courts were in any way inadequate to the task at hand, on what principle should he decide whether to exercise such a discretion? Note that if he does exercise it, he would seem to be completely free to disregard the state-court findings even though the issue may turn on an assessment of the veracity of witnesses; in such a case we have the startling result that a state prisoner is deemed to be held in violation of the Constitution of the United States because a state judge believed the prosecution's witnesses and the federal judge believes those of the defendant.

Nor do the opinions in *Brown v. Allen* deal adequately with the grave problems of federalism created by the doctrine of that case. It is fashionable today to dismiss the resentments created in the states by the existence of an indiscriminate federal habeas jurisdiction; we are told that complaints about intrusion by federal habeas courts into state criminal processes are disingenuous, directed not at the remedy but at the substantive due process doctrines enforced thereby; [177] we are further assured that such

---

Yet it is ignored in Mr. Justice Reed's own exhaustive review of the merits of the state courts' legal conclusions.

[176] In United States *ex rel.* Rogers v. Cummings, 154 F. Supp. 663 (D. Conn. 1956), the district judge on habeas took testimony with respect to the voluntariness of a confession admitted into evidence in a state criminal trial. The court of appeals reversed, holding that the district court could redetermine the facts only if the state proceeding was tainted by a "vital flaw." United States *ex rel.* Rogers v. Richmond, 252 F.2d 807 (2d Cir. 1958). The Supreme Court denied certiorari but took the unusual step of accompanying the denial with an opinion, which read as follows:

> We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony.

357 U.S. 220 (1958). For devastating and wholly justified comment on this mode of proceeding, see Brown, *Foreword: Process of Law, The Supreme Court, 1957 Term,* 72 HARV. L. REV. 77, 92–93 (1958). For the eventual disposition of the case, see Rogers v. Richmond, 365 U.S. 534 (1961) (see pp. 514–16 *infra*).

[177] See, *e.g.*, Reitz, *Federal Habeas Corpus,* 108 U. PA. L. REV. 461, 516 (1960); Pollak, *supra* note 169, at 66 ("The articulate premises of the attack on the

complaints are in any event beside the mark since very few prisoners are actually released by the federal courts.[178] But the very unanimity of the resentment among state law-enforcement officials and judges,[179] many of them, surely, as conscientious in their adherence to the Constitution and as intellectually honest as their critics, counsels, not against the jurisdiction, but against its indiscriminate expansion without principled justification. Note further that it was not state officials but the Judicial Conference of the United States, headed by Chief Justice Warren, which in 1955 adopted a report of a committee consisting of Circuit Judges Parker, Phillips and Stephens and District Judges Hooper, Vaught and Wyzanski, which stated that the expansion of the habeas jurisdiction has

> greatly interfered with the procedure of the State courts, delaying in many cases the proper enforcement of their judgments. Where adequate procedure is provided by State law for the handling of such matters, it is clear that the remedy should be sought in the State courts with any review . . . only by the Supreme Court . . . .

and recommended, *inter alia*, statutory preclusion of the writ where a federal question was "raised and determined" in the state-court system.[180]

---

habeas corpus writ are grounded in the supposed first principles of judicial finality and of the sound management of a federal union. Just below the surface, however, lurks the less plainly articulated but perhaps more deeply felt belief that the Supreme Court has grievously erred in the sequence of great cases which utilized habeas corpus to probe trial records for fundamental error.").

[178] See Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 440–41 (1961); Frankfurter, J., in Brown v. Allen, 344 U.S. 443, 510 (1953) ("reliable figures . . . showing that during the last four years five State prisoners, all told, were discharged by federal district courts, prove beyond peradventure that it is a baseless fear, a bogeyman, to worry lest State convictions be upset by allowing district courts to entertain applications"); Statement of Thurgood Marshall, *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess., ser. 6, at 80 (1955) [hereinafter cited as *Hearings*].

[179] See *Hearings*, in which are recorded not only the statements but also the major documents expressive of such resentment, including resolutions adopted by the Conference of Chief Justices, reports to such Conference by its habeas corpus committees, and resolutions adopted by and statements in behalf of the National Association of Attorneys General. The attorneys general of not less than forty-one states joined in the brief attacking the constitutionality of the Habeas Corpus Act of 1867 (surely a hapless cause), rejected by the Court of Appeals for the Third Circuit in United States *ex rel.* Elliott v. Hendricks, 213 F.2d 922 (3d Cir.), *cert. denied*, 348 U.S. 851 (1954). As far as I know the only voice raised in favor of the present habeas jurisdiction among state judges has been that of Justice Schaefer, in *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956).

[180] See *Hearings* 89, 90. The proposed statute (H.R. 5649, 84th Cong., 1st

The point is not that it is unseemly for a federal district judge to reverse the action of the highest court of the state, but that it is unseemly for him to do so without principled institutional justification for his power. This justification was simply not provided by the opinions in *Brown v. Allen.* Mr. Justice Frankfurter did attempt to deal with the problem by stating that

> insofar as this [habeas] jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law.[181]

But this does not meet the issue. Of course federal law is higher than state law. But that does not *automatically* tell us that it is better for federal judges to pronounce it than state judges, much less that once a state judge has done so on a fair and rational investigation, this should be disregarded and done over again by a federal judge. Nothing about the substantive superiority of federal law tells us why, in *Leyra v. Denno*,[182] the admissibility of a confession should have been redetermined by a federal court after the question was exhaustively canvassed pursuant to the applicable federal law by the state courts in as conscientious a manner as possible and opportunity had on a full and adequate record to secure review in the United States Supreme Court.

The problem of federalism created by *Brown v. Allen* should not be seen in terms of the possible irritation of state judges at

---

Sess. (1955)) received the unanimous support of the Judicial Conference of the United States, the Conference of Chief Justices, the Association of Attorneys General, and the section of judicial administration of the ABA; it was also supported by the Justice Department. See *id.* at 7. See also Clark, J., concurring in United States *ex rel.* Caminito v. Murphy, 222 F.2d 698, 706 (2d Cir. 1955):

> I doubt the utility for dignified or effective law enforcement of review and overturn by any federal judge of the reasoned conclusions reached by a whole hierarchy of state tribunals. . . . [O]ur sphere of superintendence should not extend to state police activities; there the state courts should have the burden, subject only to certiorari by the Supreme Court in the few cases where needed. Consequently the pending legislation to that end . . . seems wise policy.

The bill was passed by the House in both the 84th and 85th Congresses (see 102 CONG. REC. 940 (1956); 104 CONG. REC. 4675 (1958)), but died both times in the Senate. I might say that I do not mean to intimate approval of this particular bill; in fact it was so drafted that it would probably have created more problems than it solved. The point is only that the wide support the bill gained is expressive of the very real and profound concern which the present habeas jurisdiction arouses.

[181] 344 U.S. at 510.

[182] 347 U.S. 556 (1954); see pp. 449–50 *supra.*

being reversed by federal district judges. The crucial issue is the possible damage done to the inner sense of responsibility, to the pride and conscientiousness, of a state judge in doing what is, after all, under the constitutional scheme a part of *his* business: the decision of federal questions properly raised in state litigation. And the problem must be further analyzed in terms of its effect on the integrity and effectiveness of the substantive criminal law of the states. Certainly the complaints on the part of law-enforcement officers that this effect is harmful are vociferous. Some of these complaints may be tendentious or even intellectually dishonest. But the contention — that endless and inordinate delays in the imposition of criminal sanctions, brought about by the indiscriminate reopening of cases on collateral attack, have interfered intolerably with effective enforcement of the criminal law — cannot strike any of us living with the memory of the *Chessman* case as absurd. And thus the very existence of the complaints should, at least, give us pause; the burden of proof, as it were, should be on the proponent of the proposition that *Brown v. Allen* constituted a justified expansion of the habeas jurisdiction.

Finally, the doctrine of *Brown v. Allen* must be assessed in light of the strains put on the federal judicial system itself by the ever increasing flood of habeas petitions from state prisoners.[183] It is, of course, notorious that most of these petitions are frivolous. And as Justice Schaefer has said, that these "have depreciated the writ of habeas corpus cannot be doubted." [184] I have suggested before that this matter should be seen not only in terms of time and money but in terms of husbanding the intellectual and moral energies and intensities of our judges. Let us remember Justice Jackson's charge:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. . . . It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.[185]

---

[183] In fiscal 1950 there were 560 habeas petitions filed by state prisoners in the federal district courts. In 1955 there were 660; in 1958, 755; in 1960, 871; and in 1961, 906. DIR. ADM. OFF. U.S. COURTS ANN. REP. 116 (1960); *id.* at 165 (1961).

[184] Schaefer, *supra* note 179, at 25.

[185] Brown v. Allen, 344 U.S. 443, 536–37 (1953) (concurring in judgments of affirmance but dissenting with respect to habeas jurisdiction).

I do not mean to suggest that the flooding of district court dockets with frivolous habeas cases would be cured if the doctrine of *Brown v. Allen* were overthrown. But the facts compel caution. We should not encourage the flow of petitions by expanding the jurisdiction unless there is a felt need for such expansion.

B. The Right to a Federal Forum

Professor Hart sees as a possible justification for *Brown v. Allen* "the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court, and that, if the Supreme Court in its discretion denies this opportunity on petition for certiorari, it ought to be available on habeas corpus in a federal district court." [186] Professor Reitz assumes that such a "right" exists,[187] and Mr. (now Judge) Thurgood Marshall, testifying about habeas before the Congress, claimed it in extreme terms:

> I do not see how any State can claim the right to determine Federal questions. Federal questions should be determined by the Federal judiciary . . . .[188]

The proposition is not easy to assess. Surely it is plain that there exists no *constitutional* right to have the merits of a federal question determined by a federal constitutional court; this would seem to be implicit in the power of the Congress over the appellate jurisdiction of the Supreme Court and over the very existence of lower federal courts.[189] In civil cases, and in criminal cases which do not eventuate in detention, it is accepted without question that state courts exercising original jurisdiction have full authority to pass on federal questions arising therein, subject only to the discretionary certiorari jurisdiction of the Court; [190] if no such right is thought to be appropriate even for constitu-

[186] Hart, *Foreword*, 73 HARV. L. REV. 84, 106–07 (1959).

[187] Reitz, *Federal Habeas Corpus*, 108 U. PA. L. REV. 461, 464 (1960): "[T]he ultimate right of a state criminal defendant to have a federal court and federal judges pass upon his federal contentions cannot be secured solely by the Supreme Court's power to review state judgments. The sheer volume of cases is enough to preclude it."

[188] *Hearings* 85.

[189] U.S. CONST. art. III. See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 312–40 (1953).

[190] Of course the fact that civil cases may in certain instances be removed entirely to federal courts does not qualify the point that if the state court is left to adjudicate the case, it is allowed to adjudicate all the questions, federal and state, in it, and the litigants have no right to a federal-court disposition of the merits of the federal issues therein.

tional questions in such cases, why should there be one for cases involving imprisonment? Of course it might be argued that constitutional rights in criminal cases have a particular sanctity and importance so as to deserve consideration as of right by a federal court. But again we must be cautious in speaking about these "rights." After all, the "existence" of the right often turns on the narrowest kind of difference arising between judges in highly particularistic assessments of evidence or in judgments as to the proper application of the law to the evidence, and it is hard to see the result as automatically crucial to justice merely because that difference in opinion is formulated as a holding as to constitutional rights. Take Leyra's case, again, as an example: the admissibility of the confessions turned on a subtle, difficult and closely balanced assessment of a highly peculiar set of psychological facts and their legal significance. That the result eventuates, formally, as a ruling of constitutional law about constitutional rights does not logically tell us anything about the underlying importance of the actual issue canvassed.[191] And to revert to the instance previously given, if a federal judge releases a prisoner because his opinion about the credibility of a witness differs from that of the state judge, that episodic difference of opinion cannot be sanctified into a great issue merely because the result is characterized as a ruling as to constitutional rights. Litigation about constitutional rights *may* raise issues of peculiar sensitivity and importance, but will not necessarily do so. The issue may involve simply the application of well-settled and well-understood principles to a highly particular and closely balanced set of facts with no further elaboration of the principles themselves being involved, and review may consequently consist of nothing more than second-guessing the ultimate leap of judgment involved. On the other hand, if the issue in the particular case really is important, it is the very purpose of the certiorari jurisdiction to provide direct Supreme Court review.

In fact the result of the rather wooden differentiation we now

[191] *Leyra* may fruitfully be compared with a case such as Sunal v. Large, 332 U.S. 174 (1947). Formally, the former involved an issue of constitutional law bearing on a constitutional "right." Formally, the latter did not. But I cannot persuade myself that the issue in *Leyra*—whether in fact coercion of a prior confession "infected" later ones—was anywhere near as important, both with respect to the general principles involved and with respect to whether justice was done in the particular case, as the issue in *Sunal*, where the question was whether in a prosecution for failure to submit to the draft the defendant should have been permitted to show that he was unlawfully denied exemption as a minister of religion.

make between constitutional and nonconstitutional questions is not without its ironies. Why is it, for instance, that we go so far to allow relitigation of constitutional questions (even where the particular issue is closely balanced and technical) and yet do not allow any relitigation of the fundamental question of the factual guilt or innocence of the accused? If a state prisoner claims that he confessed after he was interrogated for six hours, not (as the state court found) for four, the law says he may relitigate the issue and, perhaps, gain release as a consequence, even though the evidence of guilt may be overwhelming. But if a defendant is convicted of murder and ten years later another person confesses to the crime, so that we can be absolutely certain that the defendant was innocent all the time, the law says that he must rely on executive clemency. Why? Why should we pay so little attention to finality with respect to constitutional questions when, in general, the law is so unbending with respect to other questions which, nevertheless, may bear as crucially on justice as any constitutional issue in the case?

In any event, even if we assume that issues bearing on constitutional rights are necessarily "important," this does not automatically validate the claim to a federal forum. Why should a federal court hear cases even if they do involve these important rights? The answer is, of course, clear where state courts will not — and are not compelled to — hear them at all or under fair circumstances. But what if a state court has done so? Is there any sense in which the federal courts will, in the abstract, be more "correct" with respect to issues of federal law than state courts? Surely not. There is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse. The federal judge is more "correct" under the present system only because our institutional arrangements make him authoritative. As Justice Jackson pointed out about the Supreme Court itself:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[192]

The Justice's language reminds us that no institutional arrangement, no court, can guarantee a result "correct" in an ultimate

[192] Brown v. Allen, 344 U.S. 443, 540 (1953).

sense. Why, then, is a fair state-court adjudication not a sufficient guarantee (always subject, of course, to the reviewing power of the Supreme Court, made necessary by the need for uniform, authoritative pronouncements of federal law)?

I do not wish to overstate the argument. Important values may be served by having federal judges pass on federal issues. Even in a very general sense a federal judge, operating within a different system and with a differently defined set of institutional responsibilities, may bring to bear on such issues an objectivity, a freshness and insight which may have been denied to the state judge, no matter how conscientious, whose perspective will be subtly shaped by implicit assumptions derived from his responsibilities within the state institutional framework, who stands within *that* system.[193] More particular considerations may be mentioned too. The federal judge is independent by constitutional guarantee; the state judge may not be. The difference surely does bear on conditions necessary for principled judging; it is, at least, a common assumption — perhaps implicit in the Constitution itself — that state courts may be more responsive to local pressures, local prejudices, local politics, than federal judges.[194] And there is, too, the fear that state officials, including judges, will somehow be less sympathetic or generous with respect to federal claims raised by state prisoners than federal judges.

There are, in other words, perfectly sound and honest considerations which do buttress the claim that justice will be better served if a federal constitutional judge is allowed to pass on the merits of federal claims arising in state criminal proceedings. Yet the claim, stated so largely, does not allay doubts. From the beginning it was one of the central features of our federalism that federal law *is* a part of the state law, that deciding

---

[193] See Schaefer, *supra* note 179, at 7:

> The Supreme Court's position at the summit also gives it a different perspective from that of state courts. The horizons of the state court will be relatively limited, whereas the Supreme Court can more effectively contrast the local procedures, perhaps defined by statute, with practice elsewhere throughout the country. The "insulated chambers afforded by the several States" are sometimes an advantage. But they may be too well insulated. Someone once wisely said that the basic trouble with judges is not that they are incompetent or venal beyond other men; it is just that they get used to it. And it is easy indeed to get used to a particular procedural system. What is familiar tends to become what is right.

Though directed to review by the Supreme Court, Justice Schaefer's remarks are, to a more limited extent, applicable to collateral review by federal district courts.

[194] It was, in part, this assumption that led the framers to authorize Congress to create federal courts of original jurisdiction with cognizance over federal-question and diversity cases. See THE FEDERALIST Nos. 80 & 81 (Hamilton).

federal questions is an intrinsic part of the business of state judges.[195] (This is, of course, particularly true — as Mr. Justice Story saw in *Martin v. Hunter's Lessee*[196] — in that federal questions often come up by way of defense to claims arising purely under state law.) Implicit in the whole structure is the need for confidence that the state courts will conscientiously apply to a case the *whole* of the applicable law, including the federal law. One tends, therefore, to resist the notion that our procedural system should be built on the opposite premise, that state-court judgments about federal rights bearing on state cases should be automatically ignored on the basis of rather nebulous and open-ended assumptions about their inadequacy. We must always remember that it is common ground that where there are, in a particular case, allegations with respect to the fairness of the state's process in trying the federal questions, it is clearly open to the federal habeas judge to inquire into *that* issue. In other words, *we already have accorded to federal judges a large power to supervise the fairness of the methods by which the state adjudicates claims of federal right.* The issue, then, is the narrow one whether we should go beyond this, whether the federal court should redetermine the facts and the law in cases where there is no reason to suspect failure on the part of the state to provide a full and conscientious adjudication of the federal claim, and this merely on the general premise that federal courts

[195] I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.

THE FEDERALIST No. 82, at 514 (Lodge ed. 1888) (Hamilton). For other celebrated statements of the point, see Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 340–41 (1816) ("From the very nature of their judicial duties they [state judges] would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States — 'the supreme law of the land.'"); Robb v. Connolly, 111 U.S. 624, 637 (1884) ("upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States").

[196] 14 U.S. (1 Wheat.) 304, 341–42 (1816).

are institutionally capable of providing better justice than the state courts.

Notice, too, that our question — whether on collateral attack federal courts should redetermine federal questions already adjudicated by state courts and subject to Supreme Court review — is quite different from the question whether an entire lawsuit involving federal issues should originally be adjudicated by a federal or state court. I do not, in other words, mean to be taken as questioning the propriety or wisdom of the general federal-question jurisdiction, original or removal, for the vindication of federal rights.[197] Supporting it are the factors already mentioned: the independence of federal judges and their objective perspective with respect to federal claims. In addition, federal-court adjudication provides specialized and knowledgeable tribunals with procedural and remedial tools which may be more effective in enforcing federal rights than those available in the state system.[198] But the calculus which tells us that these advantages justify giving litigants the option to have their lawsuits tried entirely in federal court is surely a different one than where the question is whether a suit which is and must be tried in state court should then be reopened to allow the redetermination of federal questions by a federal judge. The whole point is that in the latter situation we have already made the fundamental decision that we do want the state courts to decide the case.[199] And it is this decision that creates the special problems of waste of resources, strain in federal-state relations and damage to the fabric of criminal law which bear so acutely on the decision whether we should superimpose collateral review on the Supreme Court's direct supervisory jurisdiction.

---

[197] See the illuminating discussion of the federal-question jurisdiction in Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 223–34 (1948). Professor Wechsler suggests that even the original jurisdiction over claims of federal right "in cases where the claim is that state action — legislative or administrative — violates the federal Constitution or conflicts with national law" be abolished where a "plain, speedy and efficient remedy" is available in state court: "application of the federal authority to invalidate the action of a state is best accomplished when the issue finds its way to the Supreme Court after it has had examination in the state courts." (Professor Wechsler excepts from his suggestion suits under the civil rights laws.) *Id.* at 227, 229, 230.

[198] In fact the states could legitimately protest if they had to assume the entire burden and expense of administering justice in cases where the rights and duties involved are wholly creations of federal law.

[199] I do not suppose it would be seriously argued that all state criminal cases in which the defendant raises a federal defense should be made removable to federal court.

There is another aspect of the claim to a "right" to a federal forum which must, however, be taken into account, one which derives not from the notion that federal courts will provide better justice than state courts, but from a feeling that perhaps the structure of the Supreme Court's certiorari jurisdiction creates inequalities in the treatment of state prisoners which are, from the viewpoint at least of those prisoners, unfair. As the Court has so often pointed out, it will not grant certiorari in a case merely because it thinks the case was erroneously decided: the purpose of the jurisdiction is to have the Court

> resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which . . . our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.[200]

The Court thus will often not review an "unimportant" case which, on the merits, might have been reversed because deemed to be "wrong." On the other hand, once it decides to review an "important" case, or one which creates a conflict as to the law, it of course does pass on the merits and correct error. But from the individual prisoner's point of view, whether his case is "important," or was decided contrary to other lower court rulings, is entirely adventitious — whether justice was done in his case does not turn on the character of the issue decided. May we not, then, justify *Brown v. Allen* by seeing it as aimed at *equalizing* the chances of state prisoners for federal review on the merits: where the Supreme Court does not exercise its discretionary power to have a federal question decided "right," a lower federal court on habeas should do so. Why, in short, should a state prisoner's opportunity to have his federal question decided "right" turn on the happenstance of whether he is involved in an "important" litigation?

The argument assumes, of course, that the federal courts have a patent on "right" decisions of federal questions. If we assume that there is, intrinsically, no reason why such federal-court decisions should be more "correct" in an ultimate sense than state-court decisions, if a conscientious state-court litigation of

[200] Chief Justice Vinson, *Work of the Federal Courts*, Address to the American Bar Association, Sept. 7, 1949, printed in 69 Sup. Ct. V, VI. See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1394–1422 (1953).

a federal question without federal review is as likely to come to a just result as a conscientious state-court litigation followed by federal review, the mere fact that institutional considerations compel us to furnish such review in some cases does not automatically mean that justice requires us to furnish it in other cases where these institutional considerations are not operative. If the purpose of the certiorari jurisdiction is to settle conflicts and decide important cases, the mere fact that in the process the Supreme Court (infallible only because it is final) has authority to make decisions which will be *deemed* right does not prove that its jurisdiction is also necessary for the doing of justice, and therefore does not tell us that without federal review the probabilities that the states will do justice are unacceptably low.

What it comes down to, really, is that the state prisoner in an important case does have one *more* chance to persuade a set of judges — and judges, perhaps, of superior objectivity and fresher perspective with respect to matters of federal law — to see the case his way than the prisoner in an unimportant case. And this is a real difference. The sense of inequality created by the discretionary certiorari jurisdiction does seem to me a weighty and important consideration. Whether it serves in itself to justify *Brown v. Allen*, in view of all the problems created, I am not at all sure. But at least it helps rationalize and explain it.

The notion that in *Brown v. Allen* the Supreme Court was creating an alternative to certiorari in order to equalize the opportunities of state prisoners to be heard in federal forums may serve, at least in part, to explain the puzzling holding of the Court recently in *Rogers v. Richmond*.[201] In that case the Court, reviewing an application for federal habeas by a state prisoner, found that at the state trial the judge had incorrectly assumed that under federal law the trustworthiness of a confession is relevant to its admissibility, that he had, in other words, tested the question of admissibility under an erroneous constitutional standard. The Court ruled, further, that the federal court on habeas could not now itself decide the question of admissibility on the basis of the state record, because the trial judge's misconception as to the law may have colored his findings of fact: the state record was, in other words, flawed. Instead of ordering the

[201] 365 U.S. 534 (1961). For an admirable comment on this case see *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 173 (1961). The analysis of the case made in the text was first prompted by suggestions in Mr. Richard Posner's paper cited in note 174 *supra*.

federal habeas court to hold a hearing on the facts surrounding the confession and then to decide the admissibility issue, however, the Court held that the proper mandate is to order the prisoner's release subject to the state's power to grant him a new trial under proper constitutional standards. What the Court did, in other words, was just what it would have done on direct review had it found an improper assumption in the state's adjudication of the confession issue and a record on which it could not itself rule on admissibility — reverse and remand for new trial.

At first glance such a disposition on habeas is baffling. If it is the function of the habeas court in any event to redetermine the federal issue on the merits, it would seem unnecessary to have the state retry the petitioner in order to force it to go through the gesture of ruling on the matter under proper standards of constitutional law — at some stage the federal court will substitute its judgment for the state's in any event. Why should the federal court not do so now? At least in such a case if the habeas court, taking evidence to cure the flaws in the record, finds that the confession was admissible, the state judge's erroneous assumptions of law will be deemed harmless and the detention left untouched. To force the state to retry the petitioner's guilt [202] without first using the habeas court to make sure that in fact there *was* error in admitting the confession seems to be a sacrifice of one of the few advantages the habeas court has over the Supreme Court on direct review — that is, its fact-finding processes, which can illuminate the question whether the state court's erroneous assumption as to the law in fact led to an erroneous disposition of the admissibility question. We may ask further: if Rogers is now retried and the confession judged admissible by the state courts on the basis of an impeccable state record and correct assumptions about the law, and if certiorari is thereafter denied, will a subsequent district court on habeas have the power, not only to redetermine the ultimate question of admissibility but also, in its discretion, to redetermine the facts? If so, *Rogers v. Richmond* surely makes no sense at all.

But assuming that *Rogers* means that the facts relating to a confession must always be found in the state courts, with the

[202] It may be that in a state where the admissibility of confessions is a matter solely for the court, it would be permissible for the state court in a case like Rogers' to redetermine the admissibility of the confession, without retrial of the merits unless it is found that under proper standards the admission of the confession was erroneous. But in a state where the admissibility issue is also passed on by the same jury which determines guilt, such a fragmentation of the case would appear to be impossible.

federal courts, whether on direct review or on habeas, restricted to testing the issue of admissibility on the basis of such facts, the case is explainable — if by no means necessarily justifiable — in terms of a purpose to make the habeas jurisdiction a replica of the Supreme Court's appellate jurisdiction over these cases: the federal district court will review them as if it were a purely appellate court. Such a reading of *Rogers* would also serve to explain the rather puzzling expressions in the Court's opinion that to have the federal habeas court determine the facts surrounding the confession would be inconsistent with the state prisoner's right "to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures" and the state's "interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries." [203] If there is such an interest in state, as against federal, factfinding, it makes sense to satisfy that interest not only in those cases where the Supreme Court provides direct review but also where review is provided by the habeas court.

It may be added that the proposition that *Brown v. Allen* and *Rogers v. Richmond* make sense in terms of providing prisoners whose cases were not reviewed on certiorari an equivalent of such review on habeas corpus is made particularly plausible in the context of these coerced confession cases by the rather peculiar role the Supreme Court itself has assumed in such cases. For even on direct review the Court, in passing on the admissibility of confessions, has departed strikingly from its normal role of authoritative "law-giver"; in fact the Court has been signally unsuccessful in articulating general legal standards or rules for these cases. Instead of "pronouncing" the law, it has exercised a highly particularistic case-by-case supervision, carefully evaluating the particular facts and quite explicitly second-guessing the ultimate judgments of lower courts about admissibility. In effect the Court has seen its *own* function in these cases in terms of making sure that elusive federal standards are "correctly" applied in particular cases. But if this is the proper institutional function of federal supervision in this area (an assumption by no means to be taken for granted), then it becomes plausible to allocate this function, in part at least, to the district courts (thereby relieving the dockets of the Supreme Court); *this* role can be carried out by habeas courts as well as (perhaps even better than) by the

[203] 365 U.S. at 547, 548.

Supreme Court itself. In other words, once we decide (as the Supreme Court seems to have decided) that the purpose of reviewing confession cases in federal courts is, frankly, to check up on the correctness of state courts in particular cases, then, on that assumption, a habeas replica of Supreme Court review not only serves the purpose of equalization but may be justified on functional grounds as well.

On the other hand, the notion that prisoners whose cases the Supreme Court chose not to review should be given an opportunity to have such review in a habeas court is not without its own difficulties. Note that such a system in fact leaves the prisoner on habeas with one overwhelming advantage over the man whose case is given direct review: there is no time limitation on his claim, so that he is free to maneuver the timing of his case to his best advantage, perhaps benefiting by loss of evidence or absence or death of witnesses, which may not only help establish his story with respect to the confession but effectively bar retrial of the case. If, as in *Rogers*, it is determined on federal review that the state judge passed on the admissibility of a confession under an erroneous standard of constitutional law, so as to call for retrial, it may make all the difference to the state whether that judgment comes soon after the state proceeding or five, ten, or twenty years later. If our purpose is to equalize the chances of those whose cases are not reviewed by the Supreme Court, we would surely be justified in imposing a statutory time limit on the writ (running from the time that certiorari is denied) at least in those cases where no other considerations justify delay.[204]

Further, more fundamental questions, could be raised. *Brown v. Allen* creates a district court replica of Supreme Court review only for state litigants in criminal cases, and among these only for those presently under detention.[205] If equality of treatment

[204] Of course I would not suggest imposing such a limit in cases where the whole point of affording a collateral jurisdiction is to enable prisoners to raise federal claims not previously available to them.

[205] This is the case unless we take seriously the astonishing holding of the district court in Goss v. Illinois, 204 F. Supp. 268 (N.D. Ill. 1962). Goss was convicted by Illinois of contempt over his contention that the proscribed conduct was protected as an exercise of free speech by the fourteenth amendment. The conviction was affirmed by the Supreme Court of Illinois on a full consideration of the federal question, and certiorari was denied. The sheriff now holding a "mittimus" for his arrest and confinement, Goss sought a declaratory judgment in the federal district court under the Civil Rights Act, advancing precisely the same claim as was adjudicated on the merits in the state criminal proceeding. The district court held that it had jurisdiction and proceeded to redetermine the

is the aim, should it not hold for civil litigants with federal questions in their cases which the Supreme Court has chosen not to review, and similarly for state criminal defendants who have been fined rather than jailed? Further, what about the claims for equality of treatment of *federal* prisoners (or, indeed, federal litigants) whose petitions for certiorari have been denied? For if the rationale of *Brown v. Allen* is that one has a right to test federal constitutional questions in at least one federal constitutional court, then prisoners convicted by federal courts would plainly not be permitted on collateral attack to relitigate issues previously determined by the committing courts [206] (thus making the category of questions cognizable on collateral attack turn on whether one is held pursuant to state or federal law). Yet these federal prisoners, too, could claim that they are badly treated compared to those who have had their cases reviewed by the Supreme Court.

Finally, do these possible anomalies not raise still a further question? Was it institutionally sound for the Court to assume such a forward role in the complicated and sensitive task of making "as prudent use as we can . . . of the important national resources represented by the federal courts"? [207] Is the creation of a replica for certiorari in the case of state prisoners derivable

---

federal question, deciding in favor of Goss and declaring the mittimus in the hands of the sheriff to be null and void. I take it that the implication of the decision is that every federal constitutional question involving "rights, privileges and immunities" which has been fully adjudicated by state courts in civil or criminal proceedings may be redetermined by a federal district court on collateral attack under the Civil Rights Act and the federal-question jurisdiction.

[206] The Supreme Court has not passed on the question whether *Brown v. Allen* is applicable to petitions for release by federal prisoners brought under the statutory substitute for federal habeas corpus (section 2255 of the Judicial Code, 28 U.S.C. § 2255 (1958)). Nor have the implications of *Brown* for section 2255 cases been discussed by the lower federal courts. The issue was potentially before the Supreme Court in *Hodges v. United States*, where the Court of Appeals for the District of Columbia, without referring to *Brown*, had reaffirmed its pre-*Brown* holding in the *Smith* case (see note 43 *supra*), that "admission [of a coerced confession] alone does not result in the denial of a constitutional guaranty so long as the error is subject to correction on appeal and there is no indication of any deterrent to appeal, such as lack of counsel." Hodges v. United States, 282 F.2d 858, 865 (D.C. Cir. 1960). The Supreme Court, after granting certiorari and hearing argument, dismissed the writ as improvidently granted because the records "conclusively show" that the petitioner was not entitled to relief. 368 U.S. 139 (1961) (with Warren, Black and Douglas, JJ., dissenting). The *Hodges* case is complicated by the fact that the Court may have conceived that what was at issue was not the scope of review of questions previously litigated but the problem of forfeiture where a litigant fails to appeal. See also Jordan v. United States, 352 U.S. 904, *reversing* 233 F.2d 362 (D.C. Cir. 1956).

[207] Wechsler, *supra* note 197, at 218.

even from a generous and open-ended reading of the act of 1867? Was it the business of the Supreme Court under the general mandate of that act to accomplish such a tour de force? In view of the inequalities created by the Court's attempt to equalize, is not mediation here appropriately a task for the Congress?

C. The Problem of Inadequate Supreme Court Supervision

Another line of argument to support the present structure of the habeas corpus jurisdiction rests on the proposition that direct review by the Supreme Court provides inadequate supervision of the state courts' adjudications with respect to state defendants' federal constitutional rights. Of course, whether supervision is "adequate" turns on how one defines the purposes being served by such supervision. Insofar as we are told that habeas corpus is necessary because the overcrowding of the Supreme Court's docket makes it impossible for the Court to consider the merits of every case where a prisoner alleges that he has been deprived of a constitutional right,[208] this is but another version of the assertion that a federal court should decide the merits of every such case. But there does exist another, rather different, problem. It stems from the well-known fact that the typical certiorari petition from a state prisoner, and the record, if any, that accompanies it, are often wholly inadequate to inform the Supreme Court whether the case *should* be reviewed. The petitions, we are told, drafted usually without a lawyer, are frequently unintelligible and rarely clear; certified records are "almost unknown" and

> the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudication or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate.[209]

---

[208] See Reitz, *Federal Habeas Corpus*, 108 U. PA. L. REV. 461, 464 (1960); Letter From Judge Jerome Frank to Congressman Celler, printed in *Hearings* 16.

[209] Opinion of Mr. Justice Frankfurter, Brown v. Allen, 344 U.S. 443, 493–94 (1953).

And these messy and often inscrutable petitions come before the Court in very large numbers indeed.[210]

Effective adjudication by an appellate court is peculiarly dependent on the delineation of issues and focusing of facts which can be provided only by reasonably clear and competent pleadings, records and briefs. Simply put, the root of the trouble in these cases is that the Supreme Court is often unable to tell what happened below. How then can it judge wisely whether the case merits review?

The problem is not too troublesome with respect to many, maybe even the great majority, of these cases. For it will be discovered on habeas corpus that the inadequate record is a symptom of inadequate process, that the prisoner has not been accorded a chance to test his federal claim in a meaningful litigation in the state system, so that the habeas court would be free to turn to the merits under the conventional doctrine of *Frank v. Mangum*. But a different kind of case may be more troubling. Suppose a state prisoner has had a fair opportunity to litigate a federal question in the state system, but no effective record was made and his petition for certiorari does not intelligibly set forth his story, so that the Supreme Court cannot really grasp the import of the case. Certiorari will surely be denied (unless there is some special circumstance to call the Court's attention to the situation). On habeas, once the district judge has satisfied himself as to the availability of corrective process, should review on the merits be denied? The problem here is not whether one should have a federal review of the merits as of right, but whether one should not at least have an honest chance to obtain such review. If the condition of the record precludes the Supreme Court from exercising a considered judgment whether the case deserves review, does not fairness call for deciding it on the merits on habeas corpus — not the least in order that the Supreme Court will have a renewed chance to decide on the basis of the habeas corpus record whether it wishes to review the case? After all, the inability to exercise supervision in such cases not only creates inequality but damages the purposes served by the certiorari jurisdiction itself: if it should turn out that hidden in the cloudy record is a question of importance, or a decision con-

[210] In its 1961 Term the Court disposed of 1,282 cases on the Miscellaneous Docket. This included 712 denials of petitions for certiorari to state courts. See tables I and II, *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 81, 82 (1962).

flicting with other holdings, there should be some way, eventually, to subject it to Supreme Court disposition on the merits.[211]

Thus one certainly could not be scandalized by a decision that habeas should issue in such cases. Indeed, it can be rationalized in terms of *Frank v. Mangum* itself: we could view as part of the corrective process which the state must supply the creation of a record — whether in the form of a transcript, or findings, or opinion — sufficiently explicit and clear so as to give the Supreme Court a fair opportunity to decide whether it wishes to review the case.[212] (The reasoning would not, of course, work for incompetent petitions — but a good record will cure most flaws in the petition.) On the other hand, no such doctrine would in itself validate habeas in a case where the state has afforded corrective process and the Supreme Court has had a meaningful opportunity, on the basis of a full record, to determine whether it wishes to review the case.

D. Some Cautions: The Inadequate State Process

The existence, notorious and oft-exhibited, of grave inadequacies in the states' criminal procedures, both original and post-conviction, makes the federal habeas corpus jurisdiction a present necessity. On this bedrock proposition I agree with the writ's defenders. These inadequacies have been explicitly acknowledged by distinguished state judges, including a committee of the Con-

[211] Compare the suggestion made by Judge Wyzanski in Geagan v. Gavin, 181 F. Supp. 466, 469 (D. Mass. 1960), *aff'd*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962):

> The Supreme Court [in *Brown v. Allen*] recognized that if procedural and substantive federal constitutional questions with respect to state cases could be reviewed only upon the often skimpy state records . . . filed in the Supreme Court of the United States those federal constitutional questions would frequently receive inadequate attention. . . . To expand the role of federal district judges in habeas corpus cases made it possible for the Supreme Court to treat such district judges virtually as its delegates or masters to make such findings and rulings as were necessary, all subject to ultimate review by federal courts of appeal and the Supreme Court . . . .

And see the suggestion of Judge Frank in his letter to Congressman Celler, *supra* note 208, that if the habeas jurisdiction is to be restricted, the Congress should provide that in cases of petitions for certiorari from state courts, the Supreme Court be permitted to "refer the matter to the appropriate Federal district court to hear and report the facts, and recommend legal conclusions . . . ."

[212] It is interesting to note that the Senate and House reports in the 85th Congress accompanying the proposed habeas corpus statute which would have denied use of the writ where the federal question was determined or still could be determined in the state courts (see note 180 *supra*) both stated that it is a purpose of the bill to retain the jurisdiction where it "is not possible to make a State court record which could serve as a basis for review by the Supreme Court of the United States." S. REP. No. 2228, 85th Cong., 2d Sess. 3 (1958); H.R. REP. No. 1293, 85th Cong., 2d Sess. 3 (1958).

ference of Chief Justices, whose report, recommending many improvements in state procedures, states that

> responsibility for the unfortunate conditions prevailing in habeas corpus litigation rests upon the State as well as upon the Federal judicial systems, and . . . the evils presently prevailing can be reduced substantially by action taken at the State level.[213]

If any doubt remains as to this point, it should be allayed by Professor Curtis Reitz's admirable article in the *University of Pennsylvania Law Review*,[214] in which he reports on a painstaking canvass of some thirty-five cases from a ten-year period involving state prisoners in which habeas corpus was ultimately granted by a federal court. These cases show beyond a doubt that the states frequently fail to provide a fair and rational setting for the litigation of claims of federal constitutional right, so that habeas turns out to be the only available remedy for the vindication of such claims.

What is, however, so hard for me to grasp is why the existence of habeas to cure failures of state process justifies its present reach to cases where there has not been such a failure of process. Inadequacies of state procedure do not validate the *status quo*. The issue is not whether the jurisdiction should be abolished but whether its expansion to cases where there is no reasoned basis to suspect failure to provide a rational trial of the federal question, before an unbiased tribunal and through fair procedures, is justified. Professor Reitz's thirty-five cases show that there is *a* need for habeas corpus, but do not satisfy me that there was a need for it in all thirty-five, do not satisfy me that it was needed in *Leyra* (or *Brown* itself), where the state provided a full trial of the federal question and opportunity for direct Supreme Court review on a record so impeccable that the habeas court based its own judgment on it.

In fact, if the principal problem is inadequacy of state procedures for the vindication of federal constitutional rights, and the principal aim is the cure of these inadequacies,[215] then *Brown*

[213] Report of the Special Committee on Habeas Corpus to the Conference of Chief Justices, June 1953, printed in *Hearings* 92–93. The report and its appendix recommended many improvements in state criminal procedure, both in trial courts and in postconviction proceedings, see *id.* at 93, 103–08, which were unanimously approved by the Conference.

[214] Reitz, *Federal Habeas Corpus*, 108 U. PA. L. REV. 461 (1960).

[215] Both Mr. Justice Brennan and Justice Schaefer have argued that federal habeas serves to stimulate the states to devise adequate postconviction procedures. Brennan, *supra* note 178, at 441; Schaefer, *supra* note 179, at 24. This would of course be true insofar as the writ does probe the question of adequate

v. Allen would seem to be a step in the wrong direction. In effect it tells the states that not much will turn on whether or not they provide corrective process: no matter how conscientiously and fairly they apply themselves to the consideration of the merits of federal claims, whether presented at trial or on postconviction process, they will nevertheless automatically be second-guessed by federal district courts as to their conclusions of law and, possibly, factfindings too. Furthermore, the institutional needs advanced to justify this doctrine are likely to be most unpersuasive to the very group which has the power and the responsibility to improve and reform state procedure: state judges, legislators, and law-enforcement personnel. I do not, therefore, see the present system as conducive to state procedural reform. It was the "corrective process" doctrine of *Frank v. Mangum* which really created the stimulus for such reform; *Brown v. Allen* has merely blunted that stimulus.

IV. Conclusion: The Role of Discretion

What should we conclude about *Brown v. Allen*? I do not pretend to find the answer easy, nor the claims for federal supervision unweighty. Their strength derives from our own historical experience. The last twenty-five years have seen rapid and tremendous expansion and movement in the substantive doctrines derived from the due process clause which limit the power of the states in their administration of criminal justice. It is natural that, in an era of such rapid growth in the substantive federal law, there should be a demand that the remedial system keep pace, that federal supervision be expanded to make sure that the states receive the new doctrines hospitably. And there is, of course, the underlying suspicion that in fact the states have not done so, that if we do not keep a sharp eye out, federal rights will be subtly eroded, verbal respect paid to the principles but the substance robbed of meaning through astringent and unsympathetic application. (The suspicion is surely fed by the knowledge that a substantial proportion of those accused of crime, particularly in the Southern States, will be Negroes.)

Yet we must remember that the remedial system we construct must be tailored for tomorrow as well as today. It is not fanciful to suppose that the law of due process for criminal defendants

state process; but how conceivably does it justify use of the writ where there has been, by hypothesis, full corrective process?

will, in the foreseeable future, reach a resting point, will become stabilized. *Wolf v. Colorado* is already overruled; [216] *Betts v. Brady* will be reargued shortly [217] and may not be far behind. There must soon come a time in this field when it will be felt that the great battles have been won, that we should return from molar to molecular motion. And if there is to be a stabilization of the law, we should be wary about constructing a remedial system premised on unceasing and revolutionary change.

Similarly, I resist the notion that sound remedial institutions can be built on the premise that state judges are not in sympathy with federal law. Again we must think in terms of tomorrow as well as today. Hopefully we will reach the day when the suspicion will no longer be justified that state judges — especially Southern state judges — evade their responsibilities by giving only the appearance of fairness in their rulings as to state defendants' federal rights. The unification of the country is, after all, in progress; the day when Southern justice is like Northern justice, justice for the Negro like justice for the white, is no longer out of sight. And our remedial system ought to take account of this motion.

The crucial point, it is worth reiterating, is that the question before us is *not* whether federal supervision of the states' administration of criminal justice is necessary. The question is whether such supervision is inadequate if limited to the very sweeping powers of the Supreme Court on direct review, and of the district courts on habeas to inquire into the fairness of the state's process. Is *more* than this needed? Must there be further supervision if the Supreme Court has had a chance to review the case and has chosen not to, and if the federal district court finds that the state has afforded fair process for the litigation of federal rights?

True, it will be argued that such supervision cannot ensure that in each case the federal right has in fact been conscientiously protected; it does not guard against cases where there has been the appearance of fairness but not its inner essence. But is it so clear that it is the function of judicial review to give us this ultimate guarantee? *Can* the legal system assure us in any event of this ultimate inner conscientiousness? And may one not speculate that perhaps conscientiousness is a by-product not only of

[216] Mapp v. Ohio, 367 U.S. 643 (1961), *overruling* Wolf v. Colorado, 338 U.S. 25 (1949).

[217] In *Gideon v. Cochran*, the Supreme Court granted certiorari to the Supreme Court of Florida and asked counsel to discuss this question: "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?" 370 U.S. 908 (1962).

supervision from above but also of responsibility, that it is not the best way to assure honest respect for federal law to relieve the state judge of responsibility?

In sum, it seems to me that the proper verdict on the case made for *Brown v. Allen* is "not proven" — and I do think the burden of proof is on the proponents. I rest partly on the federalist premise, that the abrasions and conflicts created by federal interference with the states' administration of criminal justice should be avoided in the absence of felt need, where the institutional necessities are as dubious as they seem to me to be in this case. I also reason from the very real claims which the need for finality and repose seem to me to make on the criminal process, claims particularly strong in view of what I consider to be philosophically faulty premises about justice which are often at the heart of the demand that we repeat inquiry endlessly to make sure that no mistake has been made. And, finally, *Brown v. Allen* seems to me to be unresponsive to (and even subversive of) what should be our central aim: encouraging reform and improvement in state criminal procedures.

Nevertheless, I cannot pretend that the case the other way is weightless. Our traditional doctrines of judicial review do rest on the premise of good-faith judging. Whenever good faith is questioned, strain is put on the ordinary rules of review; and maybe untraditional and extraordinary accommodations should therefore be made. There is surely appeal in the notion, and perhaps it makes sense at a time when there still is a justified suspicion and distrust of state-court rulings as to federal constitutional rights, to have a jurisdiction with a large and roving commission "to prevent a complete miscarriage of justice"; [218] maybe

> it is well that a writ the historic purpose of which is to furnish "a swift and imperative remedy in all cases of illegal restraint" . . . should be left fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines.[219]

Of course we should not forget that there is already in existence an instrument in the administration of criminal justice whose very purpose is to assure relief where there has been a miscarriage of justice: the power of executive clemency supposedly already

[218] Learned Hand, J., in United States *ex rel.* Kulick v. Kennedy, 157 F.2d 811, 813 (2d Cir. 1946), *rev'd sub nom.* Sunal v. Large, 332 U.S. 174 (1947).

[219] Frankfurter, J., dissenting in Sunal v. Large, 332 U.S. 174, 187 (1947). See also Rutledge, J., dissenting in Ahrens v. Clark, 335 U.S. 188, 193 (1948).

gives us a roving commission, usually free of technicalities and jurisdictional limitations, to seek out and right injustice. In fact it is striking how often we lose sight of the pardon as an integral part of the administration of criminal justice; in many cases where judicial relief is sought by way of collateral attack, the question that leaps to mind is: why is not pardon the obvious and sound solution here? Why wasn't executive clemency exercised? Surely it is a sorry thing that in so many states the pardoning power has been allowed to atrophy, and is reserved for highly extraordinary (usually death) cases. And again we have the striking phenomenon that the states' own failure to provide, through the pardon, an effective instrument of justice has prompted a search for a federal substitute, in this case in the form of habeas corpus.

In any event, *Brown v. Allen* may be justified in terms of a need for an extraordinary roving jurisdiction to make sure once more that there has not been, with respect to constitutional rights, a miscarriage of justice; perhaps we do need to grant federal courts the power to redetermine the merits to assure that covert unfairness does not lurk behind the appearance of fairness. But if this is the theory of the jurisdiction, then what is called for, I submit, is a decision, based on all the facts, whether justice really does call for release in the particular case. Suppose, for instance, that a federal district judge finds (1) that the admissibility of a confession has been fully and fairly litigated in the state courts, on an impeccable record giving the Supreme Court a full opportunity to review if it so chooses; (2) that on the merits he disagrees with the state judges as to admissibility; and (3) that the evidence in the record apart from the confession, or, indeed, the trustworthiness of the confession itself, makes it absolutely clear that the defendant was guilty as charged. It is (today's) hornbook law that on direct review there would be automatic reversal, that neither the trustworthiness of the confession nor the other evidence of guilt can cure the error; let us, further, assume the soundness of this doctrine. But is it absolutely clear that the reasons which have moved us to so astringent a rule of law on the merits, as it were, should necessarily apply in a jurisdiction which is concededly extraordinary, the existence of which is justified by the need to make sure once more that justice in the particular case has indeed been done? Remember that I assume that full corrective process has been afforded in the original litigation: the defendant has had a fair opportunity to establish his federal claim. We now give him one more

chance, in the fear that justice has miscarried. But has it miscarried if he has had one meaningful go-around and the district judge can be morally assured that he was guilty? I acknowledge that the purpose of the rule of automatic reversal is to deter uncivilized police behavior and to keep the courts' own processes unsullied; but the claims for deterrence do not strike me as so inexorable that we must honor them in cases where our fundamental purpose, in fact our justification for inquiry, is, after all, to do our best by the defendant; nor can I take too seriously the idea that the integrity of the legal process will be sullied if a court in effect finds that for purposes of the extraordinary habeas jurisdiction the admission of the confession — previously tested by fair process — was harmless error.[220]

I continue to resist, in sum, the notion that the inquiry on habeas should be mere repetition, an exact replica, of what has gone before. I do not see that as institutionally justified. If we wish to have an ultimate recourse, if we want to grant the federal courts a roving extraordinary commission to undo injustice, then, it sems to me, all the factors which bear on justice should be put on the scales. If *Brown v. Allen* is to remain the law, it should be modified to make clear that where a federal constitu-

[220] The approach I suggest might have a further value — it might be a start to the solution of a problem of collateral attack which I have not discussed at all and which needs separate and rounded treatment in an independent article. This is the baffling problem of the case where there has been a change or reversal in constitutional doctrine between the time of conviction and the time when habeas is sought. If a man was convicted, under the regime of *Wolf v. Colorado,* with the aid of evidence illegally obtained from him, is his detention "unlawful" for purposes of habeas corpus now that *Wolf* has been overruled? If *Betts v. Brady* dies, will state prisoners who under the doctrine of that case were not entitled to counsel be deemed to be illegally detained? Surely it would be wholly impossible to administer a doctrine which extended *Brown v. Allen* by telling the states not only that it is their duty under the due process clause to decide every federal question "right" but that it is their further duty to decide it "right" in accordance not only with today's law but that of tomorrow too. On the other hand, a rigid rule that collateral attack is never proper where there has been a change in the applicable federal constitutional doctrine will often offend our sense of justice. May we not find an acceptable accommodation by according the district judge a large discretion to determine whether justice in the individual case would be served by release? This would involve not only an assessment of the guilt or innocence of the prisoner but also the question whether the new constitutional doctrine has as its principal purpose the safeguarding of the innocent or rather a different social purpose: *i.e.*, deterrence of unlawful police conduct.

The "retroactive" nature of the ruling in *Mapp v. Ohio* has been discussed recently in two admirable articles: Traynor, *Mapp v. Ohio at Large in the Fifty States,* [1962] DUKE L.J. 319; Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio,* 110 U. PA. L. REV. 650 (1962).

tional question has been fully canvassed by fair state process, and meaningfully submitted for possible Supreme Court review, then the federal district judge on habeas, though entitled to redetermine the merits, has a large discretion to decide whether the federal error, if any, was prejudicial, whether justice will be served by releasing the prisoner, taking into account in the largest sense all the relevant factors, including his conscientious appraisal of the guilt or innocence of the accused on the basis of the full record before him.