

FEDERAL COURTS, PRACTICE & PROCEDURE

THE ENDURING CHALLENGES FOR HABEAS CORPUS

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Habeas Corpus: You may have the body

INTRODUCTION

The late great physicist Richard Feynman is thought once to have said “If you think you understand quantum mechanics, you don’t understand quantum mechanics.”¹ Or maybe the idea expressed in that quip came from Niels Bohr, who is quoted as saying, “Anyone who is not shocked by quantum theory has not understood it.”² For our purposes, it does not matter who said it first: the key point is that there are some fields for which a little knowledge actually conceals the true nature of the challenge. It would be an overstatement to say that the law of habeas corpus approaches the mind-bending complexity of quantum mechanics.³ But habeas corpus has tied courts and legal scholars into knots for many years. One of the finest efforts to disentangle it—and to grapple with the question how, if at all, habeas corpus should be used for those whose detention flows from a criminal trial—is now fifty years

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1 *Talk: Richard Feynman*, WIKIQUOTE, https://en.wikiquote.org/wiki/Talk:Richard_Feynman (last updated Oct. 7, 2019) (attributing the quote, in 2014, to a university lecture called *The Character of Physical Law*).

2 *Niels Bohr*, WIKIQUOTE, https://en.wikiquote.org/wiki/Niels_Bohr (last updated Feb. 11, 2020). There is dispute surrounding the quote. Karen Barad attributed this specific variant to Bohr in KAREN MICHELLE BARAD, *MEETING THE UNIVERSE HALFWAY* 254 (2007), with the quote attributed to NIELS BOHR, *THE PHILOSOPHICAL WRITINGS OF NIELS BOHR* (1987), although without any page number or volume number.

3 If you doubt that characterization of quantum mechanics, I invite you to read the fascinating book by JOHN GRIBBIN, *IN SEARCH OF SCHRÖDINGER’S CAT: QUANTUM PHYSICS AND REALITY* (1984). You will be convinced.

old. I am speaking of Judge Henry Friendly's thoughtful article, published in 1970 in the *University of Chicago Law Review*, entitled *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*.⁴

Habeas corpus law has not remained static during the half century since Judge Friendly wrote, but neither has it provided satisfactory answers to the problems that he highlighted in his article. Unfortunately, many of the changes—well intended as they were by the enactors and implementers—have done nothing but create endless hurdles, loops, and traps for potential users. Enormous resources are poured into this elusive remedy. The rule of law is not well served when people are told that they have a remedy, but in fact they do not. Far better to have truth-in-labeling, so that the cases that deserve collateral review get it, and those that do not are more clearly identified from the outset and quickly dismissed. This is the goal that Judge Friendly set for himself in his article, but unfortunately it is not one that we have yet attained. Whether that is because of flaws in his suggestions, or failures to adopt them, is the subject of this Article. The answer, I suggest, is a little of both: some of his suggestions need further refinement, and others simply need to be implemented more vigorously. In the end, a remarkable number of Judge Friendly's observations still apply to today's writ, and thus many of his prescriptions remain well worth legislative attention.

I. BACKGROUND OF HABEAS CORPUS

The Latin phrase “habeas corpus” is written in the second-person present subjunctive mood of the verb “habere,” which means “to have.” “Habeas corpus” thus does *not* mean “You have the body.” That would be a present indicative statement, merely descriptive of the current state of affairs. Instead, it means something more like “You may have the body [if you can justify your custody],” or “Should you have the body?” Indeed, the use of the subjunctive mood is doing all the work here: it is what drives the writ, which for centuries has been understood to run to the custodian and to command that custodian to justify the continued detention of the applicant. Once the person has been released from custody and all cognizable collateral consequences of incarceration have ceased, the petitioner no longer has an active controversy and the habeas corpus petition must be dismissed.⁵ Dismissal is also required if the petitioner dies before the case is resolved.⁶

Following the lead of no less an authority than William Blackstone, it has been fashionable to trace the old English writ of habeas corpus back to Magna Carta itself. In his *Commentaries*, he wrote that the writ of habeas corpus ad subjiciendum is a writ of right, “established on the firmest basis by the provisions of *Magna Carta*, and a long succession of statutes enacted

4 Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

5 See *Spencer v. Kemna*, 523 U.S. 1, 7 (1998).

6 See, e.g., *Keitel v. Mazurkiewicz*, 729 F.3d 278, 280 (3d Cir. 2013) (citing cases). At least for mortal authorities, death releases a person from “custody.”

under Edward III.”⁷ Later scholars have found this claim to be overblown,⁸ yet they agree that the writ is a very old one. Codified in 1679 during the reign of Charles II, the writ of habeas corpus crossed the Atlantic largely on Blackstone’s back—his *Commentaries on the Law of England* were on every colonial lawyer’s desk. It was he who called the writ of habeas corpus ad subjiciendum “the most celebrated writ in the English law.”⁹ And from there the writ shows up in the U.S. Constitution, in Article I, Section 9, Clause 2—but not, as commentators have pointed out, as an affirmative grant of power to issue writs of habeas corpus.¹⁰ Instead, the Constitution does no more than to protect against the *suspension* of the “Privilege of the Writ of Habeas Corpus,” without defining what that writ might be, with exceptions allowing suspension during times of rebellion or invasion.¹¹

The state courts were entitled, then and now, to handle habeas corpus as they wished. But at the federal level it is Congress that has put meat on the bones of the constitutional language. And it has done so ever since the First Judiciary Act, section 14 of which gave the federal courts the power to issue writs of habeas corpus.¹²

II. PRISONER PETITIONS FROM 1867 TO 1996

It was not always obvious that the writ would be available to persons whose custody resulted from judicial proceedings, as opposed to those who were in some form of executive detention. Put bluntly, the custodian of someone in the former class has an easy answer to the question “why are you detaining this individual”: the response is “because he or she was accused, tried by a jury (or the court, or admitted guilt), and has been sentenced to prison.” This is quite different from the answer that the custodian of a person the police simply grabbed from the street and threw in jail would give. Supreme Court decisions such as *Boumediene v. Bush*¹³ and *Immigration and Naturalization Service v. St. Cyr*¹⁴ illustrate the distinctive nature of the analysis required for the latter group of cases. This Article, like Judge Friendly’s, however, is concerned solely with the first group—that is, convicted prisoners

7 3 WILLIAM BLACKSTONE, COMMENTARIES *133.

8 See, e.g., WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 45 (1980); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RTS. 375, 377–78 (1998) (“Blackstone and Coke traced habeas corpus to the Magna Carta; however, there is little relationship between Magna Carta and habeas corpus. Perhaps the most that can be said is that the writ Blackstone called the ‘glory of the English law’ arose from ‘humble and obscure origins in medieval England.’” (citations omitted) (quoting 2 BLACKSTONE, *supra* note 7 at *133; Robert J. Sharpe, *A Constitutional History of Habeas Corpus*, PUB. L., Spring 1982, at 154, 154 (book review))).

9 3 BLACKSTONE, *supra* note 7, at *129.

10 See, e.g., David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 61–65 (2006).

11 U.S. CONST. art. I, § 9, cl. 2.

12 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

13 553 U.S. 723, 732–33 (2008) (enemy combatants).

14 533 U.S. 289, 292–93 (2001) (immigration).

who seek to avail themselves of the writ of habeas corpus. It was not until 1867 that the federal courts were empowered to grant relief to both state and federal prisoners,¹⁵ and so this is a convenient starting point for a quick look at the way in which habeas corpus has functioned.

The 1867 Act empowered all federal courts and their judges or Justices, acting “within their respective jurisdictions,” 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.”¹⁶ Initially, the 1867 statute did not trigger huge numbers of petitions; to the contrary, as Lewis Mayers points out, that statute “repos[ed] almost quiescent for decades,” only to be revealed as “a sleeping giant” in the 1950s and 1960s.¹⁷ Mayers argues that the habeas corpus statute was intended to protect the rights of citizens newly freed from slavery and that there is in fact “no foundation for the [Supreme] Court’s assertions that the 1867 act was intended to afford a new remedy for state prisoners.”¹⁸ Nonetheless, that is the path that the statute ultimately took—a development that was impossible to contradict by the mid-twentieth century.

In 1948, Congress undertook a comprehensive revision of the Judicial Code.¹⁹ It endeavored, for the most part successfully, to make few substantive changes to the law, and the habeas corpus provisions of the 1867 Act were no exception. The 1948 revision codified the provisions relating to the writ for state prisoners in 28 U.S.C. § 2254, and it formally added language requiring that group of petitioners to exhaust their state remedies before turning to federal court.²⁰ The 1948 codifiers also took steps to relieve courts from the unequal burden of petitions they were receiving from federal prisoners—petitions that were heavily concentrated in districts that housed federal prisons, given the requirement to seek the writ in the district of confinement.²¹ They did so by providing a substitute motion, 28 U.S.C. § 2255, for federal prisoners who wished to challenge their convictions or sentences; that motion had to be brought in the district of conviction.²²

Although the procedural apparatus did not change much between 1867 and 1996, the same cannot be said of the cognizable grounds for relief.

15 See Judiciary Act of 1867, ch. 28, § 1, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2243 (2018)).

16 *Id.*

17 Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 31 (1965).

18 *Id.* at 55–56.

19 See *Judicial Code Revisions Make Administrative Changes*, FED. JUD. CTR., <https://www.fjc.gov/history/timeline/judicial-code-revisions-make-administrative-changes> (last visited Apr. 13, 2020).

20 See 28 U.S.C. § 2254(b)(1) (2018).

21 See *id.* § 2241.

22 *Id.* § 2255(a). In the rare case where the remedy provided by the motion under § 2255 is “inadequate or ineffective,” the statute provides that the prisoner may proceed under the general habeas corpus statute, *id.* § 2241. See, e.g., *Webster v. Daniels*, 784 F.3d 1123, 1135–39 (7th Cir. 2015) (en banc) (quoting 28 U.S.C. § 2255(e)).

Before 1867, the common wisdom was that a person confined pursuant to judicial process—that is, a prisoner—could obtain habeas corpus relief only if the court that rendered the judgment lacked jurisdiction to do so.²³ That rule was loosened in 1867, though by how much and for whom is debatable. Nonetheless, it is fair to say that federal prisoners could now complain about the convicting court's jurisdiction, about the constitutionality of the statute of conviction, and about the lawfulness of the sentence. "Pure" constitutional challenges, however, were rare.

The modern expansion of habeas corpus can be dated to two decisions from the early twentieth century: *Frank v. Mangum*²⁴ and *Moore v. Dempsey*.²⁵ Both arose out of state court proceedings; both involved a total breakdown of the criminal justice system; and both petitioners asserted that their due process rights under the Fourteenth Amendment had been violated.²⁶ In *Frank*, the Court nonetheless refused to issue the writ.²⁷ In *Moore*, it reversed course and did so.²⁸ *Moore* thus laid the doctrinal basis for broader federal power to overturn the results of a state court proceeding. But, perhaps because of the extreme facts of the case, or perhaps because the law changes slowly, it was some time before courts began to exercise that power.

It was the case of *Brown v. Allen*,²⁹ which involved the case of an African American defendant who had been tried for murder and sentenced to death before a jury that had been selected in a racially discriminatory way, that marked the beginning of an era of robust federal court action. The state courts, from the trial court through the court of last resort (and a denial of certiorari at the U.S. Supreme Court) had rejected Brown's petition.³⁰ At that point, Brown filed a petition for a writ of habeas corpus in the federal district court.³¹ At the Supreme Court, satisfied that Brown had properly exhausted his state court remedies, the Justices grappled with the question whether a federal court was entitled to revisit the decisions of state courts on federal constitutional claims. The Court rejected the argument that the state courts' decisions represented the final word, but it also refused to hold that review under § 2254 was plenary. Instead, the Court attempted to follow a middle road, in which the district court would determine whether additional proceedings were necessary, and exercise its discretion to order them only if the record failed to show that "the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion."³²

23 *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 207 (1830).

24 237 U.S. 309 (1915).

25 261 U.S. 86 (1923).

26 *See id.* at 87; *Frank*, 237 U.S. at 324–26.

27 *Frank*, 237 U.S. at 345.

28 *Moore*, 261 U.S. at 92.

29 344 U.S. 443 (1953).

30 *Id.* at 459, 466–67.

31 *Id.* at 447.

32 *Id.* at 463–64.

Other Justices in *Brown* were not satisfied with the majority's guidance to the lower courts on how to balance the interest in finality of the state court results and the federal habeas corpus remedy. Two in particular emphasized the low success rate enjoyed by prisoners who file petitions for the writ.³³ Justice Robert Jackson, concurring in the result, had this to say:

Controversy as to the undiscriminating use of the writ of habeas corpus by federal judges to set aside state court convictions is traceable to three principal causes: (1) this Court's use of the generality of the Fourteenth Amendment to subject state courts to increasing federal control, especially in the criminal law field; (2) *ad hoc* determination of due process of law issues by personal notions of justice instead of by known rules of law; and (3) the breakdown of procedural safeguards against abuse of the writ.³⁴

We will return to these concerns, since they lie behind many of Judge Friendly's observations as well. For now, however, we can contrast them to Justice Frankfurter's observations in his separate *Brown* opinion:

Experience may be summoned to support the belief that most claims in these attempts to obtain review of State convictions are without merit. Presumably they are adequately dealt with in the State courts. . . . The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.

For surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts. Rules which in effect treat all these cases indiscriminately as frivolous do not fall far short of abolishing this head of jurisdiction.³⁵

Justice Frankfurter then proposed procedures (the details of which do not matter for present purposes) for the district courts to follow.³⁶ In the final analysis, *Brown* came to be understood as a holding supporting the power of the federal courts to relitigate questions of federal constitutional law in a

33 See *id.* at 498 (opinion of Frankfurter, J.), 537 (Jackson, J., concurring).

34 *Id.* at 532 (Jackson, J., concurring).

35 *Id.* at 497-99 (opinion of Frankfurter, J.).

36 *Id.* at 502-08. Frankfurter recommended the following six steps: (1) the petitioner must make out a *prima facie* case for relief; (2) failure to exhaust is "an obvious ground for denying the application"; (3) the district courts should have discretion in deciding whether to call for the state record or to hold their own evidentiary hearing; (4) when the district court has the state court record, it may defer to the state's finding of fact (especially historical fact), but state conclusions of law cannot be accepted as binding; (5) the district court should make its own decision on both pure questions of law and mixed questions of law and fact; and (6) the judge may "take into consideration" the fact of a prior denial of relief on the same claim. *Id.*

habeas corpus case, even if those questions had been fully and fairly ventilated in the state court.

Brown's procedural green light was followed a decade later with a Supreme Court decision that further lightened the procedural burdens for habeas corpus petitioners. This was *Fay v. Noia*.³⁷ The underlying question concerned the ability of the petitioner to raise a claim that he had been convicted on the basis of a coerced confession—indeed, as Justice Brennan put it for the majority, a “conviction now admitted by the State to rest upon a confession obtained from him in violation of the Fourteenth Amendment.”³⁸ Petitioner Noia had failed to seek appellate review in the state courts, and on that basis the state courts also denied his state postconviction petition for relief. The federal district court rejected his § 2254 petition on the ground that he had failed to exhaust his state remedies, but the Second Circuit reversed.³⁹ The Supreme Court agreed that his case could go forward. Its holding is at such odds with today's habeas corpus law that it is worth setting out in full:

We hold: (1) Federal courts have *power* under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute. (2) Noia's failure to appeal was not a failure to exhaust “the remedies available in the courts of the State” as required by § 2254; that requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court. (3) Noia's failure to appeal cannot under the circumstances be deemed an intelligent and understanding waiver of his right to appeal such as to justify the withholding of federal habeas corpus relief.⁴⁰

At least with the benefit of hindsight, it is not surprising that *Noia*'s half-life was as short as it was. The combination of decisions in *Brown* and *Noia*, however, was the inspiration for Judge Friendly's 1970 article, and so it is useful to recall exactly what they said.

Needless to say, Judge Friendly was not the only person who thought that federal habeas corpus law had gone too far (though there were certainly defenders of its scope as well). Concerned about the efficiency, finality, and comity implications of such a broad scope for federal habeas corpus actions, the Supreme Court began to regroup in the early 1970s. The first sign of this trend came in *Schneekloth v. Bustamonte*,⁴¹ where the question was whether a defendant could win issuance of a writ of habeas corpus by showing that he was not aware of his right to withhold consent to a search, or if instead the

37 372 U.S. 391 (1963).

38 *Id.* at 394.

39 *Id.* at 396–97.

40 *Id.* at 398–99 (emphasis omitted).

41 412 U.S. 218 (1973).

state was entitled to justify the search for Fourth Amendment purposes by the totality of the circumstances. The Court opted for the latter rule, which was the one the state court had used.⁴² Three years later, in *Stone v. Powell*⁴³ it closed the door altogether to habeas corpus relief based on a violation of the Fourth Amendment in any case where a state had offered a full and fair opportunity to air the claim. People wondered, after *Powell*, whether the Court was planning to rein in habeas corpus one topic at a time, but that did not happen.

Instead, in 1977, *Wainwright v. Sykes*⁴⁴ heralded the virtual overruling of *Fay v. Noia* and the adoption of a rule far more deferential to state court proceedings. The Court held that a federal constitutional challenge could not be entertained if the state court ruling was based on an adequate and independent rule of state law—there, the state’s contemporaneous-objection rule.⁴⁵ At the same time the Court rejected *Noia*’s deliberate-bypass standard.⁴⁶ It also reemphasized the importance of exhausting state court remedies,⁴⁷ even while acknowledging, consistently with *Francis v. Henderson*,⁴⁸ that certain procedural defaults can be overcome if the petitioner can show cause and prejudice.⁴⁹

Much more could be said about these developments. During this period, there was, for instance, a well-developed concept of “abuse of the writ,”⁵⁰ which “defin[ed] the circumstances in which federal courts decline[d] to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus.”⁵¹ Buried within the exhaustion requirement is the rule that the federal claim must be “fairly presented to the state court[].”⁵² But we can save our consideration of the procedural complexity of this area for later, because the modern picture has been profoundly affected both by statutory change and Supreme Court decisions.

What was happening to the habeas corpus caseloads during these years? In a word, they were booming. In 1953, when *Brown v. Allen* was handed down, the federal courts handled 541 petitions.⁵³ As of 1960, state prisoner habeas corpus petitions numbered 871, or 2.27% of private civil cases in the federal courts.⁵⁴ By 1970, the year in which Judge Friendly published his

42 See *id.* at 248–49.

43 428 U.S. 465 (1976).

44 433 U.S. 72 (1977).

45 *Id.* at 81.

46 *Id.* at 85–86.

47 *Id.* at 80.

48 425 U.S. 536 (1976).

49 *Wainwright*, 433 U.S. at 87.

50 *McCleskey v. Zant*, 499 U.S. 467, 470 (1991).

51 *Id.*

52 *Duncan v. Henry*, 513 U.S. 364, 367 (1995) (Souter, J., concurring in the judgment) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

53 Friendly, *supra* note 4, at 143.

54 See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1270 (7th ed. 2015) (table setting forth number of petitions filed).

article, the number had increased tenfold, to 9063 for the year.⁵⁵ The 1980 numbers slipped back a bit, to 7031, but by 1990 it had jumped back to 10,823; in 2000 it was 21,349; and in 2010 it was 17,042.⁵⁶ For the year ending September 30, 2019, the number (down slightly from some recent years) was 16,902.⁵⁷ It is hard to resist the conclusion that through thick and thin, reform and inaction, the number relentlessly goes up. And the numbers since 1996 are the ones affected by Congress's most serious effort yet to rein in habeas corpus petitions from state and federal prisoners: the 1996 Antiterrorism and Effective Death Penalty Act,⁵⁸ known to all as AEDPA. Before turning to a close examination of Judge Friendly's 1970 proposals, we will finish up this quick tour of habeas corpus law with a look at that statute.

III. THE AEDPA REGIME

Concern had been growing for years with the burgeoning number of petitions filed by prisoners—people who all had been tried in either a state or a federal trial court, and who had all had the opportunity to pursue appellate review in the proper court system. There was also a widespread perception that the overwhelming number of petitions were meritless, that prisoner petitions were tying up federal courts with pointless work, that the federal habeas corpus regime was unjustifiably relegating the state courts to second-class status, that it stripped state court judgments of their finality, and that it perversely encouraged prisoners not to take their sentences seriously. This prompted Congress to step in with legislation designed to realign incentives and to reassert society's interest in the finality of judgments. AEDPA was the result, and in particular, the provisions of AEDPA that amended the habeas corpus statute used by state prisoners, 28 U.S.C. § 2254, and the statute used by federal prisoners, 28 U.S.C. § 2255.

Whatever else one may say about AEDPA, there is no doubt that it effected major changes in federal habeas corpus. Among the most important of those changes were the following:

- It clarified and tightened the standard that the district courts were to use in evaluating a petition.
- It introduced a new exhaustion standard:
 - The applicant had to exhaust state remedies unless none was available.
 - It allowed the district court to overlook waivers of the exhaustion requirement by the State.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS—CIVIL CASES COMMENCED, BY NATURE OF SUIT, DURING THE 12-MONTH PERIODS ENDING SEPTEMBER 30, 2015 THROUGH 2019, TABLE C-2A, at 2 (2019), https://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2019.pdf.

⁵⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

- It demanded the use of “any available procedure” under state law through which a point might be raised.
- It greatly strengthened the deference owed to state court conclusions of law, with respect to any claim adjudicated on the merits in the state court, and its new substantive standard ruled out reliance on lower federal court decisions:
 - First, was the state court’s decision “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States”;
 - Or second, was the state court’s decision “an unreasonable application of” that same law, clearly established by the Supreme Court?
- Deference to facts found by the state courts was also heightened. The federal court, according to § 2254(d)(2), was first to evaluate the case using the facts that were before the state court, asking whether the result “was based on an unreasonable determination of the facts” based on that record.
- Only in rare cases may the federal court go beyond the state factual record and hold its own evidentiary hearing pursuant to § 2254(e).
 - One such situation arises if the claim rests on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable”;
 - Another required both “a factual predicate that could not have been previously discovered through the exercise of due diligence” and facts that “would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”
- The regime for second or successive petitions also changed. They had been discouraged through the “abuse of the writ” doctrine, but AEPDA introduced a requirement of prescreening by the court of appeals before such a petition could even be filed, and stringent limits on permissions.

The constitutionality of these changes has been upheld by the Supreme Court, and so any discussion of them is one about statutes and policy. In *Felker v. Turpin*,⁵⁹ the Supreme Court held that the AEDPA regime did not amount to an impermissible suspension of the writ. It reasoned that an original writ of habeas corpus may still be sought in the Supreme Court;⁶⁰ the statute does not repeal the Supreme Court’s appellate jurisdiction in violation of the Exceptions Clause of Article III, Section 2 of the Constitution;⁶¹ and (again focusing on a possible writ in the Supreme Court itself) there is no problem with AEDPA’s standards for granting relief, because they apply

59 518 U.S. 651 (1996).

60 *Id.* at 658.

61 *Id.* at 661–62.

only to applications filed in the district courts.⁶² Having acknowledged all that, the Court rejected the petition before it in *Felker*, finding nothing so extraordinary about it that it justified such an unusual step.⁶³

Finally, as noted above, AEDPA singles out “new rules” of constitutional law in several places. The Supreme Court had already addressed what should be considered a new rule, and when such a rule may constitutionally be applied retroactively, in *Teague v. Lane*.⁶⁴ *Teague*’s teachings on retroactivity are not outdated,⁶⁵ as the Court confirmed in *Greene v. Fisher*⁶⁶ that the AEDPA and *Teague* inquiries are separate. New procedural rules, including constitutional rules of criminal procedure, normally do not apply to cases that have finished a full round of direct review, including discretionary review before the court of last resort.⁶⁷ But exceptions exist if (1) the rule affects some constitutionally protected interest; (2) the rule affects fundamental fairness (a very small set involving so-called structural errors, such as a total failure to provide counsel, a biased trial judge, racial discrimination in the selection of a grand jury, the denial of self-representation at trial, or a defective reasonable-doubt instruction);⁶⁸ or (3) the new rule affects substance, not procedure.⁶⁹

With this quick tour of the habeas corpus horizon, we are ready to return to Judge Friendly’s article, see what he recommended, see what has happened, and ask whether the system could still stand to be improved.

IV. FRIENDLY: IS INNOCENCE IRRELEVANT?

The question is a provocative one. Ingrained in the American system of justice and our notion of the rule of law is the norm that an innocent person should not be punished or sent to prison. We go to great lengths in the service of that norm: the use of the probable-cause standard for accusations, the assurance of counsel for every person who wants it, and above all, the assurance that a person cannot be convicted unless the trier of fact finds guilt beyond a reasonable doubt. We could ask Judge Friendly’s question in two ways: one might wonder why we would consider setting all of that to one side for collateral relief; or one might say that, having done our best, there is a time to be finished, even if a few residual errors remain behind.

62 *Id.* at 662.

63 *Id.* at 664–65.

64 489 U.S. 288 (1989).

65 *See, e.g.*, *Newland v. Hall*, 527 F.3d 1162, 1198–1201 (11th Cir. 2008); *Daniels v. United States*, 254 F.3d 1180, 1196 (10th Cir. 2001).

66 565 U.S. 34, 39 (2011) (“We have explained that AEDPA did not codify *Teague*, and that ‘the AEDPA and *Teague* inquiries are distinct.’” (quoting *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam))).

67 *See O’Sullivan v. Boerckel*, 526 U.S. 838 (1999).

68 *See Neder v. United States*, 527 U.S. 1, 8 (1999).

69 *See Welch v. United States*, 136 S. Ct. 1257, 1264 (2016); *Bousley v. United States*, 523 U.S. 614, 620 (1998).

Judge Friendly's article proceeds from the second of those perspectives. He begins with this observation:

After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning.⁷⁰

Put that way, it is hard to imagine who would want such a system.

But the people who specialize in ferreting out wrongful convictions, both in capital cases and in other serious felony matters, have an answer. The New England Innocence Project reports that since 1989, there have been 2471 exonerations in the United States.⁷¹ It lists the most common contributing factors: mistaken identification; false confessions; forensic science problems; perjury or false accusations; and official misconduct. The Brennan Center for Justice adds to the list prosecutorial misconduct, the strained resources and crushing caseloads of public defense attorneys, and the willingness of some people to plead guilty just to get out of jail.⁷² Most troublesome for present purposes is the length of time an exoneration takes. The Northern California Innocence Project (NCIP) notes that the National Registry of Exonerations estimates that the average exoneration occurs nearly eleven years after the conviction, and that its own data are comparable.⁷³ Critically, the NCIP states that its "clients have all been in prison long enough to have completed their appeals and been denied relief, which typically takes three years or more. Many of them have pursued one or more habeas corpus petitions on their own before learning of the existence of NCIP."⁷⁴ In other words, relief almost always comes as a result of postconviction, collateral proceedings. So this is not as one-sided an inquiry as Judge Friendly's eloquent account might make it appear to be.

It is also true, however, that the number of exonerated people pales in comparison to the number of people each year who are convicted of felonies, and to the overall number of people in prison after conviction of a felony.⁷⁵ Moreover, success rates on collateral review have always been very low.⁷⁶ And

70 Friendly, *supra* note 4, at 142.

71 *Causes of Wrongful Convictions*, NEW ENG. INNOCENCE PROJECT, <http://www.newenglandinnocence.org/causes-of-wrongful-convictions> (last visited Feb. 16, 2020).

72 See Ames Grawert, *Wrongful Convictions*, BRENNAN CTR. FOR JUST. (Oct. 5, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/wrongful-convictions>.

73 Maitreya Badami, *Why Do Exonerations Take So Long?*, SANTA CLARA U. SCH. L. (Nov. 7, 2016), <https://law.scu.edu/northern-california-innocence-project/why-do-exonerations-take-so-long/>.

74 *Id.*

75 The Bureau of Justice Statistics reports that the prison population, both state and federal, was 1,489,363 at the end of 2017. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2017, at 3 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>. Federal and state authorities admitted 418,000 new prisoners in 2017. *Id.* at 12.

76 A 2007 study examined a sample of noncapital habeas cases filed in the district courts between 2003 and 2004, and a 2012 follow-on study examined the disposition of the

the ground of a petition mattered. At the time Judge Friendly was writing, it was accurate to say that “the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.”⁷⁷ Against that backdrop, he posited that for a number of reasons, “collateral attack on criminal convictions carries a serious burden of justification.”⁷⁸

Those reasons include the following: first, collateral attack undermines the educational and deterrent functions of criminal law;⁷⁹ second, collateral attack could occur at any point during the period of custody, and long delays undermine the reliability of fact finding;⁸⁰ third, the “drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms”;⁸¹ fourth, the small number of meritorious petitions can get lost in the sea of frivolous ones;⁸² and finally, the undermining of public respect for criminal judgments that occurs when the judgment is always vulnerable to second-guessing.⁸³ These weighty concerns, Judge Friendly urged, should receive *some* consideration in the law of collateral attack, even though on the other side of the balance one finds the life, liberty, and constitutional rights of the petitioner. In that connection, he draws the following distinction:

A statement like that just quoted [acknowledging those interests], entirely sound with respect to a man who is or may be innocent, is readily metamorphosed into broader ones . . . expansive enough to cover a man steeped in guilt who attacks his conviction years later because of some technical error by the police that was or could have been considered at his trial.⁸⁴

With these concerns in mind, and cognizant of the small percentage of habeas corpus petitions that were granted as of the time he wrote,⁸⁵ he pro-

same set of cases on appeal. Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308 (2012). Of the sample cases, the district courts initially granted habeas in only 0.64% of cases. In 4.7% of cases, the prisoner was granted a certificate of appealability. In 0.7% of all cases, the courts of appeals remanded the district court’s denial of habeas, and in 0.28% of cases, the district court granted relief after remand. Additionally, the courts of appeals reversed a district court’s grant of habeas in 0.01% of cases. Thus, in the final analysis, the federal courts granted habeas in noncapital cases in only 0.82% of federal cases.

77 Friendly, *supra* note 4, at 145.

78 *Id.* at 146.

79 *Id.* (citing Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963)).

80 *Id.* at 146–47.

81 *Id.* at 148.

82 *Id.* at 149.

83 *Id.*

84 *Id.* at 150.

85 The success rates of habeas petitions have been persistently low. One study of habeas petitions filed from 1975 through 1977 found that the petition was granted in 3.2% of cases, and the prisoner was ultimately released in 1.8% of total cases. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *FEDERAL REVIEW OF STATE PRISONER PETITIONS* 5 (1984), <https://www.bjs.gov/content/pub/pdf/hc-frspp.pdf>. This rate is only modestly higher than the 0.82% grant rate shown by more recent studies. See *supra* note 76.

posed a number of reforms for collateral relief—reforms that he thought suitable both for intrasystem petitions (that is, the motion under § 2255 for federal prisoners) and intersystem petitions (that is, the petition under § 2254 for state prisoners).

As the title to the article suggests, the overarching change that Judge Friendly believed was necessary focused on innocence: he wanted “a requirement that, with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence” in his petition.⁸⁶ Such a rule, he thought, “would enable courts of first instance to screen out rather rapidly a great multitude of applications not deserving their attention,”⁸⁷ thereby enabling them to devote their resources to the few cases in which an injustice may have been done.⁸⁸ He preferred this system to one in which the writ for prisoners was abolished entirely (on the assumption that this would not clash with the Suspension Clause) in favor of exclusive reliance on executive clemency.⁸⁹

But he was not prepared to limit the writ exclusively to cases of actual innocence. There were other areas in which he was willing to allow use of the writ even without any underlying innocence claim. The first one that he indicates is worthy of continuing support is the situation in which “the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees.”⁹⁰ Under that rubric, he placed the classic cases in which the tribunal lacked jurisdiction, or the statute supporting the prosecution was unconstitutional, or the sentence could not lawfully be imposed.⁹¹ Racial discrimination in jury selection,⁹² jury tampering,⁹³ excessive publicity,⁹⁴ and lack of counsel during a critical phase⁹⁵ also fell within this category.

The second general area in which Judge Friendly thought collateral attack to be “readily justified” regardless of actual innocence occurs “where a denial of constitutional rights is claimed on the basis of facts which ‘are *dehors* the record and their effect on the judgment was not open to consideration and review on appeal.’”⁹⁶ He gave three examples of this: convictions on pleas of guilty obtained by improper means; convictions procured by the

86 Friendly, *supra* note 4, at 150.

87 *Id.*

88 *Id.*

89 *Id.* at 151.

90 *Id.*

91 *Id.*

92 See *Batson v. Kentucky*, 476 U.S. 79 (1986).

93 See *Remmer v. United States*, 347 U.S. 227 (1954).

94 See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); see also *Estes v. Texas*, 381 U.S. 532 (1965).

95 See *Missouri v. Frye*, 566 U.S. 134 (2012).

96 Friendly, *supra* note 4, at 152 (quoting *Waley v. Johnston*, 316 U.S. 101, 104 (1942) (per curiam)).

prosecution's knowing use of perjured testimony; and convictions of a person who was incompetent to stand trial.⁹⁷

Third, he was open to habeas corpus that did not include an innocence claim in situations where the law applicable to the trial did not afford any opportunity for the defendant to raise a constitutional defense at trial or on appeal.⁹⁸ Fourth and finally, Judge Friendly was willing to permit petitions resting on new developments in constitutional criminal procedure, if those developments were fundamental enough to be fully retroactive, even if there was no innocence claim.⁹⁹ Not all are, he hastened to add, noting as examples the extension of the exclusionary rule to the states, the prohibition against comment on a defendant's silence, the right to a jury trial in state criminal cases, and several others.¹⁰⁰

In summary, Judge Friendly attempted to distinguish between ordinary errors, regrettable and inevitable as they may be, and the foundational error of convicting one who is actually innocent, and the four categories that he identified as otherwise appropriate for collateral attack. This would exclude many constitutional claims from habeas corpus, he believed—a result that he defended on the ground that such a defendant has already received the structural protections guaranteed by the Constitution.¹⁰¹

V. HABEAS CORPUS AND CONSTITUTIONAL CRIMINAL PROCEDURE

It is interesting to ask, fifty years later, how well Judge Friendly's suggestions have stood the test of time. We can begin with the four categories for which he did not insist on an actual innocence claim and ask what has happened to them, and whether he struck the right balance. We then must take a procedural interlude, because many of AEDPA's most important innovations were procedural, and no one doubts that procedure can have just as much an effect as substance on the availability of the writ. Finally, we turn to the vexing problem of actual innocence. These inquiries afford the opportunity both to evaluate Judge Friendly's suggestions and to consider whether we have struck the correct balance today, under the AEDPA regime. Too generous? Too stingy? Are the distinctions he was trying to draw between these areas and other rights guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments sound ones?

A. *Criminal Process Breakdown*

The Supreme Court has long recognized that certain criteria are essential for a fair trial, and that when they are missing, the defendant is entitled to a redo. We can take some guidance on this point from the closely related

97 *Id.*

98 *Id.* at 152–53 (citing as an example *Jackson v. Denno*, 378 U.S. 368 (1964)).

99 *Id.* at 153.

100 *Id.* at 153–54.

101 *See id.* at 157.

decision in *Neder v. United States*,¹⁰² where the Court distinguished between ordinary constitutional violations, which are subject to harmless-error review, and more fundamental violations, which are not:

The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” Such errors “infect the entire trial process,” and “necessarily render a trial fundamentally unfair.” Put another way, these errors deprive defendants of “basic protections” without which “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.”¹⁰³

Stressing that the list was a short one, the Court singled out the complete denial of counsel, a biased trial judge, racial discrimination in the selection of a grand jury, the denial of self-representation at trial, the denial of a public trial, and a defective reasonable-doubt instruction as structural errors it had recognized.¹⁰⁴ While an erroneous jury instruction is certainly an error, it is the type of error that must be raised at the right time and place, and harmless-error analysis applies.

Under the modern, precise understanding of what a “jurisdictional” defect is (and is not),¹⁰⁵ these structural or framework defects would not be enough to establish a lack of jurisdiction in the court. Yet they do involve foundational constitutional problems that go to the heart of the judicial system, albeit they are procedural problems rather than problems that go to the constitutionality of the statute of prosecution or the lawfulness of the sentence. The judicial system as a whole has a strong interest in preventing, or redressing, this type of framework problem. Because the integrity of the criminal process itself is at stake, a petitioner should be able to raise one of these defects without also making a *prima facie* showing of actual innocence. When and how the petitioner does this is another matter, which depends on the procedural rules that must be followed. But I agree with Judge Friendly that the writ of habeas corpus should be available for someone who asserts this type of claim.

B. *Facts Outside the Record*

Some precision is necessary when we turn to this ground. Judge Friendly was not inviting reconsideration of every criminal conviction in which the defendant located additional facts after his conviction (including

102 527 U.S. 1 (1999).

103 *Id.* at 8–9 (omission in original) (citations omitted) (first quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991); then quoting *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993); and then quoting *Rose v. Clark*, 478 U.S. 570, 577–78 (1986)).

104 *Id.* at 8.

105 See *United States v. Cotton*, 535 U.S. 625, 625 (2002) (indictment defects do not deprive a court of its power to adjudicate the case).

direct appeals) was over. Nor do I support such a sweeping rule; I have seen too many cases in which a key witness recants, or additional alibi evidence turns up, or a new witness is located. Often the new information is cumulative, or the defendant (and her lawyer) failed to exercise due diligence when the case was first being handled. (This includes during the period when a defendant may be considering a plea of guilty—an important qualification because so many criminal prosecutions are resolved that way.)¹⁰⁶

As I understand Judge Friendly, he would limit this ground to facts that were utterly beyond the reach of the defendant at the first-instance stage. His examples illustrate the point: “convictions on pleas of guilty obtained by improper means, or on evidence known to the prosecution to be perjured, or where it later appears that the defendant was incompetent to stand trial.”¹⁰⁷ The most diligent defense lawyer in the country has no way of knowing that a guilty plea was coerced if the prosecutor has threatened the defendant not to reveal those methods and is not candid with defense counsel. Nor is counsel likely to know if the prosecutor is knowingly using perjured testimony. Incompetence to stand trial is a more difficult ground, since the trial court and defense counsel have an obligation to explore that possibility at the outset, if they can see signs of incompetence. But there are some cases in which the key information does not come to light until long after trial.¹⁰⁸ If, and only if, there was no way to raise the point earlier, it should be cognizable in habeas corpus.

C. *Lack of Legal Opportunity to Raise an Argument*

It is hard to think of examples that would fit within this category, other than the one Judge Friendly used, *Jackson v. Denno*.¹⁰⁹ There the Supreme Court ordered the grant of a writ of habeas corpus for petitioner Jackson, because the New York state courts had failed to give him a proper and timely opportunity to challenge the voluntariness of the confession on which his conviction rested. Instead, after making a preliminary determination, in which the only question was whether the confession was so obviously involuntary that it should be excluded, the New York courts left to the jury the ultimate determination of voluntariness. And worse, the jury’s finding was subsumed in its general verdict, making it impossible to know “whether the jury found the confession voluntary and relied upon it, or involuntary and

106 In 2018, approximately 90% of federal criminal cases ended with a guilty plea, while 8% of cases were dismissed. Only 2% of federal criminal cases proceeded to trial. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CTR. (June 11, 2019), <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/>.

107 Friendly, *supra* note 4, at 152 (citations omitted).

108 Something similar was alleged in *Webster v. Daniels*, 784 F.3d 1123, 1132 (7th Cir. 2015). It was not until long after the trial and direct appeal that evidence indicating that Webster had been intellectually disabled since his high school years surfaced, and thus that this claim was not recently fabricated for the criminal case.

109 378 U.S. 368 (1964).

supposedly ignored it.”¹¹⁰ The Supreme Court saw this as a failure on New York’s part to give a defendant a timely opportunity to raise an issue of constitutional dimension—the voluntariness of a confession—and so it ordered New York at a minimum to give Jackson a new hearing on voluntariness.¹¹¹

In the unlikely event that a state’s criminal procedures left a comparable lacuna somewhere, we would still need to consider whether the defendant had the obligation to make her objection in the state court (however futile that might seem), take the objection up on appeal and present the constitutional issue to the state’s highest court and in a petition for certiorari, and only then turn to habeas corpus. Litigants often preserve issues for higher court review, and it is not clear to me that this procedure would be inadequate. I thus am not persuaded that this group of cases deserves special consideration, as long as it is still possible to overcome a procedural default through the normal rules.

D. *Retroactive Changes to Constitutional Criminal Procedure*

Much ink has been spilled about retroactivity doctrine in the field of constitutional criminal procedure. Here we are not speaking about the applicability of a new constitutional rule to a case that is still on direct review; our concern is only with cases that have run the gamut of direct review and are now on collateral review in federal court. The leading decision for that group of cases continues to be *Teague v. Lane*,¹¹² despite the fact that AEDPA has something to say on the point as well. *Teague* was a splintered decision, in which Justice O’Connor wrote for the Court only in Parts I, II, and III. Members of the Court disagreed over the proper rule for retroactivity for cases on collateral review.

Justice O’Connor asked first whether the case being considered for retroactive application announced a “new rule.”¹¹³ She defined a “new rule” as one that “breaks new ground or imposes a new obligation on the States or the Federal Government.”¹¹⁴ “[A] case announces a new rule,” she said, “if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”¹¹⁵ She concluded that “[u]nless [a case on collateral review] fall[s] within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”¹¹⁶ At this juncture, it is fair to say that Justice O’Connor’s views have withstood the test of time. Thus, in *Chaidez v. United States*,¹¹⁷ the Court, over only two dissents, held that the rule requiring criminal defense attorneys to inform noncitizen cli-

110 *Id.* at 379.

111 *Id.* at 395.

112 489 U.S. 288 (1989).

113 *Id.* at 299–300 (plurality opinion).

114 *Id.* at 301.

115 *Id.*

116 *Id.* at 310.

117 568 U.S. 342 (2013).

ents of the risks of deportation arising from guilty pleas was a “new rule” and thus not applicable on collateral review.¹¹⁸ In so holding, the *Chaidez* Court applied Justice O’Connor’s *Teague* analysis.

Although these developments were far in the future when Judge Friendly wrote, his discussion is consistent with *Teague*, under which a “new rule” will not be applied on collateral attack, but applications of old rules will be. When the Supreme Court itself announces that a holding will apply to cases on collateral review, that resolves the issue for all courts.

VI. PROCEDURES GOVERNING HABEAS CORPUS PETITIONS

AEDPA made important changes to the procedures used in petitions under Sections 2254 and 2255. This is not the place for a full treatment of all of them. I will touch only on the high points, insofar as they either facilitate or impede the goals for habeas corpus that Judge Friendly outlined. Key procedural features include the following:

- The petitioner gets only one bite at the apple absent extraordinary circumstances.¹¹⁹
- There are now stringent rules for second or successive petitions, including the ban on any such petition that has not been authorized by the court of appeals. There are also strict standards for the appellate judges to use in assessing these applications.¹²⁰
- AEDPA imposes a one-year limitations period for state prisoners filing applications for a writ of habeas corpus, roughly measured from the date when the state courts finish with the case (with periods of inaction within the state court system counting toward the one year).¹²¹
- It also imposes a comparable one-year limitations period for federal prisoners filing a motion under § 2255.¹²²
- There is no appeal of right from a district court’s decision on a petition under § 2254 or a motion under § 2255; instead, either the district court or a judge of the court of appeals must issue a certificate of appealability, and such a certificate “may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.”¹²³

In the aggregate, these rules block some of the petitions that Judge Friendly would have been allowed. The problem, mentioned earlier, of obtaining evidence of actual innocence—his primary concern—is severe, and the data indicate that it takes much longer than the one-year period given by the statute. It is also extremely hard to justify the introduction of new facts, once the

118 *Id.* at 353.

119 28 U.S.C. § 2244(a) (2018).

120 *Id.* §§ 2244(b), 2255(h).

121 *Id.* § 2244(d).

122 *Id.* § 2255(f).

123 *Id.* § 2253(c)(2).

record is complete in state court.¹²⁴ This is not to say that the problem of repetitive filings is illusory—far from it. But it is troubling to solve it in a way that shuts the door on potentially meritorious petitions, whether based on actual innocence, or on one of the other grounds indicating a breakdown in the criminal system or a fundamental failure of justice.

One might respond that executive clemency exists to catch that last group of cases, but the statistics about clemency are grim. The Department of Justice's Office of the Pardon Attorney keeps clemency statistics going back to President McKinley.¹²⁵ In 1970, when President Nixon was in office, 1034 petitions for pardon and 242 petitions for clemency were pending; the President granted 82 pardons and 14 clemency petitions.¹²⁶ In 1980, President Carter had 477 pardon and 140 clemency petitions pending; he granted 155 pardons, 8 requests for clemency, and 3 remissions.¹²⁷ President George H.W. Bush in 1990 did not grant any petitions of any kind, despite the fact that there were 432 petitions for pardon and 184 for clemency pending before him.¹²⁸ President Clinton's record was no better: out of 693 petitions for pardon and 1179 for clemency pending before him in 2000, he granted 70 pardons and 6 requests for clemency.¹²⁹ President Obama granted none in 2010, even though he had 1140 pardon petitions and 1869 clemency petitions pending that year.¹³⁰ President Trump is on course to grant a very low number of requests; during his entire presidency so far, he has granted 18 petitions for pardon and 6 for clemency.¹³¹

Another response is that in *Holland v. Florida*,¹³² the Supreme Court has recognized a narrow path for equitable tolling of the AEDPA statute of limitations. In so doing, it rejected the unduly rigid standard that the court of appeals had used, under which a late filing by an attorney could be excused only if the petitioner showed "proof of bad faith, dishonesty, divided loyalty, mental impairment," or the like.¹³³ Next, the Court ruled that the existence of a nonjurisdictional limitations period in the statute supported a rebuttable presumption in favor of equitable tolling, particularly in light of the equitable principles that govern habeas corpus.¹³⁴ It found nothing in the statutory language that undermined this approach, even while it recognized that the statute spells out some exceptions to the one-year rule. The burden lies

124 See *Cullen v. Pinholster*, 563 U.S. 170, 208–09 (2011).

125 See *Clemency Statistics*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/clemency-statistics> (last updated Apr. 7, 2020).

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.*

132 560 U.S. 631 (2010).

133 *Id.* at 634 (quoting *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008) (per curiam), *rev'd*, 560 U.S. 631 (2010)).

134 *Id.* at 645–46.

on the petitioner to show that he is entitled to equitable tolling.¹³⁵ In order to meet that burden, he must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.”¹³⁶

Perhaps the *Holland* rule gives enough room for the rare case in which the one-year statute unjustly prevents a claim from going forward. But in the class of cases that most prominently inspired Judge Friendly’s article—those in which there is a claim of innocence—more may be needed. With that thought in mind, we turn finally to the plight of the wrongfully convicted, innocent person.

VII. HABEAS CORPUS AND ACTUAL INNOCENCE

The Supreme Court has been reluctant to recognize innocence as a stand-alone ground for granting a writ of habeas corpus, whether under Section 2254, 2255, or 2241, but it has never flatly ruled out the possibility either. What the Court did feel comfortable saying, no later than its decision in *Stone v. Powell*,¹³⁷ was that a claim such as a Fourth Amendment complaint about a search or seizure should be excluded from collateral review (unless there was no fair opportunity to raise it in the first-instance courts), *because* such a claim has little bearing on guilt or innocence. Later, in *Jackson v. Virginia*,¹³⁸ the Court on collateral review held that it was proper to review whether the evidence at trial was enough to demonstrate guilt beyond a reasonable doubt. Unlike the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment directly implicates the ultimate issue of guilt or innocence.

In *Herrera v. Collins*,¹³⁹ the Court tiptoed up to the issue of a freestanding claim of innocence. Prior to that time, it had been willing to forgive procedural defaults if the petitioner made a credible showing of innocence, but this was just a “gateway” device to permit the court to address whatever constitutional procedural violation had allegedly occurred. The Court’s consideration of petitioner Herrera’s claim gave great weight to the fact that Herrera’s claim of innocence rested not on evidence from the trial, but instead on evidence that had later come into his hands.¹⁴⁰ By that time, the Court said, the presumption of innocence with which every accused person begins had long since been overcome, because a jury found him guilty beyond a reasonable doubt. The question was whether there was any way in which Herrera could present his new evidence to a federal court; the state courts were closed to him.

The Supreme Court was skeptical, at best. It wrote:

135 *Id.* at 649.

136 *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

137 428 U.S. 465 (1976).

138 443 U.S. 307 (1979).

139 506 U.S. 390 (1993).

140 *Id.* at 398.

Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. . . . This rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.¹⁴¹

The Court worried that “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.”¹⁴² It also added that it had not “cast[] a blind eye toward innocence.”¹⁴³ Instead, as noted above, it had “held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence.”¹⁴⁴

After all of that, however, the Court stopped short of saying that actual innocence is never cognizable in habeas corpus. Instead, it equivocated, with the following comment:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of “actual innocence” made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.¹⁴⁵

Although only by a crack, the door to a pure “actual innocence” claim was left open by virtue of this passage. Notably, a majority of the Justices agreed that it would violate the Constitution to execute someone actually innocent of the crime of conviction. Justice O’Connor, writing for herself and Justice Kennedy, began her concurring opinion with the statement “I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution.”¹⁴⁶ Justice White, concurring in the judgment only, wrote that he “assume[d] that a persuasive showing of ‘actual innocence’ made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case.”¹⁴⁷ And Justice Blackmun, in a dissent joined by Justices Stevens and Souter, unequivocally stated that “[n]othing could be more contrary to contempo-

141 *Id.* at 400.

142 *Id.* at 401.

143 *Id.* at 404.

144 *Id.*

145 *Id.* at 417.

146 *Id.* at 419 (O’Connor, J., concurring).

147 *Id.* at 429 (White, J., concurring).

rary standards of decency or more shocking to the conscience than to execute a person who is actually innocent.”¹⁴⁸ Only Chief Justice Rehnquist and Justices Scalia and Thomas found no legally cognizable problem in such an action.

Thirteen years later, in *House v. Bell*, the Court found that petitioner House’s claim of actual innocence was strong enough to overcome his procedural default of his claim of ineffective assistance of counsel.¹⁴⁹ House also raised a freestanding claim of innocence, under which he “urge[d] the Court to answer the question left open in *Herrera*.”¹⁵⁰ The Court declined the invitation, stating that even though the evidence of innocence House had presented was strong enough to create a “gateway” to his constitutional claim, it was not strong enough to satisfy “the threshold implied in *Herrera*.”¹⁵¹ So once again, the question of the stand-alone claim of innocence was kicked down the road.

The Court came closest to grappling with that issue in a brief memorandum order in response to an original petition for a writ of habeas corpus filed by Troy Davis, who was attempting to challenge his Georgia conviction and death sentence on actual innocence grounds.¹⁵² Rather than reject the petition outright, the Court transferred it to the District Court for the Southern District of Georgia “for hearing and determination.”¹⁵³ Its memorandum order instructed the district court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.”¹⁵⁴ As Justice Stevens’s concurring opinion reveals, seven of the state’s key witnesses against Davis (who had been convicted of killing a police officer) had recanted their trial testimony.¹⁵⁵ Justice Stevens also had this to say about actual innocence:

Even if the court finds that § 2254(d)(1) [that is, AEDPA] applies in full, it is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence. Alternatively, the court may find in such a case that the statute’s text is satisfied, because decisions of this Court clearly support the proposition that it “would be an atrocious violation of our Constitution and the principles upon which it is based” to execute an innocent person.¹⁵⁶

Justice Scalia, joined by Justice Thomas, saw things quite differently. He found it remarkable that the Court was ordering reconsideration of Davis’s

148 *Id.* at 430 (Blackmun, J., dissenting) (citations omitted).

149 *House v. Bell*, 547 U.S. 518, 554 (2006) (applying the “gateway” standard of *Schlup v. Delo*, 513 U.S. 298 (1995)).

150 *Id.*

151 *Id.* at 555.

152 *See In re Davis*, 557 U.S. 952, 952 (2009).

153 *Id.*

154 *Id.*

155 *Id.* at 953 (Stevens, J., concurring).

156 *Id.* at 953–54 (quoting *In re Davis*, 565 F.3d 810, 830 (11th Cir. 2009) (Barkett, J., dissenting)).

evidence, on his original petition for a writ of habeas corpus, even though “every judicial and executive body that has examined petitioner’s stale claim of innocence has been unpersuaded” and he could not envision what kind of relief would be possible.¹⁵⁷ In his view, AEDPA set the limits on the grounds for granting a such a petition, and it allows for grants only if legal error can be shown. He insisted that “[t]his Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”¹⁵⁸ And that claim is quite accurate: although it has never definitively ruled out the possibility of such a claim, the Court has never found one either.

Surely, however, a claim of innocence (or “actual innocence,” as it is usually redundantly dubbed) should stand at the top of the hierarchy of reasons for granting relief, even at such a late stage as a collateral petition—well above a claim of a violation of *Miranda* rights, or a complaint that Confrontation Clause rights were violated, or even a claim that the jury did not reflect a fair cross-section of the community. The reason the Court and Congress have been reluctant to take this step, I suggest, is their fear that hordes of prisoners would raise frivolous claims of innocence, and that the courts would drown in trying to sort out which ones deserve plenary attention.

AEDPA recognizes innocence as a gateway claim, in its provision allowing an evidentiary hearing on a claim that was not developed earlier in a state court, if the applicant can satisfy these criteria:

- (A) the claim relies on—
 - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
- (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that *but for constitutional error*, no reasonable factfinder would have found the applicant guilty of the underlying offense.¹⁵⁹

A petitioner who is asserting innocence must rely on subparts (A)(ii) and (B), but note that subpart (B) demands a link between the asserted constitutional error and the factfinder’s assessment of the evidence. For the person who has simply found new evidence—perhaps DNA evidence that conclusively clears the defendant, or some other irrefutable proof of innocence—that link may not exist.

Nonetheless, this part of AEDPA points the way toward a sensible treatment of actual innocence. A clear and demanding threshold standard is essential, if the predictable flood of petitions is to be avoided. And this happens to be a point on which Judge Friendly was not as precise as one could wish. His article suggests several different preliminary showings: “[A] color-

157 *Id.* at 954 (Scalia, J., dissenting).

158 *Id.* at 955.

159 28 U.S.C. § 2254(e)(2) (2018) (emphasis added).

ble claim of innocence”;¹⁶⁰ evidence “that casts some shadow of a doubt on [the petitioner’s] guilt”;¹⁶¹ and most completely,

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 [petitioner’s] guilt.¹⁶²

One could imagine building on the last formulation and insisting that the petitioner wishing to assert a stand-alone claim of innocence must make this showing not by a mere “fair probability,” but (as AEDPA suggests) by clear and convincing evidence that could not have been uncovered by due diligence in time for the trial and direct appeal. It is notable in this connection that AEDPA also permits gateway innocence claims for second or successive petitions, though not freestanding claims.¹⁶³ It would not take much to tweak that language to permit an actual innocence claim.

CONCLUSION

Opponents of innocence as an independent ground for collateral relief have characterized it as a simple fact and have urged that the time for determination of facts ends well before federal collateral review begins. That may well be true for ordinary facts. But innocence is the ultimate question in any criminal case: it is far more than a common historical fact, such as which city someone was in on a particular day, or whether he was wearing certain clothes, or even what blood type he has. At the very least, innocence or guilt is the ultimate conclusion based on the underlying facts and the law, and so easily qualifies as a mixed question of law and fact. And it is a mixed question with a constitutional dimension: the entire purpose of constitutional criminal procedure, taken as a whole, is to prevent the erroneous conviction of an innocent person. Imprisoning, or worse, executing, a person who is innocent of the underlying crime would be a shocking exercise of government power. And there are other dimensions of actual innocence that deserve attention as well. For example, in light of cases such as *Adkins v. Virginia*¹⁶⁴ and *Hall v. Florida*,¹⁶⁵ is it accurate to say that a person who is so intellectually disabled that a particular punishment cannot be inflicted upon him or her is “guilty” of a crime, or is it more accurate simply to say that while the person committed the criminal acts, he or she is not responsible for them?¹⁶⁶ And if the person is not responsible, then is this the equivalent of

160 Friendly, *supra* note 4, at 142, 150, 160.

161 *Id.* at 142 (quoting *Kaufman v. United States*, 394 U.S. 217, 242 (1969) (Black, J., dissenting)).

162 *Id.* at 160.

163 See 28 U.S.C. § 2244(b)(2)(B).

164 536 U.S. 304 (2002).

165 572 U.S. 701 (2014).

166 See, e.g., Elizabeth Nevins-Saunders, *Not Guilty as Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 U.C. DAVIS L. REV. 1419, 1437–50 (2012).

innocence (recognizing that the state may nonetheless have the right to keep the person in some form of detention because of potential dangerousness to self or others)?¹⁶⁷

These and other questions about the scope of an innocence claim can be saved for another day. For now, we can return to Judge Friendly's original question: Is Innocence Irrelevant? His suggestion was to permit collateral attacks by prisoners only in situations where the applicant supplements his constitutional plea with a "colorable" claim of innocence. It is unclear whether, by phrasing it this way, he had in mind only "gateway" uses of actual innocence, or if he meant to include the freestanding claim. Although tight restrictions on such a claim would be critical—perhaps the use of Judge Friendly's standard for "colorable" claims with an added pleading requirement to show facts that, if believed, would clearly and convincingly establish innocence—some vehicle for these claims is essential. The rule of law itself demands no less.

167 See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997).