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FEDERAL HABEAS CORPUS AFTER *STONE V. POWELL*: A REMEDY ONLY FOR THE ARGUABLY INNOCENT?

Sam Boyte*

State prisoners lost several grounds for seeking federal habeas corpus relief¹ during the Supreme Court's 1975 term. In each case, the Court was prepared to admit, at least for the purposes of argument, that there were constitutional infirmities in the state criminal process which resulted in the confinement of the prisoner; nonetheless, the Court held that the prisoner would not be permitted to attack his conviction collaterally in federal court. Because the pris-

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The opinions expressed in this article are those of the author only.

1. The phrase "habeas corpus" commonly refers to the "Great Writ," *habeas corpus ad subjiciendum*. *Stone v. Powell*, 96 S. Ct. 3037, 3042 n.6 (1976), citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). That writ, long used to challenge the legality of confinement, is just one of a number of common law writs, several of which have modern counterparts, that issued to obtain the presence of parties at court. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1426-27 (2d ed. 1973) [hereinafter cited as BATOR *et al.*]; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-43 (1970). See generally Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243 (1965).

The authority of federal courts to grant the writ of habeas corpus is confirmed by 28 U.S.C. § 2241 (1970). Section 2254 of the Judicial Code makes clear the legislative intent that the authority of the federal courts includes granting the writ to inquire into the legality of the confinement of a state prisoner. The section provides that any federal judge may consider an application for a writ of habeas corpus by a state prisoner if the petitioner alleges that he is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (1970).

Federal prisoners may obtain relief on similar grounds by invoking a district court's general habeas jurisdiction under 28 U.S.C. § 2241 (1970). More commonly, however, a federal prisoner proceeds by way of a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (1970), which specifies in part that relief should be sought under this section rather than by an application for a writ of habeas corpus unless such relief would be ineffective or inadequate.

Section 2255 was enacted to ease administrative problems. A petition for habeas relief pursuant to section 2241 is properly addressed to the federal court in the district in which the prisoner is confined, whereas the section 2255 motion is submitted to the court where sentence was imposed. The administrative advantages of section 2255 are that the court reviewing the motions has ready access to the record of the proceedings which resulted in confinement of the prisoner and that section 2255 distributes collateral attacks on convictions among the various federal district courts, whereas exclusive reliance upon section 2241 would create an overload of such applications in the federal courts sitting in districts which happen to include a federal penitentiary. See *United States v. Hayman*, 342 U.S. 205, 213-19 (1952).

oner in *Francis v. Henderson*² had not complied with a state procedural rule requiring such challenges to be brought before trial, the Supreme Court held that he could not collaterally attack his conviction on the ground that Louisiana's method of selecting grand jurors was racially discriminatory.³ While acknowledging the potential for prejudice when a juror sees a criminal defendant dressed in distinctive prison garb, the Court held in *Estelle v. Williams*⁴ that a conviction was not subject to attack unless the defendant was compelled to stand trial in such clothing and that such compulsion did not exist where the defendant was denied use of his personal clothing for trial by a jailer rather than by the judge.⁵ As disappointing as those two decisions were to advocates of defendants' rights, the sense that state prisoners had "lost" a ground for collateral attack upon their convictions must have been greatest with Justice Powell's opinion in the case that the Court saved until the last day of the term, *Stone v. Powell*.⁶

Just seven years before, Justice Brennan had written for five justices in *Kaufman v. United States*⁷ the following ringing sentence: "Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial."⁸ At the announcement of the Court's decision in *Stone v. Powell*, Justice Brennan

2. 96 S. Ct. 1708 (1976).

3. Abraham Francis' claim was not that one race had been totally excluded from the grand jury which indicted him, but that the state's practice of exempting daily wage earners from serving on grand juries resulted in a racial mixture which differed from that of the general population. *Id.* at 1709 n.2.

4. 96 S. Ct. 1691 (1976).

5. The text accurately states the effect of the Supreme Court's holding; it should, however, be added that another way of stating the holding is that the Court declined to impute to the trial judge any knowledge of the jailer's action when the defendant had not communicated to the trial court any desire to avoid standing trial in prison garb. *See id.* at 1695-97.

6. 96 S. Ct. 3037 (1976). As Professor Mishkin has observed: "In quite human fashion, the Supreme Court typically leaves decision of some of its most difficult and controversial cases until the last day of the Term." Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56 (1965) [hereinafter cited as Mishkin].

7. 394 U.S. 217 (1969). Justice Brennan's opinion was written for a majority that included Chief Justice Warren and Justices Douglas, White and Fortas. Justices Black, Harlan and Stewart dissented. Justice Marshall did not participate in the decision or the consideration of the case. *Id.* at 231.

8. *Id.* at 225. The issue in *Kaufman* was not the availability of federal postconviction relief to a state prisoner, but to a federal prisoner who was proceeding under 28 U.S.C. § 2255 on a claim that unlawfully seized evidence had been introduced against him at trial. *Id.* at 219.

was part of a much-battered minority when Justice Powell stated for the majority: "In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."⁹ Arguably, the opinion in *Stone v. Powell* did more than discard Justice Brennan's premise in *Kaufman*;¹⁰ it also may have indicated the first acceptance by a majority of the Court of the argument that federal habeas relief should not normally be available to prisoners who allege only errors that do not cast doubt upon the trial court's determination that the prisoner in fact committed the proscribed acts which constituted his crime.¹¹

Justice Brennan's statement was an important part of the rationale of the decision, however, since the Court held that a federal prisoner should not be denied an opportunity to bring such a collateral attack when it would be available to a state prisoner seeking federal habeas corpus relief. *Id.* at 228. Three cases were cited in support of the contention that state prisoners could obtain federal habeas relief on claims that they were convicted on the basis of illegally admitted evidence. *See id.* at 225, citing *Mancusi v. DeForte*, 392 U.S. 364 (1968); *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Warden v. Hayden*, 387 U.S. 294 (1967).

9. 96 S. Ct. at 3052 (footnotes omitted). Justice Brennan dissented in an opinion joined by Justice Marshall. *Id.* at 3055. Justice White dissented in a separate opinion in which he joined "many of the reasons stated by Mr. Justice Brennan." *Id.* at 3071. He also argued that evidence seized in violation of the fourth amendment should, nevertheless, be admissible against a criminal defendant so long as the seizing police officer had made a reasonable good-faith attempt to comply with fourth amendment standards. *Id.* at 3071-74.

Justices Brennan and Marshall filed a joint dissent in *Estelle v. Williams*, 96 S. Ct. at 1698. Justice Brennan was the sole dissenter in *Francis*, Justice Marshall having taken no part in the decision of the case. 96 S. Ct. at 1712.

10. Justice Powell appended the following enigmatic footnote to his opinion in *Stone*: "The decision in *Kaufman* was the scope of § 2255. Our decision today rejects the dictum in *Kaufman* concerning the applicability of the exclusionary rule in federal habeas corpus review of state court decisions pursuant to § 2254. To the extent the application of the exclusionary rule in *Kaufman* did not rely upon the supervisory role of this Court over the lower federal courts, cf. *Elkins v. United States*, 364 U.S. 206 . . . (1960) . . . the rationale for its application in that context is also rejected." 96 S. Ct. at 3045 n.16. Because the majority opinion in *Kaufman* did not pretend to rest any part of its conclusion on the Supreme Court's supervisory function, it remains to be seen whether federal prisoners will have any advantage over state prisoners in attacking convictions. Justice Brennan apparently deems *Kaufman* to have been overruled. *See* 96 S. Ct. at 3058 n.5., 3063 n.14.

11. The concept of "factual guilt" has been defined by Professor Mishkin as follows: "[T]he term . . . refers to the individual having done the acts which constitute the crime with which he is charged." Mishkin, *supra* note 6, at 81 n.84. As to the contrasting concept of "legal guilt" see Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 16-18 (1964) [hereinafter cited as Packer].

In a concurring opinion in *Schneckloth v. Bustamonte*,¹² Justice Powell once advocated imposing a threshold of at least arguable innocence for some federal habeas corpus petitions, although that result-oriented concept of the function of the writ had theretofore proved unpersuasive to a majority of the Court.¹³ The contention of this article is that the acceptance of Justice Powell's opinion by the majority in *Stone v. Powell* did not mark the Court's acceptance of the threshold-of-innocence requirement. That assessment is supported by an examination of the text of the opinion and a comparison to the *Schneckloth* concurrence. Finally, it will be argued that it would be unwise to alter the writ's function as a method for testing the legality, or at a minimum the constitutionality, of the government action which resulted in a prisoner's confinement.¹⁴

I

Writing for the majority in *Stone v. Powell*, Justice Powell made no attempt to deny that the two prisoners whose cases were before the Court had been the victims of illegal searches.¹⁵ Lloyd Powell

12. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring). Justice Powell has not been the only judicial advocate of such a threshold. Chief Justice Burger and Justice Rehnquist joined his *Schneckloth* concurrence. *Id.* See also *Kaufman v. United States*, 394 U.S. 217, 231 (1969) (Black, J., dissenting); Friendly, *Is Justice Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) [hereinafter cited as Friendly].

13. Justice Black's argument that the considerations of finality should prevail when a habeas petitioner did not challenge the trial court's determination of factual guilt was rejected by a majority of the Court in *Kaufman*. 394 U.S. at 228-30; cf. Mishkin, *supra* note 6. For the relationship between the views of Justices Powell and Black, see text accompanying note 108 *infra*.

14. That the writ was broadly available to test the constitutionality of government action which brought about a prisoner's confinement was recognized in *Brown v. Allen*, 344 U.S. 443 (1953).

15. The opinion addressed two cases from different circuits for which state petitions for writs of certiorari had been granted during the 1974 term: *Rice v. Wolff*, 513 F.2d 1280 (8th Cir.), cert. granted, 422 U.S. 1055 (1975) (No. 74-1222); *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974), cert. granted, 422 U.S. 1055 (1975) (No. 74-1055).

The issue on which the Supreme Court ultimately decided the case, that the petitioners' claims were not ones cognizable on a habeas petition, received scant attention by the courts of appeals. The only reference to the issue in either opinion is the following footnote from the United States Court of Appeals for the Ninth Circuit:

Appellee also contends that failure to apply the exclusionary rule should not afford a basis for collateral attack upon a state conviction in federal court. He submits the contention "for the record," recognizing that it is contrary to recent precedent. E.g., *Whiteley v. Warden*, 401 U.S. 560 . . . (1971); *Mancusi v. DeForte*, 392 U.S. 364 . . . (1968); *Ramon v. Cupp*, 423 F.2d 248 (9th Cir. 1970). The Supreme Court explicitly

had been convicted of murder in 1968 in a California court after the court had rejected his contention that the murder weapon could not be introduced against him because it had been discovered when a police officer had arrested him in Nevada for violating an unconstitutionally vague vagrancy statute.¹⁶ While acknowledging that a portion of the statute resembled a statute which the Supreme Court declared unconstitutionally vague four years after the California court's ruling, Justice Powell determined that it was unnecessary to address the statute's constitutionality.¹⁷ In the second case, David Rice had been convicted of murder in 1971 by a Nebraska court after that court denied his motion to suppress explosives discovered in his house when police searched it on the basis of an allegedly inadequate warrant.¹⁸ Again, Justice Powell found no need to address the

approved the doctrine in *Kaufman v. United States*, 394 U.S. 217 . . . (1969), citing it as one basis for holding that failure to exclude evidence obtained in violation of the defendant's Fourth Amendment rights is a ground for collateral attack upon a *federal* conviction.

The issue was before the Court, but was not reached, in *Schneckloth v. Bustamonte*, 412 U.S. 218 . . . (1973) (Powell, J., concurring).

Powell v. Stone, 507 F.2d at 97 n.4 (emphasis in original).

16. The Henderson, Nevada, ordinance provided as follows: "Every person is a vagrant who: [1] Loiters or wanders upon the streets or from place to place without apparent reason or business and [2] who refuses to identify himself and to account for his presence when asked by any police officer to do so [3] if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification." 96 S. Ct. at 3039-40 n.1.

17. He wrote:

In support [of its holding that the statute was unconstitutionally vague, the federal court of appeals] relied principally on *Papachristou v. City of Jacksonville*, 405 U.S. 156 . . . (1972), where we invalidated a city ordinance in part defining vagrants as . . . "persons wandering or strolling around from place to place without any lawful purpose or object. . . ." *Id.*, at 156-157, n.1. . . . Noting the similarity between the first element of the Henderson ordinance and the Jacksonville ordinance it concluded that the second and third elements of the Henderson ordinance were not sufficiently specific to cure its overall vagueness. . . . Petitioner Stone challenges these conclusions, but in view of our disposition of the case we need not consider this issue.

Id. at 3040 n.2.

In addition to the vagueness grounds suggested by the court of appeals, Justice Brennan would have found the statute unconstitutional as an infringement upon an individual's fifth amendment self-incrimination privilege and as an impermissible attempt to avoid the fourth amendment's standards for arrest. *Id.* at 3069.

18. Rice, a member of the National Committee to Combat Fascism (NCCF), was convicted of the murder of a policeman who died when he examined a suitcase lying in the doorway of a home to which he had been sent in response to an apparently false emergency call. *Id.* at 3040-41.

merits of the claim, although there appeared to be little dispute that the warrant was defective and that the Nebraska Supreme Court had erred by upholding the denial of Rice's suppression motion.¹⁹

Justice Brennan professed not to understand the majority's ground for avoiding review of the merits of the claims presented by Powell and Rice.²⁰ His rhetorical feint, attributing the decision to a judicial rewriting of the habeas statutes,²¹ may have been foolhardy because it enhances the possibility that the rationale of *Stone v. Powell* will be misapprehended by advocates of the "Crime Control Model" of the criminal process.²² There are suggestions in Justice Powell's opinion that the majority would require a federal habeas petitioner to be able to establish, or at least assert, a colorable claim of innocence in addition to his allegation of constitutional error in his conviction. Justice Brennan provided a convenient summary of some of those indications, writing:

[T]he real ground of today's decision—a ground that is particularly troubling in light of its portent for habeas jurisdiction generally—is the Court's novel reinterpretation of the habeas statutes; this would read the statutes as requiring the District Courts routinely to deny habeas relief to prisoners 'in custody in violation of the Constitution or laws of the United States' as a matter of judicial 'discretion' . . . because such claims are 'different in kind' from other constitutional violations in that they 'do not 'impugn the integrity of the fact-finding process,' . . . and because application of such constitu-

19. There was little doubt that the affidavit in support of the warrant application was not sufficient to justify a finding of probable cause by the magistrate. The Supreme Court of Nebraska had upheld the denial of the suppression motion on the basis of information not given to the magistrate who had issued the warrant. 96 S. Ct. at 3041 n.3.

Not satisfied with the majority's hint that the Nebraska courts had misapplied search-and-seizure law, Justice Brennan reviewed the merits of Rice's claim in some detail, expressly found that the search was illegal, and chided the majority for not reaffirming more strongly its previous holdings that the state could not go behind the information presented to the issuing magistrate to rebuff a challenge to the validity of a search warrant. *Id.* at 3069-70.

20. *Id.* at 3056-57.

21. *Id.* at 3062. The habeas statutes are outlined in note 1 *supra*.

22. The phrase is drawn from Packer, *supra* note 11, at 9-11. Professor Packer described the Crime Control Model of criminal process as one in which the primary concern was the police investigation designed to weed out innocent suspects, identify the factually guilty individual and induce a guilty plea. "The complementary proposition is that the subsequent stages are relatively unimportant and should be truncated as much as possible." *Id.* at 13. See also *id.* at 57-59.

tional strictures 'often frees the guilty.' . . . Much in the Court's opinion suggests that a construction of the habeas statutes to deny relief for non-guilt-related constitutional violations, based on this Court's vague notions of comity and federalism . . . is the actual premise for today's decision. . . . For we are told that '[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government,' We are told that federal determination of Fourth Amendment claims merely involves 'an issue that has no bearing on the basic justice of [the defendant's] incarceration,' . . . and that 'the ultimate question [in the criminal process should invariably be] guilt or innocence.'²³

There is textual and nontextual evidence, however, that the opinion does not mandate such a lessening of the scope of habeas relief.

Although it is well to be mindful of the somewhat sullied reputation for candor in opinion writing of the *Stone v. Powell* majority,²⁴ the prudent course would be to take the Court at its word:

Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, . . . and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. As Mr. Justice Black recognized in this context, 'ordinarily the evidence seized can in no way have been rendered untrustworthy . . . and indeed often . . . alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.' . . . In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that

23. 96 S. Ct. at 3062 (citations to the majority opinion omitted).

24. See *Francis v. Henderson*, 96 S. Ct. 1708, 1714 (1976) (Brennan, J., dissenting); Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte*, 1975 WIS. L. REV. 484, 502 [hereinafter cited as Tushnet].

the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation.²⁵

That quotation is drawn from the footnotes of the opinion, however, and it will be seen that the footnotes of the majority's opinion contain much that should be accepted only as marginal law—legal propositions that may be edging into acceptance, but that also may be only the wistful thinking of the opinion writer. Thus, it is necessary to turn to the text of the opinion.

Perusal of the text supports the conclusion that *Stone v. Powell* concerns, not habeas corpus, but the utilization of what is claimed to be merely a judicially created tool, one that is used whenever it is determined that the tool can serve its intended purpose. Justice Powell began the dispositive final quarter of the opinion by writing:

We turn now to the specific question presented by these cases. . . . The question is whether state prisoners—who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by state courts at trial and on direct review—may invoke their claim again on federal habeas corpus review. The answer is to be found by weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.²⁶

His statement of the question, and particularly of how the answer is to be found, indicates that the rationale of the majority's opinion does not justify extension of the holding to matters other than the application of the rule which allows a defendant to prevent the

25. 96 S. Ct. 3052 n.37. The quotation may seem to make a nonsubstantive distinction, since it may matter but little that statutory habeas jurisdiction is left untouched if the Court directs the federal courts not to exercise their powers to the full extent authorized by Congress.

If the Court's holding were taken to mean that claims such as those presented by *Stone* and *Rice* were cognizable on a petition for habeas relief, but that federal courts were precluded from granting relief merely because the Supreme Court had directed them not to exercise jurisdiction, there could be a potential problem as to the authority of federal courts to refuse jurisdiction that had been conferred upon them by Congress. That problem, it is submitted, has been side-stepped by the refusal of the majority in *Stone v. Powell* to accept Justice Brennan's attempt to portray the majority's opinion as being concerned with the availability of federal habeas relief for constitutional claims.

26. 96 S. Ct. at 3049.

government from introducing at his criminal trial evidence that has been seized in violation of his fourth amendment right to be free from unreasonable searches and seizures by the government. Specifically, the words adopted to justify the majority's holding do not support a conclusion that federal habeas relief is to be available only to a petitioner who can point to some error in his conviction that casts doubt upon the finding of factual guilt.

Justice Powell stated the major premise of the *Stone v. Powell* opinion very directly: "The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment."²⁷ His sketch of the history of the rule emphasizes its evolution in Supreme Court decisions from *Weeks v. United States*²⁸ through *Mapp v. Ohio*.²⁹ In the historical development of the rule he found a single-mindedness that generally has escaped other scholars.³⁰ He acknowledged that two principal reasons have been

27. *Id.* at 3046. Justice Brennan did not choose to dwell upon his disagreement with the starting point of the majority's argument, but he did note it: "Although my dissent in [United States v. Calandra, 414 U.S. 338, 355 (1974)] rejected, in light of contrary decisions establishing the role of the exclusionary rule, the premise that an individual has no constitutional right to have unconstitutionally seized evidence excluded from all use by the government, I need not dispute that point here." *Id.* at 3059 (footnote omitted). In addition to his *Calandra* dissent, Justice Brennan penned a significant dissent in *United States v. Peltier*, 422 U.S. 531, 544 (1975), expounding his currently out-of-fashion view that the exclusionary rule is something more than merely a handy tool that the Court can use almost at will. For a sophisticated, exhaustive argument that due process requires that the exclusionary rule be acknowledged as a personal constitutional right, see Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).

28. 232 U.S. 383 (1914).

29. 367 U.S. 643 (1961). The opinion in *Weeks* addressed the question of admissibility of evidence at a criminal trial only indirectly by rejecting the contention that a court should admit any "competent" evidence without inquiring into how the evidence was obtained. See 232 U.S. at 394.

Support for the characterization of the exclusionary rule as a judicially created remedy is drawn from a comparison of *Wolf v. Colorado*, 338 U.S. 25 (1949), and *Mapp v. Ohio*, 367 U.S. 643 (1961). In *Wolf*, the Court held that application of the exclusionary rule, which had been broadly mandated for federal criminal prosecutions in *Gouled v. United States*, 255 U.S. 298 (1921), would not be required in state court proceedings. In *Mapp*, the Court stated that the factual premises of *Wolf* had become outdated, 367 U.S. at 651-53, and held that state courts were required to apply the rule. The sands that provided the support for *Mapp* have since been shifting. See Monaghan, *Foreword: Constitutional Common Law, The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 3-10 (1975) [hereinafter cited as Monaghan].

30. See, e.g., Monaghan, *supra* note 29, stating:

The *Mapp* majority justified the exclusionary rule as a fourth amendment remedy on a number of grounds, but ultimately held the rule binding upon the states because it was "an essential part of the right to privacy" protected by the due process clause of

offered in support of the rule: the "imperative of judicial integrity" and the deterrence of unlawful police conduct.³¹ Repeating a theme advanced previously by Justice Rehnquist in *United States v. Peltier*,³² Justice Powell found that the same pragmatic need to discourage police from unlawful searches supported both reasons.³³ He emphasized his perception that the Court had frequently sacrificed the "imperative of judicial integrity" to reasons of expediency,³⁴ permitting the introduction of illegally seized evidence if the defendant had no objection,³⁵ if the evidence was obtained in violation of the rights of someone other than the defendant who sought to suppress it,³⁶ and if the evidence is useful for impeachment purposes.³⁷ He also invoked the hoary principle that a court is not

the fourteenth amendment. Why the rule is 'an essential part' of that right has, however, never been made clear. . . .

Id. at 3 (footnotes omitted).

31. 96 S. Ct. at 3047. Justice Powell did concede that the Court's opinion in *Mapp* had justified extending the application of the rule to the states for several reasons. *Id.* at 3047 & n.21.

32. 422 U.S. 531, 536-39 (1975).

33. Powell noted:

The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

96 S. Ct. at 3047, quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960). See also Monaghan, *supra* note 29, at 4-5.

34. Other commentators have also confessed some difficulty in finding some substantive content for the concept. See, e.g., Monaghan, *supra* note 29, at 5 (discounting the idea that the judge becomes a "partner in wrongdoing" with the policeman by not excluding unconstitutionally obtained evidence).

35. 96 S. Ct. at 3047, citing *Henry v. Mississippi*, 379 U.S. 443 (1965). It is arguable, of course, that refusing to permit introduction of the evidence under such circumstances would be supportive of the policeman's unlawful conduct because it would allow the police, by illegally seizing evidence, to prevent the defendant from introducing evidence that was as much exculpatory as inculpatory. The controverted evidence in *Henry*, for example, possibly could have been used by the defendant to weaken the prosecution's case. See 379 U.S. at 451.

36. 96 S. Ct. at 3047, citing *Alderman v. United States*, 394 U.S. 165 (1969). A major premise of the Court's holding as to the defendant's lack of standing to invoke the exclusionary rule in *Alderman* was "that Fourth Amendment rights are personal rights which . . . may not be vicariously asserted." 394 U.S. at 174. Thus, the reliance in *Stone v. Powell* upon *Alderman* is somewhat ironic since Justice Powell also wrote the majority opinion in the post-*Alderman* case of *United States v. Calandra*, 414 U.S. 338, 348 (1974), where the Court rejected the contention that the exclusionary rule was a personal right.

37. 96 S. Ct. at 3047, citing *Walder v. United States*, 347 U.S. 62 (1954). The decision in *Walder*, however, would seem to reinforce, rather than dilute, the "imperative of judicial integrity." The trial judge's hands would be dirtied as much by cooperating with the defendant's perjury as with the government's illegal search. As the Court noted in *Walder*, the

to inquire into the method by which a defendant is brought into its jurisdiction³⁸ and his own comparatively recent opinion holding that considerations of judicial integrity do not preclude the presentation of unconstitutionally seized evidence to a grand jury.³⁹ Thus he concluded:

While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. . . .

The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.⁴⁰

Having thus narrowed the reasons for applying the exclusionary rule, Justice Powell next proceeded to an identification of the method for deciding when it should be applied.

Unsurprisingly, he found for the majority that “[a]s in the case of any remedial device, ‘the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.’”⁴¹ Discussing primarily his own opinion in *United States v. Calandra*,⁴² which held the exclusionary rule

impeachment theory for admitting illegally seized evidence would not be accepted if the government induced the defendant’s perjury in order to create an excuse for admitting the evidence. 347 U.S. at 66.

38. 96 S. Ct. at 3047, citing *Gerstein v. Pugh*, 420 U.S. 103 (1975). The Court had long before rejected attempts to apply that principle to illegal searches. As the *Gerstein* opinion indicates, 420 U.S. at 119, it can be traced back to *Ker v. Illinois*, 119 U.S. 436 (1886). The *Ker* rationale was important to the Court’s decision in *Adams v. New York*, 192 U.S. 585, 596 (1904), where evolution of the exclusionary rule was impeded temporarily. In *Weeks v. United States*, 232 U.S. 383, 394-97 (1914), however, the Court established a firmer ground for the exclusionary rule by rejecting an argument that the *Adams* decision had established a general rule that courts should not inquire into the source of proffered evidence.

39. 96 S. Ct. 3047, citing *United States v. Calandra*, 414 U.S. 338 (1974). To the extent that the “imperative of judicial integrity” is concerned with ensuring that the trial judge does not become a “partner in wrongdoing” with the unprincipled policeman, see note 34 *supra*, the *Calandra* decision is not directly relevant to Justice Powell’s argument in *Stone v. Powell*, since, as he noted in *Calandra*, no judge monitors the grand jury’s proceedings and the grand jury serves a function that is entirely different from that of a judicial determination of guilt at a criminal trial. 414 U.S. at 343-45. The judge’s limited involvement with a grand jury is, in fact, to assure that the grand jury itself does not infringe upon federally guaranteed rights, including those protected by the fourth amendment. *Id.* at 346 & n.4.

40. 96 S. Ct. at 3047-48 (footnote omitted).

41. *Id.* at 3048, quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974).

42. 414 U.S. 338 (1974).

inapplicable in grand jury proceedings,⁴³ and the earlier decision of *Walder v. United States*,⁴⁴ which permitted use of illegally seized evidence for impeachment purposes,⁴⁵ Justice Powell concluded that a "balancing process" was required. He quoted significant language from *Calandra*, including the following:

Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. . . . We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.⁴⁶

And he determined that the importance of *Walder* was that

the policies behind the exclusionary rule are not absolute. Rather, they must be evaluated in light of competing policies. In [*Walder*], the public interest in determination of truth at trial was deemed to outweigh the incremental contribution that might have been made to the protection of Fourth Amendment values by application of the rule.⁴⁷

Thus, the "answer" to the "specific question presented" about David Rice and Lloyd Powell,⁴⁸ was to be found by balancing the cost of enforcing the exclusionary rule in the context of a collateral attack upon a conviction against the possibility that enforcing the

43. See note 39 *supra*.

44. 347 U.S. 62 (1954).

45. See note 37 *supra*.

46. 96 S. Ct. at 3048, quoting *United States v. Calandra*, 414 U.S. 338, 351-52 (1974).

47. *Id.* at 3049. Justice Powell also noted cases which discussed who has standing to suppress unconstitutionally seized evidence and stated:

The standing requirement is premised on the view that the 'additional benefits of extending the exclusionary rule' to defendants other than the victim of the search or seizure are outweighed by the 'further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.'

Id., quoting *Alderman v. United States*, 394 U.S. 165, 174-75 (1969). See also note 36 *supra*. In addition, Justice Powell cited cases discussing whether the Court's exclusionary rule decisions would be applied retroactively. 96 S. Ct. at 3049 n.26. *But cf.* Wulf, *Limiting Prisoner Access to Habeas Corpus-Assault on the Great Writ*, 40 BROOKLYN L. REV. 253, 255-56 (1973) (distinguishing retroactivity issue) [hereinafter cited as Wulf].

48. See text at note 26 *supra*.

rule in that context would deter police from performing unconstitutional searches.

It was not difficult to load the balance against application of the rule, since its costs have often been catalogued.⁴⁹ Justice Powell emphasized that application of the exclusionary rule, even where its application is still mandated,⁵⁰ results in diverting the criminal justice process from the task of determining the defendant's guilt and results in barring the admission of relevant evidence if it is found that the police acted unlawfully in obtaining the evidence.⁵¹ The declining status of the exclusionary rule in the eyes of the *Stone v. Powell* majority then was made obvious: "Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."⁵²

It is noteworthy, however, that the text of the majority opinion does not claim that the cost of enforcing the exclusionary rule in the context of a collateral attack upon a conviction is any greater than

49. See 96 S. Ct. at 3049 n.27, citing *Irvine v. California*, 345 U.S. 128, 136 (1954); *Bivens v. Six Unknown Named Federal Agents*, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting); *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926) (Cardozo, J.); 8 WIGMORE, EVIDENCE § 2184a, at 51-52 (McNaughton ed. 1961); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 388-91 (1964) [hereinafter cited as Amsterdam]; Friendly, *supra* note 12; Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 736-54 (1970) [hereinafter cited as Oaks], and sources cited therein; Paulson, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L.C. & P.S. 255, 256 (1961); Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEXAS L. REV. 736 (1972).

50. Justice Brennan has noted "that the Court has yet to make its final frontal assault on the exclusionary rule." 96 S. Ct. 3037, 3056 n.1 (1976) (Brennan, J., dissenting). Thus the holding of *Mapp v. Ohio*, 367 U.S. 643 (1961), that the states must exclude unconstitutionally seized evidence at trial and on direct review "remains undisturbed." 96 S. Ct. at 3058. *But see* Monaghan, *supra* note 29, at 6-10 (questioning the Court's authority for insisting that the states apply the exclusionary rule if the rule has been severed from its constitutional foundation).

51. He revived Justice Black's previously rejected argument:

A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.

96 S. Ct. at 3050, quoting *Kaufman v. United States*, 394 U.S. 217, 237 (1969) (Black, J., dissenting). See note 13 *supra*.

52. 96 S. Ct. at 3050 (footnote omitted). At least one of the dissenters in *Stone v. Powell*

when the rule is applied at the initial trial or on direct appellate review. After repeating the litany of adverse consequences in those situations where *Mapp v. Ohio* requires that it be applied, the text of the majority opinion makes only the following conclusory statement: "These long-recognized costs of the rule persist when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts."⁵³

is sympathetic to that argument. Justice White is "of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief." 96 S. Ct. at 3072.

The decision in *Stone v. Powell* was of course not the only indication of the exclusionary rule's wane. In *United States v. Martinez-Fuerte*, 96 S. Ct. 3074 (1976), Justice Brennan, in dissent, charted the course of the Court's assault on the rule during the 1975 term alone.

Early in the Term, *Texas v. White*, 423 U.S. 67 (1976), permitted the warrantless search of an automobile in police custody despite the unreasonableness of the custody and opportunity to obtain a warrant. *United States v. Watson*, 96 S. Ct. 820 (1976), held that regardless [of] whether opportunity exists to obtain a warrant, an arrest in a public place for a previously committed felony never requires a warrant, a result certainly not fairly supported by either history or precedent. See *id.* at 832 (Marshall, J., dissenting). *United States v. Santana*, 96 S. Ct. 2406 (1976), went further and approved the warrantless arrest for a felony of a person standing on the front porch of her residence. *United States v. Miller*, 96 S. Ct. 1619 (1976), narrowed the Fourth Amendment's protection of privacy by denying the existence of a protectible interest in the compilation of checks, deposit slips, and other records pertaining to an individual's bank account. *Stone v. Powell*, 96 S. Ct. 3037 (1976), precluded the assertion of Fourth Amendment claims in federal collateral relief proceedings. *United States v. Janis*, 96 S. Ct. 3021 (1976), held that evidence unconstitutionally seized by a state officer is admissible in a civil proceeding by or against the United States. *South Dakota v. Opperman*, 96 S. Ct. 3092 (1976), approved sweeping inventory searches of automobiles in police custody irrespective of the particular circumstances of the case. Finally, in *Andresen v. Maryland*, 96 S. Ct. 2737 (1976), the Court, in practical effect, weakened the Fourth Amendment prohibition against general warrants.

Id. at 3087 (parallel citations omitted).

53. 96 S. Ct. at 3050. Appended to that statement, however, is the following footnote:

Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government. They include '(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded.'

Id. at 3050 n.31 (citations omitted). As to the significance of that and other footnotes in the opinion see notes 90-111 *infra* and accompanying text.

Instead of relying upon any increased costs that result from postconviction enforcement of the exclusionary rule, the majority based its holding in *Stone v. Powell* upon the determination that the benefits of the rule are negligible in that context. Having already effectively narrowed the purpose of the rule to the sole consideration of deterring unconstitutional searches,⁵⁴ Justice Powell's opinion for the majority then rejected "the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal."⁵⁵ Acknowledging that the deterrent purpose of the rule operates more as an educational device to inculcate fourth amendment ideals generally, rather than as an enforcement measure against individual overzealous policemen,⁵⁶ and that "each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment,"⁵⁷ Justice Powell nonetheless contended that repeated consideration of search-and-

54. See notes 31-33 *supra*.

55. 96 S. Ct. at 3051 (footnote omitted).

56. 96 S. Ct. at 3051. Justice Powell's willingness to acknowledge the point may have been induced partially by the fact that the more restrictive view of exclusionary-rule deterrence had been only recently soundly criticized. See *United States v. Peltier*, 422 U.S. 531, 556-58 (1975) (Brennan, J., dissenting). The persuasive force of Justice Brennan's argument in *Peltier* may have been augmented by the fact that he found support for it in two authorities much relied upon by Justice Powell. See *id.* at 557, 558 n.17, citing *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) [hereinafter cited as *Amsterdam, Perspectives*], and *Oaks, supra* note 49.

The acknowledgement that application of the exclusionary rule serves an educational function lends support to critics of the holding in *Stone v. Powell* since the effect of the holding is to leave standing erroneous interpretations of the fourth amendment requirements, thereby further clouding those requirements. Cf. *Terry v. Ohio*, 392 U.S. 1, 13 (1968) ("A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence. . . ."). Tolerating erroneous interpretations of the demands of the fourth amendment teaches only the lesson that the amendment "has no substantive content whatsoever." 96 S. Ct. 3037, 3056 n.1 (1976) (Brennan, J., dissenting). Moreover, instead of removing the incentive for illegal police conduct, the willingness to blur the boundaries of acceptable conduct provides a positive inducement for police to gather the evidence in any manner that they can in anticipation that some legitimate, or wrong but tolerated, exception to the exclusionary rule will permit the use of the evidence in some fashion to enhance the possibility of a conviction. Such a lesson in police techniques raises very directly the threat noted long ago by Justice Brandeis: "To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion).

57. 96 S. Ct. at 3051.

seizure claims in habeas petitions was more annoying than instructive.⁵⁸

The holding of *Stone v. Powell* thus rests, not upon a reinterpretation of the scope or function of federal habeas relief, but upon a determination that the costs of enforcing the exclusionary rule in the habeas context are as great as when the rule is applied at trial, and that whatever the benefits are of applying the rule at trial and on direct review,⁵⁹ they are less in the habeas context. The lessening of the benefits of the exclusionary rule shifts the balance in favor of not allowing federal courts to consider search-and-seizure claims when they are presented in habeas petitions by state prisoners, if they previously have been considered by the state courts.⁶⁰

58. In support of his statement that the "overall educative effect of the exclusionary rule would [not] be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions," *id.*, Justice Powell cited the following language from Professor Amsterdam: "As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance." *Id.* at n.34, quoting Amsterdam, *supra* note 49, at 389.

Invocation of that language to support denying consideration of a search-and-seizure claim in a habeas petition on the ground that it has already received repeated review at trial and on appeal ignores a point that Justice Powell himself made in *Schneekloth v. Bustamonte*, 412 U.S. 218, 263 (1973) (concurring opinion), namely, that fourth amendment claims frequently hinge upon a complicated factual pattern. The power of a federal habeas court to conduct an evidentiary hearing, *see* 28 U.S.C. § 2254 (1970), provides a better opportunity for review of such claims than that which is available in a succession of appellate-type reviews limited to the record developed in the trial court. *See* Tushnet, *supra* note 24, at 499.

59. Justice Powell's opinion suggests that the Court is continuing to attribute some benefit to application of the exclusionary rule at trial and direct review stages only because it lacks empirical evidence to rebut the assumption that such use of the rule discourages illegal police behavior. 96 S. Ct. at 3051. Although the Court more than a decade ago noted the difficulty of obtaining empirical evidence about the deterrent effect of the rule and used that factor as a reason for applying the rule despite the absence of supporting evidence, *see* *Elkins v. United States*, 364 U.S. 206, 218 (1960), the present Court evinces a tendency to hold that the difficulty of obtaining empirical evidence about the rule's effects is a factor that is to be weighed against application of the rule. *See* *United States v. Janis*, 96 S. Ct. 3021, 3030-32 (1976). For attempts to obtain empirical evidence and commentary on such attempts, *see* Amsterdam, *Perspectives*, *supra* note 56; Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L. REV. 681 (1974); Nagel, *Testing the Effects of Excluding Illegally Seized Evidence*, 1965 WIS. L. REV. 283; Oaks, *supra* note 49; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUDIES 243 (1973); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87 (1968); Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974).

60. The limitations of the balancing test for resolving exclusionary rule problems have

II

It is true that references to the scope and function of federal habeas corpus are not limited to the footnotes of the opinion.⁶¹ The first section of the opinion discussing the law relevant to the Court's decision⁶² consists of a sketch of the history of federal habeas corpus. Besides introducing the legal issue raised by the appeals, that first section also appears to serve the limited purpose of arguing that the Court's holding is not a departure from history.

The sketch of the history of federal habeas corpus concludes with the Court's first statement of its holding:

"We hold, therefore, that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."⁶³

It is apparent that the reference in the statement to what the Constitution requires does not refer to whatever scope the Constitution may have mandated for the "Great Writ,"⁶⁴ since the historical sketch of habeas corpus provided in the opinion provides some indication of the majority's acceptance of the view that the authority of the federal courts to issue the writ of habeas corpus flows from a statutory, not constitutional, wellhead.⁶⁵ Putting the statement of

often been noted, particularly in view of the subjective selection of the factors to be balanced. See, e.g., Tushnet, *supra* note 24 (criticizing the omission of certain factors); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974) (advocating that the seriousness of the crime charged against the defendant be considered as a factor in deciding whether to apply the rule).

61. See notes 53 *supra* and 91, 118 *infra*.

62. Justice Powell's opinion consists of four sections: a statement of the facts of the two cases including their procedural history, 96 S. Ct. at 3039-42; a recitation of the historical development of the law of federal habeas corpus, *id.* at 3042-46; a discussion of the pragmatism that, in his opinion, had characterized prior applications of the exclusionary rule, *id.* at 3046-49 and a balancing of the costs and utility of applying the exclusionary rule in collateral attacks upon convictions, *id.* at 3049-52.

63. 96 S. Ct. at 3045-46.

64. The sole reference to habeas corpus in the Constitution is the following language from article I: "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." U.S. CONST. art. I, § 9.

65. Justice Powell wrote: "The authority of federal courts to issue the writ of *habeas corpus*

the holding in context supports the conclusion that the majority did not base it upon a reinterpretation of the premises of federal habeas corpus.

The statement of the holding immediately follows the Court's conclusion that the "view" expressed in *Kaufman v. United States*⁶⁶ was "unjustified."⁶⁷ The view expressed in *Kaufman* that the *Stone v. Powell* majority rejected was that:

the effectuation of the Fourth Amendment, as applied to the states through the Fourteenth Amendment, requires the granting of habeas corpus relief when a prisoner has been convicted in state court on the basis of evidence obtained in an illegal search or seizure since those Amendments were held in *Mapp v. Ohio* . . . to require exclusion of such evidence at trial and reversal of conviction upon direct review.⁶⁸

The majority opinion states that the rejection of that view as "unjustified" is a conclusion made "in light of the nature and purpose of the Fourth Amendment exclusionary rule,"⁶⁹ not that the view is unjustified because federal habeas relief should be denied unless the petitioner can plead a colorable claim of innocence.

Justice Powell's sketch of the history of habeas corpus appears aimed at establishing that the holding in *Stone v. Powell* does not conflict directly with any prior decision of the Court.⁷⁰ Justice Bren-

ad subjiciendum was included in the first grant of federal court jurisdiction, made by the Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81. . . . The original statutory authorization did not define the substantive reach of the writ. It merely stated that the courts of the United States "shall have the power to issue writs of . . . habeas corpus. . . ." *Ibid.* The courts defined the scope of the writ. . . ." 96 S. Ct. at 3042.

It has been argued that the statutes are not needed for the federal courts to have authority to issue the writ of *habeas corpus ad subjiciendum*, the "Great Writ." See Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605. Justice Black believed that the Constitution lodged in the federal courts a habeas authority that was beyond being defined by Congress. See *Johnson v. Eisentrager*, 339 U.S. 763, 797-98 (1950). See also *Fay v. Noia*, 372 U.S. 391, 406 & n.15 (1963). The more common view, however, is that the statutes are necessary to confer habeas jurisdiction upon the federal courts. See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807).

66. 394 U.S. 217 (1969).

67. 96 S. Ct. at 3045.

68. *Id.* (citation and footnote omitted).

69. *Id.*

70. The discussion of the substantive scope of federal habeas corpus was also appropriate in view of the questions that the Court had asked the parties to address when it granted the petitions for writs of certiorari; that the Court was uncertain of the rationale it would use to dispose of the cases is indicated by the questions it addressed to the parties:

nan's assertion in *Kaufman* that previous Court decisions had left "no doubt" but that federal habeas relief was available to state prisoners with search-and-seizure claims⁷¹ created the need for a rebuttal. Thus Justice Powell outlined only so much of the history as was necessary to demonstrate that the writ's development did not indicate an unchanging view of the types of claims that could justify relief. He contended that only claims relating to the jurisdiction⁷² of the court imposing confinement had been cognizable until the early twentieth century when the Court's decision in *Frank v. Mangum*⁷³ indicated the possibility that federal courts also might issue the writ to review the failure of state courts to provide an adequate process for the consideration of federal claims. He also recounted the vacillation that had occurred in *Brown v. Allen*,⁷⁴ *Daniels v. Allen*⁷⁵ and *Fay v. Noia*⁷⁶ about the need for a petitioner to comply with legitimate state procedures before being able to seek federal habeas relief.⁷⁷

Whether, in light of the fact that the District Court found that the Henderson, Nev., police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional, respondent's claim that the gun discovered as a result of a search incident to that arrest violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution is one cognizable under 28 U.S.C. § 2254.

Stone v. Powell, 422 U.S. 1055 (1975) (granting certiorari).

Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C. § 2254.

Wolff v. Rice, 422 U.S. 1055-56 (1975) (granting certiorari).

71. See text at note 8 *supra*.

72. Justice Powell's historical sketch did acknowledge that the concept of jurisdiction had been used loosely to encompass claims that the conviction was based upon an unconstitutional statute or that the detention was based upon an illegal sentence. See 96 S. Ct. at 3042 & n.7, 3043 & n.8, citing *Ex parte Siebold*, 100 U.S. 371 (1879) (unconstitutional statute), and *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873) (illegal sentence).

73. 237 U.S. 309 (1915) (denying habeas relief to claim that conviction was obtained in mob-dominated trial on ground that state supreme court had adequately considered claim and denied relief).

74. 344 U.S. 443 (1953) (holding that claimed denials of constitutional rights were cognizable despite apparent formal adequacy of state corrective process which had denied relief).

75. 344 U.S. at 482-87 (holding that a petitioner's failure to comply with legitimate state procedural rules could bar federal habeas corpus relief).

76. 372 U.S. 391 (1963) (granting habeas relief despite failure of prisoner to comply with legitimate state procedural rule). See Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, in *THE SUPREME COURT AND THE JUDICIAL FUNCTION* 135 (P. Kurland ed. 1975).

77. That issue, which concerns whether the same type of adequate state ground that can

Approximately one-half of the habeas section of the opinion concerned *Kaufman* itself.⁷⁸ Justice Powell noted that prior to that decision, a number of lower federal courts had declined to permit collateral attacks upon convictions by federal prisoners asserting search-and-seizure claims.⁷⁹ He suggested that the decision in *Kaufman* not to approve those holdings was based upon an insufficiently critical application of precedents that should not have been controlling because none of those cases in which relief had been granted on search-and-seizure claims had come before the Court on the basis of a writ of certiorari specifically questioning the "substantive scope" of federal habeas corpus.⁸⁰ It was after pointing out that his own post-*Kaufman* concurring opinion in *Schneckloth v. Bustamonte*⁸¹ had raised the question of the desirability of examining the substantive scope of federal habeas jurisdiction that Justice Powell stated the majority's conclusion that Justice Brennan had erred in *Kaufman* in his view that the Fourth Amendment required the federal courts to consider search-and-seizure claims in habeas petitions.⁸²

By juxtaposing the reference to his *Schneckloth* concurrence, which comes close to imposing a threshold of innocence for federal habeas relief, with the majority holding in *Stone v. Powell*, Justice Powell enhanced the possibility that the latter opinion will be misinterpreted. The holding in *Stone v. Powell* is almost identical to the holding advocated by Justice Powell in *Schneckloth*, but differences in the two opinions indicate that the *Stone v. Powell* majority

bar direct review of a state conviction by the Supreme Court should also be a bar to federal habeas review, was well argued before *Fay v. Noia*, 372 U.S. 391 (1963). See Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959) [hereinafter cited as Hart], and Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961) [hereinafter cited as Reitz]. •

78. The *Kaufman* opinion itself was of course not directly contradictory, since it concerned a petition brought by a federal prisoner pursuant to 28 U.S.C. § 2255 (1970), rather than a state prisoner's petition brought pursuant to 28 U.S.C. § 2254 (1970). See notes 1 and 8 *supra*.

79. 96 S. Ct. at 3044 n.12, citing *United States v. Re*, 372 F.2d 641 (2d Cir.), cert. denied, 388 U.S. 912 (1967); *De Welles v. United States*, 372 F.2d 67 (7th Cir.), cert. denied, 388 U.S. 919 (1967); *Eisner v. United States*, 351 F.2d 55 (6th Cir. 1965); *Armstead v. United States*, 318 F.2d 725 (5th Cir. 1963); *Williams v. United States*, 307 F.2d 366 (9th Cir. 1962); *United States v. Jenkins*, 281 F.2d 193 (3d Cir. 1960).

80. 96 S. Ct. at 3044-45 & n.15.

81. 412 U.S. 218, 250 (1973).

82. See text accompanying notes 67-69 *supra*.

was not willing to accept all of the reasoning advanced in the *Schneckloth* concurrence.

III

Justice Powell's argument in *Schneckloth* was that the expanded availability of federal habeas relief during the twentieth century is appropriate only when the confinement challenged is "unjust" and that only "innocent" prisoners are unjustly confined. Although he stated the point, reiterated in *Stone v. Powell*, that the exclusionary rule has limited utility in the habeas context,⁸³ he devoted the greater portion of the opinion to a discussion of general principles of federal habeas relief. Supplying more details than in *Stone v. Powell*, he argued that it is only since the middle of the twentieth century that federal habeas relief has been available whenever a state criminal conviction has been obtained by violating the defendant's constitutional rights.⁸⁴

Acknowledging that "[n]o one would now suggest that this Court be imprisoned by every of particular habeas corpus as it existed in the late 18th and 19th centuries,"⁸⁵ he nevertheless asserted:

But recognition of that reality does not liberate us from all historical restraint. The historical evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court. . . .

. . . .
 . . . We are now faced . . . with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved, with due regard to all of the values implicated, by recourse to the central reason for habeas corpus: the affording of means . . . of redressing an *unjust* incarceration.⁸⁶

83. 412 U.S. at 266-71.

84. His analysis relies primarily upon Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) [hereinafter cited as Bator], and Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966) [hereinafter cited as Oaks, *Legal History*]. See 412 U.S. at 253 & n.3.

85. 412 U.S. at 256.

86. *Id.* at 256-58 (emphasis in original).

His definition of "unjust incarceration" is apparent from the following statement which he offered in support of his contention that review of search-and-seizure claims is not consistent with his view of the "central reason" for habeas corpus:

Prisoners raising Fourth Amendment claims collaterally usually are quite *justly* detained. The evidence obtained from searches and seizures is often 'the clearest proof of guilt' with a very high content of reliability. Rarely is there any contention that the search rendered the evidence unreliable or that its means cast doubt upon the prisoner's guilt.⁸⁷

He then adopted the following "threshold requirement" for a state prisoner seeking review of a fourth amendment claim in a petition for federal habeas relief: "I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt upon his guilt."⁸⁸

Certainly, the holding of the *Stone v. Powell* majority is presaged by the holding advocated by Justice Powell in *Schneckloth*: "I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts."⁸⁹ In *Schneckloth*, however, the suggested holding derived from the emphasis upon the petitioner's guilt or innocence as the determinant of whether the confinement is "just" and the argument that the continuing evolution of federal habeas corpus is warranted only when it tends toward remedying confinement that is not "just" under that standard. By the time of the *Stone v. Powell* opinion, the remnants of the *Schneckloth* con-

87. *Id.* at 258 (emphasis in original), quoting Friendly, *supra* note 12, at 160.

88. *Id.* at 265, quoting *Kaufman v. United States*, 394 U.S. 217, 242 (1969) (Black, J., dissenting). He also quoted approvingly the following statement from Judge Friendly:

'[W]ith a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.'

Id. at 265-66, quoting Friendly, *supra* note 12, at 142.

89. 412 U.S. at 250. The majority holding in *Schneckloth* concerned the standard of knowledge that should be required before a person's consent can excuse a warrantless search of his home. *Id.* at 223.

curing opinion's concern with guilt or innocence as a measure of the justness of confinement were relegated to footnotes that are substantial and undoubtedly significant,⁹⁰ but footnotes nonetheless.⁹¹ Two factors may explain why the pragmatic view of federal habeas relief expressed in the *Schneckloth* concurrence was diminished in the *Stone v. Powell* opinion.

First, and probably most significant, is the evisceration of the exclusionary rule which occurred during the interim. In his *Schneckloth* concurrence Justice Powell appeared to accept a claimed misapplication of the exclusionary rule as one type of constitutional claim—a variety of fourth amendment claim that would be barred from consideration on federal habeas review by the “threshold requirement” that he would adopt.⁹² He stated a very simplistic view of the deterrent purpose of the rule,⁹³ and rested his contention that the rule could be applied pragmatically only upon the cases which had held that *Mapp v. Ohio* was not to be applied retroactively⁹⁴ and that unconstitutionally seized evidence could be used for impeachment purposes.⁹⁵ It was not until the Court's post-

90. Although a footnote is as much a part of a judicial opinion as the text is, the use of footnotes as “trial balloons for new ideas” is not unknown. See American Bar Association, *Internal Operating Procedures of Appellate Courts* (1961), in R. LEFLAR, *APPELLATE JUDICIAL OPINIONS* 176 (1974).

91. See note 53 *supra*. Justice Powell also wrote:

We . . . afford broad habeas corpus relief, recognizing the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty. The Court in *Fay v. Noia* [372 U.S. 391 (1963)] described habeas corpus as a remedy for “whatever society deems to be intolerable restraints,” and recognized that those to whom the writ should be granted “are persons whom society has grievously wronged.” 372 U.S. at 401, 441. . . . But in the case of a typical Fourth Amendment claim, asserted on collateral attack, a convicted defendant is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration.

96 S. Ct. at 3050 n.31.

92. See text at note 88 *supra*.

93. Justice Powell wrote:

For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released.

412 U.S. at 269 (footnote omitted).

94. *Linkletter v. Walker*, 381 U.S. 618 (1965). See *Mishkin*, *supra* note 6; *Wulf*, *supra* note 47, at 255-56.

95. *Walder v. United States*, 347 U.S. 62 (1954); see note 37 *supra*.

Schneckloth decisions in *United States v. Calandra*⁹⁶ and *United States v. Peltier*⁹⁷ that the exclusionary rule was severed from its constitutional mooring.⁹⁸ Thus when Justice Powell addressed the application of the exclusionary rule to habeas corpus in *Stone v. Powell*, it was unnecessary for him to accord it the deference of even a "constitutional policy" as he had in *Schneckloth*;⁹⁹ rather, he was able to denominate it a mere "judicially created remedy"¹⁰⁰ which had undergone substantive change in the hands of the Court,¹⁰¹ and which had been applied pragmatically by the Court according to changing factual circumstances as necessary to serve its utilitarian purposes.¹⁰² It was therefore not necessary to develop the argument that federal habeas relief should be available only for "guilt-related" constitutional claims: an alleged violation of the fourth amendment might state a constitutional claim as to an intrusion upon the "sanctity of a man's home and the privacies of life,"¹⁰³ but a claim that the exclusionary rule had been misapplied at a criminal trial would not, since that rule was not intended to repair the wrong that had been committed by the intrusion upon privacy.¹⁰⁴

The second factor, the roles played by Justices Stewart and Blackmun, may be less important, but it is perhaps the clearest indication that the opinion in *Stone v. Powell* does not mark the majority's acceptance of the *Schneckloth* concurrence's view of what constitutes an unjust confinement. When Justice Powell wrote his *Schneckloth* concurrence, he was joined by Chief Justice Burger and by Justice Rehnquist.¹⁰⁵ Had Justices Stewart and Blackmun been willing to join, the concurring opinion could have become the majority opinion. The reason given by both for not joining was that

96. 414 U.S. 338 (1974); see note 39 *supra*.

97. 422 U.S. 531 (1975).

98. See Monaghan, *supra* note 29, at 3-10. See also note 52 *supra*.

99. 412 U.S. at 270.

100. See text accompanying note 25 *supra*.

101. See note 29 *supra*.

102. See text accompanying notes 41-47 *supra*.

103. *Boyd v. United States*, 116 U.S. 616, 630 (1886); see 96 S. Ct. at 3046.

104. Justice Powell stated in *Stone v. Powell*: "Post-*Mapp* decisions have established that the rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" 96 S. Ct. at 3048, quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

105. 412 U.S. at 250.

they did not believe a reconsideration of *Kaufman v. United States* was necessary to dispose of the claims presented in *Schneckloth*.¹⁰⁶ A more important reason, however, may have been that they were unwilling to accept the "threshold requirement" that Justice Powell advocated.¹⁰⁷ That requirement was taken quite openly from Justice Black's dissent in *Kaufman*.¹⁰⁸ Justice Stewart, no advocate of the exclusionary rule himself, had been on the Court when *Kaufman* was decided and had disagreed with the majority's willingness to permit federal prisoners to collaterally attack their convictions on the basis of search-and-seizure claims.¹⁰⁹ Rather than join Justice Black's dissent, however, he dissented with Justice Harlan, who wrote: "I concur in much of my Brother Black's opinion, and agree with his conclusion. . . . I must, however, disassociate myself from any implications . . . that the availability of this collateral remedy turns on a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation."¹¹⁰ In his own concurring opinion in *Schneckloth*, Justice Blackmun stated that, although he was not on the Supreme Court at the time *Kaufman* was decided, he agreed with the view expressed in Justice Harlan's dissent.¹¹¹ The "implications" rejected by Justice Harlan are, of course, the same implications that flow from the pragmatic "threshold requirement" advocated by Justice Powell in *Schneckloth*. That Justices Stewart and Blackmun joined Justice Powell's opinion in *Stone v. Powell*, despite their unwillingness to agree with him in *Schneckloth* or with Justice Black in *Kaufman*, provides a very strong indication that a majority of the Court does not believe that the *Stone v. Powell* opinion marks the acceptance of a guilt-relatedness rule for federal habeas claims.

IV

The caveat as to when search-and-seizure claims might be re-

106. *Id.* at 249 n.38 (Stewart, J.); *id.* at 249 (Blackmun, J., concurring).

107. See text accompanying note 88 *supra*.

108. See note 88 *supra* and accompanying text.

109. 394 U.S. at 242 (Stewart, J., dissenting).

110. *Id.* Justice Harlan would have adopted the rule of *Thornton v. United States*, 368 F.2d 822, 824 (D.C.Cir. 1966), that absent a showing of "special circumstances" a federal prisoner's search-and-seizure claims should not provide a ground for collateral attack upon his conviction.

111. 412 U.S. at 249.

viewed on a petition for federal habeas relief is consistent with the view of the *Stone v. Powell* holding as resting upon an exclusionary rule, rather than a habeas corpus, rationale. Federal habeas relief will remain available to a state prisoner who can show that he has not been "provided an opportunity for full and fair litigation of a Fourth Amendment claim" ¹¹² That much is necessary to avoid total frustration of even the minimal deterrent purpose of the exclusionary rule. There would be little practical reason for state courts not to cooperate openly with police if collateral review were not available to test whether the state had provided more than a sham review of a defendant's claim that an illegal search had occurred.

Legal and practical limitations upon the Supreme Court's power to review on a writ of certiorari the direct appeal of a conviction to a state's highest court have long provided a persuasive argument that federal habeas relief is necessary to empower the federal district courts to help the Supreme Court protect federal rights. ¹¹³ Although the opinion in *Stone v. Powell* indicates that Justice Powell has had some success in his continuing effort to increase the deference paid to state courts, ¹¹⁴ the possibilities for abuse of the fourth

112. 96 S. Ct. at 3052 (footnote omitted).

113. See *Brown v. Allen*, 344 U.S. 443, 491-94 (1953) (Frankfurter, J.); *Geagan v. Gavin*, 181 F. Supp. 466, 469 (D. Mass. 1960), *aff'd*, 292 F.2d 244 (1st Cir. 1961), *cert. denied*, 370 U.S. 903 (1962); *Mishkin*, *supra* note 6, at 86-87; *Wright & Sofaer, Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 897 (1966) (concerning federal district court's role of providing a better record than that which is normally available on certiorari); *Wulf*, *supra* note 47, at 258 n.25. See also *Stolz, Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943 (1976).

114. In his *Schnecko* concurrence, Justice Powell wrote: "In my view, this Court has few more pressing responsibilities than to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate." 412 U.S. at 265.

He must have taken particular satisfaction in writing the following footnote in *Stone v. Powell*:

The policy arguments that respondents marshal in support of the view that federal habeas corpus review is necessary to effectuate the Fourth Amendment stem from a basic mistrust of the state courts as fair and competent forums for the adjudication of federal constitutional rights. . . . [T]here is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [consideration of Fourth Amendment claims] than his neighbor in the state courthouse.'

96 S. Ct. at 3051-52 n.35, quoting *Bator*, *supra* note 84, at 509.

amendment that justified extending the exclusionary rule to state trials in *Mapp v. Ohio* likewise justify providing some check upon the application of that rule by the states. The effectiveness of the check provided in *Stone v. Powell* is open to question,¹¹⁵ but the penultimate sentence of the majority opinion, which summarizes the rationale of its full-and-fair litigation holding, reinforces the conclusion that the minimal nature of the check is premised upon the Court's continuing emasculation of the exclusionary rule, rather than upon any view of federal habeas corpus: "In [the context of a

115. The only indication of the meaning to be given to the full-and-fair litigation requirement in *Stone v. Powell* is Justice Powell's bare-bones citation of *Townsend v. Sain*, 372 U.S. 293 (1963). See 96 S. Ct. at 3052 & n.36. That decision provided the following standards for a district court to use when deciding whether an evidentiary hearing is required on a petition for habeas relief:

We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313.

The limited utility of the general citation to *Townsend* is indicated by the fact that *Stone v. Powell* apparently rejects, at least in the context of a search-and-seizure claim, one of the major precepts of *Townsend* that while a federal court may defer to the state court's finding of fact, the federal court must make its own findings of law. 372 U.S. at 318.

The willingness of the majority in *Stone v. Powell* to defer to state court interpretations of federal law may complicate the determination of whether the prisoner was afforded full and fair litigation of his claims because it will increase the difficulty of determining the facts found and relied upon by the district court. If there is to be no effective review of the state court's resolution of legal issues, the state courts may see little need to state their reasoning at length. Accurate reconstruction of the facts found by the state court will be difficult since there may be no way of knowing what facts had to be found to fit the court's legal theory. Cf. *Townsend v. Sain*, *supra* at 314-15. In view of Justice Powell's desire to enhance the respect afforded the state courts, it is not unreasonable to expect that the prisoner will have the burden of persuasion on the adequacy of the state hearing; thus, a vague statement of the facts and law by the state court is likely to be taken as supporting a presumption of adequacy. Cf. *La Valle v. Della Rose*, 410 U.S. 690 (1973).

That the presumption of correctness in state court proceedings is not always appropriate is illustrated by recent history indicating a willingness to abuse state legal machinery on sensitive issues such as civil rights. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction To Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965) [hereinafter cited as Amsterdam, *Civil Rights*]; Gellhorn, *A Decade of Desegregation—Retrospect and Prospect*, 9 UTAH L. REV. 3 (1964); Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163 (1963); Wulf, *supra* note 47, at 259 & n.31.

petition for federal habeas relief] the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force."¹¹⁶

V

That the possibility of reading *Stone v. Powell* to impose a threshold-of-innocence requirement for federal habeas relief exists is obvious from the lengths to which this article has gone to avoid that reading. Justices Brennan and Marshall clearly were concerned with the possibility that the Court might limit federal habeas relief to "guilt-related" claims.¹¹⁷ That concern is inevitable if one attempts to discern a logic in the *Stone v. Powell* opinion for determining what there may be about the nature of federal habeas corpus that might require that it be available for any particular type of claim.

Justice Brennan wrote the dissent for himself and Justice Marshall as a purported attempt to find the majority's "particular basis" for denying state prisoners a "*federal forum* for vindicating . . . federally guaranteed rights."¹¹⁸ Noting that the federal habeas corpus statute provides that federal courts have jurisdiction to grant habeas relief to state prisoners confined "in violation of the Constitution or laws of the United States,"¹¹⁹ he argued that the majority's decision could rest only upon a conclusion that a state prisoner convicted on the basis of an illegal search is not in confinement "in

116. 96 S. Ct. at 3052. Early in the majority opinion as Justice Powell introduced his discussion of *Kaufman v. United States* (see notes 66-69 *supra*) the following statement appears: "During the period in which the substantive scope of the writ was expanded, the Court did not consider whether exceptions to full review might exist with respect to particular categories of constitutional claims." 96 S. Ct. at 3044. Although Justice Powell then proceeded to a criticism of *Kaufman* that ultimately rejected its rationale, there is never an express statement in the majority opinion that it creates an exception as to a "particular categor[y] of constitutional claims." Likewise, although Justice Powell noted in his earlier proposal in *Schneekloth* that the substantive scope of federal habeas be reexamined, *id.* at 3045, the emphasis in the majority opinion upon its view that the exclusionary rule has a limited, utilitarian function is more consistent with a continuing separation of the rule from its constitutional foundation than it is with a view that the Court has stated a new view of the nature of federal habeas corpus for constitutional claims.

117. See text accompanying notes 20-21 & 23 *supra*.

118. 96 S. Ct. at 3056 (emphasis in original).

119. *Id.* at 3057.

violation of the Constitution” or that something empowered the Court to rewrite the jurisdictional statute.¹²⁰

He refused to accept the majority’s willingness to sever the exclusionary rule from the Constitution: “Under *Mapp*, as a matter of federal constitutional law, a state court *must* exclude evidence from the trial of an individual whose Fourth and Fourteenth Amendment rights were violated by a search or seizure that directly or indirectly resulted in the acquisition of that evidence.”¹²¹ Thus, he could not accept the possibility that a defendant who was convicted as a result of a misapplication of the exclusionary rule could be in confinement not in violation of the Constitution.¹²² Therefore, he attributed the majority’s holding to a rewriting of the habeas statute.

In attempting to find how the majority had rewritten the statute he focused upon the guilt-related threshold implications of the majority’s discussion of search-and-seizure claims. Then he argued that such a revision of federal habeas jurisdiction would be unwise and that, if it were done regardless of its wisdom, it should be done by Congress, not the Court.¹²³

That Justice Brennan searched in vain for a logic to support what he viewed as a revision of federal habeas jurisdiction is not surprising, since the Court offered none. The closest the Court came to stating any rationale for determining when the function or nature of habeas corpus might require certain claims to be heard and permit avoiding consideration of other claims was in a footnote:

In construing broadly the power of a federal district court to consider constitutional claims presented in a petition for writ of habeas corpus, the Court in *Fay* also reaffirmed the equitable nature of the writ, noting that “[d]iscretion is implicit in the statutory command that the judge . . . ‘dispose of the matter as law and justice require,’ More recently, in *Francis v. Henderson*, holding that a state prisoner who failed to make a timely challenge to the composition of the grand jury that indicted him cannot bring such a challenge in a post-conviction federal habeas corpus proceeding absent a claim of actual prejudice, we emphasized:

120. *Id.*

121. *Id.* at 3058 (emphasis in original).

122. *Id.* at 3057-61.

123. *Id.* at 3062-71.

This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power.¹²⁴

The inadequacy of that rationale is indicated by the fact that it applies equitable discretion in a wholly unprecedented manner. In *Fay v. Noia*, the "equitable discretion" invoked concerned "the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks."¹²⁵ Thus, the opinions in *Fay* and *Francis v. Henderson*¹²⁶ concerned circumstances where a federal habeas claim could be barred by the petitioner's refusal or failure to present it in a manner that would have allowed a state court to address it.¹²⁷ To invoke the Court's previous references to equitable discretion to bar an entire category of claims where the only error, if any, in relation to the litigation was committed by the state, not the petitioner, is to wrench that principle into a totally different concept from that which it has heretofore connoted in the habeas context.¹²⁸

The fact that Chief Justice Burger and Justice Rehnquist joined Justice Powell's concurrence in *Schneckloth*, however, indicates that there is a significant minority on the Court which is inclined toward a threshold-of-innocence requirement.¹²⁹ The periodic schol-

124. *Id.* at 3044 n.11.

125. 372 U.S. at 438.

126. 96 S. Ct. 1708 (1976).

127. See note 145 *infra*.

128. The Court's reference to considerations of comity likewise does not provide any principled basis for barring whole categories of claims since the content of that doctrine traditionally has required nothing more than that federal courts withhold habeas relief until the state courts have been allowed to address the issue. See *Ex parte Hawk*, 321 U.S. 114 (1944); 28 U.S.C. § 2254(b), (c) (1970). For a depressing account of the procedural difficulties created by the exhaustion requirement, at least before states began to improve their postconviction remedies, see BATOR *et al.*, *supra* note 1, at 1490-91. Until the decision in *Francis v. Henderson*, the Court had never held that considerations of comity alone, without any sign of misconduct in relation to the litigation by the petitioner, could justify withholding, rather than delaying, relief. 96 S. Ct. at 1716 (Brennan, J., dissenting).

129. In *Schneckloth*, Justice Powell did note that he would leave to legislation or subsequent decisions the question of whether his proposed threshold should be imposed for claims other than those raised in that appeal. 412 U.S. at 266 & n.23. His emphasis upon the "justness" of confinement and his concept of what constitutes a "just" confinement provides little reason to believe that he would not favor leading other types of constitutional claims toward the same threshold. See notes 86-87 *supra*.

arly and legislative proposals to limit the availability of federal habeas relief suggests that sympathy for such a threshold also exists outside the Supreme Court.¹³⁰ It is thus necessary to consider the propriety of such a pragmatic view of what "society deems to be intolerable restraints."¹³¹

VI

Whatever the eventual outcome of the debate that has raged about the historical function of habeas corpus,¹³² it is apparent that a threshold-of-innocence requirement is inconsistent even with the version of habeas history favored by its advocates. Justice Powell partially acknowledged that point in *Schneckloth*: "I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt."¹³³ What he failed to acknowledge, but what the history he relied upon reveals, is that the historical function of habeas corpus directly brought into question the legality of the state's, not the prisoner's, action. Thus, even according to Professor Oaks' restrictive reading of the controversial *Bushell's Case*,¹³⁴ the concern of the habeas court was with the legal-

130. See Bator, *supra* note 84; Friendly, *supra* note 12; Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956) [hereinafter cited as Pollack]; Wulf, *supra* note 47; Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221 (1973) [hereinafter cited as *Proposed Modifications*].

131. *Fay v. Noia*, 372 U.S. 391, 402 (1963).

132. In *Fay v. Noia*, Justice Brennan wrote:

At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum.

372 U.S. at 426.

The historical analysis which supported that conclusion (*see id.* at 399-426) has been sharply attacked ever since the opinion was announced. *See id.* at 448-63 (Harlan, J., dissenting). For a summary of the historical debate with citations to the relevant literature see BATOR *et al.*, *supra* note 1, at 1465-74. One irony about the debate is that it focuses upon Justice Brennan's opinion for the Court in *Fay v. Noia*; the real point of contention, however, is the holding in *Brown v. Allen*, 344 U.S. 443 (1953), that federal constitutional issues litigated in state criminal cases can be relitigated in federal court on a petition for habeas relief. Thus, to a large extent the debate has revolved around a historical justification that was offered a decade after the crucial decision was made in reliance upon other concerns.

133. 412 U.S. at 257.

134. 124 Eng. Rep. 1006 (C.P. 1670).

ity of the process that produced the confinement: if the prisoner was confined for some reason other than treason or a capital offense and his confinement was ordered by a court without formal jurisdiction, he was entitled to release because the government had not complied with the technical, legal prerequisites for confining him.¹³⁵ The emphasis upon the legality of the government's conduct continued in the early history of the writ in the United States, since release remained appropriate if the prisoner was confined pursuant to an order from a tribunal lacking jurisdiction to impose such imprisonment.¹³⁶ Whatever else the Congress may have intended when it first made federal habeas relief available to state prisoners in 1867,¹³⁷ even the authorities cited by the majority in *Stone v. Powell* indicate a continuation of the function of habeas corpus as a means to test the legality of the government's action, that is, whether the sentencing tribunal had jurisdiction, rather than whether the prisoner was factually guilty.¹³⁸ Although the expansion of the scope of federal habeas relief since that time indicates a continual raising of society's standard of what sort of restraint will be found "intolerable," the continuing concern has been with the government's role, whether it was played by the legislative, executive or judicial

135. See Oaks, *Legal History*, *supra* note 84, at 468. That society had a lower standard for what constitutes an "intolerable restraint," however, cannot be doubted, since the prisoner was not permitted to claim that respondent's return was false. *Id.*

136. *Ex parte Watkins*, 28 U.S. (3 Pet.) 370 (1830); *Ex parte Bollman*, 8 U.S. (4 Cranch) 23 (1807).

137. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 85, *as amended and codified*, 28 U.S.C. § 2254 (1970). Justice Brennan's conclusion that the 1867 statute was intended broadly to protect the federal rights of state prisoners in the Reconstruction South, *Fay v. Noia*, 372 U.S. 391, 415-17 (1963), has been disputed. Compare Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965), with Amsterdam, *Civil Rights*, *supra* note 115. It well might be argued that the language and history of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), evinces a clearer intent to protect citizens generally against illegal state action than the habeas legislation did. See *Monroe v. Pape*, 365 U.S. 167, 171-87 (1961). Present legal doctrine, however, precludes resort to section 1983 when the relief sought is release from confinement, since the habeas legislation is construed as specific legislation designed to serve that purpose. See *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). An argument to narrow the scope of section 2254 thus should have the concomitant effect of expanding the availability of section 1983 relief. Such an expansion of section 1983 would, of course, have serious effects upon federal-state relations since section 1983, unlike section 2254, imposes no requirement that the petitioner seek relief in state courts before resorting to the federal court. *Id.* at 489-92.

138. See 96 S. Ct. at 3042, *citing* *Pettibone v. Nichols*, 203 U.S. 192 (1906); *Bergemann v. Backer*, 157 U.S. 655 (1895); *Andrews v. Swartz*, 156 U.S. 272 (1895); *In re Rahrer*, 140 U.S. 545 (1891); *In re Wood*, 140 U.S. 278 (1891).

branch, in bringing about the prisoner's confinement.¹³⁹ Even at the height of the Court's expansive view that federal habeas corpus should remedy whatever society deemed to be "intolerable restraints," however, the Court stated specifically that the writ would not issue to test a claim that the prisoner could produce newly discovered evidence to show that he was in fact not guilty of the crime for which he was confined; only allegations that the government had acted unlawfully justified issuance of the "Great Writ."¹⁴⁰ Thus, the historical development of habeas corpus not only provides no "exact tie . . . to a constitutional claim relating to innocence or guilt,"¹⁴¹ it provides an affirmative indication that the traditional concern on review of a habeas petition has been the legality of government conduct and that there has been a total disregard for the factual guilt or innocence of the prisoner.

Justice Powell's concept of what constitutes "unjust" confinement would have more appeal if it were more symmetrical. However, there is every indication that the present Court is unwilling to increase the availability of federal habeas corpus for prisoners who can demonstrate the possibility of error in the determination of factual guilt. The other two principal habeas cases decided during the 1975 term, *Estelle v. Williams*¹⁴² and *Francis v. Henderson*,¹⁴³ support that conclusion by indicating the Court's willingness to rely

139. Among the landmarks of the expansion of federal habeas relief are the following: *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873) (judge lacked authority to impose sentence); *Ex parte Siebold*, 100 U.S. 371 (1879) (constitutionality of statute creating crime); *Ex parte Wilson*, 114 U.S. 417 (1885) (federal conviction obtained without grand jury indictment); *Hans Nielson, Petitioner*, 131 U.S. 176 (1889) (multiple punishment for one offense); *Frank v. Mangum*, 237 U.S. 309 (1915), and *Moore v. Dempsey*, 261 U.S. 86 (1923) (allegations that, in effect, the judicial system yielded to mob domination; failure to provide full and fair litigation of claims); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (deprivation of right to counsel); *Waley v. Johnston*, 316 U.S. 101 (1942) (facts outside record on appeal indicating coerced guilty plea); *Brown v. Allen*, 344 U.S. 443 (1953) (any deprivation of constitutional rights). See generally *Bator, supra* note 84; *Hart, supra* note 77; *Reitz, supra* note 77; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

140. See *Townsend v. Sain*, 372 U.S. 293, 317 (1963). The decision in *Townsend* was announced on the same day as that in *Fay v. Noia*, 372 U.S. 391 (1963).

A federal prisoner may challenge his conviction on the grounds of newly discovered evidence relating to the finding of guilt by moving for a new trial within the time limits and under the standards of FED. R. CRIM. P. 33.

141. See text accompanying note 133 *supra*.

142. 96 S. Ct. 1691 (1976).

143. 96 S. Ct. 1708 (1976).

upon "considerations of comity and federalism—vague concepts that are given no content by the Court"¹⁴⁴ in order to avoid the merits of habeas claims that touch upon the reliability of the guilt determination.¹⁴⁵ Chief Justice Burger's opinion in *Estelle v. Williams* provides the strongest indication of the Court's disinclination to focus upon the possibility of innocence if the result would be to expand the availability of habeas relief. He clearly acknowledged the possibility of an erroneous determination of factual guilt existing when a defendant stands trial in distinctive prison clothing:

The potential effects of presenting an accused before the jury in prison attire need not . . . be measured in the abstract. Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption [of innocence] so basic to the adversary system. . . . This is a recognition that the constant reminder of

144. *Id.* at 1715 (Brennan, J., dissenting).

145. In *Estelle v. Williams* and *Francis v. Henderson*, the Court attached significance to procedural defaults in a manner that arguably was inconsistent with two earlier landmark decisions. The Court had held in *Fay v. Noia*, 372 U.S. 391 (1963), that a federal habeas court was not precluded from addressing the merits of a petitioner's claims despite the fact that the claim would not have been cognizable on Supreme Court review of a state court decision because an adequate state law ground existed for denying relief. The Court held that the adequate-state-ground rationale would bar habeas review of the merits because of a failure to comply with a state rule of procedure only when the procedural default was committed by the petitioner under circumstances that would satisfy the standard previously set for waiver of a fundamental constitutional right. *Id.* at 439. In *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), the Court had held that the waiver of a fundamental constitutional right required "an intentional relinquishment or abandonment of a known right or privilege."

It can be argued with some force that the Court diluted the teachings of *Fay v. Noia* and *Johnson v. Zerbst* in *Estelle v. Williams* and *Francis v. Henderson* because a necessary element to the opinion in each case was that the prisoner had not raised a timely objection before trial, and the Court was willing to impose the consequences of that procedural default upon the prisoner without requiring any showing that he acted intentionally and with knowledge that he was abandoning an available remedy. Indeed, the Court's opinions seemed to place upon the prisoner the burden of, at a minimum, rebutting a presumption that the procedural default was an intelligently made tactical maneuver. See *Francis v. Henderson*, 96 S. Ct. at 1710-11; *Estelle v. Williams*, 96 S. Ct. at 1696-97.

Neither case marked as clear a break with prior law as did *Stone v. Powell*, however. The result in *Francis v. Henderson* was predictable after the Supreme Court's decision in *Davis v. United States*, 411 U.S. 233 (1973) (generally denying postconviction relief to a claim by a federal prisoner that the grand jury which convicted him was unconstitutionally selected when the prisoner had failed to make a timely objection pursuant to FED. R. CRIM. P. 12). In *Estelle v. Williams*, the Court avoided adopting a procedural-default rationale, leaving that argument to a concurring opinion by Justice Powell. 96 S. Ct. at 1697-98.

the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play.¹⁴⁶

Yet, because Williams had not challenged at trial the jailer's decision not to give him his personal clothing for the trial, the Court held that Williams had not been compelled to stand trial in his prison clothing and thus was not entitled to habeas relief.¹⁴⁷ The majority's concern was not with whether an erroneous determination of guilt had been made, but with the extent to which it could be said that the error was induced by illegal government action. That the result is not symmetrical with the concept of unjust confinement that has been invoked in support of a threshold-of-innocence requirement is emphasized by the fact that, before granting relief, the majority would require not only the possibility of error in the guilt determination and the creation of that possibility by illegal government action, but also that the error be created by a particular element in the criminal process.

Some questions about the propriety of a threshold-of-innocence requirement as a method for reducing the exercise of habeas jurisdiction by the federal courts are inevitable because the costs of the exercise of that power have been overstated.¹⁴⁸ Thus, Justice Powell's complaint in *Schneckloth* about the diversion of legal resources must be qualified by noting that federal habeas petitions from state prisoners have declined steadily since 1970,¹⁴⁹ and much of the prior increase¹⁵⁰ resulted from the temporary need to clear out a backlog

146. 96 S. Ct. at 1693.

147. *Id.* at 1695-97.

148. For Justice Powell's summary of those costs see note 53 *supra*.

149. The number of petitions for habeas relief declined from 9,063 in fiscal year 1970 to 7,833 in 1976. Even though the number of civil rights complaints from state prisoners has increased by 3,091.7 per cent in the past decade, from 218 in 1966 to 6,958 in 1976, the total of all state and federal prisoner petitions constitutes only 15.2 per cent of the federal district courts' workload. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANN. REP. 93-96. For a commentary suggesting that the sheer number of cases filed overstates the actual burden upon the district courts see Wulf, *supra* note 47, at 270-74. See also Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

150. In *Schneckloth*, Justice Powell, while acknowledging the recent decline in the number

of prisoners whose confinements were only perceived as illegal after the Supreme Court announced a series of decisions over a decade that put new content into the due process guaranteed to state defendants by the fourteenth amendment.¹⁵¹ Likewise, concern about the finality of criminal convictions,¹⁵² being based upon the hopelessness of ever reaching a "correct" result,¹⁵³ should be qualified by recognizing that its justification is greater for factual disputes than for legal controversies. Resolution of disputes about the facts of a case generally is wisely left with the factfinder because he has a unique opportunity to assess the credibility of conflicting evidence.¹⁵⁴ Resolution of legal issues, however, where the frequency of recurring questions suggests that the treatment be consistent as well as "correct," requires that the line of finality be drawn at a stage that can provide both uniformity as well as dispassionate treatment of legal issues.¹⁵⁵ Finally, there is little reason to believe that state court

of habeas petitions, referred to the increase between 1961 and 1972 as an indication that habeas corpus placed an unwarranted drain on legal resources. 412 U.S. at 260 n.14.

151. See Wulf, *supra* note 47, at 274. It is also relevant to note that much of the increasing federal court workload has resulted from litigation that has traditionally been accorded less importance than the liberty issues associated with habeas corpus. See *id.* at 270, 274; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANN. REP. 75-109.

152. *Schneckloth v. Bustamonte*, 412 U.S. 218, 261-62 (1973) (Powell, J., concurring).

153. See Bator, *supra* note 84, at 446-47.

154. Cf. FED. R. CIV. P. 52(a) (finding of fact by judge sitting without jury in civil case not to be set aside unless clearly erroneous, giving due regard to judge's ability to assess credibility of witnesses).

155. As to the need for dispassionate treatment of legal issues that may be improperly, but inevitably, subordinated to the issue of guilt or innocence at trial see Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 13 (1956); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1057 (1970).

Professor Bator does not concede that there is any greater potential for "correct" legal results. He wrote: "Assuming that there 'exists,' in an ultimate sense, a 'correct' decision of a question of law, we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether the right rule was applied, whether a new rule should not have been fashioned." Bator, *supra* note 84, at 447. Arguably supporting that contention is the following famous dictum from Justice Jackson about the Supreme Court: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion). Justice Jackson's statement, however, also indicates the need for providing a federal forum for resolution of constitutional issues: not only is the Supreme Court "final" in the sense that no other court can overrule it, but it is also "final" in the more important sense that there is no other court of even equal authority to interpret the Constitution differently. Thus the important concern of consistency in constitutional interpretation would be frustrated by allowing the 50 states to announce "final" answers to constitutional questions. The practical difficulty of providing Supreme Court review of state court decisions (see authorities cited in note 113 *supra*) supports the

irritation resulting from any "serious disrespect" for those courts created by federal habeas corpus "in derogation of the constitutional balance between the [state and federal] systems"¹⁵⁶ will be lessened if the focus of such review shifts from the resolution of admittedly challenging questions of constitutional law¹⁵⁷ to a challenge directly to the integrity and goodwill of the state trial judge.¹⁵⁸

To the extent that the desires of Congress are relevant to an identification of the claims that should warrant federal habeas relief,¹⁵⁹ there is a further reason to avoid any threshold-of-innocence requirement. In the years since the Court's opinion in *Brown v. Allen*¹⁶⁰ acknowledged the availability of federal habeas corpus for claims of confinement in violation of the Constitution, Congress has had several occasions to consider the statutes concerning federal habeas relief for state prisoners.¹⁶¹ In 1966, Congress accepted amendments which placed restrictions upon the filing of successive

compromise solution of opening the lower federal courts to constitutional issues raised in habeas petitions to confine the possibilities for conflicting interpretations of the Constitution to eleven federal courts of appeals.

Nothing more than speculation supports Justice Powell's argument in *Schneckloth* that the need for finality in criminal litigation is justified by concern for rehabilitation of the criminal. "At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen." 412 U.S. at 262 (footnote omitted). There is, however, contrary speculation about the effect upon rehabilitation of a belief that the government has obtained the conviction illegally and that the courts are unwilling to require that the government adhere to the Constitution. See *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting); Wulf, *supra* note 47, at 254 & n.9; *Proposed Modifications*, *supra* note 130, at 1250.

156. *Schneckloth v. Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J., concurring).

157. Discussing the difficulty of search-and-seizure questions, Justice White wrote: "[I]t is . . . true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men." *Stone v. Powell*, 96 S. Ct. 3037, 3073 (1976) (dissenting opinion).

It is worth noting that even the leading advocate of the need for finality in criminal litigation acknowledged the existence of unique institutional and environmental pressures upon state judges which detract from their ability to resolve questions of federal law. See Bator, *supra* note 84, at 510.

158. See Tushnet, *supra* note 24, at 495; Note, *Criminal Procedure—Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N.C.L. Rev. 633, 642 (1974).

159. See note 65 *supra*.

160. 344 U.S. 443 (1953).

161. For a discussion of the early proposals at the time of *Brown v. Allen* see Pollak, *supra* note 130.

petitions and which generally adopted the criteria announced in *Townsend v. Sain*¹⁶² for the acceptance of a state court's finding of fact.¹⁶³ There have also been proposals, however, which would have restricted the availability of federal habeas corpus still further by imposing a threshold of innocence. Legislation introduced for the Nixon Administration in the Ninety-second and Ninety-third Congresses would have limited habeas relief to a prisoner who could establish that his conviction rested upon the violation of a constitutional right that affected the reliability of the fact-finding process and that a different result would have been likely at his trial but for the violation.¹⁶⁴ Although questions about the constitutionality of congressional attempts to restrict the availability of habeas corpus undoubtedly have been important,¹⁶⁵ the fact that the legislation has not been enacted provides some indication that Congress has not yet formulated an intent to deny federal habeas relief to prisoners whose claims are directed only at the government's illegal action. The lack of a coherent legislative intent is also evident in the refusal of the 94th Congress, when enacting new habeas procedures for district courts, to address the threshold-of-innocence implications of *Stone v. Powell*.¹⁶⁶

The most important reason why there should be no threshold-of-innocence for federal habeas claims is that such a requirement would dilute values that traditionally have occupied an almost sacred position in American law. Justice Brennan identified numerous claims that arguably would not be cognizable upon review of a ha-

162. 372 U.S. 293 (1963). See note 115 *supra*.

163. Those amendments are codified at 28 U.S.C. §§ 2244(b), (c), 2254(d), (e) (1970). See *Proposed Modifications*, *supra* note 130, at 1221 & n.3.

164. S. 567, 93d Cong., 1st Sess. (1973); S. 3833, 92d Cong., 2d Sess. (1972). The text of the bill, which was introduced in identical form in both Congresses, is reproduced in Wulf, *supra* note 47, at 276-78. The two criteria which essentially establish a threshold-of-innocence requirement were drawn from proposals that Justice Rehnquist had made while he was an assistant attorney general in the Department of Justice. *Proposed Modifications*, *supra* note 130, at 1229 n.45.

165. An earlier attempt to restrict the availability of federal habeas corpus had failed largely because of constitutional questions. Senator Hugh Scott closed the debate on that bill with the following comment: "Mr. President, it is my feeling . . . if Congress tampers with the great writ, its action would have about as much chance of being held constitutional as the celebrated celluloid dog chasing the asbestos cat through hell." 114 CONG. REC. 14, 183 (1968). See Paschal, *supra* note 65, at 607.

166. See HOUSE COMM. ON THE JUDICIARY, HABEAS CORPUS RULES, H.R. REP. NO. 1471, 94th Cong., 2d Sess. 2-3 (1976).

beas petition if the petitioner were required to show that the constitutional error detracted from the reliability of the fact-finding process; those claims included the following: double jeopardy, entrapment, self-incrimination, failure to give the warnings required by *Miranda v. Arizona*,¹⁶⁷ invalid identification procedures, official surveillance of attorney-client communications, government acquisition of evidence through unconscionable means, denial of the right to a speedy trial, government administration of a "truth" serum, denial of the right to jury trial and conviction under a statute violative of the first amendment if the particular conduct could have been proscribed by a constitutionally drawn statute.¹⁶⁸

Justice Brandeis cogently stated the general, but tremendously important, principle supporting the conclusion that the government should not be allowed to keep a prisoner in confinement after putting him there by violating the restraints that the Constitution has placed upon government action:

In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.¹⁶⁹

He further identified the reason that illegal government action should not be tolerated simply because ignoring the violation will serve a pragmatic purpose: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to

167. 384 U.S. 436 (1966).

168. *Stone v. Powell*, 96 S. Ct. 3037, 3062-63 & n.13 (1976) (dissenting opinion). It should be apparent, however, that it will often be difficult to determine what constitutional rights are required solely by reference to their effect upon the reliability of the factfinding process. See White, *Federal Habeas Corpus: The Impact of the Failure To Assert a Constitutional Claim at Trial*, 58 Va. L. Rev. 67, 84 & n.76 (1972).

169. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (dissenting opinion). Justice Holmes invoked a similar principle in *Olmstead*: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part." 277 U.S. at 470 (dissenting opinion).

liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."¹⁷⁰

It is not necessary to rely only upon such bedrock, however; the Court previously has held that habeas relief is to be available to a prisoner confined in violation of the fourteenth amendment even if he was guilty and the government's illegal action did not detract from the reliability of the fact-finding process. For the Court, Justice Frankfurter wrote:

[State convictions based upon coerced confessions must be overturned] not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. . . . Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

. . . .
A defendant has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment.¹⁷¹

The controlling principle then is not that some unconstitutional government actions impede the fact-finding process, but that the guarantee of due process requires that states be allowed to confine a citizen only under certain conditions. When a state obtains a conviction without satisfying those conditions, it has acted in violation of the fourteenth amendment. For the federal courts to tolerate such an abuse, even on the ground that an aggrieved federal habeas petitioner could not establish his innocence, would be to abdicate the courts' responsibility to enforce compliance with the demands of fundamental law expressed in the Constitution. Whatever weight is given to the factor of the reliability of the fact-finding process as

170. *Id.* at 479 (footnote omitted).

171. *Rogers v. Richmond*, 365 U.S. 534, 540-41, 544-45 (1961).

different considerations are balanced to determine which procedures are required for due process, it should not be determinative of the entirely separate question of the availability of federal habeas relief to remedy the violation by the government of a right which either is, or has been, determined to be guaranteed to a state criminal defendant by the fourteenth amendment.

CONCLUSION

A careful reading of the opinion in *Stone v. Powell*, particularly when it is compared to Justice Powell's concurrence in *Schneekloth v. Bustamonte*, suggests that the Court has not yet limited federal habeas relief to only those state prisoners who can show that their convictions rest upon the violation of constitutional rights affecting the reliability of the fact-finding process. Imposition of such a threshold of innocence for federal habeas corpus would enthrone a pragmatic, result-oriented jurisprudence by subordinating due process values that heretofore have been deemed essential for a free society under law.

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