COMMENTS

THE CONSTITUTION OFFERS NO PROTECTION WITHOUT RECOURSE TO A REMEDY: WHY CONSTITUTIONAL ERRORS IN A POSTCONVICTION PROCEEDING SHOULD BE COGNIZABLE IN A PETITION FOR HABEAS CORPUS

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I. INTRODUCTION

Our legal system is replete with normative maxims but rarely absolute principles. Take for example Chief Justice Marshall's famous declaration in *Marbury v. Madison*: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[1] This renowned phrase is seemingly an absolute principal, yet in practice, it is at best a normative maxim. Under prevailing law, state prisoners ensconced in their state habeas proceedings are held in exactly this position. They have vested rights protected by the Federal Constitution, which could be violated, and yet they seem to have no remedy available if and when such violations occur. The writ of habeas corpus is the only logical (and available) avenue to address these violations even if its use may be contrary to the prevailing legal perspective on the Great Writ.[2]

Is a writ of habeas corpus the vehicle to challenge constitutional errors in a postconviction proceeding? This question is largely unan-

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1 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

2 *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 153 (2001) (discussing the narrowing of the scope of habeas corpus in the past fifteen years); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 848 (3d ed. 1999) (discussing the Antiterrorism and Effective Death Penalty Act of 1996 and its effective narrowing of the scope of habeas corpus relief).

swered, ignored by the Supreme Court and largely considered a dead issue due to a twenty-five-year-old federal circuit split between a heavily favored majority opinion[3] held by five circuits and a minority opinion announced by the First Circuit.[4] An initial answer to this question would be no. The passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) effectively limited the scope of habeas corpus.[5] This development, combined with the agreement of the majority of the circuits on this issue, strongly suggests that the prevailing attitude is no.

With *Pennsylvania v. Finley*, the Supreme Court sent a message that certain constitutional rights (such as the Sixth Amendment right to counsel) are not automatically extended to prisoners in postconviction proceedings.[6] The Court extended this ruling in its hotly contested 5-4 decision of *Murray v. Giarratano*,[7] stating "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in noncapital cases."[8] With this decision, our question becomes more complex. Now it is unclear not just whether a writ of habeas can be used to challenge constitutional violations occurring during a postconviction proceeding, but *also* whether prisoners have constitutional protections in these proceedings at all. As a practical matter, if a prisoner's due process rights were violated in a state habeas proceeding, what recourse would he have?

For prisoners facing capital punishment, it is not fundamentally fair for their remaining avenue to a new trial to be *just as* constitutionally protected as a civil suit for defamation. Yet, this would seem to be the case. Can the minimal protection of due process really be all the protection offered by the Federal Constitution to capital prisoners? The answer to this question lies within the Supreme Court's

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3 *See* Williams v. Missouri, 640 F.2d 140 (8th Cir. 1981), *cert. denied*, 451 U.S. 990 (1981); *see also* Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986); Vail v. Procunier, 747 F.2d 277 (5th Cir. 1984); Dankert v. Wharton, 733 F.2d 1537 (11th Cir. 1984), *cert. denied*, 469 U.S. 1020 (1984); Lumbert v. Finley, 735 F.2d 239 (7th Cir. 1984); Mitchell v. Wyrick, 727 F.2d 773 (8th Cir. 1984), *cert. denied*, 469 U.S. 823 (1984); Gibson v. Jackson, 578 F.2d 1045 (5th Cir. 1978), *cert. denied*, 439 U.S. 1119 (1979); Rheuark v. Shaw, 547 F.2d 1257 (5th Cir. 1977); Qualls v. Shaw, 535 F.2d 318 (5th Cir. 1976).

4 Dickerson v. Walsh, 750 F.2d 150 (1st Cir. 1984) (holding habeas corpus is the proper vehicle for an equal protection challenge to a state postconviction review process).

5 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) [hereinafter AEDPA] (codified in scattered sections of 28 U.S.C.).

6 481 U.S. 551, 557 (1987) ("States have no obligation to provide this avenue of [postconviction] relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well." (citation omitted)).

7 492 U.S. 1 (1989).

8 *Id.* at 10.

decisions in the past ten years and also within the postconviction statutes created and passed by states, the statutes' subsequent legislative history, and the historical purpose and basis of the great writ of habeas corpus.

This topic is difficult to explore because there is no instant case to examine, no particularly egregious example of the constitutional violations envisioned and the consequent barring of avenues for redress. But if some constitutional rights must exist in the postconviction setting, they must be cognizable in habeas jurisprudence because it is the only vehicle available to protect prisoners (especially those facing the death penalty) from constitutionally defective state postconviction proceedings.

This Comment is not an attempt to argue that a constitutional error in a postconviction proceeding should invalidate the underlying conviction.[9] While some might balk at the question of what, if any, additional constitutional protections the states or the Constitution should afford capital defendants, everyone in the United States is afforded due process and equal protection under the Constitution, regardless of one's crime.[10] Those who are sentenced to death, the most heinous punishment meted out in our system of justice, should be granted opportunities to address allegedly unconstitutional state procedures barring them from pursuing exoneration or commuted life sentences.

Prisoners are entitled to constitutional rights throughout their criminal proceedings, at pre-trial, trial, and post-trial.[11] Remedies for the violation of a prisoner's constitutional rights while in custody form the core function of the Great Writ. Without the use of the writ of habeas corpus, these constitutional violations are unreachable, irremediable; the prisoners are stuck, silenced. As Justice Holmes said,

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9 The conviction should be invalidated only in those situations in which the constitutional error in the postconviction proceeding blocked a relevant claim resulting from the underlying criminal procedure. If, for example, the judge's bias in the state postconviction proceeding estopped a prisoner from bringing a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), then the remedy would be the reversal of the underlying conviction. *See* the hypotheticals discussed *infra* notes 115–17 and accompanying text.

10 For example, the extension of the Eighth Amendment's protection should "not end once a defendant has been validly convicted and sentenced." Herrera v. Collins, 506 U.S. 390, 432 (1993) (Blackmun, J., dissenting).

11 *See* Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974) ("[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. . . . Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.").

"what we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."[12] Constitutional errors in post-conviction proceedings should therefore be cognizable as the basis for a writ of habeas corpus.

Part II of this Comment will briefly summarize the history of habeas in America and its use by state prisoners in federal courts (a more modern application of the writ than originally envisioned). Part III will examine the twenty-five-year-old circuit split, dissecting the legal basis for both the majority and the minority opinions. Part IV will scrutinize the state statutes directing collateral review, arguing that these statutes, in many cases, are criminal in nature and therefore constitutionally defective because of the limited protections that they grant petitioners. Part V will explicate the legal basis for recognizing and providing avenues of relief using the writ of habeas corpus for constitutional violations that occur in state collateral review. Finally, Part VI will propose possible solutions to rectify these unconstitutional deprivations of due process as well as address residual issues of comity and finality of criminal sentences.

II. THE HISTORICAL EXPANSION OF THE GREAT WRIT

The Writ of Habeas Corpus has an illustrious history. Known as "the most celebrated writ in English law,"[13] it is mentioned explicitly in the United States Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[14]

The traditional purpose of habeas corpus is "an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody."[15] The constitutional provision's language is a bit odd. It does not grant the privilege of the writ or define its scope—this is left to the statutory devices of Congress. Instead, it merely prohibits its suspension.[16]

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12 Moore v. Dempsey, 261 U.S. 86, 87–88 (1923).

13 3 WILLIAM BLACKSTONE, COMMENTARIES *129. Federal habeas corpus is the focus of this Comment, and it is therefore concerned only with the writ of habeas corpus, known more formally as habeas corpus *ad subjiciendum*. For more information on the different and varied uses of the many types of writs of habeas corpus in England, see WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980).

14 U.S. CONST. art. 1, § 9, cl. 2.

15 Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

16 Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752 (1987).

Originally, the purpose of the prohibition in the Constitution was to protect federal prisoners from a tyrannical centralized power, authorizing the states to grant the writ.[17] The scope of the writ was conditioned upon statutory authorization, and so the Judiciary Act of 1789 granted authority to federal courts to grant the writ for federal prisoners.[18] But it was not until after the Civil War when Congress explicitly granted federal courts the ability to issue writs of habeas corpus for state prisoners.[19]

Concerned by what they saw as the Southern states' resistance to the implementation of the Reconstruction Act (specifically, the act's abolishment of slavery), Congress enacted the Acts of February 5, 1867,[20] granting jurisdiction to federal courts to grant writs of habeas corpus for state prisoners. The purpose of this grant of jurisdiction was to protect former slaves from unconstitutional confinement;[21] yet until 1915, these uses of the writ were largely unrecognizable to modern eyes. In *Frank v. Mangum*,[22] the Court spoke of the writ in the broad terms envisioned in the Acts of 1867, explaining its availability whenever a state's judicial system "deprive[s] any person of life, liberty, or property without due process of law."[23] This recognition of the scope of the writ was groundbreaking, but it was not until the incorporation doctrine and the application of the Bill of Rights to the States that the writ of habeas corpus was actually used to vindicate the constitutional rights of state prisoners.

Beginning in the late 1930s, the Supreme Court identified sections of the Bill of Rights which applied to the states.[24] By the end of the 1960s, most of the amendments in the Bill of Rights dealing with criminal procedure were applied to both the states and the federal

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17 DUKER, *supra* note 13, 126–56.

18 *See* FREEDMAN, *supra* note 2, at 10–46 (concluding that federal courts were always authorized to grant habeas corpus to state prisoners, regardless of the Supreme Court's decision in *Ex parte Dorr*, 44 U.S. (3 How.) 103 (1845)).

19 *Id.*

20 Acts of February 5, 1867, chs. 27–28, 14 Stat. 385 (codified as 28 U.S.C. §§ 2241–2255 (2000)). The second Act provided "[t]hat 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 [C]onstitution, or of any treaty or law of the United States." *Id.*

21 Chemerinsky, *supra* note 16, at 753.

22 237 U.S. 309 (1915) (requiring only a notice and a hearing before a court of competent jurisdiction for criminal state proceedings to meet the requirements of due process).

23 *Id.* at 311.

24 *See* Palko v. Connecticut, 302 U.S. 319, 326–27 (1937) (explaining the premise behind the incorporation doctrine).

government.[25] The decisions of the Warren Court were largely responsible for the resulting widening of the scope of habeas corpus.[26] Definitive identification of the cause of this enlargement is difficult to ascertain, but the effect of the civil rights movement combined with the clear and convincing evidence of the discriminatory, unconstitutional actions of many Southern state courts towards African Americans indicates that, as after the Civil War, the Supreme Court used habeas corpus "as a vehicle to uphold and advance civil rights."[27]

The Warren Court enlarged the category of claims cognizable under habeas as violations of the Bill of Rights applied to the states.[28] Seemingly, the Court espoused Justice Holmes's view of when use of the writ was appropriate: "We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted."[29] This attitude towards the writ was short-lived, reined in by both Congress and future Courts.[30]

In subsequent years, under both the Burger and Rehnquist Courts, the attitude towards habeas corpus was markedly different.[31] Political conservatives had long alleged that the actual use of the writ "permitted guilty defendants to secure their release from prison,"[32] not to assert and protect constitutional rights. The Burger Court, and even more so, the Rehnquist Court, were concerned with other effects of the enlarged scope of the writ of habeas. Issues of finality of convictions, comity between state and federal courts,[33] and the costs of litigating habeas corpus were paramount for these courts.[34] These

25 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring states to grant the Sixth Amendment right to counsel to criminal defendants); Mapp v. Ohio, 367 U.S. 643 (1961) (commanding the states to grant the Fourth Amendment right to be free from unreasonable search and seizure to its citizens).

26 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (requiring states to give warnings of the right against self-incrimination to possible defendants).

27 CHEMERINSKY, *supra* note 2, at 847.

28 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4.

29 Fay v. Noia, 372 U.S. 391, 411 (1963) (quoting Frank v. Magnum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting)).

30 HERTZ & LIEBMAN, *supra* note 28, § 2.4.

31 *See* Chemerinsky, *supra* note 16, at 761 (identifying the distinctions between the Warren and Burger Courts' jurisprudence regarding habeas corpus).

32 *Id.*

33 For an exhaustive examination of the issues of comity, see J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895 (1966).

34 *See* Teague v. Lane, 489 U.S. 288, 309–10 (1989) (issuing a determinative rubric for dealing with retroactive decisions of the Supreme Court in light of the expensive costs of litigating habeas corpus claims).

judicial concerns were echoed by the federal legislature which significantly narrowed the scope of habeas corpus and limited the cognizability of certain claims with the passage in 1996 of AEDPA.[35]

The habeas corpus landscape changed after the passage of AEDPA. The Act imposed a statute of limitations of one year on habeas petitions,[36] generally prohibited successive habeas petitions, and narrowed the scope of the review,[37] changing the standard under which the federal district courts were to review the state decisions (previously it was de novo) to one of extreme deference.[38] While the ramifications of these changes are still not fully known, the passage was clearly "a dramatic restriction on the scope of the writ of habeas corpus."[39] AEDPA narrowed the jurisdictional scope of habeas, but it was largely quiet (with a few exceptions) on the question of the subject matter scope of the writ itself.

AEDPA codified much of the current Court's jurisprudence on habeas corpus. In one of the few exceptions to its focus on jurisdiction, AEDPA statutorily prohibited a specific type of claim as the basis for a habeas petition. Section 2254(i) specifically denies the cognizability of a Sixth Amendment claim based on ineffectiveness or incompetence of counsel in the collateral postconviction proceedings.[40] Directly echoing the Supreme Court's holding in *Murray v. Giarratano*,[41] which extended the Court's holding in *Pennsylvania v. Finley*[42] to capital as well as non-capital cases, AEDPA effectively closed off this potential subject matter. In contrast, the statute was silent as to the cognizability of other constitutional violations in postconviction proceedings.

The statute does provide a catchall exception which *could* apply to constitutional errors in postconviction proceedings. Section 2254

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35 AEDPA (codified in scattered sections of 28 U.S.C.).

36 28 U.S.C. § 2244 (2000). However, there are certain provisions that provide for a statute of limitations of only 180 days if the state can "opt-in." *See id.* §§ 2261–2263.

37 *Id.* § 2254.

38 *Id.* § 2254(d). The new standard required the denial of a habeas petition unless the state court adjudication of the underlying claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1). However, if the petitioner had not been able to raise the claim in state court for a number of different reasons, then review reverted to de novo.

39 CHEMERINSKY, *supra* note 2, at 849.

40 28 U.S.C. § 2254(i).

41 492 U.S. 1, 7 (1989) ("[N]either the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of 'meaningful access' required the State to appoint counsel for indigent prisoners seeking state postconviction relief.").

42 481 U.S. 551 (1987).

(b)(1)(B)(ii) states: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . circumstances exist that render such process ineffective to protect the rights of the applicant."[43] Whether these rights include constitutional rights of the prisoners *in* their postconviction proceedings is up for debate. The Court itself has been silent on this matter. As it stands, our inquiry into this matter is guided only by a twenty-five-year-old circuit split.

III. FINDING THE RIGHT AVENUE FOR RELIEF: THE CIRCUIT SPLIT

Whether a constitutional error in state postconviction proceedings can be cognizable as the basis for a writ of habeas corpus begs the question: If the traditional scope of habeas corpus is invoked by the government illegally retaining custody of a person, then how does a postconviction state proceeding fit into this scheme? State collateral proceedings are "civil action[s] designed to overturn a presumptively valid criminal judgment."[44] Yet at the same time, "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death."[45] Further, "[s]tate postconviction proceedings also are the cornerstone for all subsequent attempts to obtain collateral relief. . . . [as the state court's determinations] may control the scope of a federal court's review of a subsequent petition for a writ of habeas corpus . . . ."[46]

Hypothetically, a grave constitutional error occurs in a postconviction proceeding when the judge is clearly and obviously biased against the defendant. According to a majority of the circuit courts of appeals, the defendant has no recourse to challenge these proceedings.[47] One circuit alone recognized the irrationality of such decisions.

A. *In the Minority: The First Circuit and* Dickerson v. Walsh

In *Dickerson v. Walsh*, the First Circuit held a petitioner's claim of constitutionally deficient postconviction proceedings cognizable as

43 28 U.S.C. § 2254(b)(1)(B)(ii).

44 *Murray*, 492 U.S. at 13 (O'Connor, J., concurring).

45 *Id.* at 14 (Kennedy, J., concurring).

46 *Id.* at 26 (Stevens, J., dissenting).

47 See *supra* note 3 for a list of circuits denying relief and cognizability for errors in a postconviction proceeding.

the basis for a habeas petition.[48] The petitioner alleged that the Massachusetts postconviction review procedure violated his equal protection rights under the Fourteenth Amendment because it treated him, as a capital defendant, differently than a non-capital defendant. Petitioner had to seek leave for access to the postconviction procedure from a Massachusetts Court of Appeals, whereas non-capital defendants received access by right.[49] The First Circuit noted that "a number of courts have refused to consider attacks on postconviction proceedings by habeas petitions on the grounds that errors or defects in a state post-conviction proceeding do not *ipso facto* render a detention unlawful and, therefore, the petitioner is not entitled to habeas corpus relief."[50] However, the First Circuit opinion continued: "[T]his position is appealing at first blush, [but] on analysis we find that it is neither consonant with basic policies of habeas corpus relief nor Supreme Court rulings."[51] The opinion spoke of the need for a remedy, recognizing that the Commonwealth of Massachusetts acknowledged this need as well in its oral argument, but advocated instead for a suit under 42 U.S.C. § 1983.[52]

Relying on *Preiser v. Rodriguez*,[53] the First Circuit based its decision for cognizability on habeas as opposed to a § 1983 suit for two reasons. First, the Supreme Court held in *Preiser* that, "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus."[54] Thus, the category of claims cognizable on habeas corpus is determined by the underlying reason for the claim and the remedy hoped to correct the infirmity.

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48 750 F.2d 150 (1st Cir. 1984).

49 *Id.* at 151.

50 *Id.* at 152–53.

51 *Id.* at 153.

52 *Id.* at 153, 153 n.6. The statute, 42 U.S.C. § 1983, in its present form provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

53 411 U.S. 475 (1973).

54 *Id.* at 500.

The subject matter jurisdiction of the federal court is determined by these underlying purposes of the petition. Because Dickerson challenged the very fact of his physical imprisonment, regardless of where he was in the appeal process, his claim fell within the traditional subject matter of the writ of habeas corpus and therefore was entitled to its protection.

Second, the First Circuit acknowledged that Massachusetts "has a profound interest in its own criminal procedure and, if it is defective, ought to be given the first opportunity to correct it."[55] According to *Preiser*, federal habeas corpus "serves the important function of allowing the State to deal with these . . . problems on its own, while preserving for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress."[56] Given these strong considerations of comity, the judgment over a state's own internal criminal process requires an instrument which takes into account these issues.

There is no exhaustion requirement for § 1983.[57] The state court system may be bypassed immediately and the claim brought only before a federal court. Thus, out of respect for a state's desire to be self-corrective, the First Circuit determined that habeas corpus was the appropriate vehicle for Dickerson's claim.[58]

B. Categorical Denial: The Majority of the Circuits and Their Erroneous Reasoning

The majority of the circuits, in contrast, categorically denied these claims as cognizable. These courts followed the reasoning expressed in *Williams v. Missouri*,[59] which specified that "the state's post-conviction remedy procedure cannot serve as a basis for setting aside

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55 *Dickerson*, 750 F.2d at 153–54.

56 *Preiser*, 411 U.S. at 498.

57 For an exhaustive, but at times, erroneous discussion of the distinctions between habeas corpus and § 1983, see Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85 (1988).

58 However, this claim was dismissed because the "the petitioner's state remedies" had not been exhausted. *Dickerson*, 750 F.2d at 154.

59 640 F.2d 140 (8th Cir. 1981). See *supra* note 3 for a full list of the circuits which represent the majority view on this issue. I have chosen *Williams v. Missouri* to represent this view as it is the most quoted of the opinions, owing to its quotable phrase "Errors or defects in the state post-conviction proceeding do not, *ipso facto*, render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings." *Id.* at 143–44.

a valid original conviction."[60] The Eighth Circuit, in denying cognizability, stated that "[a]dequacy or unavailability of state postconviction procedures is material here only in the context of exhaustion of state remedies of federally protected rights and not to review alleged trial errors."[61] In *Williams*, an alleged Sixth Amendment violation was dismissed for the same reasons given in *Murray* (that the Sixth Amendment only applies in the criminal context).[62] The Eighth Circuit erroneously reasoned that the purpose of the postconviction proceeding a priori invalidated the use of habeas because it did not challenge the underlying criminal trial which led to the confinement. This analysis overlooked the practical purpose of postconviction process: to raise constitutional infirmities arising in the underlying criminal trial, not merely to exhaust state remedies to these violations. Ignoring the practical purpose of a postconviction proceeding, the Eighth Circuit disregarded the defendant's constitutional rights, which existed beyond the underlying criminal trial. Other courts adopted the *Williams* analysis for other constitutional claims with the same blanket denial and the same disregard for constitutionally deficient state postconviction procedures.[63] These decisions provide little further insight into the majority's analytical reasoning. They just denied the claims.

The Supreme Court never ruled on this issue. It is considered by some to be irrelevant[64] and yet, it is a gaping hole in a complicated minefield of jurisprudence and statutory language surrounding habeas corpus review. It is generally considered settled law that the Sixth Amendment does not extend to postconviction proceedings.[65] But what about other protections afforded by the Bill of Rights?

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60 *Id.* at 143.

61 *Id.*

62 *See id.* at 144; *Murray v. Giarratano*, 492 U.S. 1, 19 (1989).

63 *See, e.g.*, Hale v. Lockhart, 903 F.2d 545, 548 (8th Cir. 1990) (denying cognizability to a claim of due process violation even though the court reporter took excessive amounts of time to provide a trial transcript to the defense); Williams-Bey v. Trickey, 894 F.2d 314, 317 (8th Cir. 1990), *cert. denied*, 495 U.S. 936 (1990) (claiming courts were only statutorily authorized to review the constitutionality of a criminal conviction, not the resulting state postconviction proceeding).

64 *See, e.g.*, Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 770 n.294 (1995) (expressing the irrelevancy of the circuit split because *Dickerson v. Walsh* dismissed the claim on procedural grounds).

65 Eric M. Freedman makes a bold argument against this categorization of the law, claiming the fifth vote, held by Justice Kennedy is in fact still a swing vote, depending on the facts of the case before the Court. *See* Eric M. Freedman, Giarratano *Is a Scarecrow: The Right To Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006).

There is clear precedent[66] which leads to the conclusion that these constitutional violations should, nay, *must* be cognizable as the basis for a writ of habeas corpus.

IV. WHAT EXACTLY IS STATE HABEAS? THE NATURE OF THE POSTCONVICTION PROCEEDING: CIVIL OR CRIMINAL

Part of the dilemma over what, if any, constitutional protections are available in the state postconviction proceedings is a question of the nature of the review: Is it criminal or civil? There are even questions as to the "scope of the State's obligation" to provide a full collateral review process.[67] The process itself varies from state to state. According to the Supreme Court, "[i]t is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature."[68] Yet, if the purpose of such a proceeding is the affirmation of a criminal sentence, or a reevaluation of the constitutional grounds for a man's punishment for a crime, these proceedings "though they may be civil in form, are in their nature criminal."[69]

For a capital defendant, it is impossible to understate the importance of a state's collateral review process. AEDPA demands that federal courts give almost full discretion to state courts' decisions in postconviction proceedings both in terms of procedurally barring certain claims and in determining questions of both fact and law.[70] The state statutes, which control and determine the structure of the collateral review procedures, are therefore critical to a determination of what rights a capital defendant retains in a postconviction proceeding, specifically those which are more "quasi criminal" than others.[71]

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66 *See infra* Part V for a discussion of the precedent leading to this conclusion.

67 *See* Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring) (documenting the rarity of the Supreme Court involving itself at the state postconviction stage in litigation because of uncertainty regarding the state's responsibilities).

68 Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

69 Boyd v. United States, 116 U.S. 616, 634 (1886) (determining tbat the Fourth and Fifth Amendments applied to civil as well as criminal searcbes).

70 *See* Murray v. Giarratano, 492 U.S. 1, 21–22 (1989) (Stevens, J., dissenting) (identifying the structural magnitude of the state postconviction proceeding as a result of the standards of review in AEDPA).

71 While this is not a dispositive point, it is interesting that state postconviction proceedings automatically go back to the original sentencing judge from the trial, instead of being randomly assigned, like other civil review proceedings. This practice supports my suggestion that in fact these postconviction proceedings are quasi criminal, because they are de facto continuations of the trial and direct appeal. *See, e.g.*, Russel J. Davis, *Postconviction Proceedings*, *in* 28A STANDARD PENNSYLVANIA PRACTICE 2D § 138:1 (2008) (commenting

This is not an attempt to argue that *federal* habeas corpus is criminal in nature.[72] Many of the state postconviction proceedings, however, are defined by their respective state legislatures as criminal.[73] Some states have even enacted unitary appeals processes,[74] even as two other state courts have struck down similar statutes as illegal under their respective constitutions.[75] There are certain downfalls for the defendant to classify these unified proceedings as criminal,[76] but there are also immeasurable benefits such as drastically increased constitutional protections for the defendant.

The Supreme Court, silent on the exact nature of the postconviction procedure, said in *Hicks ex rel. Feiock v. Feiock*,[77] "for the purposes of applying the Due Process Clause . . . . [to] a State's proceedings[,] . . . state law provides strong guidance . . . ."[78] The Court further affirmed this sentiment in *Allen v. Illinois*,[79] in which it directed the inquiry as to "whether a particular proceeding is criminal" to be "first of all a question of statutory construction."[80]

Applying these directions to the postconviction proceeding, many of these statutes would be deemed criminal. For example, the Tennessee Post Conviction Procedure Act at no point mentions explicitly

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that there is a preference for requiring the same judge to officiate both the trial and the postconviction proceeding for reasons of expediency and familiarity with the case).

72 *See* Fay v. Noia, 372 U.S. 391, 423–24 (1963) (characterizing the traditional use of the writ of habeas corpus as a civil remedy).

73 *See, e.g.*, Tennessee Post Conviction Procedure Act, TENN. CODE ANN. §§ 40–30–101 to –30–122 (2004).

74 A unitary appeals system is when both the direct appeal and the postconviction proceeding appeal (state habeas) occur at the same time, consolidating these two separate appeals. There are three states which seem to operate uniform appeals processes. Idaho (IDAHO CODE ANN. § 19–2719 (2004)); Oklahoma (Post-Conviction Procedure Act, OKLA. STAT. ANN. tit. 22, § 1089 (2003)); Texas (TEX. CODE CRIM. PROC. ANN. art. 11.071 (Vernon 2005)). All of these statutes vary in terms of procedural and substantive requirements.

75 Florida and Pennsylvania have both created unitary appeal statutes only to have them struck down by their respective state supreme courts. *See* Allen v. Butterworth, 756 So. 2d 52, 54 (Fla. 2000); *In re* Suspension of Capital Unitary Review Act, 772 A.2d 676, 689 (Pa. 1999).

76 For example, under most state rules of civil procedure, there are broader rules governing discovery which can be particularly advantageous for prisoners. For more information, see HERTZ & LIEBMAN, *supra* note 28 at § 7.1 (identifying postconviction proceeding counsel's responsibilities in light of the civil nature of the collateral appeal).

77 485 U.S. 624 (1988) (finding a law adjudging a father's ability to meet his alimony payments to be determined by state law as to its civil nature).

78 *Id.* at 631; *see id.* (discussing the distinction between civil and criminal contempt trials).

79 478 U.S. 364 (1986) (determining a statute defining people as sexually dangerous to be civil, not criminal, within the meaning of the Fifth Amendment's prohibition against self-incrimination).

80 *Id.* at 368.

that it is civil in nature.[81] The Tennessee Supreme Court in *State v. Scales*[82] explicitly held for the purposes of the timeliness of the notice of appeal, "post-conviction proceedings are criminal in nature."[83] In later decisions, however, the Tennessee Supreme Court determined that only certain elements of the proceeding were criminal in nature, while others were civil, convoluting an already complicated procedure.[84]

In the interest of comity, the federal government generally defers to the statutory interpretation by a state court of its own criminal statute.[85] By extension, the same constitutional protections available in criminal proceedings would extend to petitioners in the postconviction proceedings, because they are *also* classified as criminal procedures. Even if a state did not explicitly say the procedures were criminal, but followed Tennessee's example (identifying parts of the procedure as criminal and others as civil), it would be impossible to divide the proceeding into civil and criminal sections. Logically, the constitutional protections would have to extend over the entire proceeding (just as they should with a unitary appeals system). Any other decision would seem to implicate a Due Process Clause violation because of basic unfairness to the defendant.

The Fourteenth Amendment's Due Process Clause stands for fundamental fairness,[86] which is clearly missing in the situation described above. Because there is no constitutionally required counsel for an indigent petitioner in a postconviction proceeding,[87] a prisoner would have to determine what sections of his proceeding would grant him more constitutional protection than others.[88] Obviously, this le-

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81 Fay v. Noia, 372 U.S. 391, 399 (1963).

82 767 S.W.2d 157 (Tenn. 1989) (finding time limits of notices of appeals comporting with criminally-based rules of appellate procedure).

83 *Id.* at 158.

84 *See* State v. Nix, 40 S.W.3d 459, 463 (Tenn. 2001) (determining postconviction proceedings are civil with regards to statutes of limitations).

85 *See, e.g.*, Burgess v. Seligman, 107 U.S. 20, 33 (1882) ("Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established . . . . Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is.").

86 *See* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987) (requiring a state's postconviction proceeding to comport with "fundamental fairness mandated by the Due Process Clause").

87 *See* Murray v. Giarratano, 492 U.S. 1, 1 (1989).

88 Even acknowledging Justice O'Connor's reminder that "once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly," Ford v. Wainwright, 477 U.S. 399, 429 (1986), due

gal labyrinth would call into question the fundamental fairness of such a confusing procedure. Postconviction proceedings are therefore, in many cases, going to be constitutionally deficient.

Is there a solution to this dilemma? Perhaps the federal government should require that all postconviction proceedings be statutorily defined as civil. Such a requirement would raise the issues of comity, but it is not fundamentally fair to deny a capital defendant, literally fighting for his right to live, an avenue to address these constitutional concerns simply because in keeping with the traditional nature of the Great Writ, these proceedings are summarily called civil.[89] As Justice Marshall famously stated in *Ford v. Wainwright*, a landmark case championing prisoner's rights, "Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether."[90]

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process of law is substantially different in criminal proceedings, even after valid conviction.

89 In the alternative, even if a state postconviction statute proclaims it is civil in nature, the Supreme Court held this as not always dispositive, creating a test to determine if the statute is punitive or regulatory in nature (criminal or civil). They adopted a seven-factor test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), which includes:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.

Id. at 168–69 (citations omitted).

While this would not be an easy burden to overcome, the Supreme Court has held a state court's determination of the nature of a proceeding (or definition of a crime) can be in itself a violation of the United States Constitution when applied without a basis in evidence. For example, in the *Lunch Counter Cases*, the Supreme Court disposed of the southern states' justifications for the conviction of African American protestors as violating disturbing the peace laws. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157 (1961); Thompson v. Louisville, 362 U.S. 199 (1960) (dismissing a state conviction as being devoid of evidence of guilt of the crime charged and therefore violating due process under the Fourteenth Amendment).

90 *Ford*, 477 U.S. at 411.

V. WHAT IS A RIGHT WITHOUT A REMEDY? *HECK V. HUMPHREY*, *FORD V. WAINWRIGHT*, AND THE CHOICE OF HABEAS CORPUS

Even if the quagmire presented by state postconviction proceedings is not clarified, two cases in tbe past twenty-five years, when looked at together, indicate a clear (if inadvertent) logical step by the Supreme Court towards recognizing constitutional errors in postconviction proceedings as within the subject matter jurisdiction of a federal court on a habeas petition.[91]

In *Heck v. Humphrey*,[92] the Court expanded the ruling in *Preiser v. Rodriguez*[93] to exclude any other legal avenues (other causes of action besides the writ of habeas) for any prisoner's claim which "call[s] into question the lawfulness of conviction or confinement."[94] Eight years previous, in *Ford v. Wainwright*,[95] the Court held a state's determination of a capital defendant's postconviction sanity unconstitutional because it lacked many of the fundamental due process protections constitutionally required in such a proceeding.[96]

Together, these two cases require the cognizability of constitutional errors in state collateral review on federal habeas petitions because: 1) *Ford v. Wainwright* explicitly acknowledges procedural due process rights inherent in state postconviction proceedings; and 2) *Heck v. Humphrey* forecloses any other avenue except federal habeas proceedings to adjudicate the violation of these rights. The holdings of these cases form the basis for the claim that any right or privilege granted by the states to petitioners in postconviction proceedings (including court-appointed counsel) is protected by the Due Process Clause of the Fourteenth Amendment and therefore can form the basis for a federal habeas petition.

The Court in *Ford v. Wainwright* invalidated a Florida statute[97] that dictated the procedure for determining the sanity of a capital defendant, on the grounds that it did not satisfy the Due Process Clause because it did not provide the petitioner "a full and fair hearing" on

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91 This Part is largely in response to a thesis proposed in a footnote of Randy Hertz and James S. Liebman's comprehensive and illuminating treatise on Habeas Corpus. *See* HERTZ & LIEBMAN, *supra* note 28. While I will not continually cite to this footnote (unless I am directly quoting), it was one of the main inspirations for this Comment.

92 512 U.S. 477 (1994).

93 411 U.S. 475 (1973). Yet, it did not speak kindly of the actual ruling in *Preiser*, calling its dicta "an unreliable, if not an unintelligible, guide." *Heck*, 512 U.S. at 482.

94 *Heck*, 512 U.S. at 483.

95 *Ford*, 477 U.S. at 399.

96 *Id.* at 416.

97 FLA. STAT. § 922.07 (1985 & Supp. 1986).

the critical issue of his sanity.[98] At the heart of this opinion is the acknowledgement that regardless of the nature of the proceeding, or the guilt/conviction status of the prisoner, "[t]he fundamental requisite of due process of law is the opportunity to be heard."[99] Since the Florida statute did not allow for the petitioner to present any evidence or be heard in his claim of mental insanity, it violated this cornerstone of American law. The state process for evaluating the claim was rendered ineffective to protect the petitioner's rights.[100]

Justice Powell attempted to limit the holding in his concurrence by pointing out the special nature of the issue of sanity[101] and distinguishing the level of deference owed to a governor (the primary decision maker in Florida's statute) as opposed to that owed to a state court.[102] He refused to "determine the precise limits that due process imposes in this area."[103] However, the thrust of the holding survived, summarized by Justice O'Connor in her concurring opinion:

> Our cases leave no doubt that where a statute indicates with "language of an unmistakabl[y] mandatory character," that state conduct injurious to an individual will not occur "absent specified substantive predicates," the statute creates an expectation protected by the Due Process Clause.[104]

The case Justice O'Connor relied upon for this conclusion was overruled on its application to administrative regulations in prisons,[105] but the jurisprudence still supports O'Connor's clear expression of the protections owed to prisoners sentenced to death. As the Supreme Court held in *Evitts v. Lucey*, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."[106] The Constitution, thus, de-

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98 *Ford*, 477 U.S. at 418. Interestingly, this phrase used to be included in the previous federal habeas corpus statute, but was excised in the current AEDPA legislation for reasons unknown.

99 *Id.* at 413 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

100 *See Ford*, 477 U.S. at 399.

101 *Id.* at 426 (Powell, J., concurring) (explaining that judging sanity is subjective and requires expert analysis).

102 *Id.* at 423.

103 *Id.* at 427.

104 *Id.* at 428 (O'Connor, J., concurring) (quoting Hewitt v. Helms, 459 U.S. 460, 471–72 (1983), *overruled by* Sandin v. Conner, 515 U.S. 472 (1995)).

105 *See* Sandin, 515 U.S. at 484 (realigning the due process test for state-granted rights to focus on the liberty protected as opposed to the liberty expectation created by the state). There are still questions as to whether *Sandin*'s ruling actually overrules *Ford*, because *Sandin* focused exclusively on prison administrative regulations and did not speak to postconviction proceedings or capital punishment.

106 469 U.S. 387, 401 (1985) (requiring due process as to first appeal of right); *see* Letty S. Di Giulio, Note, *Dying for the Right to Effective Assistance of Counsel in State Post-Conviction Pro-*

fines the "kind of process a State must afford prior to depriving an individual of a protected liberty."[107]

In contrast to Powell's attempt to pigeonhole this case to its facts, *Ford v. Wainwright* emphasized the general constitutional principle protecting expectations of due process of law when the state defines a right along with its procedural implementation.[108]

With this standard in place, the next question is: Where would a convicted prisoner, still imprisoned, seek to validate and remedy these constitutional infringements? Under *Heck v. Humphrey* (and by extension *Preiser v. Rodriguez*) the only avenue available for such a suit is § 2254.[109]

Before *Heck*, there were considerable legitimate arguments to pursue a suit for constitutional violations in a postconviction proceeding under § 1983.[110] These arguments were couched in terms similar to those of *Williams*. Reasoning because the constitutional violation does not directly dispute the fact or duration of the confinement, the argument goes, it is more analogous to a claim against a prison administrative determination, which is in the province of § 1983. An argument like this might have held traction before *Heck*, but the Supreme Court's decision foreclosed this line of argument.

To be clear, when a constitutional violation occurs in a postconviction proceeding for a capital defendant, the remedy sought is not damages. The remedy sought is a new postconviction proceeding or a federal habeas corpus review de novo of the violation. Therefore, § 1983 is not the appropriate avenue for relief because it is solely confined to redressing problems with damages or an injunction.[111]

Furthermore, the Court re-emphasized that "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release,

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ceedings: State Statutes & Due Process in Capital Cases, 9 B.U. PUB. INT. L.J. 109, 129–31 (1999) (identifying and arguing for the proposition that once states extend a statutory right of legal representation, they have a corresponding Due Process Clause requirement to ensure that such representation is, at a minimum, effective).

107 *Ford*, 477 U.S. at 428–29 (O'Connor, J., concurring).

108 This would include any postconviction proceeding, any right to counsel granted by the state, or further rights specified in postconviction acts or statutes. For a further list of possible "inadequate state corrective process" arguments, see HERTZ & LIEBMAN, *supra* note 28, § 7.1b, at 346.

109 For an excellent, extended discussion of *Heck v. Humphrey* and its subsequent effect on cases, see HERTZ & LIEBMAN, *supra* note 28, § 9.1, at 439 n.6.

110 *See* Schwartz, *supra* note 57, at 159–61.

111 *See* Heck v. Humphrey, 512 U.S. 477, 481 (1994) (specifying that the remedy provided by § 1983 is monetary damages).

even though such a claim may come within the literal terms of § 1983."[112] Finally, the court prohibited § 1983 claims where "to recover damages for allegedly unconstitutional conviction or imprisonment . . . whose unlawfulness would render a conviction or sentence invalid," stating that such a claim "is not cognizable under § 1983."[113]

Recalling the arguments used in *Williams*, *Heck* could be disputed on the ground that a constitutional error in a postconviction proceeding does not challenge the fact or duration of the confinement. But it is illogical to say that the distinction between life in prison and a death sentence does not fit under the definition of duration of confinement: "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus."[114]

Two hypotheticals can illustrate how a constitutional error in a postconviction proceeding could in fact challenge the validity of a confinement and conviction. Suppose there is a claim of ineffective assistance of counsel under the Sixth Amendment which cannot, in certain states, be brought until after the direct appeal.[115] In hypothetical A, the state system is a unified appeal system. There is no chance for the prisoner to have different counsel for his postconviction proceeding because it is combined with his direct appeal. Instead, he has the same lawyer who was ineffective the first time and does not raise the Sixth Amendment claim in the postconviction proceeding. This system of appeal would therefore violate the prisoner's constitutional right to fully present his Sixth Amendment claim for a full and fair hearing. If he is able, under *Ford* and *Heck*, to finally raise this claim in his federal habeas petition because the constitutional violation occurred also in the postconviction proceeding, he could in fact prove the invalidity of his underlying conviction due to the ineffective assistance of counsel.

In hypothetical B, the state system is a traditional system that begins the postconviction proceeding shortly after the direct appeal has concluded. But State B automatically appoints counsel for the post-

112 *Id.* at 481.

113 *Id.* at 486–87.

114 *See* HERTZ & LIEBMAN, *supra* note 28, § 9.1, at 439 n.6 (noting the continued recognition in *Muhammad v. Close*, 540 U.S. 749, 750 (2004), of habeas corpus as an avenue of relief for prisoners).

115 Some states require that these claims only be brought after direct appeal is finished, and, in *Massaro v. United States*, the Supreme Court held that federal prisoners do not have to raise claims of ineffective assistance of trial counsel on direct appeal, but can wait until collateral review. 538 U.S. 500, 508–09 (2003).

conviction proceedings. Under *Ford*, a minimal due process standard of meaningful assistance should attach to this right.[116] Assume this counsel is completely ineffectual and does not investigate appropriate claims, claims which could cause the underlying conviction to be reversed and save the life of the prisoner. Thus, the due process violations of the right granted voluntarily by State B amount to a constitutional violation in the postconviction proceeding that could clearly challenge the fact or duration of confinement. Arguments to the contrary are "appealing at first blush,"[117] but do nothing to address or remedy critical constitutional violations.

VI. POSSIBLE SOLUTIONS

The *Heck* and *Ford* decisions shape the possible solutions for the quandary their holdings present. Capital prisoners have rights, identified as requiring protection under the Due Process Clause of the Fourteenth Amendment when granted by the states (if not granted automatically by the *quasi criminal* nature of the postconviction proceeding). There is only one remedy available to a suit which could invalidate the underlying conviction: habeas corpus. However, there are severe policy considerations involved in allowing these errors to proceed straight to federal court.

The biggest concerns of enlarging the scope of habeas corpus are comity and the possible resulting tension between federal and state courts.[118] One of the pushing forces behind the changing face of habeas, issues of comity have been present since its mention in the Constitution to its most recent makeover under AEDPA.[119] If the subject matter jurisdiction of habeas corpus is, as argued here, enlarged by *Heck* and *Ford*, solutions must be proposed which would minimize the effect of this enlargement on concerns of comity as well as satisfy one of the statutory requirements of federal habeas corpus protection: exhaustion of state court remedies.[120]

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116 See Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 67–68, for a very useful and complete investigation of the due process protections which should attach when a state grants a right to counsel.

117 Dickerson v. Walsh, 750 F.2d 150, 153 (1st Cir. 1984).

118 *See* Chemerinsky, *supra* note 16, at 762 (listing four major concerns, instead of just one, when discussing the scope of habeas corpus).

119 *See id.*

120 28 U.S.C. § 2254(b) (2000).

Luckily, the issue of comity dovetails with that of the exhaustion requirement. As discussed before, Congress originally granted state prisoners the right to habeas corpus proceedings due to distrust of state courts.[121] This paranoia is no longer legally justifiable. Comity assumes that "state judiciaries are equal to federal courts in their ability and willingness to protect federal rights."[122] The exhaustion requirement is another nod to this mutual respect; it "allows state courts to interpret and enforce state criminal laws. . . . [delaying federal court review] until the state has had a full chance to correct any errors in its law or procedures."[123]

As previously discussed, these claims, if determined to be cognizable on a petition for federal habeas corpus, would fall into the section of AEDPA when circumstances exist that render such state processes ineffective to protect the rights of the applicant.[124] This would, in practice, circumvent the exhaustion requirements and oblige federal district courts to hold new, full and fair hearings on the claims brought before them or remand the claims back to the state courts to conduct the hearings. This latter choice would be preferable for both parties: for the federal courts because it lightens their case load, and for the state courts because it allows them the chance to address and adjudicate procedural issues in their own system of criminal law (exactly the purpose of the exhaustion requirement).

As argued by Judge J. Skelly Wright and Abraham D. Sofaer in their seminal article, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*,[125] if a federal court deems these state procedures lacking in due process protection enough to require the state courts to hold hearings to adjudicate the constitutional claims on their merits, then it can be assumed that they are, inter alia, constitutionally invalid procedures.[126] States would therefore be constitutionally required to fix these procedures. A solution to the problem of comity and the desire to fulfill the exhaustion requirement would require either: (a) a change in the statutory requirements of state postconviction proceedings to require certain minimal due process protections to be followed as a matter of federal law, leaving

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121 *See, e.g.*, Frank v. Mangum, 237 U.S. 309, 326 (1915) (explaining that the writ of habeas corpus was available whenever a state court violated a prisoner's due process rights).

122 CHEMERINSKY, *supra* note 2, at 840.

123 *Id.* at 861.

124 *See supra* note 43 and accompanying text.

125 *See* Wright & Sofaer, *supra* note 33.

126 *Id.* at 906–19; *accord* HERTZ & LIEBMAN, *supra* note 28, § 7.1b n.48 (citing Wright & Sofaer, *supra* note 33, at 906–19).

"to the State the task of developing appropriate ways to enforce the constitutional restriction[s]"[127]; or (b) the creation of a two-pronged test for federal district courts to apply to such claims. Similar to the high burden of proof for hearings on new evidence in federal habeas proceedings (in which the petitioner not only has to show he could not have raised the claim earlier, but must also show that "but for" the lack of this factual predicate due to a constitutional error, "no reasonable factfinder would have found the applicant guilty of the underlying offense"[128]), this test could create a workable solution on how to proceed with such claims within the already existing framework of AEDPA.

This second solution, while pacifying concerns of comity, would greatly limit the number of meritorious habeas claims. It is a stiff burden to meet. However, this avenue should only be available for constitutional errors which truly offended the fundamental fairness of the postconviction proceeding process. In this manner, concerns over using habeas corpus to adjudicate claims not directly impacting the underlying conviction could be quieted. This relief would only be available for claims like those illustrated in the hypotheticals[129]—in which the constitutional error in the collateral review impacted the petitioner's ability to properly address constitutional errors arising in the original trial or direct appeal.

VII. CONCLUSION

Congress can extend the jurisdiction of habeas corpus beyond its constitutionally mandated minimum, but it cannot restrict its purpose: to vindicate the rights of prisoners held in violation of the Constitution.

There is a need for a safety valve for capital defendants faced with fundamentally unfair postconviction proceedings. As dictated by Supreme Court precedent and suggested by the states' own postconviction relief acts, habeas corpus is the legally correct forum for addressing these claims. Constitutional errors in postconviction proceedings for capital defendants should be cognizable as the basis for a writ of federal habeas corpus.

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127 Ford v. Wainwright, 477 U.S. 399, 416 (1986).

128 28 U.S.C. §§ 2254(e)(2)(A)(ii), 2254(e)(2)(B) (2000).

129 *See supra* notes 115–17 and accompanying text.