Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners

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In its 1975 and 1976 Terms, the Supreme Court imposed the first serious limitations on federal habeas corpus for state prisoners\(^1\) after decades of procedural and substantive expansion of the scope of the writ.\(^2\) The results to date have been inconsistent and
fragmentary, largely because there has been no systematic rethinking of the purposes of habeas corpus. Indeed, the decisions either ignore the traditional functions of habeas corpus or reflect an inchoate feeling that habeas jurisdiction has become too broad.

By statute, federal habeas corpus is available to state prisoners to test claims that they are in custody in violation of the Constitution or laws of the United States. In \textit{Fay v. Noia}, the Court deliberately pressed habeas corpus jurisdiction to its outer limits, asserting that the writ is intended to provide:

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a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.
\end{quote}


4. "[W]e have come a long way from the traditional notions of the Great Writ. The common-law scholars of the past hardly would recognize what the Court has developed . . . and they would, I suspect, conclude that it is not for the better." \textit{Braden v. 30th Judicial Circuit Court}, 410 U.S. 484, 501 (1973) (Blackmun, J., concurring) (citing 4 W. BLACKSTONE, \textit{COMMENTARIES} *131-34). The reaction to the scope of the writ has several facets. First, there is the feeling that there are too many frivolous petitions which cast an unjustified burden on the district courts. See \textit{Bator, supra} note 2, at 506; \textit{Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments}, 38 U. CHI. L. REV. 142, 143-44 (1970) [hereinafter cited as \textit{Friendly, Is Innocence Irrelevant?}]. Second, there is the related feeling that the writ is being used as an adjunct to the appellate process, although it was never intended for such use. See \textit{Donnelly v. DeChristoforo}, 416 U.S. 637, 642-43 (1974); \textit{Cupp v. Naughten}, 414 U.S. 141, 146 (1973); \textit{Milton v. Wainwright}, 407 U.S. 371, 377 (1972). Third, there is the feeling, unrelated to the issue of habeas corpus, that the Court has overextended the rights which a defendant should be able to assert to avoid conviction. See, e.g., \textit{Friendly, The Bill of Rights as a Code of Criminal Procedure}, 53 CALIF. L. REV. 929 (1965). The discomfort which the Court is experiencing with, for example, the rules of Mapp v. Ohio, 367 U.S. 643 (1961), and Miranda v. Arizona, 384 U.S. 436 (1966), has led to their limitation in Michigan v. Tucker, 417 U.S. 433 (1974), and in United States v. Calandra, 414 U.S. 338 (1974). This discomfort also has led to a withdrawal of habeas jurisdiction, \textit{Stone v. Powell}, 428 U.S. 465 (1976), or to its suggested withdrawal, \textit{Brewer v. Williams}, 430 U.S. 387, 416-17 (1977) (Burger, C.J., dissenting); \textit{Castaneda v. Partida}, 430 U.S. 482, 508-09 (1977) (Powell, J., dissenting).

5. 28 U.S.C. §§ 2241-2254 (1970). \textit{Id.} § 2254(a) provides:

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The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
\end{quote}


The Court in *Noia* held, as it had held in *Brown v. Allen,* that the writ must be available to test each substantive constitutional claim raised by a state prisoner; it went beyond *Brown* by removing virtually all procedural bars to federal review. Accordingly, after dissenting), Justice Holmes stated that "*habeas corpus* ... goes to the very tissue of the structure ... and although every form may have been preserved [it] opens the inquiry [into] whether they have been more than an empty shell." See also *Wingo v. Wedding,* 418 U.S. 461, 468 (1974); *Harris v. Nelson,* 394 U.S. 286, 290-91 (1969); *Johnson v. Avery,* 393 U.S. 483, 485 (1969).

8. 344 U.S. 443 (1953).

9. In *Noia* the Court held that a state prisoner who had been convicted on the basis of a concededly coerced confession was entitled to release notwithstanding his failure to appeal his conviction for murder. He had exhausted his state remedies because no further remedy was available to him at the time he sought the writ. *Fay v. Noia,* 372 U.S. 391, 435-38 (1963). The adequate state ground of failure to appeal did not bar *habeas* relief. *Id.* at 428-35. His failure to appeal was not a waiver of review because of the "grisly choice" confronting him in that a successful appeal could have resulted in a retrial and subsequent death penalty. He initially had been sentenced to life imprisonment. *Id.* at 435-40. Prior to *Stone v. Powell,* 428 U.S. 465 (1976), the writ was available, absent any procedural bar, if any substantive right was violated and if the alleged constitutional error was not found to be harmless. In *Milton v. Wainwright,* 407 U.S. 371 (1972), the Court held the admission of arguably coerced confessions, in the context of that case, to be harmless if error at all. *Stone* limited the substantive scope of the writ by withdrawing fourth amendment claims from review where the prisoner has had an adequate opportunity to litigate his claim in the state courts. See text accompanying notes 33 & 34 infra.


This was a result of the Court's view that the district courts were better equipped than the Supreme Court to evaluate state prisoners' claims in the first instance. See text accompanying notes 16-18 infra. Prior to the 1977 decision in *Wainwright v. Sykes,* 97 S. Ct. 2497 (1977), *habeas corpus* relief was available even if the state court had not passed on a claim, if the failure to do so was not by virtue of the prisoner's own deliberate bypass of state remedies. *Fay v. Noia,* 372 U.S. 391 (1963). See text accompanying notes 153-162 infra. Prior to *Stone v. Powell,* 428 U.S. 465 (1976), to the extent that the state courts had considered and rejected a claim, relief was available in every case if the state courts were wrong on the law or if the state factfinding process was not entitled to a presumption of correctness. *Fay v. Noia,* 372 U.S. 391 (1963); *Townsend v. Sain,* 372 U.S. 293 (1963); 28 U.S.C. § 2254 (1970). If the former, the prisoner was entitled to the writ. A grant of the writ for constitutional errors in state process generally entitles the prisoner to his release unless retried within a period of time specified by the issuing court. A federal court is empowered to "dispose of the matter as law and justice require." 28 U.S.C. § 2243 (1970). See *Carafas v. LaVallee,* 391 U.S. 234 (1968). If the latter, he was entitled to a de novo factual determination either at an evidentiary hearing, through the use of some other
Noia, governmental accountability included accountability for correct results as determined by the last court empowered to review the claim. In Kaufman v. United States, the Court decided that "adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." Thus, even if a claim had been thoroughly litigated once, a prisoner was entitled to have it relitigated, except in limited circumstances.

It was the availability of substantive relitigation which provoked the sharpest adverse reaction. Numerous scholars decried unending collateral attack on both state and federal judgments of conviction and argued strongly for some principle of finality which would halt what they viewed as the unnecessary, wasteful, even damaging relitigation of constitutional claims.

On the other hand, not only did a majority of the Court believe that a mechanism for relief should always be available to test constitutional claims, but there was also considerable sentiment that substantive review was even more necessary when constitutional claims were raised by state prisoners than when they were raised by federal prisoners. At least theoretically, certiorari was


13. See note 10 supra and accompanying text.


15. Kaufman v. United States, 394 U.S. 217, 226 (1969). In Kaufman the Court apparently agreed with the Government's argument that special concerns prompted broad review of state judgments of conviction, although it disagreed with the Govern-
available to test the claims of state prisoners directly on review of the highest state court.\textsuperscript{16} However, particularly with the rapid expansion of federal rights which the states were required to enforce, this route was considered impracticable.\textsuperscript{17} Moreover, a basic mistrust of the state courts' willingness and ability to perform adequately also prompted the Court to expand the availability of federal collateral review.\textsuperscript{18}

In its recent habeas cases, the Court has not consistently addressed these concerns,\textsuperscript{19} nor has it supported its results in terms of the functions to be served by the writ. Indeed, one of the most striking features of recent habeas decisions is that, while the Court still insists that it adheres to the general principle of a right to substantive relitigation,\textsuperscript{20} it has recently narrowed federal habeas corpus jurisdiction in three ways. First, the substantive scope of the writ has been limited,\textsuperscript{21} and there is the suggestion that it might be further limited.\textsuperscript{22} Second, its availability has been curtailed by

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  \item Support for this proposition [of more limited review of claims brought by federal prisoners] is drawn from the fact that considerations which this Court, in \textit{Fay v. Noia} \ldots deemed justifications for affording a federal forum to state prisoners—e.g., the necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions—do not obtain with respect to federal prisoners.
  \item Kaufman v. United States, 394 U.S. 217, 225-26 (1969). Recognizing all this, the Court nevertheless asserted: "The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." \textit{Id.} at 226. \textit{Kaufman} was overruled by \textit{Stone v. Powell}, 428 U.S. 465 (1976), insofar as \textit{Kaufman} afforded collateral relief for fourth amendment claims. \textit{See} text accompanying notes 33 & 34 \textit{infra}. The Court in \textit{Stone} did not, however, confront \textit{Kaufman}'s view of the function of the writ.
a forfeiture standard which resurrects the adequate state ground doctrine. 23 Third, the Court has taken a first step toward possibly precluding habeas relief totally where the state has adequate post-conviction process. 24 Thus, while unwilling to abandon the principle of substantive relitigation, except in one area, 25 the Court nevertheless has embarked on a course of decisions which makes access to such relitigation more difficult in the first instance. 26 In view of the undeniable costs and questionable benefits of substantive relitigation, 27 it may be time to reconsider the idea of a continuously available “mechanism for relief.” 28 But any change should focus on the concerns which underlie habeas corpus and should take a consistent view of those concerns.

The extent to which, and the circumstances under which, federal habeas review of state court convictions should be available have been in controversy since the Supreme Court began to expand habeas jurisdiction; thus, the issues involved in an expansion or contraction of the writ have long been identified. 29 The purpose of this article is to show that recent developments in the law of habeas corpus have taken place with little or no regard for the relevant issues and that a consistent, contemporary approach to the problems engendered by federal review of claims brought by state prisoners is both necessary and possible. 30

U.S. 387, 413-14 (1977) (Powell, J., concurring); id. at 419-29 (Burger, C.J., dissenting).

23. Wainwright v. Sykes, 97 S. Ct. 2497 (1977). Under the adequate state ground doctrine, a claim which the state courts have declined to consider because of a nonconstitutional reason, such as a procedural default, has been held nonreviewable on federal habeas corpus. Brown v. Allen, 344 U.S. 443, 458 (1953). Fay v. Noia, 372 U.S. 391 (1963), specifically rejected the adequate state ground as a bar to habeas corpus relief. See note 9 supra and accompanying text.

24. Swain v. Pressley, 430 U.S. 372 (1977), upheld the power of Congress to eliminate the general availability of habeas corpus for the District of Columbia and to substitute an adequate remedy to be used in the local District of Columbia courts. Although the decision dealt only with the unique status of the District of Columbia, it may have implications with respect to state prisoners. See text accompanying notes 245-255 infra.


27. See Bator, supra note 2; Friendly, Is Innocence Irrelevant?, supra note 4.


30. Judge Friendly, while approving the result in Stone, noted that he “would
SUBSTANTIVE LIMITATIONS

Until 1976, the Supreme Court adhered to the principle of Fay v. Noia31 and Brown v. Allen.32 In that year, however, the Court imposed its first and, to date, its only substantive limitation on the scope of habeas corpus. In Stone v. Powell,33 the Court decided that there would be no habeas review of fourth amendment claims in cases in which the petitioner had had a full and fair opportunity to raise the issues in state courts.34 Although at least some members of the Court apparently would consider similar treatment for claims arising under Miranda v. Arizona,35 and for claims involving the pretrial right to counsel,36 Stone has not yet been extended.

Consequently, claims arising under the fourth amendment are entitled to less federal consideration than are any other constitutional claims. But the Court has not articulated any theory relevant to the purposes of habeas corpus jurisdiction which justifies such a ranking of constitutional rights. This absence of a rationale not only makes it difficult to reconcile the past with the present, but also makes it extremely difficult to predict the future. That is, with no clear view of the way in which the Court perceives habeas corpus, it cannot be said whether Stone represents a sui generis limitation on review of fourth amendment claims; whether it has predictive value for limiting habeas corpus to claims which cast doubt on the guilt or innocence of the petitioner; whether it portends limiting habeas corpus to claims which do not involve the enforcement of "prophylactic" rules; or whether it suggests limiting habeas corpus

have preferred to have seen it reached by a thoroughgoing judicial reconsideration of the whole subject of collateral attack on criminal convictions or, failing that, by legislation." Friendly, Federalism: A Foreword, 86 YALE L.J. 1019, 1031 (1977). For an approach to recent developments in federal habeas corpus different from that taken herein, see Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 YALE L.J. 1035 (1977).

32. 344 U.S. 443 (1953).
34. Id. at 481-82. See also id. at 494 n.37.
35. 384 U.S. 436 (1966). In Wainwright v. Sykes, 97 S. Ct. 2407, 2506 n.11 (1977), the majority declined to consider the applicability of Stone to Miranda claims because the issue had not been argued.

to claims arising from rights which have been held retroactively applicable to cases decided before the announcing decision. Of all these related possibilities, none deals with the concerns which have heretofore governed the availability of the writ.

The principal judicial precursors of Stone are the dissenting opinions in Kaufman v. United States37 and the concurring opinion of Justice Powell in Schneckloth v. Bustamonte.38 Both of those cases involved fourth amendment claims. In Kaufman the claim was raised for the first time in an application for federal postconviction relief under Section 2255 of Title 28 of the United States Code.39 Justice Black would have declined to consider a claim either by way of section 2255 or by way of habeas corpus for state prisoners40 unless the claim cast “some shadow of a doubt”41 on petitioner’s guilt. Justices Harlan and Stewart would have excepted fourth amendment claims from collateral review, except in “limited and special circumstances.”42 However, they disagreed with Justice Black’s thesis that reviewability should turn on guilt or innocence.43 The entire Court seems to have agreed that the standards for collateral review of federal convictions should be the same as the standards for review of state convictions. But the dissenters would have withdrawn relitigation of fourth amendment claims from both federal and state postconviction review;44 the majority considered such review required for both classes of prisoners.45

In Schneckloth v. Bustamonte,46 Justice Powell, concurring, said that habeas corpus should not be available to test a claim that illegally seized evidence should have been excluded from a

37. 394 U.S. 217, 231 (1969) (Black, J., dissenting); id. at 242 (Harlan, J., dissenting).
It is coterminous with the relief available to state prisoners and has been held to be a constitutionally adequate substitute for the writ. United States v. Hayman, 342 U.S. 205 (1952).
42. Id. at 242 (Harlan, J., dissenting). The circumstances to which the opinion refers, by citation to Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1966), and to Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 391-92 & n.60 (1964), largely involve inadequate counsel, or some other inadequacy in the process by which the claim was determined. Kaufman v. United States, 394 U.S. 217, 241 (1969) (Black, J., dissenting).
44. Id. (Harlan, J., dissenting).
45. Id. at 225-26.
46. 412 U.S. 218, 250 (1973) (Powell, J., concurring). Justice Powell was joined in his concurring opinion by the Chief Justice and by Justice Rehnquist.
state trial unless petitioner had not had a fair opportunity to litigate that question in the state courts.\textsuperscript{47} Disposing of \textit{Noia} as deriving from a "revisionist view of the historic function" of the writ,\textsuperscript{48} Justice Powell concluded that the value of finality of judgments was an historic limitation on the scope of the writ,\textsuperscript{49} and that although "[n]o one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries ... recognition of that reality does not liberate us from all historical restraint."\textsuperscript{50}

Justice Powell said that, typically, fourth amendment claims have no bearing on the justice of incarceration. Thus, while habeas corpus should be available for "added assurance" against unjust incarceration, prisoners raising fourth amendment claims are generally justly detained.\textsuperscript{51} He did not define what he meant by "added assurance" or further explain why such relitigation was necessary. His underlying premise, as had been Justice Black's, was that justice is done when the guilty are convicted: A guilty person is justly detained; evidence seized in violation of the fourth amendment is reliable and produces correct, that is, just, results.

Three years after \textit{Schneckloth}, the Court decided \textit{Stone v. Powell},\textsuperscript{52} holding: "[W]here 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."\textsuperscript{53}

In \textit{Stone} there was a marked shift in emphasis from the concurrence in \textit{Schneckloth}, notwithstanding that Justice Powell wrote both opinions, and that the holding in \textit{Stone} is a mirror image of the language in the \textit{Schneckloth} concurrence.\textsuperscript{54} Where \textit{Schneckloth}
deals largely with habeas corpus, Stone deals largely with the fourth amendment exclusionary rule. Gone is the resort to history as demonstrating a need to temper the purposes of the writ; instead, the brief historical synopsis is intended to show that, until Brown v. Allen and Fay v. Noia, the writ had developed to compensate for the lack of adequate state corrective process. Gone is any reference to the value of finality; relegated to a footnote is the discussion of the costs of collateral review; transferred to an analysis of the exclusionary rule itself is the discussion of the role of guilt or innocence. The opinion rejects the idea that effectuation of the purposes of the fourth amendment exclusionary rule requires the availability of habeas corpus. The Court concluded instead that the exclusionary rule "is not a personal constitutional right. It is not calculated to redress the injury . . . ."

Justice Brennan, in dissent, refocused the issue on habeas corpus. In his view, the Court must have been stating "either that respondents [were] not, as a matter of statutory construction, 'in custody in violation of the Constitution,' . . . or that 'considerations of comity and concern for the orderly administration of criminal justice' . . . [were] sufficient to allow this Court to rewrite jurisdictional statutes enacted by Congress." Justice Brennan maintained:

However the Court reinterprets Mapp, and whatever the rationale now attributed to Mapp's holding or the purpose ascribed to the exclusionary rule, the prevailing constitutional rule is that unconstitutionally seized evidence cannot be admitted in the criminal trial of a person whose federal constitutional rights were violated by the search or seizure. The erroneous admission

59. Stone v. Powell, 428 U.S. 465, 486 (1976). By this analysis, the Court completely identified fourth amendment claims with the exclusionary rule. It thus left virtually all fourth amendment claims without a federal collateral remedy, holding: "[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." Id. at 494 n.37.
60. Id. at 502 (Brennan, J., dissenting).
61. Id. at 504-06 (Brennan, J., dissenting) (citing id. at 478 n.1).
of such evidence is a violation of the Federal Constitution—
Mapp inexorably means at least this much, or there would be no
basis for applying the exclusionary rule in state criminal proceed-
ings . . . .

Since the majority acknowledged that the right not to be convicted
on the basis of fourth amendment violations still existed and could,
indeed, be invoked by way of certiorari, Justice Brennan could not
see how the “constitutional deprivation suddenly vanishes” when
habeas jurisdiction is invoked; he stressed that Congress had effec-
tively cast the district courts as “surrogate Supreme Courts.”

Justice Brennan thus viewed the decision as having ominous
implications for the future of habeas corpus, especially because of
the majority’s reliance on the irrelevance of fourth amendment vio-
lations to guilt or innocence. He was concerned about the future
availability of habeas for a whole range of constitutional claims that
are not “‘guilt-related.’ ”

The majority opinion described this portion of the dissent as
“hyperbole.” The majority did not, however, clearly indicate the
possible scope of Stone. The most limited interpretation of the de-
cision, that it will not be expanded beyond fourth amendment situ-
ations, finds some support in that, until Stone, the only suggestions
for substantive limitations on habeas corpus were made in fourth
amendment cases. The Stone rationale, that the fourth amendment
exclusionary rule “is not a personal constitutional right,” rein-
forces this interpretation.

If this is the basis of Stone, it tells much more about the fu-
ture of the exclusionary rule than about the future scope of habeas
corpus. The exclusionary rule is, at last, “neatly severed from its
contceptual nexus,” but the surgery appears deliberately limited.
This is not, I suspect, because Justice Powell and at least the two
other members of the Court who had joined his Schneckloth con-

62. Id. at 510 (Brennan, J., dissenting).
63. Id. at 511 (Brennan, J., dissenting).
64. Id. at 511-12 (Brennan, J., dissenting).
65. Id. at 517-18 (Brennan, J., dissenting).
66. Id. at 518 (Brennan, J., dissenting). Among such claims, Justice Brennan
listed double jeopardy, entrapment, self-incrimination, Miranda violations, and use
of invalid identification procedures. Id. at 517-18 & n.13 (Brennan, J., dissenting).
67. Id. at 494-95 n.37.
68. See text accompanying notes 37 & 38 supra.
currence would not have preferred a broader approach, but because not enough members of the Court were willing to deal with the broader habeas problems. This seems to be the only sound explanation for the striking difference between the Schneckloth concurrence and Stone. The differences between them, as well as the failure, thus far, of the proponents of the extension of Stone to muster a majority of the Court to their position, indicate that Stone was not intended to set a trend for habeas corpus.

Even construed as a single substantive limitation on habeas corpus, Stone is hard to comprehend. As long as it remains true that the Constitution forbids convicting a defendant on the basis of illegally seized evidence, a person so convicted is held in custody in violation of the Constitution. As such, he is entitled to federal review of his constitutional claims by way of habeas corpus. This is so until and unless the Court determines that, as a general matter, adequate state process is sufficient to bar relitigation of constitutional claims. The substantive distinction drawn by the Court simply fails to further the purposes of the writ.

The lack of adequate justification for singling out one constitutional provision for different treatment tends to exert some pressure to develop a broader rule. Possible bases for such a rule can be discerned not only in Stone and its precursors, but also in Brewer v. Williams and Wainwright v. Sykes. However, the possible lines of argument which emerge from these cases appear

71. See text accompanying notes 54-58 supra.

72. In Brewer v. Williams, 430 U.S. 387 (1977), which involved a claim that the right to counsel before trial had been violated, the majority did not even advert to the possible extension of Stone. The Chief Justice would have relied on Stone to deny relief, id. at 419-29 (Burger, C.J., dissenting), and Justice Powell would, in an appropriate case, have considered its extension to fifth and sixth amendment claims, id. at 413-14 (Powell, J., concurring). In Justice Powell's view, however, Brewer was not such a case because the parties had not had the opportunity to brief the issue, id. at 414 & n.3 (Powell, J., concurring). See also Castaneda v. Partida, 430 U.S. 482, 507-09 & n.1 (1977) (Powell, J., dissenting), which involved alleged discrimination in grand jury selection. In Wainwright v. Sykes, 97 S. Ct. 2497, 2506 n.11 (1977), which involved a Miranda claim, the Court declined to reach the applicability of Stone because this issue had not been raised by the parties.


74. One of the principal suggestions with respect to habeas corpus is that there should be no substantive relitigation of any claims unless state process has been found inadequate to deal with them. See Bator, supra note 2; Friendly, Is Innocence Irrelevant?, supra note 4. See also text accompanying note 238 infra.

75. 430 U.S. 387, 416-17 (1977) (Burger, C.J., dissenting). Id. at 409-11, 413 n.2 (Powell, J., concurring).

76. 97 S. Ct. 2497, 2506 n.11 (1977).
to have as little to do with the rationale of habeas corpus as does Stone itself.

The Role of Guilt or Innocence

One dominant theme in fourth amendment cases is that since fourth amendment violations do not bear any relation to the reliability of the guilt-determining process, and since the victims of such violations are nearly always guilty, habeas corpus should not lie to evaluate claimed violations.\[^77\] Justice Black's position in Kaufman v. United States\[^78\] was that the claim should not be heard unless it casts some "shadow of a doubt"\[^79\] on the defendant's guilt, equating, as did Justice Powell in Schneckloth v. Bustamante,\[^80\] justice with conviction of the guilty.

But this simple equation is antithetical to the concept that the Bill of Rights and the fourteenth amendment set standards for official conduct irrespective of guilt or innocence.\[^81\] While some constitutional provisions have been held applicable to the states because the rights they embody are believed necessary to assure reliable factfinding,\[^82\] this is by no means true of all provisions which have been held binding on the states.\[^83\] That is, the decision to make certain enumerated rights applicable to the states through the fourteenth amendment did not always depend on the contribution which enforcement of these rights would make to the determination of guilt or innocence. The principal purposes of such incorporation are to require the states to enforce these fundamental rights and to insure their consistent enforcement. This can be achieved

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\[^77\] Several members of the Court have recently expressed an inclination to focus the habeas corpus inquiry on whether or not the alleged violation could have resulted in an incorrect verdict. See Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting); id. at 507 (Stewart, J., dissenting). But see Brewer v. Williams, 430 U.S. 387, 413 n.2 (1977) (Powell, J., concurring). While this approach basically would limit the scope of review, at least one Justice is prepared to follow the approach to its logical conclusion and to consider if the evidence at trial was sufficient to establish guilt beyond a reasonable doubt. This would represent an unprecedented expansion of the scope of the writ. Freeman v. Zahradnick, 97 S. Ct. 1150, 1152 (1977) (Stewart, J., dissenting from denial of certiorari).


\[^79\] Id. at 242 (Black, J., dissenting).


\[^82\] See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel at trial).

\[^83\] See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial).
only by federal review. Consequently, any withdrawal of direct review would be inconsistent with the purposes of incorporation. To the extent that collateral review provides surrogate certiorari review and provides it for far more cases than could be reviewed directly, withdrawal of collateral review is also inconsistent with the purposes of incorporation.

The role which guilt or innocence might play in defining the scope of habeas corpus review for claims brought by state prisoners is limited at best.84 If the underlying premise of the scope of collateral review is that a mechanism should be continuously available to relitigate constitutional claims,85 then innocence is irrelevant. That is, if the right is enforceable in the first instance irrespective of its bearing on guilt or innocence, the rationale of relitigation requires that it remain enforceable. Thus, in this context, to the extent that the guilt-innocence inquiry equates justice only with “correct” results and pays no attention to the means used to secure those results, it is too narrow.

If, on the other hand, the underlying premise of the scope of collateral review is that there should be no relitigation of claims which have been fully and fairly litigated,86 even if only in the state courts, then the colorable claim of innocence acts as a kind of judicial safety valve. It allows relitigation even though the underlying process appears adequate because of some perception that the wrong result has been reached. In this context, the idea is expansive rather than restrictive.

Indeed, it was precisely in this context that Judge Friendly suggested the relevance of a colorable claim of innocence to the availability of collateral attack.87 He took the position that collateral attack “carries a serious burden of justification”88 which can be met only in four types of cases.89 The underlying principle is that, in all

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84. Justice Black was an early Supreme Court proponent of the relevance of guilt or innocence to collateral attack. See text accompanying note 41 supra. The idea found its most scholarly presentation in the 1970 article by Judge Friendly, see Friendly, Is Innocence Irrelevant?, supra note 4.
85. See note 12 supra and accompanying text.
86. See note 74 supra and accompanying text.
88. Id. at 146-49. Judge Friendly addressed himself principally to collateral attack in a unitary system, that is, a single state or federal system. Id. at 146. However, he ultimately concluded that the same principles which he believed should govern a unitary system should also govern where federal relief is sought against a state conviction. Id. at 167.
89. These are cases in which (1) the criminal process has broken down to the extent that the court can be said to have lost jurisdiction; (2) a denial of rights is
of these areas, a violation would mean that petitioner had not had one fair opportunity to litigate the charges. Where there had been such an opportunity, Judge Friendly did not believe that the claim should be relitigated “in the absence of a colorable showing of innocence.”

[T]he petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Even where the basic premise of the scope of the writ makes the question of innocence expansive rather than restrictive, there are serious difficulties with its applicability. Presumably a “colorable claim of innocence” means something other than harmless error since Judge Friendly, at least, would include in the evaluation any evidence which, it is claimed, should have been excluded. But, if state process has been adequate, the verdict would seem to be the last thing which should be relitigated. Certainly, going behind verdicts would aggravate, not reduce, federal-state tension. Workload would not be appreciably lessened because, unless courts were to begin to construe petitions very strictly, someone would have to read the state records to evaluate the evidence and the colorability of the claim of innocence. In short, examining whether there is a colorable claim of innocence is more, not less, intrusive; it is at least as time-consuming as the present practice. Yet the principal rationale of a system which would limit relitigation to cases in which there has been a failure of

Claimed on the basis of facts outside the record and, hence, this denial could not have been directly reviewed; (3) there has been a failure to provide proper procedure for defending at trial and on appeal; (4) new constitutional developments relating to criminal procedure apply. Id. at 151-54.

90. Id. at 142.

91. Id. at 160 (footnote omitted). Judge Friendly believed that this proposal would almost always preclude collateral attack on claims of illegal search and seizure and on Miranda claims, but not on claims that confessions are “involuntary in the pre-Miranda sense,” at least where there was no other substantial evidence of guilt. Id. at 161-64.

process is to limit intrusiveness and to avoid needless expenditure of resources.  

The Integrity of the Factfinding Process

In Stone the Court declined to extend the fourth amendment exclusionary rule to habeas corpus because, among other things, it does not relate to the integrity of the factfinding process. It does not, by its nature, affect the reliability of the verdict. This is different from, although related to, the "colorable claim of innocence" approach. But this concept, too, has nothing to do with the announced purposes of habeas corpus jurisdiction.

The integrity of the factfinding process touchstone derives from the cases dealing with the retroactivity of newly announced rules. Cases announcing new rules which are held necessary for reliable determinations of guilt or innocence are typically held retroactive. Cases in which the integrity of the factfinding process is not impugned typically are held prospective only, notwithstanding that they, too, deal with constitutional rights. Except for the new approach taken by the Court in Stone, it has always been the case that once the right is announced and has attached, it becomes enforceable by way of habeas corpus.

The retroactivity-prospectivity distinction, which was criticized sharply from its inception as analytically indefensible, developed as a response to problems unrelated to habeas review. If numbers of new rights were to be held applicable to the states, and if those rights were to be held retroactive, the states would spend enormous time and resources relitigating the past and, perhaps, release people adjudged guilty by reliable processes. If the alternative to prospectivity were not to extend the right at all, the Court was unwilling to pay the price. This judicial compromise has resulted in holding retroactive only a very limited number of new rights: the

93. See text accompanying notes 27 & 28 supra.
94. See text accompanying note 111 infra.
right to counsel at trial, the right to confront witnesses, the right not to have a jury consider a coerced confession, and the right not to be tried in violation of the double jeopardy clause.

On the other hand, some of the most basic principles of the Anglo-American system of criminal justice have been held not to apply retroactively to the states, including the privilege against self-incrimination and the right to a jury trial. However, if the direct review process failed to remedy any violation of these rights, there is no question that the present Court would consider a petitioner entitled to habeas review of the claims on their merits.

In short, the retroactivity cases developed as a result of considerations having nothing to do with the availability of federal review. The distinctions which they draw bear no relation to enforcing a right once it is held applicable, at least if the Court is adhering to its belief in continuously available review. That is, if a claim involves the integrity of the factfinding process, but the state has adequately considered it, there is no more compelling reason to relitigate it than there is to relitigate other claims. If the concerns which led to broad habeas review are still legitimate, there is no less compelling reason to relitigate one sort of constitutional claim than there is to relitigate another.

The Prophylactic Rules

Another possible extension of Stone would be to cases in which the only claimed violation is of so-called "prophylactic" rules, rules of conduct which the Court has announced to secure underlying rights. The term "prophylactic" is, indeed, a term of

108. See note 15 supra and accompanying text.
109. See Wainwright v. Sykes, 97 S. Ct. 2497 (1977); Brewer v. Williams, 430 U.S. 387, 415 (1977) (Burger, C.J., dissenting). However, in Castaneda v. Partida, 430 U.S. 482 (1977), Justice Powell's dissent suggested that Stone might be extended to other classes of cases. The issue involved in Castaneda was discrimination in grand jury selection. Justice Powell declined to address the question because it had not been briefed or argued. Id. at 508 n.1 (Powell, J., dissenting).
denigration and its use reflects the Court's ambivalence toward the rules themselves rather than any view of the proper scope of habeas corpus.

It is simply incorrect to speak, as the Court did in *Stone*, of "extending" a prophylactic, generally an exclusionary, rule to habeas corpus. The issue in habeas corpus is not whether, for example, illegally seized evidence may be used in the habeas corpus proceeding itself. The issue is whether such evidence was used in a prior proceeding where the Constitution forbade its use. This issue is in sharp contrast to the issue in cases such as *United States v. Calandra*,112 in which the Court stated, correctly or incorrectly, that the Constitution is not violated by the use of illegally seized evidence in a proceeding other than a trial. Thus, the Court did not extend the fourth amendment exclusionary rule to the grand jury.113 But *Stone* involved the use of allegedly illegally seized evidence at trial and that is, so far, a violation of the Constitution.114

The reluctance of the Court to extend prophylactic rules to habeas corpus appears to stem from an ambivalent attitude toward the continued use of such rules at all, as shown by an increasing reluctance to enforce them literally. This is clear not only from the Court's treatment of the fourth amendment exclusionary rule115 but also from its *Miranda* decisions116 and its identification decisions.117 A major reason for this reluctance is the inescapable fact that violation of a rule does not necessarily mean violation of the right it was designed to protect. If a rule does not relate to guilt or innocence, and if noncompliance does not even mean that a protected right has been violated, it becomes extremely difficult to justify per se enforcement of the rule.118

It is possible that some or all prophylactic rules should be recast or abandoned.119 But the problems raised by their current

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113. *Id.* at 350.
115. See *id.* at 493-94.
status are not solved by continuing to require adherence to them and then, for all practical purposes, refusing to allow their federal enforcement. If substantive relitigation is necessary because of the inadequacy of certiorari review and the inadequacy of state resolution, then it is necessary for all constitutionally protected claims. If prophylactic rules are necessary to protect constitutional rights, then their enforcement is a federal function as much as is the enforcement of the rights they were designed to protect.

An Alternative Approach

The possible limitations on review of substantive claims by way of federal habeas corpus all suffer from a failure to address themselves to the purposes of the writ. Distinctions based on guilt or innocence, on the reliability of the factfinding process, or on enforcement of prophylactic rules have, in fact, nothing to do with whether or not collateral attack should be available, but rather with whether federal review should be available at all for state prisoners who have had their claims considered by the state courts. The difficulty with adopting any one of the proposed limitations is that, in any given case, it might not insure justice in a constitutional sense.

The Court, or at least some of its members, seems to be searching for a rationale for review which will preserve broad substantive review for the federal courts while insuring against results which it perceives to be unjust. In this respect, it does not appear to be searching for a rationale for habeas corpus different from a rationale for its direct review of state court judgments. To the extent that *Stone* distinguishes between the scope of direct and collateral review of claims brought by state prisoners, it is inconsistent with this search, it is at odds with the idea that habeas corpus functions to provide surrogate certiorari review, and it circumvents the real problem which is continued per se enforcement of prophylactic rules.

Accordingly, if there are to be any changes in the scope of substantive review, such changes should not be accomplished by carving indefensible exceptions from the habeas purview. Rather, the changes should be the same for both direct and collateral review

120. See text accompanying notes 16-18 *supra*.
122. Adoption of any one of these limitations might not result in enforcement of a right which the Court has held fundamental and binding on the states. See text accompanying notes 81-84 *supra*. 

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and should utilize a due process analysis. That is, in each case federal review would address the nature of the underlying right, the nature of the conduct alleged to have violated that right, and the consequences of the alleged violation. This approach avoids the "draconian"\(^{123}\) results of per se enforcement of exclusionary rules while protecting the underlying right. Depending upon the right involved, this approach may or may not take account of the impact of the violation on the reliability of the guilt-determining process; it should not, in any event, depend on a reviewing court's perception of guilt. The due process standard simply harmonizes the scope of substantive review with the need to enforce the underlying right.

This, indeed, appears to be the approach taken by the Court in the identification cases.\(^{124}\) In the initial trilogy of identification cases, United States v. Wade,\(^ {125}\) Gilbert v. California,\(^ {126}\) and Stovall v. Denno,\(^ {127}\) the Court required that counsel be available at lineups. However, it declined to say that an in-court identification could not be made if the rule with respect to counsel had been violated. It decided instead that the permissibility of the in-court identification would be determined by an analysis of all factors surrounding the prior identification to determine whether the identification so tainted that the jury should not even have been permitted to evaluate it.\(^ {128}\)

Last Term, the Court adhered to and refined this approach. In Manson v. Brathwaite,\(^ {129}\) a habeas corpus case, the Court considered the circumstances under which identification testimony could be offered at trial where the right to counsel was not involved. The state conceded that the pretrial identification procedure was "suggestive [because only one photograph was used] and unnecessary [because there was no emergency or exigent circumstance]."\(^ {130}\) The Court said that two approaches to such cases had developed.

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124. This also appears to be a developing trend in Miranda cases. See Michigan v. Tucker, 417 U.S. 433 (1974). It is the traditional approach in dealing with nonenumerated rights or rights not involving prophylactic rules. See, e.g., Donnelly v. DeChristoforo, 416 U.S. 637 (1974).
125. 388 U.S. 218 (1967).
126. 388 U.S. 293 (1967).
130. Id. at 108.
The first was a per se rule requiring exclusion of such evidence "without regard to reliability."\textsuperscript{131} The second approach continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. . . . This second approach . . . serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact.\textsuperscript{132}

Adopting this second approach, the Court denied relief because evaluation of the circumstances resulted in a finding that the evidence was reliable and that its admission did not violate due process.\textsuperscript{133}

In \textit{Manson} the Court not only moved away from per se rules in the identification area but also it signaled some effort to subsume such rules within a due process analysis.\textsuperscript{134} If the Court can do this in the identification area, there seems to be no reason not to take the same approach, for example, in the \textit{Miranda}\textsuperscript{135} and fourth amendment areas.\textsuperscript{136} In cases involving the warnings set

\begin{itemize}
\item \textsuperscript{131} \textit{Id.} at 110.
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.} at 117.
\item \textsuperscript{134} The Court noted: "Certainly, inflexible rules of exclusion, that may frustrate rather than promote justice, have not been viewed recently by this Court with unlimited enthusiasm." \textit{Id.} at 113 (citing Brewer v. Williams, 430 U.S. 387 (1977)).
\item \textsuperscript{135} Miranda v. Arizona, 384 U.S. 436 (1966). Apparently, it was of no significance to the Court that \textit{Manson} arose on habeas rather than on direct review since the Court nowhere addresses the distinction.
\item \textsuperscript{136} The problem and the danger lie in the components of the totality of the circumstances analysis. That is, in \textit{Manson} the Court indicated that "reliability is the linchpin." \textit{Manson} v. Brathwaite, 432 U.S. 98, 114 (1977). Since the underlying rationale for exclusion of eyewitness identification has always been reliability, this characterization may be appropriate. But in fourth and fifth amendment cases, reliability is not the principal value being served and a too ready transfer of the concept of reliability to those areas as the linchpin would distort their purpose. The touchstone of reliability relates to the inclination to limit habeas corpus to issues affecting the determination of guilt or innocence. See note 77 \textit{supra} and accompanying text. However, even Justice Powell, the most consistent proponent of this view, was unable to adhere to it in Brewer v. Williams, 430 U.S. 387, 409 (1977) (Powell, J., concurring). In this case, where no doubt was expressed as to the accuracy of the verdict or the manner in which it was reached, Justice Powell pointed out that while he might be inclined to extend \textit{Stone} to other classes of cases, [here, we have a Sixth Amendment case and also one in which the police deliberately took advantage of an inherently coercive setting in the absence of counsel, contrary to their express agreement. Police are to be commended for diligent efforts to ascertain the truth, but the police conduct in this case plainly violated respondent's constitutional rights.
\item \textit{Id.} at 413 n.2 (Powell, J., concurring).
\end{itemize}
forth in *Miranda v. Arizona*, the inquiry might center on what, if any, information was conveyed and its impact on the waiver of the privilege against self-incrimination, rather than on whether there was strict technical compliance. In fourth amendment cases, the good faith of the officers and the nature of their conduct would seem more important than technical perfection. It is, after all, difficult to sympathize with exclusion of the evidence in *Stone v. Powell*. It is equally difficult not to sympathize with exclusion in *Mapp v. Ohio*.

**PROCEDURAL LIMITATIONS: THE ADEQUATE STATE GROUND**

The question of the ends to be served by federal habeas corpus review of state convictions has received no more consideration in the Court's recent procedural decisions than it has in its substantive decisions. As a result, in the past two Terms the Court has decided several cases involving procedural problems in different ways. It has, however, scarcely touched the habeas questions involved.

In theory, the issue whether habeas corpus should be available to a state prisoner may arise where (1) state courts have been asked to consider and have considered a claim and it is alleged that they reached the wrong result; (2) state courts have been asked to...
consider and have considered a claim and it is asserted that they have done so inadequately;\textsuperscript{142} (3) state courts have never been asked to consider a claim;\textsuperscript{143} and, (4) state courts have been asked to consider a claim and have refused to do so.\textsuperscript{144}

By far the most dramatic procedural development in habeas corpus since \textit{Fay v. Noia}\textsuperscript{145} was the decision in \textit{Wainwright v. Sykes}.\textsuperscript{146} In \textit{Sykes} the Court held that failure to comply with state rules of trial procedure which would bar state consideration of a claim will also bar federal review absent a showing of both "cause" and "prejudice."\textsuperscript{147} Essentially, this is a determination that where a legitimate state interest in procedural rules bars state consideration of a claim, that same interest should preclude federal litigation. Thus, the Court has resurrected the adequate state ground\textsuperscript{148} which it rejected in \textit{Noia} and has substituted it for the waiver analysis mandated by that decision.\textsuperscript{149}

case in which constitutional claims turn upon the resolution of contested factual issues," Townsend v. Sain, 372 U.S. 293, 312 (1963), the overwhelming number of habeas cases are decided on the state court records. This is certainly true for the habeas cases which ultimately reach the Supreme Court. \textit{See, e.g.}, Michigan v. Tucker, 417 U.S. 433 (1974); Cupp v. Naughten, 414 U.S. 141 (1973); Mancusi v. Stubbs, 408 U.S. 204 (1972); Milton v. Wainwright, 407 U.S. 371 (1972); Dutton v. Evans, 400 U.S. 74 (1970); Frazier v. Cupp, 394 U.S. 731 (1969); Stovall v. Denno, 388 U.S. 293 (1967); Jackson v. Denno, 378 U.S. 369 (1964). District court hearings were held in far fewer cases which reached the Court, \textit{see, e.g.}, Boulden v. Holman, 394 U.S. 478 (1969); Miller v. Pate, 386 U.S. 1 (1966).

\textsuperscript{142} This would generally be an assertion that federal factfinding is required, \textit{see, e.g.}, Townsend v. Sain, 372 U.S. 293 (1963). This second situation presents the only possible basis which now exists for securing federal review of fourth amendment claims, \textit{see} Stone v. Powell, 428 U.S. 465 (1976), as well as the basis for overcoming the presumption of correctness attached to state findings of fact in all other substantive areas. Townsend v. Sain, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d) (1970).

\textsuperscript{143} The immediate inquiry here is whether or not petitioner has exhausted his presently available state remedies. 28 U.S.C. § 2254(b) (1970). \textit{See} Picard v. Conner, 404 U.S. 270 (1971). For a person to be barred by the exhaustion requirement, a state remedy must be available at the time habeas relief is sought. Fay v. Noia, 372 U.S. 391, 435 (1963). If petitioner has exhausted state remedies, the inquiry then would be whether he has waived the right to have a federal court consider his claim. \textit{Id.} at 438-40.

\textsuperscript{144} The inquiry here is whether the refusal is grounded in some failure to comply with state procedural rules and the weight to be given to this failure. \textit{Compare} Wainwright v. Sykes, 97 S. Ct. 2497 (1977) \textit{with} Fay v. Noia, 372 U.S. 391 (1963).

\textsuperscript{145} 372 U.S. 391 (1963).
\textsuperscript{146} 97 S. Ct. 2497 (1977).
\textsuperscript{147} \textit{Id.} at 2506.
\textsuperscript{148} \textit{See} note 23 \textit{supra}.
\textsuperscript{149} Wainwright v. Sykes, 97 S. Ct. 2497, 2506 (1977). \textit{See} text accompanying notes 153-167 \textit{infra}.
The problem of procedural bars to habeas corpus had its modern genesis in the several cases reviewed in *Brown v. Allen*.\(^{150}\) One petitioner, having pursued his claims through the state courts and having had them decided on the merits, was entitled to federal collateral review.\(^{151}\) Another, having filed his appeal one day out of time, was not so entitled since his conviction was then held to rest on an adequate and independent state ground.\(^{152}\) The result was a striking anomaly: Although the underlying claims were identical, the first petitioner was entitled to have his constitutional claim considered by both state and federal courts; the second petitioner was not entitled to have it considered at all.

This anomaly was largely dispelled by *Noia*. In that case the habeas petitioner had been convicted of murder and sentenced to life imprisonment. He did not appeal his judgment of conviction because of his fear that, on retrial, he would be sentenced to death. His conviction rested on a concededly coerced confession.\(^{153}\) The state courts denied collateral relief because the issue was one which should have been raised on appeal from the judgment of conviction.\(^{154}\) The Second Circuit reversed a denial of habeas corpus on the ground that “exceptional circumstances” existed.\(^{155}\) The Supreme Court affirmed but on different and far more sweeping grounds. The Court held that state remedies had been exhausted because, at the time of the habeas application, there was no state remedy available to petitioner.\(^{156}\) Since there were no presently available state remedies to which the federal courts should defer, petitioner was entitled to federal review of the merits of his constitutional claim unless he had deliberately waived that claim.\(^{157}\) The Court noted that, while interests of federalism require initial deference to the states, ultimate responsibility for correct results

\(^{150}\) 344 U.S. 443 (1953).

\(^{151}\) Id. at 466-77.

\(^{152}\) Id. at 486-87. See note 23 *supra* and accompanying text.

\(^{153}\) Noia’s codefendants were successful in having their confessions adjudged coerced. *Caminito v. Murphy*, 222 F.2d 698 (2d Cir.), *cert. denied*, 350 U.S. 896 (1955); *People v. Bonino*, 1 N.Y.2d 752, 135 N.E.2d 51, 152 N.Y.S.2d 298 (1956). The state acknowledged that Noia’s confession had been obtained under the same circumstances as were Caminito’s and Bonino’s, but insisted on holding Noia to his procedural default, his failure to appeal.


\(^{157}\) Id.
lies in the federal courts. Since sheer volume precludes the
Supreme Court from assuming this responsibility, the lot falls to the
district courts to do so in the first instance, subject to review by the
courts of appeals and the Supreme Court.

The opinion rejected the adequate state ground as a bar to
habeas relief, holding it applicable only in cases of direct review, but
inappropiate where the issue is unconscionable detention. In short, Noia found no procedural bar to habeas review unless
deliberate bypass were proved by the state. This strict standard
seemed to apply to any procedural limitation which prevented re-
view of a constitutional claim, including failures to move to sup-
press, failures to object at trial, and failures to appeal. Essentially, the rationale was that a fundamental right was at issue,
such as the right not to be convicted on the basis of a coerced
confession, and that right could be lost only if personally waived by
the defendant under the strict waiver standard enunciated in
Johnson v. Zerbst.

Immediately, this idea met lower federal court resistance,
especially with regard to objections which could have been and
were not made at trial, and where petitioner was represented by
counsel whose competence he did not challenge. Since federal
and state courts are bound by the same standard of waiver, and
since a failure to object is a typical bar to federal appellate relief,
it was hard for federal courts to accept the idea that they must
always look behind the failure to object at trial to ascertain the
availability of collateral relief.

Two years after Noia, the Court decided Henry v. Missis-

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158. Id. at 415-26.
159. Id. at 436-37.
160. Id. at 428-34.
161. Id.
162. Id. at 433. “Deliberate bypass” was used by the Court synonymously with
“waiver.” Id. at 438-39.
166. Id. at 438-39.
167. 304 U.S. 458 (1938). “A waiver is ordinarily an intentional relinquishment
or abandonment of a known right or privilege.” Id. at 464.
168. See, e.g., Whitney v. United States, 413 F.2d 326 (8th Cir. 1974); United
States ex rel. Terry v. Henderson, 462 F.2d 1125 (2d Cir. 1972); United States ex rel.
Green v. Rundle, 452 F.2d 232 (3d Cir. 1971); United States ex rel. Cruz v. LaVallee,
448 F.2d 671 (2d Cir. 1971).
169. See, e.g., United States v. Indiviglio, 352 F.2d 276 (2d Cir. 1965), cert.
sippi. In that case, counsel had failed to comply with a contemporaneous objection rule and, therefore, had not preserved a claim that illegally seized evidence had been admitted at trial. The case went to the Supreme Court not on habeas corpus but on direct review and was remanded to the state for a hearing "on the question whether the petitioner [was] to be deemed to have knowingly waived decision of his federal claim when timely objection was not made." The opinion distinguished between substantive and procedural state grounds as bases for limiting direct federal review. It held that where the state ground alleged to bar relief was substantive, the adequate state ground doctrine was necessary to avoid advisory opinions. But that was not true where the state ground was "purely procedural".

A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. . . . [A] litigant’s procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State’s insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.

In a footnote to this passage, the Court added:

This will not lead inevitably to a plethora of attacks on the application of state procedural rules; where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate nonfederal ground doctrine in the vast majority of cases.

The Court then declined to determine the adequacy of the state ground because, even assuming it to be inadequate, the record suggested a possible waiver by counsel, and

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171. Id. at 445-46.
172. Id. at 446.
173. Id. at 446-47.
174. Id. at 447-48 (citations omitted) (footnote omitted).
175. Id. at 448 n.3.
176. Id. at 450.
Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims... we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case.177

The decision by the Court in Henry to remand on the question of waiver left the relationship between direct and collateral review unclear. Henry might be read to mean that habeas corpus would be available where direct federal review was unavailable. This reading would flow from the Court's assumption, in remanding, that the state ground was inadequate. The Court said that if the state found no waiver, it could still insist on enforcing its procedural rule, but that the federal courts could consider the claim on habeas corpus if, in fact, it had not been waived.178

The implication is that direct review would be unavailable, although that implication virtually nullifies the Court's painstaking differentiation between substantive and procedural state grounds and between legitimate and inadequate state interests. If a state's adherence to its procedural rules will, in any event, bar relief, there seems no reason to analyze those rules in any given case. If, indeed, the Court meant that habeas would be available where direct review is not, that result is indefensible. If a principal purpose of habeas corpus for state prisoners is surrogate certiorari review,179 there appears to be no reason for collateral attack to be more readily available than direct federal review. Moreover, since a result is not definite until the Supreme Court has reviewed or declined to review a claim, or the time within which to request review has passed, preventing one more step while encouraging three is certainly counterproductive.180

Another unclear aspect of Henry is the relationship between adequate state ground and waiver. The Court in Henry expected that application of either doctrine in any case was likely to produce the same results.181 However, a reading of the opinion as a whole

177. Id. at 451-52 (citation omitted).
178. Id. at 452-53.
180. The defendant who was barred by an adequate state ground could not seek relief directly from the Supreme Court but could seek habeas corpus and, if necessary, appeal its denial. Finally, he could seek Supreme Court review of an unsuccessful appeal.
181. See text accompanying note 175 supra.
raises the possibility that in Henry itself a defendant could be held to have waived a right under a rule which the state had no legitimate interest in enforcing. Moreover, the Court did not suggest that the issue of waiver was directly reviewable, although waiver of federal rights is a federal question.

Noia never satisfactorily explained why a rule which the state had a legitimate interest in enforcing on direct review should lose that force collaterally. Henry never satisfactorily explained why the Court should be bound on direct review by a rule which the state had no legitimate interest in enforcing.

In Wainwright v. Sykes, the Court rejected Noia and made direct and collateral review standards the same, but it based those standards on the adequate state ground doctrine and not on waiver. In Sykes respondent claimed only after trial that testimony was admitted in violation of his Miranda rights. The state courts had refused to consider the claim on the merits because of respondent's failure to comply with the state's contemporaneous objection rule. The Court addressed the issue of the circumstances under which an adequate state ground would bar relief. Canvassing prior cases, the Court said:

To the extent that the dicta of Fay v. Noia may be thought to have laid down an all-inclusive rule rendering state timely objection rules ineffective to bar review of underlying federal claims in federal habeas proceedings—absent a "knowing waiver" or a "deliberate bypass" of the right to so object—its effect was limited by Francis . . . .

The limitation on Noia which the Court relied upon was Francis v. Henderson, decided the previous Term. Francis, in turn, rested on Davis v. United States, a case brought pursuant to section

182. In Wainwright v. Sykes, 97 S. Ct. 2497, 2504 n.8 (1977), the Court indicated that waiver is itself an adequate state ground. Inasmuch as waiver has always been considered a federal question, Fay v. Noia, 372 U.S. 391, 439 (1963), it is difficult to see how it can be denominated an adequate state ground.


184. Id. at 2507. In adopting the adequate state ground which already applied on direct review, Henry v. Mississippi, 379 U.S. 443 (1965), the Court equated the standards for direct and collateral review.


186. Id. at 2503.

187. Id. at 2505.


In *Davis* the Court had held that a federal prisoner who had failed to make timely challenge to the composition of a grand jury could not do so by collateral attack. In *Francis* the issue was whether a state prisoner who had failed to make timely challenge to the grand jury composition could secure habeas corpus relief, or whether the *Davis* rule applied to state cases. The Court upheld a statutorily imposed waiver because the interest in having the issue timely raised was as strong for state as for federal courts and because considerations of comity and federalism required the same result. To overcome the waiver, defendant would have to show cause for the failure to raise the claim and would also have to show actual prejudice.

In applying the *Francis* rule to waived objections to confessions, absent a showing of cause and prejudice, the Court in *Sykes* relied on a decision which had simply served to equate federal and state collateral review. Thus, in rejecting *Noia*, the Court did not consider any of the special circumstances which have been thought to underlie habeas jurisdiction. Moreover, *Sykes* recreated the anomaly which had existed prior to *Noia*. It upheld the rule of *Brown v. Allen* that, once a state claim had been litigated, a federal court should independently determine the correctness of the result, but it barred claims which had not been litigated absent a showing of cause and prejudice. It declined to define that term except to state that it was narrower than the *Noia* deliberate bypass doctrine.

193. *Id.* at 541-42.
194. *Id.* at 542. The only reference to *Noia* in the majority opinion in *Francis* was in support of the proposition that the Court had the power to entertain the claim on its merits. *Id.* at 539.
196. *See* text accompanying notes 150-153 *supra*. The most recent illustration of the anomaly is seen by comparing *Francis v. Henderson*, 425 U.S. 536 (1976), with *Castaneda v. Partida*, 430 U.S. 482 (1977). In *Francis* defendant was held to have waived his right to challenge the composition of the grand jury in the state courts and, thus, was barred from federal consideration of that claim. Accordingly, he never received a substantive review of that issue in any court. In *Castaneda* the state courts considered the merits of the defendant's challenge to the grand jury. He, therefore, became entitled to federal collateral review of that claim. Accordingly, his claim was reviewed by two judicial systems.
197. 344 U.S. 443 (1953).
However, if constitutional rights are important enough to justify relitigation, they are at least important enough not to fall behind a virtually impenetrable barrier of failure to satisfy a local contemporaneous objection rule. This is not to say that failure to satisfy state procedural rules is entitled to no weight or to as little weight as Noia accorded it, but rather to say that it is entitled to more weight than Sykes accorded it. Moreover, by adopting the adequate state ground as defined by Henry, Davis, and Francis, the Court is according presumptive validity to the state procedural bar which a defendant must overcome. Acknowledging that some, possibly most, state procedural grounds barring review are “legitimate” in an abstract sense does not mean that they should present an automatic barrier to habeas corpus in individual cases.

The question remains to what extent a defendant, whose rights have allegedly been violated, has the obligation either to invoke state process under state rules or to forego the right to raise his claim at all. If the function of the writ of habeas corpus is to provide a continuously available mechanism to test constitutional claims substantively, a strong argument can be made that only a deliberate waiver should bar its litigation. Even if the function of

of Brown v. Allen, 344 U.S. 443 (1953), applies with equal force to Sykes:

[Brown] tells the state courts that the more liberal they are in considering the federal constitutional claims of state prisoners on the merits the more freely they will be subjected to the delays and the indignity, as it is often felt to be, of federal-court review of their decisions, whereas the more astute they are to lay procedural traps for criminal defendants the surer they will be of immunizing their decisions from federal examination.

Hart, supra note 14, at 118.

199. See text accompanying notes 160-162 supra.

200. Since state courts are charged with enforcement of constitutional rights, they should be apprised of such claims at a time when adjudicating them will cause the least disruption in the administration of criminal justice. Thus, the states have a legitimate interest in having constitutional issues aired at the earliest possible moment. In this sense, contemporaneous objection rules, rules governing the making of pretrial motions, and the conduct of posttrial procedures are rooted in legitimate state interests.

201. Even a deliberate waiver does not necessarily require consultation with defendant if the issue waived is one which counsel normally decides as a part of the conduct of the trial. See, e.g., Faretta v. California, 422 U.S. 806 (1975): “It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.” Id. at 820 (citing Brookhart v. Janis, 384 U.S. 1, 7-8 (1966); Henry v. Mississippi, 379 U.S. 443, 451 (1965); Fay v. Noia, 372 U.S. 391, 439 (1963)). However, in such circumstances, it must be established that counsel had considered the issue and, where necessary, had investigated any significant facts. The enforcement of procedural defaults by counsel and the refusal to allow relitigation of at least fourth amendment claims raises anew the problem of the standard by
the writ were to test the adequacy of state process, some further inquiry would be needed beyond acknowledgment of the general legitimate interest of the state in having claims raised and determined in its own courts. Moreover, where the issue is the right to litigate a claim even once, it is not clear why the failure to comply with a state procedural rule should bar relief where the error is plain and easily correctable by the trial judge.\(^{202}\)

After *Sykes*, it might appear that almost any failure to raise a claim\(^{203}\) in the appropriate state court would bar federal review. However, *Estelle v. Williams*,\(^{204}\) *Blackledge v. Allison*,\(^{205}\) and *Henderson v. Kibbe*,\(^{206}\) all decided between *Francis* and *Sykes*, cast at least some doubt on the accuracy of that interpretation.

On the same day that it decided *Francis*, the Court decided *Estelle v. Williams*.\(^{207}\) In *Estelle* the respondent was tried in prison clothing, after permission to wear civilian clothes had been denied by a jail officer. Neither respondent nor his attorney objected in court.\(^{208}\) Writing for the majority, the Chief Justice indicated that if respondent had been compelled to stand trial in prison garb, he would have been denied a fair trial and would be entitled to relief.\(^{209}\) However, he concluded that "the failure to make an objection to the court as to being tried in such clothes, for whatever which the competence of counsel is to be evaluated. *McMann v. Richardson*, 397 U.S. 759 (1970), suggests a rather vague standard: whether counsel's advice fell "within the range of competence demanded of attorneys in criminal cases." *Id.* at 771. See also *Tollett v. Henderson*, 411 U.S. 258 (1973). These were cases involving the counseling of a guilty plea. The lower courts are divided on the appropriate standard in assessing the competence of trial counsel, and three different standards can be found: (1) the proceedings must be a "farce" or a "mockery of justice" in order to hold counsel's competence inadequate, see, e.g., United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976). But see United States v. Daniels, 558 F.2d 122 (2d Cir. 1977), which suggests that this standard, long adhered to by the Second Circuit, see United States v. Wight, 176 F.2d 376, (2d Cir. 1949), *cert. denied*, 388 U.S. 950 (1950), may be reconsidered; (2) counsel must meet "the customary skill and knowledge which normally prevails at the time and place," see, e.g., Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970); (3) counsel must meet the "minimum standard of professional representation," see, e.g., United States ex rel. Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975). For a discussion of recent developments in this area, see 6 *HOUSTON L. REV.* 245 (1977).


203. See text accompanying notes 147, 196-198 *supra*.


208. *Id.* at 502.

209. *Id.* at 504-05, 512.
reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." That respondent himself had been aware of the issue, that Texas courts generally acceded to requests to appear in civilian clothing, and that tactical reasons could be imagined for failing to make the request were apparently all factors in the Court's finding an absence of compulsion:

We are not confronted with an alleged relinquishment of a fundamental right of the sort at issue in Johnson v. Zerbst. There, the Court understandably found it difficult to conceive of an accused making a knowing decision to forgo the fundamental right to the assistance of counsel, absent a showing of conscious surrender of a known right. The Court has not, however, engaged in this exacting analysis with respect to strategic and tactical decisions, even those with constitutional implications by a counselled accused.

The reason for this rule is clear: if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation.

Without referring to Noia, the Court reached a result at odds with that decision. By assuming that a strategic decision was possible, the Court employed the language of Noia. By declining to explore whether such a decision was made in the specific case, the Court rejected Noia's rationale.

Justice Powell, joined by Justice Stewart, concurred. He identified two situations in which a conviction would be upheld despite a claimed constitutional error: where it can be shown that the substantive right was "consensually relinquished," and where there has been an "'inexcusable procedural default'" in failing to object when the right "could have been protected." Since the right could have been protected, respondent should be held to the failure to object.

In Blackledge v. Allison, the proceedings of respondent's

210. Id. at 512-13.
211. Id. at 506-12.
212. Id. at 508 n.3 (citations omitted).
213. Id. at 513 (Powell, J., concurring).
214. Id. (Powell, J., concurring).
215. Id. (Powell, J., concurring).
216. Id. at 513-14 (Powell, J., concurring).
state court guilty plea were not transcribed. Instead, the trial court employed a preprinted form on which blank spaces were filled in with respondent's answers. The form indicated that respondent said that he understood the sentence he could receive and that no threats or promises had been made to induce the plea which resulted in a sentence of from seventeen to twenty-one years in prison. The opinion by Justice Stewart indicates that respondent tried, unsuccessfully, to secure state collateral relief, but it does not set forth the grounds alleged in the application or the reason it was denied by the state courts.

On federal habeas corpus, respondent alleged a broken sentence promise made in the presence of a third party, and said that he had been instructed to answer the questions in court in such a way that the court would accept the plea. The Court recognized the need for the finality of guilty pleas, but noted: "[A]rrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees." Then the Court held that although the representations made in open court were a formidable barrier in any subsequent collateral proceedings, they were not insurmountable. This was so apparently not only because of the detailed allegations, but also, and more importantly, because plea bargaining was, at the time of this conviction, a sub rosa process which did not allow for recording of underlying bargains. In a sense, this case is a mirror image of Estelle v. Williams. In Estelle respondent was held to his failure to object because the Texas courts would have granted relief if the objection had been raised. In Blackledge respondent was not held to his failure to notify the state court of a promise because such a plea bargain would not have been acceptable to the court.

Two weeks after deciding Blackledge, the Court decided Henderson v. Kibbe, reversing a Second Circuit decision which had granted the writ because of the failure of the state trial judge

218. Id. at 66 n.1.
219. Id. at 69.
220. Id. at 67.
221. Id. at 69.
222. Id. at 72 (citing Harris v. Nelson, 394 U.S. 286, 290-91 (1969)).
223. Id. at 74-77.
225. See text accompanying notes 208-212 supra.
adequately to charge on the issue of causation.\textsuperscript{227} The New York State Court of Appeals had considered the issue of the adequacy of proof of causation but had declined to consider the adequacy of the charge because the issue had not been raised in the trial court.\textsuperscript{228} The Second Circuit held that since the defense had consistently challenged the sufficiency of the proof at trial, the failure to object was not a deliberate bypass but an inadvertent omission.\textsuperscript{229} The Supreme Court apparently accepted this finding at least to the extent of considering the failure to object not an absolute bar to relief:

Orderly procedure requires that the respective adversaries' views as to how the jury should be instructed be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.

The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.\textsuperscript{230}

The Court in \textit{Kibbe} did not bar relief because of the procedural default, nor did it inquire into the reason for the default. Instead, it denied relief on the merits. The Court painstakingly explored New York law to determine what, if any, error there was in the instruction and whether it was so defective as to deny due process.\textsuperscript{231} Chief Justice Burger concurred on the ground that the \textit{Noia} deliberate bypass doctrine should not extend to "midtrial procedural omissions which impair substantial state interests."\textsuperscript{232} He would have barred the claim on this basis.

Thus, in \textit{Sykes} and \textit{Francis}, the Court deferred to a state procedural rule without examining the specific case. In \textit{Estelle} and \textit{Blackledge}, the Court indicated a willingness at least to evaluate

\begin{itemize}
\item \textsuperscript{227} Respondent was charged with murder for having robbed the deceased and having left him, drunk, on a cold night, on a snow-covered road, without his glasses and partly undressed, where he was killed by a speeding truck. \textit{Id.} at 147.
\item \textsuperscript{228} \textit{Id.} at 150.
\item \textsuperscript{229} United States \textit{ex rel.} Kibbe v. Henderson, 534 F.2d 493 (2d Cir. 1976), rev'd, 431 U.S. 145 (1977).
\item \textsuperscript{230} Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (footnotes omitted).
\item \textsuperscript{231} \textit{Id.} at 156-57.
\item \textsuperscript{232} \textit{Id.} at 158 (Burger, C.J., concurring).
\end{itemize}
whether or not the state would enforce a constitutional right if properly raised. To that extent, and assuming that they are still viable, they may temper the strict rule of Sykes in future cases.\textsuperscript{233} Kibbe, however, appears flatly inconsistent with Sykes, although the two cases were decided slightly more than one month apart. Assuming that the need for a federal forum still underlies habeas corpus for state prisoners, and acknowledging the obvious interests of the state in cleaning its own house, a proper balance lies somewhere between Noia and Sykes.

If federal habeas corpus must be available to vindicate federal rights, inadvertence or oversight by counsel or defendant should be insufficient to bar federal review regardless of the significance the state attaches to its procedural rules as a general matter.\textsuperscript{234} On the other hand, if competent counsel evaluates and rejects a claim respecting the conduct of the trial, that should generally be sufficient to bar relief since it gives weight to the valid state interest and also to the constitutional claim. If this is what Sykes means by “cause,” it provides an appropriate accommodation of competing interests. But if the Court will not accept such grounds where counsel appears generally competent, then the rule is too restrictive.

More disturbing is the Court's addition of a standard requiring a showing of prejudice. It is very difficult to understand what place this element has in an evaluation of waiver. If the Court means that petitioner must show that, without the error complained of, the result would have been different in a harmless error sense,\textsuperscript{235} it requires a habeas corpus court to evaluate the merits to determine whether it should evaluate the merits. If the Court means that the error complained of could have affected the outcome of the

\textsuperscript{233} Although Estelle v. Williams, 425 U.S. 501 (1976), had been decided the previous Term, Blackledge v. Allison, 431 U.S. 63 (1977), was decided only seven weeks before Sykes.

\textsuperscript{234} Moreover, where an error is plain on the face of the record and could have been corrected by the trial court, a failure by counsel to act should not be dispositive. In Estelle, for example, the trial judge easily could have asked if defendant wanted to wear civilian clothing. The court needed no additional facts to make its inquiry beyond the physical appearance of the defendant. But see Pate v. Robinson, 383 U.S. 375 (1966), where the trial court was held to a duty to inquire into defendant's capacity to stand trial notwithstanding the absence of an objection. On the other hand, in Kibbe the trial court was alleged to have made the constitutional error. In such a case, there might be a higher duty on the part of counsel to call such error to the court's attention. Yet, in Estelle the Court declined to find error because there had been no objection, and in Kibbe it did not find waiver although there had been no objection.

\textsuperscript{235} See note 92 supra and accompanying text.
it is simply requiring an allegation of facts which, if proved, would entitle petitioner to relief. This view would be wholly reasonable, but since it has always been the law in any event, it seems unlikely that that is what the Court contemplated.

The Court adopted the cause and prejudice standard from *Francis v. Henderson*. But that case involved the failure to object to grand jury composition. A trial and adjudication of guilt under a higher standard of proof than is required for the grand jury to indict ordinarily will obviate grand jury error. Moreover, the state has a particularly high interest in not having to undo an error-free verdict because of tainted pretrial proceedings which could have been cured before trial. Such factors might militate in favor of the result in *Francis*. But *Sykes* involved the process of adjudicating guilt. Only if the error is harmless is it obviated. In this context, engrafting a substantive requirement on a procedural inquiry is inappropriate.

**PROCEDURAL LIMITATIONS: THE ADEQUATE STATE HEARING**

A third possible means of limiting habeas corpus would be to abandon the writ as a means of providing a continuously available mechanism for substantive review and to restrict it to a determination of the adequacy of state process. Where state process is adequate, there would be no review of the merits. This has, for some time, been the position of several scholars. It has the virtues of consistency, economy, finality, and limited exacerbation of federal-state relations. Its principal problem is that it does not provide the "added assurance" which prompted the expansion of the writ, and it is not clear that state courts are producing sufficiently correct results to limit substantive review to the vagaries of the certiorari jurisdiction.

The inconsistent desires to limit federal oversight of state court constitutional adjudication and to retain full federal authority to review constitutional questions have led to inconsistent results. To some extent the Court accommodated both these ends in *Townsend v. Sain* by permitting a federal court to defer to state

findings of fact where certain criteria were met. Moreover, it recently opted for reviewing only the adequacy of process in fourth amendment cases and in the District of Columbia. In Stone v. Powell, the Court held that a federal court must accept the result reached by the state court if there has been a fair opportunity to litigate the claim. In Swain v. Pressley, a unanimous Court accepted the power of Congress to withdraw habeas jurisdiction from the federal courts and to substitute for it a comprehensive postconviction remedy in the local District of Columbia courts. The statute, modeled after section 2255, provides that all collateral attacks on local District convictions are to be brought in the local courts and that there will be no habeas review of such convictions if the District review process is adequate. The District of Columbia statute is part of a comprehensive reorganization of local District courts designed, in part, to make the District more analogous to a state. The question now is whether and to what extent the Supreme Court would defer to a state statute designed to provide all the requisite incidents of collateral review.

There are some straws in the wind. First, one of the reasons which has been advanced in favor of broad habeas jurisdiction is that it enables constitutional claims to be considered by article III judges with lifetime tenure. But in Swain, the Court minimized the importance of that factor. Second and relatedly, the inadequacy of state results was an important factor in broadening habeas review. Recently, the Court seems more inclined to regard the states with favor. However, there is no particular reason to believe that the states are any more or less correct than they ever were. Third, many states did not provide comprehensive postconviction review even at the time of Noia. However, postconvic-

252. See Bator, supra note 2, at 509-10.
254. For example, it is difficult to see how the petitioner in Brewer v. Williams, 430 U.S. 387 (1977), was denied relief in the state appellate process.
tion relief is now at least theoretically available in most states, and Swain could be interpreted as a sign of increasing deference to those procedures.

As an abstract matter, it can be believed that state performance has improved substantially since 1963, if only because more attention to constitutional rights is required by Supreme Court decisions and because counsel is mandatory. What is not known is the degree of improvement and the extent to which any improvement is the result of the availability of broad federal review. That the Court has withdrawn substantive habeas jurisdiction in only limited contexts and that it continues to review claims which have received plenary state consideration seem to indicate that the


256. Since 1963, the privilege against self-incrimination has been held applicable to the states, Malloy v. Hogan, 378 U.S. 1 (1964), as has the prohibition against double jeopardy, Benton v. Maryland, 395 U.S. 784 (1969). The right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), the right to a jury trial, Duncan v. Louisiana, 391 U.S. 145 (1968), the right to confront witnesses, Pointer v. Texas, 380 U.S. 400 (1965), and the right to a speedy and public trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), have all been applied to the states.

Court will not soon relinquish the power it has assumed. With so many questions still unanswered, this is probably just as well. Should the Court defer to state statutes and review only the adequacy of process, it will be faced on a broader plane with the problem which already exists after Stone and Swain: It is not entirely clear what adequate state process is. The Supreme Court has not addressed what constitutes an opportunity for full and fair litigation since Townsend. That case was concerned with setting standards for deciding when district courts should make de novo determinations of historical fact.  

Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

The Court was careful to state that this discretionary deference to state courts did not relate to conclusions of law. Stone addressed the problem only in an ambiguous footnote; Swain did not address it at all.

Three possibilities must be considered. The first involves the cases where there has been no state determination of the claim at all because either none was requested or none was timely requested. As to these, the adequacy of the procedural bar should be evaluated in light of the federal interest.

The second group of cases is that in which a claim is raised and a threshold determination is made that the application does not allege facts which, if proven, would warrant relief. These cases

259. Id. at 312-13 (footnote omitted).
260. Id. at 318.
261. Stone v. Powell, 428 U.S. 465, 494 n.36 (1976). By use of the "cf." signal before citing Townsend v. Sain, 372 U.S. 293 (1963), the Court left unclear whether the Townsend criteria apply in assessing the adequacy of state process under the Stone rule, or whether the Court merely intended to suggest that some criteria should be developed analogous to those in Townsend. For a discussion of the "cf." signal, see A UNIFORM SYSTEM OF CITATION rule 2:3, at 7 (12th ed. 1976). The lower courts have been grappling with this question. See, e.g., Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977); O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir.), cert. denied, 97 S. Ct. 2981 (1977).
present pure questions of law. In these questions the federal courts presumably have the most direct interest and expertise. To the extent that habeas corpus is a substitute for certiorari, it is significant that it is in these questions which the Supreme Court has the greatest institutional interest. On the other hand, state court determinations of pure questions of law do not involve intricate procedures and their adequacy is easily evaluated: whether there was an unbiased tribunal before which a defendant could appear with competent counsel. The only justification for habeas review of such questions would be distrust of state courts coupled with the burden on the Supreme Court. Yet, the Court has decided many cases on review of habeas petitions which involved no new factfinding by the lower federal courts. The net effect is to delay definitive resolution of important questions.

Perhaps the largest category is those cases in which there has been a state evidentiary hearing which, it is claimed, was procedurally so defective as not to produce reliable results. Non-fourth amendment cases continue to be governed by Townsend. Lower courts which have been faced with fourth amendment cases after Stone have, for the most part, simply stated that they find the state hearing to be full and fair without stating the standard by which they reached that determination. One possibility is that any mechanism which appears generally adequate is adequate. Under this view, no review would be made of the record. Another possibility is that for this category the Townsend criteria would apply. Some support for this is found in the Stone footnote mentioned above. The contention that this construction would render Stone a nullity could be answered by the argument that the Stone "opportunity" language was meant to deal also with cases in which the issue was

264. Id. at 318. See also 28 U.S.C. § 2254(d) (1970).
266. Bator, supra note 2, at 510-23; Friendly, Is Innocence Irrelevant?, supra note 4, at 164-65.
267. See note 141 supra.
268. See, e.g., Gates v. Henderson, 568 F.2d 830 (2d Cir. 1977); Bracco v. Reed, 540 F.2d 1019, 1020 (9th Cir. 1976); Chavez v. Rodriguez, 540 F.2d 500, 502 (10th Cir. 1976). Only in O'Berry v. Wainwright, 546 F.2d 1204, 1223 (5th Cir.), cert. denied, 97 S. Ct. 2981 (1977), did the Court attempt to articulate standards for review.
270. See note 261 supra.
not timely raised and that this became even more necessary after \textit{Wainwright v. Sykes}.\textsuperscript{271}

An intermediate position would be that the petition would have not only to allege facts which would entitle the petitioner to relief, but also to allege absent or incompetent counsel, lack of process to obtain witnesses, knowing use of perjured testimony, or some other flaw typically thought to undermine a factfinding process.\textsuperscript{272} Whether or not the result was fairly supported by the record would, on the other hand, seem to relate more to the correctness of the result as a question of fact and law, and would be reviewable only by way of certiorari. Adoption of any one of these positions would depend on what is perceived to be the function of the writ.

\textbf{CONCLUSION}

By failing to consider the function of habeas corpus in deciding recent habeas cases, the Court has cast substantial confusion over the area. While \textit{Noia} was too broad procedurally and perhaps substantively, a federal system requires some federal review and some consistency. The certiorari jurisdiction is probably inadequate for this. Limitation of review only to the question of the adequacy of state process is probably insufficient, a fact seemingly accepted by the Court, and the addition of review where there is some question of guilt does not aid matters. Such an inquiry is diversionary.

Any substantive limitation should focus on a due process inquiry taking account of the factors relevant to the right alleged to have been violated. Any procedural limitation should focus on whether a substantial right was sacrificed which either the defendant, counsel, or the court should reasonably have asserted. In short, a rule which provides for precise relitigation of all claims is too sweeping; a rule which almost automatically bars litigation even once is too restrictive.

\textsuperscript{271} 97 S. Ct. 2497 (1977).
\textsuperscript{272} See Bator, \textit{supra} note 2, at 451-62; Friendly, \textit{Is Innocence Irrelevant?}, \textit{supra} note 4, at 151-54, 167.