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The Search For a New Equilibrium in Habeas Corpus Review: Resolution of Conflicting Values

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THE SEARCH FOR A NEW EQUILIBRIUM IN HABEAS CORPUS REVIEW: RESOLUTION OF CONFLICTING VALUES

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The author analyzes recent United States Supreme Court decisions, which change the scope of federal habeas corpus review, and develops a model to promote a coherent view of the scope of habeas corpus. This model, which is based upon vindicating the underlying constitutional right, provides broad review of alleged violations which undermine the reliability of the fact finding process and provides narrow review of other alleged violations.

> When precedents are to be straightened out, and some are to be avoided in favor of others, and language which has become too tangled to guide is to be recast, the appropriate common law tool is *principle*. . . . [I]f *principle* is to be *sound* principle with a life-basis, a sense-basis, and a solid guidesomeness into emerging conditions, then it must have an explicit *reason* which both displays its wisdom and helps to clarify its application.**

I. INTRODUCTION

Thirty years ago Mr. Justice Frankfurter spoke of federal habeas corpus as an "untidy area" of the law.[1] Little has transpired in the intervening years to change that characterization. The wide range of problems embraced by habeas proceedings generate issues of considerable subtlety and complexity—issues which have received extensive consideration by courts and commentators. Yet, there remains a basic structural defect in the case law and commentaries: a failure to perceive and distinguish such complexities and then to fashion a paradigm through which rational decision making becomes possible.

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** K. LLEWELLYN, THE COMMON LAW TRADITION 434-35 (1960) (emphasis in original).

1. Sunal v. Large, 332 U.S. 174, 184 (1947) (Frankfurter, J., dissenting).

This article attempts to design a framework which will enable thoughtful analysis and resolution of the myriad of problems surrounding federal habeas corpus relief. In order to design an adequate model, the article begins with a brief historical perspective. Such a perspective is necessary to lay a foundation for understanding the problems and advancing a possible solution.

History, of course, is insufficient by itself to furnish the structure of a model. The next section of the article, therefore, moves to more recent Supreme Court and congressional action. In this regard, particular attention is paid to section 2254 of title 28 of the United States Code, which deals with access of state prisoners to federal courts.[2]

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2. 28 U.S.C. § 2254 (1970). While the focus is on section 2254, much that can be said in this regard applies also to section 2255 of title 28 of the United States Code which deals with the right of federal prisoners in habeas proceedings. Section 2254 provides:

State custody; remedies in Federal courts

(a) 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.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

The development of the model will be completed in the final section of the article. The intent is to suggest a model which will promote a rational decision making process, a process that does not exchange rationality for principle but includes both within its framework. On another level the model suggests a mode of analysis for other unsettled constitutional and criminal procedural issues.

II. EXPANSION OF THE WRIT

While sketching a brief history of the Great Writ, it is well to

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(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

28 U.S.C. § 2254 (1970).

Section 2243 of title 28 sets out the procedural requirements that a habeas court must follow once a petition is filed. It instructs the court to either award the writ or enter an order to show cause why the writ should not be granted. The section requires the writ or order to be directed to the person having custody of the petitioner, and provides time limits for return of the writ or response. It requires the respondent to make a return certifying the true cause of detention. The section also provides procedures for setting a hearing and requires the presence of the petitioner at such a hearing, if any issue of fact is presented in the petition. Section 2243 allows the petitioner to deny any facts alleged in the return or allege other material facts. It also provides for amendment of the return and the petitioner's response to the return. The section also directs the court to "summarily hear and determine the facts and dispose of the matter as law and justice requires." 28 U.S.C. § 2243 (1970).

keep in mind that in law, as in nature, the weight of the pendulum modulates its own swing.[3] Historically, the writ of habeas corpus lay to determine whether a person under custody was restrained in accordance with law. Since 1867, the lower federal courts have been empowered through habeas corpus to reopen "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."[4] Initially, the state's burden on habeas corpus was merely to show that the state court was one of competent jurisdiction.[5] If jurisdictional rules, the rules governing the distribution of authority to make decisions, had been observed, any antecedent violations of procedural safeguards were immaterial.[6] Only challenges to nonjudicial detentions without proper legal process or to confinement by the judgment of a court without competence could be heard on federal review.

It is generally agreed that the first great broadening of the scope of habeas corpus came with the approval of the post-Civil War constitutional amendments.[7] Congress made the writ available to state prisoners to provide a means of redress for those persons who

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3. A recent provocative article suggests that one of the great advantages of a federal system, and one of the important functions promoted by the writ of habeas corpus, is the unique constitutional dialogue which is created between state governments and the federal government. Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977). This dialogue leads to a dialectical synthesis of principles and serves as a driving force behind the articulation of rights. The federal courts are likely to present the "utopian" viewpoint, whereas the state courts are likely to present the "pragmatic" viewpoint. The authors suggest that the great advances of constitutional law in the 1950's and 1960's were based on "explicating the dialectic between these opposing tendencies, rather than defending one or another approach." *Id.* at 1050 n.78. One rather eloquent rationalization of dialecticism posits that:

> A court bent upon validating current behavior soon loses the force of its legitimating mission by abstaining entirely from utopian perspectives upon an imperfect world. Conversely, a Court bent upon wholesale utopian reform soon finds the political capital necessary to effectuate change squandered, for it ignores the historical base from which change must proceed and the presumptive claim that this base has to legitimacy under the Constitution.

Id.

4. Act of February 5, 1867, ch. XXVII, 14 Stat. 385.

5. *See, e.g., Ex parte* Bridges, 4 F. Cas. 98, 106 (C.C.N.D. Ga. 1875).

6. *See* HART & WECHSLER, THE FEDERAL COURT AND THE FEDERAL SYSTEM, 1238-40 (1953); Hart, *The Supreme Court, 1958 Term; Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 101-25 (1959). *See generally Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

7. *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Oakes, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966); *Developments in the Law—Federal Habeas Corpus*, *supra* note 6. The writ of habeas corpus was originally available only to federal prisoners pursuant to the Judiciary Act of 1789. The expansion of the writ to include state prisoners within the purview of the statutory language came by the Act of February 5, 1867, ch. XXVII, 14 Stat. 385.

might be detained by uncooperative local authorities. Gradually, the jurisdictional constraints gave way to the larger equitable concepts which served to broaden access to the federal forum.[8] By 1915, the Supreme Court announced that the federal judges' job was "to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law."[9]

In 1938, the Court decided the seminal case of *Johnson v. Zerbst*,[10] in which it stated that the sixth amendment "withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[11] The Court permitted the question of whether there had been a "voluntary and knowing" waiver to be reexamined de novo in the habeas corpus proceedings. The Court emphasized the helplessness of the defendant who was forced to defend himself and the absence of any effective remedy by way of appeal for denial of his right to counsel. The opinion left unresolved, however, the issue of whether claimed denials of constitutional rights other than those specifically raised could also be examined de novo by a habeas corpus court. The Court did not explain whether review should extend to an appraisal of evidence, which would be necessary where the use of a coerced confession was alleged.

By the early 1940's the Court had openly abandoned its "jurisdictional" approach and had begun overseeing federal substantive rights. Mere compliance with rules governing the distribution of authority would no longer be sufficient to avoid federal inquiry into the means used to protect constitutionally guaranteed rights. In *Waley v. Johnston* the Court expressly acknowledged that the writ was available to consider constitutional claims as well as questions of jurisdiction.[12] This federal inquiry might be pursued in

8. *See, e.g., Ex parte* Royall, 117 U.S. 241 (1886) (first habeas case that came from state court to United States Supreme Court); *Ex parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). For an exhaustive history of section 2254, see Darr v. Burford, 399 U.S. 200, 204-14 (1950).

9. Frank v. Mangum, 237 U.S. 309, 331 (1915); *see* Moore v. Dempsey, 261 U.S. 86 (1923).

10. 304 U.S. 458 (1938). *Johnson* involved a claim of denial of right to counsel by indigent federal prisoners. There the Court formulated its famous test for the waiver of a federal right. That test requires an "intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

11. *Id.* at 463.

12. 316 U.S. 101, 104-05 (1942). In *Waley*, the defendant claimed that his guilty plea had been coerced by law enforcement officers. In response, the Court held that review would always be available for constitutional claims dependent upon facts outside the record. The

habeas corpus proceedings even though a determination of constitutional error could not be made on the face of the record of conviction, but called for a reappraisal of evidence already examined in the initial proceedings.[13]

In 1953 the Court fixed the position to which it has, to a substantial degree, recently returned. In *Brown v. Allen,*[14] the Court for the first time unequivocally established that even if a state had fully determined a constitutional claim, a federal habeas court could reexamine the legal issues and, in its discretion, the facts. State adjudication would carry weight but would not have res judicata effect in a federal court.[15] The Court emphasized that, with regard to state prisoners, due process of law was not primarily concerned with the adequacy of a state's corrective processes or with the prisoner's personal opportunity to avail himself of those processes. Rather, due process was concerned with the correct application of basic federal rules governing the decision to be made. In *Brown* the Court concerned itself with the avoidance of any underlying constitutional error. Yet it is crucial to note that in the companion case of *Daniels v. Allen,*[16] the Court rested its decision on the principle

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Court stated the writ "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Id.* at 104.

13. Still as late as 1951, Justice Frankfurter indicated doubt as to whether a state prisoner's claim of conviction by use of a coerced confession was reviewable on habeas corpus unless the prisoner was able to show a further denial of constitutional right in the state's failure to provide an adequate process for correction of the initial constitutional error. In Jennings v. Illinois, 342 U.S. 104 (1951), Justice Frankfurter opined that where the record reflected that petitioner had duly raised, and the trial court duly litigated the constitutional claims involved, the writ of certiorari should be dismissed for lack of a "properly presented federal question." Justice Frankfurter pointed out that in collateral proceedings in the court below there had been no showing that circumstances existed which warranted "a new and independent inquiry into those determinations as a matter of federal right." *Id.* at 115-16 (Frankfurter, J. dissenting). The majority, however, remanded the case for a determination of whether the state act in question provided an appropriate remedy for petitioners to assert that their constitutional rights were infringed. If that finding was negative, petitioners' claims would then be cognizable in federal district court. *Id.* at 111-12.

14. 344 U.S. 443 (1953). In *Brown* the prisoner asserted a denial of his constitutional right by use of a coerced confession and by means of discrimination against Negroes in selection of both the grand and petit juries. At trial petitioner had been represented by competent counsel and his claims were presented to the trial court. He duly appealed from his conviction to the state's highest court and received a full review of his claims. That court upheld his conviction. He applied to the Supreme Court for a writ of certiorari and the writ was denied. The Supreme Court ruled that the prisoner was entitled to a full review of his constitutional claim from a federal district court. The *Brown* position was reaffirmed in Wainwright v. Sykes, 433 U.S. 72 (1977).

15. Brown v. Allen, 344 U.S. 443, 458 (1953).

16. 344 U.S. 443 (1953). *Daniels,* heard by the Court with *Brown* and two other habeas petitions, was a case in which two prisoners had failed to obtain a decision on the merits of their federal constitutional claims from the state's highest court. *Daniels* followed the precise

that the authority of the states to regulate and enforce the procedure of their own courts deserved to be respected, and that a state prisoner lost his right to review of his federal claim in a federal court if he did not utilize the state procedures made available to him.

Thus, by 1953 there were two potential paths available to a state prisoner to obtain federal habeas corpus review. When the petitioner was in some fashion impeded procedurally in presenting his case, such as by the lack of or inadequacy of his counsel or by excusable ignorance of facts or law, the prisoner was given the benefit of habeas corpus on the grounds relied upon in *Waley v. Johnston,* that "the writ is the only means of preserving his right."[17] On the other hand, where petitioner satisfied state procedural requirements by presenting his contentions in state courts to the fullest extent of available procedures, his constitutional claim would be reviewable in federal habeas corpus proceedings under the *Brown* rationale. Contentions not made in conformance with state procedures, however, would be dismissed under the *Daniels* rationale.

Such was the state of the law until 1963 when the Supreme Court announced its famous decision in *Fay v. Noia,*[18] sweeping away the final barriers to broad collateral reexamination of state criminal convictions in federal habeas corpus proceedings. *Fay* was decided the same day as *Townsend v. Sain,*[19] *Gideon v. Wain-*

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pattern of Brown's case in the state court up until the last day for filing the appeal papers in the state supreme court. Daniel's counsel had the papers ready and would have filed them on time if he had dropped them in a mail box. Instead, he hand delivered them the next day at the time they would have arrived by mail. The state supreme court decided that the appeal had been filed too late and refused to consider it. The Supreme Court of the United States held that since the state court judgment rested on a reasonable application of the state's legislative procedural rules, a ground that would have barred direct review by the Court, the district court lacked authority to grant habeas relief. The tensions underlying *Brown* and *Daniels* could hardly be more illustrative of administrative problems in a federalist system devoted to the concept of ordered liberty.

17. 316 U.S. 101, 105 (1942). For an analysis of this case, see note 12 *supra.*

18. 372 U.S. 391 (1963). Noia was convicted of felony murder on the basis of his allegedly coerced confession. The trial judge stated that he had seriously considered disregarding the jury's recommendation of mercy and sentencing Noia to death. *Id.* at 396 n.3. The state contended that since Noia had bypassed the state appellate process, there was an adequate and independent state ground for conviction. However, the Court held that such procedural defaults did not bar federal habeas to a petitioner who had deliberately bypassed state procedures, where the circumstances of Noia's failure to appeal did not constitute an intelligent and understanding waiver. *Id.* at 438-40. The Court reasoned that, in light of the judge's expressed sentiment at sentencing, Noia's decision not to appeal was not a tactical or strategic move, or a deliberate avoidance of state procedures, but was a choice between accepting life imprisonment or pursuing an appeal which "if successful, might well have led to a retrial and death sentence." *Id.* at 440.

19. 372 U.S. 293 (1963). *Townsend,* a capital case in which the petitioner claimed his confession was coerced by the use of truth serum, outlined the duty of federal habeas courts to conduct fact finding hearings with respect to petitions brought by state prisoners.

wright,[20] and *Douglas v. California*.[21] *Fay* and *Townsend* were to become the vehicles by which the Warren Court intended to protect expanded due process rights.[22] The Warren Court thus created remedial protection for the constitutionalization of expanded due process rights in the criminal procedure area by means of increased availability of federal habeas corpus.[23]

The Court in *Fay* held that a federal court could exercise jurisdiction regardless of whether federal claims had been raised in the state courts. Habeas corpus relief would *always* be available where the detention was in violation of federal law, subject only to the limitation that such relief not be granted to one who "deliberately sought to bypass" the orderly adjudication of his federal defenses in state court. "Deliberate bypass" was deemed the equivalent of the "knowing and intelligent" waiver standard of *Johnson v. Zerbst*.[24] Both standards were subject to the same test and the presence of either was expressly predicated on the considered choice of the petitioner.[25] The goal was to assure that no defendant would

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20. 372 U.S. 335 (1963).

21. 372 U.S. 353 (1963).

22. Federal supervision of availability of habeas corpus was entirely consistent with the Court's devotion to equality both in and outside of the criminal justice field. Its policy of selective incorporation, including annexation of remedial protection in the form of injunctive relief in areas such as civil rights, illuminated the underlying philosophy of federally guaranteed equality before the law. For the principal decisions intending to accomplish this, see *In re* Winship, 397 U.S. 358 (1970)(proof beyond reasonable doubt); Benton v. Maryland, 395 U.S. 784 (1969)(fifth amendment prohibition of double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968)(sixth amendment right to jury trial); Washington v. Texas, 388 U.S. 14 (1967)(sixth amendment right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213 (1967)(sixth amendment right to speedy trial); Pointer v. Texas, 380 U.S. 400 (1965)(sixth amendment right to confront witnesses); Malloy v. Hogan, 378 U.S. 1 (1964)(fifth amendment right to remain silent); Kerr v. California, 374 U.S. 23 (1963)(fourth amendment exclusionary rule); Gideon v. Wainwright, 372 U.S. 335 (1963)(sixth amendment right to counsel); Robinson v. California, 370 U.S. 660 (1962)(eighth amendment prohibition of cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961)(fourth amendment exclusionary rule). *See also* Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977); Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964).

23. *See* Friendly, *supra* note 22. *See also* McFeely, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 537-40 (1976).

24. 304 U.S. 458, 464 (1938). For an analysis of this decision, see note 10 *supra*.

25. Fay v. Noia, 372 U.S. 391, 439 (1963). Subsequent Supreme Court cases have wrestled with the concept of deliberate bypass. *See, e.g.*, Davis v. United States, 411 U.S. 223 (1973)(failure to raise claim before trial waives right to collateral attack); Kaufman v. United States, 394 U.S. 217 (1969)(failure to appeal from state conviction does not per se prohibit federal habeas relief, although it is one of the factors federal courts must consider in determining whether there was a bypass of state review); Henry v. Mississippi, 379 U.S. 442, 451 (1965)(decision of counsel relating to trial strategy, even when made without the consultation of defendant, would bar *direct* federal review of claims thereby foregone except where "the circumstances are exceptional"). *See also* Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Francis v Henderson, 425 U.S. 536 (1976); Estelle v. Williams,

relinquish a guaranteed right without full understanding.

With the ruling in *Fay*, the two paths to federal habeas review became a freeway.[26] The Court's broadening of habeas corpus insured the active participation of federal courts in the construction and protection of constitutional rights. Justice Brennan made this underlying premise abundantly clear when he stated "it is the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[27] This "manifest policy" enunciated in *Fay*, favoring independent federal adjudication free from the impact of structural deficiencies in state criminal process, assured the federal judiciary full supervisory authority over federal rights. Although *Townsend v. Sain* may be viewed as supporting the presumption of correctness of state factfinding it also may be seen as securing independence of the federal forum from state factfinding processes.[28]

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425 U.S. 501 (1976). *See generally* Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. REV. 78 (1964).

26. Waley v. Johnston, 316 U.S. 101 (1942), had been concerned only with constitutional rights which could not have been vindicated except collaterally. Brown v. Allen, 344 U.S. 443 (1953), was concerned with avoiding constitutional error, but deferred to state procedural rules. Daniels v. Allen, 344 U.S. 443 (1953) epitomized such deference. Fay v. Noia, 372 U.S. 391 (1963), essentially obliterated the distinctions developed in those cases and allowed review of *all* claims absent a deliberate bypass, by holding that failure to exhaust state remedies applied only to those remedies still open to petitioner at the time of his application for federal review. Thus where a petitioner would be denied state review because of a failure to make a timely appeal, as in *Daniels*, federal review became available.

27. Fay v. Noia, 372 U.S. 391, 424 (1963).

28. 372 U.S. 293 (1963). *Townsend* held that federal courts upon petition for a writ of habeas corpus, *must* hold an evidentiary hearing to determine a constitutional claim if the petitioner "did not receive a full and fair evidentiary hearing in a state court." *Id.* at 312. The Court listed six situations in which a hearing would be mandatory, including cases in which (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination was not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there was a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appeared that the state trier of fact did not afford the habeas applicant a full and fair fact hearing. In ascertaining when a hearing is mandatory the determination is made upon a review of the answer, the transcript record of state proceedings, and the expanded record if there is one. *Id.* at 319.

In 1966 Congress amended section 2254 of title 28 to conform, in large measure, to the *Townsend* criteria. Act of November 2, 1966, Pub. L. No. 89-710, 80 Stat. 1105. The amendment clearly places the burden upon the petitioner, when there has already been a state hearing, to show that it was not a fair or adequate hearing, in order to force a federal evidentiary hearing. Since the function of an evidentiary hearing is to try issues of fact, such a hearing is unnecessary when solely issues of law are raised. In those situations where a hearing is not mandatory, the hearing is in the discretion of the judge. 372 U.S. at 318. If a judge decides that an evidentiary hearing is neither required nor desirable, he shall make such a disposition of the petition "as law and justice require." 28 U.S.C. § 2243 (1970). The incongruity of the requirement in section 2255 that a hearing *must* be held for federal prison-

The arguments concerning *Fay's* principle of independent federal review were immediately forthcoming. Pro-*Fay* forces adopted the point of view stressing the unreliability of state courts, and emphasizing the importance and particular characteristics of a federal forum which make federal courts the most logical arenas in which to hear federal constitutional claims.[29] Critics of *Fay* generally fell into two categories: (1) those who considered reduction of constitutional error an end in itself;[30] and (2) those who criticized federal review as wasteful of judicial resources, counterproductive to the ends of finality, and a usurpation of state rights.[31] In viewing the most recent Supreme Court cases it appears that the critics of *Fay* are prevailing.

Before examining the recent decisions, however, it is instructive to look at recent congressional activity in this area. Although legis-

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ers on review where such requirement was discretionary with regard to state prisoners under section 2254, stems from congressional effort to encourage and strengthen state factfinding procedures. *See* S. REP. No. 1797, 89th Cong., 2d Sess. (1966). That this purpose is accepted and fostered by the Supreme Court is reaffirmed in Wainwright v. Sykes, 433 U.S. 72 (1977). For a statement of the role of *Townsend* as the criterion for *when* a hearing in federal habeas is mandatory, see Notes of the Advisory Committee, Rules Governing Section 2254 Cases in the United States District Courts, Rule 8, *reprinted in* 28 U.S.C.A. *foll.* § 2254 at 1132-34 (West Supp. 1977), *as amended by* Act of September 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334. *See also* Wainwright v. Sykes, 433 U.S. 72 (1977). Most importantly, the 1976 amendments set aside the power of a judge to dismiss a second or successive petition, even if new grounds of relief were alleged, if the judge determined that prior failure to assert such grounds was not excusable. Dismissal would be permitted only if the prior failure to assert such grounds constituted an abuse of the writ. The amendments also establish a rebuttable presumption that the passage of more than five years from the time of the judgment of conviction to the time of filing a habeas petition is prejudicial to the state. The presumption does not arise if the time is less than five years.

29. *See, e.g., Developments in the Law—Federal Habeas Corpus, supra* note 6, at 1057. The emphasis upon differences of an institutional nature was specifically rejected as a forceful rationale in Stone v. Powell. "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States." Stone v. Powell, 428 U.S. 465, 493 n.35 (1976). Nonetheless, the argument persists that independent federal review is necessary to ensure that constitutional rights are adequately protected and to provide a forum for the dialogue essential to definition and creation of constitutional rights. *See generally* Cover & Aleinikoff, *supra* note 3.

30. *See, e.g.*, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). *See also* Schneckloth v. Bustamonte, 412 U.S. 218 (1973)(Powell, J., concurring). This approach views the relevant question to be whether or not an innocent man has been convicted.

31. *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963). Some would attribute this view to Justice Rehnquist upon a reading of his opinion in Wainwright v. Sykes, 433 U.S. 72 (1977). Those promoting this view favor a cutback in availability of federal habeas corpus and give little credence to the value of the habeas forum in federal-state dialogues as a means of cooperative definition of constitutional rights.

lative proposals to modify federal habeas corpus for state prisoners began in the 1950's[32] it was not until 1966 that Congress enacted a revision of the federal habeas corpus statutes.[33] Immediate and continued criticism focused on the amended statutes' failure to accord conclusive finality to state convictions.[34] A proposed amendment to the Omnibus Crime Control and Safe Street Act of 1968 would have drastically limited federal habeas corpus for state prisoners.[35] That amendment was defeated, largely because of fears concerning its constitutionality.[36] In 1973 Senate Bill 567 was proposed to the Senate Judiciary Committee.[37] The bill appeared in response to claims by *Fay*'s critics that prevailing habeas corpus procedures permitted thousands of frivolous petitions to be filed causing delays and overburdening the state and federal judiciaries, that the potential for relitigation undermined prisoner rehabilitation by acceptance of punishment, and that unnecessary tension was fostered between state and federal courts. The bill was intended to sharply limit the availability of a federal forum to state prisoners. It provided that any state determination of a constitutional claim would be conclusive, subject only to Supreme Court review; that federal habeas corpus relief would be available only if state adjudication of an alleged constitutional violation was unobtainable through no fault of the prisoner; and that the alleged violation must involve a right, the primary purpose of which was the protection of the reliability of the state court factfinding process, and that without the violation, a different result probably would have occurred.[38]

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32. *See, e.g.*, Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956).

33. Section 2244 of title 28 was amended to create limited res judicata, barring petitioners from prosecuting further claims if they had either a district court hearing or Supreme Court review of an issue, unless the petitioner produced facts not previously adjudicated. *See* 28 U.S.C. § 2244(b)(c)(1970). Section 2254 was revised to make a state's findings of fact presumptively correct and put the burden on the petitioner to prove otherwise. *See* 28 U.S.C. § 2254(d)(e)(1970). The purpose of this revision was to encourage states to provide adequate trial procedures and post-conviction remedies that would develop a complete record of the facts and thus make federal evidentiary hearings unnecessary. *See* S. REP. No. 1797, 89th Cong., 2d Sess. (1966). *See also* note 28 *supra*.

34. The National Association of Attorneys General and the Department of Justice were the two main critics. *See generally* Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221 (1973).

35. S. 917, 90th Cong., 2d Sess., 114 CONG. REC. 11,189 (1968). For the complete text as it emerged from committee, see 114 CONG. REC. 11,189 (1968).

36. *See* Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 606-07.

37. S. 567, 93d Cong., 1st Sess., 119 CONG. REC. 2220 (1973). An identical bill had previously been in the Senate and a similar bill was introduced in the House during the Ninety-Second Congress. *See* S. 3833, 92d Cong., 2d Sess. (1972); H.R. 13,722, 92d Sess. (1972). These bills represented the combined suggestions of the National Association of Attorneys General and the Department of Justice. 119 CONG. REC. 2220. *See* note 34 *supra*.

38. Letter from Attorney General Richard Kleindienst to Representative Emanuel Celler

Senate Bill 567, if adopted, would have barred federal habeas corpus review of a substantial constitutional question if the question: (1) had been determined; (2) could have been determined but was not determined; or, (3) still could be determined by the state courts. Once a state court had ruled on the merits of an issue, either on direct appeal or collateral attack, the only possible remedy would be direct review by the Supreme Court. Since almost every issue presented on habeas review would have been previously determined by the state under the doctrine of exhaustion of state remedies, the revision would have, to a great extent, barred habeas petitioners from alleging either that the state had incorrectly decided a constitutional issue or that the state provided inadequate procedures for determining a constitutional issue.[39]

Senate Bill 567 treated failure to utilize an available state remedy as a deliberate bypass which barred relief on habeas. This provision, if approved, would have drastically limited *Fay v. Noia.* In limiting *Fay,* the bill would have caused a forfeiture of rights by both "knowing and intelligent" waiver and by inadvertent procedural error. Only for a clearly unintelligent and involuntary bypass of a constitutional right would habeas review be allowed. Consequently, the discretion of federal judges to grant relief would have been greatly diminished. Although the Bill was not reported out of committee, within four years the Supreme Court had provided almost identical guidelines for review of federal habeas petitions.

III. THE RECENT DECISIONS: *Estelle, Francis, Sykes* AND *Stone v. Powell*

In four opinions handed down in the last two terms,[40] the Supreme Court has retreated from the position of *Fay v. Noia,*[41] se-

(June 22, 1972), *reprinted in* 119 CONG. REC. 2220 2(a) (1973).

39. Under existing law, exhaustion is not necessary if there are circumstances rendering such processes ineffective to protect the rights of the prisoner. 28 U.S.C. § 2254(b)(1970). *Cf.* United States *ex rel.* Reis v. Wainwright, 525 F.2d 1269, 1272 (5th Cir. 1976)(petitioner did not have to present her claim of incompetent retained counsel to the state court before seeking federal habeas relief because such a resort would be futile where, "[i]n an uninterrupted line of cases Florida had steadfastly refused to recognize incompetence of privately retained counsel as a valid basis for post-conviction relief").

40. Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976). *Estelle, Francis* and *Sykes* are essentially concerned with the problems of determining when the failure to properly raise a constitutional claim in a state proceeding forecloses review by a federal court. *Stone* addresses the foreclosure of review after raising a constitutional claim in state court. All deal with the issue of when a state procedural rule may be deemed an adequate state ground precluding federal review of the underlying constitutional rights.

41. It will be remembered that the *Fay* Court articulated three principal concepts: (1) that there would be no waiver of right to a federal habeas corpus forum, absent "deliberate

verely limiting the discretion of the federal courts on habeas review of state decisions.[42] In these cases the Court has reassessed the appropriate scope of federal post-conviction relief to be accorded state prisoners outside of the guilty plea context.[43] The majority has reemphasized the basic precepts of *Brown* and *Daniels*[44] and has rejected the redundancy concept, the idea of independent federal review, articulated in *Fay*. Thus, where petitioner has failed to follow state procedures, federal habeas corpus review is barred unless the prisoner has been somehow prevented from effectively utilizing those procedures. Where a prisoner has complied with all state procedures, however, the federal habeas court must review the legal issues raised by the prisoner and may review the factual issues.

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bypass" of state remedies; (2) that there would be no automatic waiver attributed to the petitioner by acts or omissions of his counsel; and (3) that there would be no preclusion of federal review on the basis of state adjudication. All three of these elements have been eviscerated.

42. Not surprisingly, the imposition of due process on the states was also checked. *See* note 22 *supra*. In three decisions in the 1975 term, the Court mandated a higher threshold for showing a legally protected liberty or property interest. *See* Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976). In another noteworthy decision, the Court found a constitutionally protected interest and ruled that state remedies were capable of protecting that interest. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

43. The scope of review addressed in the three recent decisions was exclusive of, but quite closely related to, the scope of review in the guilty plea cases discussed in the *Brady* trilogy: Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970). The *Brady* trilogy was the first broad contraction of *Fay*'s parameters. There, the Court validated the use of a negotiated plea and established that for most purposes, a voluntary plea entered upon advice of counsel, operates as a "break in the chain of events" sufficient to cut off antecedent constitutional claims. *Brady* adopted the Johnson v. Zerbst "knowing and intelligent waiver" standard, as redefined by Judge Tuttle of the Fifth Circuit Court of Appeals:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958).

In Tollett v. Henderson, 411 U.S. 258 (1973), collateral relief was denied after entry of a guilty plea in a capital case, when petitioner wished to attack the composition of the grand jury which had indicted him. *Tollett*, carried to its furthest extention, would extinguish *all* antecedent constitutional claims so long as the circumstances of the plea were consistent with controlling standards of voluntariness, intelligence, and the right to counsel. *But see* Blackledge v. Perry, 427 U.S. 21 (1977)(a defendant who calls into question the right of the state to prosecute him at all, for example, when he claims he has been subjected to double jeopardy, may seek habeas review in spite of his guilty plea).

44. *See* text accompanying notes 14-17 *supra*. *Sykes* expressly states that the *Brown* rule is in no way changed. *Sykes* deals only with contentions of federal law which were *not* resolved on the merits in the state proceedings. 433 U.S. 72, 87 (1977).

Certainly a number of people bemoan this retrenching. Supporting the Court's move in this area, one argument posits that the goal of insuring that states protect expanded due process rights has been achieved and that with such protection assured, the Burger Court is simply returning to a more balanced position. Central to such a position is the idea that "there is room not only for a doctrine of conscious waiver of federal constitutional rights but for a distinct doctrine of inadvertent loss of them by inexcusable procedural default."[45] There is considerable agreement that *Fay* served its purpose well, greatly enhancing the likelihood that justice would be done without resort to a federal court.[46] In analyzing the right to federal review, if one reaches the conclusion that much has been accomplished with respect to state protection of federal rights, then it is also clear that the values of comity, efficiency and finality assume significantly greater weight. It is, therefore, from one historical perpective, quite logical for the present Court to decide that where a prisoner has an unimpeded opportunity for an adequate appeal, that is, effective assistance of counsel and full and fair access to the facts and the applicable law, habeas ought not to be allowed "to do broader service than would have been done on appeal."[47]

There are respectable arguments against this rationale. The elimination of "independent" federal review brings forth a plethora of renewed arguments regarding the "special competency" of the federal tribunal.[48] Those arguments are augmented by the notion that habeas review is crucial to the formation of rights and remedies by virtue of its position as a unique forum for discussion of constitutional views.[49] Furthermore, it is arguable that reconciling the un-

45. *See Hart, supra* note 6, at 101-18, 119. Both waiver and forfeiture concepts promote the ends of efficiency and finality. Forfeiture does not necessarily mean, however, that every technicality of state law need be enshrined. Uncompromising deference to state procedural law would be extraordinarily difficult to reconcile with a policy of flexible reexamination of state court substantive determinations. It was just this problem, the problem of creating some sort of logically defensible symmetry, that underlay the demand for stricter scrutiny of the "reasonableness" of state court procedures during the *Brown/Daniels* reign. That demand plus, of course, the Warren Court's devotion to equality concepts, culminated in the *Fay* decision. For an excellent discussion of waiver, see Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977).

46. *See, e.g.*, 63 IOWA L. REV. 392 (1977). For informative discussions of the response of state courts to the broad demand to protect due process rights, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); 29 STAN. L. REV. 297 (1977).

47. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942)(addressing considerations of orderly appellate procedure and the necessity for the doctrine of waiver).

48. *See, e.g., Developments in the Law—Federal Habeas Corpus, supra* note 6.

49. *Compare* Frank v. Mangum, 237 U.S. 309 (1915), *with* Moore v. Dempsey, 261 U.S. 86 (1923). *See generally* Cover & Aleinikoff, *supra* note 3.

derlying philosophies of *Brown* (flexible federal review of substantive rights) and *Sykes* (deference to state procedural rules) applies an undesirable type of pressure on state judicial systems. It suggests to state courts that the more industrious they are in considering federal constitutional claims of state prisoners on the merits, the more often they will be subject to the delays and the "indignity" of federal court review. On the other hand, the more cleverly enacted are their procedural traps, the surer they will be of protecting their decisions from federal review.[50] For present purposes, however, one should recognize that the recent cases have limited the scope of discretionary federal review.

Estelle v. Williams and *Francis v. Henderson* were decided on the same day. In *Estelle,* Chief Justice Burger, expressing the view of six members of the Court, held that although a state cannot, consistent with fourteenth amendment due process and equal protection requirements, compel an accused to stand trial before a jury while dressed in identifiable prison clothing, failure to make an objection to the court was sufficient to negate the presence of compulsion necessary to establish a constitutional violation.[51] Justice Brennan, in his dissent, argued strongly that the Court "has abrogated the traditional waiver standard for rights affecting the fairness and accuracy of fact finding process"[52] and imposed instead automatic forfeiture. Justices Powell and Stewart, in their concurring opinion, made some attempt to ease the potential rigidity of the decision, by pointing out that "even when confronted by such a procedural default, discretion might sometimes be exercised to overcome conviction on the familiar principles of plain error."[53]

In *Francis,*[54] the Court extended to state prisoners the rule set

50. *See Hart, supra* note 6, at 117-18.

51. 425 U.S. 501 (1976). *Estelle* involved a jury trial for assault with intent to commit murder with malice. Petitioner had asked his jailor, prior to trial, to allow him to wear civilian clothes to trial. The request was denied and neither petitioner nor his retained counsel objected in court. The Chief Justice stressed the importance of participation of counsel in holding that petitioner had no right to federal review. Justice Powell, joined by Justice Stewart, concurred, expressing the view that a tactical choice or procedural default of the nature involved should operate as a matter of federal law to preclude the later raising of the substantive constitutional right. Justice Brennan, joined by Justice Marshall, dissented. Justice Stevens did not participate. For a recent acceptance of the *Estelle* approach, see Government of the Virgin Islands v. Smith, 558 F.2d 691 (3d Cir. 1977).

52. 425 U.S. 501, 523 n.5 (1976).

53. *Id.* at 514 n.2.

54. 425 U.S. 536 (1976). A 17 year old Negro petitioner had been duly convicted in state court. He was represented at trial by uncompensated appointed counsel. He did not appeal the state court conviction. Petitioner claimed for the first time, on collateral attack in the state court, that the state had excluded daily wage earners from the grand jury, resulting in exclusion of a disproportionate number of blacks. Francis's claim would seemingly have been

out in *Davis v. United States*.[55] In *Davis*, the Court established a rule denying collateral relief on section 2255 motions by federal prisoners challenging an unconstitutional grand jury indictment, absent a showing of *cause* for the failure to challenge and a showing of *actual prejudice* where the merits of defendant's constitutional claim had been entertained either on direct or collateral review by the state court. *Francis* imposes this cause and actual prejudice standard on state defendants seeking federal review. The Court noted that there was power in the federal court to entertain an application, but rested its holding on "considerations of comity and concerns for the orderly administration of criminal justice."[56]

In *Wainwright v. Sykes*[57] the Court again addressed the issue of a state procedural rule as an adequate and independent state ground precluding federal habeas review.[58] Interpreting section

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cognizable under *Fay*, absent a deliberate bypass. However, the Court chose to emphasize the valid interest of the state in requiring that objection be made before a retrial became too difficult. *Id.* at 540-41. The Court held that the petition for habeas review must be denied unless actual prejudice could be shown to have resulted from the composition of the grand jury.

Francis did not attempt to distinguish *Fay*. This is possibly the result of disagreement among the justices as to the proper scope of habeas review outside the grand jury discrimination context. The latter category is rather easily differentiated due to the nature of the grand jury function. If the defendant is determined at trial to be guilty beyond a reasonable doubt, it is difficult to argue that a grand jury would not have found probable cause to indict, had it been free of discriminatory influences. *See* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1357-66 (1977).

55. 411 U.S. 233 (1973).

56. 425 U.S. 536, 539 (1976).

57. 433 U.S. 72 (1977). Petitioner had been convicted of third-degree murder. Upon arrest, the defendant had been given his *Miranda* warnings. He declined counsel and confessed. At trial, defendant's court appointed attorney failed to object to the admission of his inculpatory statements. By virtue of the state's contemporaneous objection rule, defendant thereby waived the claim. He later maintained that he did not understand the *Miranda* warnings because he was intoxicated, and that his confession was, therefore, involuntary. Justice Rehnquist defended the Court's decision in terms of respect for state rules of finality of judgment. Chief Justice Burger and Justices Stewart, Blackmun, Powell and Stevens joined. Chief Justice Burger filed a concurring opinion in which he emphasized that the claim before the Court related to events during trial, and that "trial decisions are of necessity entrusted to the accused's attorney," 433 U.S. at 94, and that the *Fay-Zerbst* standard of "knowing and intelligent waiver" was simply inapplicable. *Id.* Justice Stevens concurred on the grounds that the decision was "consistent with the way other federal courts have actually been applying *Fay*," that the petitioner had competent counsel, that there was no fundamental unfairness, and that the deterrent purpose of the *Miranda* rule was inapplicable. *Id.* at 94-96. Justice White concurred in the result, indicating a preference for application of the "harmless error" standard and expressing a desire to avoid shifting the burden of proving actual prejudice to the defendant. *Id.* at 97-99. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. In attacking the Court's acceptance of forfeiture of defendant's rights by the decisions of his counsel, Justice Brennan reemphasized the need for closer scrutiny of lawyers' actions. *Id.* at 99-118.

58. The Court suggests that *Sykes* involved a waiver, a "knowing and intelligent" relinquishment of a right, however, the Court imposed the forfeiture standard of "cause and

2254, the Court extended the rule of *Francis* to *all* claims not timely raised during trial by counseled defendants. That is, even where the merits of the constitutional claim were *not* reached, due to lack of compliance with state procedural rules, the defendant would have the burden of showing cause for and actual prejudice from the procedural default.[59] The effect of the new standard is to shift the burden of proof from the state to secure a prima facie determination of voluntariness to the defendant to show both cause for and prejudice from the procedural default. The Court presumably intends to hold the petitioner to a standard of reasonable diligence consistent with an attempt to invoke equitable relief. The majority apparently feels that the rule will be a flexible standard with adequate protection guaranteed to the defendant who may be in danger of suffering a miscarriage of justice.[60]

In *Estelle, Francis* and *Sykes* the Court emphasized the importance of finality and efficiency.[61] Because the result in each case is to recognize either a waiver or forfeiture, without analyzing the substantive nature of the underlying right, it is crucial to the Court's conclusions that state procedural protections are fair and

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prejudice" upon the defendant. The apparently interchangeable use of "waiver" and "forfeiture" adds even more confusion to an already hazy area. *See* Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

59. To summarize the major steps with respect to state procedure: *Daniels* stated that a state procedural rule may bar federal review; *Fay* stated that state procedural rules are no bar unless there is a deliberate bypass (using the same standard as waiver). *Davis*, purportedly interpolating congressional intent with respect to the statutory language of section 2255, required a showing of *cause*, rather than a Johnson v. Zerbst waiver, to obtain review. The Court noted that the phrase "the Court for cause shown may grant relief from waiver" was adopted by Congress pursuant to 18 U.S.C. § 377 (1970). 411 U.S. 233, 241 (1973). The *Davis* rule was extended in *Francis* and *Sykes*. The cause and prejudice standard was thus incorporated by reference into the body of law governing section 2254 petitions. 433 U.S. 72 (1977). *Davis, Francis,* and *Sykes* appear to have been disposed of on the prejudice aspect. Left unresolved is what constitutes cause. Not surprisingly, the Court has declined to define the two elements, but noted that the *Francis* rule is "narrower than the standard set forth in dicta in Fay v. Noia." 433 U.S. at 88-89. The Court seemed to accept Justice Frankfurter's admonition in his *Brown* opinion which sounded the wisdom of retaining flexibility in this area: "experience cautions that the very nature and function of the writ of habeas corpus precludes the formulation of fool-proof standards which [all] District Judges can automatically apply." Brown v. Allen, 344 U.S. 443, 501 (1953).

> To attempt rigid rules would either give spuriously concrete form to wide-ranging purposes or betray the purposes by strangulating rigidities. . . . The fact that we cannot formulate rules that are absolute or of a definiteness almost mechanically applicable does not discharge us from the duty of trying to be as accurate and specific as the nature of the subject permits.

Id. at 513. The Fifth Circuit has made at least one attempt to interpret the "cause and prejudice" criteria. *See* Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977).

60. Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977).

61. *See* note 40 *supra*.

adequate and that the defendant had the effective assistance of counsel.[62] If a defendant has been counseled, he is deemed to have acted of his own volition. This line of analysis is nearly synonymous with that developed in the guilty plea cases: a tactical choice by a counseled defendant defeats antecedent claims.[63] Under this trilogy and the *Brady* trilogy,[64] the Court need not investigate the underlying right, but need only address the question of adequacy of counsel and adequacy of the forum.

In the sense that the Court is dealing with structural elements prescribing "the rules of the road" and providing adequate notice, it may be that a categorical approach to preclusion of federal review will remain acceptable to the majority and is to be effectuated even where the right involved is deemed fundamental. A different standard, however, seems to apply with regard to questions which go to the sufficiency of the evidence.

Stone v. Powell[65] is logically consistent with *Estelle, Francis* and *Sykes* in that state determinations are given res judicata effect. *Stone,* however, differs in approach from the above cases. In *Stone* the Court initially looked to the substantive right involved and questioned the manner in which the procedure at issue furthered or obstructed justice. After examining the history of the exclusionary rule and its deterrent value, Justice Powell utilized a cost-benefit analysis and balanced the interests safeguarded by the rule against competing social interests. The degree of certainty of guilt weighed

62. The Court equates "counseled" with the concept of volitional choice underlying the Johnson v. Zerbst waiver standard and *Fay*'s "deliberate bypass" notion. That is, the elements of volition, knowledge and intelligent decision making are subsumed by the presence of counsel. In a practical sense, this may occasion unfortunate results such as in *Daniels* and perhaps in *Estelle,* especially if one were to assume that the facts were not generated by "strategic choice," where counsel's technical errors precluded petitioner's opportunity for habeas review. However, the "practical" argument cuts both ways. As long as we proceed under an adversarial system, representation by counsel is the only practical means to proceed in the vast majority of cases. The problem condenses itself to the question of competency of counsel.

63. *See* Cover & Aleinikoff, *supra* note 3. *See also* Blackledge v. Allison, 431 U.S. 63 (1977). With the more adequate procedures now in force, evidentiary hearings would be needed "only in the most extraordinary circumstances." *Id.* at 80 n.19.

64. *See* note 43 *supra.*

65. 428 U.S. 465 (1976). *Stone* held that where the state has provided an opportunity for full and fair litigation of a fourth amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the grounds that evidence obtained through an unconstitutional search and seizure was introduced at his trial. Justice Powell delivered the opinion of the Court; Chief Justice Burger and Justices Stewart, Blackmun, Rehnquist and Stevens joined. The Chief Justice filed a concurring opinion. Justice Brennan filed a dissenting opinion in which Justice Marshall joined. Justice White filed a dissenting opinion. The *Stone* majority specifically refused to consider the statutory scope of habeas corpus. *Id.* at 482 n.17.

heavily in the calculus.[66] The majority concluded that even if there were some marginal incremental deterrent value in isolated cases, the "resulting advance of the . . . Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice."[67]

While a number of questions were left unresolved, the majority made it perfectly clear that the categorical equation between right and remedy, which dominated the Warren Court methodology, is dead. The Burger Court explicitly pointed out that, while federal courts do not lack jurisdiction over such claims, they need not apply the exclusionary rule on habeas corpus 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."[68] The Court's action was in a large part guided by the recognition of the attenuated value of the deterrent effect of

66. *Id.* at 489-90. Guilt, innocence, or dangerousness of the defendant has rarely been isolated as the object of focused inquiry in federal review. Judge Friendly, however, has long supported the position that the innocence of the defendant should affect the disposition of the claim in federal habeas corpus. *See* Friendly, *supra* note 30.

67. The social costs delineated by Justice Powell included: "(i) the effective use of limited judicial resources; (ii) the necessity of finality in criminal trials; (iii) minimization of friction between the federal and state systems of justice; and (iv) maintenance of the constitutional balance upon which the doctrine of federalism is founded." Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973). Furthermore, the *Stone* Court observed that the application of the exclusionary rule deflects the truth finding process and frustrates the true aim of the criminal justice system: conviction of the guilty and acquittal of the innocent. Stone v. Powell, 428 U.S. 465, 489-91 (1976). The relative inefficiency of habeas corpus relief is due to two factors: the small number of state convictions that are successfully challenged in federal court, *see* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 333-35 (1973), and the likelihood of a low correlation between frustration of outcome (reversal of convictions) and altered "front line" police behavior. *See* Cover & Aleinikoff, *supra* note 3, at 1041 n.46 & 1044 n.56.

68. 428 U.S. 465, 495 n.37 (1976). The burden is, of course, on the state prisoner to exhaust state remedies and to make a prima facie showing that he was denied "an opportunity for full and fair litigation." The Fifth Circuit has addressed the question of whether or not "an opportunity for full and fair consideration" requires consideration at both the state trial and state appellate court level, or whether it required consideration by only one level of state courts. O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977). Beginning in a delightfully facetious manner, the court stated: "[c]onsistently with the ambiguity of the Supreme Court's opinion we conclude that sometimes 'full and fair consideration' means consideration by two tiers of state courts—sometimes it requires consideration by only one." *Id.* at 1213. The court concluded,

> where there are *facts* in dispute, full and fair consideration requires consideration by the fact finding court, and at least the availability of meaningful appellate review by a higher state court. Where, however, the facts are undisputed, and there is nothing to be served by ordering a new evidentiary hearing, the full and fair consideration requirement is satisfied where the state appellate court, presented with an undisputed factual record, gives full consideration to defendant's Fourth Amendment claims.

Id. (emphasis in original).

the exclusionary rule in habeas proceedings. But had the Court intended to focus on limiting the exclusionary rule itself, there were more direct approaches available. By focusing on the reliability of the truth-finding process and weighing the utility of the exclusionary rule in habeas proceedings as an efficacious means of promoting truth, the Court embraced a broader perspective, one enormously disturbing to the dissenting Justices.[69]

The approach presented by *Stone* will require the Court to immediately analyze the nature of the right and the consequences of diminution of the procedural protection. The decision to grant or deny habeas relief will depend upon whether or not the procedure in question furthers accurate and reliable truth-finding.[70] Analyzing the procedure in terms of its utility, its perceived success or failure with respect to the function which it is deemed to serve, necessitates a balancing of interests and the values underlying those interests. *Stone* did not, however, determine the relative weights to be assigned to the interests. In other words, it remains uncertain what will be "the sensibilities that will guide the Court in assigning relative weight to normative demands and social costs."[71]

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69. Justice Brennan fears a broad reading of *Stone:* that estoppel will be applied, *inter alia,* to claims of double jeopardy, self-incrimination, and use of invalid identification procedures. *See* 428 U.S. 465, 517-18 & n.13 (1976). Justice Brennan, joined by Justice Marshall, argues vehemently, in dissent, that the "procedural safeguards mandated in the Framer's Constitution are not admonitions to be tolerated only to the extent they serve functional purposes that ensure that the 'guilty' are punished and the 'innocent' freed." *Id.* at 523-24. Rather, the Justice continues, "every guarantee enshrined in the Constitution [has] an independent vitality and value." *Id.* For substantiation of the fears Justice Brennan expressed in the *Stone* dissent, see the dissent of Chief Justice Burger, in Brewer v. Williams, 420 U.S. 387, 415 (1977) (arguing that *Stone* should have barred relitigation of the *Massiah* type claim at issue in that case). *See also* Castaneda v. Portida, 430 U.S. 432, 507 (1977) (Powell, J., dissenting) (it may be appropriate to extend *Stone* at least to discriminatory grand jury claims since such claims may become moot subsequent to an error-free trial). *Id.* at 508 n.1.

70. This standard resembles the standard of Senate Bill 567, promoted by the Justice Department and the National Association of Attorneys General, which stated that after passing the exhaustion requirements, the state claim which the prisoner sought to present on habeas had to have "as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction." S. 567, 93d Cong. 1st Sess. 119 CONG. REC. 2220 § 2(a)(1973). *See* text accompanying notes 37-39 *supra.*

71. *See* Stotzky and Swan, *Due Process Methodology and The Prisoner Exchange Treaties: Confronting an Uncertain Calculus,* 62 MINN. L. REV. ___ (1978). (All references are to pre-publication draft). In a sophisticated and provocative analysis of due process methodology, Professors Stotzky and Swan suggest that "there may be less concern than in the past for those 'silent approaches and slight deviations' . . . by which 'unconstitutional practices get their first footings.' " Boyd v. United States, 116 U.S. 616, 635 (1886). *See* Stone v. Powell, 428 U.S. 465, 524-25 & n.17 (1976) (Brennan, J., dissenting). The authors argue that:

> Although the Justice [Powell] may have stated the rule he was fashioning overbroadly (all collateral attack is foreclosed), there is more than enough to suggest

Moreover, it is by no means clear in which instance the Court will implement a case by case approach, inquiring into factual matters specific to the particular petitioner's guilt and his claim of unconstitutional procedure and in which instances the Court will fashion categories wherein certain types of procedures are deemed to have a positive correlation with accurate factfinding and will thus be categorically protected.[72] In *Manson v. Braithwaite,*[73] the Court used the ad hoc approach, approving the use of identification allegedly obtained by unnecessarily suggestive procedures, which the petitioner argued had impaired the reliability of the guilt-finding process. The majority stated that once an improper procedure had been used, the evidence should not be rejected, if, in the totality of the circumstances, the evidence appeared to be reliable.[74] In *Brewer*

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a willingness to return *in appropriate cases* to the untidy task of decision by 'inclusion and exclusion' where 'differences in degree'—measured in ethical terms—become the hallmark of Constitutional rule.

72. After reviewing the period of substantive expansion of the writ of habeas corpus, the *Stone* majority concluded that the Court had never determined "whether exceptions to full review might exist with respect to particular categories of constitutional claims." Stone v. Powell, 428 U.S. 465, 478-79 (1976).

73. 432 U.S. 98 (1977). Justice Blackmun delivered the opinion of the Court. Justices Marshall and Brennan dissented. In *Manson*, an undercover agent who had only a fleeting, late night opportunity to observe the defendant, testified at trial about the out-of-court identification that resulted from an unnecessarily suggestive single photo show-up. The agent's fleeting opportunity to observe the defendant, coupled with the number of "buys" the agent made from different suspects and defendant's plausible alibi defense, raised serious questions about reliability of the agent's in-court identification. The Court rejected the argument that only a strict per se rule of exclusion would have a direct and immediate impact on law enforcement agents. Rather, the Court noted, reliability is the "linchpin" in determining the admissibility of identification testimony. The Court, therefore, applied a fourteenth amendment fundamental fairness standard by considering the totality of the circumstances rather than adopt a strict exclusionary rule. The opinion suggests that a totality-of-circumstances approach limits the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact. The Court noted that, "inflexible rules of exclusion, that may frustrate rather than promote justice, have not been viewed recently by this Court with unlimited enthusiasm." *Id.* at 113 (citing Brewer v. Williams, 430 U.S. 387 (1977); United States v. Janis, 428 U.S. 433 (1976)).

74. The Court's approach seems to have almost the same effect as an application of a "harmless error" standard. *See* Chapman v. California, 386 U.S. 18 (1967). Arguably, the Supreme Court intended that analogy. The signal from the Court may be to establish categories, through the use of a *Stone* estoppel, for all rights currently amenable to the "harmless error" doctrine. *See, e.g.,* Harrington v. California, 395 U.S. 250 (1969)(right to confrontation); Chapman v. California, 368 U.S. 18 (1967) (privilege against self-incrimination); Fahy v. Connecticut, 375 U.S. 85 (1963)(right to suppress illegal evidence). Conversely, the courts should not categorize those rights which as a matter of law cannot be subjected to the "harmless error" standard. *See, e.g.,* Haynes v. Washington, 373 U.S. 503 (1963)(coerced confession); Gideon v. Wainwright, 372 U.S. 335 (1963)(denial of counsel). The effect of this move would be to shift the burden of proof from the state, which has to prove "harmless error" beyond a reasonable doubt, to the defendant, who would have to prove the lack of full and fair litigation below. *See also* Moore v. Illinois, 429 U.S. 1061 (1977). The Court ruled unanimously that a Chicago man convicted of a rape suffered a violation of his right to a fair trial

v. Williams,[75] however, the Court upheld the reversal of a state court conviction, despite strong evidence of the defendant's guilt, where the inculpatory evidence had been secured in violation of the defendant's right to counsel. *Brewer* signals the importance the Court attaches to effective assistance of counsel in ensuring a full and fair trial.[76] Solicitude for the right to counsel may indicate a willingness to establish broader protection for rights deemed fundamental.[77]

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when authorities permitted his alleged victim to point him out during a preliminary court hearing before he had obtained a lawyer. The justices ordered the case returned to an appeals court to determine whether the identification was "harmless error" in light of other evidence against the defendant.

75. 430 U.S. 387 (1977). Williams was arrested, arraigned, and committed to jail in Davenport, Iowa, for abducting a ten year old girl in Des Moines, Iowa. Both his lawyer in Des Moines, and his lawyer at the Davenport arraignment advised Williams not to make any statements until after consulting with the Des Moines lawyer upon being returned to Des Moines. The police officers who were to accompany Williams on the automobile drive back to Des Mones agreed not to question him during the trip. During the trip Williams expressed no willingness to be interrogated in the absence of an attorney. Instead he stated several times that he would tell the whole story after seeing his lawyer in Des Moines. However, one of the police officers, who knew that Williams was a former mental patient, and was deeply religious, sought to obtain incriminating remarks from Williams by stating to him during the drive that he felt they should stop and locate the girl's body because her parents were entitled to a Christian burial for the girl, who had been taken away from them on Christmas Eve. Williams eventually made several incriminating statements in the course of the trip and finally directed the police to the girl's body. Williams was tried and convicted of murder, over his objections to the admission of evidence relating to or resulting from any statements he made during the automobile ride. The Supreme Court of Iowa affirmed, holding, as did the trial court, that Williams had waived his constitutional right to the assistance of counsel. Williams then petitioned for habeas corpus in a federal district court, which held that the evidence in question had been wrongly admitted at Williams's trial on the ground, *inter alia*, that he had been denied his constitutional right to the assistance of counsel, and further ruled that he had not waived that right. The court of appeals and the Supreme Court affirmed.

76. *But see* Wainwright v. Sykes, 433 U.S. 62, 79 (1977).

77. The Court has in the past afforded special consideration to those rights "which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973) (listing as fundamental the rights to counsel, confrontation, jury trial, speedy trial, and against double jeopardy). These rights have been historically held to the knowing and intelligent waiver standard. Cover & Aleinikoff, *supra* note 3, at 1093 & n.263.

The Court has emphasized the role of effective assistance of counsel in each of the four major cases addressed in this article. In contrast to the fourth and fifth amendments, both framed in negative language designating what the government cannot do, the sixth amendment is framed as an affirmative command, embracing several different facets designed to ensure fair adversarial proceedings. If the affirmative nature of the sixth amendment right to assistance of counsel reflects a paramount value of the Framers, then the right is *crucial* to the preservation of other values in the Bill of Rights. As such, it arguably should be preserved for each individual at an increased expense to society. *See* Bonds v. Wainwright, 564 F.2d 1125, 1130 (5th Cir. 1977)(a valid waiver of right to effective assistance of counsel must be preceded by an explanation to the client of what he was waiving), *reh. en banc granted;* Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977)(defendant held not to have waived federal constitutional claim in state court where defendant's attorney filed a motion in arrest of judgment without informing defendant of the relevant allegations). *See also* Brewer v. Williams, 430 U.S. 387 (1977). *But see* Faretta v. California, 422 U.S. 806 (1975)(right to

While the decision was complicated by reprehensible police conduct which may have shocked the Court's conscience,[78] *Brewer* suggests that the *Stone* estoppel would not be applied to fundamental rights even though a claim had been fully and fairly litigated in state courts. On the other hand, where the constitutional standards violated are prophylactic or deterrent in nature, governmental interests would prevail.[79]

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conduct *pro se* defense established over objection that the states' obligation to assure a fair trial is undermined by the exercise of that right). For a discussion of the balancing of conflicting values in *Faretta*, see 24 AM. U.L. REV. 897 (1976).

With dicta from the Supreme Court and with several federal circuits leading the way, a significant shift has occurred in the standard for effective assistance of counsel. McMann v. Richardson, 397 U.S. 759 (1970), is one of the cases providing such dicta. The Court there suggested that defendants are due advice that is "within the range of competence demanded by attorneys in criminal cases." *Id.* at 771 (dicta). A recent restatement of this standard appears in Justice Rehnquist's dissent in Henderson v. Morgan, 426 U.S. 637 (1976), which opines that the test should be "based on the practices of reasonably competent attorneys experienced in the day to day business of representing criminal defendants in a trial court." *Id.* at 656. The Fifth Circuit adopted the "reasonably effective assistance" standard in MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir.), *modified per curiam en banc*, 289 F.2d 928 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961). However, both state and federal courts within the circuit have been slow to break away from the traditional "farce and mockery" test. Courts in Georgia, for example, did not adopt the Fifth Circuit's formulation until 1974. Pitt v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). Florida continues to adhere to the "farce and mockery" test. *See* Caplinger v. State, 271 So.2d 780 (Fla. 3d Dist. 1973)(per curiam). *See also* Johnson v. State, 328 So.2d 33 (Fla. 3d Dist. 1976)(per curiam); Andrews v. State, 319 So.2d 613 (Fla. 3d Dist. 1975)(per curiam).

In judging both the competency of counsel and the presence of waiver, courts have tended to distinguish between counsel who were completely ignorant of the relevant law and counsel who were aware of the law, but may have misjudged its strength as applied to the facts of the particular case. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1357-62 (1977).

The procedural right of effective assistance of counsel will be increasingly important under the Court's recent decisions. Extensive protection of this right by liberal habeas review, however, will undermine efficiency and finality. A great number of claims alleging various constitutional deprivations will surely be transformed into claims of ineffective assistance of counsel. Conscientious federal courts will have to either investigate the facts of the allegation or impose stricter controls on state procedures. *See* Cover & Aleinikoff, *supra* note 3, at 1083. *See generally* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973).

78. *See* Rochin v. United States, 342 U.S. 165, 172 (1952).

79. Many questions, of course, remain unanswered. The most significant of these questions relate to competence of counsel. Troublesome questions which will arise when right to counsel issues are presented include: the extent to which, and in what instances, the court may impose waiver or forfeiture upon a defendant who is personally unaware of his rights; what constitutes a "trial decision"; and whether or not defendant acted volitionally. Questions regarding the adequacy of the forum will continue to arise. Thus, it will be necessary to determine whether there has been adequate opportunity to air claims at the state level. Questions relating to the expansion of the *Stone* doctrine will force considerable value analysis. It is probably reasonably accurate, however, to summarize the general parameters of habeas review in the manner which follows:

I. Where a state prisoner has met the preliminary requirements of section 2254 of title 28, federal habeas review is always open if: (1) petitioner has fully complied with state

IV. A Model for Analysis of Habeas Review

It is, of course, at the margin in each procedural area that the judiciary is called upon to examine the extent to which collective action can infringe upon individual rights. Much of the confusion found in judicial opinions and secondary literature on the role of habeas corpus review can be traced to a failure of the courts to be explicit about underlying conflicts in objectives and values created by the vast expansion in the habeas area. In *Stone v. Powell,* the Court suggested a "pragmatic"[80] method of approaching procedural issues. While any pragmatic approach offers something less than quantitative answers, such a test offers a means of reaching answers in an area where uncertainty abounds. The Court's use of a cost-benefit analysis suggests an approach which emphasizes precise definition of the conflicting interests arising in the context of habeas review. Such an approach lends itself to the task of restructuring a

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procedures, Brown v. Allen, 344 U.S. 443 (1953); or (2) if petitioner was somehow impeded in presenting his contention at trial and/or on direct review. Waley v. Johnson, 316 U.S. 101 (1942).

II. Where petitioner has had *the opportunity for a full and fair hearing on the merits* at state trial and appeal, there are three instances in which federal review will be barred by a state court decision resting upon adequate and independent state grounds. First, if, with participation of competent counsel, petitioner knowingly and intelligently waived a right which would have been otherwise cognizable on federal review, the burden is on the state to prove a knowing and intelligent waiver. Some courts may interpret the mere participation of competent counsel as the equivalent of a "considered choice" by defendant. *See* Estelle v. Williams, 425 U.S. 501 (1976). Plain error *may* be available to ameliorate harsh results in some instances. *Id.* 514 n.2 (1976)(Powell and Stewart, JJ., concurring). Second, if petitioner, represented by competent counsel, failed to timely raise constitutional contentions, review will be barred unless petitioner can show cause and actual prejudice. Francis v. Henderson, 425 U.S. 536 (1976) (burden of proof is shifted from the state to show voluntary and knowing waiver, to defendant to show cause and prejudice. Where competent counsel participated, any trial choice *may* be deemed to be the equivalent of deliberate bypass). The third situation in which federal review will be barred by a state court decision resting upon independent state grounds exists where petitioner claims unconstitutional detention on grounds of illegal search or seizure in violation of the fourth amendment exclusionary rule. Stone v. Powell, 428 U.S. 465 (1976).

III. Where contentions of federal law were *not* resolved on the merits in state proceedings, due to petitioner's procedural default, federal review will be barred unless defendant can show cause and prejudice. Wainwright v. Sykes, 433 U.S. 72 (1977) (burden is on petitioner to figure out what constitutes cause and actual prejudice and to prove it).

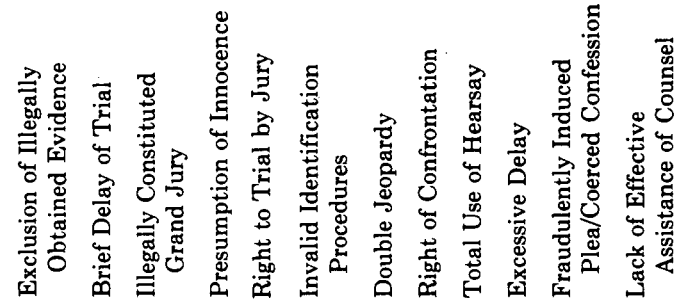
IV. Federal review is *unsettled* where petitioner alleges procedural deficiencies in the state trial process and the Supreme Court has not established a per se rule. The courts may invoke the *Stone* balancing test by looking to the nature of the right involved and the efficacy of the rule challenged.

Where federal review is *barred,* the nature of the right or remedy is not in question. However, the procedure of the state must be adequate to provide the opportunity for defendant to present claims at trial and on direct review. A defendant must also have counsel competent within the range of current standards.

80. 428 U.S. 465, 488 (1976).

rational decision making framework for habeas corpus analysis. The tool is at hand by which a new equilibrium may be found.

Any serious effort to define and evaluate objectives must take into account the utility and practicality of alternatives.[81] Because alternatives exist, it follows that the search will be for optimal review rather than for maximum review.[82] Once optimality is defined as the goal it becomes possible to understand that there is necessarily a point at which the costs of review exceed the gains. In other words, there will be a point of diminishing returns. In analyzing fourth amendment exclusionary rule claims, the Court has fixed the point of diminishing returns at "full and fair consideration" by the state. Lower courts may properly view that decision as defining the optimal amount of review for the purpose of providing deterrence of unconstitutional practices in the exclusionary rule context. But what of other areas of the law? At what point *do* the protections afforded by a particular procedural rule reach the point of diminishing returns? The answer lies somewhere on a continuum and *Stone* serves as the model for analysis. One might view the problem figuratively.



WITH A VIEW TO THE UNDERLYING RIGHT, AT WHAT POINT ON THE CONTINUUM DO SOCIAL COSTS OF ENFORCING A PROCEDURAL RULE REACH THE POINT OF DIMINISHING RETURNS?

81. The fact that the pendulum appears to have begun a "return" trip, after the *Fay* days of almost unlimited federal review, illustrates dissatisfaction with an expansive model. While it would doubtlessly be inaccurate to suggest that the Court perceives a return to a purely jurisdictional perspective of federal habeas questions, it is nonetheless clear that the judiciary in arriving at the scope of federal review must consider the capacity of the courts and the quality of the courts' work product. The issue of scope of review requires assessing the effect of the system on both the rights of the individual and the rights of society as a whole. If habeas review is seen *only* as a means of protecting the innocent, then anything which impugned the accuracy of the fact finding process would be relevant as a criterion to distinguish among constitutional claims. If habeas is seen as what *Fay* terms a remedy "for whatever society deems to be intolerable restraints," 372 U.S. 391, 401 (1963), then the relevant criterion is not just the accuracy of fact finding procedures, but also considerations going to the "fairness" of the process.

82. In the ordinary sense of the word, optimal means the best average result when there

If a "balancing test" is used[83] and it is assumed that the value of a procedural rule is determined by its utility in assuring the reliability of the factfinding process, a model continuum can be constructed going from the tenuous position of prophylactic deterrent procedure, to the firmly protected procedures deemed fundamental to the preservation of a fair trial. On the lower end of the scale would be, for example, failure to give *Miranda* warnings, claims for an illegally constituted grand jury, and brief deviations with respect to delay of trial. These issues, similar in nature to the exclusionary rule issues, would, in most instances, pose few difficulties under the Burger Court approach. Absent egregious circumstances, institutional or governmental interests would prevail. Further along the continuum would be procedural issues related to the presumption of innocence, the right to trial by jury and prevention of

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is a choice of combinations: the mean of two or more maximum or minimum effects that represent the most favorable result. Similarly, in economic terms, an optimal point is reached where both sides of the equation—after proper weighting—reach their maximum possible potential. On the theory of optimal enforcement in the criminal law field, see Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Landes & Posner, *The Private Enforcement of Law*, 4 J. LEG. STUD. 1 (1975).

83. Of course, the balance changes depending upon the underlying values at stake. Each justice may make different assumptions or assign different weights to the values undergirding any particular right. For an innovative methodological approach to "due process" analysis in "weighing up" the social values underlying specific constitutional rights and the governmental interests at stake in such a process, see Stotzky and Swan, *supra* note 71.

> For many problems in these "open-textured" areas of the constitution . . . judicial experience offers much that guides in identifying the affected values and assaying their relative weights. Too often, subjectivity in a judge or a charge of subjectivity by a critic stems from a failure to undertake the painstaking yet essential task of teasing guidance out of that experience in ways that extend beyond finding a rule sufficient to the case; a failure to find guidance in tendencies of judicial experience. Where new questions arise for which guidance is lacking, or where the final calculus is highly uncertain, important institutional sensibilities tend to insulate judgment from the vagaries of subjective bias. . . .

Id.

In formulating their methodology, the authors present certain constraints which confine and structure this approach and positively limit the charge of judicial subjectivity. First, there is the matter of adequately particularizing the nature and extent of the contending interests in a case. A second structural constraint which adds rigor to the process relates to the problem of correctly identifying the governmental interests in the case. Third, the authors suggest that it is necessary to question the conventional two tier "nature" and "form" dichotomy that has come to dominate much "due process" analysis.

The authors continue on a theoretical note, discussing their view of the legal process in relation to decisions in the "open textured" areas of the Constitution: "[T]he process is inevitable and continuous. It goes to the very heart of legal reasoning and cannot be confined but only disciplined." *Id.* Finally, they express the view that "[n]either commentators nor judges can ignore the fact that the judicial mind is affected by an often unarticulated sense of the place of the courts in the larger scheme of governances and that this sense, if fully nurtured, ennobles both the judge and law he would lay down." *Id.*

invalid lineup and identification procedures.[84] Here the decisions are closer, because of a philosophical and emotional devotion to the underlying rights, despite the fact that the procedural rules involved *may* have little or no relevance to the accuracy of the factfinding process. While the scales at this point on the continuum are more evenly balanced, utopian concepts weigh heavily, probably precluding a categorical rule in favor of institutional/governmental interests. In such cases, the Court will very likely tolerate, if not promote, an ad hoc approach. Next, there might be rules designed to protect rights such as freedom from double jeopardy and the right to confrontation at trial. These rules are potentially vulnerable to categorical treatment if judgment is based solely upon utility in assuring reliability of the factfinding process. The rights involved, however, are conceivably so intertwined with concerns for protecting the individual from majoritarian oppression, as to almost certainly be protected from summary treatment. Toward the upper end of the continuum there are cases where procedural deficiencies cast serious doubt upon the basic determination of guilt; cases involving excessive delay of trial, total reliance on hearsay evidence, coerced or otherwise fraudulently induced confessions and guilty pleas, and lack of effective assistance of counsel. In a general sense, these latter rights are deemed worthy of stricter scrutiny. By giving these rights increased protection they become both the objects of greater solicitude and the subjects of greater expenditures of resources.

While there are rarely clear answers in the search for an optimal amount of review, the necessity for judgment continues. In the absence of specific Supreme Court direction, and with only our "shared values"[85] as a guide, the points of diminishing return will slowly be defined by the synthesis of thought emerging from state and federal courts.[86] The process, as it continues, must be based

84. The Supreme Court has temporarily eased the fears of those who thought that lineup and identification procedures would be the first area to which *Stone* would be expanded. *See* Manson v. Braithwaite, 432 U.S. 98 (1977). Justice Powell has recently suggested that it may be appropriate to extend *Stone* to discriminatory grand jury claims since such claims may be "mooted" by subsequent error-free trial. Castaneda v. Partida, 430 U.S. 482, 506 n.1 (1977) (Powell, J., dissenting).

85. For a discussion of "shared values" as the "controlling consensus" in most constitutional litigation, see Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284-311 (1973). *See generally*, R. UNGER, KNOWLEDGE AND POLITICS (1975).

86. In the brief time since the decisions in *Stone, Estelle, Francis,* and *Sykes,* the courts have begun to respond. Movement toward expansion of the *Stone* estoppel is guarded. *Compare,* Green v. Massey, 546 F.2d 51, 53 (5th Cir. 1977)(double jeopardy is "specifically proclaimed 'personal constitutional' right"); United States *ex rel.* Tyrrell v. Jeffes, 420 F. Supp. 256 (E.D. Pa. 1976)(*Stone* estoppel not applicable to line-up and identification claims); Sedswick v. Superior Court of the District of Columbia, 417 F. Supp. 386 (D.D.C. 1976)(dou-

upon careful particularization of four factors: (1) the interests at stake; (2) the values attached to those interests; (3) the functional utility of procedures designed to protect the interest; and (4) the extent of the inherent constraint of finite resources. Only by explicitly recognizing and clearly articulating those factors, can objective weighing of interests inform the search for a new equilibrium in habeas corpus review. Only by constructing a model which recognizes these factors can an optimal amount of review be obtained. Only by securing an optimal amount of review can costs to both society and the individual be minimized. The Supreme Court in *Stone v. Powell* has offered an analysis which provides guidance in the form of both structure and mode. It is willing to attribute to lower courts, state and federal, the capacity and the ingeniousness to interpret rules to suit contemporary demands within the parameters defined by the Court and within the framework of the Constitution.

V. CONCLUSION

The Writ of Habeas Corpus has served throughout our history as a conduit by which questions of constitutional principles and notions of fundamental fairness are funneled to the courts. By im-

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ble jeopardy clause is an established individual constitutional right and stands on different footing from the exclusionary rule), *with* Richardson v. Stone, 421 F. Supp. 577, 579 (N.D. Cal. 1976)(*Stone* estoppel applicable to *Miranda* claims which "do not question the reliability of a statement"); Szaraz v. Perini, 421 F. Supp. 8 (N.D. Ohio 1976)(*Stone* estoppel applicable to line-up and identification claims not affecting the reliability of identification). *See also* O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977)(fourth amendment claim never raised at trial or considered on merits in any state post-conviction proceeding barred by opportunity below for full and fair hearing).

Questions arising under *Estelle, Francis,* and *Sykes* have centered on issues of effective assistance of counsel. *See, e.g.*, Bonds v. Wainwright, 564 F.2d 1125 (5th Cir. 1977) (waiver of right to effective assistance of counsel must be an intelligent, understanding, and voluntary decision); Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977) (choice made by counsel and not participated in by defendant does not automatically bar habeas relief). *See also*, Ennis v. LeFevre, 560 F.2d 1072 (2d Cir. 1977); Jiminez v. Estelle, 557 F.2d 506 (5th Cir. 1977).

The lack of unanimity in this area is evidenced by the vigorous dissents in *O'Berry* and *Bonds.* Justice Goldberg's statement that "[t]he exclusionary rule has been stoned, but is not dead," O'Berry v. Wainwright, 546 F.2d 1204, 1221 (5th Cir. 1977), revealed his dissatisfaction with the current trend. Similarly, Justice Tjoflat in *Bonds* attacked the analysis, the conclusion and the ramifications of the circuit's newly formulated waiver standard with regard to effective assistance of counsel. *Id.* at 1132. The Supreme Court has reviewed the possibility of a categorical position in identification procedure cases, but upon the facts presented, declined to extend the *Stone* doctrine. Manson v. Braithwaite, 432 U.S. 98. *See* note 73 *supra*. The Court has declined to review the question of whether or not the *Stone* estoppel should be extended to fifth and sixth amendment claims in cases in which there was opportunity for full and fair hearing of all claims in state courts. Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), *cert. denied sub. nom*, Jago v. Papp, 98 S. Ct. 439 (1977).

posing stricter constraints upon federal courts by extending the res judicata effect of state decisions, the Supreme Court has forced renewed and more precise analysis of all areas of habeas corpus review. Once again the duty—and the opportunity—is thrust upon the judiciary to thoughtfully analyze the role of habeas corpus review in the federalist tradition, and to weave into the fabric in the "open-textured areas of the law," sound principles upon which the concept of ordered liberty may be nurtured.