Gone, But Not Forgotten? Habeas Corpus for Necessary Predicate Offenses

Garrett Ordower†

INTRODUCTION

Criminal registration schemes have a long lineage in the United States,[1] and indeed throughout the modern era.[2] The past decade, however, has seen an unprecedented surge in criminal registrations since the mid-1990s implementation of Megan's Laws aimed at sex offenders. Today, nearly 700,000 people are registered under these laws.[3] Given the political popularity of criminal registration and community notification laws,[4] and the increasing accessibility of registration information through the Internet, it would not be surprising to see such schemes extended to wider classes of offenders—or even to all those convicted of felonies.[5]

Inherent in every community notification scheme is a requirement that the offender update their information with law enforce-

---

† BS 2001, Northwestern University; JD Candidate 2010, The University of Chicago Law School.

1 Municipal laws requiring those with criminal records to register with local law enforcement were especially popular in the 1930s and 1940s. See Note, *Criminal Registration Ordinances: Police Control over Potential Recidivists*, 103 U Pa L Rev 60, 63 (1954) ("The immediate objectives of these ordinances appeared to be the incarceration or expulsion of undesirables, rather than the registration of criminals. It was believed that the individuals affected would move elsewhere to avoid registration."). The enthusiasm for such ordinances faded after the Supreme Court held that without formal notification they violated due process. See *Lambert v California*, 355 US 225, 229–30 (1957) ("Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.").

2 See Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* xi (Stanford 2009) ("Human societies have long felt a powerful need to identify potentially dangerous individuals in their midst.").

3 National Center for Missing and Exploited Children, *Map of Registered Sex Offenders in the United States*, online at http://www.missingkids.com/en_US/documents/sex-offender-map.pdf (visited Apr 15, 2009).

4 One Gallup poll found 90 percent of 1,000 adults favored "[r]equiring that if a sexual offender is released from prison, [ ] the community where he will live be notified." See Question qn26b, August Wave 2, Gallup Brain (August 1994).

5 See Wayne A. Logan, *Federal Habeas in the Information Age*, 85 Minn L Rev 147, 178 (2000) ("Although today sex offenders are the prime target of such informational sanctions, this will not likely always be so. Indeed, expansion to other offender populations would be entirely consistent with the trajectory of penology."). See also Lior Jacob Strahilevitz, *Privacy versus Antidiscrimination*, 75 U Chi L Rev 363, 380 (2008) ("Such online resources [like Megan's Laws registries] should be expanded to include all criminal convictions of adults, as Colorado, Florida, and a handful of other states have done."); Daniel J. Solove and Paul M. Schwartz, *Information Privacy Law* 655 (Aspen 3d ed 2009) ("Should registries of felons stop at sexual offenders? Why not all people convicted of a crime?").

ment. Since few offenders would do this voluntarily, these schemes ensure compliance by threatening strict penalties for those who go off-the-radar.[6]

Courts have recognized that those subject to these schemes face a unique situation: if arrested for failing to register they cannot contest the crime that served as the basis for their registration offense—only whether or not they complied with the registration statute. Courts have considered civil commitment schemes in a similar light; under those schemes offenders can be held beyond their initial sentence if it is determined they will continue to pose a danger if released. Because offenders cannot challenge their underlying, expired convictions if arrested for failing to register, offenders have sought to challenge those convictions through habeas corpus.[7] Courts disagree as to whether offenders can challenge their expired, underlying convictions ("necessary predicate offenses") when arrested for failing to register as a sex offender or civilly committed ("necessary-predicate-based offenses"). This Comment seeks to understand the unique challenges brought about by the increasing prevalence of necessary-predicate-based offenses and whether or not habeas corpus might be a tool to allow for offenders to challenge necessary predicate offenses.

Part I of this Comment outlines the history of habeas corpus, concentrating on the requirement that a petitioner be "in custody" in order to bring a habeas challenge. While the custody requirement used to be black-and-white,[8] advances in technology and penology, including the increasing use of parole, probation, sentence enhancements, and necessary-predicate-based offenses have made the custody requirement far more complicated.[9] Part I concludes with a discussion of

---

6 See, for example, Bill Rankin, *Sentence for Sex Offenders Ovverruled*, Atlanta Journal-Const C1 (Nov 26, 2008) (noting that the life sentence imposed upon Cedric Bradshaw for failing to register as a sex offender—a result of his conviction at age nineteen for statutory rape—had been overturned after being held in violation of the Eighth Amendment).

7 Habeas corpus allows those "in custody in violation of the Constitution or laws or treaties of the United States" to challenge their confinement. See 28 USC § 2254(a). The most common constitutional violations asserted by habeas petitioners are: ineffective assistance of counsel; new evidence of innocence; undisclosed or false evidence; sentencing error; insufficient evidence of guilt; erroneous evidentiary ruling; improper jury instructions; improper prosecutorial argument; or a plea negotiation error. See Nancy J. King, Fred L. Cheesman, II, and Brian J. Ostrom, *Executive Summary: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners under the Antiterrorism and Effective Death Penalty Act of 1996* 5 (Vanderbilt 2007).

8 See, for example, *Wales v Whitney*, 114 US 564, 571–72 (1885) (holding that in order "to make a case for *habeas corpus* . . . [t]here must be actual confinement or the present means of enforcing it").

9 It is now settled law, however, that the custody requirement is satisfied by those on parole, *Jones v Cunningham*, 371 US 236 (1963), probation, *Thomas v Zaruba*, 188 Fed Appx 485

the prudential bar the Court has erected in the sentence enhancement context, which holds that an offender satisfies the "custody" requirement when challenging a sentence enhancement, but in almost all cases shuts the door to courts examining those offenses that serve as a basis for the enhancement.

Part II examines courts' identification and treatment of necessary-predicate-based offenses, finding that there is uncertainty as to whether the prudential bar erected by the Court prohibits the examination of necessary predicate offenses.[10] It also briefly discusses the custodial bar courts have universally found to those seeking habeas relief when subject to registration schemes, but not actually imprisoned as a result of violating those schemes.

Part III clarifies this area of the law by examining the rationales that underlie the Court's decisions related to custody in general and sentence enhancements in particular. Part III finds that while habeas corpus petitioners should be able to challenge necessary predicate offenses when arrested for necessary-predicate-based registration offenses, the same does not hold true for those subject to civil commitment schemes.

I. THE HISTORY AND DEVELOPMENT OF THE GREAT WRIT

To understand how the custody requirement applies to necessary predicate offenses, it is instructive to first understand the historical development of habeas. The writ of habeas corpus dates to the Magna Carta in 1215 and that document's promise that no person would be imprisoned in contravention of the law of the land.[11] Though the Magna Carta did not specify a mechanism to challenge allegedly illegal confinement, over the course of several centuries habeas became the preferred method.[12] The "painstaking" development of habeas proceeded during the days of the British Empire, and at the time of the founding "[t]he Framers . . . understood the writ of habeas corpus as a vital in-

---

(7th Cir 2006), in a mental institution, *Baxstrom v Herold*, 383 US 107 (1966), drafted into the military, *Oestereich v Selective Service*, 393 US 233 (1968), or required to perform community service, *Barry v Bergen County Probation Department*, 128 F3d 152 (3d Cir 1997).

10 See, for example, *Brock v Weston*, 31 F3d 887, 890 (9th Cir 1994) ("With an enhanced sentence, the prior conviction only lengthens the period of confinement; here, the prior conviction is a necessary predicate to the confinement.").

11 "No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land." *Boumediene v Bush*, 128 S Ct 2229, 2244 (2008), quoting Richard L. Perry, ed, *Sources of Our Liberties* 17 (Quinn & Boden 1959).

12 *Boumediene*, 128 S Ct at 2244.

strument to secure [the] . . . freedom [from unlawful restraint]."[13] The Suspension Clause of the Constitution reads: "The 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."[14]

Since the founding, "most of the major legislative enactments pertaining to habeas corpus have acted not to contract the writ's protection but to expand it."[15] But in recent decades Congress has increased its efforts to limit the use of habeas, in part because of frustration with the large numbers of petitions filed by convicted criminals, who must have exhausted all other avenues of direct appeal and state post-conviction proceedings in order to be eligible for habeas relief.[16] Each year, petitioners file more than ten thousand habeas petitions,[17] with pro se litigants filing more than 90 percent of the total petitions.[18] This results in thousands of poorly drafted petitions whose arguments have already been rejected by numerous courts. But, to a prisoner without any other options (aside from petitioning for a pardon or commutation), there is little to lose. The chances of a prisoner serving a non-capital sentence being granted habeas relief are about one in three hundred.[19] Those supporting constriction of habeas cite the large number of meritless petitions as evidence that habeas unduly burdens federal courts.[20]

For courts, the availability of habeas is controlled by the jurisdictional requirement that a petitioner be "in custody" in order to be eligible for relief.[21] As different types of confinement have developed, habeas

---

13 Id (discussing the writ's evolution, beginning with its early use as a tool employed by courts in service of the king).

14 US Const Art I, § 9, cl 2.

15 *Boumediene*, 128 S Ct at 2263. But see *Fay v Noia*, 372 US 391, 411–12 (1963) ("We do not suggest that this Court has always followed an unwavering line in its conclusions as to the availability of the Great Writ. Our development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling.").

16 28 USC § 2254(b)(1)(A) ("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 unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . .").

17 Bureau of Justice Statistics, Discussion Paper, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 2 (1995) (compiling data on the handling of habeas petitions in eighteen federal district courts).

18 Id at 14.

19 King, Cheesman, and Ostrom, *Habeas Litigation in U.S. District Courts* at 9–10 (cited in note 7) (noting that the rate of habeas relief for non-capital prisoners was 1 out of every 341 cases filed, while for capital cases it is about 12 percent).

20 See, for example, Leslie Harris, *Thurmond Bill Targets Appeals*, Legal Times 41 (Sept 19, 1988) (describing a speech in which Justice Powell "argued that the broad availability of the federal post-conviction writ created a burdensome system marked by delay and repetitive review, which Congress could not have anticipated").

21 28 USC § 2254.

"has grown to achieve its grand purpose" of providing an adaptable mechanism through which those without any other avenue of recourse can petition for release.[22] Habeas's "root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment."[23] In order to understand whether habeas should apply to the underlying, expired conviction in the context of necessary-predicate-based offenses, it is necessary to understand how habeas has evolved alongside new forms of punishment and confinement.

A. The Traditional Custody Requirement

The custody requirement used to be a bright-line rule: either someone was physically confined and therefore eligible for habeas, or he was not.[24] This meant that a petitioner who had been released on bail[25] or on parole[26] was no longer eligible for habeas relief. The rationale for this rule was that habeas corpus, which literally means "you have the body,"[27] necessitated present physical custody by the person against whom the petition was brought, because without physical custody it would be impossible to release the "body."[28]

Cracks in this rule began to develop in 1960, in the case of *Parker v Ellis*.[29] In *Parker*, the Court followed precedent and upheld the dismissal of a habeas petition for mootness because the petitioner had been released,[30] even though the petition had been pending for five years prior to the petitioner's release.[31] The decision, however, was 5-4, with Chief Justice Earl Warren and Justice William Douglas issuing blistering dissents. Warren wrote that:

---

22 *Jones v Cunningham*, 371 US 236, 243 (1963).

23 *Fay*, 372 US at 402 (holding that a state prisoner's failure to appeal from a state conviction for felony murder did not preclude him from seeking habeas review in federal court).

24 See, for example, *Wales v Whitney*, 114 US 564, 569 (1885) (holding that an arrested naval officer ordered to confine himself to Washington, DC was not eligible for habeas because he was "under no physical restraint" and able to "walk[] the streets of Washington with no one to hinder his movements").

25 *Stallings v Splain*, 253 US 339, 343 (1920) (holding that a petitioner on bail was "no longer under actual restraint . . . [and] not entitled to the writ of habeas corpus").

26 *Weber v Squier*, 315 US 810, 810 (1942) (denying certiorari on the ground that the petitioner's habeas petition was moot because he had been released on parole).

27 Cary Federman, *The Body and the State: Habeas Corpus and American Jurisprudence* ix (SUNY 2006).

28 *Wales*, 114 US at 574 ("In case of a person who is going at large, with no one controlling or watching him, or detaining him, his body cannot be produced by the person to whom the writ is directed.").

29 362 US 574 (1960) (per curiam).

30 Id at 575.

31 Id at 577 (Warren dissenting).

> If the court is right in holding that George Parker's five-year quest for justice must end ignominiously in the limbo of mootness, surely something is badly askew in our system of criminal justice.
>
> . . .
>
> I dissent from the notion that, because we cannot do more, we should do nothing at all.[32]

Chief Justice Warren's dissent suggested that habeas should no longer be thought of only as a tool to relieve prisoners from present restraints, but instead should be a weapon wielded to "obtain[] justice and maintain[] the rule of law when other procedures have been unavailable or ineffective."[33] Warren's formulation would soon become law and would open the door for an expansive "in custody" requirement that allowed for challenges to expired convictions based on later consequences.

B. The Warren Court and the Expansion of the "In Custody" Requirement

Just three years after *Parker*, the Court once again considered whether the "custody" requirement could apply to someone no longer in physical custody—this time holding that a petitioner on parole could be considered "in custody." In *Jones v Cunningham*,[34] Justice Hugo Black, writing for the majority, noted that, "English courts have long recognized the writ as a proper remedy even though the restraint is something less than close physical confinement."[35] Justice Black then described why the writ should be allowed for parolees: "[T]he Great Writ . . . is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[36]

When Justice Black discussed the writ "grow[ing] to achieve its grand purpose," he did so in the context of a parole system that had reached every United States jurisdiction in 1944, only twenty years

---

32 Id at 577, 594 (Warren dissenting).

33 *Parker*, 362 US at 583 (Warren dissenting) (discussing the writ's origins in Roman law and historical role in enforcing the guarantees of the Magna Carta).

34 371 US 236 (1963).

35 Id at 238–39 (citing eighteenth century English cases where habeas was used to determine if a woman was being kept away from her husband against her will, and to require the production of a servant in court despite her master assigning her to another man).

36 Id at 243 (noting that the condition of the petitioner's parole constituted significant restraints on his freedom).

earlier,[37] "fueled by growing optimism in the ability of a penology equipped with social-scientific data to identify and counteract the causes of criminality."[38] Though Justice Black did not explicitly acknowledge this context, the growth of indeterminate sentencing schemes meant that many habeas petitions for parolees and probationers would be mooted had *Parker* remained valid.

Five years later, in *Carafas v LaVallee*,[39] the Court overturned *Parker*, holding that a habeas petition filed while a petitioner was imprisoned should not be dismissed for mootness once the petitioner has been unconditionally released from custody.[40] In language reminiscent of *Jones* five years earlier, the Court explained that it was "clear" the petition was not moot because of the "collateral consequences" of the conviction.[41] The Court reasoned that there was no statutory bar to such a conclusion, since the statute requires only that the petitioner be "in custody" when the petition is "filed."[42]

These decisions marked a significant expansion of habeas—as explained by Justice Black—from the "static, narrow, formalistic remedy" of decisions like *Parker* to the flexible instrument for correcting injustices envisioned by Chief Justice Warren. This expansion, however, also raised serious issues related to the finality of convictions and ease of administration. Though the Warren Court signaled it wished to allow the writ a great deal of power, it did not come close to answering the question of how far that power should extend—including whether it could be used to challenge expired convictions.

C. After the Warren Court, Courts Continue Grappling with "Custody"

Jones and *Carafas* expanded habeas to petitioners not physically "in custody" at the time their petitions were adjudicated, but the bounds of this expansion remained unclear. Courts of appeals began to consider whether habeas could provide relief for expired sentences when petitioners argued they were still "in custody" because of later consequences. The arguments for an expansive interpretation of the "custody" requirement stemmed from *Carafas*'s holding that the "col-

---

37 For an examination of the development of state parole systems, see generally Helen L. Witmer, *The History, Theory and Results of Parole*, 18 J Am Inst Crim & Criminol 24 (May 1927).

38 James J. Beha, II, *Redemption to Reform: The Intellectual Origins of the Prison Reform Movement*, 63 NYU Ann Surv Am L 773, 774 (2008).

39 391 US 234 (1968).

40 Id at 240.

41 Id at 237–38 ("In consequence of his conviction, [the petitioner] cannot engage in certain businesses . . . he cannot vote in any election held in New York State; he cannot serve as a juror.").

42 Id at 238–39.

lateral consequences" of a conviction prevented mootness upon release. By the same logic, the argument went, a whole host of "collateral consequences" flowing from convictions warranted the availability of habeas, even post-release. "Collateral consequences" typically involve civil disabilities imposed upon convicted felons, like the loss of the right to vote, serve on a jury, or hold professional licenses.

In 1969, for example, the Fifth Circuit held that a habeas challenge could be brought to an expired conviction because that expired conviction enhanced the sentence for a subsequent offense.[43] The court reasoned that the prisoner could be considered "in custody" on the prior conviction because, "were the prior conviction[] invalidated, the petitioner's present confinement would be shortened or terminated."[44] In the absence of clarification on the issue by a higher court, circuit courts continued to expand the "custody" definition. In 1979, the Fifth Circuit held that "in custody does not necessarily mean in custody for the offense being attacked. Instead, jurisdiction exists if there is a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration."[45] This conception of custody—eventually adopted by at least four circuits—demonstrates the vast expansion of the writ over a relatively short period of time.[46]

Under this conception of "custody," a petitioner had to challenge his current sentence as unconstitutional, rather than simply bringing a challenge to the underlying, expired conviction. But notably, courts exhibited reluctance to dismiss a habeas petition on a "hypertechnical pitfall."[47] Courts found that this "nexus" requirement—a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration—could be satisfied if the sentencing judge "took the [previous] conviction into account when he sentenced" the

---

43 See *Cappetta v Wainwright*, 406 F2d 1238, 1239 (5th Cir 1969).

44 Id.

45 *Sinclair v Blackburn*, 599 F2d 673, 676 (5th Cir 1979) (per curiam) (quotation marks omitted). See also *Young v Lynaugh*, 821 F2d 1133, 1137 (5th Cir 1987) (allowing a habeas petition when there was a "positive and demonstrable" connection between a prisoner's "current custody" and the "allegedly unconstitutional [prior] conviction").

46 *Young v Vaughn*, 83 F3d 72, 78–79 (3d Cir 1996) ("With the possible exception of [an] Eighth Circuit[] decision . . . we are aware of no case holding that a prisoner in custody under a sentence . . . enhanced by . . . a conviction whose sentence has expired may not attack the prior conviction at all.").

47 See *Lynaugh*, 821 F2d at 1137 (dispensing with the state's argument that the petitioner's prior conviction was not related to his present confinement, since he was not directly challenging his present confinement).

prisoner for a later conviction.[48] Essentially, this meant that anyone sentenced as a repeat offender could seemingly bring a habeas challenge to a previous conviction by challenging the enhanced sentence, regardless of how long ago the previous conviction had expired.

In 1989, some twenty years after *Carafas*, the Supreme Court in *Maleng v Cook*[49] considered whether a habeas petitioner could, either directly or indirectly, challenge an expired conviction that served as the basis for a later sentence enhancement.[50] The Court held that petitions attacking an expired conviction would be liberally construed as "asserting a challenge to the [current] sentence[], as enhanced by the allegedly invalid prior conviction."[51] By creating this legal fiction, the Court allowed lower courts to consider habeas challenges to expired convictions by allowing the current sentence to satisfy the custody requirement. But the Court declined to clarify the practical meaning of its holding, "express[ing] no view on the extent to which the [earlier] conviction itself may be subject to challenge in the attack upon the [current] sentence[] which it was used to enhance."[52] By sidestepping this important question of how extensively courts could reexamine expired convictions, the Court left lower courts with little guidance and complete discretion. As Judge Frank Easterbrook explained, "[w]hether the federal court with jurisdiction over the custodian holding the prisoner on sentence B may inquire into the validity of sentence A is a matter of comity and the rules of preclusion, not of 'custody.'"[53] *Maleng*, however, did not address these issues of comity or preclusion.

Lacking specific guidance, courts continued using the "nexus" approach after *Maleng*. Essentially, if the petitioner could demonstrate that the current sentence had been enhanced by the expired sentence, courts would examine the expired sentence. In practice, *Maleng* did not change how courts handled these challenges—they applied the

---

48 *Tucker v Duckworth*, 1993 WL 139003, *2 (7th Cir) (citing *Lynaugh* in finding that a judge's consideration of the petitioner's prior conviction in sentencing him as a habitual offender satisfied the nexus requirement).

49 490 US 488 (1989) (per curiam).

50 Id at 492.

51 Id at 493.

52 Id at 494. Courts entertaining habeas petitions generally have virtually unfettered discretion to examine the factual and legal conclusions of other courts, and to order any remedy "as law and justice require." See 28 USC § 2243 (codifying habeas corpus procedures).

53 *Crank v Duckworth*, 905 F2d 1090, 1091 (7th Cir 1990) (holding that since the defendant was sentenced under a recidivist statute for an additional thirty years, he was "in custody" for habeas purposes).

same "nexus" test both before and after the decision.[54] One commentator suggested that *Maleng* further "mudd[ied] the waters of habeas corpus law."[55] *Maleng* made it clear that petitioners currently incarcerated for enhanced sentences would not be jurisdictionally barred from challenging their expired sentences, but it did nothing to clarify whether they would be otherwise barred.

D. The Rehnquist Court and the Reining in of Habeas

While the Warren Court's expansive view continued to reverberate, *Maleng* made clear that no radical expansions—such as allowing habeas challenges not filed pre-release based solely on "collateral consequences"—would be implemented.[56] But Congress, reeling from an upsurge of crime in the early 1990s and strong public sentiment urging tougher treatment of criminals, had its own vision for the future of habeas.[57] In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act[58] (AEDPA), which "codified the longstanding abuse-of-the-writ doctrine."[59] That doctrine essentially allowed courts to dismiss successive habeas petitions that raised repetitive claims.[60] Congress's decision to codify these constraints on habeas, rather than allowing courts to enforce "abuses of the writ," signaled its intent to limit habeas.[61] AEDPA's purpose has been recognized as advancing the goals of "comity, finality, and federalism."[62]

---

54 See, for example, *Vaughan*, 83 F3d at 79 (explaining that "in practice . . . it makes little difference how the petitioner states his claim").

55 D. Brian King, Note, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 NYU L Rev 1373, 1387–88 n 112 (1989) (exploring when constitutionally deficient prior convictions may be used to enhance a criminal sentence).

56 *Maleng*, 490 US at 492 (identifying the possibility that a prior conviction would be used to enhance a later sentence as a "collateral consequence" insufficient to render an individual "in custody" for habeas purposes).

57 See Kyle P. Reynolds, Comment, *"Second or Successive" Habeas Petitions and Late-ripening Claims after* Panetti v Quarterman, 74 U Chi L Rev 1475, 1515 n 21 (2007) (placing AEDPA in the context of the Oklahoma City bombing and noting one legislator's criticism of the Act as "a knee-jerk reaction to a most heinous crime").

58 Antiterrorism and Effective Death Penalty Act of 1996, Pub L No 104-132, 110 Stat 1214, codified as amended in various sections of 28 USC.

59 *Boumediene*, 128 S Ct at 2264 (noting that AEDPA's restrictions on "second or successive" claims did not depart substantially from common law procedures).

60 Id.

61 See, for example, *Karr v Crabtree*, 21 F Supp 2d 1228, 1236 (ED Wash 1998) ("It is clear that Congress has given no indication whatsoever that it desires to expand on a prisoner's rights to collaterally attack prior convictions and/or sentences.").

62 See *Williams v Taylor*, 529 US 420, 436 (2000) ("There is no doubt Congress intended AEDPA to advance these doctrines.").

In April 2001, on the same day, the Court decided two cases—*Daniels v United States*[63] and *Lackawanna County District Attorney v Coss*[64]—examining whether a petitioner could challenge an expired conviction used to enhance a later sentence. Both *Daniels* and *Coss* addressed the question explicitly left unanswered in *Maleng*: "the extent to which the [expired] conviction itself may be subject to challenge in the attack upon the [current] sentence[] which it was used to enhance."[65] Both cases acknowledged that the respective petitioners satisfied the "custody" requirement because of *Maleng*, but ultimately foreclosed the availability of habeas because of prudential constraints alluded to but never addressed in that opinion. While the Court held that the petitioners were not barred by the jurisdictional custody requirement, it erected a new prudential barrier that foreclosed their challenges. Whereas custody had once been the be-all, end-all threshold question for courts, in *Coss* and *Daniels* the court imposed its own threshold—not grounded in the statute's jurisdictional bar rooted in the history of the writ—but instead rooted in the Court's assessment of its proper institutional role in reexamining expired convictions and the implications therein for issues of finality and comity.[66]

Daniels and *Coss* differed in only one significant respect. The petitioner in *Daniels*, a federal prisoner, had been sentenced under the Armed Career Criminal Act of 1984,[67] and petitioned for relief under § 2255, the habeas statute for federal prisoners.[68] In *Coss*, a state prisoner petitioned under § 2254, the habeas statute for state prisoners.[69]

Justice Sandra Day O'Connor wrote both majority opinions, which held that an expired conviction cannot be attacked when that conviction serves to enhance a later sentence except in a few rare cir-

---

63 532 US 374 (2001).

64 532 US 394 (2001).

65 *Maleng*, 490 US at 494 (emphasizing that the court's holding only reached the issue of "custody" for the purposes of subject-matter jurisdiction).

66 The concept of "finality" became an important one for the Court when issuing habeas decisions beginning in the 1960s. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv L Rev 441, 447 (1963) ("[T]he 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, even though in the very nature of things no such processes can give us ultimate assurances.").

67 Armed Career Criminal Act of 1984, Pub L No 98-473, 98 Stat 2185, codified at 18 USC § 924(e).

68 *Daniels*, 532 US at 376–77.

69 *Coss*, 532 US at 396–97. Although the federal and state habeas statutes do differ procedurally, the "custody" requirement of both has been interpreted similarly, and similar prudential constraints have been placed on both.

cumstances.[70] To reach this holding, Justice O'Connor concentrated on four justifications: (1) the ease of administration; (2) the need for finality of convictions; (3) the ability of the accused to avoid further consequences from an expired conviction; and (4) the availability of other avenues of recourse.[71] Based on these considerations, Justice O'Connor concluded that an expired conviction could be subject to habeas review only under certain, narrow circumstances.

Justice O'Connor emphasized "ease of administration"[72] as a central concern, noting the difficulty of a district court "hav[ing] the documents necessary to evaluate claims arising from long-past proceedings in a different jurisdiction."[73] The Court's holding also relied on the difficulty inherent in a federal habeas court accessing old state records. "As time passes … the likelihood that trial records will be retained by the local courts and will be accessible for review diminishes substantially."[74]

Justice O'Connor also emphasized federalism concerns in explaining that the holding was animated by the state's "strong interest in preserving the integrity of [a] judgment."[75] This interest, she wrote, stems from the state's need to rely on judgments for the "disabilities" it imposes upon convicted felons, and for its own recidivist sentencing schemes.[76] "[O]nce a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid."[77] *Coss* and *Daniels* thus established a rebuttable presumption that expired convictions used to enhance later sentences are not cognizable in habeas.

The Court did, however, provide for a number of exceptions to this general rule because "[i]n [certain] situations, a habeas petition directed at the enhanced sentence may effectively be the first and only forum available for review of the prior conviction."[78] In both *Coss* and *Daniels* the Court allowed a habeas petition for the "unique constitutional defect" of a "failure to appoint counsel in violation of the Sixth Amendment."[79]

---

70 See *Daniels*, 532 US at 384; *Coss*, 532 US at 406.
71 See *Daniels*, 532 US at 379, 381; *Coss*, 532 US at 395, 407.
72 *Daniels*, 532 US at 378; *Coss*, 532 US at 403.
73 *Daniels*, 532 US at 379.
74 *Coss*, 532 US at 403.
75 Id. See also *Daniels*, 532 US at 379.
76 Id (stressing the "presumption of regularity that attaches to final judgments").
77 *Coss*, 532 US at 403.
78 Id at 406.
79 Id at 404.

In *Coss*, a plurality of the Court acknowledged that "[i]t is not always the case . . . that a defendant can be faulted for failing to obtain timely review of a constitutional claim. For example, a state court may, without justification, refuse to rule on a constitutional claim that has been properly presented to it."[80] Similarly, in *Daniels*, the Court "recognize[d] that there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own."[81] Finally, the *Coss* plurality left open the possibility of a challenge when "a defendant may obtain compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner."[82] These exceptions limited habeas, but provided lower courts some leeway to grant the writ in exceptional circumstances such as actual innocence or failure to appoint counsel.

In both cases, the Court grounded its holding on the availability of numerous avenues of recourse for defendants to challenge prior criminal convictions. "[T]he defendant is not entitled to another bite at the apple simply because that conviction is later used to enhance another sentence."[83] Justice O'Connor dismissed Souter's dissenting opinion, which suggested the "incentives" may not exist for a challenge to the original conviction, but may only make a challenge worthwhile once it is used as an enhancement. In rejecting this argument, Justice O'Connor explained:

> If a person chooses not to pursue those remedies, he does so with the knowledge that the conviction will stay on his record. This knowledge should serve as an incentive not to commit a subsequent crime and risk having the sentence for that crime enhanced under a recidivist sentencing statute.[84]

Justice O'Connor acknowledged the difficulties of not allowing habeas review when continued consequences exist, but put the responsibility for remedying these consequences with the criminal, not with the court.

The rebuttable presumption established by *Coss* and *Daniels* constrained when an offender could challenge expired convictions that enhanced a sentence not through the jurisdictional custody requirement, but through a court-imposed prudential constraint. As one commentator

---

80 Id at 405.

81 532 US at 383 (declining to rule on whether a defendant could challenge a prior conviction under § 2255 in such a case).

82 532 US at 405.

83 *Daniels*, 532 US at 383.

84 Id at 381 n 1.

put it, where once "the Court's emphasis was [ ] on expanding availability of the Great Writ" and "vindicating individual constitutional rights," it had become more concerned with "federalism, finality, factual innocence, and negotiation of a dazzling and dizzying array of technical hoops."[85] But in narrowly focusing on sentence enhancements, the Court left unresolved how lower courts should treat challenges to expired sentences in which the current sentence was not *enhanced* by prior convictions, but *necessarily predicated* on those convictions.[86]

II. CURRENT TREATMENT OF HABEAS CHALLENGES TO NECESSARY PREDICATE AND SIMILAR OFFENSES

For practical purposes, the *Coss* and *Daniels* decisions essentially bifurcated the traditional "custody" inquiry. Whereas once the operative inquiry in similar cases was whether the petitioner was "in custody," the opinions required a petition to establish both "custody" and to show that the petition fit into one of the exceptions *Coss* and *Daniels* allowed. *Coss* and *Daniels* created a presumption that expired convictions used for sentence enhancement cannot be challenged through habeas.[87]

Lower courts have disagreed over whether *Coss* and *Daniels* control necessary predicate situations or are limited to enhanced sentences. Courts have referred to the concept of a necessary predicate offense in the context of both criminal confinement for failure to register as a sex offender and civil confinement as a sexually dangerous person. Courts are divided both over whether in these situations the offender should be considered "in custody" for habeas purposes, and whether *Coss* and *Daniels* foreclose relief. Two additional situations can be instructive in understanding courts' treatment of habeas for expired convictions: courts have suggested that being a felon in possession of a firearm could also be considered a necessary-predicate-based offense;[88]

---

85 Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 Am J Crim L 99, 100–01 (1995) (discussing the discrepancy between the Court's general trend of reducing the substantive scope of the habeas right even while broadening the jurisdictional scope).

86 See Part III.A (discussing how *Coss* and *Daniels* do not control the necessary predicate situation).

87 See Part III.C.

88 *Davis v Nassau County*, 524 F Supp 2d 182, 190 (EDNY 2007) ("[A]n individual convicted of a felony could revive a habeas challenge for that conviction if he was convicted decades later for being a felon in possession of a firearm."). One of the few courts to address this held that *Coss* controls. *Steverson v Summers*, 258 F3d 520, 523 (6th Cir 2001) (holding that the defendant did not meet the "in custody" requirement to pursue a habeas petition for the expired state convictions that led to a sentence enhancement under the Armed Career Criminal Act).

and courts have universally held that being subject to sex offender registration alone does not satisfy the "custody" requirement.[89]

A. Judicial Recognition of Necessary-Predicate-Based Offenses as a Distinct Category for Habeas Purposes

In 1994, nearly a decade before the Court would hand down the *Coss* and *Daniels* decisions, the Ninth Circuit considered the case of Louis Brock, who had been confined as a "sexually violent predator" under Washington's Sexually Violent Predators Act.[90] Brock brought a habeas challenge to the 1974 assault conviction that served as the basis for his civil commitment, but the district court dismissed the petition, ruling that he was no longer "in custody" for habeas purposes.[91] In light of *Maleng*, however, the court recognized that "the district court should have liberally construed [the petition] as an attack on his 1974 conviction in the context of an attack on his commitment under the Act."[92] The court decided that Brock's habeas challenge was stronger than one challenging a sentence enhancement because his "confinement is more closely related to the prior conviction than is incarceration pursuant to a sentence enhanced by a prior conviction."[93] Furthermore, the court reasoned, "[I]t is even more appropriate for a court to examine an expired conviction in the present circumstances than for it to do so in the context of an enhanced sentence" because "[w]ith an enhanced sentence, the prior conviction only lengthens the period of confinement; here, the prior conviction is a *necessary predicate* to the confinement."[94] The court then decided that "in the absence of a Supreme Court holding to the contrary" it would instruct the district court to decide whether the 1974 conviction did indeed serve as the predicate for Brock's civil commitment, and, if so, to "resolve his challenge to that conviction."[95] Courts began to use *Brock*'s reasoning to distinguish other situations in which the normal pattern of an enhanced sentence did not apply.[96]

---

89 See Part II.C.

90 *Brock v Weston*, 31 F3d 887, 888 (9th Cir 1994); Wash Rev Code § 71.09 et seq (1992) (setting out procedures for civil commitment of sexually violent predators).

91 *Brock*, 31 F3d at 888.

92 Id at 890 (emphasis omitted).

93 Id.

94 Id (emphasis added).

95 *Brock*, 31 F3d at 891.

96 See, for example, *Young*, 83 F3d 72, 78 (3d Cir 1996):

> [I]t is true that the relationship between Young's convictions and sentences is unusual. Instead of *enhancing* a subsequent sentence . . . Young's expired 1989 conviction constituted a

In May 2001, less than a month after the *Coss* and *Daniels* decisions, the Ninth Circuit again addressed the necessary predicate issue in the case of Louis Zichko, who had entirely served an earlier rape conviction, but had been imprisoned for failing to register as a sex offender.[97] The court, relying on *Brock*, held that "a habeas petitioner is 'in custody' for the purposes of challenging an earlier, expired rape conviction, when he is incarcerated for failing to comply with a state sex offender registration law because the earlier rape conviction 'is a necessary predicate' to the failure to register charge."[98]

B. After *Coss* and *Daniels*, Does the Necessary Predicate Distinction Survive?

The *Zichko* court ruled just weeks after the *Coss* and *Daniels* decisions. First, in addressing the "custody" prong, the court noted *Coss* was "not to the contrary" and that Zichko would satisfy the custody requirement based on his failure-to-register arrest.[99] The court, however, decided it was not necessary to "address whether we are barred from reaching the merits of his habeas petition" by *Coss* because it found Zichko's petition otherwise procedurally barred.[100] The *Zichko* court thus treated the failure-to-register offense the same as the Supreme Court treated sentence enhancements for purposes of the custody analysis, but declined to examine whether the *Coss* and *Daniels* bar applied equally to necessary predicate offenses.

Zichko and *Brock* have been followed within the Ninth Circuit, but their importance outside of that circuit has been limited. In 2006, the district court of New Jersey held that a man could bring a habeas challenge to his confinement based on that state's Sexually Violent Predator Act because his "confinement under the SVPA is more closely related to his prior conviction than incarceration pursuant to a sentence enhanced by a prior conviction."[101] That court recognized that

---

parole violation in his 1984 conviction, thereby serving as a *predicate* for his present prison sentence. However, this difference only makes Young's case stronger: but for his 1989 conviction, he would not be in prison or otherwise "in custody" at all. Young's confinement is thus even more closely related to his 1989 conviction than if it were merely the result of a sentence enhanced by that conviction.

97 *Zichko v Idaho*, 247 F3d 1015, 1019 (9th Cir 2001).

98 Id, quoting *Brock*, 31 F3d at 890.

99 *Zichko*, 247 F3d at 1020.

100 Id at 1021–22 (holding that Zichko procedurally defaulted his claim by failing to identify errors in the trial court's findings of fact or conclusions of law and by failing to appeal to the Idaho Supreme Court).

101 *Jennings v Rogers*, 2006 WL 1977434, *4 (D NJ).

"an enhanced sentence based on a prior conviction only lengthens the period of incarceration, whereas in this case, Bruce Jennings's prior conviction was the necessary predicate to confinement under the SVPA."[102] The court did not even engage in an analysis of *Coss* or *Daniels* after finding the "custody" requirement fulfilled, but rather went on to evaluate the merits of the petition itself. Other courts have also analyzed the merits of expired convictions in the context of incarceration for failing to register as a sex offender without discussing the prudential barrier to doing so.[103]

Most courts, however, have suggested that while a petitioner challenging a necessary predicate offense does satisfy the custody prong of the analysis, *Coss* and *Daniels* clearly apply and thus foreclose relief.[104] At least one court has disagreed, however, rejecting entirely the distinction in *Zichko* and *Brock* that an enhanced sentence is different from a necessary-predicate-based offense—like failing to register as a sex offender—and concluding that later incarceration or civil commitment does not even satisfy the custody prong. "[A]lthough some courts have suggested that the analysis is different where the underlying conviction is not simply enhancing a sentence but rather is a necessary predicate for the subsequent conviction or incarceration, this Court disagrees."[105] In *Davis v Nassau County*,[106] a district court examined *Maleng* and *Carafas*, finding that "the clear focus of the rule enunciated" in those cases was that once a sentence has expired, the "'in custody' requirement cannot be satisfied regardless of the precise nature of the collateral consequence of the conviction."[107] *Davis* rejected the necessary predicate distinction, holding that

> once the conviction has fully expired, the "in custody" requirement cannot be met simply by becoming re-incarcerated for violating some collateral consequence of a conviction … [w]hen such a re-incarceration occurs as a result of failing to register, the

---

102 Id (finding the Ninth Circuit's reasoning in *Brock* "sound and apposite").

103 See, for example, *White v Dexter*, 2009 WL 1424373, *20 (ED Cal); *Brent v Salazar*, 2008 WL 962873, *3 (CD Cal) (concluding that petitioner could not challenge a due process violation from his 1984 underlying conviction to a failure-to-register charge because it was time barred).

104 See, for example, *Hearn v Schriro*, 2009 WL 383642, *4–5 (D Ariz) (holding that "[p]etitioner [ ] cannot take advantage of the *Zichko* exception to challenge his 1982 conviction since he is not currently incarcerated for failing to comply with Arizona's sex offender registration statute," but noting that Coss "clearly forecloses that challenge"); *Stevens v Fabian*, 2009 WL 161216, *14 (D Minn) ("Petitioner could satisfy the 'in custody' requirement . . . [but] his claims for relief would nevertheless be barred by the rule adopted in *Coss*.").

105 *Davis*, 524 F Supp 2d at 189–90.

106 524 F Supp 2d 182 (EDNY 2007).

107 Id at 190.

> resulting sentence is not a continuation of the sex offense sentence . . . but rather is pursuant to an entirely separate conviction.[108]

The court rested its holding on the practical problems that would arise from a regime where an arrest for failing to register as a sex offender would render a petitioner "in custody" for the purpose of challenging an expired sentence: "[I]f the 'in custody' requirement were met under these circumstances, then any time an individual suffered some collateral penalty due to his status as a sex offender or convicted felon, he could resurrect a habeas challenge to the underlying predicate conviction."[109] The caveat being, of course, that the petitioner would have first been subject to arrest as explained in Part II.C.

The *Davis* court echoed Justice O'Connor's concerns in *Coss*, suggesting that allowing such challenges would "undermine the ability to have finality in convictions" and cause "practical problems for state courts."[110] The court nevertheless applied *Coss*, holding that even if the petitioner would be considered "in custody" according to *Maleng*, he would not fit into one of the *Coss* exceptions, finding that "[i]n the instant case, the channels of state appellate review existed, but petitioner never perfected his appeal."[111] The court essentially echoed Justice O'Connor's reasoning in *Coss* that a petitioner should not get another bite at the apple because of the later consequences of the conviction.

C. Custodial Bar for Collateral Consequences

It is important to note that while *incarceration* for failing to register as a sex offender satisfies the custody requirement, either for the underlying conviction or the failure-to-register arrest, no court has found that a sex offender registration requirement alone renders a petitioner "in custody" for habeas purposes. *Maleng* held that "once the sentence imposed for a conviction has completely expired, the collateral consequences of the conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack."[112] In examining this question, the Ninth Circuit attempted to place registration on a continuum of habeas decisions dealing with the "in custody" requirement: "The boundary that limits the 'in custody' requirement is the line between a 'restraint on liberty' and a 'collateral conse-

---

108 Id.
109 Id.
110 *Davis*, 524 F Supp 2d at 190.
111 Id at 192.
112 490 US at 492.

quence of a conviction.'"[113] The court noted that fines and revocations of professional licenses generally do not meet the "in custody" requirement.[114] The sex offender registration scheme, the court concluded, more closely resembles the type of "collateral consequence" excluded from habeas under *Maleng* because "the constraints of this law lack the discernible impediment to movement that typically satisfies the 'in custody' requirement."[115] Several articles, however, have examined the Ninth Circuit's decision and argued that a contrary conclusion is warranted because the registration schemes amount to confinement.[116]

III. THE SOLUTION: UNDERSTANDING NECESSARY-PREDICATE-BASED OFFENSES AND ALLOWING "ONE FULL BITE"

To arrive at a solution that appropriately addresses the unique characteristics of necessary-predicate-based offenses in the habeas context, this Part analyzes the relevant legal and prudential considerations. First, it demonstrates that the narrow holdings in *Coss* and *Daniels* do not control the necessary predicate situation. Second, it considers how the traditional habeas analysis of *Maleng* and its predecessors would handle the necessary predicate situation. Third, it analyzes how the reasoning of *Coss* and *Daniels* should relate to the necessary predicate situation. Fourth, it examines and isolates the operative distinctions between sentence enhancements and necessary predicates, and examines the distinctions between the two types of necessary-predicate-based offenses. Based on this analysis, this Part provides a framework, consistent with current Court decisions, for considering habeas petitions to

---

113 *Williamson v Gregoire*, 151 F3d 1180, 1183 (9th Cir 1998).

114 Id.

115 Id at 1184 (noting that the revocation of a driver's license, which had been held by several courts not to meet the "in custody" requirement, constitutes a much greater restraint on one's movements than does sex offender registration).

116 See generally, for example, Stephen C. Dries, *Sex Predators and Federal Habeas Corpus: Has the Great Writ Gone Awol?*, 39 Suffolk U L Rev 673 (2006) (discussing the application of the Supreme Court's habeas jurisprudence to defendants deemed sex predators); Kerri L. Arnone, Note, *Megan's Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief?*, 42 Ariz L Rev 157 (2000) (examining Supreme Court precedent on the "in custody" requirement and applying it to the case of Megan's Law defendants seeking habeas review); Kimberly A. Murphy, *The Use of Federal Writs of Habeas Corpus to Release the Obligation to Report under State Sex Offender Statutes: Are Defendants 'In Custody' for Purposes of Habeas Corpus Review?*, 2000 L Rev Mich St U Detroit C L 513 (arguing that sex offenders should be able to use federal habeas review to attack state registration requirements); Tina D. Santos, Note, Williamson v. Gregoire*: How Much Is Enough? The Custody Requirement in the Context of Sex Offender Registration and Notification Statutes*, 23 Seattle U L Rev 457 (1999) (arguing that the Ninth Circuit erred in holding that a petitioner subject to Washington's sex offender registration scheme was not "in custody" for habeas purposes).

expired convictions based on subsequent incarceration for necessary-predicate-based offenses.

A. *Coss* and *Daniels* Do Not Control Habeas Relief for Necessary-Predicate-Based Offenses

In *Coss*, the Court indicated its holding was limited to situations in which the expired conviction was used to enhance a later sentence. For example, the Court stated that it was addressing whether "federal post-conviction relief is available when a prisoner challenges a current sentence on the ground that it was enhanced based on an allegedly unconstitutional prior conviction."[117] If the Court were attempting to rule on the validity of challenges to all expired convictions, it could have made a much broader statement of the issue.[118]

Other sections of *Coss* further support a narrow reading of the opinion. For example, when the Court addressed the specifics of challenges it would allow for expired convictions, it first explained that convictions "no longer open to direct or collateral attack in [their] own right . . . may be regarded as conclusively valid."[119] This sentence appears to be broadly applicable, and establishes a presumption that any expired sentence is final; however, this presumption does nothing to alter the holding of *Maleng* and the line of "custody" cases that led to it. The Court then turned to enhanced sentences, and found that "the defendant generally may not challenge the enhanced sentence" in a habeas petition, except when one of the exceptions outlined in Part I.D exists.[120] That the Court first presumed finality, and then asked whether that finality can be challenged during an enhancement, suggests that the type of reliance upon the expired sentence is the operative part of the inquiry into rebutting that presumption. The significant differences between sentence enhancements and sentences necessarily predicated on earlier convictions suggest that this inquiry should be different for necessary-predicate-based offenses.

---

117 *Coss*, 532 US at 396.

118 One court's restatement of the *Coss* holding is instructive: "The rule adopted in *Coss* is clear: After a sentence has been fully served, the conviction that caused that sentence is not subject to federal habeas corpus review, even if that conviction enhanced a later sentence, *(or otherwise affected a later proceeding*), for which the petitioner is still in custody." *Stevens v Fabian*, 2009 WL 161216, *13 (D Minn) (emphasis added). The court broadened the Supreme Court's holding with the parenthetical, which would not have been necessary had the court itself issued such a broad ruling.

119 *Coss*, 532 US at 403.

120 Id at 403–04.

Furthermore, throughout the opinion, the Court extensively discussed factors only relevant in the sentence enhancement context. For example, it engaged in a lengthy discussion of how the judge arrived at Coss's sentencing guideline range. This discussion would have been unnecessary had the Court intended its holding to be broadly applicable to all expired sentences.

It is also notable that the Court issued *Coss* and *Daniels* on the same day, though they both dealt with habeas challenges to expired convictions, the difference being that one dealt with a challenge to a federal sentence and the other a state sentence. Had the Court wished to rule broadly on expired convictions, it would likely not have issued separate rulings treating the challenges to expired convictions separately based on whether they were enhanced in a state or federal proceeding.[121]

B. Habeas Challenges to Necessary Predicate Offenses under *Maleng* and Its Predecessors

Prior to *Coss*, it seems probable that the evolving definition of "custody" that led to *Maleng* would have allowed for a habeas challenge to an expired necessary predicate offense based on its later consequences, specifically an arrest for failure to register as a sex offender or civil commitment as a sexually violent person. The *Maleng* Court held that an offender could "assert[] a challenge to the [current] sentence, as enhanced by the allegedly invalid prior conviction."[122] The *Maleng* Court declined to decide to what extent that prior conviction itself could be challenged, leaving courts to make case-by-case decisions as to whether there was "a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration" and then to use their considerable discretion and decide whether to engage in an examination of the prior conviction.[123] Although this nexus requirement had to be demonstrated in the context of sentence enhancements, it is beyond question that there is always a positive, demonstrable relationship between a prior conviction and subsequent incarceration for a necessary-predicate-based offense. (Without the sex offense conviction, the offender *cannot* be arrested for failing to register

---

121 For an example of the Supreme Court consolidating cases in order to reach a broader opinion, see generally *Miranda v Arizona*, 384 US 436 (1966) (ruling on three state supreme court opinions and one federal court of appeals opinion).

122 490 US at 493. For a more complete discussion of the *Maleng* decision, see Part I.C.

123 *Sinclair v Blackburn*, 599 F2d 673, 676 (5th Cir 1979) (per curiam) (affirming the denial of a habeas petition made by a prisoner for an earlier conviction because he did not satisfy the "in custody" requirement).

as a sex offender.) Therefore, after *Maleng*, the "in custody" requirement would be satisfied if the "nexus" requirement were satisfied, and the "nexus" requirement would *always* be satisfied in the case of later incarceration for a necessary-predicate-based offense.

The satisfaction of the "custody" requirement for the necessary-predicate-based offense is consistent with the judicial development of the "in custody" requirement itself, from the "static, narrow, formalistic remedy" that required instant physical confinement to a writ whose "scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[124] After *Maleng*, Courts seemingly had broad leeway to address necessary predicate offenses and to remedy the issues raised by petitioners "as law and justice require."[125]

The *Coss* and *Daniels* decisions narrowed the availability of challenges to expired convictions by adding prudential constraints that cabined courts' discretion to entertain challenges to expired convictions even if the traditional custody requirement were satisfied. Though limited to the sentence enhancement context, the constraints introduced in *Coss* and *Daniels* and the reasoning animating those constraints must be considered when deciding whether habeas should be available in the necessary predicate context.

C. Prudential Constraints in *Coss* and *Daniels*

In *Coss* and *Daniels* the Court addressed "the question [ ] explicitly left unanswered in *Maleng*: the extent to which the prior expired conviction itself may be subject to challenge in the attack upon the current sentence which it was used to enhance."[126] In effect, the Court introduced prudential constraints into the expansive definition of custody reached in *Maleng*. Prior to these decisions the "custody" question was binary, but *Coss* and *Daniels* limited the importance of the "in custody" inquiry, and added an additional hurdle that petitioners had to satisfy before a court could reach an expired conviction. In creating a rebuttable presumption (no habeas challenges to expired sentences based on sentence enhancements except in three narrow circumstances), the Court considered several factors: (1) the need for finality of convictions; (2) ease of administration; (3) the ability of the accused to avoid further con-

---

124 *Jones*, 371 US at 243. See Part I.A–B.

125 28 USC § 2243.

126 *Coss*, 532 US at 402 (quotation marks omitted).

sequences from an expired conviction; and (4) the availability of other avenues of recourse and incentives to pursue those avenues.[127]

Though *Coss* and *Daniels* addressed sentence enhancements, and do not control the necessary predicate situation, the reasoning that animated those holdings is consistent with the habeas jurisprudence of the last two decades and its focus on constraining availability of the writ because of finality and federalism considerations. In order to achieve a workable solution to the necessary predicate situation, the factors examined in those opinions must be applied to necessary-predicate-based offenses, and the differences between sentence enhancements and those offenses must be explored. While certain factors apply equally in both situations, an analysis will demonstrate that on balance the prudential constraints imposed by *Coss* and *Daniels* should not apply to registration offenses in particular.

1. Finality of convictions.

The "presumption of regularity" in expired convictions that states rely upon does not differ significantly when dealing with either sentence enhancements or necessary predicate offenses. In both situations, states retain a strong interest in upholding the validity of their convictions, and being able to rely upon those convictions in imposing civil disabilities on convicted felons, such as revocation of the right to vote or right to serve on a jury. States also maintain a strong interest in the ability to administer sex offender registration schemes. An assurance of the finality of the convictions that states rely upon in implementing those schemes is nearly as important as the assurance of finality and regularity a sentencing judge must have in order to impose additional prison time upon a recidivist offender. Although the imposition of jail time could be considered more dependent upon the validity of an earlier conviction than is a civil registration scheme.

2. Ease of administration.

The concerns regarding "ease of administration" also do not differ significantly between sentence enhancements and necessary predicate offenses for individual cases. In either situation a federal judge may be required to "rummage" through decades-old state records and revisit cases in which witnesses are difficult to locate, dead, or lack memories of the events at issue. However, in the aggregate the "ease

---

127 For a discussion, see Part I.D.

of administration" concerns differ significantly. The sheer difference in numbers of those who would be eligible to challenge their expired convictions based on sentence enhancements versus necessary-predicate-based offenses suggests that prudential considerations are weaker in the necessary predicate context. In 2007, for example, 47 percent of upward sentence departures stemmed from "criminal history," by far the most common reason for such departures.[128] More than 50 percent of federal offenders in 2007 (more than thirty thousand people) had prior criminal history factored in when determining their guideline sentence range.[129] Nearly three thousand offenders received sentencing adjustments as "career offenders" or "armed career criminals."[130] Even a conservative estimate that assumes only 10 percent of the 1.5 million people imprisoned nationwide have their sentences enhanced would mean 150,000 potential habeas challenges to expired convictions. During 2004 to 2007, however, only 4,503 people were arrested for failing to register as sex offenders nationwide.[131] From a practical perspective, the Court could not be expected to open the federal courts up to hundreds of thousands of viable habeas challenges, but the relatively small number at issue for registration offenses suggests that the practicality of allowing challenges would not be a dispositive factor for the Court.[132]

These concerns are even less present in the context of civil commitment proceedings, because civil commitment proceedings require their own independent process (which will be discussed further below).[133]

---

128 United States Sentencing Commission, *Reasons Given by Sentencing Courts for Upward Departures from the Guideline Range* (2007), online at http://www.ussc.gov/ANNRPT/2007/Table24.pdf (visited Apr 18, 2009).

129 United States Sentencing Commission, *Offenders in Each Offense Level and Criminal History Category* (2007), online at http://www.ussc.gov/ANNRPT/2007/Table21.pdf (visited Apr 18, 2009).

130 United States Sentencing Commission, *Offenders Receiving Career Offender/Armed Career Criminal Adjustments in Each Primary Offense Category* (2007), online at http://www.ussc.gov/ANNRPT/2007/Table22.pdf (visited Apr 18, 2009).

131 Department of Justice, Office of Inspector General, *Review of the Department of Justice's Implementation of the Sex Offender Registration and Notification Act* vi (Dec 2008).

132 Should other necessary-predicate-based offenses be implemented that would lead to a significantly higher number of challenges this reasoning may not hold. As discussed below, the availability of these challenges should incentivize courts and legislators to provide warnings that would obviate the need for an increased caseload.

133 States are allowed to establish their own procedures for civil commitment. See, for example, *Poole v Goodno*, 335 F3d 705, 708, 710 (8th Cir 2003):

> The Supreme Court has permitted states to set their own procedural requirements for civil commitments . . . [a]lthough the commitment trial is to the court without a jury, the court must find by clear and convincing evidence that the proposed patient meets the requirements to be considered [sexually dangerous].

3. The ability of the accused to avoid further consequences from an expired conviction.

The distinction between sentence enhancements, registration offenses, and civil commitments is particularly acute in the context of the ability to avoid later consequences of prior activity. First, those subject to later consequences from registration offenses face those consequences by virtue of their prior conviction alone, without the need for a subsequent, independently culpable or malum in se offense. Second, those facing sentence enhancements have the opportunity to mitigate the effect of the expired conviction by appealing to the sentencing judge, while those subject to registration requirements or civil commitment often have their later consequences predetermined by their earlier offense. Third, those facing civil commitment face a similar opportunity to those facing sentence enhancements, in that independent facts must be established to warrant continued confinement.

The *Daniels* Court suggested that the "knowledge [that a prior conviction remains on one's record] should serve as an incentive not to commit a subsequent crime and risk having the sentence for that crime enhanced."[134] Convictions based on registration offenses differ from enhanced sentences in that the latter only lengthens the period of confinement for a subsequent crime, while the former results in reincarceration even though the defendant lacks independent criminal culpability.[135] Judicial recognition that failure-to-register offenses do not entail the same level of culpability as other criminal acts has a history that spans at least fifty years. The Ninth Circuit, for example, recently characterized the violation of a sex offender registration scheme as a "passive, harmless, and technical violation."[136] Five decades earlier, in *Lambert v California*,[137] the Supreme Court held that a felon registration scheme in Los Angeles violated due process by not providing fair

---

Regardless, continued confinement is not allowed without satisfying due process requirements. See *Vitek v Jones*, 445 US 480, 493–94 (1980):

> A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

134 *Daniels*, 532 US at 381 n 1.

135 See Part II.A.

136 *Gonzalez v Duncan*, 551 F3d 875, 877, 885 (9th Cir 2008) (holding that failing to register as a sex offender could not serve as a "third strike" that would lead to life imprisonment because it would be cruel and unusual punishment).

137 355 US 225 (1957).

notice of the registration requirements.[138] While the criteria *Lambert* provided to differentiate the registration scheme from other criminal offenses was applied in the due process context, it also provided a more general description of how failure-to-register offenses lack independent criminal culpability.

Legal interpretations of *Lambert* focus on three factors that the Court used to distinguish failure-to-register offenses from the wider universe of criminal offenses.[139] First, the conduct at issue "is wholly passive—mere failure to register . . . is unlike the commission of acts."[140] Second, the "duty to act [is] triggered by mere status"; in *Lambert* the status at issue was being in Los Angeles.[141] Third, the conduct itself is malum prohibitum; in *Lambert* for example, "[b]eing in Los Angeles is not per se blameworthy."[142] Essentially, *Lambert* created a classification of offenses that are: (1) acts of omission; (2) triggered by status; and (3) malum prohibitum rather than malum in se. While *Lambert*'s classification applied to a due process inquiry, these criteria demonstrate that registration offenses can be characterized as lacking the independent criminal culpability of other criminal offenses, such as later offenses to which sentence enhancements are applied. Registration offenses operate much like the collateral bar rule, which allows for a judge to hold a defendant in criminal contempt for violating a court order, but does not allow the defendant to challenge the underlying merits of that order.[143] In the context of a court order, however, the defendant may escape the collateral bar rule by asking the judge

---

138 Id at 228 ("Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.").

139 See, for example, Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 Am Crim L Rev 1, 16–17 (1995).

140 *Lambert*, 355 US at 228 (1957). See also *United States v Weiler*, 458 F2d 474, 478 (3d Cir 1972) ("While a line between offenses of commission and omission may sometimes be difficult to draw and, when drawn, may not always be a satisfactory yardstick, the distinction is nevertheless a legitimate consideration.").

141 Susan L. Pilcher, 33 Am Crim L Rev at 16–17 (cited in note 139).

142 *United States v Freed*, 401 US 601, 608 (1971) (discussing the *Lambert* decision). See also Michael L. Travers, Comment, *Mistake of Law in Mala Prohibita Crimes*, 62 U Chi L Rev 1301, 1301 n 3 (1995):

> Mala prohibita ("wrongs that are prohibited") criminal offenses proscribe conduct that is wrongful simply because a legislature has chosen to criminalize it; examples of such crimes include speeding and disposing of hazardous waste without the appropriate permit. In contrast, mala in se ("wrongs in themselves") crimes are those that traditionally have been regarded as inherently evil; examples include rape and larceny.

143 See *Authority of the Trial Judge*, 38 Georgetown L J Ann Rev Crim Pro 581, 591 n 1794 (2009) ("The collateral bar rule provides that a defendant may not violate a court order and then challenge the order's constitutionality as [a] defense in a criminal-contempt proceeding.").

to vacate the order, whereas in the context of a registration offense states may or may not provide varying avenues for those subject to registration requirements to escape the consequences of those requirements.

Similarly, in *Coss* and *Daniels* the Court's concerns may have been mitigated because proposed sentence enhancements are subject to an adversarial proceeding in front of a sentencing judge, who has significant discretion to revisit the facts of the expired conviction and adjust his sentence accordingly.[144] In the case of failure to register as a sex offender, for example, the sentencing judge may be constrained by mandatory minimum sentences (as was the judge who sentenced Cedric Bradshaw to life in prison)[145] and can usually consider only whether the registration took place or not, if it was a first or subsequent offense, and the criminal history of the offender.

In the context of civil commitment, the defendant also has significant avenues available to avoid the later consequences of a necessary predicate offense. To begin with, many civil commitment statutes do not require a predicate criminal conviction at all; even an arrest without conviction or an acquittal can lead to eligibility for civil commitment.[146] Civil commitment requires that the person subject to it be "unable to control their behavior and [ ] thereby pose a danger to the public health and safety."[147] Typically, civil commitment statutes require both "evidence of past sexually violent behavior *and* a present mental condition that creates a likelihood of such conduct in the future if the person is not incapacitated."[148] Because of this, an underlying offense alone is not sufficient for civil commitment; instead, a court must find present dangerousness, of which the prior conduct may be considered evidence.[149] Those facing civil commitment must be afforded due process protections that allow them to challenge the grounds for their commit-

---

144 Although federal enhancements are based on the federal guidelines, those are merely advisory and a judge has wide discretion to sentence within and below the guideline range. Sentences are also subject to an adversarial proceeding. See *United States v Booker*, 543 US 220, 245 (2005) (noting that the Sentencing Act, as modified by the Court's holding, "requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well").

145 See note 6.

146 See, for example, *Kansas v Hendricks*, 521 US 346, 362 (1997) (affirming that a Kansas statute providing for civil commitment was not intended to be punitive and so could be applied to individuals absolved of criminal responsibility).

147 Id at 357.

148 Id (emphasis added).

149 Id at 370 (affirming that the statute at issue used prior convictions and charged conduct as evidence of "mental abnormalit[ies]" and "personality disorder[s]").

ment.[150] Because a habeas petitioner who is civilly committed would indisputably be considered "in custody" under their present commitment, they would be able to challenge the grounds for their confinement, including the continued relevance or validity of an expired conviction that served as evidence of their current sexual dangerousness.

Thus, in evaluating the ability of a defendant to avoid further consequences from his prior conduct, it is clear that those subject to registration offenses face a situation markedly different from those facing sentence enhancements or those who are civilly committed.

4. The availability of and incentives to pursue other avenues of recourse.

Coss and *Daniels* foreclosed habeas review in part because defendants have "multiple forums" of review available, both on direct appeal and in post-conviction proceedings.[151] But the Court also considered whether the incentives realistically existed for a defendant to pursue review prior to sentence enhancement for a subsequent offense. In *Daniels*, Justice Souter prompted this discussion of incentives by arguing that the defendant "may well have foregone direct challenge [to the expired conviction] because the penalty was not practically worth challenging, and may well have passed up collateral attack because he had no counsel to speak for him."[152] But faced with a fifteen-year mandatory minimum sentence, it is easy to see where the defendant's cost-benefit analysis may have shifted.

> In denying him any right to attack convictions later when attacks are worth the trouble, the Court adopts a policy of promoting challenges earlier when they may not justify the effort and perhaps never will. That is a very odd incentive for a court to create, and the eccentricity is hardly softened by the likelihood that most defendants will not notice before it is too late.[153]

---

150 See, for example, *Sisneroz v California*, 2009 WL 302280, *13 (ED Cal):

> [I]n order to satisfy due process, a prisoner facing transfer for involuntary commitment to a mental hospital is entitled to: (1) written notice; (2) a hearing at which the evidence relied upon for the commitment is disclosed to the prisoner; (3) an opportunity at the hearing for the prisoner to be heard in person, to present testimony and documentary evidence, and to cross-examine witnesses called by the State; (4) an independent decision-maker; (5) reasoned findings of fact; (6) legal counsel; and (7) effective and timely notice of those rights.

151 See Part I.D.

152 532 US at 391 (Souter dissenting).

153 Id.

Justice O'Connor pushed back against this reasoning because of the defendant's ability to avoid further consequences by not committing a subsequent crime.[154] Defendants subject to later consequences from necessary predicate offenses, however, may not be able to avoid later consequences because of the lack of independent criminal culpability, leaving them with only the ability to fight their convictions at the outset. However, a distortion in the incentives that adhere to a defendant exists in the case of necessary predicate offenses because of the lack of a requirement that a defendant be informed of the "collateral consequences" of his conviction. While there is a constitutional requirement that a defendant be informed of the "direct" consequences of a guilty plea (like the potential length of a sentence), there is no requirement that the defendant be warned of other possible consequences, such as the possibility of civil commitment as a sexually violent person or being subject to a sex offender registration scheme.[155] In many cases there would be nothing to warn the defendant about because these schemes often apply retroactively.

To illustrate, a criminal facing a fifty-year sentence would fight that sentence harder than the same criminal facing a one-year sentence. If the criminal is aware of the length of the possible sentence, he has the ability to engage in an accurate cost-benefit analysis to determine how much to spend on a defense, whether to take a plea deal, or whether to go to trial. Empirical evidence suggests that if a defendant is aware of civil commitment or sexual registration schemes when going through the trial or appeals process, the defendant will expend more resources because defendants expend more resources fighting longer sentences.[156] In the context of sex offenses this may be particu-

---

154 See Part III.C.3.

155 *Virsnieks v Smith*, 521 F3d 707, 715 (7th Cir 2008) (noting that a guilty plea is "voluntary and intelligent" as long as a defendant has been informed of its direct consequences). But see *State v Bellamy*, 835 A2d 1231, 1238 (NJ 2003) ("[W]hen the consequence of a plea may be so severe that a defendant may be confined for the remainder of his or her life, fundamental fairness demands that the trial court inform defendant of that possible consequence."). For a criticism of the distinction that courts draw between "direct" and "collateral" consequences in the context of the constitutional warning requirement during guilty pleas, see Jenny Roberts, *The Mythical Divide between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 Minn L Rev 670, 672–73 (2008) ("By strictly circumscribing the category of direct consequences, courts promote finality and efficiency in the plea bargain process. . . . This approach, however, completely ignores defendant's right, and need, to know what he is truly getting himself into by waiving his constitutional rights to trial and to remain silent.").

156 John Scalia, *Federal Criminal Appeals, 1999, with Trends 1985–99*, Bureau of Justice Statistics Special Report 4 (Apr 2001):

> Defendants who filed a criminal appeal during 1999 received prison sentences that, on average, were more than twice as long as the average prison term received by all defendants

larly acute, a recent empirical study shows that registration laws do have a deterrent effect, particularly on first-time offenders.[157] If the laws themselves have a noticeable deterrent effect, it can be assumed that those facing the consequences of those laws would also be affected in terms of their defense strategies.

The idea that defendants must have accurate information about potential consequences pervades the law, because of the principle that people should have the opportunity to conform their conduct so as to avoid facing criminal sanctions. This rationale can be seen in numerous areas of the law, including the "void for vagueness" doctrine, the "rule of lenity," and the constitutional ban on bills of attainder and ex post facto laws.[158] As recently explained by Judge Richard Posner, the ex post facto clause "gives people a minimal sense of control over their lives by guaranteeing that as long as they avoid an act in the future they can avoid punishment for something they did in the past, which cannot be altered."[159] Similarly a "conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited."[160]

Though the informational deficits described here may not rise to the level of a due process violation, and the Court has decided that sex offender registration schemes do not constitute an ex post facto law,[161] the constitutional norms underlying those doctrines still apply in the present context.[162] The natural law principles that require due process,

---

sentenced . . . 126 months for those appealing compared to 59 months for all defendants. . . . The rate at which defendants filed criminal appeals increased as the length of their prison terms increased.

157 J.J. Prescott and Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* *25–26 (University of Michigan Law School Olin Law & Economics Working Paper No 08-006, Feb 2008), online at http://papers.ssrn.com/abstract_id=1100584 (visited July 1, 2009).

158 See Cass R. Sunstein, *Legal Reasoning and Political Conflict* 102–06 (Oxford 1996) ("[T]he rule of law requires rules that are *clear*, in the sense that people need not guess about their meaning . . . [t]he 'rule of lenity' provides that in the face of ambiguity, criminal statutes will be construed favorably to the criminal defendant.") (emphasis omitted).

159 *United States v Dixon*, 551 F3d 578, 584 (7th Cir 2008).

160 *United States v Williams*, 128 S Ct 1830, 1845 (2008).

161 *Smith v Doe*, 538 US 84 (2003) (holding that sex offender registration schemes do not violate the Constitution's ban on ex post facto laws because they are civil laws).

162 The sometimes inseparable relationship between due process and habeas corpus has been emphasized in the recent War on Terror cases. See *Hamdi v Rumsfeld*, 542 US 507, 525 (2004) (plurality) ("Our resolution of this dispute requires a careful examination both of the writ of habeas corpus . . . and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance."); *Boumediene v Bush*, 128 S Ct 2229, 2269 (2008) ("What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."); id ("[T]here are places in the *Hamdi* plurality opinion where it is difficult to tell

ban ex post facto laws and disfavor retroactivity in other contexts also suggest that habeas corpus—as an extraordinary writ of last resort—should allow a remedy when an offender lacked information necessary to make a rational decision whether to fight his conviction.

Informational deficits tie directly into *Coss*'s dictum that a petitioner may be able to obtain habeas relief when that defendant "can[not] be faulted for failing to obtain timely review of a constitutional claim."[163] This *Coss* exception has not been successful in many cases thus far, but courts have explained how it could be given a fairly expansive reading. One opinion suggested that the "effectively" language could be read to reach ineffective assistance of counsel claims.[164] Another court found that the *Coss* exception could apply when the petitioner had been unable to challenge a Texas conviction that led to the revocation of his Louisiana parole because:

> [T]he truncated sentence imposed following his appeal expired well before petitioner was able to attack his Texas conviction in a federal petition for writ of habeas corpus. Thus, this seems to be the situation contemplated by the Court in *Coss* where petitioner should not be " . . . faulted for failing to obtain timely review of a constitutional claim."[165]

These allowances are consistent with habeas jurisprudence interpreting the statute of limitations liberally to allow "one full bite," that is, "at least one meaningful opportunity for postconviction review."[166] While Justice O'Connor expressed concern in *Daniels* that a later enhancement should not give a petitioner "another bite at the apple," in the context of necessary-predicate-based offenses the petitioner often

---

where its extrapolation of [habeas corpus] ends and its analysis of the petitioner's Due Process rights begins.").

163 532 US at 405–06.

164 *Lyons v Lee*, 316 F3d 528, 535 (4th Cir 2003) (Gregory concurring) (suggesting the *Coss* exception could also apply to situations in which a Sixth Amendment violation was so substantial as to render the defendant effectively without the benefit of any legal representation).

165 *Glenn v Warden*, 2006 WL 2548762, *4 (WD La) (emphasis omitted).

166 Randy Hertz and James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 120 (Lexis 5th ed 2005) (examining cases in which courts have "forgo[ne] a literal interpretation" of the habeas statute of limitations in order to allow at least one meaningful postconviction review). See also *Duncan v Walker*, 533 US 167, 192 (2001) (Breyer dissenting) ("In two recent cases, we have assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review, and we have interpreted statutory ambiguities accordingly."); id at 183 (Souter concurring) ("[N]either the Court's narrow holding, nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity.").

did not even know to take the first bite because warnings of registration requirements or the possibility of civil commitment were not required.

D. Applying the *Coss*/*Daniels* Analysis to Necessary Predicate Offenses

The factors examined in the *Coss* and *Daniels* opinions suggest that the availability of habeas for necessary predicate offenses should be different than for sentence enhancements. While the finality concerns are equally present in both contexts, the "ease of administration" concerns are significantly less severe in the necessary predicate context, and in particular in the context of registration offenses because of the much smaller universe of potential habeas petitioners. Second, those subject to registration requirements from their necessary predicate offenses do not have the same opportunities to avoid those consequences as do those subject to sentence enhancements or civil commitment, both because failure-to-register offenses have traditionally been held to lack the culpability of other criminal acts, and because sentencing judges addressing the later consequences of registration offenses often lack the discretion that judges have when considering sentence enhancements. Third, petitioners have often been denied a true opportunity to contest their necessary predicate offenses because they did not have accurate information that would have properly incentivized them to challenge their convictions.

This analysis suggests that if petitioners did not originally have the requisite information to challenge a necessary predicate offense and are subject to later incarceration based on a registration offense but are unable to contest the merits of that incarceration, it would be consistent with *Coss* and *Daniels* to allow those challenges later. The remainder of this Part examines the distinctions that must be drawn in order to achieve a workable solution based on ensuring "one full bite of the apple" for those subject to later consequences for necessary predicate offenses in the context of civil commitment schemes and registration requirements.

1. Civil commitment schemes.

Civil commitment schemes present the same concerns about finality in revisiting expired convictions as do sentence enhancements. In terms of ease of administration, the concerns are similar, but not as significant because of the substantial procedural requirements that already attend civil commitment schemes. Those facing civil commitment have similar opportunities to avoid the future consequences of

their necessary predicate offenses as do those facing sentence enhancements because of the procedural requirements that attend civil commitment proceedings, and the fact that in a civil commitment proceeding incarceration is based not only upon prior acts but also upon a finding of present and future dangerousness. Those facing civil commitment are generally not required to have been informed about the possibility that their necessary predicate offense might serve as a basis for their later commitment, and thus may not have had the proper incentives to challenge their prior confinement or expired conviction when it would have been properly cognizable in habeas without running into the prudential bar of *Coss* and *Daniels*.

Those who have been civilly committed, therefore, have the ability to challenge the basis for their current confinement without the need to explicity revisit their prior convictions in the manner foreclosed by *Coss* and *Daniels*. Someone who has been civilly committed satisfies the jurisdictional "custody" requirement. A petitioner may, without implicating the *Coss*/*Daniels* prudential bar, for example, present facts that would undermine the relevance of a prior conviction, or otherwise suggest they are not currently dangerous, which would lead to their release from custody.

Because of the similarities between sentence enhancement proceedings and civil commitment proceedings, and because the factors that motivated *Coss* and *Daniels* are similar in both situations, the prudential bar erected in those cases should apply equally to this particular species of necessary-predicate-based offense.

2. Registration offenses.

The finality considerations present in the sentence enhancement context are equally applicable in the context of registration offenses. The ease of administration concerns, while equally applicable in individual cases, differ significantly in the aggregate because of the much smaller number of eligible petitioners—based on a "custody" analysis that would require arrest prior to the satisfaction of that jurisdictional element.

The major differences between registration offenses on the one hand and sentence enhancements and civil commitment on the other stems from the ability of the person subject to the registration offense to avoid the later consequences of the underlying, expired conviction, and the incentives that existed at the time of the conviction for the necessary predicate offense for the individual subject to the registration offense to seek recourse to avoid the registration requirements. These two considerations are intertwined and inextricable—those who had knowledge of the registration requirement at the time of their orig-

inal plea or trial for the necessary predicate offense should, consistent with the reasoning of *Coss* and *Daniels*, be held responsible for not pursuing those avenues of recourse at an earlier stage when the finality and ease of administration concerns were not as pressing. Those who did not have knowledge of those requirements at the time of the trial or plea for their underlying offense, however, cannot be faulted for failing to pursue those remedies at an earlier stage.

There are three categories of offenders subject to registration schemes: (1) offenders who were wholly unaware of the consequences because the schemes had not yet been put in place; (2) offenders who were not aware because there was no requirement that they be notified of "collateral consequences" like sex offender registration;[167] and (3) offenders who were aware of those consequences at the time of their conviction for the necessary predicate offense.

Some states, such as Alaska, require the court entering a guilty plea on behalf of a sex offender to "infor[m] the defendant in writing of the requirements of [the Act] and, if it can be determined by the court, the period of registration required."[168] Other states ask the sentencing court to inform the sex offender of registration requirements upon judgment or conviction, not during a plea negotiation or prior to a trial, but make explicit that "failure to include the certification in the order of commitment or the judgment of conviction shall not relieve a sex offender of the [reporting] obligations."[169] The usual mechanism for informing sex offenders of their reporting requirements is to do so upon release from prison. Usually the facility releasing the prisoner has an obligation to inform local law enforcement that the sex offender will be moving to their area.[170]

In addition, many states have limited the application of their laws to offenders sentenced after the law has been passed. But numerous other states have made the reporting requirements retroactive; and usually a sex offender required to register in one jurisdiction will have to continue registering when moving to another jurisdiction, regardless of the local registration requirements.[171]

---

167 *Virsnieks*, 521 F3d at 715 ("[A]lthough a defendant must be informed of the direct consequences flowing from a plea, he need not be informed of collateral consequences.").

168 Alaska Rules of Crim Pro 11(c)(4).

169 NY Corrections Law § 168(d) (enumerating the duties of courts under New York's Sex Offender Registration Act).

170 See, for example, 18 USC § 4042 (requiring the Bureau of Prisons to notify local law enforcement when a sex offender in federal custody is due to be released).

171 For fact sheets discussing registration requirements in all fifty states, see National Center for Missing and Exploited Children, *Child-Sexual-Exploitation State Resources*, online at

Many states require the sex offender to comply with the sex offender registration statutes regardless of whether the person has received notification of any obligation to comply with the statute.[172] However, in order to be convicted of failure to register, a jury must find that the defendant had actual knowledge of the registration requirements.[173] The inquiry in this situation, however, does not turn on whether there was knowledge before conviction, but rather, for reasons discussed previously, after the conviction. These considerations suggest two categories for evaluating whether challenges to necessary predicate offenses that serve as the bases for registration requirements should be cognizable in habeas.

a) Those who received warnings or had actual knowledge of registration requirements. In cases where offenders have been warned or have actual knowledge prior to a conviction that they may face registration requirements, the prudential bar of *Coss* and *Daniels* should apply. The Court has ruled in recent years consistent with the goals of federalism and finality, and though the ability to avoid later consequences from the necessary predicate offense does differ in the context of a registration scheme, in that something akin to the collateral bar rule applies and the merits underlying the requirement are still unreachable, the defendant had incentives at the time of conviction to present challenges to his conviction without upsetting the Court's goals for habeas.

b) Those who lack actual knowledge or were convicted before a registration scheme has been passed. Those petitioners who have been convicted of a necessary predicate offense and are later subject to a registration scheme that did not exist at the time of their conviction, or who lacked actual knowledge of that scheme at the time of their conviction, suffer the full weight of the informational deficits discussed earlier. In these situations, the petitioners should be able to mount challenges without regard to the prudential bar advanced in *Coss* and *Daniels*. While the petition would still be subject to the numerous other bars to habeas relief, in the event of cause and prejudice, and the filing of new claims, such a carve out to the *Coss*/*Daniels* bar would ensure the fundamental fairness and freedom from unlawful restraint that has long been a hallmark of habeas jurisprudence would

---

http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1346 (visited Apr 18, 2009).

172 See, for example, Alaska Stat § 12.63.010(a)(3) (requiring registration "by the next working day of becoming physically present in the state").

173 See *White v Dexter*, 2009 WL 1424373, *12 (ED Cal) (addressing the petitioner's claim that he did not believe he resided in California City and so was not subject to its registration requirements).

continue without unnecessarily upsetting the finality and federalism goals of recent habeas decisions. Such an exception is well rooted in habeas rulings. "Perhaps precepts of fundamental fairness inherent in 'due process' suggest that a forum to litigate challenges like petitioner's must be made available somewhere for the odd case in which the challenge could not have been brought earlier."[174] This situation has support in *Coss* itself where the plurality suggested that "[i]n [certain] situations, a habeas petition directed at the enhanced sentence may effectively be the first and only forum available for review of the prior conviction."[175]

c) Analyzing the outcomes of these rules. Instituting these two rules would lead to results that would be both consistent with the concerns regarding "finality" and "ease of administration" at issue in *Coss* and *Daniels* and the ability of habeas to serve its "grand purpose" of protecting against wrongful restraints on liberty.

First of all, it would encourage legislators to adopt warning requirements to make those subject to registration requirements aware of the continuing consequences of their convictions. Warnings are a low-cost measure that would then limit litigation related to later challenges, easing finality and administrative concerns. In addition, these warnings comport with the principles animating the constitutional guarantee that offenders be informed of the possible sentences that could stem from guilty pleas, and more generally with the due process concerns related to registration requirements highlighted in *Lambert*.

Second, many states would institute schemes limiting retroactivity. By imposing requirements only on those who have been convicted after the effective date of such schemes they would be able to then give warnings and limit untimely collateral litigation.

Third, in cases where schemes apply retroactively, a slight increase in collateral attacks may be expected; and though this would undermine the prudential goals advanced in *Coss* and *Daniels*, it would comport with the goals of habeas more generally in terms of providing a "first and only forum," "one bite at the apple," or ensuring "fundamental fairness."

Fourth, there may be situations in which offenders might purposely violate the law in order to become in "custody" for the purposes of bringing a habeas petition to their expired conviction. Though this would once again undermine the finality and ease of administration goals discussed in *Coss* and *Daniels*, because of the high cost associated with the ability to bring such a petition (getting arrested), and

---

174 *Daniels*, 532 US at 386 (Scalia concurring).

175 *Coss*, 532 US at 406.

the very low probability of success, it would be expected that only meritorious claims would be brought.

The expected outcomes of the rules outlined above therefore result in a desirable balancing of the prudential considerations that favor limiting habeas petitions to expired convictions, and the goals of lasting justice that are a hallmark of modern habeas jurisprudence as outlined in Part I.

CONCLUSION

The lengthy history and substantial power of habeas corpus are both a blessing and a curse. As has been shown in the recent War on Terror cases, the writ remains a remedy that has an unequaled power to bring about the release of those held unjustly. But its power has also brought about fear that it will be wielded by those who have no genuine need for it, and who rely on it instead of those remedies more properly applicable to their situations. Its history also bogs it down, tangling it up with antiquated notions of confinement that do not track the myriad methods of punishment, rehabilitation, and restraints that comprise today's criminal justice system.

In an effort to restrain the availability of habeas, the Court has limited its ability to revisit expired convictions, but in situations in which such a challenge is the only way to effectively escape a present confinement, as in the case of registration requirements based on necessary predicate offenses, either the habeas challenge must be allowed or the informational deficits inherent in the necessary-predicate-based class of crimes must be cured.

Although "custody" may not mean the same thing it did fifty years ago, or will mean fifty years from now, a combination of habeas challenges to expired convictions and information-forcing requirements will ensure that *all* criminal defendants facing confinement regardless of the laws on the books at the time of their prosecutions will have the same incentives to fight their necessary predicate offenses as do *all* of those to whom the new laws apply.