COMMENT

Mixed Questions and the Scope of Federal Habeas Review: Consideration of *Miranda* Claims in *Thompson v. Keohane*

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I. Introduction

Federal habeas corpus review has been called everything from "another Magna Carta"[1] to the "end of the beginning" of a criminal prosecution.[2] The conflict between judicial preservation of expansive federal habeas review and legislative attempts to limit it is tied to the Court's view of its role and the elevation of federal courts over state courts as policymakers. The current approach permits lower federal courts to be the ultimate arbiters of federal constitutional issues although the legitimacy of this scheme is flawed. The values implicit in broad federal habeas review conflict with competing concerns about finality and efficiency.

I will examine how de novo review of mixed questions of law and fact (here, in the *Miranda* context) wastes judicial resources and diverts federal courts from claims with more precedential value. Mixed questions of law and fact should be treated as divisible from the ultimate constitutional question at issue, with a deferential standard of review applied to the factual component *and* to the state courts' application of the facts under the totality of the circumstances. This approach is more consistent with the reforms contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("the 1996 Act"),[3] which clarified the de novo standard of review as it applies in federal habeas proceedings.[4] Federal courts now cannot ignore state court judgments, but rather must "focus explicitly on a previous adjudication on the merits in state court and . . . decide forthrightly whether the state court reached the correct outcome."[5]

As we seek to balance the costs and benefits of federal habeas review, the question becomes not how much justice do we want, but how much can we afford? Reform proposals have contemplated reducing the number of habeas petitions filed, improving the quality of the petitions, or, in the absence of imposing limits on the scope of federal habeas review, creating additional courts to handle the peti-

1. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 136 (1770), *quoted in* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 7 (Greenwood Press ed. 1980).

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

3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2244-2266 (Supp. 1997)) [hereinafter 1996 Act].

4. *See* 28 U.S.C. § 2254(d) (1966), *amended by* The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(e) (Supp. 1997) [hereinafter *as amended*].

5. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 449 (1996).

tions. I will examine the tensions inherent in the current system and the relative benefits of decreasing the quantity of petitions, improving their quality, or increasing the capacity of the reviewing courts. In addition, I will briefly discuss implementation of some of these approaches in the 1996 Act.

Federal courts' review of state prisoners' habeas petitions creates a conflict between at least two fundamental and competing values: individual constitutional rights on the one hand, and society's desire to see punishment carried out on the other.[6] Most state prisoners who avail themselves of federal habeas review have been convicted of serious crimes and received lengthy sentences after a jury trial.[7] Although successful petitions are rare,[8] the public perception that dangerous criminals are being released on "technicalities" increases the pressure on the Court to limit the scope of federal habeas review. Many critics also suggest that federal habeas review wastefully duplicates the efforts of the state courts and allocates significant judicial resources to a small percentage of cases without considering whether the federal court system can bear the costs of such expansive review.[9]

In charting the limits of federal habeas review, we must not ignore the frustrating reality that we seek a perfect "truth" via an im-

6. Former Attorney General Edwin Meese III characterized the function of the criminal justice system as the "protect[ion] [of] innocent people from the depredations of criminals." Edwin Meese III, *Preface to* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE REPORT NO. 7, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS (1988) [hereinafter REVIEW OF STATE JUDGMENTS].

7. In a recent study, the four most common convictions suffered by habeas petitioners were homicide (30%), robbery (18%), burglary (16%), and sexual assault (10%). The median state court sentences imposed ranged from 24 to 30 years. *See* STATE JUSTICE INSTITUTE, NATIONAL CENTER FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 35 (1994) [hereinafter SJI STUDY].

8. In a 1979 study, 3.2% of habeas petitions resulted in some relief, and 1.7% resulted in the petitioner's release. *See* Paul Robinson, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (Federal Justice Research Program 1979) [hereinafter ROBINSON STUDY], *cited in* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 34. In the SJI study, covering the years 1990 and 1992, petitioners were successful in less than 1% of the cases. *See* SJI STUDY, *supra* note 7, at 62.

9. Professor Evan Lee has argued that, in the context of federal appellate review, appellate courts should apply a deferential standard of review to mixed questions because de novo review does not yield decisions with meaningful precedential value. Lee suggests that "principled decision making" which results in useful precedent is one of the primary functions of appellate review. Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 236-37 (1991).

perfect system of review.[10] The process of judicial scrutiny is expected to distill the truth from the facts: "We burn a hot fire here; it melts down all concealment."[11] The question is whether the successive distillation of the facts through federal habeas review ultimately yields a pure result or rather allows the truth to evaporate.[12]

II. Background

A. Origins of the Writ of Habeas Corpus

The traditional common law function of the "Great Writ" of habeas corpus was to "insure the integrity of the process resulting in imprisonment."[13] The writ was a pretrial remedy that protected individuals from arbitrary executive detention.[14] In colonial America, the states were considered the "primary protectors of individual liberty."[15] Therefore, the Framers considered it unnecessary to provide federal habeas review for state prisoners. Rather, they intended the habeas clause in the Constitution[16] to prevent Congress from suspending state habeas relief for federal prisoners.[17] Eventually, the jurisdiction of the habeas writ was extended to state prisoners, bringing them under the policies being articulated by the federal government.[18]

The adoption of the writ in the United States was codified in section 14 of the Habeas Corpus Act of 1789 ("the 1789 Act"), which provided that "either of the justices of the [United States] supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of

10. As one commentator noted, the institutional concept of "'freedom from error' must eventually include a notion that some complex of institutional processes is empowered definitively to *establish* whether or not there was error." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 447 (1963).

11. ARTHUR MILLER, THE CRUCIBLE 89 (Penguin ed. 1976).

12. As the Department of Justice Office of Legal Policy put it, "[t]here is no reason to believe that a 'better' result is obtained in any objective sense in the small proportion of cases in which the federal habeas court does reach a different conclusion from the state courts." REVIEW OF STATE JUDGMENTS, *supra* note 6, at iii-iv. Of course, "results" in this context may be difficult to measure empirically. The relatively small number of reversals can be used either to support or criticize expansive federal habeas review.

13. DUKER, *supra* note 1, at 3.

14. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at ii.

15. DUKER, *supra* note 1, at 181.

16. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9.

17. *See* DUKER, *supra* note 1, at 181.

18. *See id.*

commitment."[19] The passage of the 1789 Act raised federalism concerns. Members of Congress objected on the grounds that:

> Each State is competent, it is presumed, to pass laws for the protection of the rights and liberties of its citizens . . . and in this consists the independence of the respective States. The means of obtaining the benefit of the writ of habeas corpus . . . constitute an important part of the laws of the several States. . . . If, therefore, you pass a law on this subject, it will, if it has any effect, control the laws of the several States; and, in Proportion as it has this effect, it weakens the respective State authorities, and tends to consolidate their powers in the General Government.[20]

Over the next 200 years, critics of federal habeas review continued to be troubled by the ability of federal courts to impose their constitutional interpretations on the state courts without regard for federalist principles.

The next major extension of the scope of federal habeas review came in the Habeas Corpus Act of 1867 ("the 1867 Act"). The 1867 Act was created "to provide a federal remedy for former slaves who were being held in involuntary servitude in violation of the . . . Thirteenth Amendment."[21] The wording of the 1867 Act, which provided federal habeas review to anyone being held in "restraint of liberty"[22] broadened the scope of federal habeas review to include state prisoners.[23] Even after the 1867 Act, however, federal habeas review was not available to individuals who were imprisoned by a state court of "competent jurisdiction."[24] Generally, a court with proper jurisdiction had jurisdiction over both the subject of the trial and the person being tried.[25] This view was "consistent with the nineteenth-century notion of federalism, which placed primary responsibility for individual liberty and criminal justice on the state courts."[26]

In 1886 the Court first articulated the doctrine of exhaustion, which provided that federal habeas review was not available until the

19. Habeas Corpus Act of 1789, 1 Stat. 81 (1789), *quoted in* DUKER, *supra* note 1, at 182.

20. 9 ANNALS OF CONG. 502 (1790), *quoted in* DUKER, *supra* note 1, at 186.

21. REVIEW OF STATE JUDGMENTS, *supra* note 6, at 3, 9.

22. *Id.* at 8.

23. *See* DUKER, *supra* note 1, at 187, 193-94.

24. *Id.* at 229.

25. *See id.* at 245.

26. *Id.* at 248.

petitioner had exhausted all the available state remedies.[27] In *Royall*, the petitioner was indicted under a state statute and, while awaiting trial in state court, sought to challenge its constitutionality in federal district court. The district court denied petitioner's writ of habeas corpus and the Court affirmed, holding that federal courts had the discretion not to decide federal constitutional questions until after a state court had considered the issue before it.[28] The policy supporting this decision, as articulated by the Court, was that "the public good requires that those relations [between state and federal courts] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution."[29] *Royall* and its progeny did not imply that federal habeas review would not be available, but only that it should be deferred pending a final state court judgment.[30]

Almost thirty years later, in the landmark case of *Frank v. Mangum*,[31] the Court addressed the problem of inadequate state process. The Court held that state trial court jurisdiction could be "lost" before exhaustion of state remedies if the court failed to provide adequate corrective process on appeal.[32] Otherwise, federal habeas relief was available only where state appellate review was "inadequate or unavailable."[33] In *Moore v. Dempsey*,[34] the Court permitted habeas corpus review where no other means for review was available, but noted that "mere mistakes of law . . . are not to be corrected."[35]

In the sharply divided 1952 decision of *Brown v. Allen*,[36] the Warren Court articulated the first major modern expansion of the scope of

27. *See Ex parte* Royall, 117 U.S. 241 (1886). This doctrine was later codified. 28 U.S.C. § 2254(e) (Supp. 1997) (amending 28 U.S.C. § 2254(b)-(c) (1966)); *see* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 14.

28. *See Royall*, 117 U.S. at 253.

29. *Id.* at 251.

30. *See* Bator, *supra* note 10, at 478-79. Subsequent cases interpreted *Royall* to mean that the discretion not to hear habeas claims before the exhaustion of state remedies implies that there *will* be federal habeas review of those claims after exhaustion. *See* Fay v. Noia, 372 U.S. 391, 420 (1963). Justice Scalia has criticized this interpretation as a misreading of *Royall*, which he argues did not guarantee state prisoners the right to a federal forum for all federal constitutional claims, but merely gave them the same rights to federal habeas review as federal prisoners had. *See* Withrow v. Williams, 507 U.S. 680, 722 (1993) (Scalia, J., concurring in part and dissenting in part).

31. 237 U.S. 309 (1915).

32. *See* DUKER, *supra* note 1, at 250-53.

33. *Id.* at 256 (citing *Ex parte* Hawk, 321 U.S. 114 (1944)).

34. 261 U.S. 86 (1923).

35. *Id.* at 91.

36. 344 U.S. 443 (1953). Three Justices wrote separately, concurring in the result. Justices Black, Douglas, and Frankfurter dissented. *See id.*

federal habeas review. In *Brown*, the Court consolidated the cases of three petitioners incarcerated in North Carolina.[37] The petitioners sought federal habeas review of their constitutional claims that there was racial discrimination in the selection of their juries and that their coerced confessions were improperly admitted, in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[38] The convictions of all three petitioners were affirmed by the North Carolina Supreme Court.[39] After reiterating the exhaustion doctrine, the Court held that *all* constitutional claims could be relitigated on federal habeas, even where state process was adequate.[40]

Under the Supremacy Clause,[41] federal habeas review was designed to correct misapplications of constitutional law. As Justice Frankfurter noted in *Brown*: "The State court cannot have the last say when it, though on fair consideration[,] . . . may have misconceived a federal constitutional right."[42] *Brown* sought to have federal courts correct state court errors in constitutional interpretation.[43] In Justice Frankfurter's somewhat circular analysis, federal courts were best suited for the task of reviewing claims of constitutional error because they had been designated by Congress as "the member in the hierarchy of the federal judiciary to express the higher [federal constitutional] law."[44] Although Justice Frankfurter admitted that this hierarchy placed even the lower federal courts in a position where they could override state supreme courts' adjudications of constitutional claims, he argued it was not "a case of a lower court sitting in judgment on a higher court . . . [but] merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law."[45] Justice Frankfurter drew this conclusion despite the fact that state courts are not otherwise bound by the decisions of lower federal courts on federal constitutional issues.

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37. *See id.*

38. *See id.* at 465.

39. *See id.* at 447.

40. *See id.* at 457-58, 487; *see also Williams*, 507 U.S. at 715-16 (Scalia, J., concurring in part and dissenting in part) for a summary of the modern scope of federal habeas review.

41. U.S. CONST. art. VI, § 2.

42. *Brown*, 344 U.S. at 508 (opinion of Frankfurter, J.).

43. *See* DUKER, *supra* note 1, at 258-59 (citing Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959)). Together, the trio of *Brown*, *Townsend v. Sain*, 372 U.S. 293 (1963), and *Fay v. Noia*, 372 U.S. 391 (1963), established general federal habeas review of state court judgments in criminal cases. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 18.

44. *Brown*, 344 U.S. at 510 (opinion of Frankfurter, J.).

45. *Id.*

With the unprecedented expansion of the scope of federal habeas review by the Warren Court, federal habeas review again became "the medium for broadcasting federal policy."[46] The modern Court viewed habeas corpus review as a means of articulating constitutional values and "modern-day substantive due process."[47] This expansion of habeas review, however, was not without its costs. As I will examine in the context of the *Thompson* decision, the values of finality, efficiency, and parity between state and federal courts compete with the values of fairness and vindication of individual liberties enshrined in far-reaching federal habeas review.[48]

Expansive federal review of state court decisions creates tension between the state and federal systems. Implicit in this structure is a value judgment about the capability of state courts as guardians of federal constitutional rights. Some commentators have argued that this tension has productive and valuable side effects, because it "foster[s] a dialogue" between the federal and state courts.[49] This dialogue, however, may be "not a dialogue of equals, but of superior and inferior" in a system where the federal courts always get the last word.[50] Many proponents of federal habeas review suggest that "[f]ederal rights are more forcefully vindicated in federal than in state courts,"[51] an argument suggested by precedent.[52] This value judgment, which continues to permeate the Court's decisions despite its disclaimers to the contrary, has significant and damaging consequences for the effective administration of justice.

B. Modern Parameters of Federal Habeas Review

Modern habeas corpus review is a "purely statutory remedy," which creates a "quasi-appellate jurisdiction of lower federal courts in state criminal cases."[53] The Court has held that the primary purpose

46. DUKER, *supra* note 1, at 181.

47. *Id.* at 267-69.

48. These competing values were described by Justice O'Connor as finality, federalism, and fairness in *Williams*, 507 U.S. at 697 (O'Connor, J., concurring in part and dissenting in part). *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring) (stating that values to be considered include "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded").

49. DUKER, *supra* note 1, at 271.

50. REVIEW OF STATE JUDGMENTS, *supra* note 6, at 53.

51. DUKER, *supra* note 1, at 271.

52. *See, e.g.*, *Brown*, 344 U.S. at 508-13 (opinion of Frankfurter, J.).

53. REVIEW OF STATE JUDGMENTS, *supra* note 6, at i.

of prosecuting crime is "that guilt shall not escape or innocence suffer."[54] In modern habeas review, however, the fundamental question of factual guilt or innocence is often irrelevant, as the courts focus on resolving only claims of constitutional violations.[55]

Retreating somewhat from the expansive Warren Court interpretations, the Burger Court restricted habeas review in a series of decisions in the 1970s. These cases narrowed the range of claims that may be raised in habeas petitions by defendants who pleaded guilty,[56] barred consideration of claims that were not properly raised before the state court, and barred Fourth Amendment claims already litigated in state courts.[57] The Court also applied a deferential standard to state courts' findings of fact.[58]

Reform efforts have focused on four major proposals: abolition or limitation of federal habeas corpus review as a postconviction remedy for state prisoners,[59] conditioning availability of federal habeas review on the failure of meaningful state process,[60] imposing statutory

54. Berger v. United States, 295 U.S. 78, 88 (1935).

55. Conversely, as Justice O'Connor has pointed out, "this Court continuously has recognized that the ultimate equity on the prisoner's side—a sufficient showing of actual innocence—is normally sufficient, standing alone, to outweigh other concerns and justify adjudication of the prisoner's constitutional claim." *Williams*, 507 U.S. at 700 (O'Connor, J., concurring in part and dissenting in part).

56. *See* Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759 (1970).

57. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (holding that a petitioner's failure to make timely objections to the admission of inculpatory statements under a state rule bars federal habeas review of a *Miranda* claim); Stone v. Powell, 428 U.S. 465, 494-95 (1976) (holding that a state prisoner who has had a full and fair opportunity to litigate a Fourth Amendment claim may not obtain habeas review of any allegation that his conviction was based on evidence obtained by an illegal search or seizure).

A recent attempt to apply the *Stone* analysis to preclude federal habeas review of *Miranda* claims, supported by the Attorneys General of 35 states, was rejected by the Court, with vigorous opposition from Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. *See Williams*, 507 U.S. at 702. The Court has also declined to apply the *Stone* rationale to claims of insufficient evidence, *see* Jackson v. Virginia, 443 U.S. 307, 324 (1979), racial discrimination in jury selection, *see* Rose v. Mitchell, 443 U.S. 545, 560-61 (1979), and ineffective assistance of counsel, *see* Kimmelman v. Morrison, 477 U.S. 365, 373-83 (1986).

58. *See* Sumner v. Mata, 449 U.S. 539 (1981). *See generally* REVIEW OF STATE JUDGMENTS, *supra* note 6, at iv-v.

59. REVIEW OF STATE JUDGMENTS, *supra* note 6, at i. This drastic step was proposed in Title II of the Omnibus Crime Control and Safe Streets Act of 1968, but was later deleted as part of a compromise to ensure the Bill's passage. *See id.* at 30-31.

60. *See id.* at vi; *see also Williams*, 507 U.S. at 715 (Scalia, J., dissenting in part). Scalia suggests that no federal habeas review should be available where the petitioner has already had "full and fair opportunity to litigate [the] claim." *Id.* This approach has been criticized on the ground that it still requires federal courts to make value judgments about the ade-

time limits for filing habeas corpus petitions,[61] and creating a statutory standard of greater deference to state court findings, which would employ a "clearly erroneous" rather than a de novo standard of review.[62] One successful legislative effort to limit the scope of federal habeas review was the 1966 amendment to 28 U.S.C. § 2254, the statute that provides federal habeas review for state prisoners.[63] On April 24, 1996, 28 U.S.C. §§ 2254 and 2255 were again amended by the 1996 Act.[64] Some key provisions of the Act incorporate procedural limitations,[65] establish statutes of limitation for filing federal habeas petitions,[66] and clarify the responsibilities of reviewing federal courts in the amended § 2254(d).[67]

The current system of federal habeas review has been criticized as both showing an "unjustified preference for aggrandizing the lower federal courts at the expense of the state judiciaries"[68] and being tainted by "a one-sided concern with defense interests—and a correlative disregard of competing public interests and constitutional val-

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quacy of state courts' evaluation of federal constitutional claims. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at vi.

61. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at vi. Unsuccessful legislation has proposed a one-year statute of limitation for filing habeas petitions. *See* Criminal Justice Reform Act, H.R. 3777, 100th Cong. (1988), and S. 1970, 101st Cong. (1990)). *Who Is on Trial?: Conflicts Between the Federal and State Judicial Systems in Criminal Cases, Hearing Before a Subcomm. of the Comm. on Gov't Operations*, 100th Cong., 7-8, 152 (1988) [hereinafter *Who Is on Trial?*] (statement of Paul G. Cassell, Associate Deputy Attorney General, U.S. Department of Justice); Jim Smith, *Federal Habeas Corpus—A Need for Reform*, 73 J. CRIM. L. & CRIMINOLOGY 1036, 1042 (1982).

Time limits were finally imposed by the 1996 Act. Under the Act prisoners must file habeas petitions within one year of the date of the final state court judgment, unless certain exceptions apply. *See* 28 U.S.C. § 2244, *as amended by* Pub. L. No. 104-132, § 101, 110 Stat. 1217 (1996).

62. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at vi-vii. This proposal contemplates legislative extension of the *Stone* rationale to bar federal habeas review of *Miranda* and *Massiah* claims. *Id.*; *see also* Yackle, *supra* note 5, at 423-26 for a summary of reform proposals from the 1940s to 1980s.

63. 28 U.S.C. § 2254, *as amended*. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at iii for other examples of successful legislative reform.

64. 28 U.S.C. § 2254(d)-(e) (Supp. 1997).

65. 28 U.S.C. § 2253, *as amended by* Pub. L. No. 104-132, § 102, 110 Stat. 1217 (1996) (limiting circumstances of federal habeas appeal); FED. APP. P. 22, *as amended* (amending subsection (a)(1) requiring transfer of application from circuit to district court, (2) prohibiting application with the circuit court after denial from the district court and, (3) providing for appeal to the appropriate court).

66. 28 U.S.C. § 2244(d)(1), *as amended* by Pub. L. No. 104-132, § 101, 110 Stat. 1217 (1996) (providing for a one year statute of limitations on federal habeas claims).

67. 28 U.S.C. § 2254(b),(d)-(i), *as amended by* Pub. L. No. 104-132 § 104, 110 Stat. 1218 (1996).

68. REVIEW OF STATE JUDGMENTS, *supra* note 6, at v.

ues."[69] Supporters of expansive federal review emphasize the need to protect individual constitutional rights from abusive governmental power. Equating public interest with constitutional values, however, can either support or detract from the importance of federal habeas review. The Court's decision in *Thompson* is an example of the Court's awareness of and attempts to address (or disregard) these concerns and criticisms.[70]

C. The Statutory Presumption of Correctness

In 1966, Congress amended § 2254(d) to create a presumption of correctness for state court findings of fact.[71] Under the amended statute, the federal habeas court was not required to conduct a new evidentiary hearing if the state courts' conclusions were made after a hearing on the merits by a court with competent jurisdiction and were supported by adequate written findings.[72] If a case fell within one of the eight statutory exceptions, however, the presumption of correctness did not apply.[73]

In 1996 § 2254(d) was amended, and now provides that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

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69. *Id.*

70. *See infra* notes 154-181 and accompanying text.

71. Pub. L. No. 89-711, § 2(a)-(d), 80 Stat. 1105 (1966).

72. 28 U.S.C § 2254(d), *as amended by* Pub. L. No. 89-711, § 2, 80 Stat. 1105 (1966).

73. The eight exceptions were:

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> (3) that the material facts were not adequately developed at the State court hearing;
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made . . . is produced as provided for . . . and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

28 U.S.C. § 2254(d)(1)-(8), *as amended by* The Antiterrorism and Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. § 2254(e) (Supp. 1997)).

> merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[74]

The former § 2254(d) was redesignated as § 2254(e).[75] Section 2254(e) now governs the effect that federal courts must give to prior state court findings of fact:

> (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (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.[76]

This provision makes the possibility of an evidentiary hearing remote unless the petitioner can establish that there is an intervening new rule or overwhelming newly discovered evidence that would tend to prove his innocence.

Despite the presumption of correctness in § 2254(e)(1), § 2254(d)(2) appears to leave open federal habeas review of historical facts to determine whether the state court's determination of the facts was "unreasonable."[77] Thus, the new statutory scheme does little to protect even state court determination of historical facts, leaving review of mixed questions wide open.

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74. 28 U.S.C. § 2254(d) (Supp. 1997).
75. Pub. L. No. 104-132, Title I, § 104, 110 Stat. 1218 (Supp. 1997).
76. 28 U.S.C. § 2254(e) (1996).
77. Yackle, *supra* note 5, at 382 n.4.

III. Drawing Lines in the Sand: Law/Fact Jurisprudence

A. Questions of Fact: The Court as Observer

In *Thompson v. Keohane*, the petitioner was convicted of murdering his ex-wife. He alleged that his confession was obtained illegally when he was questioned in police custody without being given the *Miranda* warnings.[78] This type of *Miranda* claim presents what has generally been characterized as a mixed question of law and fact.

According to the *Thompson* majority, while factual issues may "encompass more than 'basic, primary, or historical facts,' their resolution depends heavily on the trial court's appraisal of witness credibility and demeanor."[79] The majority admitted that "'the Court has not charted an entirely clear course in th[e] area'" of distinguishing questions of fact from questions of law or mixed questions of law and fact.[80]

The Court has characterized juror impartiality and competency to stand trial as "factual issues" entitled to the presumption of correctness.[81] For example, in *Patton v. Yount*, the petitioner, a high school math teacher, confessed to murdering one of his students.[82] His first conviction was reversed due to a *Miranda* violation. After his second conviction was upheld by the Pennsylvania Supreme Court, petitioner claimed that the jury was biased by excessive pretrial publicity.[83] The Court upheld the trial court's findings that jury impartiality was not affected by pretrial publicity.[84] The Court held that the statutory presumption of correctness applied to the state court's determination of whether juror bias existed. Since this determination "is essentially one of credibility, and therefore largely one of demeanor . . . the trial court's resolution of such questions is entitled, even on direct appeal, to 'special deference.'"[85] Because voir dire takes place in open court

78. 116 S. Ct. 457, 460 (1995).

79. *Id.* at 465 (1995).

80. *Id.* at 464 (quoting Miller v. Fenton, 474 U.S. 104, 113 (1985)).

81. *Id.* (citing Maggio v. Fulford, 462 U.S. 111, 117 (1983) (competency), and Wainwright v. Witt, 469 U.S. 412, 429 (1985), Patton v. Yount, 467 U.S. 1025, 1036 (1984), and Rushen v. Spain, 464 U.S. 114, 120 (1983) (juror impartiality)). In contrast, voluntariness of a confession and effectiveness of counsel have been characterized as issues of law. *Id.* at 465 (citing Miller, 474 U.S. at 116) (voluntariness of confession), Strickland v. Washington, 466 U.S. 668, 698 (1984) and Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) (ineffective assistance of counsel claims)).

82. *Patton*, 467 U.S. at 1027.

83. *See id.* at 1027-28.

84. *See id.* at 1035.

85. *Id.* at 1038 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 500 (1984)).

and "[j]urors . . . cannot be expected invariably to express themselves carefully or even consistently[,] . . . it is [the trial court] judge who is best situated to determine competency to serve impartially."[86]

Similarly, in *Rushen v. Spain*,[87] a juror met privately with the trial judge to inform him that she knew one of the defense witnesses had murdered her childhood best friend. The trial judge obtained her assurance that this knowledge would not affect the impartiality of her deliberations, but he did not record the conversations or inform either party of his meetings with the juror.[88] The Court upheld the state appellate court's determination that the *ex parte* communications between the juror and the trial judge were harmless constitutional error.[89] Although noting that "[t]he final decision whether the alleged constitutional error was harmless is one of federal law," the Court concluded that "the factual findings arising out of the state courts' post-trial hearings are entitled to a presumption of correctness. . . . The substance of the ex parte communications and their effect on juror impartiality are questions of historical fact entitled to this presumption."[90]

The Court has also applied the presumption of correctness to findings of a defendant's competency to stand trial.[91] The Court emphasized the importance of the trial court's role as observer: " 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth.' "[92]

As the *Thompson* dissent notes, where this is true, federal habeas courts are perhaps the least well suited to consider the claims at issue because they are the farthest removed in time and place from the live testimony presented at trial.[93]

86. *Id.* at 1039; *see also Witt*, 469 U.S. at 425-26 (There will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . This is why deference must be paid to the trial judge who sees and hears the juror.").

87. 464 U.S. 114, 116 (1983).

88. *See id.*

89. *See id.* at 120-21.

90. *Id.* (citations omitted).

91. *See Maggio*, 462 U.S. at 113.

92. *Id.* at 118 (quoting United States v. Oregon Med. Soc'y, 343 U.S. 326, 339 (1952)) (citations omitted).

93. *See Thompson*, 116 S. Ct. at 467-69 (Thomas, J., dissenting).

B. Mixed Questions of Law and Fact: Review or Defer?

In *Brown*, Justice Frankfurter defined the classic distinction between questions of fact and mixed questions of law and fact:

> Where the ascertainment of the historical facts does not dispose of the claim but calls for interpretation of the legal significance of such facts . . . the District Judge must exercise his own judgment on this blend of facts and their legal values. Thus, so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.[94]

As the Court noted in *Thompson*, "the proper characterization of a question as one of fact or law is sometimes slippery."[95] Indeed, even where the issue is a mixed question of law and fact, "subsidiary factual questions . . . are entitled to the presumption" of correctness.[96]

1. Thompson v. Keohane: *The Facts*

On September 10, 1986, two hunters found a dead woman floating in a lake near Fairbanks, Alaska.[97] She had been stabbed twenty-nine times and her body was wrapped in chains and a bedspread.[98] Alaska state troopers issued a press release asking citizens to help them identify the body.[99] The next day, petitioner Thompson called the police and told them that the description in the press release sounded like his ex-wife, Dixie Thompson, who had been missing for about a month.[100] The police established through dental records that the body was indeed that of Dixie Thompson.[101] On September 15, a state trooper phoned Thompson and asked him to come to the police station to identify items purportedly belonging to Dixie.[102] It was later established that the trooper's primary motivation in calling Thompson was to investigate the murder.[103]

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94. *Brown*, 344 U.S. at 507 (citation omitted). In other words, "a mixed question [is] one that requires the decision maker to apply law to facts." Lee, *supra* note 9, at 238.

95. *Thompson*, 116 S. Ct. at 464. The distinction between "law" and "fact" may indeed be "a formalistic riddle." Lee, *supra* note 9, at 237.

96. Miller v. Fenton, 474 U.S. 104, 112 (1985). In *Miller*, the Court cited issues such as whether the petitioner had been given a "truth serum" or whether police officers actually used coercive tactics as examples of subsidiary facts entitled to the presumption of correctness. *Id.*

97. *See Thompson*, 116 S. Ct. at 460.

98. *See id.* at 467.

99. *See id.* at 460.

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* at 460-61.

Thompson drove to police headquarters in his truck and immediately identified the items as Dixie's.[104] He stayed at the police station for two hours while two unarmed troopers questioned him about Dixie's disappearance. The conversation took place in an interview room and was tape-recorded.[105] Thompson was not given *Miranda* warnings at the beginning of this interview.[106] Throughout the interview, however, the troopers repeatedly told Thompson he was free to leave.[107] They also told him they suspected him of killing Dixie.[108] After telling him that they had warrants to search his house and truck, the officers continued their questioning.[109] During this interview, and in response to questions that were designed to elicit a self-incriminating response, Thompson eventually confessed to murdering Dixie.[110]

At the end of the interview, the troopers allowed Thompson to leave but impounded his truck in order to search it.[111] The troopers gave Thompson a ride to a friend's house.[112] About two hours later, Thompson was arrested and charged with first-degree murder.[113]

The trial court denied Thompson's motion to suppress the taped statements.[114] The trial court held that Thompson was not "in custody" for *Miranda* purposes during the September 15 questioning and that the troopers were, therefore, not obliged to give Thompson his

104. *See id.* at 461.

105. *See id.*

106. *See id.*

107. *See id.* For example: "[Y]ou can go any time you want to . . . . I mean you're free to get up and walk out of here now and . . . never talk to me again." *Id.* at 461 n.1.

108. The trooper also said, "I know that you did this thing. . . . I can see it when I'm looking at you. And I know you care about Dixie. I mean this isn't something that you wanted to happen." *Id.* The officers explicitly told Thompson they thought he had killed Dixie: "your friends or associates . . . have been kind of calling up and . . . they've been pointing at you"; "we can prove conclusively beyond a reasonable doubt that—that you were responsible for this thing"; "you haven't told me the part about where Dixie gets killed." *Id.* at 461 n.1.

109. *See id.* at 460-61.

110. *See id.* at 461.

111. *See id.*

112. *See id.*

113. The trial court commented on the short period of time between the questioning and the arrest as being one of the factors that made the trial court's denial of Thompson's motion to suppress the taped statements a close call. *See id.* at 462. Precedent suggests that this emphasis is irrelevant, as the time of arrest generally has not been emphasized or even discussed in the Court's decisions. *See* California v. Beheler, 463 U.S. 1121, 1122 (1983) (5 days elapsed between interrogation and arrest); Oregon v. Mathiason, 429 U.S. 492, 492-95 (1977) (no time of arrest stated in facts).

114. *See Thompson*, 116 S. Ct. at 461.

Miranda warnings at that stage in the investigation.[115] The trial court concluded that "a reasonable person would have felt free to leave."[116]

The prosecution played Thompson's tape-recorded confession at trial, and the jury convicted him of first-degree murder and tampering with evidence.[117] The Alaska Court of Appeals affirmed.[118] The Alaska Supreme Court denied Thompson's petition for review.[119]

Thompson then filed a habeas corpus petition in the federal district court.[120] The district court denied the writ, holding that the state court's determination that Thompson was not "in custody" for *Miranda* purposes at the time of the September 15 statements was entitled to a presumption of correctness under former § 2254(d).[121] The Court of Appeals for the Ninth Circuit affirmed, holding that the custody issue was a question of fact.[122]

The Ninth Circuit based its decision on *Krantz v. Briggs*.[123] In *Krantz*, the court held that a state court's determination of custody status for *Miranda* purposes is a finding of fact entitled to a presumption of correctness under former § 2254(d) where the state made its determination after a hearing on the merits.[124] The court cited *Miller* for the proposition that "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question."[125]

2. *Determination of Custodial Status Under* Miranda

The *Miranda* decision requires that before questioning a person who has been taken into police custody, the police must warn the person "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[126] Custodial interrogations, which require *Miranda* warnings before questioning is initiated, are defined as "questioning . . . after a person has been taken into custody or otherwise deprived of his freedom of action in

115. *See id.* at 461-62.
116. *Id.* at 462.
117. *See id.*
118. *See id.* (citing Thompson v. State, 768 P.2d 127, 131 (Alaska Ct. App. 1989)).
119. *See id.*
120. *See id.*
121. *Id.*
122. *See id.*
123. *See id.* at 462 n.4 (citing Krantz v. Briggs, 983 F.2d 961, 964 (9th Cir. 1989)).
124. *See Krantz*, 983 F.2d at 964.
125. *Id.* (quoting Miller v. Fenton, 474 U.S. 104, 113 (1985)).
126. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

any significant way."[127] The well-established relevant inquiry as to whether a suspect was "in custody" at a particular point is "how a reasonable man in the suspect's position would have understood his situation."[128] This objective "reasonable man" test turns on whether there was "'restraint on freedom of movement' of the degree associated with a formal arrest."[129] If a reasonable person would have felt he was free to leave, then he is not "in custody" and the duty to give the *Miranda* warnings is not triggered.[130]

In *Oregon v. Mathiason*,[131] the defendant was suspected of committing a burglary. About twenty-five days after the burglary, a police officer visited Mathiason's apartment, leaving a card asking him to call the officer. Mathiason did call and arranged to meet with the officer at a nearby police station. He was questioned in an interview room. The officer falsely told him that officers had found his fingerprints at the scene of the crime. Within five minutes, Mathiason confessed to the burglary.[132] The Court found that "there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way."[133] The officer's false statement about the fingerprints was held to be irrelevant in determining the custody issue.[134]

In *Mathiason*, the Court noted that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."[135] Police officers are not required to give *Miranda* warnings to everyone they question. The warnings are also not

127. *Id.*

128. Berkemer v. McCray, 468 U.S. 420, 442 (1984). This test, characterized as an objective "reasonable man" test, is considered superior to a subjective test because it does not rely "either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question." *Id.* at 442 n.35 (quoting People v. P., 233 N.E.2d 255, 260 (N.Y. 1967)).

129. Stansbury v. California, 114 S. Ct 1526, 1529 (1994) (citations omitted).

130. *Id.* (citing California v. Beheler, 463 U.S. 1121, 1124 n.2 (1983) (per curiam)). As Justice O'Connor has noted, "[t]he task of determining when a defendant is in 'custody' has proved to be a 'slippery one.'" Withrow v. Williams, 507 U.S. 680, 711 (1993) (O'Connor, J., concurring and dissenting) (quoting Oregon v. Elstad, 470 U.S. 298, 309 (1985)).

131. 429 U.S. 492 (1977) (per curiam).

132. *See id.* at 493-94.

133. *Id.* at 495.

134. *See id.* at 495-96.

135. *Id.* at 495.

required merely because the questioning takes place at a police station or because the person being questioned is already a suspect.[136]

In *California v. Beheler*,[137] the defendant's stepbrother killed a woman in a failed robbery. Beheler called the police almost immediately after the shooting.[138] He made inculpatory statements to police officers who arrived on the scene. Later that day, the police asked Beheler to accompany them to the station for questioning, while informing him that he was not under arrest. He agreed to come with them.[139] Once at the station, Beheler discussed the murder even though he had not been Mirandized. The interview lasted less than thirty minutes.[140] At the end of the interview, the police allowed Beheler to leave. Five days later, he was arrested and questioned again about the murder. He was advised of his *Miranda* rights and waived them. During his second interview, he admitted that his earlier incriminating statements to the police were voluntary.[141] The trial court admitted both statements into evidence, and Beheler was convicted of aiding and abetting first-degree murder.[142] The Supreme Court held that Beheler was not "in custody" during the questioning.[143]

Finally, in an Eighth Circuit case, the circumstances of the questioning paralleled those in *Thompson*.[144] In March 1987, a mutilated and dismembered female torso was found in rural St. Charles County, Missouri. Shortly after this grisly discovery, petitioner Feltrop told the sheriff in nearby Jefferson County that his girlfriend, Barbara Roam, was missing.[145] The sheriff suspected that the unidentified torso might be Roam's. He asked Feltrop to come to the sheriff's office to meet with investigators. Feltrop drove to the sheriff's office and waited there for more than two hours for the St. Charles County officers to arrive.[146] Two officers questioned him in a small office.[147] About an hour and a half into the interrogation, the officers asked

136. *See id.* at 495; *see also Berkemer*, 468 U.S. at 440 (typical traffic stops do not, without more, amount to "custody").
137. 463 U.S. 1121 (1983).
138. *See id.* at 1122.
139. *See id.*
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.* at 1123.
144. Feltrop v. Delo, 46 F.3d 766, 768 (8th Cir. 1995).
145. *See id.*
146. *See id.*
147. *See id.*

Feltrop if he was a Christian and would tell the truth. Feltrop answered, "She clawed me and tried to take the knife."[148] The officers then gave him the *Miranda* warnings.[149] Feltrop confessed to killing Roam and directed officers to a trash bag containing her severed head, hands, and lower legs.[150] He was later convicted of first-degree murder and sentenced to death.[151]

In his federal habeas petition, Feltrop claimed his initial statements were involuntary and were elicited in violation of the *Miranda* requirements.[152] The Eighth Circuit reviewed the question of voluntariness de novo, but held that the trial court's finding that Feltrop was not in custody when he made his first incriminating statement was entitled to a presumption of correctness under former § 2254(d).[153]

3. Resolution on Remand

In the *Thompson* Court's analysis, the *Miranda* custody determination requires two separate inquiries: one factual, one legal.[154] In this type of determination, however, the legal application is governed by and closely linked to the factual component, which therefore becomes dispositive of the ultimate constitutional issue. The reviewing court must ask "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave."[155] While the first inquiry is factual, the second requires the "application of the controlling legal standard to the historical facts" and is therefore a mixed question of law and fact subject to de novo review.[156]

The Court distinguished *Miller*, *Patton*, and *Maggio* by emphasizing that "the trial court does not have a first-person vantage on whether a defendant was 'in custody' for *Miranda* purposes."[157] But *Miranda* violations necessarily take place behind closed doors. Given this reality, the state courts have the closest possible vantage point for determining the factual issues, which in a *Miranda* context may be determined by the testimony of police officers and (possibly) the de-

148. *Id.*
149. *See id.*
150. *See id.*
151. *See id.* at 768-69.
152. *See id.* at 772.
153. *See id.* at 772-73.
154. *See Thompson*, 116 S. Ct. at 465.
155. *Id.*
156. *Id.*
157. *Id.* at 466.

fendant.[158] The majority also noted that determinations of *Miranda* violations have precedential value, while decisions about juror impartiality and defendant competency are made on a case-by-case basis and generally lack precedential value.[159] The facts of each potentially custodial situation are also unique, however, and do not create clear precedent unless they form the basis for bright-line rules. (For example, a court-created bright-line rule might announce that a thirty minute detention is not overlong, but a thirty-five minute detention is.) And since the Court has thus far resisted drawing such a line, review of *Miranda* violations may amount to "unending review of fact patterns too peculiar to recur."[160]

The majority's analysis implies that while state courts can interpret claims which are constitutionally significant as long as their decisions do not create precedent, the task of making decisions with precedential value is apparently best left to the federal courts, even though state courts are not otherwise bound by lower federal courts' judgments on federal constitutional issues. Summarily concluding that "state-court 'in custody' determinations warrant independent review by a federal habeas court," the Court remanded the case to the Ninth Circuit for reconsideration of petitioner's *Miranda* claim.[161]

Justice Thomas concluded in his dissent (joined by Justice Rehnquist) that Thompson would not be able to establish a *Miranda* violation even under de novo review.[162] It is undisputed that Thompson came to the police station voluntarily, was repeatedly told he could leave, and that he was in fact allowed to leave when the interrogation was over.[163] He was, however, also subjected to aggressive questioning and psychological pressure designed to elicit an incriminating response.[164]

Justice Thomas then noted that if relief was granted to Thompson based on the facts of the case, it would amount to an extension of precedent in a novel direction and would, therefore, be barred by

158. *See id.* at 468 (Thomas, J., dissenting) ("The state trial judge is, in my estimation, the best-positioned actor to decide the relatively straightforward and fact-laden question of Miranda custody . . . . In making the custody determination, the state trial judge must consider a complex of diverse and case-specific factors in an effort to gain an overall sense of the defendant's situation at the time of the interrogation.").

159. *See id.* at 466.

160. Lee, *supra* note 9, at 236.

161. *Thompson*, 116 S. Ct. at 467.

162. *See id.* at 470 (Thomas, J., dissenting).

163. *See id.* at 469.

164. *See id.* at 460-61.

Teague v. Lane,[165] which precludes reconsideration of federal constitutional claims based on a new rule or novel application of an existing rule announced after the final state court judgment.[166] The new section 2254(d) echoes the definition of a "new" rule or novel application expressed in *Teague* and its progeny.[167] Relief may still be granted, however, when the state court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[168] As Professor Larry Yackle has suggested, "the reference to 'clearly established' federal law implies that federal habeas is not typically to be a vehicle for advancing the development of federal rights."[169] If *Thompson* had been decided after the 1996 Act was passed, Justice Thomas's argument could have been employed to restrict consideration of the petitioner's claim to whether the state court's application of *Miranda* principles was an unreasonable application of the law. This in turn would restrict a reviewing federal court to consideration of the *overall* correctness of the state's application of the law rather than dissection of the facts or de novo application of the legal standard that was dispositive of the ultimate constitutional issue (in Thompson's case, whether his Fifth Amendment right against self-incrimination was violated).

The fact that the questioning took place in the police station or that Thompson was already a suspect is irrelevant for the purposes of the "in custody" determination.[170] While the questioning officer's subjective belief that the person he is interrogating is a suspect does not affect the custody inquiry, the picture changes if the officer's beliefs are communicated "by word or deed, to the individual being questioned."[171] Even where communicated, "those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'"[172] The question of whether those beliefs existed, or were communicated to the defendant, is best

165. 489 U.S. 288 (1989).

166. *See Thompson*, 116 S. Ct. at 469 n.1 (Thomas, J., dissenting) (citing *Teague*, 489 U.S. 288 (1989)).

167. *See* Yackle, *supra* note 5, at 415.

168. 28 U.S.C. § 2254(d)(1) (1996), *as amended*.

169. Yackle, *supra* note 5, at 415.

170. *See* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam); *see also* Stansbury v. California, 114 S. Ct. 1526, 1529-30 (1994).

171. *Stansbury*, 114 S. Ct. at 1530.

172. *Id.* (quoting Berkemer v. McCray, 468 U.S. 420, 435 n.22 (1984)).

answered through the presentation of testimony and its evaluation by the trial court.

In an Eleventh Circuit case, the police told petitioner Purvis, a mentally ill man with the psychological capabilities of an eight- to ten-year-old child, that he would die in the electric chair for the murder he had allegedly committed.[173] He was later questioned by a psychiatrist.[174] After five to ten minutes of conversation, Purvis admitted to killing his neighbor.[175] Police then gave Purvis the *Miranda* warnings before recording his confession.[176] The Eleventh Circuit upheld the state trial court's finding that Purvis "was not deprived of his freedom of action and that he had sufficient intellectual capacity to understand the circumstances surrounding his questioning."[177] The court noted that Purvis had gone to the police station voluntarily and was free to leave until the psychiatrist told the detectives about his confession.[178]

Although the officers told Thompson about their suspicions, this is not dispositive of the issue of whether a reasonable person in Thompson's position would have felt free to leave.[179] Thompson, a man of normal intelligence, was arguably in a stronger position than Purvis to assess his freedom to end the questioning. The fact that Thompson's truck was impounded is also not dispositive. This is particularly true since the police actually assisted his departure by providing transportation to a friend's house. Precedent suggests that the fact that a suspect actually left after questioning is one factor supporting the inference that he believed he was free to do so.[180] On remand, the Ninth Circuit should conclude that under the totality of the circumstances, Thompson's statements were admissible. This conclusion supports Justice Thomas's finality-based argument that the Court should "avoid putting the State of Alaska to the uncertainty and expense of defending for the sixth time in nine years an eminently reasonable judgment secured against a confessed murderer."[181]

173. Purvis v. Dugger, 932 F.2d 1413, 1415 (11th Cir. 1991).
174. *See id.* at 1416.
175. *See id.*
176. *See id.*
177. *Id.* at 1419.
178. *See id.* at 1418.
179. *See Stansbury*, 114 S. Ct. at 1530.
180. *See Mathiason*, 429 U.S. at 713-14.
181. *Thompson*, 116 S. Ct. at 470 (Thomas, J., dissenting).

C. Constitutional Rights and the "Three F's": Finality, Federalism, and Fairness

1. Deterrence and Resolution: Social Values and the Need for Finality

Like Thompson, most petitioners who avail themselves of federal habeas corpus review have been convicted of serious crimes after a jury trial.[182] A recent multisite study found that sixty-two percent of habeas petitioners were convicted after trial,[183] where the average jury trial rate for felonies was just six percent.[184] Of course, defendants pursuing these remedies are likely facing lengthy prison terms or the death penalty and are therefore less likely to plead guilty initially. Federal habeas petitioners are also more likely to have been represented at trial, often because of the seriousness of their crimes.[185] Therefore, at a threshold level, federal habeas review gives additional judicial attention to claims of defendants who have already received more judicial process than the vast majority of criminal defendants.[186] As one critic put it, the habeas system allows "a persistent defendant, however guilty, [ ] eventually [to] get lucky and persuade some judge or court to find error, given unlimited opportunities to do so."[187]

The need for finality in a criminal judgment is a serious competing value that, if prioritized, would operate to reduce the availability of federal habeas review. As one scathing commentary put it, supporting expansive federal habeas review "ignores the fact that frivolous and harassing litigation is itself a seriously antisocial activity, and disregards its potential effect of increasing the arrogance of unrepentant criminals."[188] It is undeniable that federal habeas review after the exhaustion of state court remedies interferes with the efficient administration of justice and consumes scarce judicial resources.

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182. *See* ROBINSON STUDY *supra* note 8, at 4(a), *cited in* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 36. The Robinson study found that over 80% of federal habeas petitioners were convicted by jury trial.

183. *See* SJI STUDY, *supra* note 7, at 36.

184. *See id.*

185. *See id.*

186. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at iv.

187. Remarks of Assistant Attorney General Stephen J. Markman at a Seminar on the Administration of Justice Sponsored by the Brookings Institution, Annapolis, Maryland, at 1-2 (Mar. 8, 1986), *quoted in* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 2.

Some "notorious" petitioners cited by the Office of Legal Policy in support of its sweeping reform proposals included Booker Hillery (tried and convicted three times for the murder of fifteen-year-old Marlene Miller in the farm town of Hanford, California), Johnny Witt (whose case was heard by the Court in *Wainwright v. Witt*, 469 U.S. 412 (1985)), and Arthur Aiken (a gas station robber still in the process of appealing claims stemming from his 1965 murder conviction). *See id.* at 76-90.

188. *Id.* at vi.

It is also true, however, that where constitutional rights are implicated, putting a premium on efficiency carries the risk that constitutional violations might go unremedied. The question is whether these risks are important enough to justify overturning state court judgments years after the crime occurred.

On a practical level, it is important to note that petitioners seeking federal habeas review generally remain in prison throughout the lengthy litigation.[189] Therefore, the concern about undermining the deterrent effect of a criminal conviction is exaggerated, particularly in light of the relatively small number of prisoners who seek federal habeas review.[190] Indeed, in some noncapital cases, the petitioner may be paroled before the habeas litigation is completed.[191] Ultimately, the vast majority of convicted criminals are punished for their crime and serve their sentences without seeking federal relief.

2. *Respect for State Court Judgments*

Objectively, state and federal courts have an equal obligation to uphold federal constitutional law.[192] Indeed, "one of the central features of our federalism [is] that federal law *is* a part of the state law, that deciding federal questions is an intrinsic part of the business of state judges."[193] Yet the structure of federal habeas review charges the lower federal courts with evaluating the adequacy of state court interpretations of constitutional rights. The resulting tension between the state and federal systems has been the focus of much criticism. Justice O'Connor, a former state appellate judge, has observed that:

> [W]e should strive to make both the federal and the state systems strong, independent and viable. . . . State judges in assuming office take an oath to support the federal as well as the state

189. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6.

190. In 1991, only one percent of state court prisoners filed federal habeas petitions. *See* SJI STUDY, *supra* note 7, at 14. The percentage of state prisoners seeking federal habeas relief has ranged from a low of 0.52% in 1961 to a high of 5.14% in 1970. The decline in filings since 1970 is at least partly attributable to the Court's decisions limiting the availability of federal habeas relief. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 22.

191. *See Krantz*, 983 F.2d at 962 n.1. Petitioner finished serving his state prison term for assault and was paroled before his appeal of the district court's dismissal of his habeas corpus petition reached the Ninth Circuit. He was subsequently reincarcerated in another state for violating his parole.

192. *See Who Is on Trial?*, *supra* note 61, at 7 (statement of Paul Cassell).

193. Bator, *supra* note 10, at 510-11.

> constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so.[194]

The *Thompson* majority's value judgments about the legitimacy of state court precedent preserves the Court-created hierarchy that conflicts with the traditional conception of federalism.

The concern about the lack of parity between state and federal courts is closely linked to finality issues. Stressing the importance of finality, one commentator noted that "if a job can be well done once, it should not be done twice."[195] In this same vein, if a state court can competently adjudicate federal constitutional claims, then a lower federal court should not be permitted to overturn its judgments. The extremely low reversal rate on habeas suggests both that state and federal courts generally agree on the validity of particular constitutional claims and that substantial judicial resources are being expended to search for the proverbial needle in the haystack.[196] As Justice Jackson stated in *Brown*: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[197]

Protection from erroneous constitutional interpretation by state courts is ensured by the availability of direct review to the Court.[198] Even the judgment of the Court is superior largely because it is final. Justice Jackson aptly noted: "We are not final because we are infallible, but we are infallible only because we are final."[199]

It may be argued that state court judges, both at the trial and appellate levels, are more likely to have personal biases and to have those biases reinforced (rather than challenged) by sitting in a community to which they are likely to have personal and professional ties. But while federal judges may be better insulated from political pressures and local bias than state judges, they are certainly not immune to public opinion or free from personal prejudices. In some situations, all the parties (including the petitioner) may benefit from state court judges' familiarity with and understanding of the community in which

194. Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814-15 (1981).

195. Bator, *supra* note 10, at 451.

196. The similarity of the claims raised and the high affirmance rate clearly suggest "duplication of effort" by the federal courts. SJI STUDY, *supra* note 7, at 91.

197. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result).

198. *See Who Is on Trial?*, *supra* note 61, at 7 (statement of Paul Cassell).

199. *Brown*, 344 U.S. at 540 (Jackson, J., concurring in result).

the crimes took place—an understanding that may not be shared by federal judges, especially at the appellate level.[200]

3. *The "Right" to a Federal Forum*

Although Justice Frankfurter maintained that federal courts were required to decide state prisoners' constitutional claims, he never made the source of this mandate entirely clear.[201] Arguably, state prisoners do not have a right to a federal adjudication of their constitutional claims because Article III of the Constitution did not mandate the creation of the lower federal courts and, therefore, there is no constitutional right of access to this federal forum.[202] The supposed right to a federal forum rests in part on the belief that federal courts are more sensitive and receptive to criminal defendants' constitutional claims.[203] This idea is irrevocably tied to the decisional hierarchy sustained by the Court in *Thompson*. The *Thompson* Court held that where the state court is not "in an appreciably better position than the federal habeas court to make [the ultimate] determination," the determination falls to the federal court.[204] With that hierarchy in place, even the highest state courts will never be in "an appreciably better position" to make constitutional determinations of mixed questions, despite their objectively equal mandate to uphold and interpret the federal Constitution and their proximity to and intimate knowledge of the case.

The 1996 Act was designed to address the procedure for filing federal habeas claims, rather than make big substantive changes in the scope of federal habeas review. Senator Orrin Hatch, one of the 1996 Act's principal sponsors, commented that the goal of the statute was to fix problems in the system, "while still preserving and protecting the constitutional rights of those who are accused."[205] Traditionally, de novo review in the federal habeas context meant that federal courts

200. *See Thompson*, 116 S. Ct. at 469 (Thomas, J., dissenting). As Justice Thomas put it, "I have no doubt that the state trier of fact is best situated to put himself in the suspect's shoes, and consequently is in a better position to determine what it would have been like for a reasonable man to be in the suspect's shoes." *Id.*

201. *See Brown*, 344 U.S. at 488-513 (opinion of Frankfurter, J.); *see also* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 20-21.

202. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 42. This argument does not affect the right to petition for direct review by the United States Supreme Court, which *is* explicitly constitutionally guaranteed. U.S. CONST. art. III, § 2.

203. *See* REVIEW OF STATE JUDGMENTS, *supra* note 6, at 43.

204. 116 S. Ct. at 466 (quoting Miller v. Fenton, 474 U.S. 104, 117 (1985)).

205. 141 CONG. REC. S7479 (daily ed. May 25, 1995) (statement of Sen. Hatch), *quoted in* Yackle, *supra* note 5, at 398.

considering a petitioner's claims could ignore previous state court decisions on the merits and proceed accordingly.[206] However, under the new section 2254(d), a state court's prior adjudication on the merits becomes the starting point for federal courts' consideration of constitutional claims.[207] Arguably, this change will have a "psychological effect" on federal judges who will now "limit . . . judgment to whether a previous decision-maker reached the correct result" rather than "shoulder[ing the] initial responsibility for addressing and resolving a question."[208] Under the revised statutory scheme, federal courts should at least review the factual components of mixed questions deferentially, assessing only the overall accuracy of the state court decision without needless and burdensome reconsideration of esoteric and unique facts.

IV. Conclusion: How Much Justice Can We Afford?

In *Thompson*, the Court relied on value judgments in extending the already fine distinction between questions of fact (entitled to the presumption of correctness of § 2254(e), as amended by the 1996 Act) and mixed questions of law and fact (reviewed de novo). The Court used the distinction to allocate this additional burden to the federal courts without considering whether the courts could meet the increased demands placed on them. The Court also ignored the dissent's concern about wasteful duplicative review of state court judgments.

The 1996 Act does not, however, substantively alter the existing federal habeas scheme.[209] If federal habeas review is to continue in its current form, then the establishment of separate courts to consider habeas cases should be considered to ensure that other cases in the federal caseload get the attention they deserve. In fact, there may already be de facto separate process, at least for the petitions of death row prisoners.[210] One district court judge who was involved in Ted Bundy's appeal complained before a House Subcommittee about the "inordinate amount of time being spent on duplicative review . . . [which] will take time away from other people who have a right to

206. *See* Yackle, *supra* note 5, at 412.

207. *See id.* at 412-13.

208. *Id.* at 413.

209. *See id.* at 422, 449.

210. *See* SJI STUDY, *supra* note 7, at 83, 93 (special clerks assigned solely to track capital cases).

their day in court."[211] On the other hand, a separate judicial track for habeas petitions may be too costly and would still divert resources from the rest of the federal caseload.

Additionally, although many petitioners had representation at trial, most petitioners represent themselves when filing federal habeas claims.[212] Therefore, substantial time and effort may be spent just to determine which claims are being raised. Pro se claims are often poorly framed and difficult to understand. The appointment of counsel might improve the quality of the petitions by framing the claims clearly and by eliminating petitioners' weakest arguments.

The SJI study suggested that Alabama's disproportionately high filing rate was linked to its habitual offender statute, which exposed prisoners with prior felony convictions to lengthy sentences.[213] A similar outcome can be expected from California's three strikes law, which imposes mandatory life sentences for a third conviction of certain listed "serious and/or violent felony offenses."[214] In a large state with an already overburdened court system, this increased demand on the courts underscores the need for a separate system. As the cost of searching for the rare meritorious claim increases, expansion of the courts' capacity to review habeas claims may become prohibitive. Increasingly, duplicative federal habeas review is becoming a luxury we may not be able to afford.

211. *Who Is on Trial?*, *supra* note 61, at 67 (statement of Hon. G. Kendall Sharp, Middle District of Florida).

212. In one study, 75% of federal habeas petitioners filed without representation. *See* SJI STUDY, *supra* note 7, at 37.

213. *See id.* at 91.

214. CAL. PENAL CODE § 667(b) (West Supp. 1997); *see also id.* §§ 1192.7(c) and 667.5(c) for the list of qualifying felonies.