CLOSING THE CIRCLE: *CASE V. NEBRASKA* AND THE FUTURE OF HABEAS REFORM

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The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.[1]

It would be a bitter irony indeed if our [state] courts, in an effort to accommodate the Supreme Court's retrenchment of federal habeas review, were artificially to elevate procedural rulings over substantive adjudications in post-conviction review, at a time when the Court's curtailment of [federal] habeas review forces state prisoners to rely increasingly on state post-conviction proceedings as their last resort for vindicating their state and federal constitutional rights.[2]

INTRODUCTION

Government earns legitimacy only to the extent that it prevents the arbitrary deprivation of individual rights.[3] In criminal law, the writ of habeas corpus is a principal vehicle by which federal and state courts provide this protection.[4] The essence of habeas is to ensure a full judicial review of the merits of every constitutional claim raised by a petitioner regarding the legality of her confinement.[5]

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1. Coppedge v. United States, 369 U.S. 438, 449 (1962).

2. State v. Preciose, 609 A.2d 1280, 1294 (N.J. 1992).

3. *See* THE FEDERALIST NO. 51, at 352 (James Madison) (Jacob Cooke ed., 1961) ("Justice is the end of government. It is the end of civil society.").

4. Article I, Section 9 of the Constitution recognizes the writ, and federal habeas claims are governed by statute at 28 U.S.C. §§ 2241–56 (2000). State postconviction remedies take many forms, including (1) the writ of habeas corpus, (2) the writ of error coram nobis, and (3) remedies in the nature of the writ of coram nobis. These remedies may derive from state constitutions, statutes, or rules of court. A general review of these remedies is too extensive to undertake here, and has been thoroughly accomplished in other works. *See, e.g.*, DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF § 3-2 (1996 ed.). Unless otherwise stated, for the purposes of this analysis I group all available state collateral remedies as "state postconviction procedures."

5. Extensive exceptions to this essential function have been created, as discussed at length below. Each exception derives from a specific government interest or value—finality, conservation of judicial resources, and comity between state and federal courts, to name a few. These exceptions constrain the mode of procedure through which petitioners must apply for relief.

This protection is essential in criminal law. Criminal cases are deeply imbued with constitutional implications.[6] Any criminal case in any court implicates the defendant's rights under the Fifth and Sixth Amendments,[7] and many others raise First, Second, Fourth, and Eighth Amendment concerns as well. The Warren Court decided a host of landmark cases defining national standards on the meaning and application of each of these rights. Many of these landmark cases arose on federal habeas corpus petitions.[8] This era also produced a vitally important opinion about how habeas cases should be decided. Hidden among the Warren Court habeas cases is a brief decision issued in *Case v. Nebraska*[9] that is remarkable for its clarity, as well as for the joining of forces between Justices Brennan and Clark, who found common ground on a straightforward proposition: the states owe both the people and the federal courts fair procedures by which federal rights may be vindicated in state court. Contained within the decision's few paragraphs is a blueprint that would guide the development of habeas corpus over the subsequent thirty-five years.

The question in *Case* was whether the Fourteenth Amendment required the states to afford postconviction procedures to reach the merits of constitutional claims.[10] Decided during the dawning awareness of widespread state abuse of constitutional rights, and against the backdrop of a dramatic upswing in the dockets of federal courts,[11] *Case* suggests a structure marked by the sharing of the burden of reviewing postconviction claims between state and federal courts. Procedures organized along the lines proposed in *Case* would give earlier relief to aggrieved state prisoners, allow for greater deference to state courts, and relieve federal courts from increasing docket loads.

Considerable though they are, these benefits make up only half of the *Case* proposition. Of equal importance, state habeas must provide a fair and adequate substitute for federal review. This essential second step ensures that burden-sharing does not infringe upon constitutional rights. Unfair or inadequate state procedures set a trap for meritorious and frivolous claims alike. For the petitioner, whose interest is to gain relief from *some* court, federal deference to unfair state postconviction procedures presents the worst of both worlds: no fair

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Nevertheless, habeas remains the ultimate tool for safeguarding constitutional rights in the criminal process.

6. These implications regard both the individual rights of defendants (i.e., Fourth, Fifth, and Sixth Amendment protections) and also the structure of governance, such as how rights are guaranteed to individuals. As we shall see, it is often the latter that causes the greater controversy.

7. These rights are, of course, incorporated against the states through the Fourteenth Amendment. I use the foundational rights in this article for ease of discussion.

8. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

9. 381 U.S. 336 (1965) (per curiam).

10. *See id.* at 337.

11. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 56–64 (1996) (documenting an unprecedented increase in federal habeas filings beginning around 1960).

chance in state courts, and no review in federal court. While it is true that in the *Case* era every state instituted some form of postconviction review, no state remedy currently provides the kind of procedural protections to petitioners that would ensure that each state hearing is fair and adequate to fully determine the merits of constitutional claims. Reform of federal habeas may have reapportioned docket loads, but it has also seriously eroded the rights of petitioners, whose chances to raise meritorious claims in state habeas are often unfairly limited.

As the statutory and common law surrounding federal habeas corpus continues to evolve, the principle of fairness to the petitioner, which was integral to the *Case* proposition, must regain its original position of primacy over the other competing values implicated by postconviction procedures. The time is now ripe for a review of the *Case* question, and to reaffirm all of the principles the *Case* court expressed.

The aim of this article is to unpack the reasoning within the *Case* decision, to demonstrate that the reform proposed therein has been left incomplete, and to discuss the singular importance of recognizing a constitutional basis for fair state postconviction procedures to avert a gathering crisis in postconviction review. In part I, I explore the historic tensions between state and federal courts over the review of the constitutionality of state criminal convictions, and conclude that the rights of habeas petitioners have been neglected in the move to restrict federal habeas and defer to inadequate state proceedings. In part II, I discuss the basic purposes of habeas review and conclude that its essential function to redress constitutional wrongs has survived reform. In part III I review the holdings of the Supreme Court and conclude that the question raised in *Case* remains open. In part IV I return to a detailed consideration of *Case* and the cases that followed. I argue that although four later decisions[12] assume or purport to conclude that there is no constitutional basis for fair state postconviction proceedings, none actually settles the question. Finally, in part V I argue that recognition of such a right represents the only possible mechanism for safeguarding the constitutional rights of state prisoners given the current restrictions on federal habeas.

I.
THE STRUGGLE FOR PRIMACY BETWEEN STATE AND FEDERAL COURTS: SYSTEMIC TENSION AND ITS BENEFITS TO THE PETITIONER

Habeas is a powerful weapon against injustice. Its essential role is to rectify constitutional wrongs.[13] In this pursuit it casts aside convictions that would

12. These discussions are *United States v. MacCollom*, 426 U.S. 317 (1976), *Pennsylvania v. Finley*, 481 U.S. 551 (1987), *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991). *See infra* part IV.

13. *See* Frank v. Mangum, 237 U.S. 309, 335 (1915) (establishing that federal review is available where a state "supplying no corrective process . . . deprives the accused of his life or

otherwise be final. In this sense, every successful habeas petition represents not only a harmful error below, but also the failure of what may have been successive opportunities for correction. When issued against a state by a federal court, a grant of habeas corpus signifies that the state criminal court made a constitutional error.[14] In this manner, habeas aggravates the tensions between national and state governments inherent in the design of Article I of the Constitution. Overturning determinations of federal law made by a state's highest court, the federal writ invites friction between federal and state judiciaries.

Negotiations are delicate at the intersection of state and federal jurisdiction.[15] State courts undoubtedly have the final word on questions of state law; it is also fairly well settled that the federal courts have the final say on questions of federal law.[16] Any easy comity breaks down, however, when a federal habeas court—a federal *trial* court—reviews questions of federal law which have previously been ruled upon by a state supreme court.[17] To the state judiciary, it is as if insult is heaped upon injury in such reversals. Not only does the federal court alter the result reached by the highest state court, but a mere trial judge delivers the blow.

This trouble is stitched into the system itself. Every successful habeas petition carries with it the paternalistic subtext that the state court "got it wrong." The cumulative effect of an endless stream of federal habeas petitions is to

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liberty without due process of law"). *See generally* Henry Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

14. During a trial, the decision about the meaning of constitutional rights belongs to the state court trial judge. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring) ("It is the solemn duty of [state] courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law."); *Ex parte* Royall, 117 U.S. 241, 251 (1886) (stating that under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution"); *see also* McKnett v. St. Louis & S.F. Ry. Co., 292 U.S. 230, 233 (1934) ("The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution."); General Oil Co. v. Crain, 209 U.S. 211 (1908). By constitutional design, the last call belongs to the federal courts. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 346 (1816).

15. As the Second Circuit noted in *Sanders v. Sullivan*, 863 F.2d 218 (2d Cir. 1988):

> In our system of government, the federal courts, Janus-like, must often observe two directions at once. On the one hand, through unstinting vigilance, we must warrant the guarantees of the Constitution. Yet we are enjoined, on the other hand, to forbear gratuitous intrusions into the judicial functions of the several states. Nowhere are these two competing imperatives more inextricably intertwined than in a federal court's habeas corpus duties.

863 F.2d at 218–19. *See also* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1 (1990) (describing the problems associated with federal review of state judgments in death penalty habeas petitions).

16. *Martin*, 14 U.S. at 346.

17. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

reinforce presumptions about the inferiority of state judges, in turn stoking resentment on the part of the state judiciary. Neither sentiment assists in the orderly administration of federal law, but both are endemic to the structure of collateral federal review and could only be limited through extensive re-engineering of federal habeas procedure.[18] That is exactly what has happened in the decades since *Fay v. Noia*,[19] culminating in the present state of affairs.[20]

It is important to note that the tensions and resistance intrinsic to dual sovereignty create systemic inefficiencies that may actually produce net benefits. Setting competing powers against one another prevents the undue concentration of power and forestalls the tyranny of any one branch; this restraint upon the "encroaching nature" of governmental power safeguards individual rights.[21] Likewise, rights are protected by the vertical division of national and state government.[22] Tensions between national and state authority slow the impulsive exercise of power, creating reflective opportunities for reason to emerge.[23] Thus it would be unwise, as well as impossible, to eliminate inefficiencies in the administration of justice altogether. Rather, the goal should be to organize tensions inherent in the system of habeas review in such a way as to promote justice. For the state habeas petitioner, open access to federal court ensures the availability of at least one full and fair opportunity to redress constitutional wrongs. Friction notwithstanding, any organization of collateral federal review must not foreclose the availability of a judicial remedy for constitutional wrongs.

It is also worthwhile to consider the risks and incentives created in the organization of postconviction review. Any conceivable system of postconviction review allocates risk and incentives amongst the federal courts, state courts, and the petitioner. It is important that the system allocate risks and in-

18. Petitioners also pay dearly under this regime. State judges, knowing that they are merely a stop on the way to federal court, may expend minimal effort in reviewing petitioners' claims. Meanwhile, the reviewing federal court, anxious not to step on the toes of the state court and thereby exacerbate an already bad relationship, may give undue weight to any analysis conducted below. The effect is to stack a heavier burden of proof upon the petitioner.

19. 372 U.S. 391 (1963) (allowing federal habeas courts to adjudicate claims of federal right notwithstanding independent, adequate grounds for state courts' determinations).

20. *See infra* notes 73–97 and accompanying text.

21. THE FEDERALIST NO. 47, at 323–24 (James Madison) (Jacob Cooke ed., 1961); THE FEDERALIST NO. 48, at 332 (James Madison) (Jacob Cooke ed., 1961).

22. William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 442 (1961) ("Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions.").

23. Due process in the criminal context cannot be understood merely as being entitled to the assistance of counsel, or to a transcript, or to any other single procedure. It is an evolving standard that reaches the fine details of criminal procedure and litigation. Thus, the requirements of the Due Process Clause are best worked out through scrutinizing case-by-case the procedures available to litigants and the relevant constitutional, administrative, and sovereignty interests. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (arguing that federal habeas corpus review of state convictions creates a federal-state dialogue that fosters the development of constitutional criminal law).

centives rationally; it is essential that the allocation of risks and incentives serve the ultimate goal of protecting constitutional rights. Our multi-tiered system, utilizing state and federal courts for appellate review and collateral attack, presents a method to balance the competing rights, interests, risks and incentives manifest in every criminal case. Federal courts have a clear interest in the uniformity of federal law and in maintaining manageable dockets; state judges have an interest in the finality of their judgments and the effective administration of justice in their courts. Burdens associated with the division of labor between state and federal courts include increased docket loads, lack of finality through exposure to later de novo review, and threats to the integrity of constitutional rights.

Individual claimants have a paramount interest in the remedy of meritorious claims. As currently organized, a disproportionate burden falls upon the petitioner.[24] At each stage, the petitioner must present her claims at her first opportunity to do so. If she "sits" on her claims, she will have waived them forever. Thus, the petitioner must proceed correctly at each and every stage of the process.[25]

The petitioner's first opportunity to present a claim arises in the first forum where the court's procedure is adequate to redress the constitutional violation.[26] Adequate procedure provides for the full examination of all dimensions of a constitutional claim.[27] Fair procedures allocate burdens of proof correctly[28] and allow for the clear presentation and full exploration of legal questions,[29] and fair

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24. I do not challenge the notion that the petitioner must bear *some* risk. However, the allocation of risk must be rational. It makes no sense for a party to bear the risk for things that the party is not able to change, or that the party bears no responsibility in creating. Moreover, the burden of proof in any habeas petition rests with the petitioner. Thinking beyond burdens, petitioners may reasonably be held to bear the risk for successive petitions where the basis for the successive petition was available to the petitioner at the time of the original. Of course, an important corollary to this rule would be to exempt the petitioner from such risk where she was incapable of raising her successive claim at the time of the original—this is particularly so in the case of claims under *Brady v. Maryland*, 373 U.S. 83 (1963).

25. Petitioners often negotiate these complicated procedures without assistance of counsel. *See* Pennsylvania v. Finley, 481 U.S. 551 (1987) (denying existence of Sixth Amendment right to counsel in state postconviction proceedings); *cf.* Douglas v. California, 372 U.S. 353, 356–57 (1963) (noting importance of counsel in negotiating complex procedural requirements).

26. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Townsend v. Sain, 372 U.S. 293 (1963). When discussing procedural fairness, a ready analogy may be made to due process rights at trial and other judicial proceedings. Such analogies are made throughout the ensuing discussion.

27. *See, e.g.*, *Townsend*, 372 U.S. at 316.

28. *Id.* For example, if certain burdens of proof at trial are erroneously relegated to the defendant, then the hearing is not full and fair. *See* Taylor v. Kentucky, 436 U.S. 478, 490 (1978) (entitling the defendant to an instruction as to the presumption of innocence); Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.").

29. *See* In re Winship, 397 U.S. 358, 364 (1970) (articulating the constitutional basis for burdens of proof). Fairness and reliability are thus linked. *See generally* Stephen B. Bright, *Death*

judgments rely on correct standards of law.[30] The presiding fact-finder must also consider and decide relevant questions of fact,[31] and fair findings of fact must be supported by evidence.[32] A fair hearing also produces a record adequate for a meaningful appeal.[33] The power of the writ of habeas corpus derives from the fact that it makes all such safeguards available.

A side effect of the writ's power has been a backlash against federal authority, and enduring tensions have directed federal habeas doctrine towards greater deference to state courts. Once at the forefront of protecting rights after conviction, federal courts have now effectively been relegated to the sidelines. Since the early 1970s, Congress and the federal courts have instituted a number of dramatic changes to the structure of postconviction review.[34] As a result of these changes, state postconviction proceedings have increasingly become both the first and the last opportunity for state petitioners to claim the protection of the courts from violations of their rights.[35]

Amidst the reorganization of federal habeas, the essential function of habeas courts to rectify constitutional wrongs remains unchanged. Although the federal courts have traditionally been the habeas forums of last resort, state judiciaries

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Penalty Moratorium: Fairness, Integrity at Stake, CRIM. JUST., Summer 1998, at 28.

30. The Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), amended 28 U.S.C. § 2254(d)(1) to make an erroneous application of federal law a predicate to habeas review. 28 U.S.C. § 2254(d)(1) (2000). The scope of this prerequisite has been the subject of much litigation. *See* Green v. French, 143 F.3d 865 (4th Cir. 1998); O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998); Mata v. Johnson, 99 F.3d 1261 (5th Cir. 1996). However, the statute cannot alter the power of the federal courts to rule on and decide cases. *See O'Brien*, 145 F.3d at 21–23, 27. *See generally* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Brief for Petitioner, Williams v. Taylor, 529 U.S. 420 (2000) (No. 99-6615).

31. *See Townsend*, 372 U.S. at 313–14. Conclusory observations made by the state court that do not indicate the factual basis for its decision do not meet this standard. *See, e.g.*, Johnson v. Trigg, 28 F.3d 639, 644 (7th Cir. 1994) (noting that the "so-called finding" by the state court, which "was simply an observation offered in the course of a ruling on an objection to evidence" is not the type of "finding to which deference is due").

32. *See Townsend*, 372 U.S. at 316 (citing Fiske v. Kansas, 274 U.S. 380, 385 (1927); Blackburn v. Alabama, 361 U.S. 199, 208–09 (1960)).

33. *See Townsend*, 372 U.S. at 313–14. A federal rehearing is required where the state court record as a whole is not presented to the habeas court, is incomplete, or where its accuracy is in dispute. *See id.* at 315 ("If any combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation."); United States *ex rel.* Jennings v. Ragen, 358 U.S. 276, 277 (1959).

34. *See infra* part III.

35. *See, e.g.*, Rose v. Lundy, 455 U.S. 509 (1982) (requiring dismissal of a petition containing claims not presented to the state court); Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977) (stating that claims not presented in state court may be raised on federal habeas corpus review only if cause and prejudice are shown); Stone v. Powell, 428 U.S. 465, 494 (1976) (stating that Fourth Amendment exclusionary rule claims cannot be raised on habeas corpus if the state court provided a full and fair hearing); *see also* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 386–93 (1996) (providing a concise review of the provisions of AEDPA).

share in the constitutional duty to defend individual rights.[36] Recent reform has merely altered who decides questions of federal law for habeas petitioners. Reform has not, and indeed cannot, undermine the gravity of petitioners' constitutional claims or dilute the essential function of habeas corpus. Accordingly, so long as constitutional rights are adequately protected, there is nothing inherently wrong with shifting to the states the primary responsibility for the rectification of constitutional wrongs. However, the thrust of habeas reform has been solely to reduce the friction between state and federal courts. In the process, the rights of the petitioner have been neglected.[37]

II.
FOUNDATIONS: THE ESSENTIAL FUNCTION OF HABEAS CORPUS

The reorganization of habeas corpus threatens to limit the availability—and ultimately, therefore, the meaning—of many core constitutional rights. The fundamental principle that a person whose constitutional rights have been violated may seek recourse from the courts is as old as *Marbury v. Madison*,[38] and underlies the very reason the modern writ exists.[39] Protecting rights by forging adequate remedies is the essential role of the courts, and, in a democracy committed to the protection of individual rights, is essential to the maintenance of civil liberty;[40] open access to the courts is thus essential as well.[41] In criminal law, habeas ensures this access.

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36. *See, e.g.*, Young v. Ragen, 337 U.S. 235, 239 (1949) ("We recognize the difficulties with which [the states are] faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met.").

37. This is hardly surprising. Habeas reform has involved the political process, yet habeas petitioners are among the least represented constituencies in the country. Not only are most from disenfranchised and impoverished communities, but many have been literally disenfranchised by law. *See Developments in the Law—The Law of Prisons,* 115 Harv. L. Rev. 1838, 1940 & n.13 (noting that roughly 3.9 million voting-age citizens are disenfranchised as a result of criminal convictions and that more than one-third of this number are African-American men, who are disenfranchised at seven times the national average rate). Protecting fundamental rights of such politically voiceless constituencies is an essential function of the courts. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1937).

38. 5 U.S. (1 Cranch) 137 (1803).

39. Habeas corpus is one of the most important means for courts to address the merits of constitutional claims involving those whose physical freedom has been taken away. Although some have argued that habeas in its current form has expanded beyond the bounds understood by the Framers when they drafted the Suspension Clause, *see, e.g.*, INS v. St. Cyr, 533 U.S. 289, 341–45 (Scalia, J., dissenting), I argue above that there must be *some* process by which such claims may be raised, and it seems rather pointless to invent one simply to substitute under another name the functions that habeas already plays.

40. *See, e.g.*, *Marbury*, 5 U.S. (1 Cranch) at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

41. *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603 (1988) (A "'serious constitutional question' . . . would arise if a federal statute were construed to deny *any judicial forum* for a colorable

It is important to recognize that *only* a postconviction process can adequately protect many constitutional rights. Although trial is the "main event" in the criminal process, much can go wrong there. In the heat of the moment, even the most seasoned counsel could make egregious errors that harm her client, and the most careful trial judge might not recognize, or might misjudge, the merits of a constitutional claim.[42] The most important remedies available at trial include contemporaneous objections, motions for a new trial, motions to arrest judgment, and motions to withdraw a guilty plea. As a rule, constitutional claims arising in the heat of trial ripen quickly, and adequate remedies rapidly grow stale.[43]

In recognition of the inadequacy of trial remedies to redress constitutional violations, all states have instituted the right to appeal. Appellate remedies have been referred to as "the primary avenue for review of [criminal] sentences."[44] Although the Constitution does not explicitly require the states to provide appellate remedies,[45] if a state chooses to afford appeals, those procedures must comport with fairness and due process.[46] Every state affords persons convicted

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constitutional claim." (emphasis added) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 752 (1975))).

42. At trial, a battery of due process protections shields the defendant, preserving the integrity of her fundamental rights to life and liberty. *See, e.g.*, Reed v. Farley, 512 U.S. 339 (1994) (discussing the Sixth Amendment right to a speedy trial); Illinois v. Allen, 397 U.S. 337 (1970) (discussing the Sixth Amendment right to confront witnesses); Miranda v. Arizona, 384 U.S. 436 (1966) (describing the Fifth Amendment privilege against self incrimination). The defendant benefits from the presumption of innocence, *see, e.g.*, *In re* Winship, 397 U.S. 358, 363–64 (1970), and the adversarial trial process puts the government to its proof. Where that process fails, the results can be disastrous. *See, e.g.*, Stephen B. Bright, *Glimpses at a Dream Yet to be Realized*, THE CHAMPION, Mar. 1998, at 12. Due process requires a neutral tribunal to decide the defendant's case. *See, e.g.*, Bracy v. Gramley, 520 U.S. 899, 904–05 (1997) (The "Due Process Clause . . . establishes a constitutional floor" that "clearly requires 'a fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of . . . [the] case." (citations omitted)). The defendant may choose when or if to testify. *See, e.g.*, Brooks v. Tennessee, 406 U.S. 605, 611–12 (1972). She is entitled to fully cross-examine the state's witnesses, Davis v. Alaska, 415 U.S. 308 (1974), and to present her own witnesses. *See, e.g.*, Washington v. Texas, 388 U.S. 14, 19 (1967). Any evidence surviving such testing must reasonably establish proof beyond a reasonable doubt before a jury may convict. Jackson v. Virginia, 443 U.S. 307, 322–24 (1979).

43. *See, e.g.*, ARIZ. R. CRIM. P. 24.1 (requiring a motion for new trial to be made within ten days after a verdict is rendered).

44. Murray v. Giarratano, 492 U.S. 1, 9, 11 (1989) (citing Barefoot v. Estelle, 463 U.S. 880 (1983)). The importance of a full appellate review is also implicit in *Townsend v. Sain*, 372 U.S. 293, 313 (1963), which specifically recognized that the absence or inadequacy of a trial record provides a basis for new fact-finding proceedings.

45. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (stating that although states need not provide appeals, if they do, the Due Process Clause requires that appeals conform to dictates of fundamental fairness). Notably, appellate review furnishes the defendant's exclusive remedy for Fourth Amendment violations. *See* Stone v. Powell, 428 U.S. 465 (1976). However, to preclude federal habeas corpus review, state appellate review of Fourth Amendment claims must be "full and fair." *Id.* at 494. *See also* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 27.3 (4th ed. 2001).

46. *See, e.g.*, Douglas v. California, 372 U.S. 353, 356 (1963).

of a serious crime at least one level of appellate review.[47] Constitutional protections shield the state appellant and assure a fair opportunity to present an appeal.[48] If left unused, most appellate remedies become permanently unavailable—often within a very short time after trial.[49]

However, appellate remedies are strictly circumscribed. Because appellate jurisdiction is limited to claims arising on the record, appeal may not reach all of the constitutional errors in a petitioner's trial.[50] Many serious violations of a defendant's constitutional rights might never appear in the trial transcript. For instance, failure of the prosecution to turn over exculpatory evidence to the defense, improper judicial bias, problems with the composition of the jury pool, and ineffective defense representation might only come to light long after trial. Appellate courts generally must also defer to determinations of fact, even erroneous ones, made by the lower court.[51] Because appellate courts cannot hear new evidence, revealing such transgressions generally requires additional fact-

47. *See* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985); *see also* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 513 (1992); James E. Lobsenz, *A Constitutional Right to an Appeal: Guarding Against Unacceptable Risks of Erroneous Conviction*, 8 U. PUGET SOUND L. REV. 375, 376 (1985).

48. *See, e.g.*, Anders v. California, 386 U.S. 738, 742 (1967) (entitling appellant to the full support of counsel); *Douglas*, 372 U.S. at 357 (same). *But see* Smith v. Robbins, 528 U.S. 259, 272 (2000) (finding that *Anders* entitlement to counsel is not constitutionally mandated, but merely a prophylactic measure designed to protect the appellant's Fourteenth Amendment right to a fundamentally fair appeal procedure). While the Court has held that the Sixth Amendment right to counsel generally does not apply after the first appeal as of right, Ross v. Moffitt, 417 U.S. 600, 610 (1974), when direct appeal constitutes the first place a prisoner can fairly present a constitutional claim, appeal procedures must provide for the full and fair presentation of those claims. Otherwise, an inadequate state appellate process would deny the petitioner her one and only "adequate opportunity to present [her] claims fairly in the context of the State's appellate process" as guaranteed in *Moffitt*, 417 U.S. at 616. *See also* Coleman v. Thompson, 501 U.S. 722, 756 (1991).

49. *See, e.g.*, ARIZ. R. CRIM. P. 31.3 (requiring a convicted person to file a notice of appeal in the convicting court within twenty days after entry of judgment and sentence); *see also* note 168 *infra* and accompanying text.

50. Nevertheless, fairness requires a complete appellate remedy for constitutional violations that occur at trial. *See, e.g.*, Moore v. Dempsey, 261 U.S. 86 (1923); Frank v. Mangum, 237 U.S. 309 (1915). Direct appeal provides that remedy. *Frank*, 237 U.S. at 334–35. The term "corrective process" itself means more than merely a forum, and also requires that some adequate remedy be made available. *Id.* at 337–38 (noting that, where a trial is dominated by the threat of mob violence, the appropriate remedy is a new trial). Forms of appellate process include direct appeal, writ of error, and writ of certiorari. Appellate review furnishes a sober second judgment as to rulings of law present in the trial record. Additionally, appellate review furnishes a forum for raising the host of constitutional claims that, being raised but overruled at trial, do not ripen until after the trial is completed. On appeal, any legal error not deemed harmless warrants reversal of the judgment. *See, e.g.*, Chapman v. California, 382 U.S. 18 (1966).

51. *But see* Blackburn v. Alabama, 361 U.S. 199, 205 (1960) (granting deference to the decision of the trial court, but "scrutinizing every aspect" of the record for evidence of a due process violation); Spano v. New York, 360 U.S. 315, 316 (1959) (finding that "serious doubt" as to the constitutionality of a confession warranted Supreme Court review of a decision otherwise granted deference).

finding hearings. Habeas has been the mechanism for providing such hearings in federal court; habeas courts can hear new evidence and thereby flesh out the record.

Moreover, while statutes of limitations govern appeals, important federal rights often turn on issues that arise after that time has run. For instance, evidence that the prosecutor has suborned perjury may not arise until after a witness experiences a crisis of conscience. Proof that the prosecution has suppressed exculpatory evidence may not emerge before the petitioner has been incarcerated for years. Racially biased methods of jury selection may only come to light well after conviction. When a defendant suffers under an unconstitutional sentence, a remedy should not turn on whether the violation is discovered immediately or later. Limiting remedies to direct appeal would leave the fate of individual defendants to chance.[52]

Trial and appellate review are also insufficient to guarantee federal review of constitutional issues. Although the Supreme Court can review the rulings of state courts as to federal law on certiorari, like all appellate oversight, this review is limited to issues present in the trial and appellate record. Unlike other appellate remedies, however, certiorari review of direct appeals is discretionary and thus unsuited to protect the federal rights of all state prisoners.[53] The Supreme Court accepts for argument only a tiny fraction of the certiorari petitions filed every year and routinely denies certiorari on meritorious cases.[54]

Habeas opens the door to claims that cannot be raised on appeal; therefore, postconviction review plays a central role in protecting important constitutional rights.[55] For example, postconviction remedies generally provide the sole means of raising suppression of evidence claims under *Brady v. Maryland*,[56] as well as juror misconduct claims.[57] Collateral attack furnishes the principal vehicle for protecting the Sixth Amendment guarantee of effective counsel. Postconviction

52. Limiting review to direct appeal would also create an incentive for the prosecution to suppress evidence that would establish violations under *Brady v. Maryland*, 373 U.S. 83 (1963), racial bias in jury selection, or subornation of perjury.

53. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (1988) (virtually eliminating Supreme Court review by appeal, making nearly all cases coming before the Court discretionary).

54. Accordingly, denial of certiorari exerts no preclusive effect on later proceedings. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 447 (1953) (reviewing issues on habeas that were previously raised in a denied petition for certiorari).

55. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 126 (1982) (recognizing that the writ of habeas corpus "is a bulwark against convictions that violate fundamental fairness"); Young v. Ragen, 337 U.S. 235, 239 (1949) (compelling the states to provide a defendant at least one opportunity to raise her constitutional objection).

56. 373 U.S. 83 (1963).

57. *See, e.g.*, United States v. Colombo, 869 F.2d 149, 151 (2d Cir. 1989) (evidence that a juror lied on voir dire discovered in a postconviction challenge to the conviction); *see also* United States v. Martinez, 14 F.3d 543, 550 (11th Cir. 1994) (finding that a juror forfeited qualifications by watching a newscast of the trial); People v. Honeycutt, 570 P.2d 1050, 1053 (Cal. 1977) (prohibiting a juror from seeking the advice of a friend, who was an attorney, as to deliberations).

procedures also provide the exclusive remedy for all other constitutional rights that find protection under the umbrella of the Sixth Amendment.[58] Notably, only postconviction courts capable of hearing new evidence can ventilate claims of innocence, which have become especially compelling with the advent of new technology.[59]

Postconviction proceedings are also effective to redress unlawful bias at trial. Criminal law has historically been a theater of institutionalized racism.[60] As of 1995 more than 32.2% of all African-American males were under control of the criminal justice system, compared to 6.7% of white males.[61] Commentators have attributed such disparities to differential enforcement of criminal laws against minority groups,[62] disproportionate penalties for certain crimes,[63] and the systematic disenfranchisement of minority communities.[64] Moreover, studies have shown that courts themselves reflect the racial biases of society at large.[65] Racial bias distorts what might otherwise be fair procedures; yet such bias may not be evident in the trial record. Rather, its effects may be observable only upon comparative study.[66] Habeas courts, with their ability to hear new facts, are essential to ferreting out systemic problems like racial bias in criminal law.

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58. Sixth Amendment violations have been found for a number of defaults by defense counsel, even those that would not ordinarily be cognizable on collateral review. *See, e.g.*, Withrow v. Williams, 507 U.S. 680 (1993) (finding counsel's failure to move to exclude evidence obtained in violation of the Fourth Amendment to be a basis for a valid Sixth Amendment claim on federal habeas despite the general bar against presentation of Fourth Amendment claims on habeas under *Stone v. Powell*, 428 U.S. 465 (1976)).

59. *See generally* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

60. *See, e.g.*, A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: UNEQUAL JUSTICE IN THE STATE CRIMINAL JUSTICE SYSTEM 127–51 (1996).

61. *See* MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER (1995).

62. *See Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1494–1520 (1988) [hereinafter *Race and the Criminal Process*].

63. *See* DEATH PENALTY INFORMATION CTR., THE DEATH PENALTY IN BLACK & WHITE: NEW STUDIES ON RACISM IN CAPITAL PUNISHMENT (1988).

64. *See* THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998).

65. *See, e.g.*, *Race and the Criminal Process*, *supra* note 62, at 1520–31 (presenting a review of data demonstrating racial bias in prosecutorial charging decisions, judicial behavior, and sentencing outcomes); *see also* McCleskey v. Zant, 499 U.S. 467 (1991). Racial discrimination is also reflected in the catalogue of litigation around jury selection. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986).

66. Furman v. Georgia, 408 U.S. 238, 245, 249–50 (1972) (observing that "unpopular minorities" suffer worse punishment at the hands of the criminal justice system than others); *see also* David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) (identifying racial disparities in the application of the death penalty).

Finally, many of these claims may only be raised on collateral attack as a matter of law.[67] Constitutional rights that can be redressed only via postconviction proceedings are no less compelling than those protected on direct appeal or at trial; given the politically weak position of prisoners, the most effective remedy will almost always be in the courts.[68] To maintain equality between these classes of constitutional rights, postconviction procedures must express and embody the same due process standards woven into trial and appellate procedures. But in a federal system characterized by concurrent jurisdiction, to say a remedy is judicial is to raise the question, "Whose judiciary?" State trial judges are obliged to police and enforce the defendant's constitutional rights at trial; the Supreme Court has the last word in the exposition of federal law.[69] Within these clear margins, however, experience is the best guide. It is politically untenable to ignore state court interests; similarly, Article III courts may not be excised from the process altogether. What options remain involve some combination of state and federal review that together are sufficient to ensure that each petitioner secures at least one full judicial review of the merits of her claim. The struggle to strike this balance has a long and rich history, which I examine in the next section.

III.
THE GATHERING STORM: ONGOING REFORM OF FEDERAL HABEAS

Over the course of the twentieth century, habeas was a predominantly federal domain. Even as the states began to institute postconviction procedures, the federal legacy remained. The concurrent jurisdiction over federal questions shared by state and federal courts created a structure of federal habeas corpus characterized by repeated opportunities to relitigate the same federal question, first in state, then in federal court. This model brought about a crisis the effects of which are still being felt today.

Following *Young v. Ragen*[70] in 1949, the general absence of fair postconviction procedures at the state level opened the door to federal habeas courts.[71] There, the petitioner was able to relitigate any and all of the federal claims he raised in any state postconviction proceedings. The ability to relitigate federal claims in federal court reflected the attitude prevailing between the 1923 case *Moore v. Dempsey*[72] and the late 1970s that viewed federal habeas as the

67. *See* HERTZ & LIEBMAN, *supra* note 45, § 7.1b, at 323 n.77.

68. *See supra* note 37.

69. *See supra* note 14.

70. 337 U.S. 235 (1949).

71. In *Young*, Chief Justice Vinson noted that "it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." 337 U.S. at 238. The Court acknowledged that the task of creating state procedures adequate to provide full and fair review of federal questions placed burdens on the state. "Nevertheless, that requirement must be met." *Id.* at 238–39.

72. 261 U.S. 86, 91 (1923) ("[Where] the whole [state] proceeding is a mask . . . and . . . the

postconviction remedy of choice. The relitigation model was so entrenched as to be explicitly endorsed by the Supreme Court in *Fay v. Noia*[73] in 1963.

That the issue considered in *Case v. Nebraska*[74] of constitutional requirements for state postconviction procedures was not again squarely raised reflects the uneasy détente struck between federal and state courts under the relitigation model. Federal reversal of state court judgments strained inter-governmental tensions, but readily available federal review ensured the protection of individual rights. As long as *some* court performed the essential task of vindicating constitutional rights, a crisis was avoided. Accordingly, under the relitigation model, the *Case* question never attained enough importance to resolve.

As a model, the ability to relitigate claims in state and federal courts created incentives for needless inefficiency that engendered a persistent tension in the administration of the courts. The federal courts bore the brunt of the costs of the relitigation model. Every claim, whether rejected by a state court or not, was fair game in federal court, with the result that a steady stream of claims arising from state criminal courts filled the dockets of the federal courts.[75] State courts also bore costs, but indirect ones. Because federal courts routinely heard claims that had already been denied at the state level, every successful habeas petition represented a reversal of a state court's disposition. In this environment, one could little expect state courts to make federal questions their paramount concern. Instead, the strong incentive was for state courts to simply pass claims on to federal court.

Petitioners chose the fastest way into federal court, often bypassing state collateral remedies altogether. Certain that their claims would always be heard fully in federal court, petitioners sometimes chose to serialize their claims. Particularly in the case of capital petitioners, there was every reason to particularize claims, raising them in successive petitions, thereby holding off the appointment with the electric chair. The result was crowding in both state and federal dockets. While highly protective of the rights of petitioners, the relitigation model was a political disaster. Federal courts were increasingly perceived as invasive, state courts as ineffectual.[76] Without an active voice on behalf of petitioners to prevent change, reform of the system was a certainty.

The 1977 decision *Wainwright v. Sykes*[77] signaled the advent of dramatic changes in the interaction of state and federal postconviction procedures. Citing

State Courts fail[] to correct the wrong, . . . perfection in the machinery for correction . . . can[not] prevent this Court from securing to the petitioners their constitutional rights.").

73. 372 U.S. 391, 438 (1963) (implementing a "deliberate bypass" standard for assessing when a state procedural default precludes litigation of an issue in federal court).

74. 381 U.S. 336 (1965) (per curiam).

75. *See* Bator, *supra* note 17, at 506 & n.183 (documenting growth of federal district court habeas filings in the wake of *Brown v. Allen*, 344 U.S. 443 (1953)).

76. *See generally id.*

77. 433 U.S. 72 (1977).

the friction between federal and state interests caused by the relitigation model,[78] the Court adopted a presumption of deference to state procedural default rules that barred petitioners from presenting meritorious constitutional claims in federal court that could have been presented to state courts but were not.[79]

Since the *Sykes* era, the Court and Congress have taken steps to delegate greater responsibility for the adjudication of constitutional rights to state courts and narrowed the aperture through which claims must pass to secure federal review. Strict guidelines regarding exhaustion have raised the bar for petitioners seeking federal review.[80] The Court has excluded Fourth Amendment claims from federal habeas corpus review,[81] made it more difficult for a habeas petitioner to obtain an evidentiary hearing where one has been provided in state court,[82] adopted an extremely restrictive doctrine regarding retroactivity of constitutional decisions,[83] reduced the burden on the states to establish harmless error once a constitutional violation is found,[84] and erected barriers to the filing of a second habeas petition.[85] For the petitioner whose request for a federal hearing is granted, the federal court will defer to state court determinations of fact.[86] Recently, in addition to relying on state court determinations of fact, some federal courts had indicated that they might defer also to state court determinations of federal law.[87] These decisions have expanded significantly the role of state courts in adjudicating constitutional rights.

Federal retrenchment of habeas corpus review culminated in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA).[88] That statute amended federal habeas rules to incorporate doctrine developed by the Court that restricted federal habeas.[89] Among the most dramatic effects AEDPA has had on federal habeas arises from its amendments to 28 U.S.C. § 2254(d)(1).[90] That section sets the standard of review applicable in federal

78. *Id.* at 90.

79. *Id.* at 87.

80. *See* Rose v. Lundy, 455 U.S. 509 (1992).

81. *See* Stone v. Powell, 428 U.S. 465 (1976).

82. *See* Townsend v. Sain, 372 U.S. 293 (1963).

83. *See* Teague v. Lane, 489 U.S. 288 (1989).

84. *See* Brecht v. Abramson, 507 U.S. 619 (1993).

85. *See* Calderon v. Ashmus, 523 U.S. 740 (1998).

86. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); *Townsend*, 372 U.S. 293.

87. *See, e.g.*, Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998); discussion accompanying notes 95–97, *infra*.

88. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

89. *See* HERTZ & LIEBMAN, *supra* note 45, § 2.4d, at 79.

90. Pursuant to amended 28 U.S.C. § 2254(d)(1), a state prisoner's habeas corpus application:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the 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.

28 U.S.C. § 2254(d)(1) (2000).

court over state court determinations of federal law. The statutory text resists straightforward interpretation, and the circuits soon split as to its meaning.[91]

The most aggressive reading of § 2254(d)(1) came from the Fourth Circuit.[92] Taking its cue from a perceived "statutory purpose" to eliminate federal habeas,[93] the Fourth Circuit interpreted AEDPA to preclude federal review of a state court decision of federal law unless that decision was wrong under Supreme Court precedent that controls in law *and in fact*, or if all reasonable jurists would agree that the decision was wrong.[94] The Fourth Circuit's strict interpretation would virtually eliminate federal habeas corpus review of state court judgments on questions of federal law.

However, in *Williams v. Taylor*,[95] the Court struck down the Fourth Circuit's restrictive interpretation of § 2254(d)(1), arguably agreeing with Justice Stevens' statement that "there is nothing [in § 2254(d)(1)] that implies anything less than independent review by the federal courts."[96] Although the decision rejects the Fourth Circuit's restrictive standard, it confirms that the trend towards making state court determinations of federal law effectively final continues. As Justice Stevens pointed out, AEDPA expresses "a mood that the Federal Judiciary must respect."[97] Given this mood and the ongoing abridgement of federal habeas, the issue whether the states must provide an adequate substitute assumes critical importance. The relitigation model of *Young* has been rejected, but the maxim underlying that model, that adequate review by *some* court is essential, has lost neither logical force nor precedential value.

IV.
CLOSE ENCOUNTERS: *CASE V. NEBRASKA*

In *Case v. Nebraska*,[98] the Supreme Court passed on this very question: how to organize national postconviction procedures so as to ensure justice. Paul Case was a state prisoner who brought a colorable constitutional claim on state postconviction review. The Nebraska Supreme Court denied relief on grounds that the state legislature had not granted the state courts jurisdiction over federal habeas claims. The court's opinion implied that the petitioner should instead

91. *Compare, e.g.*, O'Brien v. Dubois, 145 F.3d 16, 23 (1st Cir. 1998) (interpreting 28 U.S.C. § 2254(d)(1) as codifying choice of law principles derived from *Teague v. Lane*, 489 U.S. 288 (1989)), *with* Gomez v. Acevedo, 106 F.3d 192, 198–99 (7th Cir. 1997) (interpreting 28 U.S.C. § 2254(d)(1) as requiring different standards of review for questions of law and mixed questions of law and fact).

92. *See, e.g.*, *Williams*, 163 F.3d 860.

93. Green v. French, 143 F.3d 865, 870 (4th Cir. 1998).

94. *Id.*

95. 529 U.S. 362 (2000).

96. *Id.* at 389 (plurality opinion). *But see id.* at 402–09 (O'Connor, J., for the Court) (criticizing this view as applied to situations not presented by the case at bar).

97. *Id.* at 386 (plurality opinion) (internal quotations and citation omitted).

98. 381 U.S. 336 (1965) (per curiam).

seek relief on his claim of denial of the right of counsel in federal court.[99] Case instead petitioned for certiorari to the United States Supreme Court, arguing that by failing to provide a forum in which he could vindicate his claim the state had denied him due process. The Court granted certiorari.[100] In response, the Nebraska State Legislature hastily enacted a postconviction statute that encompassed the petitioner's claim, thereby mooting the question on certiorari.[101]

The Court then vacated the judgment and remanded to the Nebraska Supreme Court for reconsideration in light of the supervening statute,[102] but the concurring opinions by Justices Brennan and Clark together offer a lucid and compelling view that reads like a blueprint for rational reform of the relitigation model of habeas. Indeed, understanding the current state of state postconviction procedures begins with *Case v. Nebraska*. The concurring opinions of Justices Brennan and Clark demarcate two important halves of habeas reform. While Justice Clark argued for sensible structural changes, Justice Brennan warned that such changes must be made in service of the essential function of postconviction review: to protect constitutional rights.

Justice Brennan noted the petitioner's argument that the expansion of protections under the Due Process Clause threatened to pull the federal judiciary into an ever-greater oversight of state criminal law.[103] The states could avoid this intervention through the implementation of fair postconviction procedures. Sound postconviction procedures would make the exhaustion of available state remedies meaningful[104] and accelerate the resolution of meritorious claims.[105] Meaningful exhaustion would also clarify issues for federal review, allow for the vigorous exercise of preclusion rules announced in *Townsend v. Sain*,[106] and "promot[e] state primacy in the implementation of [constitutional] guarantees."[107]

Justice Clark focused on the inefficiencies caused by inadequate state postconviction processes.[108] Finding the states' duty to provide "some adequate remedy" for constitutional violations to be implicit in the exhaustion doctrine, Justice Clark pointed out that those state postconviction processes that did exist at the time were so heterogeneous "in . . . scope and availability . . . [as to] result

99. Case v. Nebraska, 129 N.W.2d 107, 113 (Neb. 1964) ("The position of the courts of this state in respect to questions that are justiciable in habeas corpus are [sic] quite limited in comparison with those of the courts of the United States . . . .").

100. Case v. Nebraska, 379 U.S. 958 (1965).

101. This statute was adopted after the United States Supreme Court had granted certiorari and heard arguments, but before its decision. *See* 1965 Neb. Laws 486 (effective Apr. 12, 1965).

102. *Case*, 381 U.S. at 337.

103. *Id.* at 344 (Brennan, J., concurring).

104. *Id.* at 345.

105. *Id.* at 346–47.

106. 372 U.S. 293, 312–18 (1962).

107. *Case*, 381 U.S. at 345 (Brennan, J., concurring).

108. *Id.* at 337–40 (Clark, J., concurring).

in their being entirely inadequate"[109] to protect federal rights. These inadequacies created "a tremendous increase in habeas corpus applications in federal courts."[110] As Justice Clark saw it, it was this increase in federal habeas petitions that

> has brought about much public agitation and debate over proposed limitations of the habeas corpus jurisdiction of federal courts. The necessity for such proposals has been based on various grounds, including that of federal-state comity; inordinate delay in the administration of criminal justice in the state courts; and the heavy burden on the federal judiciary.[111]

In Justice Clark's view, the "enactment by the several States of post-conviction remedy statutes" furnishing an adequate opportunity for state prisoners to present their constitutional claims in state court was a "practical answer to the problem."[112]

Justice Clark's vision implies a disarmingly simple model: After direct appeal is exhausted,[113] the petitioner files a collateral attack in state court. Should she encounter problems there—i.e., lack of opportunity to raise her claim, unfair rules, or denial of counsel—then she may either file a habeas petition in federal court, or appeal to the Supreme Court. If she were to file a habeas petition, instead of asking for a federal rehearing of the questions already presented in state court, she would seek vindication of her right to a full and fair hearing in state court. Relief *could* take the form of a full hearing of the petitioner's underlying claims in federal court. A more appropriate remedy, however, would be for the federal court to remand the petitioner's case to the state postconviction court with directions to cure whatever defect denied her a fair hearing.

Justice Clark's system uses all available judicial resources, without divesting either the state or federal courts of an essential role in protecting the petitioner. It allows state courts a first cut at providing postconviction procedure, and assures a federal voice in the review of those proceedings. It would shed light on state postconviction proceedings that have heretofore evaded direct review—proceedings which have trapped more meritorious claims than they have resolved. But the full significance of Justice Clark's proposal for structural reform emerges only upon consideration of Justice Brennan's arguments. The entire point of habeas reform is to ensure justice for petitioners. Properly

109. *Id.* at 338.

110. *Id.*

111. *Id.* at 338–39.

112. *Id.* at 339–40.

113. Whether the petitioner must wait until after her direct appeal to file a collateral attack on her conviction, or whether she may do so simultaneously with her direct appeal, depends on the governing statute. For ease of analysis, I assume here that she must wait until after her direct appeal is exhausted before filing a collateral attack.

organized, this sharing of burdens between federal and state judiciaries would ameliorate tensions that have incessantly dogged habeas. With the air cleared, a respect for constitutional rights might regain its preeminent stature. Of course, this arrangement would create friction between federal and state courts—perhaps even significant friction. However, while such friction is a constant feature of the relitigation model, in this system it would be a temporary by-product of necessary reform. It will, by definition, only be encountered where the federal courts have identified unfair postconviction proceedings.

Both Justices Brennan and Clark foresaw dire consequences from a failure to reform postconviction remedies.[114] Increasing friction between state and federal court systems imposed a ceiling on the extent to which federal habeas could feasibly be relied upon as the preferred means of protecting the federal rights of state prisoners. Continuing unabated, the friction would, at some point, become great enough to precipitate a crisis that would cause either (1) a scaling back of Fourteenth Amendment due process rights, (2) a collapse of what adequate remedies were already in existence,[115] or (3) the implementation of effective state postconviction processes.

The first two options are, of course, opposite sides of the same coin. There are no rights without remedies. Although significant, the tensions created by postconviction procedure simply do not justify the abrogation of the Constitution. This leaves the third scenario, and this has in fact been a major theme of postconviction reform over the last thirty-five years. Indeed, Justice Clark's vision demarcating structural reform in state processes has quite nearly reached completion. Yet, along the way, Justice Brennan's analysis has been largely overlooked. The adequacy of state postconviction review is now the central question presented by habeas reform. Yet whether the Constitution requires the states to provide adequate postconviction remedies at all has never been squarely decided.[116] The issue remains, in the words of one Supreme Court Justice, "shrouded in . . . uncertainty."[117]

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114. *Case*, 381 U.S. at 340 (Clark, J., concurring); *id.* at 345–46 (Brennan, J., concurring).

115. Justice Clark was not prepared to sanction either of these alternatives, stating flatly that arguments for the restriction of the scope of federal habeas jurisdiction based on concerns about comity, delay or the workload of federal courts cannot "survive careful scrutiny." *Id.* at 339 (Clark, J., concurring).

116. This lack of clarity has been costly. For example, in response to alleged abuses of state postconviction procedures—which included a Sixth Amendment claim by a third party on behalf of a mentally ill death row prisoner that trial counsel was ineffective for making no use of the prisoner's history of mental illness at either trial or sentencing, the seeming "disappearance" of cases into federal court, and the growing number of state petitions—in 1989 the Supreme Court of Arkansas elected to strike down the state's existing postconviction procedures, replacing them with rules dramatically limiting the opportunity to present claims to the state court. Whitmore v. State, 771 S.W.2d 266, 268 (Ark. 1989). The following year, the same court reversed itself in a per curiam decision reinstating rules "embracing the scope" of the procedures that had been struck down in *Whitmore*. *In re* Post-conviction Procedures, 797 S.W.2d 458 (Ark. 1990).

117. Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring).

The *Case* decision accelerated a process that had begun some fifteen years earlier of substituting statutory or court-rule-based postconviction remedies for the traditionally narrow writs of habeas corpus and coram nobis,[118] lowering federal-state tensions to a simmer. In the more than three decades following *Case v. Nebraska*, the Court has had occasion to comment on the constitutional basis of state postconviction procedures in four major cases: *United States v. MacCollom*,[119] *Pennsylvania v. Finley*,[120] *Murray v. Giarratano*,[121] and *Coleman v. Thompson*.[122] These decisions manifest a shift in thinking away from the relitigation model. The Court has not yet found a constitutional basis for the duty on states to provide postconviction procedures. However, as there is no case directly on point, the question remains open.

The Court's first commentary on the *Case* question came in *MacCollom*. In that case, the petitioner was convicted in federal court of uttering forged currency.[123] He did not appeal. Later, he requested a copy of his transcript from the convicting court. After a hearing, the court decided that the petitioner was not entitled to a transcript because he had failed to state a claim upon which postconviction relief could be granted. The Court interpreted the Criminal Justice Act[124] and 28 U.S.C. § 753(f) as requiring provision of a free transcript only if the claims asserted by the petitioner are "'not frivolous' and . . . the transcript is 'needed to decide the issue.'"[125] Justice Rehnquist reasoned that this threshold showing did not violate the petitioner's Fifth Amendment rights, considering that he had failed to appeal.[126] The Court went on to note that the minimal statutory requirements of non-frivolity and claim-relatedness did not violate the Equal Protection Clause, as neither the Fourteenth nor the Fifth

118. WILKES, *supra* note 4, § 2-5, at 98. Although their adequacy is arguable, since 1949 forty-six states have adopted some form of statutory or court-rule based postconviction remedy through which violations of federal rights can be challenged in state court. *Id.* at 98–99. The remaining four states (California, Connecticut, New Hampshire and Virginia) judicially expanded the scope of habeas corpus. *Id.* at 100–101. *See generally id.* at App. A (surveying states); LARRY YACKLE, POSTCONVICTION REMEDIES §§ 1–13 (1981 & Supp. 2001).

119. 426 U.S. 317 (1976).

120. 481 U.S. 551 (1987).

121. 492 U.S. 1 (1989).

122. 501 U.S. 722 (1991).

123. *MacCollom*, 317 U.S. at 319. The recitation of facts above is drawn from the Court's opinion.

124. 18 U.S.C. § 3006A (2000).

125. *MacCollom*, 426 U.S. at 320–21 (quoting 28 U.S.C. § 753(f)).

126. *Id.* at 323–24. In dictum, Justice Rehnquist also suggested that "the Due Process Clause of the Fifth Amendment . . . does not establish any right to collaterally attack a final judgment of conviction." *Id.* at 323. However, as his subsequent analysis reveals, a petitioner is entitled to *some* adequate forum in which to raise constitutional claims fairly. The petitioner's transcript would have been available to him had he chosen to pursue a direct appeal from the judgment of conviction. *Id.* at 328. Thus, the case concerns what level of showing is necessary to overcome a waiver of constitutional rights, not whether or to what extent postconviction remedies are constitutionally required.

Amendments requires "absolute equality" between indigent and wealthy petitioners.[127] Rather, "[i]n the context of a criminal proceeding they require 'only an adequate opportunity to present [one's] claims fairly . . . .'"[128] Thus, an indigent claimant asserting her constitutional rights for the first time on appeal is entitled to counsel[129] while a petitioner asserting a discretionary second appeal is not.[130] Notably, the *MacCollom* Court indicated that where habeas review provides the first opportunity to present a Sixth Amendment claim of ineffective assistance of counsel, a transcript should be provided,[131] but noted that such a claim was not presented on the facts before the Court.[132]

The Court's next commentary arrived a little more than ten years later with *Finley*,[133] a case in which the petitioner asserted a right to receive *Anders*[134]-type assistance of counsel in state postconviction proceedings where he had raised claims identical to those he raised on direct appeal. Characterizing state postconviction review of claims already raised on direct appeal as "discretionary,"[135] the Court reasoned that requiring counsel to meet the *Anders* requirements in such context would entitle the petitioner to a windfall, equipping the petitioner with "a sword to upset the prior determination of guilt."[136] Again in passing, Justice Rehnquist opined that the "[s]tates have no obligation to provide [collateral] relief."[137] For support of this conclusory statement, Justice Rehnquist cited only the dicta from *MacCollom* discussed above.[138] Thus, Justice Rehnquist's statements denying a constitutional duty on the states to provide adequate process to present fairly constitutional claims are neither necessary to the holding of either case, nor in any way conclusive of the issue.

More recent commentary on the *Case* questions came in 1989 with *Giarratano*,[139] a case in which Virginia death row inmates brought a civil rights suit claiming to have been denied their constitutional right to free assistance of effective counsel to pursue state postconviction remedies. *Finley*'s denial of

127. *Id.* at 324.

128. *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974) (second alteration in original)).

129. *See* Evitts v. Lucey, 469 U.S. 387 (1985).

130. *See Ross*, 417 U.S. at 618.

131. *MacCollom*, 426 U.S. at 326.

132. *Id.* at 327.

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

134. Anders v. California, 386 U.S. 738, 744 (1967) (establishing procedures requiring appellate counsel who intends to withdraw from a case because she sees an appeal as "wholly frivolous" to advise the court and request permission from the court to withdraw. "That request must . . . be accompanied by a brief referring to *anything* in the record that might *arguably* support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." (emphasis added)).

135. *Finley*, 481 U.S. at 555.

136. *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 610–11 (1974)).

137. *Id.* at 557.

138. *Id. See also* text accompanying note 126, *supra*, and note 153, *infra*.

139. Murray v. Giarratano, 492 U.S. 1, 3 (1989).

counsel in state collateral proceedings for claims already presented on direct appeal did not control that case. Choosing not to focus on the singular opportunity to vindicate constitutional rights in state collateral proceedings, petitioners did not put the *Case* question to the Court. Rather, petitioners relied primarily on the Court's precedents holding that death is different[140] and that "the Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death."[141]

The Court rejected these arguments, concluding that capital cases are different only insofar as they require greater safeguards at trial and sentencing.[142] Accordingly, the Court extended *Finley*'s holding to capital cases where direct appeal is the primary avenue of review of a conviction or sentence.[143] Justice Rehnquist argued that "[*i*]*f*. . . direct appeal is the primary avenue of appeal for review of capital cases as well as other sentences," provision of counsel on direct appeal is sufficient to protect the rights of petitioners.[144] Notably, the question whether the Constitution requires the assistance of counsel where state postconviction remedies present the "primary avenue" of vindicating constitutional rights goes unanswered in the opinion.

In *Coleman*[145] the Court came very close to considering the *Case* question left open by *MacCollom*, *Finley*, and *Giarratano*. One question raised by the petitioner in *Coleman* was whether there is an "exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction."[146] Since Virginia law prevented the petitioner from raising ineffective assistance of counsel claims until he reached state collateral proceedings, the question seemed to be squarely presented.[147] Nevertheless, the Court avoided the key question in a stunning display of question-begging reasoning. The petitioner challenged the performance of counsel on appeal from a state habeas judgment who had failed to comply with Virginia's jurisdictional rule requiring notice of appeal from a habeas trial court's ruling within thirty days; the effectiveness of his habeas trial counsel was not at issue. That Virginia's state habeas trial court had merely

140. *See* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

141. *Giarratano*, 492 U.S. at 8 (citing Beck v. Alabama, 447 U.S. 625 (1980) (trial judge must give jury the option to convict of a lesser offense); *Lockett*, 438 U.S. at 604 (jury must be allowed to consider all of a capital defendant's mitigating character evidence); Eddings v. Oklahoma, 455 U.S. 104 (1982) (same)).

142. *Id.* at 10 ("The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed.").

143. *Id.*

144. *Id.* at 11 (emphasis added) (citing Barefoot v. Estelle, 463 U.S. 880 (1983)).

145. Coleman v. Thompson, 501 U.S. 722 (1991).

146. *Id.* at 755.

147. *See id.* ("[U]nder Virginia law at the time of Coleman's trial and direct appeal, ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in state habeas.").

"addressed" the petitioner's claims satisfied Justice O'Connor, who framed any further review as gratuitous.[148] The question under consideration was thus "only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment."[149] Rather than answering this question, however, O'Connor avoided it. In rejecting the petitioner's claim, Justice O'Connor merely cited *Finley* and *Giarratano*, flatly denying the existence of a free-standing right to counsel in a postconviction appeal.[150]

Justice O'Connor's analysis glosses over the petitioner's need for a full and fair process in the forum providing the first opportunity to present constitutional claims. Whether that opportunity arises on direct appeal or in a collateral context is of no moment. In light of *Evitts v. Lucey*,[151] were the petitioner in *Coleman* aggrieved by his counsel's failure to perfect a direct appeal, he could have sought relief on habeas on a claim of ineffective assistance of counsel. State habeas presented Coleman's first opportunity to raise a number of claims, the appeal from which implicates the same substantive concerns as those in *Lucey*. In denying relief to Coleman, O'Connor distinguished *Lucey*—and created an entirely new procedural category—by suggesting that Coleman's habeas petition was both his hearing on the merits of his claims *and* his appeal.[152]

The analytical gymnastics performed by Justice O'Connor to avoid the *Case* question drastically limit *Coleman*'s influence. The holding that state habeas appellate counsel's errors do not constitute cause for procedural default seems to apply only where the constitutional effectiveness of state habeas counsel is not at issue. The *Coleman* rule has no application where state habeas trial counsel mishandles constitutional claims that can only be brought in state habeas. Moreover, *Coleman* does not speak to the *quality* of state habeas procedures, only whether constitutional claims were "addressed" by state habeas courts.[153] Thus, like *MacCollom*, *Finley*, and *Giarratano* before it, *Coleman* left open the question of whether the Constitution requires the states to provide postconviction remedies adequate to protect federal rights presented in the first instance. This question has not been presented squarely since *Case*, and the concurring opinions of Justices Brennan and Clark still provide the best blueprint for resolving the issue.

Recognizing the constitutional stature of state postconviction process is the shortest distance to completing the reform outlined in *Case*. The alternative, implementing fair procedures in fifty-one separate sovereign jurisdictions by

148. *Id.* ("We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court.").

149. *Id.*

150. *Id.*

151. 469 U.S. 387 (1985) (establishing constitutional right to counsel in first appeal as of right).

152. *Id.* at 756.

153. *Id.* at 755.

legislation, would present formidable difficulties. Congress lacks authority to direct the states to change their own laws. Simply waiting for the states to change voluntarily would be a fool's errand. Constitutional rights are the only mechanisms capable of compelling systemic changes in every state, even the relatively minor changes discussed here.

Fairness is essential in state postconviction proceedings, which offer the first opportunity to raise claims that do not appear on the face of the appellate record or that can only be redressed through the presentation of new evidence.[154] The forum of first resort, state postconviction proceedings, must be adequate to fully and fairly provide relief. Moreover, state postconviction proceedings directly influence the scope of any subsequent federal review.[155] Petitioners are entitled to only one full review of their constitutional claims.[156] Before any federal habeas petition will be heard, the petitioner must fairly present each claim to state courts. Where a petitioner fails to exhaust available state remedies, her claim will not be heard by a federal court, but will be remanded back to the state. Typically, unexhausted claims remanded to state court are time-barred. Absent a showing of sufficient cause and prejudice, no federal court will hear a claim that has failed to meet state procedural requirements. The claim is thus defaulted. This is the fate of many otherwise meritorious claims.

If the petitioner is put to the hazard of waiver and default on meritorious claims, the state should similarly be required to provide fair and open access to a full corrective proceeding. More directly, default rules mean that a state court is often the court of last resort for raising federal claims. Playing a central role in the enforcement of constitutional rights, state postconviction proceedings must provide a meaningful opportunity to litigate claims. As noted above, after *Case*, every state now provides *some* opportunity to raise a postconviction claim.[157] This is not to say that state postconviction procedures are currently adequate for the task they are now expected to fulfill. The predicate for federal habeas review of state convictions has historically been that the states have not provided opportunities for review. Indeed, in *Case*, the state had denied *any* opportunity to raise a postconviction claim in a state court. Federal habeas was a sound and certain backstop ensuring review. However, having evolved under a wholly different model of federal habeas than the one currently in season, most state

154. *See, e.g.*, United States v. MacCollom, 426 U.S. 317, 327 (1976) ("[A]ny discussion [petitioner] may have had with his trial counsel . . . would not normally appear in the transcript of proceedings at trial . . . . The failure to flesh out . . . [petitioner's] claim of ineffective assistance of counsel, then, is not likely to have been cured by a transcript."). *See also* United States v. Shoaf, 341 F.2d 832, 835 (4th Cir. 1964) ("The usual grounds for successful collateral attacks upon convictions arise out of occurrences outside of the courtroom.").

155. *See generally* State *ex rel.* Glover v. State, 660 So. 2d 1189 (La. 1995) (finding the repeal of state mechanisms for reviewing constitutional claims to be impermissible); Davis v. State, 912 S.W.2d 689 (Tenn. 1995).

156. *See, e.g.*, *Coleman*, 501 U.S. at 756.

157. *See supra* note 118 and sources cited therein.

postconviction procedures cannot be relied upon to develop fully questions of law or fact presented in postconviction claims. In theory, federal habeas still assures review, but the ascendancy of deference to state postconviction determinations significantly limits that review.

Deficiencies in state collateral proceedings commence before the petitioner gets into court. Many petitioners are denied a hearing on their claims in state court despite having made out a prima facie case in the pleadings. In *Blackledge v. Allison*,[158] the Court held that a federal petitioner making bare allegations of fact that, if true, would make out a federal claim is "entitled to . . . plenary processing of his claims, including full opportunity for presentation of the relevant facts."[159] The holding in *Blackledge* is based upon principles of fundamental fairness. Yet, inexplicably, several states impose a higher standard for obtaining a hearing on a federal claim.[160] Many of these standards are excessive and burdensome on petitioners.[161] With the retrenchment of federal habeas, denial of a hearing at the state level may now result in the elimination of *any* opportunity to vindicate constitutional rights.[162]

State courts frequently abdicate their duty to protect pro se litigants. The overwhelming majority of state collateral petitions are pursued pro se. Petitioners confronting the vast resources of state attorney's offices begin with a tremendous disadvantage. To level the playing field, courts are allowed to assist pro se litigants;[163] nevertheless, many courts fail to do so sufficiently.[164] A state attorney general's office and a pro se petitioner cannot be considered equal adversaries. Lack of adversariness in turn diminishes the reliability of any hearing's results.[165] Even when hearings are granted in state court, proceedings

158. 431 U.S. 63 (1977).

159. *Id.* at 82–83 (citations omitted).

160. *See, e.g.*, Pennsylvania Post Conviction Relief Act, 42 PA. CONS. STAT. ANN. § 9545 (West 1995) (requiring that a petitioner's request for an evidentiary hearing include a signed affidavit of each witness to avoid rendering a proposed witness's testimony inadmissible and limiting discovery to that permitted by leave of the court upon a showing of exceptional circumstances).

161. *See generally* WILKES, *supra* note 4, at § 3-2 (describing limitations placed on availability of state postconviction relief including "absurdly short" statutes of limitations, bars on successive claims, and substantive limits modeled on the "new rule" principle of *Teague v. Lane*, 489 U.S. 288 (1989)). Living in confinement and devoid of resources, prisoners proceeding pro se understandably often fail to get past such obstacles.

162. Failure to obtain a hearing at the state level takes on critical significance in light of the strict statutes of limitations imposed by many states, *see supra* note 161, and in conjunction with the standard of deference to procedural default in state court set out in *Wainwright v. Sykes*, 433 U.S. 72 (1977).

163. *See, e.g.*, United States v. Miller, 197 F.3d 644 (3d Cir. 1999) (prescribing affirmative duties upon the federal trial court to assist pro se habeas petitioners in some circumstances).

164. *See, e.g.*, United States v. Sanchez-Barreto, 93 F.3d 17 (1st Cir. 1996) (faulting the trial court for failing to determine a pro se petitioner's intent to withdraw plea).

165. Perhaps the most dramatic example of the breakdown of adversariness in state postconviction proceedings occurs when the court adopts the state's pleadings and merely affixes a ruling. *See, e.g.*, Johnson v. Trigg, 28 F.3d 639, 644 (7th Cir. 1994) (finding that the state court's

are typically unfair. Many courts routinely deny relief after arguments. Commentators have noted a cynical attitude among state court judges sitting in postconviction proceedings.[166] Such cynicism may be the result of the generally poor technical quality of pro se petitions as well as an exhaustion doctrine which invites petitioners to include every imaginable claim in their initial petition regardless of the merits of each claim. The combination of this multitude of claims with the poor technical quality of many pro se briefings may create a "needle-in-the-haystack" problem that effectively prejudices petitioners. State postconviction petitioners also encounter statutes of limitations governing the availability of state remedies.[167] These limitation periods are far too short to ensure that violations of constitutional rights are redressed.[168] Additionally, many states have restricted the total number of applications for relief that a petitioner may file.[169]

Most of the problems with state postconviction proceedings could be minimized were petitioners to be represented by effective counsel. Collateral attack typically entails complex legal claims and extensive factual development. Likewise, the interaction of exhaustion and procedural default doctrines creates numerous opportunities for the inexperienced petitioner to forever forfeit meritorious claims. Prisoners cannot reasonably be expected to navigate this procedural minefield on their own. Nonetheless, state habeas petitioners are routinely denied the assistance of counsel in state postconviction proceedings.[170] Even when counsel in state collateral proceedings assists petitioners, petitioners are not currently entitled to effective assistance of counsel.[171] In light of exhaustion and procedural default rules, postconviction counsel can seriously harm a petitioner's case, a harm for which there is no recourse. A concurrent benefit accompanying the acknowledgement of the constitutional basis for a full and fair state postconviction procedure would be the right to counsel in those proceedings. The uniquely important role that state postconviction procedures play in the litigation of claims justifies the presence of counsel. There can be no

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ruling was not entitled to deference on a relevant factual issue because the opinion merely "endors[ed] . . . the state's version of the facts, [and] did not purport to make independent findings . . . .").

166. *See, e.g.*, Henry B. Robertson, *The Needle in the Haystack: Towards A New State Postconviction Remedy*, 41 DEPAUL L. REV. 333, 334 (1992) (observing that "[t]he only consistency in the courts' treatment of [postconviction remedies] is that they almost always deny them out of hand. The proceedings are, and are intended to be, exercises in futility.").

167. *See* WILKES, *supra* note 4, at § 3-2 (noting that twenty-eight states have imposed statutes of limitations on their principal postconviction remedies or on all such remedies).

168. *See id.* (noting such "absurdly short" periods as 30 days (Arizona) and 90 days (Arkansas). Twelve states have limitations periods of a year or less).

169. *See id.*

170. Where counsel is provided in state postconviction proceedings, her performance need not be constitutionally effective. *See* Pennsylvania v. Finley, 481 U.S. 551, 558 (1987).

171. *Id.*

doubt that this would be a major advance for the cause of justice and the integrity of constitutional rights.[172]

Alarmingly, many states are actually curtailing the availability of state postconviction remedies and relief. Mimicking Burger-Rehnquist Supreme Court decisions narrowing the availability of postconviction relief at the federal level, several states have replaced previously existing postconviction remedies with new and more restrictive models.[173] The Arkansas Supreme Court actually abolished all state postconviction remedies for more than a year before promulgating a new and narrower replacement.[174] More troubling still, some states have expanded their rules of forfeiture and procedural default.[175] Federal procedural default rules are predicated on notions of comity and respect for state court rules; state courts cannot rely on the same logic to justify procedural defaults. Yet the state procedural bars have clearly been enacted to echo the retrenchment of federal habeas.[176] Absent compelling justification, state forfeiture rules appear as transparent procedural maneuvering to seal constitutional claims from review. Similarly, many states have adopted retroactivity guidelines[177] that reflect the Court's ruling in *Teague v. Lane*.[178]

The federal habeas "backstop" has helped to avert a crisis despite the inadequacy of state postconviction procedures.[179] Now that federal review has

172. Of course, if there is a constitutional right to counsel in state collateral proceedings, the petitioner must have the attendant right of assistance by effective counsel. The proposal to guarantee effective representation in postconviction proceedings might be criticized as preparing an invitation to perpetual litigation. In particular, one might fear the following scenario: A state postconviction petitioner, assisted by counsel, loses her state habeas appeal. She advances to federal habeas, but also files a subsequent petition in state court challenging the effectiveness of her state habeas counsel. Should she lose this petition, she would then re-file, challenging the effectiveness of subsequent counsel, and so on ad infinitum. This is not likely to occur. As an initial matter, there is no such problem in federal habeas, even though effectiveness of counsel is essential to developing complex postconviction claims in federal court. Rather, petitioners make their very best efforts at each opportunity they have. Secondly, even if the cycle were to occur, it would most likely be in capital cases. Perpetually open questions about effectiveness of counsel could slow the administration of the death penalty. However, the state's interest in speeding up that administration is specious at best. Indeed, the problem might be framed another way: What is a state's legitimate interest in rushing a petitioner to the gallows who has meritorious claims left undeveloped?

173. *See* WILKES, *supra* note 4, at § 3-2.

174. *See In re* Post-conviction Procedures, 797 S.W.2d 458 (Ark. 1990); Whitmore v. State, 771 S.W.2d 266, 268 (Ark. 1989) (abolishing postconviction remedies in Arkansas due to "alleged abuses of our post-conviction remedies" by petitioners).

175. *See* WILKES, *supra* note 4, at § 3-2.

176. *See, e.g.*, State v. Preciose, 609 A.2d 1280, 1291–92 (N.J. 1993) ("The Supreme Court's cause-and-prejudice standard has encouraged some state legislatures to enact and some state courts to enforce stricter procedural bars to post-conviction relief.").

177. *See, e.g.*, Ferrel v. State, 902 P.2d 1113 (Okla. Crim. App. 1995); State v. Horton, 536 N.W.2d 155 (Wis. Ct. App. 1995). *See generally* WILKES, *supra* note 4, § 3-2 at 123 & n.21; Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421 (1992).

178. 489 U.S. 288 (1989).

179. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 463–64 (1953) (noting that because of federal habeas "[a] way is left open to redress violations of the Constitution").

become largely unavailable, state court deficits threaten the very integrity of federal constitutional rights. The crisis that has been avoided thus far now menaces on the horizon.

V.
CLOSING THE CIRCLE: RECOGNITION OF THE CONSTITUTIONAL BASIS FOR STATE POSTCONVICTION PROCEDURES CAN MAKE EXISTING STATE PROCEDURES ADEQUATE

The United States Supreme Court may direct state courts to comply with important constitutional requirements.[180] Fairness is the touchstone of due process,[181] and the Supreme Court may direct the states to comport with fair procedures.[182] Federal oversight is most appropriate when, while providing no remedial procedure, a state deprives the petitioner of her constitutional rights. Such deprivations justify the very existence of federal postconviction procedures. However, this is the floor, not the ceiling, of federal review. Where the states provide a remedial procedure that is unfair or inadequate to reach federal claims, federal review is equally appropriate.[183]

Currently, claims that state collateral procedures are unfair or inadequate come before federal courts in one of two postures: (1) the petitioner argues that inadequate state procedures, which prevented her from litigating her federal claim in state court, constitute cause to overcome procedural default, or (2) the petitioner argues that a state court's determination of fact does not preclude federal fact-finding because of inadequate state process.

When a petitioner's claim was defaulted at the state level, before those claims can be heard in federal court, she must show cause and prejudice to

180. *See, e.g.*, Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (noting that a court's authority to review voir dire in state court cases is limited to requiring state courts to comply with the Constitution).

181. *See, e.g.*, Rotchin v. California, 342 U.S. 165 (1952).

182. *See* Carter v. Illinois, 329 U.S. 173 (1946).

183. *See* Stone v. Powell, 428 U.S. 465, 494 (1976) (denying federal habeas corpus relief where a state petitioner had a "full and fair opportunity to litigate" a Fourth Amendment claim in state court); Townsend v. Sain, 372 U.S. 293, 312–18 (1963) (describing how "full and fair" a state court evidentiary hearing on a factual matter must be in order to preclude relitigation in federal habeas court). Notably, *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985), identifies three factors that must be weighed in determining whether due process and fundamental fairness considerations mandate a requested procedural safeguard in a judicial forum where the litigant's liberty is at stake: (1) the private interest at stake; (2) the governmental interest at stake; and (3) the probable value of the safeguard and the risk of erroneous deprivation of the relevant interests in the absence of the safeguard. There can be no doubt that a full and fair hearing on a constitutional claim is mandated by the *Ake* test. First, the private interest in life and liberty is entitled to the highest constitutional protection. Conversely, the government has no legitimate interest in preventing a full and fair hearing. A full and fair hearing on constitutional claims is invaluable to the integrity of constitutional rights. Absent a full and fair hearing, erroneous deprivation of constitutional rights is certain.

excuse her failure to develop the claims in state court.[184] In essence, the cause and prejudice test allocates the risks of default to the party asking for the state court to be deprived of the opportunity to review the federal question. The cause and prejudice test requires the petitioner to present a good reason to deprive the state court of the opportunity to rule on her federal claims. That reason must be good enough to relieve the petitioner of responsibility for her default. Even at the apex of the relitigation model's influence, when federal courts were most hospitable to entertaining the merits of claims that the states asserted were defaulted, a petitioner who deliberately bypassed state remedies was barred from having her claims heard in federal court.[185] However, when state postconviction proceedings are not adequate to develop federal claims, the federal courts have not hesitated to act—even going beyond the cause and prejudice test to reach the merits.[186]

Petitioners can also challenge inadequate state collateral proceedings by arguing for federal fact-finding because the state did not afford a full and fair opportunity to develop facts. However, in light of the uncertain constitutional basis for state postconviction proceedings, it has been difficult for petitioners to make out these claims.[187] Even when successful, the remedy has been for the federal court to hear the claims. As with challenging inadequate state collateral procedures as cause for procedural default, the deterrent effect of challenging deference to state fact-finding dwindles as time passes.

The remedy for claims passing the cause and prejudice test has simply been to open the door to federal court. But the typically long expanse of time between the violation and the remedy dilutes the deterrent effect of this approach. Moreover, individual claimants are not capable of challenging the structural problems of state collateral review systems. In the same way that the exclusionary rule is imperfect, where little feedback reaches the "cop on the beat," the grant of a federal hearing fails to adequately promote fairness in state court. Without direct feedback, whatever systemic problems with state postconviction proceedings prevented the full and fair presentation of federal claims in the first place inevitably evade repair.

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184. *See, e.g.*, Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).

185. Fay v. Noia, 372 U.S. 391, 419–20 (1963).

186. *See, e.g.*, Williams v. Lockhart, 849 F.2d 1134 (8th Cir. 1991) (requiring the district court to hold a hearing on a habeas petition alleging ineffective assistance of counsel where counsel failed to appeal a postconviction petition and represented the victim in other proceedings, and where the state court required the petitioner to show that counsel's failures made proceedings a "farce and mockery of justice"); McNutt v. Texas, 323 F.2d 662 (5th Cir. 1963) (providing that a petitioner who raised a claim of inadequate opportunity to consult with counsel was entitled to an evidentiary hearing in federal court); Cooper v. Denno, 129 F. Supp. 123 (S.D.N.Y. 1955) (providing that a federal district court is empowered to hold a plenary hearing if the court feels that the printed record is an inadequate basis upon which to decide the factual issue presented).

187. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 277–78 (1999) (detailing a petitioner's unsuccessful attempt to gain a hearing or discovery on a *Brady* claim where a subsequent discovery order pursuant to a federal habeas petition uncovered important *Brady* evidence).

When state collateral procedures are constitutionally deficient, the more appropriate remedy is remand to state court rather than simply opening the door to federal review. This may only be done if the federal court can articulate what standards are fair. To do so, the question of fairness must have a basis in federal law that applies to the states. Federal statutory law has no more influence than mere suggestion. Only a constitutional rule would enable the federal courts to define the parameters of fairness in review of constitutional claims. Remand pursuant to such a rule would force the state courts to redress both of the separate harms suffered by the petitioner: the unfair original process, and the underlying constitutional violation.[188] Case by case, remand is likely to result in an overall improvement of state postconviction systems. Remand would force open state courts for the full and fair presentation of federal claims. When a state hearing does not reach or decide the issues of fact presented by the defendant, the remand would instruct the state courts to make fair procedures available. Remand would also create an incentive to develop a clear legal and factual record. Since AEDPA authorizes federal review only of a state "judgment,"[189] the petitioner is entitled to have the judge's reasoning laid out for review by the federal courts. The remand to the deciding court would require that the court clarify its reasoning for purposes of any subsequent review.[190]

Undoubtedly, remand may temporarily exacerbate tensions between federal and state judiciaries. However, the gravity of the constitutional rights at stake justifies the imposition of costs on the states. When states perpetrate violations of the Constitution, they should bear the costs of the remedy. Under the current regime, individual petitioners bear the burden of inadequate state procedures. After the initial shock of complying with federal standards, the states will absorb the costs of conforming to due process standards.[191]

Acknowledging the constitutional stature of state collateral proceedings would afford the most direct means of making state postconviction procedures fair and adequate.[192] Aside from ultimately enhancing the reliability of state

188. If the state fails to do so, then the federal court is empowered to release the petitioner upon a subsequent federal habeas petition. *See* Summary of Petitioner's Brief, Case v. Nebraska, 14 L. Ed. 2d 973, 974 (1965) (No. 843). Additionally, the claim that the state failed to provide adequate remedial process should not be barred as a successive habeas petition, as it would be a new claim based entirely on the subsequent deprivation, not the first.

189. 28 U.S.C. § 2254(a) (2000).

190. This may allow the petitioner to raise a challenge based on the requirement in *Townsend v. Sain*, 372 U.S. 293, 316 (1963) that state court judgments be fairly supported by the record.

191. The Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), held that the Due Process Clause of the Fourteenth Amendment requires that state criminal convictions be made in accordance with fair procedures, forcing the states to provide counsel to all indigent criminal defendants. Despite the disruption of state criminal procedure brought about by this requirement, every state complied. On the whole, *Gideon* was a much greater imposition upon state sovereignty than what is here proposed. Nevertheless, today it is universally accepted that defendants are entitled to the assistance of counsel at trial.

192. AEDPA set a limitations period on federal habeas petitions. 28 U.S.C. § 2241(d)(1)

judgments through the institution of higher standards, such acknowledgement would bring these needed changes rapidly. Waiting for all fifty states to devise adequate postconviction processes is pointless. Each state has an interest in limiting its costs. And though an adequate remedial scheme requires that the states take up slack from federal courts, many states' reactions have been exactly the opposite, mimicking federal postconviction retrenchment to limit access to their own courts.[193]

When both the state and federal courts shift onto one another the responsibility for ensuring that state convictions are constitutional, it is the petitioners who bear the cost. The need to maintain the integrity of constitutional rights mandates the availability of fair procedures by which to raise constitutional claims. Without adequate remedy for their violation, constitutional rights collapse into empty rhetoric.

CONCLUSION

Due process requires that some adequate opportunity exists in which to challenge unconstitutional convictions. This opportunity has always been provided by federal review. However, federal oversight has caused considerable friction between the federal and state judiciaries. Structural and procedural reforms designed simply to eliminate friction miss the point. Friction and tension between state and federal courts are unavoidable. The point is not to attempt to eliminate this tension, but to harness it in service of the essential function of postconviction review—to protect constitutional rights.

Nevertheless, recent federal habeas reform has responded to the inefficiencies manifest in the relitigation model of habeas by dramatically reducing the availability of federal review. This reform has not altered the basic constitutional requirement that some adequate opportunity be available to aggrieved petitioners. However, the burden for providing adequate postconviction reme-

(2000). In addition, Section 2261 of Title 28 provides that states that comply with federal standards for the provision of counsel in capital cases are entitled to a shorter limitations period and less federal oversight in general on federal habeas review of those convictions. *See* Alexander Rundlet, *Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need for the Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 666–669 (1999). As of this writing, only one state (Arizona) has even arguably complied with the minimum requirements of this "opt-in" system. *See* Spears v. Stewart, 283 F.3d 992 (9th Cir. 2002) (holding that Arizona's system for provision of counsel met the opt-in requirements, but declining to give the state the benefit of curtailed federal review because the state had not complied with its own rules in the case at bar). The failure of this experiment to date suggests that federal statutory inducements in the form of limited federal review are unlikely to convince states to adopt extensive (and expensive) reforms. In addition, criticism has been leveled at the opt-in statute for giving those states that refuse counsel to its petitioners a net benefit. *See* Rundlet, *supra*, at 665. With their strict time limits, the opt-in provisions bargain away petitioners' opportunities to present a well-developed claim for the assistance of counsel. Yet the limitations period makes it nearly impossible for counsel to be effective. Pressed by the alarmingly short limitations period set by § 2263, state postconviction counsel will be forced to make uninformed judgments.

193. *See supra* note 161 and accompanying text.

dies has shifted to the states. Unfortunately, existing state postconviction processes cannot carry this burden.

Commentators have argued that the retrenchment of federal habeas has not divested the federal courts of jurisdiction to hear habeas claims,[194] that habeas reform is unconstitutional,[195] and that federal habeas ought to be restored to its position as protector of constitutional rights.[196] While these arguments have substantial merit, federal habeas has in fact been changed. For good or ill, the relitigation model has effectively been superseded. Given a conservative federal judiciary and the willingness of politicians to make easy sport of convicts for political gain, it will not return in the near future. Yet state courts are often under-equipped and many are currently unsuited to adequately protect federal rights. State habeas petitioners encounter arbitrary obstacles to full and fair litigation of their claims. Distributed across all petitioners, these costs go unmeasured. Recognizing the constitutional stature of state postconviction procedures would properly observe all of the interests at play, and refocus postconviction review away from the proceduralism under which it has labored, toward protecting constitutional rights.

194. *See* HERTZ & LIEBMAN, *supra* note 45, § 30, at 1231–37.

195. *See* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Reform Act*, 47 DUKE L.J. 1 (1997).

196. *See* Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992).