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# Reflections on Reform of § 2254 Habeas Petitions

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*I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals may then be left with a more entire charge of federal causes; and appeals, in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts to district courts of the Union.*[1]

Alexander Hamilton

The recent doctrinal history of federal habeas corpus petitions brought by state prisoners describes a continuing quest for a golden equilibrium between finality and certainty. It is not surprising that this quest has inspired subtle and extensive commentary by some of the legal community's most distinguished members.[2] Legalism is

* United States Circuit Judge for the Fifth Circuit. I thank Cristopher Eisgruber, a former clerk, for his research, writing, and critique of my efforts, all essential to this Article. Professor Barry Friedman of Vanderbilt, and Professor Larry Kramer of Chicago, have also sharpened my views in discussions and in their writings. This Article was drawn from a lecture I presented at Hofstra University School of Law on October 18, 1989. Since then, I have drawn on various passages for other purposes, including my testimony before the Senate Judiciary Committee on November 8, 1989 in support of the Powell Committee recommendations regarding habeas corpus and the death penalty.

1. THE FEDERALIST NO. 82, at 516 (A. Hamilton) (H.C. Lodge ed. 1902).

2. *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (examining the circumstances under which habeas corpus jurisdiction of the federal courts should be used to redetermine federal questions in state criminal proceedings); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970) (proposing that convictions, with a few exceptions, should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence). Professor Bator directed his attention to "the problem of finality as it bears on the great task of creating rational institutional schemes for

characterized in great part by the effort to distill disputed facts into a dispositive judgment. The limits upon the success of this effort are reflected quite directly in debate over the principles of *res judicata*—more generally, the binding effect of the same judgment upon the polity. There is perhaps no greater sign of our adherence to *res judicata* than our willingness to permit a legal judgment, once rendered, to justify the continued incarceration, or in extreme cases, the death, of an individual criminally convicted. The grand irony of our principles is that to make the "rule of law" possible, inchoate facts must be subjected to the judgment of bench or jury—the "rule of men" in a particular sense. Scholarly and judicial reflection upon habeas corpus doctrine for this reason tends, at bottom, to depend upon fundamental debates about the possibility of legalism.

It is not the purpose of this Article to re-open these grand inquiries into the root tensions of American legalism. On the contrary, this Article considers two practical reforms to § 2254[3] habeas procedures that avoid entirely these deeper arguments by accepting, for the most part, the ordering of state and federal authority implicit in contemporary Supreme Court habeas doctrine. In particular, I examine a proposal that the habeas process be streamlined by injecting § 2254 petitions directly into the federal appellate courts, without any preliminary federal district court proceeding. This treatment of state prisoners' habeas petitions is arguably appropriate because the modern law of habeas corpus effectively uses federal habeas proceedings for appellate supervision of the state criminal process. As such, the irrepressible questions about the limits of legalism are confined, as I believe the system correctly stands, to resolution by the law of the forum that rendered the conviction: state habeas proceedings for state prisoners and § 2255 proceedings for federal prisoners.[4] I then proceed to suggest a method of treatment by which Congress can address the problem of successive writ applications by a single peti-

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the administration of the criminal law." Bator, *supra*, at 446. For a discussion of Judge Friendly's "claim of innocence" theory, see *infra* note 24; Ledewitz, *Procedural Default in Death Penalty Cases: Fundamental Miscarriage of Justice and Actual Innocence*, 24 CRIM. L. BULL. 379, 394 (1988).

In discussing the balance between finality and certainty, Judge Friendly has recognized that "it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment." Friendly, *supra*, at 146 (quoting Bator, *supra*, at 452).

3. Throughout this article, § 2254 will refer to 28 U.S.C. § 2254 (1988) - the provision in the United States Code that pertains to state custody and remedies available in federal courts.

4. 28 U.S.C. § 2255 (1988).

tioner and the draw of non-capital cases upon the recent recommendation of the Powell Committee[5] for habeas procedures in capital cases.

This Article is divided into three parts. First, I briefly summarize the concerns which underlie the development of modern habeas law.[6] Second, I review the case for an understanding of modern § 2254 habeas doctrine that depends upon reference to an appellate model.[7] Finally, to frame consideration of these issues, I translate these considerations into two practical proposals:[8] 1) I propose direct recourse from the state courts to the intermediate federal appeals courts and 2) I propose a limited extension of the Powell Committee recommendation with a statutory refinement of Justice Harlan's vision of habeas, essentially adopted by the Supreme Court in *Teague v. Lane*.[9] In developing these suggestions, I will assume that we are only dealing with non-capital cases, and so set aside for now any problems special to death penalty appeals. In so doing, I do not wish to imply that I believe "death is different"[10] for purposes of the pro-

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5. AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES, JUD. CONF. OF THE U.S., COMMITTEE REPORT AND PROPOSAL (1989) [hereinafter POWELL COMM. REP.].

6. *See infra* notes 11-27 and accompanying text.

7. *See infra* notes 28-53 and accompanying text.

8. *See infra* notes 54-79 and accompanying text.

9. 489 U.S. 288 (1989). In *Teague*, the Court adopted Justice Harlan's approach to retroactivity for cases on collateral review - an approach espoused in Mackey v. United States, 401 U.S. 667 (1971) (separate opinion of Harlan, J.). Justice Harlan believed in a general principle that new rules should not be applied retroactively to cases on collateral review. In discussing the nature of habeas corpus, Justice Harlan stated:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

*Mackey*, 401 U.S. at 682-83 (emphasis in original).

Justice Harlan recognized only two exceptions to his rule of nonretroactivity for cases on collateral review. The first exception would apply a new rule retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.* at 692. The second exception applies a new rule retroactively for claims of nonobservance of those procedures that are "implicit in the concept of ordered liberty." *Id.* at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

10. For a discussion of the "death is different" theory, see Batey, *Federal Habeas Corpus Relief and the Death Penalty: "Finality with a Capital F"*, 36 U. FLA. L. REV. 252 (1984). Professor Batey has argued that because death is a different form of punishment, habeas corpus relief for capital prisoners should also be different. As Professor Batey points out, the Supreme Court noted the unique status of death as a form of punishment in Gardner

posals. In fact, I incline to the contrary view. However, death certainly is different, at least in the sense of requiring specific arguments about why death is or is not different as a substantive matter with respect to a particular topic. I leave those arguments for another day, so as to concentrate now on procedural issues deriving from structural principles uncomplicated by the more particularized debate over capital punishment.

## I. THE MODERN HISTORY OF HABEAS CORPUS LAW

The modern history of habeas law dates from the Supreme Court's 1953 decision in *Brown v. Allen*.[11] That case entrenched and expanded the results of a century-long expansion of the writ.[12] A series of decisions, originating out of Reconstruction legislation enacted in 1867,[13] had taken the writ from a narrow, albeit storied, means of relief for those incarcerated without legal process, and transformed it into a much broader remedy that would protect federal constitutional rights left unvindicated by the state appellate pro-

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v. Florida, 430 U.S. 349 (1977), wherein the court stated:

> [F]ive members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

*Id.* at 357-58.

11. 344 U.S. 443 (1953) (expanding the scope of the writ from a traditional narrow focus on jurisdictional error to encompass a claim of constitutional error brought by a prisoner in state custody); *see* Allen, Schachtman & Wilson, *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 RUTGERS L.J. 675, 675 n.1 (1982) (describing the Supreme Court's decision in *Brown* as an expansion of the scope of federal habeas review and as a finding that federal courts have the power to redetermine a constitutional issue on the merits, the adequacy of state adjudication notwithstanding); Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 252 (1988) (stating that the *Brown* Court, rather than explicitly discussing the expansion in the writ's scope, simply presumed the enlarged scope of the writ).

12. *See* Darr v. Burford, 339 U.S. 200 (1950); House v. Mayo, 324 U.S. 42 (1945); Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938); Salinger v. Loisel, 265 U.S. 224 (1924); Henry v. Henkel, 235 U.S. 219 (1914); Glasgow v. Moyer, 225 U.S. 420 (1912); *In re* Lincoln, 202 U.S. 178 (1906); *Ex parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

13. Act of Feb. 5, 1867, ch. 28, § 1, 14 stat. 385. The Habeas Corpus Act of 1867 states in part:

> [T]he several courts of the United States, and the several justices and judges of such courts, . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .

*Id.*

cess.[14] It is this reformed writ which has generated the vast flow of habeas petitions now handled by the federal court, and which has instigated the debate about the proper scope of the habeas remedy.[15]

These changes in the character of the habeas writ are procedural manifestations of two much more comprehensive currents in American legal history: the expansion of constitutional rights,[16] particularly with respect to the states, and the effort to achieve racial equality. The modern habeas writ shares its history with these two great substantive movements, for habeas doctrine and the constitutional jurisprudence of civil rights both emerged out of the war between the states. The fourteenth amendment and the federal habeas statutes were both children of Reconstruction. It is not surprising that their developments should run parallel.[17]

The federal judiciary's efforts to vindicate in court the constitutional promise of equality reinvigorated the old federal distrust of state courts. The states were perceived as unfriendly fora for freshly announced constitutional rights, and as potential instruments of the discriminatory animus which those rights aimed to extirpate.[18] If federal supervision of the state judiciary was to be had, either the Supreme Court would have to radically increase its case load, or some other mechanism would have to be found. Whether by intention or by portentous accident, the habeas writ provided the Court

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14. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 331-35 (4th ed. 1983); *see also* Bator, *supra* note 2, at 463-99 (discussing the evolution of federal habeas corpus law from 1789 to 1952).

15. *See* Friendly, *supra* note 2, at 143-44 (noting the inundation of the federal courts with habeas petitions).

16. *See, e.g.*, Friedman, *supra* note 11, at 275 (discussing the broad scope of substantive federal rights accorded to state prisoners under the fourteenth amendment's due process clause). Professor Friedman lists several cases that have epitomized this broad scope of rights. *See* Rochin v. California, 342 U.S. 165, 172 (1952) (stating that the use of emetic by police to retrieve evidence consumed by suspect violates due process); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (stating that the use of perjured testimony by prosecuting authorities violates the fourteenth amendment). For other cases, see Friedman, *supra* note 11, at 275 n.126.

17. That is not to say that the writ was *intended* to serve anything like the purpose it serves today. For a discussion of the 1867 statute, with emphasis on its connection to the thirteenth amendment, see Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 52, 58 (1965); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE SERIES, REPORT NO. 7, REPORT TO THE ATTORNEY GENERAL: FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS (May 27, 1988) [hereinafter REPORT TO THE ATTORNEY GENERAL].

18. *See* Fay v. Noia, 372 U.S. 391, 415 (1963) (stating that the Habeas Corpus Act of 1867 was passed to counter anticipated Southern resistance to Reconstruction); Friedman, *supra* note 11, at 262 ("[t]he Reconstruction Congress passed the Act of 1867 as one part of its broad program for reforming the secessionist states." (Citations omitted)).

with a saving mechanism.[19]

These are the problems and purposes that give rise to the present form of the habeas writ. By a natural process, their influence upon jurisdictional doctrine has been overshadowed by a conceptual framework calibrated to measure the integrity of particular convictions. The Court's constitutional protections for black Americans within the criminal process took, in many instances, the form of general rights designed to ensure the accuracy of the criminal process.[20] The rights of minorities to be free from discriminatory use of police force were secured by rights that protected the people more generally from the unfair use of police force. The habeas writ became the means for challenging convictions that did not meet this general, racially neutral idea for the criminal process. Furthermore, the habeas writ, as a collateral challenge to a final conviction, added complications of its own that would not be present had the Supreme Court been able to monitor the state courts directly, through the appellate process. The habeas writ, unlike the direct appeal, involved an exception to the normal principles of finality. Thus the combination of the habeas writ and constitutional rights came to impinge upon very general questions about the finality of legal judgments in criminal cases, and about the circumstances under which principles of *res judicata* would suffice to answer a prisoner's plea for freedom.

By still further, but equally natural, evolution, many of the most recent developments in habeas law proceed from one more particular concern: the rights of prisoners convicted without the benefit of adequate counsel.[21] The problem of ineffective counsel has obvious relevance to the problems of both race and individual rights. Black litigants, often impoverished, were disadvantaged by their inability to obtain legal representation with sufficient energy and ability to vindicate their interests. The need for effective assistance of counsel came to be recognized and the right to a fair trial more generally conceived. And again, these substantive developments dovetailed neatly with the characteristics of the habeas writ.[22] Ineffective assistance of counsel is a problem that may dog a litigant up through the appel-

19. *See* Friedman, *supra* note 11, at 274-75 (stating that the Supreme Court could not adequately review federal questions that arose out of state criminal cases and thus the lower federal courts would act as surrogates through the writ of habeas corpus).

20. *See* Bator, *supra* note 2, at 481-83 (describing cases that limited the application of habeas corpus insofar as the writ could not be used to review discriminatory practices that state courts are competent to decide).

21. *See* Sanders v. United States, 373 U.S. 1 (1963).

22. *See* Friedman, *supra* note 11, at 275-76.

late process: the same lawyer who misrepresents a defendant at trial might do so on appeal. The possibility of a collateral attack, not subject to the time limits governing appeals, permits a prisoner to correct counsel's errors later on when, whether by dint of new counsel, the prisoner's own persistence, or sheer good fortune, those errors become apparent.[23]

Today the state habeas docket of the federal courts is the product of these overlapping themes and problems—the quest for racial equality, the expansion of individual constitutional rights, concern with ineffective counsel, distrust of state criminal processes, and the resulting pressure upon the Supreme Court's appellate docket. There are logical as well as historical links among these topics, and the present shape of the habeas writ likewise has a basis in the internal interpretive logic of a remedy that promises to protect citizens from "unlawful confinement." I leave for another time the question whether this mix of concerns and principles is the best mix.

For purposes of the proposal advanced herein, the point is simply that this mix is the mix we now have. If one does not understand the mix, one cannot really understand the modern version of the writ. In particular, someone who believes that the § 2254 habeas writ simply reflects our society's concern that innocent people not be incarcerated, is met with a glaring difficulty. As Judge Friendly has observed: the writ neither requires, nor in many instances provides a forum for, a simple claim of factual innocence.[24] Federal constitutional law does accord defendants the benefit of the "beyond a reasonable doubt" standard.[25] The federal courts do have significant fact-finding powers that may be invoked to investigate the factual predicate for constitutional claims, although the habeas statute now

23. For a discussion of the ineffective assistance of counsel claim, see *id.* at 324-29.

24. Judge Friendly has argued that convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence. *See* Friendly, *supra* note 2, at 142. According to Judge Friendly, a "defendant would not bring himself within this criterion by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained." *Id.* at 160. A formulation of this criterion has been set forth by Judge Friendly:

> [T]he petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

*Id.*

25. *In re* Winship, 397 U.S. 358, 362 (1970) ("[e]xpressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required.").

requires deference to the states, absent exceptional circumstances.[26] Finally, a prisoner might be able to challenge a conviction on factual grounds through a motion based on newly discovered evidence, or on other state law grounds. But § 2254, for the most part, does not aid an innocent prisoner who is simply the victim of a jury's equally innocent, but nonetheless damning, mistake. Simply put, the modern habeas writ only offers appellate relief.[27]

This appellate character of the § 2254 writ provides the chief premise for the proposal outlined in Section III, a proposal which would refashion the procedural mantle of the writ along expressly appellate lines. It is also the backdrop to the suggestions of Section IV. The next section describes in more detail the predominately appellate features of modern habeas jurisprudence. My point thus far has been to treat the sense of those features in light of the writ's multiple purposes, aware that they are not likely to make sense if viewed only by reference to the search for a balance between innocence and finality.

## II. Habeas Corpus as an Appellate Model

Barry Friedman has recently made a strong case for having an appellate model of habeas corpus.[28] His article is clear and precise, and enables us to confine our discussion here to a brief summary of the relevant points. Friedman analyzes the scope of the writ,[29] the procedural default rules,[30] and the res judicata and exhaustion doctrines[31] from the perspective of the appellate model. He goes on to use the model as a critical lens upon the writ, suggesting, among other changes, a more aggressive review for ineffective assistance of counsel.[32] He also propounds a thesis about the relation between the "old" and "new" habeas writs.[33] Friedman's critical perspective raises questions which, again, I prefer to put aside for another day. My immediate concern is with the procedural apparatus best suited

26. For a discussion of the federal courts' fact-finding powers and the extent to which deference to the states is required, see P. Bator, P. Mishkin, D. Shapiro & D. Meltzer, Hart and Wechsler's The Federal Courts and the Federal System 1561-68 (3d ed. 1988).

27. *See* Friedman, *supra* note 11, at 324-29.

28. *Id.* at 324-40.

29. *Id.* at 277-88.

30. *Id.* at 288-303.

31. *Id.* at 303-19.

32. *Id.* at 325-28; *see also id.* at 287-88 (criticizing Stone v. Powell, 428 U.S. 465 (1976)).

33. *Id.* at 319-29.

to the appellate form of habeas doctrine, apart from the question of what constitutes the best content for that form.

For the purposes of this Article, the most important indicators of the present habeas writ's appellate nature are two doctrines: the rules requiring deference to state court fact-finding and those honoring state findings of procedural default. Federal deference to the state's factual determinations is, of course, commanded by the language of § 2254 itself. Subsection (d) of the statute provides that a State court's "determination after a hearing on the merits of a factual issue" is entitled to "be presumed to be correct" unless one of seven enumerated exceptions applies.[34] A prisoner who cannot invoke one of the exceptions has the burden of establishing by convincing evidence that the state court's factual determination was erroneous.[35] The Supreme Court has interpreted this provision to require that any federal court which rejects state factual findings must specify written reasons for doing so.[36]

Section 2254(d)'s rule of deference limits the fact-finding role of the federal courts, and so opens the way to an appellate view of the federal habeas writ. State criminal courts receive deference comparable to that which a federal appeals court would give to a federal trial court. This rule of deference is all the more important because state prisoners must exhaust their remedies before proceeding to fed-

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34. *See* 28 U.S.C. § 2254(d) (1988). According to this statute, a state court determination is presumed to be correct unless it is shown:

> 1) that the merits of the factual dispute were not resolved in the State court hearing;
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> 2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> 3) that the material facts were not adequately developed at the State court hearing;
>
> 4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
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> 5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> 6) that the applicant did not receive a full, fair and adequate hearing in the State court proceeding; or
>
> 7) that the applicant was otherwise denied due process of law in the State court proceeding . . . .

*Id.*

35. *See* 28 U.S.C. § 2254(d)(8) (stating that if the part of the record in which the determination of such factual issue was made fails to support such a finding, as determined by the federal court upon review of the record as a whole, the state court determination will not be presumed to be correct).

36. Sumner v. Mata, 449 U.S. 539, 551 (1981).

eral court.[37] State courts must have an opportunity to rule on factual issues relevant to the habeas petition; the federal courts, in short, are not open to habeas petitions as courts of first impression.[38]

The federal doctrine honoring state law procedural defaults makes a like contribution to the appellate status of the writ. After first holding that a prisoner's federal habeas claims would not be barred by a state procedural default unless the prisoner had withheld the claims deliberately,[39] the Supreme Court has since established that a state's decision to invoke its procedural default rule must be honored by the federal courts unless the prisoner can excuse the default by showing "cause and prejudice."[40] In other words, the prisoner must show that there was cause for the default, and that the prisoner would be prejudiced if the default were recognized.[41] This standard is a tough one. Attorney error does not constitute "cause" unless the attorney's incompetence was so glaring as to render counsel ineffective within the meaning of the sixth amendment.[42] The petitioner will not be able to show prejudice unless it is demonstrated that the default might be outcome determinative.[43]

This respect for state procedural default rules is a judge-made doctrine, not directly drawn from any express statutory provision. Friedman argues that federal regard for state defaults is easily explained by the appellate model,[44] but almost impossible to justify adequately from any other perspective.[45] The short point is that a de-

37. 28 U.S.C. § 2254(b) (1988).

38. *See* Friedman, *supra* note 11, at 309-19 (discussing the exhaustion requirement more generally from the perspective of the appellate model).

39. Fay v. Noia, 372 U.S. 391, 438-39 (1963).

40. *See* Wainwright v. Sykes, 433 U.S. 72, 84 (1977) (relying on Davis v. United States, 411 U.S. 233, 242 (1973)).

41. *Id.*; *see infra* note 46 and accompanying text (discussing the "miscarriage of justice" exception).

42. *See* Murray v. Carrier, 477 U.S. 478, 488 (1986) (holding that a federal habeas petitioner cannot show cause for a procedural default by establishing that a competent defense counsel's failure to raise a substantive claim of error was inadvertant rather than deliberate). The *Carrier* Court stated that as long as a defendant is represented by counsel whose performance is not constitutionally ineffective, counsel's failure to raise a claim does not constitute cause for procedural default. *Id.*; *see also* Smith v. Murray, 477 U.S. 527, 534 (1986) (stating that a deliberate decision not to pursue a particular claim does not warrant excusing a defendant's failure to adhere to a state's rule for disposition of its criminal cases).

43. *See* Friedman, *supra* note 11, at 295 & n.238 (citation to cases omitted); *see also* Dugger v. Adams, 109 S. Ct. 1211, 1216 (1989) (holding that petitioner's failure to object to jury instructions at trial would not be overlooked to permit the merits of a habeas petition to be heard).

44. Friedman, *supra* note 11, at 298-302.

45. *Id.* at 288-98.

fault may provide the state with a procedural trump to a prisoner's assertion of innocence or rights. The Court's doctrine permits an escape valve in the form of a "fundamental miscarriage of justice" exception, but that proviso is narrowly construed.[46] Strict respect for earlier defaults is standard practice for an appellate court: arguments not properly preserved below are lost on appeal. Yet, if the habeas writ is not conceived along appellate lines, but simply as an independent protection for substantive rights and as a concession to liberty's claims against the finality of the criminal process, the dispositive weight given to what may only be errors of counsel becomes incomprehensible.

As Friedman argues, the scope of the writ is yet another important sign of its appellate character.[47] As is the case with direct appeals, the habeas writ permits the § 2254 petitioner to raise nearly any federal claim argued in the state courts. However, the match is not perfect. Only constitutional arguments may be asserted, and not even all of these remain available.[48] The habeas writ is appellate in nature, but it is not exactly the same as a "second bite" at the appellate process. Its content and scope have been restricted to fit the particular purposes that spurred the writ's expansion. These variations from the pure appellate model are, however, of no consequence for the reforms suggested herein.

The Court's most recent twist to habeas doctrine is its decision in *Teague v. Lane*.[49] The *Teague* ruling, like so many other aspects of habeas jurisprudence, comports well with an appellate model. *Teague* bars state prisoners from asserting, via collateral attack, any federal constitutional right not accepted at the time the petitioner's conviction became final.[50] The rule is subject to only two limited exceptions: a petitioner may rely on a new rule if the rule 1) immu-

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46. *See Dugger*, 109 S. Ct. at 1217 n.6; *Wainwright* 433 U.S. at 90-91 (stating that "the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."). Justice Rehnquist's opinion in *Wainwright* allows for an exception to procedural default known as the "miscarriage of justice" exception. *See* Ledewitz, *supra* note 2, at 389.

47. Friedman, *supra* note 11 at 277-88.

48. *See id.* at 279-86 (discussing Stone v. Powell, 428 U.S. 465 (1976), and its successors). In *Stone*, the Court disallowed a claim that evidence should have been excluded even though it was claimed that the evidence was seized in violation of the fourth amendment. *Stone*, 428 U.S. at 494-96.

49. 489 U.S. 288 (1989).

50. *See supra* note 9 and accompanying text (discussing the *Teague* Court's adoption of Justice Harlan's view of retroactivity).

nizes specified conduct from state prosecution or 2) recognizes a procedural right both fundamental to ordered liberty and central to the petitioner's claim to innocence.[51] The *Teague* bar functions as a facial extension of the procedural default rule: a convict who wishes to challenge a verdict by asserting an as yet unrecognized constitutional right, must do so on appeal, or lose the chance to vindicate that right. This restriction on the petitioner's claims makes sense if the federal habeas writ is viewed as an avenue giving the petitioner a second appellate track, later in time than the immediate set of appeals, but unmodified by intervening changes in the law. Otherwise, however, the *Teague* doctrine might appear to reflect an arbitrary compromise of the habeas writ in favor of finality interests.

None of this implies that the habeas writ is entirely appellate in character. Mixed with these appellate features are special exceptions, directed to factual innocence and manifest injustice, that respond to the overlapping concerns which informed the writ's expansion.[52] Functional impurity, however, is no barrier to procedural reforms premised upon a dominant strand in the writ's composition.[53] As the next section explains, once the primary conduit for habeas petitions is adapted to suit the prevailing character of the writ, exceptions can easily be devised to accommodate departures from the appellate norm.

## III. Rerouting the Flow of Habeas Cases

The practical consequence of the doctrines and purposes that form § 2254 habeas law is that most state prisoners come to federal court with petitions raising appellate issues. Whether the petitioners get relief depends upon the disposition of federal legal questions, not factual disputes. These are arguments well-suited to the appellate courts. The prisoners must initiate their federal petitions, however, in

51. *Teague*, 489 U.S. at 311-16; *see also* Penry v. Lynaugh, 109 S. Ct. 2934, 2952-53 (1989) (interpreting the first exception's application to death cases).

52. *See* Friedman, *supra* note 11, at 319-24 (discussing the role that actual innocence has in habeas corpus petitions).

53. Nothing in this Article would change if, for example, the writ's function were characterized as "dialectical," rather than "appellate," in the way described in Cover and Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977). Cover and Aleinikoff describe a model of federal-state interaction which occurs "whenever jurisdictional rules link state and federal tribunals and create areas of overlap in which neither system can claim total sovereignty." *Id.* at 1048. The result of such an overlap is conflict between the two court systems, which fosters an "open-ended dialogue" know as dialectical federalism. *Id.* These authors note that habeas corpus is the most dramatic example of such dual input. *Id.*

the federal trial courts. If the habeas writ indeed has the appellate character suggested by the discussion in the last two sections, this recourse to the trial courts is a wasted step. It unnecessarily burdens both the trial courts and the petitioners who simply wait through the trial court process to assert their claims before an appellate court.

Statistics compiled by the Administrative Office of the United States Courts,[54] and reproduced in Tables 1, 2, and 3 at the end of this Article, bear out this hypothesis. Table 1[55] suggests two important conclusions. First, more than 98% of the prisoner habeas petitions filed in district court never go to trial, and, indeed, more than 97% of these never even reach the pretrial phase. Nonetheless, almost a third of the petitions filed in district court go on to reach the appellate courts. Even if it is assumed that *all* of the petitions which reach the pretrial stage proceed into the appellate courts, more than 30% of the district court's cases end up reaching the appellate courts in a form nearly identical to the one they had in the district court—that is, without extensive development by the district court, and with no federal fact-finding. Conversely, about 90% of the cases seen by the appellate court simply repeat issues handled by the district courts without reaching the pretrial stage.

Table 2[56] shows that these "double appeal" cases—the ones which can safely be assumed to present duplicative issues to the district and appellate courts—consume substantial amounts of court time. Even when attention is restricted to those cases disposed of before pretrial, the median time that a petition spends in district court is five months. A substantial number of petitions—above ten per cent—spend more than three times as long in district court. These numbers permit a rough estimate of the time consumed by district court action on these "double appeal" petitions. If it is assumed that all petitions which proceed to the pretrial stage are appealed to the circuit courts, then there still remains approximately 3,000 appeals which must come from cases that never reached the pretrial stage. If it is further assumed that the mean time for district court handling of these petitions equals the median time,[57] then

54. ADMININISTRATIVE OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR (1987) [hereinafter 1987 ANN. REP.]; ADMINISTRATIVE OFF. OF THE U.S. CTS., ANNUAL REPORT OF THE DIRECTOR (1988) [hereinafter 1988 ANN. REP.].

55. Table 1 is extracted from tables B-7 and C-4 found in 1987 ANN. REP., *supra* note 54, at 166, 209; 1988 ANN. REP., *supra* note 54, at 169, 212.

56. *See* 1988 ANN. REP., *supra* note 54, at 222 (table C5B).

57. This is a conservative assumption, since the downward deviations from the mean are bounded at zero, and the upward deviations are unbounded. Indeed, we know that 10% of the

15,030 court-months per calendar year of time, or approximately 1250 court-years per calendar year, pass before these petitions are relayed upward for largely duplicative proceedings in the appellate courts.

Obviously, the district courts do not work on these petitions continuously, or at all close to continuously, while the petitions pend. It would be a mistake to translate those 1250 court-years directly into hours of judicial labor. Yet it would be an equal mistake to assume that no work was invested in the "double appeal" petitions. At the very least, the district courts must devote energy to these cases in order to screen out those raising factual issues, dispose of the legal questions, and simply to oversee the procedural aspects of a 3000-case addition to the docket.[58]

On the other hand, these years of court time translate directly into years served by prisoners while waiting for their habeas petitions to reach the federal appellate courts. Of course, only a very small percentage of these petitions prove meritorious, so that most of this time would be served regardless of the track followed by the futile claims for habeas relief. Nonetheless, it must be disturbing, if the writ is to be taken seriously, to find that this extra time is allowed to lapse needlessly before a final disposition of the petition is made.

For these reasons, the proposal is to make the circuit courts the entry point into the federal system for § 2254 habeas petitions.[59] The circuits would not thereby become courts of first impression for the petitions; the exhaustion requirement of § 2254(b) would remain intact, and the petitions would have to pass through the state system first.[60] But the 3000 or so petitions that now fall into the "double

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upward deviations exceed the median by more than ten months, while only 10% of the downward deviations are less than one month. For the numbers given, the mean could not possibly be below 4.4 months, and even that result presupposes a bizarre clustering of the cases (10% requiring zero time, 40% requiring 1 month exactly, 40% requiring 5 months exactly, and 10% requiring 20 months exactly, yielding a median of 5 and a mean of 4.4). The actual mean most likely exceeds 5 considerably. Assuming a linear distribution of the cases between the median and the 10% outliers, for example, results in a mean no less than 8.2 months.

58. *See* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 333 (1973) (listing the time interval from the writ filing to its disposition). Professor Shapiro emphasized that "even cases disposed of in 0 days sometimes consume[] significant judicial time in the review of the papers and the state record." *Id.*

59. In this respect the proposal differs from those advanced in Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273, 275-76 (1983) (suggesting direct appellate review of state criminal proceedings by the intermediate federal appeals courts), and Friendly, *supra* note 2, at 166 (same).

60. There has been much criticism of the exhaustion requirement, often because the requirement is seen as imposing a burden on the states rather than furthering comity interests,

appeal" category could be disposed of directly by the appellate courts.[61]

Of course, this proposal would greatly increase the screening responsibilities of the federal appeals courts. More than 9000 petitions are now handled by the district courts, and only a third of those proceed onward to the appellate courts. As Table 3[62] indicates, however, the federal appeals courts already have in place some of the mechanisms necessary to accommodate this screening responsibility. Table 3 shows that about 10% of the cases reaching the appellate courts during the year ending June 30, 1988 were terminated without judicial action. In addition, more than half of the appeals were terminated without a decision on the merits, although it is not possible to determine how many of these cases required plenary review of a difficult procedural issue.

In any event, the transfer of screening responsibilities to the appellate courts would require an increase in the *size* of that operation, but would not radically alter the *kind* of work done by the circuit administration. If circuit courts did become the point of entry for § 2254 petitions, it would be desirable to consider the experience of district courts when designing administrative mechanisms to handle the case load. The circuits would probably rely on staff counsel to analyze the substantive and jurisdictional issues in a case before submitting the matter to one judge or a judicial panel. A single judge might have authority to route the case to a panel, dismiss on a technical jurisdictional ground, or set the case for fact-finding.

As the last possibility implies, the appellate court would have to have available a means for trying factual issues in the approximately 2.2% of the cases which actually reach the pretrial stage. If the appellate model were taken literally, it would seem appropriate to remand these cases to the state courts, which serve as fact-finders within that model. Yet such a peculiar device, awkward from the

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and because its application may burden the number of procedural dismissals in the federal courts, prolonging the life of unmeritorious claims and perhaps delaying the resolution of meritorious ones. *See* Friendly, *supra* note 2, at 168-69. A revision of the exhaustion requirement would not be incompatible with the appellate model of habeas advocated here, so long as the character of the questions before the federal courts were not changed. An exhaustion requirement plainly vindicates important federalism values if, as I maintain, a state can waive exhaustion. *See* Felder v. Estelle, 693 F.2d 549, 554-55 (5th Cir. 1982) (Higginbotham, J., concurring).

61. *See* Tables 2 and 3.

62. 1988 ANN. REP., *supra* note 54, at 146 (table B-1A).

standpoint of comity and perhaps even unconstitutional,[63] can be easily avoided by permitting the appellate courts to route cases to the district courts, or to employ magistrates, or even, although it strikes me as unwise, to conduct their own fact-finding hearings. The number of cases requiring this treatment would be small.

This proposal would require a minor restructuring of the statutory relations among the various federal courts. But there is no constitutional difficulty with reshaping federal procedure to conform to the appellate character of the writ. The only possible source of such a difficulty is the long-standing concern over the locus of federal authority to review decisions by state courts of federal issues.[64] An express procedural recognition of the appellate character of the habeas writ might appear to subordinate the state courts to an intermediate federal court. But this subordination is apparent only. The substantial challenge to the power of the state courts comes from the now-accepted scope of the habeas writ itself, and would not change with a reordering of the federal procedural track. The writ has an appellate character, and an obvious impact upon the finality of state conviction, regardless of where state prisoners first file their federal petitions. Treating the writ as appellate in character would in no way give the federal courts any new authority to direct the actions of state judges.

## IV. AN EXTENSION OF THE POWELL COMMITTEE RECOMMENDATIONS

Heretofore I have only suggested that Congress, by merely rerouting the flow of habeas cases, might achieve a more expeditious and, presumably, fairer system. This suggestion is made to highlight

63. *See, e.g.*, District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) (concerning challenges to the District of Columbia's bar admission rules). The Supreme Court is the only federal court with the authority to review final judgments of a state court's judicial proceedings. *Id.* at 482. District courts cannot review state court decisions in particular cases, even when it is alleged that the state court's actions were unconstitutional. *Id.* at 486. However, the district courts do have jurisdiction over general challenges to the constitutionality of the state's bar rules. *Id.* at 483. *But see* Meador, *supra* note 59, at 276-77 (finding no constitutional defect in an arrangement that would subject state courts to the supervision of federal appeals courts).

64. *See, e.g.*, *Feldman*, 460 U.S. at 482-84 (delineating the authority that federal district courts have to review constitutional challenges in state courts); Cohens v. Virginia, 19 U.S. 264, 412 (1821) (stating that when defendants remove state court judgments into federal courts to resolve federal issues, they are not "commencing" suits against states for eleventh amendment purposes); Martin v. Hunter's Lessee, 14 U.S. 304, 351 (1816) (holding that the appellate power of the federal courts extends to cases pending in state courts, regardless of a Virginia court ruling to the contrary).

the reality of where we are today. It does not speak to more fundamental proposals for reform. These proposals range from the elimination of review by inferior federal courts to various restrictions, such as time limits and expansion of the full and fair concept of *Stone v. Powell*.[65] These proposals have long been debated and are well developed except for the recent proposal of the Powell Committee[66] and the question of a congressional role in the explication of the Court's decision last term in *Teague*.

Retired Justice Lewis Powell chaired the Ad Hoc Committee on Federal Habeas Corpus in capital cases. Chief Justice Rehnquist charged the committee to study the role of federal courts when reviewing cases in which a death sentence has been imposed by a state court.[67]

States wishing to confine prisoners sentenced to death to the new procedures must provide competent counsel in state habeas procedures. Execution is automatically stayed on the state appointment of counsel to the habeas petitioner. The stay "is to remain in place until federal habeas proceedings are completed, or until the prisoner has failed to file a petition within the allotted time."[68] In turn, federal habeas "will encompass only claims that have been exhausted in state court."[69] In essence, every prisoner would be assured of at least one review for constitutional error of his conviction by federal courts. Federal review thereafter is "extremely limited."[70] A stay of execution and grant of relief in a capital case would thereafter be permitted only if:

> (1) the claim has never been raised in state or federal court previously; (2) there is a valid excuse for not discovering and raising the claim during the prisoner's initial opportunity for state and federal post-conviction review; and (3) the facts underlying the claim raise a serious doubt about the prisoner's guilt of the offense or offenses for which the death penalty was imposed.[71]

It is fair to ask why prisoners serving a term of years should

65. 428 U.S. 465, 494 (1976) (holding that where a state provides an opportunity for a "full and fair litigation" of a fourth amendment claim, federal habeas corpus relief is not available on the grounds that unconstitutionally seized evidence was introduced at trial).

66. POWELL COMM. REP., *supra* note 5.

67. Specifically, the committee "was to inquire into the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases . . . ." *Id.* at 1.

68. *Id.* at 7.

69. *Id.*

70. *Id.* at 17.

71. *Id.*

have greater opportunities to attack their conviction than those the committee proposes for capital cases. The quick answer is that they do not. The limits upon habeas proposed by the Powell Committee rest on a critical condition. The condition is that states furnish competent counsel at the post conviction stage. The recommendation also rests on the proposition that persons sentenced to a term of years are serving their sentences while they attack their conviction; that is, pursuit of habeas by a state prisoner is not itself a frustration of the state's solemn judgment.

The Powell Committee proposal builds on the habeas remedy. It does not present its proposal as a "right of appeal." Yet, there is little question but that its proposal is much closer to a right of appeal than to the habeas writ as presently construed. The suggestion for non-capital cases made here is far more modest, altering only the flow of habeas cases from state courts directly to the court of appeals. Nonetheless we must ask whether the Powell Committee proposal should be limited to death cases.

The answer must turn in part on the different incentives of the two classes of prisoners. Is the incentive for non-capital prisoners to present all of their claims as quickly as possible sufficient to curb abusive successive filings? Ultimately the question becomes whether interests of finality and repose are being properly weighed.

The prospect of a state furnishing counsel for all state prisoners in their collateral attacks on convictions is impracticable on its face. The burden for capital cases alone is substantial. Yet, when a prisoner is represented by competent counsel, it is difficult to see why a limitation upon successive writs, as has been recommended by the Powell Committee for death cases, should not be applicable. Indeed, given the incentive of state prisoners in noncapital cases to pursue attack on their convictions as quickly as possible, such a limit on successive writs seems to be an *a fortiori* case.

Federal habeas petitions have grown steadily from 7,033 in 1978 to 9,542 in 1987.[72] According to a 1979 study, over 30% of petitioners in federal court had filed at least one federal habeas petition.[73] In numbers alone, then, the problem of successive petitions is

72. REPORT TO THE ATTORNEY GENERAL, *supra* note 17, at 33.

73. P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 4(a), 15 (U.S. Dep't of Justice, Federal Justice Research Program, Office for Improvement in the Administration of Justice, 1979). Support for Professor Robinson's study was provided by the Federal Justice Research Program, and the results of this study have been analyzed in Allen, Schachtman & Wilson, *supra* note 11; *see id.* at 708

serious. But, the greatest cost of successive petitions is not the burden of their number, substantial though that may be. Rather, the greater cost is the erosion of the intangible values of finality. There is a basic tension between the rule of law and an open-ended tolerance of efforts to escape its force. Relying on Professor Robinson's 1979 study, a report to the U.S. Attorney General noted that "only 3.2% of petitions resulted in any form of relief and only 1.7% resulted in an order directing release from custody."[74] Relatedly, delays in filing are substantial. In the 1979 study, "[a]bout 40% of the petitions . . . were filed more than five years after conviction and nearly a third were filed more than ten years after conviction."[75]

Under the Powell Committee recommendation, a petitioner represented by competent counsel in a first petition can present a successive petition only under limited circumstances. What would be the unfairness in insisting upon similar, or even more stringent, restrictions on all federal habeas petitions attacking state court convictions? Why not insist on a threshold demonstration of ineffective assistance of counsel before entertaining *any* successive petition for federal habeas, unless the facts underlying the claim raise a serious doubt about the prisoner's guilt of the offense? Similarly, why not insist upon a limitations period, with limited escape rules?

Proposals for change in the law of habeas corpus are remarkable for the strong responses they spark. Even the gentle suggestions made in this Article would be vigorously opposed by many. As we work through proposals for change we ought not forget that the Congress, in creating a separate court system for the District of Columbia in 1970, barred all prisoners in the district from seeking federal habeas.[76] The D.C. prisoners may pursue only a collateral remedy in the D.C. courts.[77] That is, D.C. prisoners have no access to the inferior federal courts. The constitutionality of this reform has been upheld.[78]

Finally, any agenda for reform might consider explication of *Teague v. Lane* by statute or rule. Here, legislation is arguably a more efficient process than our case-by-case effort. As previously ex-

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(stating that 30.6% of the petitioners studied had previously applied for federal habeas corpus relief on at least one occasion); *see also* REPORT TO THE ATTORNEY GENERAL, *supra* note 17, at 34 (discussing Professor Robinson's findings).

74. REPORT TO THE ATTORNEY GENERAL, *supra* note 17, at 34-35.

75. *Id.* at 36; *see* Allen, Schachtman & Wilson, *supra* note 11, at 704.

76. D.C. CODE ANN. § 23-110(g) (1989).

77. *Id.* § 23-110(a).

78. Swain v. Pressley, 430 U.S. 372, 384 (1977).

plained, the Court's decision last term in *Teague v. Lane* limits a state prisoner's attack in federal court to the use of the law in place when his conviction became final. Other difficulties aside, *Teague* presents the difficulty of separating "new" from "old" law. This is inherently difficult for judges trained to find old traces for new trails. In *Teague* the Court explained that a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent . . . ."[79] For now I am persuaded that *Teague* should be left to the courts, at least until the courts have had a fair opportunity to develop its reach.

It is beyond the limits of this Article to sketch defining standards that Congress might consider in an effort to gain clarity and certainty in the court's subscription to Justice Harlan's view regarding habeas. It is sufficient for now to suggest its consideration along with the wide range of other possibilities, in this never ending quest for a fair and just system. Surely, this quest requires a thoughtful review of the present law of habeas corpus. Absent congressional assistance, the courts will continue to slog along through the muck it has created. I doubt its necessity; I am convinced that it is unwise.

## V. CONCLUSION

To recharacterize the modern writ as a right of appeal is radical at first glance. Turning the flow of cases from United States District Courts to the Courts of Appeals may, in fact, be unwise for the sole reason that there are fewer Courts of Appeals. The question becomes whether the advantages to the entire system are sufficient to justify the shift of the burden to the Courts of Appeals. These concerns make me wary.

There is another distinct cardinal advantage to such change, an intrinsic benefit in addition to the instrumental benefits discussed—the application of rules of preclusion ordinarily attending appeals. Ultimately, this may be the most compelling argument. There is a point at which federal review of state convictions by lower federal courts ceases to resemble habeas corpus. If forthrightly considering an appellate right is disturbing, we can consider the possibility that reform can proceed in a direction away from its appellate role and return to habeas corpus.

79. Teague v. Lane, 489 U.S. 288, 301 (1989) (citations omitted) (emphasis in original).

Table 1

Statistics on Disposition of
§ 2254 Habeas Petitions
in the Federal Court[80]

| | 1986-87 | 1987-88 |
|---|---|---|
| Total | 9320 | 9348 |
| Terminated w/out court action | 2497 | 1689 |
| Terminated before pretrial | 6557 | 7458 |
| Terminated during or after pretrial but without trial | 167 | 97 |
| Terminated by bench trial | 92 | 98 |
| Terminated by jury trial | 7 | 6 |
| Percent reaching trial | 1.1% | 1.1% |
| Appeals commenced in Circuit Courts | 2755 | 3107 |

Conclusion: In almost no cases does the district court make factual findings. In more than 97% of the habeas petitions, the case is terminated even before the pretrial stage is reached. The district courts do, however, apparently screen out a number of cases, since only about 31% of the cases filed in district court now reach the appellate courts.

[80] 1987 ANN. REP., *supra* note 54, at 166, 209 (tables B-7 and C4); 1988 ANN. REP., *supra* note 54, at 169, 212 (tables B-7 and C4).

Table 2

Statistics on the Duration of § 2254 Habeas Cases in District Court[81]

| Case was disposed of: | No. of Cases | Time Intervals in Months: 10% took less than: | Median Interval | 10% took more than: |
|---|---|---|---|---|
| In any fashion (i.e., total cases) | 9348 | 1 | 5 | 20 |
| Without court action | 1689 | 1 | 5 | 21 |
| Before Pretrial | 7458 | 1 | 5 | 19 |
| During or After Pretrial | 97 | 4 | 14 | 41 |
| During or After Trial | 104 | 3 | 17 | 44 |

Conclusion: The typical § 2254 petition spends about five months in district court, and not infrequently, such a petition will spend nearly two years in district court, even when the petition is eventually disposed of before pre-trial. Indeed, for the year analyzed, more than 900 petitions spent 19 months or more in district court, only to be disposed of before pretrial or without court action.

[81] 1988 ANN. REP., *supra* note 54, at 222 (table C5B).

Table 3

Appellate Docket: Cases Commenced and Terminated During the Year Ending June 30, 1988[82]

| | |
|---|---|
| Total Commenced | 3107 |
| Total Terminated | 3040 |
| Method of Termination: | |
| —by Consolidation | 49 |
| —Procedurally (total) | 1757 |
| —by judge | 1425 |
| —by staff | 332 |
| —On Merits (total) | 1275 |
| —after oral hearing | 463 |
| —on briefs | 812 |
| Cases Pending | |
| —June 30, 1987 | 1642 |
| —June 30, 1988 | 1668 |

[82] 1988 ANN. REP., *supra* note 54, at 146 (table B-1A).