Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone

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JUDICIAL INTEGRITY, THE APPEARANCE OF JUSTICE, AND THE GREAT WRIT OF HABEAS CORPUS: HOW TO KILL TWO THIRDS (OR MORE) WITH ONE STONE

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It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate interest in the enforcement of criminal justice or procedure . . . . Habeas corpus is one of the precarious heritages of Anglo-American civilization.1

I. INTRODUCTION: HISTORICAL PERSPECTIVE

The scope of federal habeas corpus review has been disputed ever since Congress codified the authority of federal courts to issue writs of habeas corpus.2 The Judiciary Act of 1789 confined habeas claims to prisoners "in custody, under or by colour of the authority of the United States."3 The Supreme Court further limited the scope of habeas corpus review in 1830, when it refused to consider habeas relief if the petitioner had been imprisoned by a court of competent jurisdiction.4 In the period following the Civil War, the Court began to expand the concept of jurisdiction in its habeas decisions.5 For instance, the Court held that convictions under unconstitutional statutes were void and destroyed the sentencing courts' jurisdiction,6 and

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2 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-2. For a discussion of the early British experience, see Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1042-45 (1970) [hereinafter cited as Developments].
3 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 82.
5 See generally Developments, supra note 2, at 1045-50.
6 Ex parte Siebold, 100 U.S. 371, 376-77 (1879).
that a court lacked jurisdiction to authorize a second punishment for a crime. In 1867, Congress made the writ available to state as well as federal prisoners, and authorized relief in "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." Despite this legislation, the Act was not perceived as an invitation to review all federal questions decided by the state court; courts still looked to their broadened interpretations of jurisdiction.

In 1915, *Frank v. Mangum* marked a departure from this position. The Supreme Court acknowledged that a federal habeas court was not limited merely to reconsidering the jurisdiction of the sentencing court, but could also review the state determination of a prisoner's federal claim. Subsequently, the Court reaffirmed this opinion, and in 1942 finally abandoned the fictitious restraint of jurisdiction. A decade later, in *Brown v. Allen*, which opened the modern era of federal habeas corpus, the Court clarified its position on rehearing constitutional claims previously afforded an apparently adequate corrective process by the state. The Court eschewed definitive guidelines and placed the decision to reconsider the merits within

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7 *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (defendant received fine and imprisonment under a statute authorizing fine or imprisonment; trial court without jurisdiction to impose any sentence beyond the statutory authorization). In *Ex parte* Wilson, 114 U.S. 417 (1885), the court ordered the release of a prisoner who was convicted without a grand jury indictment.


9 In 1886, in *Ex parte* Royall, 117 U.S. 241 (1886), the Supreme Court heard its first case brought by a state petitioner; the Court's appellate jurisdiction in habeas cases had been removed shortly after the passage of the 1867 Act. *See* Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44. Jurisdiction was not restored until 1885. *See* Act of March 3, 1885, ch. 353, 23 Stat. 437.

10 *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873) (defendant received fine and imprisonment under a statute authorizing fine or imprisonment; trial court without jurisdiction to impose any sentence beyond the statutory authorization). In *Ex parte* Wilson, 114 U.S. 417 (1885), the court ordered the release of a prisoner who was convicted without a grand jury indictment.


12 237 U.S. 309 (1915) (defendant alleged that hostile public sentiment influenced trial and that rendering verdict in his absence violated his rights).

13 *Id.* at 33-36. The petitioner was denied habeas review, however, because his claim had been properly adjudicated by the state court.


15 *Waley v. Johnston*, 316 U.S. 101 (1942). The Court expressly recognized that the writ was available to consider the constitutionality of conviction as well as the sentencing court's jurisdiction. *Id.* at 104-05.

16 344 U.S. 443 (1953).

17 *Id.* at 465-87.
the "sound discretion" of the federal district judge. All federal constitutional questions presented by state prisoners were cognizable on federal habeas corpus, and could be relitigated regardless of the adequacy of the state process or the fact that the state had fully and fairly considered the claim.

As the substantive scope of habeas corpus review matured, the Court interposed a procedural restriction between petitioners and habeas relief. Habeas petitioners first had to exhaust state judicial remedies before they sought federal review. Although Congress eventually codified this requirement, it did not have a debilitating prophylactic effect on the habeas petitioner's access to a federal forum, for in Fay v. Noia, one of the three habeas corpus landmark decisions of 1963, the Court characterized the requirement as "a rule of discretion, avowedly flexible, yielding always to 'exceptional circumstances.'" It "refer[red] only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court." Therefore, a petitioner would not be denied federal habeas corpus relief on the ground of exhaustion if he was barred from further state relief because he failed to make a timely appeal of his conviction. Townsend v. Sain, the second case of the trilogy, recognized that Brown provided insufficient guidelines to govern federal review, and therefore catalogued specific situations which mandated reconsideration. In the third case of the 1963 trilogy, Sanders v. United States,

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17 Id. at 460-65.
18 Id. at 507-10 (Frankfurter, J., speaking for five Justices). Federal prisoners were also given the benefits of the decision in Brown. See Kaufman v. United States, 394 U.S. 217 (1969).
19 See Ex parte Hawk, 321 U.S. 114 (1944); Ex parte Royall, 117 U.S. 241 (1886).
20 For a more elaborate discussion of the early history of the exhaustion requirement, see Developments, supra note 2, at 1093-1103.
21 28 U.S.C. § 2254(b), (c)(1970). Section 2254(b) provides an exception where "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."
22 372 U.S. 391 (1963). In Fay, a state prisoner instituted habeas corpus proceedings to set aside a conviction allegedly obtained upon a coerced confession. Petitioner's co-defendants had successfully appealed to reverse similar convictions. Although petitioner had not appealed, the Court ruled that his petition should have been considered.
23 Id. at 426.
24 Id. at 399. Even if a petitioner had deliberately bypassed the once-available state procedure, federal relief was not necessarily foreclosed. Id. at 438-39.
27 Id. at 312-13. The federal district court must grant habeas corpus review if:
   (1) the merits of the factual dispute were not resolved in the state hearing; (2) the
the Supreme Court held that federal district courts had discretion to consider second or successive applications for writs of habeas corpus, even when the latter application presented a claim identical to one that had been raised previously.\[29\]

Although *Fay*, *Townsend*, and *Sanders* defined the contours of discretionary denial of federal habeas relief, they left the jurisdictional power of federal district courts untouched.\[30\] But the summer of 1976 brought the turning point for the expanded scope of federal habeas corpus for state prisoners.\[31\] The decision in *Stone v. Powell*\[32\] creates serious misgivings about the continued vitality of *Fay* and *Townsend*. In addition, *Stone* casts an ominous shadow on the integrity of the Supreme Court of the United States.

II. THE PROBLEM: *Stone v. Powell*

On February 18, 1968, Lloyd Powell was arrested for vagrancy in Henderson, Nevada. During the search incident to his arrest, police discovered a .38 caliber revolver which implicated Powell in a murder committed in California the previous night.\[33\] At trial in California, Powell attempted to have the testimony about the revolver's discovery excluded from trial on the ground that the ordinance under which he had been arrested was unconstitutionally vague, thereby rendering the warrantless search invalid.\[34\] The trial court rejected this conten-
tion, and subsequently convicted Powell of murder. The California District Court of Appeal affirmed the conviction, and found that the error, if any, in admitting the challenged testimony was harmless. Powell's attempt to obtain state habeas corpus relief was denied.

Three years after his conviction, Powell filed a petition for federal habeas corpus relief, under 28 U.S.C. § 2254(a), contending that the testimony about the revolver should have been excluded as the fruit of an illegal search. The district court found that the Nevada police officer had probable cause to arrest Powell, irrespective of the constitutionality of the vagrancy ordinance and, therefore, that the search was permissible as incident to a lawful arrest. In the alternative, the court found that any error in admitting the evidence was harmless beyond a reasonable doubt. In December 1974, the Ninth Circuit reversed, finding that the vagrancy ordinance was unconstitutionally vague, that the arrest was, therefore, unlawful, and that the testimony should have been excluded. Because the disputed testimony corroborated other evidence, the court concluded that the admission of the testimony was not harmless beyond a reasonable doubt.

The Supreme Court decision also encompassed a companion case, Rice v. Wolff, in which defendant Rice was convicted of murder for the August 1970 bombing death of an Omaha police officer. At Rice's trial, evidence discovered in a search of his home was introduced, including materials for the construction of explosive devices. The trial court rejected Rice's attempts to suppress the evidence, and the Supreme Court of Nebraska affirmed the conviction, upholding the validity of the search warrant. In September 1972, Rice filed a

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25 Id. at 469-70.
26 Id. at 470. See Chapman v. California, 386 U.S. 18 (1967).
27 428 U.S. at 470.
28 For a discussion of the "custody" requirement of § 2254, see Developments, supra note 2, at 1072-79.
29 428 U.S. at 470.
30 Id.
31 Id. at 470-71.
32 Powell v. Stone, 507 F.2d 93 (9th Cir. 1974).
33 See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (vagrancy ordinance invalidated because unconstitutionally vague).
34 The court decided that although exclusion of the evidence would serve no deterrent purposes with regard to police officers who were enforcing statutes in good faith, the public interest would be served by deterring legislators from enacting unconstitutional statutes. 507 F.2d at 98.
35 Id. at 99.
36 Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975).
37 428 U.S. at 471.
38 Id. at 472.
petition for habeas corpus relief in federal district court, contending
that his incarceration was unlawful because of the use of evidence
obtained during an illegal search of his home.\textsuperscript{50} The court found that
the warrant was indeed invalid,\textsuperscript{51} and rejected the state's argument
that the arrest was justified by exigent circumstances.\textsuperscript{52} This decision
was affirmed by the United States Court of Appeals for the Eighth
Circuit.\textsuperscript{53}

Reviewing these decisions on writs of certiorari, the United States
Supreme Court reversed both circuit courts. But instead of deciding
whether the evidence used to convict the petitioners was unlawfully
obtained, the Court held that because the state courts had "provided
an opportunity for full and fair litigation of [the] Fourth Amendment
claim,"\textsuperscript{54} federal habeas corpus relief should not have been granted.

\textbf{III. ANALYSIS AND CRITIQUE OF THE COURT'S DECISION}

Although \textit{Stone v. Powell} has a devastating impact on federal
habeas corpus jurisdiction, Justice Powell expressed his opinion for
the six-man majority in terms of a constitutional analysis of the
exclusionary rule. He acknowledged that, under existing precedent,
fourth amendment claims were cognizable under sections 2254 and
2255 of Title 28 United States Code,\textsuperscript{55} and traced the expansion of
federal habeas jurisdiction from its original interpretation as a mere
inquiry into jurisdiction to acceptance of the writ as a remedy for all
federal constitutional claims, including those arising from allegedly
illegal searches and seizures.\textsuperscript{56} In his analysis of habeas jurisdiction
for fourth amendment claims, however, Justice Powell described its
recent expansion as based on the "view" that the fourth amendment
requires habeas relief when a prisoner is in custody pursuant to a
conviction resulting from illegally obtained evidence.\textsuperscript{57} Contending
that the Court never considered this view completely, he then rejected
it in favor of his own view of the nature and purpose of the exclusion-
ary rule.\textsuperscript{58}

\begin{itemize}
  \item \textsuperscript{50} 428 U.S. at 472-73.
  \item \textsuperscript{51} Rice v. Wolff, 388 F. Supp. 185, 190-94 (D. Neb. 1974).
  \item \textsuperscript{52} 388 F. Supp. at 201 (pursuant to a separate evidentiary hearing).
  \item \textsuperscript{53} Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975).
  \item \textsuperscript{54} 428 U.S. at 481-82, 494.
  \item \textsuperscript{55} 28 U.S.C. §§ 2254, 2255 (1970). Section 2255 is the primary post-conviction remedy for
            federal prisoners.
  \item \textsuperscript{56} 428 U.S. at 474-480. See Kaufman v. United States, 394 U.S. 217 (1969)(search and
            seizure claims allowed in § 2255 proceedings).
  \item \textsuperscript{57} 428 U.S. at 480-81.
  \item \textsuperscript{58} Id. at 481. Of course, the need for compromise in reaching a majority opinion might mean
            that Justice Powell's views on habeas corpus do not square precisely with those expressed by
            him for the Court. See generally, Schneckloth v. Bustamonte, 412 U.S. 218, 250 et. seq.
\end{itemize}
The Court reviewed the development of and rationale for the exclusionary rule, and found that the "imperative of judicial integrity," violated when a court condones illegal police practices, supplied only limited justification for the rule. Instead, the "primary justification" was the deterrence of police transgressions that violate an individual's fourth amendment rights. A major consequence of this latter aspect, the majority argued, is that the exclusionary rule is not a "personal constitutional right," but merely a "judicially created remedy" intended generally to effectuate the fourth amendment. Therefore, no individual has a right to the exclusion of illegally obtained evidence, exclusion is within the discretion of the court, and is based on a determination of whether the remedy will further the goal of deterrence in the circumstances of the particular case. With respect to its application, the exclusionary rule was seen as essentially involving a balancing process: to the extent that societal costs of excluding questioned evidence outweigh the deterrent effect on police misconduct, the evidence should be held to be admissible.

Notwithstanding the accuracy of Justice Powell's analysis, it is more important to note the direction in which the Court is heading on fourth amendment claims. Seven of the Justices expressed some doubt concerning the application of the exclusionary rule; in fact, Chief Justice Burger seemed prepared to abandon it entirely. The


428 U.S. at 482-89.

428 U.S. at 486.


See 428 U.S. at 486.

Id. at 486-87. The "societal costs" at trial and on direct review include the belief that "the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." Id. at 489-90. Thus, the major cost of the rule to the majority was that it "deflects the truthfinding process and often frees the guilty." Id. at 490. The Court also considered the costs of federal habeas corpus review—using limited judicial resources, undermining finality, increasing friction between federal and state courts, and upsetting the constitutional balance of federalism. Id. at 491 n. 31.

428 U.S. at 488.

Although Justice White agreed with dissenting Justice Brennan that habeas corpus should be available to state prisoners to remedy exclusionary rule violations, 428 U.S. at 536-37 (White, J., dissenting), he went on to argue that the rule should not apply where "law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds," id. at 540, since in such situations there could be no deterrent effect.

Characterizing the indirect sanction on police officers that habeas relief would provide as "sophisticated nonsense," id. at 498 (Burger, C.J., concurring), Chief Justice Burger declared
The importance of Stone to the future of the exclusionary rule may be in the Court's formulation of theoretical foundations to limit its application. In any event, constriction of the scope of the rule can no longer be doubted, especially in light of recent Supreme Court decisions; the only question is simply how far the limitation will go.

Whatever Stone's effect may be on the exclusionary rule generally, it clearly has great significance for the future of federal habeas corpus actions brought by state prisoners. Because the Court believed that the exclusionary rule has a minimal deterrent effect at collateral proceedings, which typically occur long after the alleged police misconduct, the Court tipped the scale against utilization of the rule. But the Court also discussed Kaufman v. United States, which allowed collateral review for search and seizure claims of federal prisoners. Kaufman assumed that state prisoners had such a right: "Our decisions leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial." Rather than overrule Kaufman or its predecessors, the Court treated them merely as an unsubstan-

that "the exclusionary rule has been operative long enough to demonstrate its flaws." Id. at 496 (Burger, C.J., concurring). More than a decade earlier, he wrote that if the public believes that law enforcement is hampered by "technicalities," there develops "a sour and bitter feeling that is psychologically and socially unhealthy." Burger, Who Will Watch the Watchman?, 14 AM. U. L. REV. 1, 22 (1964). The Chief Justice also clearly stated this view in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415-18 (1971)(Burger, C.J., dissenting), and more recently, in a different context, in Brewer v. Williams, ___ U.S. ___, 97 S. Ct. 1232, 1248 (1977)(Burger, C.J., dissenting). ("The result in this case ought to be intolerable in any society which purports to call itself an organized society. . . . It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involved gross police misconduct or honest human error.").

See, e.g., United States v. Janis, 428 U.S. 433 (1976)(exclusionary rule does not forbid evidence illegally seized by a criminal law enforcement agent of one sovereign to be used in the civil proceedings of another sovereign) (decided the same day as Stone); Andersen v. Maryland, 427 U.S. 463 (1976)(neither fourth nor fifth amendment precludes search of lawyer's office under warrant which resulted, inter alia, in seizure of memoranda which the attorney had prepared for his own use); United States v. Peltier, 422 U.S. 531 (1975)(retroactivity of warrantless automobile border search decision, Almeida-Sanchez v. United States, 413 U.S. 266 (1973), rejected) (Justice Douglas, dissenting, noted the "slow strangulation of the rule," at 561).

Even statutory exclusion under 18 U.S.C. § 2518(10)(a)(1970) recently has been subject to limitation. See United States v. Donovan, ___ U.S. ___, 97 S. Ct. 658 (1977)(fourth amendment does not require government to name all persons likely to be overheard in telephone tap).

That question is not the primary focus of this article.

See 428 U.S. at 489-495.

394 U.S. 217.

Id. at 225. See, e.g., Mancusi v. De Forte, 392 U.S. 364 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Warden v. Hayden, 387 U.S. 294 (1967)(fourth amendment cases where state prisoners used federal habeas corpus collateral review).

Although the Stone majority rejected Kaufman's dictum as to state prisoners, the Court left open the possibility that Kaufman's holding may still be supported by "the supervisory role of this Court over the lower federal courts." 428 U.S. at 481 n.16. Justice Brennan saw no basis
tiated "view" of the exclusionary rule. Moreover, in perceiving search and seizure claims as lacking constitutional foundations, the Court avoided the apparent conflict between Stone and the federal habeas corpus statute, which allows relief to petitioners held in custody "in violation of the Constitution or laws or treaties of the United States." The Court then dismissed, as "unjustified," the Kaufman view that application of the fourth amendment extends to habeas relief for state prisoners with claims of illegally obtained evidence.

The majority's characterization of prior case law affording habeas review to fourth amendment claims is based on the assumption that deterring improper police actions is the sole justification for the exclusionary rule. However, the precedent is justifiable on other grounds as well. First, it is plainly arguable that judicial integrity does require the exclusion of illegally obtained evidence. Second, Kaufman explicitly rejected the Stone Court's argument concerning the scope of federal habeas corpus. Another significant ground, which was not considered adequately by the majority, relates directly to the essential nature of federal habeas corpus—the need for providing a federal forum for all constitutional claims. The existing guidelines of Townsend v. Sain can protect the interests of federalism sufficiently and give proper deference to the findings of state courts. But only by insuring that federal judicial review will not be foreclosed can the guarantee of a federal forum be preserved. Although Stone...
indicates that the Supreme Court's certiorari jurisdiction can serve this function, as a practical matter certiorari is used infrequently to review state criminal convictions, and certainly the Court intimates no inclination to move in that direction on claims charging use of illegal evidence in state criminal prosecutions. Furthermore, the allocation of judicial resources for determining federal questions is constitutionally an issue to be determined by Congress. Once congressional intent is manifested, any reduction of that authority is a matter of legislative, rather than judicial, prerogative. It should not go unobserved that legislative attempts to restrict the scope of federal habeas jurisdiction have been unsuccessful. Moreover, amendment of the federal habeas statute subsequent to judicial expansion of the scope of the remedy did not alter the principles that collateral relief is available respecting any constitutional claim and that federal courts are the proper tribunals to hear those claims.

In short, whatever competency state courts have to decide federal constitutional questions, the effect of Stone is to preclude congressionally created procedure for federal review of possible errors in state decisions, at least to the extent that fourth amendment claims are involved. To be sure, Congress has specifically indicated that deference should be given to state determinations and has furnished guidelines for that purpose. But Congress also has declared that the federal judiciary should have the final word in interpreting federal constitutional questions.

See 428 U.S. at 493 n.35.

For statistical data on this point, see The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 279-82 (1976).

See notes 170-76 infra and accompanying text.


For a discussion of this point in Stone, see 428 U.S. at 493-94 at n.35 (majority opinion); id. at 517, 525-26, 529 (Brennan, J., dissenting). See also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 523-24 (1963).

See 428 U.S. at 517-18 (Brennan, J., dissenting) (extension of Stone to other possible challenges).

constitutional claims. Without any doubt, Stone v. Powell has perverted this mandate.

In his dissent, Justice Brennan vigorously noted that the majority opinion did not pass muster even when subjected to the Court's own reasoning. The Court did not question that exclusion of the tainted evidence admitted at the trials of Powell and Rice was constitutionally required pursuant to Mapp v. Ohio and later cases. At the trial and appellate levels, the deterrent effect was deemed sufficient to tip the judicial balance in favor of exclusion. Only at the level of federal collateral attack, the majority argued, did the "societal cost" of employing the exclusionary rule outweigh the deterrent effect on the distant police misconduct. Concededly, the deterrent effect resulting from use of the exclusionary rule diminishes with the increasing remoteness of the police actions. By the time petitions for federal habeas review are filed, however, the societal costs of exclusion already should have been incurred. The costs are not greater solely because the balance is struck at a later stage of the proceeding. Furthermore, so long as Mapp survives, failure to exclude the evidence at trial is a constitutional error, and, once that error results in custody, the balancing process is no longer relevant. The federal habeas corpus statute provides for review of any custody in violation of the Constitution; this authority cannot properly be restricted by the application of a judicial balancing test.

In sum, the exposition in Stone leaves a great deal to be desired. The Court avoided critical issues and neglected to distinguish adequately precedent that reached contrary results on the constitutional quality of the exclusionary rule. Also, the decision does not squarely confront the scope of existing habeas jurisdiction statutes. Although it is cast in a constitutional mold, Stone restricts this jurisdiction without overruling contrary authority. Further, the case fails to specify precisely what constitutes a "full and fair opportunity for litigation" in state courts. Presumably, the Court intended that the standards of Townsend v. Sain would govern, because of both the lan-
guage used and a brief and vague reference to Townsend. But, if this is actually the correct interpretation, Stone has added virtually nothing, for in Townsend the Court required federal courts to hold evidentiary hearings when certain criteria indicated that state courts had not given habeas corpus applicants a "full and fair hearing" in direct or collateral proceedings on the claims raised in the habeas petition.

To add something to Townsend, Stone must be read as a mandatory instruction to federal district courts that they not afford relief on fourth amendment issues to state prisoners whose grievances were resolved in the state courts. If this is the case, however, conflicts with existing statutes and case law cannot be avoided.

Further, if Stone forecloses habeas relief merely by providing the defendant an "opportunity" to litigate his claim (whether or not the opportunity was exercised), then the decision is inconsistent with Fay v. Noia, in which the Court held that a defendant's failure to exhaust state judicial remedies no longer available to him, would not bar habeas relief unless the defendant deliberately bypassed them.

One reason that the full import of Stone is difficult to assess is that the nature of the Court's holding is somewhat elusive. The majority states three differing formulations of its ruling: "where the State provided an opportunity for full and fair litigation," the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground

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102 428 U.S. at 494 n.36.
103 372 U.S. 293, 312-18 (1963). Of course, under Townsend, even if a federal evidentiary hearing is not otherwise required, the district court has the discretion to hold one. Id. at 318-19.
104 The Fifth Circuit used Townsend criteria to interpret Stone's "opportunity for full and fair litigation," but carefully distinguished Townsend as intended primarily to determine the need for a federal evidentiary hearing, while Stone determines whether or not federal habeas jurisdiction may be accepted at all. O'Berry v. Wainwright, 546 F.2d 1204, 1211 (5th Cir. 1977). The result of this distinction is a two-tiered test: where the facts are 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, the full and fair consideration requirement is satisfied where the state appellate court, presented with an undisputed factual record, gives full consideration to [the] Fourth Amendment claims.
Id. at 1213 (original emphasis). Cf. Talavera v. Wainwright, 547 F.2d 1238 (5th Cir. 1977)(circumstances in which remand is necessary on issue of full and fair opportunity).
107 428 U.S. at 482, 494.
that evidence obtained in an unconstitutional search and seizure was introduced at his trial'';\textsuperscript{108} (2) a state prisoner \textit{may not be granted} federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial';\textsuperscript{109} and (3) "a federal court \textit{need not apply} the exclusionary rule on habeas review of a Fourth Amendment claim"\textsuperscript{110} absent a showing of lack of opportunity for full and fair litigation of the claim in the state courts. This final expression appears in a footnote to the second formulation, and states that the decision does not limit federal habeas corpus jurisdiction.'\textsuperscript{111} Under the first statement of the Court’s rule as well, a federal court in its sound discretion could consider a petition from a state prisoner alleging a fourth amendment claim that previously had been litigated in the state courts. But under the second formulation, such relief appears to be precluded.

Despite this confusion, the circumstances and background of \textit{Stone} suggest that the holding is a compulsory bar to federal jurisdiction over state prisoners' fourth amendment claims. Since the Court did not dispute the earlier federal decisions regarding Powell and Rice, the court might have permitted the convictions of two men to be vacated as proper exercises of discretion within the jurisdiction of federal habeas corpus. Alternatively, the cases could have been remanded to their respective courts of appeals for rehearing in light of the Supreme Court’s interpretation of the exclusionary rule balancing test. Instead, the circuit court decisions were reversed, with the Supreme Court intimating that exercise of jurisdiction was entirely inappropriate, and that the rule carved in \textit{Stone} was mandatory.

This rigid construction has been followed substantially. For example, the Fifth Circuit has interpreted \textit{Stone} as a "bar" to federal relief,'\textsuperscript{112} and will consider the fourth amendment claims presented by state prisoners "only upon a showing that the state failed to provide . . . an opportunity for full and fair litigation of [the] claim."'\textsuperscript{113} Since \textit{Stone} was decided, only two circuits have allowed relief under

\textsuperscript{108} Id. at 482 (emphasis added).
\textsuperscript{109} Id. at 494 (emphasis added).
\textsuperscript{110} Id. at 494-95 n.37 (emphasis added).
\textsuperscript{111} "Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation." Id.
\textsuperscript{112} White v. Alabama, 541 F.2d 1092, 1093 (5th Cir. 1976). The Fifth Circuit further clarified its interpretation of \textit{Stone} in O'Berry v. Wainwright, 546 F.2d 1204 (5th Cir. 1977): "Despite the assertions of the Supreme Court in \textit{Stone} to the contrary, we would be blind to reality to pretend that the practical effect of that decision is not a limitation on federal court jurisdiction." Id. at 1211-12.
\textsuperscript{113} Caver v. Alabama, 537 F.2d 1333, 1335-36 (5th Cir. 1976). The court acknowledged that this was a difficult burden for a state prisoner to meet. Id. at 1336. \textit{See also} note 129 supra.
these circumstances. In Gates v. Henderson, the Second Circuit also construed Stone to "foreclose" habeas review, but then applied the criteria of Townsend v. Sain to grant relief after the finding that an opportunity for full and fair litigation of the claim had not been provided in the state courts. One judge dissented, arguing that this approach was "an artful effort to circumvent Stone" because of the failure to "accord any deference to the strong view expressed in Stone, based on deeply rooted public policy, that the exclusionary rule is unique and should not be invoked on habeas petitions under the circumstances [therein] described by Mr. Justice Powell . . . " The dissenter recommended the following holding, which many courts have applied: The dismissal of the petition is "[a]ffirmed on the authority of Stone v. Powell."

IV. PROBLEMS WITH THE COURT’S SOLUTION: JUDICIAL INTEGRITY IN A DISINGENUOUS SYSTEM

A. Judicial Integrity: The Fourth Amendment Conception

As discussed earlier, the Stone Court opted for the deterrence rather than the judicial integrity rationale to explain the exclusionary rule. This decision was the culmination of some fifty years of the Court’s dealing with the idea of the "imperative of judicial integrity." Although the concept was not so formulated until 1960, it was conceived in 1928 in the Holmes and Brandeis dissents in Olmstead v. United States. According to Justice Holmes:

no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business [as using at
trial evidence which has been obtained by means contrary to the Federal Constitution, it does not permit the judge to allow such iniquities . . . .122

Justice Brandeis added that

[i]n a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If a government becomes a law-breaker, it breeds contempt for law; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.123

The judicial integrity doctrine focuses on the "clean hands" of the criminal justice process,124 and the countenance of the judiciary in the public eye. By admitting the fruits of an unconstitutional or illegal police search into evidence, a court implicitly sanctions such misbehavior, and thereby becomes a confederate in the improper activity.125

A particularly important feature of the early theory was its exacting quality. According to Justice Brandeis, a court could preserve its untainted image only by refusing to admit illegally obtained evidence.126 No distinction was made between trial and extra-trial proceedings, nor does it appear, in light of the doctrine's rationale, that any distinction was intended. Although the holding of Stone v. Powell

122 Id. at 470 (Holmes, J., dissenting).
123 Id. at 485 (Brandeis, J., dissenting). See also Weeks v. United States, 232 U.S. 383, 392-93 (1914). This rationale was first accepted by the Court in McNabb v. United States, 318 U.S. 332, 345 (1943), and subsequently reaffirmed in Elkins v. United States, 364 U.S. 206, 222-23 (1960); Mapp v. Ohio, 367 U.S. 643, 659 (1961); Miranda v. Arizona, 384 U.S. 436, 479-80 (1966); Terry v. Ohio, 392 U.S. 1, 12-13 (1968); and Lee v. Florida, 392 U.S. 378, 385-86 n.9 (1968).

The development of the philosophy expressed in Olmstead has been traced to the Holmes-Brandeis dissents in Burdeau v. McDowell, 256 U.S. 465, 477 (1920) (arguing that evidence obtained illegally by a private party who then turned it over to police should have been excluded because the evidence was obtained by an unfair and unethical method), and to the Brandeis dissent in Casey v. United States, 270 U.S. 413 (1926) (arguing that the conviction should have been overturned on the ground of entrapment). See Cole, The Exclusionary Rule in Probation and Parole Revocation Proceedings: Some Observations on Deterrence and the "Imperative of Judicial Integrity," 52 Chi-Kent L. Rev. 21, 39-40 (1975).


125 Stated differently, the issue is whether the criminal should "go free" because "the constable has blundered." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardovo, J.).

clearly is contrary to this assertion, it is only fair to note that *Stone* did not mark the first departure. The trend to abandon the Brandeis "clean hands" doctrine began soon after the Court decided *Mapp v. Ohio*, which placed the dual objectives of deterrence and integrity on equal footing. Considering the retroactivity of *Mapp*, the Supreme Court said virtually nothing about the imperative of judicial integrity; rather, it stated that the purpose of the exclusionary rule "was to deter the lawless action of the police and to effectively enforce the Fourth Amendment." A subsequent retroactivity decision, focused exclusively on the objective of deterring unlawful searches and seizures, and said nothing about the preservation of judicial integrity. And, more recently, writing for the Court in *United States v. Peltier*, Justice Rehnquist maintained that:

the "imperative of judicial integrity" is ... not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search and seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution.

Thus, the death knell for the judicial integrity justification for the exclusionary rule had been tolling for some time before the resounding tenor of *Stone v. Powell*. But, apart from debating the preeminence of the deterrence rationale, the concept of judicial integrity survives in a broader setting than that of the fourth amendment.

129 *Id.* at 637.
130 Desist v. United States, 394 U.S. 244, 251-52 (1969) (notably written by Justice Stewart, who wrote the opinion for the Court in *Elkins*, supra note 120).
131 422 U.S. 531 (1975).
132 *Id.* at 537-38 (original emphasis). See also United States v. Calandra, 414 U.S. 338, 355-56 n.11 (1974)(embracing the deterrence rationale and dismissing the idea that the spirit of judicial integrity would be betrayed by allowing the use of illegally seized evidence in a grand jury proceeding).
134 See, e.g., *Michigan v. Payne*, 412 U.S. 47 (1973): "This question [of the retroactivity of North Carolina v. Pearce, 395 U.S. 711 (1969)(due process limitations guard against possible vindictiveness where judge imposes a more severe sentence upon a defendant after new trial)] relates to the integrity of the judicial process, not to the limitations placed by the Constitution on police behavior." *Id.* at 63 (Marshall, J., dissenting); *In re Martinez*, 1 Cal.3d 641, 654-55, 463 P.2d 734, 743 (1970)(allowing parole termination based upon illegally seized evidence)(Pe-
B. Judicial Integrity: A Doctrine for All Seasons

Generally, "judicial integrity" has been employed in connection with the sanctity, probity, and rectitude of the legal process itself, whether criminal or civil. Indeed, "integrity" is defined as the "soundness of and adherence to moral principle and character; uprightness; honesty... [or] a sound, unimpaired, or perfect condition." Courts have used the term in a variety of contexts. References to "judicial integrity" appear in a range of cases, from discussions of a judge's partiality, bias, or conflict of interest, to the disparity among sentences imposed for similar crimes. The term has also been applied to the efficiency and effective allocation of adjudicatory resources. And courts often emphasize that the public has or should have respect for the particular process, program, or entity at issue.

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134 See, e.g., In re Sawyer, 360 U.S. 622, 624-25 (1959).

135 See, e.g., United States v. Capriola, 537 F.2d 319, 321 (9th Cir. 1976) ("when there is a substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity, the preservation of the appearance of judicial integrity and impartiality requires that the sentencing judge record an explanation.").

136 See, e.g., United States ex rel. Miller v. Pate, 429 F.2d 1001 (7th Cir. 1970) (federal district court lacks authority to restrain state from retrying petitioner after denial of speedy trial, when state did not comply with order to retry but instead appealed the order unsuccessfully). ("We have complete confidence in the judicial integrity of the Illinois judiciary to see that petitioner's rights will be carefully guarded and protected in light of what has now transpired." Id. at 1003).

137 In distinguishing those issues which are "guilt-related" from those which are not, the Supreme Court in Stone v. Powell spoke of the "integrity of the fact-finding process." 428 U.S. at 479, quoting Kaufman v. United States, 394 U.S. 217, 224 (1969).


The "appearance of justice"\(^\text{144}\) is a topic frequently examined in discussions of judicial integrity.\(^\text{142}\) At the base of both abstractions is the belief that justice itself is a nullity if the public does not perceive it as being done, because the public then has little or no regard for the legal system.\(^\text{143}\) For example, in Offutt v. United States,\(^\text{144}\) when a federal judge displayed personal animosity and lack of proper judicial restraint during a prolonged dispute with the defense counsel, the reviewing court debated whether contempt charges filed against the attorney should have been tried by a different judge. Deciding in the affirmative, the Court proclaimed:

The vital point is that in sitting in judgment on . . . a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.\(^\text{145}\)

Thus, the paramount issue is whether the Supreme Court in Stone v. Powell violated its own general formulations of "judicial integrity" and the "appearance of justice." We submit that it has done so.

The first reason for this assertion is that in restricting federal habeas corpus jurisdiction for state prisoners, the Court gave a "novel reinterpretation" to the habeas statutes.\(^\text{148}\) That is, the majority would

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\(^{142}\) See, e.g., United States v. Leavitt, 478 F.2d 1101, 1104 (1st Cir. 1973)(drunken condition of defendant does not automatically invalidate sentencing; court has discretion according to circumstances); Roy v. Jones, 349 F. Supp. 315, 319 (W.D. Pa. 1972)(impact on community of justice of peace requires preservation of judicial integrity and its appearance); Hobson v. Hanson, 265 F. Supp. 902, 931 (D.D.C. 1967)(Wright, J., dissenting)("The need to preserve judicial integrity is more than just a matter of judges satisfying themselves that the environment in which they work is sufficiently free of interference to enable them to administer the law honorably and efficiently. Litigants and our citizenry in general must also be satisfied.").

\(^{143}\) "Without the appearance as well as the fact of justice, respect for the law vanishes in a democracy." In re Greenberg, 422 Pa. 411, 416, 280 A.2d 370, 372 (1971). "When the image of the judiciary is tarnished, the moral authority of the court is critically undermined." J. MACKENZIE, THE APPEARANCE OF JUSTICE x (1974).

The theme of "judicial integrity" appears in Farrer Herschells' well-known retort at the Bar when Sir George Jessell attempted to cut his argument short: "Important as it is that people should get justice, it was even more important that they should be made to feel and see that they were getting it." 2 J. ATLAY, VICTORIAN CHANCELLORS 460 (1908).

\(^{144}\) 348 U.S. 11 (1954).

\(^{145}\) 348 U.S. at 14 (emphasis supplied).

\(^{146}\) 428 U.S. at 515 (Brennan, J., dissenting).
allow the judiciary to create a hierarchy of constitutional violations, based upon whether or not the claim "impugn[s] the integrity of the fact-finding process." Yet the habeas statutes allow relief to state prisoners "in custody in violation of the Constitution or laws . . . of the United States." The Court creates this judicial discretion with little discussion of section 2254, previously construed to grant federal jurisdiction for fourth amendment claims of state prisoners.

This lack of analytical depth is apparent also in the majority's treatment of contradictory precedent. Avoiding direct confrontation with the habeas statutes, the Court purported to cast its holding in constitutional terms. But the Court did not explicitly overrule any of the numerous precedents that applied fourth amendment principles in collateral review of state convictions; indeed, it did not even discuss principles of stare decisis. Rather, the Court asserted that those Justices who joined in prior decisions simply overlooked the obvious constitutional dimension. The majority then obscured its own evasion in an interest balancing approach.

As long as Mapp v. Ohio remains undisturbed, however, the attempt to base Stone on the Constitution must fail, for under Mapp, as a matter of federal constitutional law, a state court must exclude evidence from the trial of an individual whose fourth and fourteenth amendment rights were violated by a search and seizure that either directly or indirectly resulted in the acquisition of that evidence. As Justice Brennan observed, "it is simply inconceivable that the constitutional deprivation suddenly vanishes after the appellate process has been exhausted." There is no doubt, at least in one sense, that the law is what the Court says it is. But predictability based on logical legal reasoning is a quality that any viable judicial system

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147 Id. at 479.
149 See 428 U.S. at 516 (Brennan, J., dissenting).
150 Id. at 506-09.
151 See note 71 supra.
152 "It borders on the incredible to suggest that so many Justices for so long merely 'assumed' the answer to such a basic jurisdictional question." 428 U.S. at 509 n.6 (Brennan, J., dissenting).
154 See 428 U.S. at 509-15 (Brennan, J., dissenting). This principle recently was reaffirmed in United States v. Calandra, 414 U.S. 338 (1974). "[E]vidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." Id. at 347 (emphasis supplied).
155 Id. at 511.
must preserve. In the words of Lord Coke, "the knowne certaintie of the law is the safetie of all."

Closely related to the idea of predictability is the clear incongruity in establishing a particular principle as part of a society's theoretical and functional jurisprudence and then announcing that there is no principle after all. As Professor Fuller has suitably asserted, "a failure of congruence between the rules as announced and their actual administration . . . does not simply result in a bad system of law; it results in something that is not properly called a legal system at all . . . ." In short, how can we expect the citizenry to honor the law and the legal system if that honor is not reciprocated? Yet this is precisely the mold cast in Stone when the Court reaffirms the exclusionary rule, but rejects its application once the appellate process has been exhausted. The absence of the remedy on post-conviction attack eviscerates the right itself. In fact, one argument employed by the Court in Mapp to overrule its holding in Wolf v. Colorado and extend the exclusionary rule to state trial proceedings, was that the admission of the new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the [unlawfully obtained] evidence. . . . To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

As an additional consequence, the Court discards the longstanding principle that for purposes of federal habeas corpus jurisdiction, there are no subordinate constitutional rights. In basing its distinction on whether claims are "guilt-related," the Court could limit habeas corpus jurisdiction even further. Justice Brennan warns of such future

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160 L. Fuller, note 157 supra, at 39. Cf. Jackson v. Lykes Bros. Steamship Co., 386 U.S. 731, 736-37 (1967) (Stewart, J., dissenting) ("The Court holds that this . . . law cannot mean what it says . . . . [But] [i]t is our duty to apply the law, not to repeal it.")
161 See, e.g., L. Fuller, note 157 supra, at 39-40.
163 338 U.S. 25 (1949)(fourth amendment not applicable to state prosecutions).
164 367 U.S. 643, 656 (1961)(emphasis supplied). Cf. Desist v. United States, 394 U.S. 244, 258 (1969)(Harlan, J., dissenting)("We do not release a criminal from jail because we like to do so, or because we think it is wise to do so, but only because the government has offended constitutional principle in the conduct of his case.")
165 See 428 U.S. at 523-24 (Brennan, J., dissenting).
166 See 428 U.S. at 479, 490, 517-18 (Brennan, J., dissenting).
constriction, "if not for all grounds of alleged unconstitutional detention, then at least for claims—for example, of double jeopardy, entrapment, self-incrimination, *Miranda* violations,\(^7\) and use of invalid identification procedures\(^8\)—that this Court later decides are not guilt-related."\(^9\) Yet this potential hierarchy of federal constitutional rights ignores both the principles of stare decisis and Congress' failure to alter habeas statutes after they were judicially interpreted as recognizing all federal constitutional contentions.\(^1\)

Another egregious element of the majority opinion is its view of federalism, finality, and the effective use of judicial resources. In rejecting collateral fourth amendment claims from state prisoners, the Court effectively ignores the settled principle that Congress has cast district courts in the role of surrogate Supreme Courts to adjudicate habeas actions which assert constitutional claims.\(^2\) It is for Congress, and not the courts, to decide what is the most efficacious method to enforce federal constitutional rights.\(^3\) According to the law and spirit of habeas corpus prior to *Stone,* "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary

\(^{10}\) See *Miranda v. Arizona*, 384 U.S. 436 (1966)(prosecution may not use statements stemming from custodial interrogation of defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.) (Indeed, the recent case of *Brewer v. Williams*, ___ U.S. ___, 97 S. Ct. 1232 (1977) (five-to-four decision) (§ 2254 appeal of sixth and fourteenth amendment violations) threatened to extend *Stone v. Powell* to *Miranda* cases. See 97 S. Ct. at 1246-47 (Powell, J., concurring); id. at 1250-54 (Burger, C.J., dissenting). See note 66 supra.

\(^{11}\) The application of *Stone v. Powell* to this issue is now before the Court in *Manson v. Braithwaite*, argued, 45 U.S.L.W. 3412 (U.S. Nov. 29, 1976)(No. 75-371).

\(^{12}\) See 428 U.S. at 517-518 (Brennan, J., dissenting)(Brennan notes other possible "guilt-related" claims. The application of *Stone v. Powell* in the use of habeas corpus to review the standard for fair representation of a minority group on a local grand jury was before the Court recently in *Castaneda v. Partida*, ___ U.S. ___, 97 S. Ct. 1272 (1977), but was not a ground for the Court's decision. See also *Maness v. Wainwright*, writ of certiorari dismissed as improvidently granted, 45 U.S.L.W. 4331 (1977)(application of rule preventing defendant from impeaching his own witness).

\(^{13}\) See 428 U.S. at 522 (Brennan, J., dissenting).


> It is not for us to determine whether this power should have been vested in the federal courts . . . . [T]he wisdom of such a modification in the law is for Congress to consider . . . . It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims . . . .

*Id.* at 499-500. See also *Zwickler v. Koota*, 389 U.S. 241, 247 (1967)(Congress made federal judges "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.") (original emphasis).

\(^{15}\) See note 171 supra.
federal judicial review. 173 Federal courts were to "have the 'last say' with respect to questions of federal law." 174 Where constitutional rights were at stake, the integrity of proceedings at and before trial required "the continuing availability of a mechanism for relief." 175 "[N]o binding weight is to be attached to the State determination. The congressional requirement is greater. The State Court cannot have the last say when it, though on fair consideration of what procedurally may be deemed fairness, may have misconceived a federal constitutional right." 176

Following Townsend v. Sain 177 and Fay v. Noia, 178 congressional actions indicated its belief that the superior authority of federal law should be asserted in federal courts. 179 As Congress modified the habeas statutes to incorporate Townsend and provide a limited res judicata effect for factual determinations of state judges, 180 it did not modify the principles of Brown, Fay, and Kaufman. According to these cases, collateral relief was to be available with respect to any constitutional deprivation and federal district judges, subject only to appellate review, were to be the spokesmen for the supremacy of federal law. 181

Without question, Stone v. Powell has contravened these well-established principles. In so doing, we submit that it has degraded the virtues of logic and candor, 182 and eliminated the essential elements


In essence, the issue of the proper point of repose for the criminal process deals with two fundamental questions: whether we can determine adequately, with our present state of knowledge, (1) that those acts which we define as criminal and, therefore, punish, should be so defined and punished, and (2) that our criminal process is a rational and fair one. If both questions are answered in the affirmative, the next question is whether the closing of the traditional "safety valve" of habeas corpus will increase the pressure at other points in the system, such as parole and clemency, or, indeed, whether extra-legal pressures, such as riot and revolt will result. This "safety valve" theory will be the subject of a future article.


177 372 U.S. 293 (1963); see notes 26-27, 101-104 supra and accompanying text.
178 372 U.S. 391 (1963); see notes 22-25 supra and accompanying text.
179 See notes 86-87 supra.
180 428 U.S. at 528 (Brennan, J., dissenting).
of any viable legal order—judicial integrity and the appearance of justice.

V. CONCLUSION: ON STONE AND GLASS HOUSES

Potentially, Stone could pulverize federal relief for rights expressed in or derived from other constitutional amendments. Another possibility is that federal habeas corpus jurisdiction will be foreclosed where state post-conviction statutes mirror the federal relief available under section 2255. Even Sanders v. United States, the third case of the 1963 trilogy, is under debate. Moreover, the occasionally advanced argument that federal habeas corpus relief should be available only to those who present a colorable claim of innocence may be only a Stone's throw away. But if one or more of these approaches is taken, it will contradict earlier positions held by the Supreme Court, such as that "[h]abeas corpus is one of the precious heritages of Anglo-American civilization," and that "[i]t must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." It is, of course, true that change may be indispensable to the dynamic quality of the law, and that if the Court desires to follow one of the above routes it will be able to do

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183 See notes 167-69 supra. See also Francis v. Henderson, 425 U.S. 536 (1976) (habeas corpus must be denied unless actual prejudices could be shown to have resulted from the composition of the grand jury).

184 See Swain v. Pressley, ___ U.S. ___, 97 S.Ct. 1224 (1977) (federal court was prohibited by D.C. statute from entertaining application for writ from D.C. prisoner, where statute provides adequate fact finding procedure and was deliberately patterned after 28 U.S.C. § 2255).


186 See Kelley, Finality and Habeas Corpus: Is the Rule that Res Judicata May Not Apply to Habeas Corpus or Motion to Vacate Still Viable?, 78 W. Va. L. Rev. 1 (1975).


190 Bowen v. Johnston, 306 U.S. 19, 26 (1939); see Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) ("[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."). See also Chafee, The Most Important Human Right in the Constitution, 32 B.U.L. Rev. 143 (1952). See generally Humphrey v. Smith, 336 U.S. 695 (1949) (guilt or innocence irrelevant to habeas corpus review); Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (Holmes, J.); cf. Thompson v. Church, 1 Root 312 (Conn. 1791) ("[T]he business of the court is to try the case, and not the man; . . . a very bad man may have a very righteous case.").

so, for legal reasoning has a logic of its own. But if it does go in such a direction, the Court should be mindful of Cardozo's admonition that there is a "tendency of a principle to expand itself beyond the limit of its logic." In Stone v. Powell, the Court curtailed federal habeas corpus jurisdiction with inadequate explanations and improper reasoning, and failed to address fundamental issues presented by the case. In curbing the exclusionary rule, the Court may hope that the public will hold judicial proceedings in more esteem. But in the long-run, the Court may lose broader respect for the entire legal system.

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102 See note 156 supra and accompanying text. "[U]nless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court." Wright, The Doubtful Omiscience of Appellate Courts, 41 MINN. L. REV. 751 (1957). "[The Constitution is] a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), reprinted in L. GOLDBERG & E. LEVENSON, LAWLESS JUDGES 11 (1935).

103 B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 51 (1921). The Court also would do well to bear in mind its own admonition in a different context in Boyd v. United States, 116 U.S. 616, 635 (1886), that "illegitimate ... practices get their first footing ... by silent approaches and slight deviations from legal modes of procedure."

104 "Whoso diggeth a pit shall fall therein: and he that rolleth a Stone, it will return upon him." Proverbs 26:27 (King James version)(capitalization and emphasis supplied). See also Doyle v. Hofstader, 257 N.Y. 244, 268, 177 N.E. 489, 498 (1931)(Cardozo, J.)("A community whose judges would be willing to give it whatever law might gratify the impulse of the moment would find in the end that it had paid too high a price for relieving itself of the bother of waiting a session of the Legislature and the enactment of a statute in accordance with established forms.")
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