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CHANGE IN THE AVAILABILITY OF FEDERAL HABEAS CORPUS: ITS SIGNIFICANCE FOR STATE PRISONERS AND STATE CORRECTIONAL PROGRAMS†

Frank J. Remington*

I. INTRODUCTION

Expressions of dissatisfaction with state prisoner use of federal writs of habeas corpus continue. Recently Attorney General Meese was reported as telling the Judicial Conference of the Seventh Circuit: "[M]ost of the writs filed today were frivolous 'recreational activities' [by inmates whom he referred to as 'lawyers in penitentiaries'] designed to harass federal authorities."¹ Referring to the Reagan administration's proposal pending in the United States Senate to restrict habeas corpus, Mr. Meese said the bill "would preserve the great writ for appropriate cases."²

Repeated, but as yet unsuccessful, efforts have been made in the Congress to narrow the scope of federal habeas corpus review of state court criminal convictions.³ The circumstances in which habeas

† I am mindful of the fact that this issue of the *Michigan Law Review* honors Frank Allen on the occasion of his retirement from Michigan. I have known Frank as a friend and as one of the truly thoughtful people in the criminal law field. The thesis of this article is that federal courts ought, in state habeas corpus cases, be concerned about guilt or innocence and relative degrees of guilt, a position which I think Frank Allen would support, though I have not discussed this with him. From his early work on poverty and the administration of federal criminal justice (REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963)) to his more recent writings, Frank Allen has focused his attention on the individual defendant. He has effectively argued against overly long incarceration to achieve unrealistic rehabilitative goals, and against the overly long incarceration that results from some present-day efforts to avoid disparities in punishment which "tend to punish people the same way who have committed crimes in very different circumstances." Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 155 (1978).

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1. Milwaukee Sentinel, May 20, 1986, at 5, col. 1.

2. *Id.* The Attorney General's reference was to a bill introduced by Senator Thurmond, S. 2301, 99th Cong., 2d Sess. (1986).

3. The congressional history is documented in Olsen, *Judicial Proposals to Limit the Jurisdictional Scope of Federal Post-Conviction Habeas Corpus Consideration of the Claims of State Prisoners*, 31 BUFFALO L. REV. 301, 334 nn.178-79 (1982); see also L. YACKLE, POSTCONVICTION REMEDIES § 19, at 92 nn.40-41 (1981); *id.* § 19, at 26-27 (Supp. 1986); Remington, *State Prisoner Access to Postconviction Relief — A Lessening Role for Federal Courts: An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287, 292-96 (1983); Yackle, *The Reagan Administration's*

corpus is available to state prisoners have also been the subject of an increasing number of decisions of the United States Supreme Court, and, over the past several decades, the subject of voluminous law review literature.⁴

Put most succinctly, dissatisfaction with broad access to habeas corpus by state prisoners has been expressed for the following reasons.⁵ First, the present situation is inconsistent with a proper allocation of responsibility between federal and state courts. The abuse of the writ by state prisoners has resulted in an undue burden on the federal judiciary.⁶ Even when petitions have arguable merit, it is an affront to state courts, particularly state supreme courts, to be overruled by a single United States district court judge.

Second, the current situation is inconsistent with an effective state criminal justice system. The use, and particularly the abuse, of the writ has resulted in the lack of finality of state court convictions so that the deterrent effect of a conviction is lessened and the prisoner remains more interested in litigation than in rehabilitation.⁷

The proposals for change have been several, reflecting some differences of opinion whether the principal issue is a wise allocation of responsibility between federal and state courts, the achievement of a more effective criminal justice response to crime, or the adherence to certain fundamental values including, but not limited to, protection of the innocent. The proposals for change that have been suggested include:

Habeas Corpus Proposals, 68 IOWA L. REV. 609 (1983); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners — Reform or Revocation?*, 61 GEO. L.J. 1221 (1973).

4. See, e.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). More contemporary articles discussing the availability of habeas corpus to state prisoners are: Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062 (1984-1985); Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1130 (1986); Pagano, *Federal Habeas Corpus for State Prisoners: Present and Future*, 49 ALB. L. REV. 1 (1984); Note, *Emerging Jurisdictional Doctrines of the Burger Court: A Doctrine of Convenience*, 59 ST. JOHN'S L. REV. 316 (1985).

5. See 3 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 27.2, at 301-06 (1984), for a summary of Justice Powell's analysis of the unnecessary cost of overly expansive federal habeas review.

6. The number of state habeas cases increased from 8349 in 1984 to 8534 in 1985, with the most cases filed in Florida and Texas. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 148 (1985), contained in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (1985).

7. It is usually unclear whether the concern is with a lessening of the deterrent effect of the criminal sanction, which arguably can be achieved even if the inmate who appears guilty is in fact innocent, or with rehabilitation, which hardly seems achievable by "finality" if in fact the inmate did not commit the crime of which he or she has been convicted. Justice Powell's recital of the detrimental effect of the lack of finality probably is directed to the availability of habeas corpus in cases with no colorable showing of innocence.

(1) One should not have a right to habeas corpus review if a full and fair hearing has been held in state court.⁸

(2) One should not have a right to habeas corpus review unless all state procedures have been exhausted.⁹ When an issue has not been raised in state court, federal habeas review should be available only if there was "cause" for the failure to raise the issue in state court and "prejudice" resulting to the petitioner as a result of the inability to raise the issue.¹⁰ In addition, for those issues decided in state court, the factual conclusions by the state court must be presumed to be correct.¹¹

(3) Federal court review should be limited to issues that relate to the reliability of the state court guilt-finding process.¹²

(4) Federal court review should be limited to petitioners who can make a colorable showing that they are in fact innocent of the crime for which they have been convicted.¹³

(5) Federal court review should be limited to constitutional violations that amount to "fundamental unfairness."¹⁴

(6) Federal court review should be limited to issues raised within a specified period of time following the exhaustion of state court remedies.¹⁵

Before discussing these proposals in greater detail it may be helpful to review the current availability of federal habeas corpus to state prisoners, particularly in light of the several cases decided during last year's Term of the United States Supreme Court.

8. The classical development of this is found in Bator, *supra* note 4; see also 3 W. LAFAVE & J. ISRAEL, *supra* note 5, § 27.3, at 324-27.

9. See 3 W. LAFAVE & J. ISRAEL, *supra* note 5, § 27.7, at 373-81.

10. See *id.* § 27.4, at 337-53.

11. See *id.* § 27.6, at 361-73.

12. See L. YACKLE, *supra* note 3, at 395-400.

13. *Id.* at 398. Yackle points out that a colorable showing of innocence may resemble the more familiar inquiry into harmless error.

14. This is the position of Justice Stevens, who clearly would go beyond issues of guilt or innocence but would not make habeas available for all, even nonharmless, constitutional violations. His view is that constitutional violations are of three types: harmless, those raisable only on appeal, and those raisable by means of habeas. See, e.g., *Rose v. Lundy*, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting); *Wainwright v. Sykes*, 433 U.S. 72, 95-97 (1977) (Stevens, J., concurring).

15. See S. 2301, 99th Cong., 1st Sess. § 6 (1986); see also H.R. 73, 100th Cong., 1st Sess. § 2(e) (1987); H.R. 72, 100th Cong., 1st Sess. § 2(e) (1987); S. 260, 100th Cong., 1st Sess. (1987).

II. FEDERAL HABEAS CORPUS REVIEW OF STATE COURT CONVICTIONS: RECENT CHANGES BY THE UNITED STATES SUPREME COURT

The current situation at the end of the most recent Term of the United States Supreme Court is as follows:

(1) State remedies must be exhausted before filing a petition of habeas corpus in federal court. The failure to raise an issue in state court because of a procedural default precludes federal habeas corpus relief unless there are both "cause" for the failure to raise the issue in state court and "prejudice" resulting to the petitioner as a consequence of not being able to raise the issue. Absent either "cause" or "prejudice," the petitioner may raise the issue only if he or she can demonstrate that the "constitutional violation has probably resulted in the conviction of one who is actually innocent."¹⁶ In this latter instance "a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."¹⁷

(2) A fourth amendment claim cannot be raised by means of federal habeas unless there was not a full and fair hearing in state court,¹⁸ or if the failure to raise the issue in state court constitutes a denial of the sixth amendment right to effective assistance of counsel.¹⁹ Even if counsel is ineffective (and thus there is a showing of "cause" for failing to raise the issue in state court), three members of the Court expressly reserved judgment on whether the "prejudice" requirement is fulfilled if the petitioner clearly is guilty of the crime of which he or she was convicted.

(3) With respect to non-fourth amendment claims (in a case in which the issue was raised and decided in state court and state remedies have been exhausted), the Court is split.

Led by Justice Powell, some members of the Court focus on the guilt/innocence issue both to determine when habeas is appropriate (Does the alleged error affect the reliability of the fact-finding process?),²⁰ and to determine whether the error was harmless (Is guilt shown beyond a reasonable doubt?).²¹ In contrast, Justice Stevens would allow habeas in situations not involving the reliability of the fact-finding process and would refuse, in appropriate circumstances, to

16. *Murray v. Carrier*, 106 S. Ct. 2639, 2650 (1986).

17. 106 S. Ct. at 2650.

18. *Stone v. Powell*, 428 U.S. 465, 481-82 (1976).

19. *Kemmelman v. Morrison*, 106 S. Ct. 2574 (1986).

20. *Rose v. Clark*, 106 S. Ct. 3101 (1986).

21. 106 S. Ct. at 3107.

find harmless error even when guilt is shown beyond a reasonable doubt.²²

What Professor Seidman said in 1980 remains true today:

On close examination, the Burger Court's criminal procedure decisions are not consistent with a guilt-or-innocence model of criminal justice. On the contrary, the Court has continued to use the criminal justice system as a tool for social engineering, even when this pursuit of broad social goals conflicts with the need to reach factually reliable judgments in individual cases.²³

Both Justice Powell and Justice Stevens, and those members of the Court who joined them in individual cases, have agreed that the availability of federal habeas to state prisoners should be restricted somewhat. Neither Justice Powell nor Justice Stevens recognizes habeas as proper merely because of a violation of federal constitutional law. The difference of opinion relates to the proper basis for limiting habeas. Justice Powell would require a showing of a constitutional error affecting the reliability of the guilt-finding process and a colorable showing of innocence by the individual petitioner (at least that guilt not be shown beyond a reasonable doubt and thus the error be found harmless). So-called social engineering changes such as those affecting the racial composition of the grand jury would, if Justice Powell had his way, be left to the Supreme Court on direct review. Justice Stevens, on the other hand, would allow habeas for any constitutional violation that results in fundamental unfairness, whether or not the violation related to the reliability of the guilt-finding process and whether or not there is a colorable showing of innocence by the individual petitioner.

Whether either view will emerge as the clear majority view, only the future will tell. The Court's effort to develop a basis for limiting state prisoner access to federal habeas is the background against which to compare the proposed congressional limitation upon access to federal habeas.

22. 106 S. Ct. 3101, 3111-12 (Stevens, J., concurring).

23. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437 (1980).

A recent, at least implicit, recognition of the propriety of using federal habeas to achieve non-guilt-or-innocence objectives is *Allen v. Hardy*, 106 S. Ct. 2878 (1986), in which the Court allowed habeas to be brought but declined to apply *Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (changing the standard for proving unconstitutional racial abuse of peremptory challenges), retroactively because:

By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well. . . . Accordingly, we cannot say that the new rule has such a fundamental impact on the integrity of factfinding as to compel retroactive application.

106 S. Ct. at 2880-81.

III. CONGRESSIONAL PROPOSALS TO LIMIT THE AVAILABILITY OF FEDERAL HABEAS CORPUS REVIEW

Repeated efforts in Congress to limit access to federal courts by state prisoners have been unsuccessful, but the efforts continue, as reflected in S. 2301 introduced in the Senate in April 1986 by Senator Strom Thurmond. A somewhat similar bill was passed in February 1984 by a Senate vote of 67 to 9,²⁴ so clearly there was, at that time at least, substantial support for change in the current availability of federal habeas for state prisoners. The reintroduction of the bill in 1986 indicates that at least some members of the Congress, the Reagan administration, and others²⁵ feel that the limitations adopted by the Burger Court still leave too much room for federal habeas corpus review of state court criminal convictions.

Two major changes are proposed by the bill: First, a habeas petition must be filed within one year of the date when state remedies are exhausted. Second, any claim of federal constitutional violation can be brought only if there is a showing that the claim has not been "fully and fairly adjudicated" in state court.²⁶

The language of S. 2301 would lead one to conclude that the limitation of *Stone v. Powell*²⁷ will be extended to all claims of denial of a federal constitutional right made in behalf of a state prisoner. Both *Stone* and S. 2301 use the language of full and fair adjudication in state court to describe claims that can no longer be raised by federal habeas corpus.

Representatives of the Department of Justice do assert that the limitation is less strict than that imposed by *Stone v. Powell* on fourth amendment claims. A representative of the department asserted, in an answer to a question asked by Senator Biden: "This question mistak-

24. S. 1763, 98th Cong., 2d Sess. (1984).

25. *Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 223-30 (1982) (statement of a panel consisting of Hon. C.C. Torbert, Jr., Chief Justice, Supreme Court of Alabama; Hon. W. Ward Reynoldson, Chief Justice, Supreme Court of Iowa; and Hon. Jim Smith, Attorney General, State of Florida); see also letter to Hon. Strom Thurmond from Edward F. Hennessey, President, Conference of Chief Justices (Mar. 19, 1986) (copy on file at National Center for State Courts).

26. S. 2301, 99th Cong., 2d Sess. § 5 (1986), would overrule *Rose v. Lundy*, 455 U.S. 509 (1982), and allow the federal court to dismiss meritless claims by state prisoners even though state remedies as to the dismissed claim have not been exhausted. Presumably the court could then consider those remaining claims as to which state remedies have been exhausted properly. The requirement of *Sumner v. Mata*, 449 U.S. 539 (1981), that factual conclusions by state courts be presumed correct, and the "cause" and "prejudice" requirements of *Wainwright v. Sykes*, 433 U.S. 72 (1977), would apparently be continued. Slight change in language produces some uncertainty whether *Stone v. Powell*, 428 U.S. 465 (1976), would continue to preclude federal court review of fourth amendment claims if the petition alleges that the state court's application of the fourth amendment in the particular case was "unreasonable."

27. 428 U.S. 465 (1976).

only assumes that the general standard of review under [S. 2301] is the same as that of *Stone v. Powell*. In fact, it is broader, including a review of the reasonableness of the state determination."²⁸

The limiting language in *Stone v. Powell* is that habeas corpus is precluded if the state court afforded the defendant "an opportunity for full and fair litigation of a Fourth Amendment claim."²⁹ S. 2301 provides that habeas corpus is precluded if the defendant's claim "has been fully and fairly adjudicated in State proceedings."³⁰

The language itself hardly supports the Department of Justice assertion that S. 2301 requires a reasonable state court determination of the federal constitutional issue. This was evident in an oral exchange between Senator Leahy and Mr. Trott.

Mr. TROTT. I would think we could easily find a factual situation where . . . the Federal court would be well-justified in saying we are not going to pay deference to the result of the State court's adjudication of these issues, because the determination was unreasonable in that it was flat wrong; it flew right in the face of Federal cases or precedent, or Federal rules, regulations or procedures.

Senator LEAHY. But there is no "reasonableness" standard written in the bill, is there?

Mr. TROTT. Well, the legislative history makes it very clear . . .

Senator LEAHY. Yes, but it is not in there. Wouldn't it be just simpler to not write in anything that would even give the appearance of precluding a Federal court from determining Federal constitutional issues?

Mr. TROTT. I do not think it gives that appearance at all, Senator . . .³¹

Compare Mr. Trott's interpretation of the language of the bill (as one of reasonableness) with Professor Amsterdam's interpretation:

If passed, this provision would make the most drastic revision of the judicial system for enforcing constitutional rights that any Act of Congress has made since Reconstruction. . . .

. . . .

. . . The scope of this prohibition embraces valid constitutional claims of every kind and consequence. No matter how fundamental the constitutional right involved, no matter how plain the violation of that right, no matter how egregiously incorrect the state court's condoning of the violation, no matter whether or not the resulting conviction was subjected to state appellate review, no matter how unfair the conviction or innocent the prisoner, he or she must remain unconstitutionally

28. *Habeas Corpus Reform: Hearings on S. 238 Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 58 (1985) [hereinafter *Habeas Corpus Reform*].

29. 428 U.S. at 494.

30. See *Habeas Corpus Reform*, *supra* note 28, at 8.

31. *Id.* at 17.

imprisoned.³²

As Mr. Trott asserts, the legislative history supports the conclusion that full and fair adjudication must meet a minimum standard of reasonableness. This is made explicit in the statement of Senator Thurmond, the bill's principal sponsor.

A State adjudication would not be full and fair in the intended sense if the determination arrived at did not meet a minimum standard of reasonableness. Specifically, the determination must reflect a reasonable interpretation of Federal law, a reasonable view of the facts in light of the evidence presented to the State court, and a reasonable disposition in light of the facts found and the rule of law applied.

. . . .

. . . [D]eference to the State determination would be required only when, in the Federal courts' own estimation, such differences as they may have with the State courts reflect at most reasonable differences of opinion concerning the interpretation or application of Federal law, or pertinent factual conclusions, in cases in which the proper determination is unclear.³³

The legislative history does not indicate why, if the objective is to preclude review only of reasonable applications of federal constitutional law by state courts, the proposed statutory revision does not say that. Certainly if a sophisticated reader like Anthony Amsterdam interprets the language as being at least as broad as the limiting language of *Stone v. Powell*, others are going to do so also.³⁴

Whether a United States district court judge denying a writ of habeas corpus can find merely that the claim was "fully and fairly adjudicated in State proceedings" or whether it must be further found that the state court made a reasonable, if erroneous, interpretation of the relevant federal constitutional law, is unclear.³⁵

That the Reagan administration desires to limit state prisoner access to federal habeas corpus is clear enough. What is much less clear is what public policy objective the Thurmond Bill seeks to achieve. Although state court decisions would be deferred to, no deference is required when the state court application of federal constitutional law

32. *Id.* at 151-52.

33. S. REP. NO. 226, 98th Cong., 1st Sess. 25 (1983).

34. The lower court decisions interpreting the *Stone v. Powell* limitation certainly do not suggest federal court involvement in unreasonably erroneous state court decisions. See 3 W. LAFAYE & J. ISRAEL, *supra* note 5, § 27.3.

35. The Department of Justice position sounds very much like the good-faith exception. The actions of both the constable and the state court will be sustained if their decisions, though erroneous, are reasonable. See *United States v. Leon*, 468 U.S. 897 (1984); see also The Omnibus Drug Enforcement, Education, and Control Act of 1986, H.R. 5484, which would permit the introduction of drug evidence obtained by a search and seizure if the officer, though mistaken, acted in good faith. 39 Crim. L. Rep. (BNA) 2463-64 (1986).

principles is less than reasonable. The judgment that a state supreme court's interpretation of the federal Constitution was not only erroneous but also unreasonably so, seems unlikely to resolve any ego problems a state court may have after being overruled by a single United States district court judge.³⁶

Nor has the Department of Justice been consistent over the years with respect to the conceptual basis for limiting state prisoner access to federal habeas review. Illustrative of this, then-Assistant Attorney General, now Chief Justice, William Rehnquist in 1971 wrote to Chief Justice Warren Burger urging support for legislation that would have restricted the availability of federal habeas corpus. Three alternatives were proposed. The first would have limited habeas to constitutional violations "relating to the reliability of the fact-finding process underlying the judgment."³⁷ The second would have required the petitioner to show "grounds for reasonable doubt of his guilt."³⁸ The third would have precluded review if the petitioner "was given an adequate opportunity to obtain a hearing on his constitutional claim in the state court."³⁹ Commenting on the third alternative, Rehnquist said: "A primary deficiency . . . is that it would . . . severely limit the rights of state prisoners to seek federal relief."⁴⁰

In subsequent testimony before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, Mr. Rehnquist said:

It would be wrong to say that the writ, as used by Federal courts, has not on occasion served to vindicate the public interest in a fair trial. Unfortunately, however, it has been availed of time after time to relitigate issues which not only have nothing to do with the guilt or innocence of the defendant, but nothing to do with the underlying fairness of the factfinding process by which he was found guilty.⁴¹

36. See Olsen, *supra* note 3.

37. See letter from William H. Rehnquist to J. Edward Lumbard 5 (Aug. 20, 1971) (sent to Chief Justice Burger with Rehnquist's letter of Sept. 23, 1971) (on file at *Michigan Law Review*).

38. *Id.* at 8.

39. *Id.* at 9.

40. *Id.* at 11. Rehnquist did not assert that the proposal would preclude only "reasonable" applications of federal constitutional law by state courts. Rather he said, "Obviously, this would be the most severe of our three alternatives, since it would effectively divest a habeas right for state prisoners whose constitutional claims were determined in state court." *Id.* at 10.

41. *Speedy Trial: Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 101 (1971). Mr. Rehnquist added:

The compelling interest of the Federal system of criminal justice is not merely that the innocent be acquitted, but that the guilty be convicted only after a fact-finding process which is in itself fair to them. I think that all but a tiny fraction of the cases processed through the Federal and State criminal justice systems in this country meet that standard. But our concern for the rights of the criminal defendant requires that we leave open to him the right to Federal habeas corpus if he can show that he was denied such fairness. But existing practice by no means limits the writ to such use.

Id.

The primary objective of the Department of Justice at that time seemed to be to limit state prisoner access to federal habeas to cases in which there was either reason to doubt the reliability of the fact-finding process or reason to believe that the petitioner was probably innocent.

This is apparently no longer the view of the Department of Justice, which now supports what Chief Justice Rehnquist described in 1971 as the "most severe" limitation on state prisoner access to federal habeas.

IV. COMPARING THE DEPARTMENT OF JUSTICE/CONGRESSIONAL APPROACH TO CHANGE WITH THAT OF THE UNITED STATES SUPREME COURT

Neither the Supreme Court nor the Department of Justice seems able to decide upon a single, consistent conceptual basis for limiting state prisoner access to federal habeas review.

In brief, the Court seems to be trying to achieve at least three objectives: (1) greater deference to state courts, particularly with respect to fourth amendment claims; (2) continued ability to use habeas corpus as an appropriate vehicle to make certain social engineering decisions, such as proper racial representation on juries; and (3) keeping the door always open to those who can show that a federal constitutional violation raises serious doubt about the reliability of the guilt-finding process and can show, in the individual case, that the violation may have resulted in the conviction of an innocent person.

In contrast, the Department of Justice and the 1986 congressional proposal for change seem designed to achieve the single objective of greater deference to state court determinations of federal constitutional law questions.⁴² But the requirement that state courts be reasonable in their interpretations leaves unclear what significance, if any, would be given to questions of guilt or innocence or of fundamental unfairness.

42. Deference to "reasonable" state court determinations would preclude the use of habeas to achieve social engineering objectives such as adequate racial representations on juries, *see* *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), since reliance by the state court on prior United States Supreme Court precedent could hardly be viewed as unreasonable. It probably would also preclude habeas in some cases in which the constitutional violation raises doubt about the reliability of the guilt-finding process and may have resulted in the conviction of an innocent person, so long as the alleged state court mistake as to federal constitutional law was a reasonable one.

V. THE SIGNIFICANCE OF CHANGE TO STATE PRISONERS AND STATE CORRECTIONAL PROGRAMS

The literature dealing with federal court review of state court convictions contains relatively little discussion of the interests of state correctional programs or of the interests of state prisoners whose ability to pursue federal habeas corpus relief is at issue. What discussion there has been has dealt primarily with the public policy implications of change upon the general effectiveness of the criminal justice system, particularly the ability of the system to deter crime by the imposition of prompt and certain punishment for crimes that are committed.

Assertions have been made that prisoner rehabilitation is adversely affected because prisoners are more concerned with litigation than with their rehabilitation. Yet the scant evidence⁴³ and experience seem to lead to the conclusion that continuing access to justice serves, rather than disservices, the goal of prisoner rehabilitation, particularly for those who have an arguable claim of innocence.

Perhaps the failure to give attention to the effect which change in the availability of federal habeas will have on state correctional programs and on state prisoners is because we know very little about the relationship between the two. But we do know more than has heretofore been said, and we ought in any event to be asking the question if only to encourage others to seek the answers. First what we do know:

(1) State prisons are full, and those responsible for the management of state prisons have no desire to keep people who ought not be there at all or who ought to be there for a shorter period of time than their present conviction and sentence require:

(2) The cases of greatest concern to prison inmates themselves are those in which it appears that the inmate did not commit the crime or does not deserve to be imprisoned for as long as the sentence requires. These are also the situations of greatest concern to prison custodial and treatment staff.⁴⁴

43. See Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 744 (1966) ("[W]e currently know too little about . . . prisoner education . . . to warrant firm judgments that liberal habeas corpus impairs those objectives."). Professor Schwartz says Paul Freund

has commented that filing habeas corpus petitions may actually have a positive therapeutic and educational effect on prisoners. Moreover, much of our crime is committed by the underprivileged and disadvantaged, those who find society cruel, unfair, and hypocritical. The concern for equal justice reflected in a system which does not forget such people but continues to attempt to rectify any injustice they may have suffered can also have a significantly deterrent and educational effect. On the other hand, rehabilitation is seriously hindered if a prisoner feels he has been the victim of inequitable treatment.

Id. at 744 n.130.

44. In the University of Wisconsin Law School Legal Assistance to Institutionalized Persons Program we have had twenty years of experience in giving legal assistance to inmates of Wiscon-

(3) In contrast, little concern is expressed, by either correctional officials or inmates, over issues like the legality of the evidence used at trial, the composition of the grand jury, or other matters unrelated to guilt or innocence. Of course, most inmates welcome any possibility to get out of prison sooner, even if on what some may view as a technicality. However, the inmate who believes in his or her innocence is different than one who admits guilt but believes a legal basis may exist for upsetting the conviction.⁴⁵

Although reliable data on the number of possibly innocent prisoners who are wrongly confined are lacking, the percentage of the total population is probably very small. One is reminded, however, of Justice Walter Schaefer's comment: "[I]t is not a needle we are looking for in these stacks of papers, but the rights of a human being."⁴⁶ Though the number of completely innocent prisoners may be limited, experience demonstrates that a greater number of prisoners have a colorable argument that they are not guilty of as serious an offense or of as many offenses⁴⁷ as their conviction record shows, or that their sentence does not accurately reflect the actual sentence imposed or is illegal in other respects.⁴⁸ Indeed, in Wisconsin in recent years as many as thirty percent of the convictions resulting in imprisonment had errors which, if not corrected, would inappropriately lengthen the prisoner's period of confinement. In large measure this was because of a failure properly to credit preconviction jail time, but numerous other kinds of errors were also made.⁴⁹

sin state correctional institutions. We frequently are asked by staff to see an inmate, often one who is agitated about his or her confinement. Typically the request is made because the staff has concluded that the inmate has an apparently legitimate reason for being agitated. For example, we were asked to see a 6'7", 290-pound, depressed, brain-damaged inmate who was given a six-year prison term for what appeared to be a minor marijuana offense. Evidently the staff felt that the sentence was disproportionate to the conduct involved and felt that any correctional treatment of the inmate would be seriously handicapped by the inmate's understandable feeling of injustice. A motion to reduce the sentence has been made.

45. In my view, priority in legal services programs with limited resources should be given to the concerns of inmates who have some basis for believing that they are not guilty of the offense of which they were convicted or have received a sentence unduly long in light of the circumstances of the offense they committed. Our experience with correctional administrators at the institution and state levels is that they concur in the judgment that these cases deserve high priority in receiving legal assistance.

46. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956).

47. See *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975) (Powell, J.) ("[T]he criminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability.").

48. Although federal habeas may not be available to redress many sentencing errors, due process requirements are applicable to sentencing, such as the right to be sentenced on the basis of accurate facts. See Note, *How Unreliable Fact Finding Can Undermine Sentencing Guidelines*, 95 YALE L.J. 1258, 1281 & n.110 (1986).

49. The original impetus in Wisconsin for granting credit for jail time was relief granted to prisoners who brought habeas in the federal district courts, successfully arguing that the denial of

At a time when the emphasis is increasingly on definite sentences proportional to the seriousness of the conduct, errors in sentencing have an impact on the inmate similar to an erroneous conviction for an offense more serious than that actually committed. Both result in a longer term of imprisonment than that legally justified.

If inmates complain about their conviction, one cannot usually know with any degree of certainty whether the inmate is guilty or innocent of the crime of which he or she was convicted. What one can do, however, is review the matter carefully to see if there is sufficient doubt about the reliability of the guilt-finding process to permit an arguably meritorious claim that an innocent person may have been convicted (or a guilty person convicted of an offense more serious than that committed).⁵⁰

A postconviction process which is responsive to those who have an arguable claim of innocence (not guilty or at least not guilty of as serious an offense as that of which they were convicted) is desirable for several reasons: (1) imprisoning people who ought not be confined or ought not be confined for so long is economically wasteful;⁵¹ (2) a correctional program is unfairly burdened if it is asked to treat constructively a person who has an arguable claim of innocence;⁵² and (3) a most basic right of an individual is not to be punished for a crime he or she did not commit.⁵³ It would seem to follow that from a state cor-

credit for time in jail while unable to post bail was a denial of equal protection. *See United States v. Gaines*, 436 F.2d 1069 (2d Cir.), *vacated and remanded*, 402 U.S. 1006 (1971) (in light of the equal protection concession of the Solicitor General).

50. One might say, in behalf of inmates who claim innocence, that it is desirable to be able to argue that illegalities occurred that are unrelated to guilt or innocence, such as a fourth amendment violation. This seems to have been the position of Judge Friendly, who urged that any federal constitutional violation could be raised by federal habeas but only if the individual inmate could also make a colorable showing of innocence. Friendly, *supra* note 4. No doubt courts often find so-called technical violations if it appears that the inmate may be innocent. But there is merit to Paul Bator's claim that one can never know for sure about guilt or innocence and thus the best that one can do is ensure that the system is as effective as possible in separating the guilty from the innocent. This suggests that a proper balance of values may be to grant relief if innocence is claimed and some reason exists to believe that the system may have been deficient in the guilt-finding process. In this respect postconviction counsel is to the criminal justice system what the pathologist is to the surgery department of the hospital.

51. *See* R. POSNER, *ECONOMIC ANALYSIS OF LAW* 521 (3d ed. 1986); R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 186-88 (1985); Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

52. When I served on a parole board, the most difficult situation involved the inmate who said he did not commit the crime. If he did not, he obviously should be released. If he did commit it and is denying that fact, the denial might be indication of a high likelihood of repetition and ought to be a factor against release on discretionary parole. In these situations it was comforting to know that the doors of the courts were open to deal with this issue.

53. This is the conclusion reached by Jack A. Guttenberg in *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617 (1984). He urges that procedural default not bar federal habeas review of guilt-related issues.

rectional program point of view the greatest opportunity for postconviction review, both state and federal, should be for those who can make an arguably valid showing that the guilt-finding process failed in their case.

Yet much of the discussion of requiring a "colorable showing of innocence"⁵⁴ or of requiring a showing of doubt about the reliability of the guilt-finding process⁵⁵ has been couched in negative terms — how to *limit* access to federal habeas corpus.⁵⁶ Apparently, an affirmative argument has not been made that important state correctional objectives will be served by allowing postconviction challenge by those who can make an arguable claim of innocence. Such an argument may be implicit in recent decisions of the Supreme Court that keep habeas available to the innocent even if they cannot show "cause" for failure to use proper state procedures, but the language of the opinions is of fairness rather than of a contribution to a proper and effective correctional program.

One consequence is that the current congressional debate is between those who, on the one hand, argue for continued access to federal habeas corpus for all claims of federal constitutional violation, whether or not related to guilt or innocence, and, on the other hand, those who argue for greater deference to state courts by denying access to federal habeas, even for those who are able to make an arguable claim of innocence.

As is often the case, the extremes seem easier to defend than is a middle position.

(1) To focus on guilt or innocence issues is arguably impractical, even if it makes good correctional sense to do so.

It may not be so easy, as many critics of collateral attack think, to fashion rules limiting the use of habeas corpus to certain constitutional rights or to special classes of defendants. Consider, for example, a focus on the innocence of a defendant. Even a defendant who is guilty of something might have been innocent of the crime for which he was convicted. Degrees of culpability are often the important matters in dispute. Does a defendant who claims to have been improperly convicted of a higher offense get the same treatment as a defendant who claims to be totally innocent? And what does it mean to be innocent? That the Gov-

54. Friendly, *supra* note 4, at 157.

55. *Schneekloth v. Bustamonte*, 412 U.S. 218, 250-75 (1973) (Powell, J., concurring).

56. See Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1099 (1977):

There is now ample evidence that most of the Court recognizes guilt/innocence as an important constitutional value which informs the processes of articulation and enforcement of constitutional law related to criminal justice. But this evidence emerges primarily from opinions using the principle to narrow the scope of constitutional rights

ernment is unable to muster sufficient proof? Or that the defense has affirmative proof?

It would not be surprising if, unable to agree on which claims deserve preference or which classes of defendants should receive special consideration, reformers of habeas corpus attempt to provide for greater deference to findings made by state courts, to limit the repetition of petitions, and to devote most of their attention to procedural reforms, not to limitations on the scope of the issues properly raised in habeas corpus proceedings.⁵⁷

In addition to telling who is "innocent," knowing which constitutional violations give rise to doubt about the reliability of the fact-finding process is also difficult. The courts have struggled with this issue in determining whether new constitutional decisions are to be applied retroactively. For example, in one of the last decisions of the Term, the Court split on whether the prohibition against using peremptory challenges to exclude members of a race would adversely affect the reliability of the fact-finding process.⁵⁸

(2) Some argue that the number of state prisoners who are "arguably innocent" is small, however "arguably innocent" is defined. Attorney General Meese has recently said that "writs of habeas corpus clog up the courts but add 'precious little to the quality of justice' "⁵⁹

(3) Some assert that state courts are as sensitive to the rights of the innocent as are federal courts and thus that federal habeas corpus is not needed as a protection to the arguably innocent.⁶⁰

(4) Finally, those who argue against any limitation on state prisoner access to federal habeas corpus seem to assume, without discussion, that the interest of state prisoners would be disserved by limiting access to federal habeas to the arguably innocent.

In my view, adopting the position of Justice Powell and eliminating the procedural obstacles now placed in the path of the state prisoner who seeks federal habeas are in the interest of state prisoners and state correctional programs. My reasons are:

(1) As a limitation it is far preferable to the proposal in S. 2301 that would limit access to federal habeas corpus to cases in which state courts failed to adjudicate the federal constitutional claim fully and

57. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 391 n.169 (1983). See also the thoughtful criticism of "the guilt-innocence based limitations" in Olsen, *supra* note 3, at 315-31.

58. See *Allen v. Hardy*, 106 S. Ct. 2878 (1986); see also Olsen, *supra* note 3, at 322-31; cf. Guttenberg, *supra* note 53.

59. Milwaukee Sentinel, *supra* note 1.

60. See *Nichols v. Gagnon*, 710 F.2d 1267, 1271 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984) ("The concern . . . assuring that the innocent are not convicted . . . cannot be faulted. But it is unclear to us why the state courts cannot be fully trusted to prevent such an outrage.").

fairly. However this limitation is interpreted, whether federal habeas would be available to the arguably innocent if the proposed legislation should be enacted is at best unclear.

(2) As a limitation it is preferable to most of the increasingly complex and time-consuming procedural requirements adopted by the United States Supreme Court. Delay in reaching finality, which critics of present habeas practice seem to assume gives an undue advantage to the state prisoner, is not in the interest of the state prisoner who has an arguable claim of innocence.⁶¹ Yet procedural requirements like that of *Rose v. Lundy*⁶² add to the delay in reaching what may be an arguable claim of innocence.

(3) Federal court review by means of habeas does add significantly to state court concern over guilt and innocence.⁶³ Although state courts are obviously concerned about the risk that an innocent person may be convicted, it is also true that federal court review of state court convictions has contributed significantly to the ability of state courts to make accurate guilt-innocence decisions. Several illustrations can be given:

(a) In *Sandstrom v. Montana*,⁶⁴ the Supreme Court held unconstitutional an instruction, commonly given in state courts, which could well have been understood by jurors to be a mandatory presumption of guilt. The salutary result has been the abandonment in state practice of this hard-to-defend instruction and, as important, an increasingly careful scrutiny by state courts of instructions whether phrased as inferences or as presumptions.

(b) In *Beck v. Alabama*,⁶⁵ the Supreme Court called attention to the risk to the innocent that may result from a failure to give a lesser-included-offense instruction in a situation in which the evidence supports the giving of such an instruction. Again the impact on state practice has been a positive one. For example, in Wisconsin trial

61. See *Dean v. Young*, 777 F.2d 1239, 1240 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1794 (1986) ("Expeditionary review of criminal convictions should be the norm. Review must come quickly in order to relieve those in prison of the continuing effects of a wrongful conviction. A day in jail cannot be reclaimed. . . . [D]elay is the enemy of truth.").

62. 455 U.S. 509 (1982).

63. It is interesting to note a conservative's view of the value of access to federal court for a civil plaintiff. "I think most trial lawyers . . . would be very loath to see federal diversity jurisdiction taken away from the federal courts. There is a lot of justice which has occurred as a result of that ability to go to the federal courts rather than the state courts" *Senate Judiciary Committee Member Discusses Federal Courts' Role, Specific Legal Issues*, THIRD BRANCH, Oct. 1986, at 1, 5-6 (remarks by Senator Orrin Hatch).

64. 442 U.S. 510 (1979).

65. 447 U.S. 625 (1980); see Note, *Beck v. Alabama, The Right to a Lesser Included Offense Instruction in Capital Cases*, 1981 WIS. L. REV. 560.

judges discuss this issue directly with the defendant in any case in which it appears that counsel has made a decision not to ask for an instruction on a lesser included offense.⁶⁶

(c) Cases like *Holloway v. Arkansas*⁶⁷ have contributed to state court sensitivity to the potential risk to a defendant if he or she is represented by the lawyer who is representing one or more codefendants. Part of the problem in this situation is the possibility that such conflict as exists will result in less than adequate representation and, in turn, a risk that an innocent person will be convicted or be convicted of a more serious offense than that actually committed.

(d) Other illustrations can be given. Certainly *Jackson v. Virginia*⁶⁸ underscores the importance of ensuring that the evidence is adequate to sustain a finding of guilty, and *United States v. Gipson*⁶⁹ has called state courts' attention to the relationship between jury unanimity and proof beyond a reasonable doubt. Perhaps more obvious are the decisions such as *Gideon*,⁷⁰ insisting that defendants have a right to counsel, and *Chambers v. Mississippi*,⁷¹ insisting that one has a federal constitutional right to introduce evidence in defense.

Of course, the federal court can review guilt-related issues even if habeas corpus is unavailable as a remedy. The problem is that the time of the Supreme Court is limited and implementation of decisions such as those cited above may require, for a period of time at least, the oversight of the lower court federal judiciary.

Federal habeas can also, as Justice Stevens urges, be available for both guilt- and non-guilt-related claims. The question, not easily answered, is whether the opportunity to raise guilt-related issues will be increased if, as Justice Powell urges, federal habeas is limited to guilt-related claims. Such evidence as exists seems to suggest that the opportunity to raise guilt-related claims will be greater if the views of Justice Powell prevail. Professor Yackle suggests this possibility:

Finally, if the Court were to import a new emphasis upon guilt or innocence into habeas corpus it would have to decide whether the effect would be only to restrict the availability of the writ by eliminating some claims from its scope, or whether its new analysis might lead it to extend habeas to some claims not previously entertained in collateral proceed-

66. See 3 WIS. JURY INSTRUCTIONS, CRIMINAL SM-6 (University of Wisconsin, Extension Law Dept. 1980).

67. 435 U.S. 475 (1978).

68. 443 U.S. 307 (1979).

69. 553 F.2d 453 (5th Cir. 1977).

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

71. 410 U.S. 284 (1973).

ings⁷²

Some of the experience following the decision in *Sandstrom v. Montana*⁷³ is also instructive with respect to this issue.⁷⁴ Because the *Sandstrom* decision was based on doubt about the reliability of the fact-finding process, it was certain to apply retroactively. Also because of the same doubt about the reliability of the fact-finding process, it was arguable that the instruction could never be harmless error.⁷⁵ Thus it appeared that any state prison inmate in whose trial the instruction was given was entitled to a reversal of the conviction, no matter how obvious the particular state prisoner's guilt might be. One would have thought, from a state prisoner point of view, that this was the happiest of all possible developments. In fact the reverse was true, at least in the State of Wisconsin.

Several Wisconsin trial and intermediate appellate courts and the United States District Court for the Eastern District of Wisconsin held a Wisconsin jury instruction to be unconstitutional under *Sandstrom*. When the issue reached the Wisconsin Supreme Court, that court appeared to have the following alternatives: (1) reverse the conviction and thereby invalidate all previous first degree murder convictions in Wisconsin; (2) hold that a defendant cannot raise the issue if no objection to the instruction was made at the trial;⁷⁶ or (3) find that the Wisconsin instruction, unlike the Montana instruction in *Sandstrom*, did not create a sufficient risk of jury confusion and thus did not affect the reliability of the guilt-finding process.

Holding that the failure to object to the instruction at trial consti-

72. L. YACKLE, *supra* note 3, § 101, at 399. In the historically important New York homicide case *People v. Caruso*, 246 N.Y. 437, 440, 159 N.E. 390, 391 (1927), Judge Andrews said: "If guilt is clear, errors or instances of unfair conduct by the prosecutor may sometimes be ignored. The greater the doubt of guilt, however, the more likely are errors to affect the substantial rights of the accused." See also the comment by Judge Posner in *Nichols v. Gagnon*, 710 F.2d 1267, 1271 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984):

The proposition that "innocence is not irrelevant" was advanced in *Friendly* [*supra* note 4] in an effort to reduce the inundation of the federal courts with collateral attacks on convictions, rather than to establish a new ground for such attacks. But it had, we conjecture, the unintended consequence of encouraging the Supreme Court to create in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), a completely new office for the federal courts in habeas corpus

73. 442 U.S. 510 (1979); see text at note 64 *supra*.

74. We in the University of Wisconsin Law School Legal Assistance to Institutionalized Persons Program represented some of the inmates, such as Mr. Pige, in the *Sandstrom* litigation. This ought to be kept in mind in evaluating the significance of the analysis in this article of the experience with the *Sandstrom* decision. See *Remington*, *supra* note 3, at 300-04.

75. In *Connecticut v. Johnson*, 460 U.S. 73 (1983), the Court split four to four on the issue of harmless error, but it later held in *Rose v. Clark*, 106 S. Ct. 3101 (1986), that the harmless-error rule did apply.

76. See *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977) ("The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.").

tuted a waiver would have been contrary to Wisconsin's plain error rule.⁷⁷ It therefore appeared that the court's alternatives were to reverse all convictions or to find the instruction to be proper in all cases, even those in which the evidence of guilt was conflicting; thus, in the latter case, if the jury instruction were misunderstood there was a risk that an innocent person might be convicted. Despite the similar wording of the Montana instruction ("[T]he law presumes that a person intends the ordinary consequences of his voluntary acts.")⁷⁸ and the Wisconsin instruction ("When there are no circumstances to prevent or rebut the presumption, the law presumes that a reasonable person intends all the natural, probable, and usual consequences of his deliberate acts."),⁷⁹ the Wisconsin Supreme Court held that jurors would understand the Wisconsin instruction merely to place the burden of production rather than the burden of persuasion on the defendant;⁸⁰ thus, *Sandstrom* did not apply.

Reviewing the same Wisconsin instruction in the *Pigee* case,⁸¹ the Seventh Circuit Court of Appeals held the instruction to be proper for several reasons, including that it had qualifying language not in the Montana instruction, and that the presumption could be overcome by "circumstances to prevent or rebut it."⁸² In a still later case the Seventh Circuit said:

[T]he Supreme Court's cases do not announce a firm principle that vindicates the majority's decision in *Pigee*. *Francis* pulls the rug out from under the first reason the majority gave in *Pigee*; the Court held unconstitutional in *Francis* an instruction that informed the jury that "the presumption [of intent] may be rebutted."

. . . The Wisconsin instruction may or may not receive the approbation of the Supreme Court; certainly it presses if it does not exceed the wavering boundary staked out in the Court's cases.⁸³

When the Wisconsin Supreme Court and the Seventh Circuit Court of Appeals were given what appeared to be two options — reverse the conviction of all prisoners convicted of first degree murder or find that the instruction did not raise sufficient doubt about the relia-

77. See 3 W. LAFAVE & J. ISRAEL, *supra* note 5, § 26.5(d).

78. *Sandstrom v. Montana*, 442 U.S. 510, 513 (1979).

79. *Muller v. State*, 94 Wis. 2d 450, 469, 289 N.W.2d 570, 580 (1980) (emphasis deleted).

80. *Muller*, 94 Wis. 2d at 477-78, 289 N.W.2d at 583-84.

81. *Pigee v. Israel*, 670 F.2d 690 (7th Cir.), *cert. denied*, 959 U.S. 846 (1982).

82. 670 F.2d at 694-95.

83. *Dean v. Young*, 777 F.2d 1239, 1244 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1794 (1986). The Wisconsin Court of Appeals subsequently sustained the instruction, concluding: "Shifting this burden of production to the defendant is constitutionally permissible, contrary to Rodriguez's assertion, so long as no reasonable juror could interpret the presumption as shifting the burden of persuasion." *State v. Rodriguez*, No. 85-2192 (Wis. Ct. App. Aug. 22, 1986) (LEXIS, States library, Wisc. file).

bility of the fact-finding process — the result, in my view, was predictable. I believe, but cannot prove, that the ability to limit relief to the arguably innocent would have led the Wisconsin court, and possibly the Seventh Circuit, to grant relief in a case in which the facts indicated that the instruction, if misunderstood, may have led to the conviction of a person who was innocent of the crime charged (usually first degree murder). Thus limiting habeas relief to the arguably innocent, in this situation, would have increased rather than decreased the chance of success for those who have an arguable claim of innocence.

Later the United States Supreme Court held that a violation of *Sandstrom* can be harmless because, although the purpose of *Sandstrom* "is to ensure that only the guilty are criminally punished," when "the verdict of guilty reached in a case in which *Sandstrom* error was committed is correct beyond a reasonable doubt, reversal of the conviction does nothing to promote the interest that the rule serves."⁸⁴

A frank recognition of this fact earlier in the process by all of the courts involved, state and federal, would have made significant contributions to important correctional objectives:

(1) In its original unqualified form, the *Sandstrom* decision gave rise to unrealistic expectations by a large number of Wisconsin inmates, expectations subsequently frustrated by the decisions of the Wisconsin Supreme Court and the Seventh Circuit. All correctional administrators agree that the worst thing for a prison population is to create expectations that cannot be fulfilled.

(2) From a correctional point of view, elementary requirements of a constructive program for dealing with inmates are basic honesty and candor, especially when the answer is no. It is difficult to explain to a prisoner that the conviction was affirmed because it was concluded that Wisconsin jurors clearly understood an instruction, if the various courts that reviewed the instruction were unable to agree on what it meant or on how it would be interpreted by the jury. Particularly difficult is explaining this to a prisoner whose conviction was based on conflicting evidence, under circumstances in which jury misunderstanding may have resulted in a conviction for an offense more serious than would have been found by a jury not misled by an admittedly confusing instruction.

Justice Stevens may be right that the public interest is served by an ability to deal with non-guilt-related constitutional violations by means of federal habeas. Certainly so-called social engineering objectives, such as proper racial representation on juries, are important to a

84. *Rose v. Clark*, 106 S. Ct. 3101, 3107 (1986).

proper system of criminal justice. It seems less clear that doing this will serve either the interest of a state correctional program or the interests of state prisoners. The issue is of fundamental importance:

It is a habit that treats criminal defendants as not quite human — as symbols to be manipulated in a larger struggle rather than as people to be dealt with on their own terms. It matters little whether we use them to make an example of what happens to people who disobey society's norms or we use them to demonstrate our commitment to social justice. In the end, we are using them still, and use for one purpose breeds use for another.

It is hardly surprising that we have fallen into this habit. Indeed, we may have had very little choice. An alternative model focusing on individual defendants rather than broader social policy would require the state to make ultimate moral judgments about the persons charged with crimes. Instead of deciding what punishment served the commonweal, the state would have to determine what punishment the defendant deserved. Such a model would, of course, require accurate factfinding. We would have to forsake use of the system to achieve goals that distort the reliability of individual results.⁸⁵

VI. CONCLUSION

It seems inevitable that limitations will be imposed on access to federal habeas by state prisoners. The need is for agreement on the conceptual basis for the limitations. Focusing on the possibility of innocence seems clearly best from the point of view of the state prisoner and the state correctional program. It is better than the increased procedural obstacles which are inconsistent both with finality and with the obvious interest of the arguably innocent in a prompt decision. It is preferable to the proposal in S. 2301 because neither finality nor the status of state courts is served by the continued incarceration of those who are not guilty or not deserving of confinement for so long as prescribed.

Correctional institutions work best when those who are confined have hope.⁸⁶ And correctional programs work best when the criminal justice system is understandable and credible. Judge Lay puts it best: "[W]ith knowledge of our fallibility and a realization of past errors, we can hardly insure our confidence by creating an irrevocable end to the guilt determining process."⁸⁷

85. Seidman, *supra* note 23, at 501-02.

86. The worst prison in the country is the Atlanta Federal Penitentiary. See STAFF OF SUB-COMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 99TH CONG., 2D SESS., REPORT ON THE ATLANTA FEDERAL PENITENTIARY (Comm. Print 1986). The report noted that "[t]his form of warehousing is brutal and dehumanizing. The Cuban detainees have no practical hope for release or return." *Id.* at iii.

87. Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prison-*

Although legislation was not adopted by the 99th Congress, efforts to change federal habeas corpus law continue in the 100th Congress. State judges continue to express concern about federal habeas review of state court decisions, especially if that review is by a non-article III magistrate. Senator Thurmond has introduced another revision, as has Senator Sims. The Thurmond Bill⁸⁸ is substantially the same as that introduced in the 99th Congress. Although it seems unlikely that any of the bills will pass, particularly with the Democratic majority in the Judiciary Subcommittee on the Constitution (Senator Paul Simon, Chair), the effort continues. It remains important therefore to continue the search for an acceptable basis in principle for defining the scope of federal court postconviction review of state court criminal convictions.⁸⁹

ers Preserved, 21 DE PAUL L. REV. 701, 710 (1972), quoted in 3 W. LAFAVE & J. ISRAEL, *supra* note 5, § 27.2, at 299. *But cf.* *Nichols v. Gagnon*, 710 F.2d 1267, 1272 (7th Cir. 1983), *cert. denied*, 466 U.S. 940 (1984): "To transform the federal courts in the exercise of their habeas corpus jurisdiction from enforcers of specific constitutional rights to guarantors of the accuracy of state court determinations of guilt would enmesh the federal judiciary in almost every detail of state criminal procedure . . ." To which it seems to me the response is: No, only those aspects of state criminal procedure that create an unacceptably high risk of convicting an innocent person or a guilty person of an offense more serious than that committed. *See* Mishkin, *The Supreme Court, 1964 Term — Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 80 (1965):

The principal grounds for habeas corpus generally accepted today on their face assert constitutional defects in the procedure used to convict; at base, however, the recognition of these grounds serves to free prisoners as to whom there is greater doubt than the Constitution allows that they have in fact done the acts which constitute the crime for which they are being punished.

See also Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1075 (1978).

88. S. 260, 100th Cong., 1st Sess., 133 CONG. REC. S518-20 (daily ed. Jan. 6, 1987).

89. My thanks to Mr. Paul Summit for his help in updating the congressional developments.