SMU | Dedman School of Law

SMU Law Review

Volume 37 | Issue 2 Article 4

January 1983

Federal Habeas Corpus: Relevance of the Guilt Determination Process to Restriction of the Great Writ

Kevin E. Teel

FEDERAL HABEAS CORPUS: RELEVANCE OF THE GUILT DETERMINATION PROCESS TO RESTRICTION OF THE GREAT WRIT

by Kevin E. Teel

THE writ of habeas corpus ad subjiciendum,[1] often referred to as the Great Writ,[2] has been a form of relief for the unjustly confined prisoner for many centuries. From early beginnings in the sixteenth century,[3] the Great Writ made its way from the common law of England[4] to the American colonies,[5] and ultimately into the Constitution[6] and laws of the United States.[7] The scope of relief granted by the writ has evolved through several stages over the course of its long history. This Comment discusses recent restrictions on the scope of federal habeas corpus and evaluates the propriety of these restrictions in light of the traditional purpose of the Great Writ.

The traditional purpose of federal habeas corpus was to remedy constitutional infractions that resulted in the unjust imprisonment of innocent defendants.[8] Federal habeas corpus gradually developed into a broader remedy, however, available to correct any violation of a prisoner's consti-

1. The ancestor of the modern writ of habeas corpus developed from a division of the original habeas corpus writ into three varieties: habeas corpus ad respondendum, used by a plaintiff who had a cause of action against one confined by the process of an inferior court; habeas corpus ad faciendum et recipiendum, used by a defendant to remove a civil action to a superior court; and habeas corpus ad subjiciendum, used by a defendant confined on a criminal charge. The last form, habeas corpus ad subjiciendum, was the only form of writ used for protecting liberty. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 111, 118 (3d ed. 1944).

2. Stone v. Powell, 428 U.S. 465, 474-75 n.6 (1976); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).

3. Jenks, *The Story of Habeas Corpus*, 18 LAW Q. REV. 64, 64-69 (1902).

4. The geographic origin of the writ is a matter of speculation. Some authorities believe the writ had its genesis in England. *Id.* Other commentators find an origin for the writ in the Roman writ de nomine libero exhibendo, by which a person could be released from an improper confinement. Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55, 56 (1934).

5. For a discussion of the writ of habeas corpus as it existed in colonial America, see McFeeley, *The Historical Development of Habeas Corpus*, 30 SW. L.J. 585, 590-94 (1976).

6. U.S. CONST. art. I, § 9, cl. 2.

7. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81; Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241-2255 (1976 & Supp. V 1981)).

8. Jackson v. Virginia, 443 U.S. 307, 323 (1979); Wainwright v. Sykes, 433 U.S. 72, 74-81 (1977); Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Fay v. Noia, 372 U.S. 391, 405, 426 (1963); Brown v. Allen, 344 U.S. 443, 449 (1953).

tutional rights, whether or not the constitutional violation had any bearing on the defendant's innocence.[9] Some commentators justify this expansion of habeas review to claims unrelated to the guilt determination process as a way of enforcing constitutional rights.[10] Other commentators, however, criticize the expansion of habeas relief to nonguilt related claims.[11] The criticism of broad habeas review is based on several factors. First, broad federal habeas corpus review is arguably inconsistent with the recognized need for finality in criminal judgments.[12] Second, the ability of federal courts to alter the final judgments of state courts through habeas review frustrates the policy of comity between the state and federal court systems.[13] Finally, critics of broad habeas review argue that federal habeas petitions are often frivolous[14] and unduly burden the federal judiciary.[15]

A series of recent Supreme Court decisions that have gradually narrowed the scope of federal habeas review reflect a sensitivity to these criticisms. These decisions, beginning with the watershed case of *Stone v. Powell*,[16] have spawned a wealth of controversy concerning the proper scope of federal habeas corpus.[17] Several commentators have concluded that *Stone* and its early progeny recognize a bifurcated approach to constitutional claims, distinguishing those that are related to guilt from those that are not.[18] The general view has been that, although *Stone* may restrict habeas review of constitutional claims unrelated to the guilt determination

9. Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953); *see infra* notes 98-111 and accompanying text (discussing *Fay* and *Brown*).

10. *See* Brief for Petitioner at 22, Rose v. Mitchell, 443 U.S. 545 (1979); Amicus Curiae Brief at 13, Jackson v. Virginia, 443 U.S. 307 (1979).

11. *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

12. *See* Engle v. Isaac, 456 U.S. 107, 126-27 (1982); Ashe v. Swenson, 397 U.S. 436 (1970); Bator, *supra* note 11, at 446-48.

13. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring); Rizzo v. Goode, 423 U.S. 362 (1976). *See generally* Note, Stone v. Powell *and the New Federalism: A Challenge to Congress*, 14 HARV. J. ON LEGIS. 152 (1976) (discussing this new federalism).

14. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 443 (1983).

15. The number of federal habeas petitions filed by state prisoners increased from 127 in 1941 to more than 9,000 in 1970. 1970 ADMIN. OFFICE U.S. COURTS ANN. REP. 121; 1960 ADMIN. OFFICE U.S. COURTS ANN. REP. 116. Advocates of broad habeas review, however, claim that the burden is not as great as these numbers may indicate. For example, nearly 94% of all habeas claims are decided without a trial or hearing and are disposed of by a mere review of the record. P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 22 (1979). Of those that reach the hearing stage, the vast majority are disposed of in a single day. 1976 ADMIN. OFFICE U.S. COURTS ANN. REP. 332-33, table C-8.

16. 428 U.S. 465 (1976); *see infra* notes 115-36 and accompanying text.

17. *See, e.g.*, Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1 (1982). Reynolds, Sumner v. Mata: *Twilight's Last Gleaming for Federal Habeas Corpus Review of State Court Convictions? Speculations on the Future of the Great Writ*, 4 U. ARK. LITTLE ROCK L.J. 289 (1981); Robbins & Sanders, *Judicial Integrity, the Appearance of Justice, and the Great Writ of Habeas Corpus: How to Kill Two Thirds (or More) with One Stone*, 15 AM. CRIM. L. REV. 63 (1977).

18. *See* Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 595-96 (1982); Comment, *Federal Habeas Corpus: The Relevance of Petitioner's Innocence*, 46 UMKC L. REV. 382, 422 (1978).

process,[19] those claims that are guilt related will continue to receive federal habeas review.[20] There are indications, however, that the Supreme Court no longer places as much emphasis on this distinction between guilt and nonguilt related claims, and that the Court may further restrict the availability of federal habeas review even as to some guilt related claims.[21] The distinction between guilt and nonguilt related claims is consistent with the traditional purpose of federal habeas corpus, the "protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."[22] This Comment seeks to show that while restriction of federal habeas corpus may be warranted in situations where the constitutional claims at issue do not bear on the prisoner's guilt or innocence, restriction of habeas relief is not proper where the constitutional infraction is related to the guilt determination process.

I. ENGLISH ORIGINS AND COMMON LAW HISTORY OF HABEAS CORPUS

Federal habeas corpus review was statutorily provided for in the Judiciary Act of 1789[23] and the Habeas Corpus Act of 1867.[24] The Judiciary Act provided for habeas review of federal court convictions, and the Habeas Corpus Act extended federal habeas review to state court convictions.[25] Neither of these acts define the term "habeas corpus." Chief Justice Marshall, however, declared in an early case interpreting the Judiciary Act that courts could resort to the common law to determine the meaning of habeas

19. For example, constitutional claims unrelated to the guilt determination process include a fourth amendment search and seizure claim. Evidence obtained through an illegal search and seizure is procured in violation of the Constitution, but it is no less reliable because of the manner in which it is obtained. Thus, the use of such evidence at trial does not impugn the integrity of the guilt determination process. *See Stone*, 428 U.S. at 490 (citing Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting)).

20. Examples of guilt related claims include: a claim that the conviction was based on a coerced confession, Brown v. Mississippi, 297 U.S. 278 (1936); a claim that the prosecutor knowingly used perjured testimony, Mooney v. Holohan, 294 U.S. 103 (1935); and a claim that the trial was dominated by mob violence, Moore v. Dempsey, 261 U.S. 86 (1923). These types of claims have also been characterized as claims relating to "fundamental fairness." Rose v. Lundy, 455 U.S. 509, 543-44 (1982) (Stevens, J., dissenting).

21. *See, e.g.*, Engle v. Isaac, 456 U.S. 107 (1982); Sumner v. Mata, 449 U.S. 539 (1981). For a discussion of these cases and other indications of the recent restriction of habeas relief as to guilt related claims, see *infra* notes 175-223 and accompanying text.

22. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

23. Ch. 20, § 14, 1 Stat. 81.

24. Ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241-2255 (1976 & Supp. V 1981)).

25. The Judiciary Act provided "[t]hat writs of *habeas corpus* shall in no case extend to prisoners . . . unless . . . they are in custody, under or by colour of the authority of the United States . . . ." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81, 82. The Habeas Corpus Act of 1867 granted federal courts jurisdiction to issue writs of habeas corpus to state prisoners:

> 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.

28 U.S.C. § 2254(a) (1976).

corpus.[26] Thus, an important consideration in determining the proper scope of habeas corpus today is the purpose of the writ as it developed at common law.[27]

The precise origin of the writ is unclear.[28] Most scholars agree, however, that habeas corpus, which literally means "you have the body,"[29] had its genesis in a procedural device designed to compel the attendance of certain persons before the court.[30] This procedural device developed into a writ known as habeas corpus cum causa.[31] Despite primary use as a procedural device, habeas corpus cum causa did develop some substantive elements.[32] In addition to requiring the person at whom the writ was directed to produce the body of the prisoner, it also required the person to state the cause of detention.[33]

During this period an increasing rivalry developed between the common law courts and the Crown's special courts.[34] Because of this rivalry, the common law courts were anxious to make use of procedural devices to assert supremacy over the Crown and its special courts. The writ of habeas corpus cum causa was one such device; the common law courts could use it to compel the Crown to explain the reason for executive imprisonments.[35] Beginning in the latter half of the sixteenth century, the writ of habeas corpus cum causa was used increasingly in jurisdictional skirmishes between these two court systems.[36] During this period the writ of habeas corpus cum causa evolved into an independent writ for challenging the validity of an imprisonment.[37] This independent writ was denominated habeas corpus ad subjiciendum and is the direct ancestor of the

---

26. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807). Chief Justice Marshall wrote: "[F]or the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law . . . ." *Id.* at 93.

27. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 253-54 (1973) (Powell, J., concurring). Justice Powell wrote:

> It has been established that both the Framers of the Constitution and the authors of the 1867 Act expected that the scope of habeas corpus would be determined with reference to the writ's historic, common-law development . . . . It thus becomes important to understand exactly what was the common-law scope of the writ both when embraced by our Constitution and incorporated into the Habeas Corpus Act of 1867.

Id. at 253 (footnotes omitted).

28. *See* Jenks, *supra* note 3, at 64:

> It may sound a little surprising to assert, at the present day, that there is no readily accessible book, nor, indeed, so far as the writer is aware, any book, which gives, in a succinct and intelligible form, an account of the origin of this famous bulwark of our liberties.

29. BLACK'S LAW DICTIONARY 638 (5th ed. 1979).

30. 9 W. HOLDSWORTH, *supra* note 1, at 108-09.

31. During this period of its history the writ was used as a secondary writ in conjunction with two original writs, certiorari and privilege. These original writs operated to transfer judicial proceedings from an inferior to a superior court. *Id.* at 110-11.

32. For example, habeas corpus cum causa was used to challenge the legality of a confinement. Jenks, *supra* note 3, at 72.

33. *Id.*

34. 9 W. HOLDSWORTH, *supra* note 1, at 109; McFeeley, *supra* note 5, at 586-88.

35. McFeeley, *supra* note 5, at 586-88.

36. *Id.*

37. 9 W. HOLDSWORTH, *supra* note 1, at 111.

statutory writ used to inquire into criminal convictions.[38]

The last stage in the development of habeas corpus involves its relationship to the English common law concept of due process.[39] From the sixteenth through the eighteenth centuries, the Great Writ came to be used increasingly for the purposes of protecting liberty.[40] History clearly shows, however, that the writ was used primarily to challenge the jurisdiction of the sentencing court.[41] A prisoner convicted by a court of competent jurisdiction had no recourse through the Great Writ. Essentially, two conflicting views exist concerning the seemingly narrow scope of habeas corpus during this period.[42] One view states that the writ was simply not intended to remedy all restraints imposed without due process of law, but rather was limited to an inquiry into the sentencing court's jurisdiction.[43] The other view contends that this concern with the sentencing court's jurisdiction was not the result of the narrow scope of habeas corpus, but rather was a product of the narrow view of due process at the time.[44]

---

38. Engle v. Isaac, 456 U.S. 107, 126 (1982).

39. The concept of due process in sixteenth century England was much more limited than its modern counterpart. Lord Coke's writings indicate that a prisoner had received due process if his imprisoners could show a lawful cause for the detention and that they were acting under proper authority. *See* R. MOTT, DUE PROCESS OF LAW 76-79 (1926) (citing 1 COKE, 2D INSTITUTES 52-53 (1797 ed.)). For a general discussion of the early English concept of due process, see R. MOTT, *supra*, at 71-86.

40. 2 W. BLACKSTONE, COMMENTARIES *131.

41. Bator, *supra* note 11, at 466 & n.51; Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 459-60 (1966).

42. *Compare* Fay v. Noia, 372 U.S. 391, 426 (1963) ("At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law . . . ."), *with* Schneckloth v. Bustamonte, 412 U.S. 218, 253 (1973) (Powell, J., concurring) ("[R]ecent scholarship has cast grave doubt on *Fay's* version of the writ's historic function."); *compare also Schneckloth*, 412 U.S. at 254 (concluding writ was to verify jurisdiction of committing court); Oaks, *supra* note 43, at 468 (court on habeas review limited to verifying jurisdiction of committing court); *and* D. MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY 26-27 (1966) (concluding that common law habeas corpus was aimed at "detention not pursuant to judicial process," so the Act addressed to executive commitment); *with Fay*, 372 U.S. at 402-03 (notion of narrow scope of writ refuted by history; untrue that exclusive common law use of writ was remedy for executive detentions).

43. *See* Oaks, *supra* note 41, at 468. Professor Oaks contends that the writ prior to adoption of the Constitution was fairly limited in scope so that "once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court." *Id.* (footnote omitted); *see generally* Bator, *supra* note 11 (discussing need for limiting habeas review for purposes of finality of judgments).

44. *See* Peller, *supra* note 18, at 622. Peller agrees that under common law habeas, and for several years under statutory habeas, the reviewing court's inquiry was limited to whether the sentencing court had jurisdiction. Professor Oaks concludes that the reason for this limited review was that habeas corpus jurisdiction itself was limited to the jurisdictional inquiry. Peller asserts that this conclusion is erroneous and argues that during the early years of statutory habeas corpus:

> [C]riminal due process encompassed only the right not to be detained unless the detention was pursuant to the judgment of a court of competent jurisdiction . . . . Thus, when the Court held that a habeas petition must be denied because the alleged trial error did not impugn the state court's jurisdiction, it decided *on the merits* that a due process claim had not been stated, not that habeas jurisdiction was unavailable.

Id. (emphasis in original); *see also* Comment, *supra* note 18, at 395-99. The author con-

Since the scope of the statutory federal habeas corpus writ rests on the scope of the common law writ,[45] the divergence between these two views is of considerable significance. If the first view is accepted, then the federal habeas corpus writ was statutorily given a narrow scope. Expansion of the writ's scope by the Supreme Court in later years can then be viewed as a judicial decision to expand habeas review beyond the statutory minimum. Under this view, the current restrictions on habeas corpus may be viewed as a retreat from the earlier broad reading of the statute and would not be statutorily barred. On the other hand, if the second view is accepted, then the habeas statutes gave federal habeas corpus a broad scope. The expansion of the federal habeas remedy in later years would then reflect not so much a change in the scope of the writ itself, as an expansion in the concept of due process.[46] Thus, any restrictions by the Supreme Court that reduce the scope of habeas corpus below the broad relief available at common law would be statutorily barred. This Comment takes the position that the second view is the better one. Therefore, for purposes of this discussion the assumption is made that the federal habeas corpus statutes incorporate the broad scope of the common law writ and mandate a correspondingly broad scope for federal habeas corpus. The early development of statutory habeas corpus in the United States supports this view.

II. STATUTORY HABEAS CORPUS

A. The Judiciary Act of 1789

The Great Writ has been a part of American jurisprudence since its incorporation into the Constitution.[47] The first statutory provision for habeas corpus review appeared in the Judiciary Act of 1789.[48] The Act received an apparently restrictive reading by the Supreme Court in *Ex parte Watkins*.[49] The Court in *Watkins* held that the judgment of a federal court of competent jurisdiction could not be impeached on habeas review.[50] At first blush, this decision seems to support the view that at

---

cludes that "[t]he difference in the scope of review of habeas corpus at English law and federal habeas corpus in modern times must be attributed primarily to the vastly different concepts of due process." *Id.* at 399.

45. *See supra* note 27 and accompanying text.

46. *See* Peller, *supra* note 18, at 644-49.

47. U.S. CONST. art. I, § 9, cl. 2.

48. Ch. 20, § 14, 1 Stat. 81.

49. 28 U.S. (3 Pet.) 193 (1830).

50. *Id.* at 202. The Court wrote:

> The judgment of a Court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this Court would be . . . . It puts an end to inquiry concerning the fact, by deciding it . . . . An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous.

Id.

Watkins was preceded by *Ex parte* Kearney, 20 U.S. (7 Wheat.) 37 (1822), which also construed the writ narrowly. The Court in *Kearney* refused to review the prisoner's constitutional claim on habeas because the writ was not "a proper remedy, where a party was committed for a contempt by a court of competent jurisdiction . . . ." *Id.* at 44.

common law habeas review was limited to an examination of the jurisdiction of the sentencing court.[51] Since Congress intended the Act to codify the common law scope of the writ,[52] statutory habeas would therefore be limited to a jurisdictional inquiry.[53] Conflicting views exist, however, on the significance of *Watkins*. One authority has argued that the Court refused to reach the merits of the habeas petition in that case, not because of a narrow view of the habeas remedy, but because of the Supreme Court's lack of appellate jurisdiction over federal criminal judgments at that time.[54] The argument reasoned that the Court in *Watkins* construed the scope of habeas review quite broadly and therefore viewed it as very similar to an appeal.[55] The Court thus refused to decide the case on the merits because it lacked the appellate jurisdiction to do so.[56]

Decisions subsequent to *Watkins* gradually expanded habeas corpus under the Judiciary Act.[57] In *Ex parte Lange*[58] the Court ordered the release of a prisoner duly convicted by a federal circuit court because the circuit court initially imposed a sentence in excess of the legal maximum and then resentenced the defendant in an attempt to correct its error.[59] Although the Supreme Court conceded that the circuit court had jurisdiction over criminal cases, it held that the circuit court had no "jurisdiction" to impose a second sentence since doing so violated the Constitution.[60] The Court thus indicated that habeas relief would be available for some claims beyond those traditionally thought of as jurisdictional.[61]

The Supreme Court further expanded habeas corpus in another federal prisoner case, *Ex parte Siebold*.[62] In that case the Court authorized habeas relief where the statute under which the defendant was convicted was attacked as unconstitutional.[63] Once again the sentencing court's jurisdiction over criminal trials was not challenged, but the Court nevertheless

---

51. *See supra* note 43 and accompanying text.

52. Fay v. Noia, 372 U.S. 391, 405-06 (1963).

53. For citation of *Watkins* as support for the theory that, traditionally, habeas corpus was limited to the question of the sentencing court's jurisdiction, see Bator, *supra* note 1, at 466; *see also* Rose v. Mitchell, 443 U.S. 545, 580 (1979) (Powell, J., concurring) (writ granted when trial court lacked jurisdiction).

54. Fay v. Noia, 372 U.S. at 407. Justice Brennan, writing for the Court, concluded that "[t]he Court had no general jurisdiction of appeals from federal criminal judgments; . . . if, therefore, the writ of habeas corpus was appellate in nature, its issuance to vacate such a judgment would have the effect of accomplishing indirectly what the Court had no power to do directly." *Id.*; *see* Peller, *supra* note 18, at 610-11.

55. Peller, *supra* note 18, at 611.

56. Support for this argument can be found in the habeas decisions of the lower federal courts during the period when the Supreme Court did not have appellate jurisdiction over criminal cases. *See, e.g., In re* McDonald, 16 F. Cas. 17 (E.D. Mo. 1861) (No. 8751); Peller, *supra* note 18, at 612-14.

57. For a discussion of the development of habeas corpus under the Judiciary Act, see Wainwright v. Sykes, 433 U.S. 72, 79 (1977).

58. 85 U.S. (18 Wall.) 163 (1873).

59. *Id.* at 164-65.

60. *Id.* at 176-77.

61. Wainwright v. Sykes, 433 U.S. 72, 79 (1977) (citing *Ex parte Lange* for expansion of federal habeas corpus).

62. 100 U.S. 371 (1879).

63. *Id.* at 374.

allowed habeas review. The Court held that an unconstitutional law is void and that the federal trial court could not have "jurisdiction" over a case involving a void law.[64] Both *Lange* and *Siebold* indicate a stretching of the concept of jurisdiction in order to extend habeas review to claims alleging violations of the prisoner's due process rights. Advocates of narrow habeas review nevertheless conclude that these cases fall within what they consider the traditional scope of habeas review because each was ostensibly decided on jurisdictional grounds.[65] Proponents of broad habeas review, on the other hand, conclude that these cases reflect an expanding view of due process. They reason that statutory habeas corpus is based on the common law principle that restraints imposed in contravention of due process could be remedied by writ of habeas corpus.[66] Therefore, as the concept of criminal due process expanded to include greater rights for the accused, the scope of injustices that could be remedied on habeas review also expanded, as *Lange* and *Siebold* indicate.

B. Habeas Corpus Act of 1867

The Supreme Court continued to struggle with the relationship between the common law writ of habeas corpus and the statutory form of the writ after the Habeas Corpus Act of 1867 extended the statutory writ to state prisoners.[67] Because of the paucity of legislative history on the Habeas Corpus Act,[68] there are conflicting views as to the scope Congress intended to give the writ. One view holds that Congress perceived habeas corpus as a broad remedy and intended to authorize federal court inquiry into state criminal convictions for all claims of confinement in violation of the con-

---

64. *Id.* at 376-77. The Court concluded that "[a]n unconstitutional law is void, and is as no law. . . . A conviction under it is not merely erroneous, but is illegal and void . . . . [I]f the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes." *Id.*

65. Professor Bator notes that although *Lange* and *Siebold* represent a "softening" of the jurisdictional concept, the Court continued to justify its decisions on the lack of jurisdiction of the sentencing court. Bator, *supra* note 11, at 471-74; *see also* Stone v. Powell, 428 U.S. 465, 475-76 & nn.7-8 (1976) (discussing softening of jurisdictional concept).

66. Fay v. Noia, 372 U.S. 391, 408 (1963).

67. Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241-2255 (1976 & Supp. V 1981)); *see* Wainwright v. Sykes, 433 U.S. 72 (1977), where the Court stated:

> In 1867, Congress expanded the statutory language so as to make the writ available to one held in state as well as federal custody. For more than a century . . . this Court has grappled with the relationship between the classical common-law writ of habeas corpus and the remedy provided in 28 U.S.C. § 2254.

433 U.S. at 78.

68. Lehman v. Lycoming County Children's Servs. Agency, 102 S. Ct. 3231, 3241, 73 L. Ed. 2d 928, 941-42 (1982) (Blackmun, J., dissenting). The Court in *Lehman* commented: "The sparse legislative history of the . . . Habeas Corpus Act of February 5, 1867, . . . gave 'no indication whatever that the bill intended to change the general *nature* of the classical habeas jurisdiction.' " *Id.* (emphasis in original) (quoting Bator, *supra* note 11, at 467-77). Professor Bator notes that "[t]he Act received only the most perfunctory attention and consideration in the Congress; indeed, there were complaints that its effects could not be understood at all." Bator, *supra* note 11, at 475-76 (footnote omitted). For a detailed discussion of the legislative history surrounding the 1867 Act, see Comment, *supra* note 18, at 404-15.

stitution.[69] The opposing view contends that Congress intended habeas corpus to be a narrow remedy and therefore authorized only a limited review of state court criminal convictions.[70] The Supreme Court thus embarked on a difficult journey in construing the scope of habeas corpus under the 1867 Act. Initially, as the following sections discuss, the court steered a course toward broad habeas review.

III. EXPANSION OF FEDERAL HABEAS CORPUS REVIEW

Shortly after Congress gave federal courts the authority to hear habeas petitions of state prisoners it repealed the Supreme Court's jurisdiction over appeals from circuit court habeas decisions.[71] Until Congress restored the Supreme Court's appellate jurisdiction over habeas decisions nearly twenty years later,[72] the Court had no opportunity to construe the Habeas Corpus Act.[73] *Ex parte Royall*[74] was the first habeas case to reach the Supreme Court following reinstatement of its appellate jurisdiction under the Habeas Corpus Act. In *Royall* the court established the "exhaustion" requirement, a procedural restriction on habeas corpus that requires a state prisoner to exhaust his state remedies before seeking federal habeas review.[75] One scholar views the exhaustion requirement as reflecting a narrow construction of the habeas statute[76] and argues that the requirement to pursue state remedies fully would be illogical if the final state determination could ultimately be overturned on habeas.[77] This view is rejected by another commentator who argues that the exhaustion doctrine makes sense from the standpoint of comity,[78] and in any event is merely a procedural requirement that does not bar federal habeas review of any constitutional claim.[79] In this view *Royall* essentially dealt with procedural restrictions and did not address the issue of the proper substantive scope of habeas corpus.[80]

---

69. Fay v. Noia, 372 U.S. 391, 417 (1963); Peller, *supra* note 18, at 618.

70. Schneckloth v. Bustamonte, 412 U.S. 218, 255 (1973) (Powell, J., dissenting); Bator, *supra* note 11, at 475-76; Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 56-58 (1965).

71. Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44.

72. Act of March 3, 1885, ch. 353, 23 Stat. 437.

73. Although the Supreme Court did not have the opportunity to construe the Habeas Corpus Act during this period, the lower federal courts did. *See* Peller, *supra* note 18, at 623-34 and cases cited therein.

74. 117 U.S. 241 (1886).

75. *Id.* at 250-54.

76. *See* Bator, *supra* note 11, at 478-80.

77. *Id.* at 483.

78. *See* Peller, *supra* note 18, at 637. In *Royall* the Court found that in the interest of comity federal courts should not "presume that the decision of the State court [on the constitutional claim] . . . would disregard the settled principles of constitutional law announced by this court . . . ." 117 U.S. at 252.

79. The Court in *Royall* stated that while the federal courts should not presume that the state courts will rule improperly on constitutional claims, they still have discretion to decide whether or not to entertain a writ of habeas corpus after the state court has made its ruling. 117 U.S. at 253; *see* Peller, *supra* note 18, at 635.

80. Bator, *supra* note 11, at 478-79.

One of the earliest Supreme Court decisions specifically addressing the issue of the substantive scope of the statutory writ was *In re Wood*,[81] which involved a black convicted of murder in a New York trial court. After conviction, the defendant discovered that the jury selection statute systematically excluded blacks from the lists of prospective grand jurors and petit jurors. The defendant sought habeas relief in federal court, which was denied.[82] The Supreme Court affirmed the dismissal of the writ, pointing out that the defendant had not challenged the constitutionality of the jury selection statute and thus had not made the traditional habeas claim of no jurisdiction in the state trial court.[83] *Wood* is generally interpreted as following the decisions under the Judiciary Act of 1789 that limited the scope of federal habeas corpus to consideration of the sentencing court's jurisdiction.[84] During the twenty-five years following *Wood* only limited expansion of federal habeas corpus occurred, through an occasional stretching of the concept of the sentencing court's "jurisdiction" to include a few claims that were not actually jurisdictional.[85]

Substantive expansion of the writ began in 1915 with the Supreme Court's decision in *Frank v. Mangum*.[86] The prisoner in *Frank* claimed that his state court trial had been dominated by a mob, thus making impartial decision by the judge and jury impossible. The federal district court denied the prisoner's petition for writ of habeas corpus, and the Supreme Court affirmed.[87] The Court reasoned that a claim of mob domination, if true, would be a violation of due process,[88] but concluded that the claim had been fully and fairly litigated in the state court and therefore adhered to the state court's finding that no prejudicial interference with justice had occurred.[89] Although the writ was denied in *Frank*, the decision is seen as an expansive construction of the habeas statute[90] because

81. 140 U.S. 278 (1891).

82. *Id.* at 279.

83. *Id.* at 287. The Court stated that the question of the unconstitutionality of the jury selection process as applied to the defendant did not affect the sentencing court's jurisdiction. *Id.*

84. *See* Stone v. Powell, 428 U.S. 465, 476 (1976); Bator, *supra* note 11, at 481. *But see* Peller, *supra* note 18, at 639. Peller explains the holding in *Wood* by noting the inflexibility of habeas remedies at the time of the decision. The only relief available on habeas where the prisoner challenged the application of a statute was unconditional release, whereas on direct review the judgment could be modified, affirmed, or reversed. Peller sees this preference for the remedies available on direct review as the rationale for the *Wood* holding, rather than the jurisdictional concept advocated by Professor Bator. Peller, *supra* note 18, at 639-41.

85. The stretching of the jurisdictional concept occurred primarily in two ways: (1) by allowing habeas review of claims alleging unconstitutionality of a statute, as in *Ex parte* Siebold, 100 U.S. 371 (1879); and (2) by allowing review of claims where the sentence was alleged to be illegal, as in *Ex parte* Lange, 85 U.S. (1 Wall.) 163 (1873).

86. 237 U.S. 309 (1915).

87. *Id.* at 317-18.

88. *Id.* at 335. Justice Pitney, writing for the Court, found that "if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law . . . ." *Id.*

89. *Id.* at 335-36; Frank v. State, 141 Ga. 243, 80 S.E. 1016, 1033-34 (1914).

90. Bator, *supra* note 11, at 486-87. *Contra* Reitz, *Federal Habeas Corpus: Impact of an*

the Court recognized that a federal court could have inquired into the merits of the case, despite competent jurisdiction in the state court, if the constitutional claim had not been fully and fairly litigated below.[91] In *Frank* the Court thus implicitly abandoned the idea that habeas corpus was available only for a jurisdictional inquiry into the sentencing court's decision.[92]

The Supreme Court expanded habeas review still further in *Johnson v. Zerbst*,[93] a case involving an indigent prisoner's claim that he was denied his sixth amendment right to counsel at trial. The Court held that the federal habeas court must determine the claim on the merits.[94] In a related case, *Waley v. Johnston*,[95] the Court held that a prisoner's claim that his guilty plea was coerced was reviewable on habeas, regardless of the sentencing court's jurisdiction.[96] *Waley* and *Johnson* clearly indicated that the Court no longer accepted the concept of jurisdiction as the determinant of the availability of federal habeas review.[97]

In the landmark case of *Brown v. Allen*[98] the Court held that all constitutional claims are cognizable on federal habeas corpus review.[99] *Brown* involved two prisoners who had fully litigated their federal claims in the state trial court.[100] Their petitions for writ of habeas corpus had been denied by the federal courts below, and the Supreme Court affirmed.[101] It did so, however, not on the grounds of the "full and fair" litigation standard of *Frank v. Mangum*,[102] but rather because it had considered and rejected the merits of the prisoners' claims.[103] This new expansive treatment of habeas corpus appeared to be the result of the Court's interpretation of the Habeas Corpus Act of 1867 as requiring federal courts to be the

---

Abortive State Proceeding, 74 HARV. L. REV. 1315, 1319 (1961) (discussing view that *Frank* is restrictive with respect to habeas jurisdiction).

91. 237 U.S. at 336. The court stated that "the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination . . . ." *Id.*

92. *See* Stone v. Powell, 428 U.S. 465, 476 (1976); Peller, *supra* note 18, at 645.

93. 304 U.S. 458 (1938).

94. *Id.* at 468-69; *see* Wainwright v. Sykes, 433 U.S. 72, 79 (1977).

95. 316 U.S. 101 (1942).

96. *Id.* at 104-05.

97. *Id.* The Court held that "the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it." *Id.*

98. 344 U.S. 443 (1953).

99. *Id.* at 485-86; *see* Stone v. Powell, 428 U.S. 465, 521 (1976) (Brennan, J., dissenting); Hart, *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959).

100. *Brown v. Allen* involved proceedings as to three criminal defendants: Brown, Speller, and Daniel. Brown and Speller had fully litigated their claims in the state courts, and their claims had been rejected on the merits. Daniel had not litigated his claim in the state courts because of a procedural default. *See* Bator, *supra* note 11, at 499-500.

101. 344 U.S. at 487.

102. 237 U.S. 309, 335-36 (1915).

103. A commentator notes that *Brown v. Allen* broke new ground because it seemed to hold that "due process of law in the case of state prisoners is not primarily concerned with the adequacy of the state's corrective process or of the prisoner's personal opportunity to avail himself of this process . . . but relates essentially to the avoidance in the end of any underlying constitutional error . . . ." Hart, *supra* note 99, at 106.

last reviewers of federal claims.[104] After *Brown*, no matter how fully the state court had considered a federal constitutional issue, that issue could be redetermined by a federal court on habeas corpus.[105]

The broad scope of federal habeas corpus reached its zenith in the Supreme Court's decision in *Fay v. Noia*.[106] Noia had been convicted of felony murder in state court solely on the basis of a signed confession. It was later established that the confession had been coerced and thus procured in violation of the Constitution.[107] Noia failed to appeal to a higher state court, however, and the federal district court denied Noia's petition for writ of habeas corpus on this procedural ground.[108] The court of appeals reversed, and the Supreme Court affirmed the grant of the writ.[109] The Supreme Court held that federal habeas review is available as long as the prisoner does not "deliberately by-pass" the state court system.[110] Although *Fay* dealt with the procedural requirements surrounding habeas corpus rather than the substantive scope of the writ, the decision reflected an expansive reading of the Habeas Corpus Act. Justice Brennan, writing for the majority in *Fay*, discussed the history of the Act and concluded that Congress intended federal habeas corpus to be a broad remedy protecting diverse constitutional rights.[111]

IV. RESTRICTIONS OF FEDERAL HABEAS CORPUS REVIEW

Fay v. Noia was decided in 1963. By the early 1970s there were indications that restrictions on the scope of habeas review would be forthcoming.[112] Several Supreme Court Justices had criticized broad habeas

104. Justice Frankfurter indicated that state consideration cannot foreclose federal review of constitutional claims. Brown v. Allen, 344 U.S. at 500; see Peller, *supra* note 18, at 662-63.

105. *See* Wainwright v. Sykes, 433 U.S. 72, 79 (1977); Stone v. Powell, 428 U.S. 465, 477 (1976).

106. 372 U.S. 391 (1963).

107. *Id.* at 395-96. Noia was convicted along with two co-defendants, all of whom had signed confessions. The two co-defendants, but not Noia, appealed their convictions. During the subsequent proceedings in state court it was established that their confessions had been coerced. In Noia's subsequent federal habeas corpus proceeding it was stipulated that his confession had also been coerced. United States v. Fay, 183 F. Supp. 222, 225 (S.D.N.Y. 1960).

108. *Id.* at 226.

109. 372 U.S. at 441.

110. *Id.* at 438; *see* Wainwright v. Sykes, 433 U.S. 72, 81-83 (1977).

111. 372 U.S. at 426. Justice Brennan stated: "Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum." *Id.*

112. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Kaufman v. United States, 394 U.S. 217 (1969). In *Kaufman* Justice Black filed a dissenting opinion in which he stated:

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

review, pointing out the substantial cost of habeas review to society[113] and arguing that such costs were less justified when the constitutional claim at issue had no bearing on the prisoner's guilt or innocence.[114] In 1976, in *Stone v. Powell*,[115] a majority of the Supreme Court responded to these arguments by substantially restricting federal habeas review of fourth amendment search and seizure claims.

A. Stone v. Powell

The prisoner in *Stone v. Powell*[116] was convicted of second-degree murder in a California court. Powell was arrested ten hours after the homicide for violation of a local vagrancy ordinance. Subsequent to the arrest a police officer discovered a handgun said to be the murder weapon in Powell's possession. At trial the prosecution offered into evidence testimony concerning the discovery of the revolver.[117] Powell argued that the vagrancy ordinance was unconstitutionally vague and that the gun and the testimony concerning its discovery should therefore have been suppressed as the products of an unconstitutional arrest. The state courts rejected this argument,[118] and the federal district court denied Powell's petition for a writ of habeas corpus.[119] The court of appeals for the Ninth Circuit reversed, granting the writ.[120] The Supreme Court reversed the grant of habeas corpus relief and 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 ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[121]

Id. at 237 (Black, J., dissenting), *quoted with approval in* Stone v. Powell, 428 U.S. 465, 490 (1976).

In *Schneckloth* Justice Powell wrote a concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, in which he discussed at some length the costs and benefits of habeas review of fourth amendment search and seizure claims. Placing great reliance on Professor Bator's conclusions as to the scope of the Great Writ, Justice Powell concluded that habeas review of search and seizure claims was not justified. 412 U.S. at 250-75 (Powell, J., concurring). The views of Justices Black and Powell ultimately commanded a majority of the court in Stone v. Powell, 428 U.S. 465 (1976). *See infra* notes 116-34 and accompanying text.

113. Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring). Justice Powell listed the costs of habeas review as including intrusions on these societal values: "(i) the most effective utilitzation of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." *Id.*; *see also* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (Powell, J.) (list of costs). *See generally* Friendly, *supra* note 11, at 148 (most serious problem with proliferation of collateral attacks is burden placed on legal system in handling cases).

114. Schneckloth v. Bustamonte, 412 U.S. 218, 256-58 (1973) (Powell, J., concurring).

115. 428 U.S. 465 (1976).

116. *Id.*

117. Testimony was admitted at trial that identified the handgun as the murder weapon. There was also testimony as to the discovery of the gun in Powell's possession after his arrest. *Id.* at 469-70.

118. *Id.* at 470.

119. *Id.*

120. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974).

121. 428 U.S. at 482.

The Court based its holding on several grounds. It noted that the exclusionary rule is not a personal constitutional right but rather a judge-made remedial measure.[122] Thus, a person convicted on the basis of illegally seized evidence is not unconstitutionally confined since no constitutional right has been violated.[123] The Court also stated that the basic purpose of the exclusionary rule is to deter police from performing unconstitutional searches and seizures,[124] and concluded that this purpose is not frustrated by a refusal to recognize collateral attacks on a judgment based on the exclusionary rule.[125] The Court also discussed the various societal costs associated with extending the exclusionary rule to collateral review of fourth amendment claims. The Court stated that use of the exclusionary rule diverts attention from the central question of guilt or innocence and forbids the introduction of evidence that is typically reliable, thus increasing the chances that a guilty defendant will go free.[126] The Court concluded that the costs of using the exclusionary rule on collateral attack outweighed the small benefit achieved in deterring unconstitutional police activity.[127]

The *Stone* decision caused considerable debate over the extent to which the opinion should be extended to restrict habeas corpus review of other constitutional claims.[128] The answer to this question depends on the interpretation given to *Stone*. Five different rationales have been advanced for the decision.[129] One view contends that the *Stone* decision is based on the notion that federal habeas relief should always be available to prisoners whose claims impugn the guilt determination process, while habeas relief may be restricted when the claim is not guilt related.[130] Another suggested ground for the decision is the difference between personal constitutional

122. *Id.* at 486. The Court reasoned that exclusion of illegally seized evidence does not protect the defendant's right to privacy. Exclusion of the evidence deters police from procuring evidence in an illegal manner in the future, thus protecting the fourth amendment rights of others, but not actually remedying the injury to the defendant. *Id.*

123. *Id.*

124. *Id.* The Court noted that while the purpose of the exclusionary rule is to promote respect for constitutional rights, it may ironically promote disrespect for the administration of law if it is used to allow obviously guilty criminals to escape punishment simply because the evidence against them was gathered illegally. *Id.* at 491.

125. *Id.* at 493-94. The Court noted that, while the use of the exclusionary rule at the trial level provides a deterrent to police misconduct, the deterrent effect decreases as it is used in proceedings further removed from trial. *Id.*; *see* Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964).

126. 428 U.S. at 489-90.

127. *Id.* at 494.

128. *See, e.g.*, Boyte, *Federal Habeas Corpus After* Stone v. Powell: *A Remedy Only for the Arguably Innocent?*, 11 U. RICH. L. REV. 291 (1977); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Green, Stone v. Powell: *The Hermeneutics of the Burger Court*, 10 CREIGHTON L. REV. 655 (1977); Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233 (1979); Robbins & Sanders, *supra* note 17.

129. *See* Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297, 303-04 (1978).

130. *See, e.g.*, Cover & Aleinikoff, *supra* note 128, at 1076, 1086-94; Green, *supra* note 128, at 658-59.

rights and the prophylactic rules set up to enforce those rights.[131] A third view argues that *Stone* was based on considerations of comity and finality; federal courts should not be allowed to overturn state decisions easily through habeas review.[132] A fourth rationale holds that the Court was seeking to reduce the excessive burden of state habeas cases on the federal courts.[133] Finally, the view has been advanced that *Stone* was not really concerned with the scope of habeas review in general, but was rather concerned with fourth amendment doctrine.[134]

The rationale for the *Stone* decision that most closely comports with the historical purpose of the Great Writ is the first mentioned interpretation; that a distinction should be recognized between those constitutional claims that attack the integrity of the guilt determination process and those that do not.[135] Under this guilt/innocence rationale, restriction of habeas review may be justified as to some claims unrelated to guilt, but should not be restricted where the claim is related to the guilt determination process. To limit habeas review of guilt related claims would frustrate the historical purpose of habeas corpus.[136] The following sections review the Supreme Court's habeas decisions following *Stone* and analyze the scope of habeas review reflected by those cases in terms of the guilt/innocence rationale of *Stone*. While many of these decisions focus on procedural issues, they nevertheless reveal the Court's attitude toward the substantive scope of federal habeas corpus.

B. Adherence to the Guilt/Innocence Rationale Following Stone

Within a year of its decision in *Stone v. Powell* the Supreme Court had the opportunity to limit habeas review further in *Castaneda v. Partida*.[137] Partida, a Mexican-American, was convicted in a Texas state court of burglary with intent to rape. He filed a petition for writ of habeas corpus on the ground that the grand jury selection procedure discriminated against

131. For a discussion of the apparent subconstitutional nature of the exclusionary rule used to enforce fourth amendment rights, see Monagham, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 20-23 (1975); Schrock & Welsh, *Reconsidering the Constitutional Common Law,* 91 HARV. L. REV. 1117, 1119 (1978).

132. *See* Note, *supra* note 13, at 154-56, 162-71.

133. *See supra* note 15 and accompanying text (discussing opposing views on burden that habeas petitions place on federal judiciary).

134. *See* Boyte, *supra* note 128, at 298-99, 313-14; Soloff, *supra* note 129, at 307, 314-15.

135. *See supra* notes 8-11 and accompanying text.

136. Since 1867 the Supreme Court has faced four questions regarding the writ of habeas corpus: (1) What claims are cognizable on federal habeas review? (2) If the claim is cognizable, to what extent should the federal court defer to the findings made by the state court? (3) How completely must a petitioner for federal habeas relief exhaust his state court remedies? (4) Even if the claim is cognizable on federal habeas review, should the federal court refuse to consider it because of an adequate and independent state court ground? Wainwright v. Sykes, 433 U.S. 72, 78-79 (1977). The first question deals with the substantive scope of habeas review, while the remaining three questions deal with procedural prerequisites to habeas review. This Comment is concerned with the substantive scope of habeas review. It does, however, discuss several cases dealing with the three procedural questions, because these decisions reflect the Court's attitude toward the writ. The procedural cases are helpful in analyzing the likelihood of future substantive restrictions on habeas review.

137. 430 U.S. 482 (1977).

Mexican-Americans, thus violating his constitutional rights to due process and equal protection.[138] The district court dismissed the writ,[139] and the court of appeals reversed.[140] The Supreme Court affirmed the grant of the writ[141] despite the fact that Partida's claim of grand jury discrimination had no bearing on the guilt determination process at trial.[142] Although the Court did not discuss the guilt/innocence rationale in its opinion, the decision should not be interpreted as an indication that the Court no longer viewed this rationale as determinative. The Court's failure to extend *Stone*'s guilt/innocence rationale to a case involving another nonguilt related claim is probably due to the fact that the issue was neither briefed nor argued by either party.[143] Justice Powell indicated in his dissenting opinion[144] that the *Stone* rationale probably could be extended to foreclose habeas review of a grand jury discrimination claim, but concluded that because the issue had not been raised, it could not be decided.[145]

The Court decided another habeas case, *Brewer v. Williams*,[146] on the same day as *Castaneda*. In *Brewer* the constitutional claim raised on habeas petition was violation of the prisoner's sixth amendment right to assistance of counsel. Although the lack of legal counsel might conceivably distort the guilt determination process in some cases, little doubt existed as to the prisoner's guilt in *Brewer*.[147] The Court nevertheless reviewed the prisoner's claim and granted the writ.[148] Once again the Court did not discuss the guilt/innocence rationale. The Court's failure to do so can be explained by the fact that *Stone* received no mention in the briefs and little discussion at oral argument.[149] Justice Powell, in a concurring opinion, did imply, however, that in deciding whether *Stone* should be extended to foreclose habeas review of other constitutional claims, the primary consideration would be the effect of the constitutional infraction

138. Texas uses the "key man" system to select its grand juries. Under this system the state district judge appoints jury commissioners. The jury commissioners then select citizens to compose a list from which the actual grand jury is drawn. *Id.* at 484-85.

139. Partida v. Castaneda, 384 F. Supp. 79 (S.D. Tex. 1974).

140. Partida v. Castaneda, 524 F.2d 481 (5th Cir. 1975).

141. 430 U.S. at 501.

142. Discrimination in grand jury selection clearly does not affect the guilt determination process. The grand jury's indictment merely brought Partida before a trial court to determine his guilt or innocence. Partida made no claim of discrimination in the trial itself.

143. 430 U.S. at 508 n.1 (Powell, J., dissenting).

144. Justice Powell was joined in his dissent by Chief Justice Burger and Justice Rehnquist. *Id.* at 507 (Powell, J., dissenting).

145. *Id.* at 508 n.1.

146. 430 U.S. 387 (1977).

147. *Id.* at 416 (Burger, C.J., dissenting). Chief Justice Burger attacked the Court for granting the writ in this case, saying: "Williams is guilty of the savage murder of a small child; no member of the Court contends he is not." *Id.*

148. *Id.* at 406.

149. *Id.* at 414 n.3 (Powell, J., concurring). In his dissent, Chief Justice Burger maintained that the lack of argument on the *Stone* issue should not have resulted in the grant of the writ. He stated the proper course for the Court to take would have been either to remand the case so that the circuit court could reconsider its judgment in light of *Stone* or to apply the intervening decision of *Stone* without the benefit of adversary argument. *Id.* at 428.

on the guilt determination process.[150] The failure of the Court to extend the *Stone* rationale to the nonguilt related claims raised in *Brewer* and *Castaneda* may be explained in part by the fact that the *Stone* decision was relatively new and its implications uncertain.[151]

Three months after *Brewer* and *Castaneda* were decided, the Court rendered its decision in *Wainwright v. Sykes*.[152] Sykes was convicted of murder in state court based on an oral statement he made to police following the reading of his *Miranda* rights. Although Sykes never objected to use of the statement at trial, he claimed in his petition for writ of habeas corpus in federal district court that the statement was inadmissible because he had not understood his *Miranda* rights. The Supreme Court held that a defendant who fails to comply with a state procedural rule requiring contemporaneous objections[153] must show cause for such failure and demonstrate that admission of the challenged evidence caused him actual prejudice before a petition for writ of habeas corpus may be granted.[154] The Court concluded that Sykes had not met this "cause and actual prejudice" standard and remanded the case to the district court with instructions to dismiss the writ.[155] Although *Wainwright* involved procedural prerequisites to federal habeas review, rather than the substantive scope of the writ itself, the case did briefly address the guilt/innocence rationale. The Court implied that the "actual prejudice" element of the two-pronged standard does not violate the guilt/innocence rationale because a prisoner can always meet the actual prejudice requirement when his constitutional claim impugns the integrity of the guilt determination process.[156] Since the

150. *Id.* at 414. Justice Powell noted that application of *Stone* to fifth and sixth amendment claims is questionable because such claims are often related to the guilt determination process. *Id.*

151. *Id.* at 413-14 (Powell, J., concurring). The *Stone* decision was rendered after the lower federal courts had rendered their judgments on the habeas petition. Obviously, neither party could have briefed the *Stone* issue in their argument to those courts.

152. 433 U.S. 72 (1977).

153. The procedural rule involved in *Wainwright* was FLA. R. CRIM. P. 3.190(i), which requires a defendant to make motions to suppress illegally obtained evidence prior to or at trial. 433 U.S. at 76 & n.5.

154. 433 U.S. at 87. The "cause and actual prejudice" standard developed as a response to the "deliberate by-pass" standard enunciated in Fay v. Noia, 372 U.S. 391 (1963). In *Fay* the Court held that a procedural default at the state level did not bar bringing the claim in federal habeas court unless the failure to litigate the claim in the state courts was a deliberate by-pass of the state courts. *Id.* at 438. In Francis v. Henderson, 425 U.S. 536 (1976), the Court disposed of the "deliberate by-pass" standard in favor of a "cause and actual prejudice" standard. *Id.* at 542. Under the latter, if the petitioner had not litigated his claim in the state courts, he had to show cause for and actual prejudice from the default before habeas review would be available. In *Wainwright* the Court found that this cause and actual prejudice standard applied to Sykes's claim and that he had not demonstrated sufficient cause for his default; thus, he could not gain federal habeas review. 433 U.S. at 91.

155. 433 U.S. at 91.

156. *Id.* Sykes's claim, which was similar to the one presented in *Stone*, did not impugn the integrity of the guilt determination process. The fact that Sykes did not understand his *Miranda* warnings did not denigrate the reliability of the statement he made, just as the fact that evidence obtained through an illegal search and seizure does not reduce the reliability of that evidence. In *Wainwright* the Court concluded that Sykes's claim did not attack the integrity of the guilt determination process because "[t]he other evidence of guilt presented

Court dismissed the writ on procedural grounds, it never reached the question of *Stone*'s effect on the substantive scope of habeas review.[157]

The Supreme Court did address the extension of *Stone* in *Jackson v. Virginia*.[158] Jackson was convicted of first-degree murder in state court. In his habeas petition he alleged that his constitutional right to due process had been violated because the evidence at trial was insufficient to support the conviction.[159] The state urged that Jackson's claim of insufficient evidence should not be cognizable on federal habeas review because review of such claims would involve substantial societal costs.[160] The Court noted that these same costs were a factor in the *Stone* decision,[161] but refused to extend *Stone* to foreclose review of Jackson's claim.[162] The Court clearly indicated that since Jackson's claim was directly related to the guilt determination process, an extension of *Stone* would be improper.[163] The Court therefore held that Jackson's claim was cognizable on federal habeas review.[164]

The Supreme Court handed down another major decision affecting the scope of federal habeas corpus in the same year it decided *Jackson*. In *Rose v. Mitchell*[165] the Court addressed a question similar to that considered in *Castaneda*:[166] Should a claim of racial discrimination in the selection of a state grand jury foreman be cognizable on federal habeas review? Since the claim involved was not related to the guilt determination process,[167] the Court could have extended the guilt/innocence rationale of *Stone* to foreclose habeas review.[168] The Court held, however, that the

---

at trial . . . was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement." *Id.*

157. *Id.* at 87 n.11.

158. 443 U.S. 307 (1979).

159. One of Jackson's defenses at trial had been that he could not be convicted on a first degree murder charge because he was too intoxicated at the time of the killing to form the specific intent to kill. *Id.* at 311. The issue in *Jackson* focused on the showing necessary to obtain habeas relief: that there was no evidence to support Jackson's conviction under Thompson v. Louisville, 362 U.S. 199 (1960), or that the evidence was insufficient to justify a finding of guilt beyond a reasonable doubt by a rational trier of fact under *In re* Winship, 397 U.S. 358 (1970). The Court held that the latter standard applied. 443 U.S. at 324.

160. 443 U.S. at 321 (increased burden on federal judiciary, lack of finality in state criminal proceedings, and friction between federal and state courts).

161. *See supra* note 126 and accompanying text.

162. 443 U.S. at 321.

163. *Id.* at 323. The Court stated: "The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in *Stone v. Powell*, *supra*. The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." *Id.*

164. *Id.* at 324. After reviewing the merits of Jackson's claim, however, the Court denied the writ, holding that the evidence presented at trial was sufficient to support the conviction. *Id.* at 326.

165. 443 U.S. 545 (1979).

166. *See supra* notes 137-45 and accompanying text.

167. In discussing the relation of a grand jury discrimination claim to the guilt determination process, one commentator has noted that "once a petitioner has been found guilty by a properly selected petit jury in a trial free from constitutional error, his or her claim that the grand jury selection process was tainted cannot impugn the determination of guilt." Peller, *supra* note 18, at 598 n.108.

168. 443 U.S. at 598.

claim was reviewable[169] because the benefits achieved by extending review to this claim exceeded the accompanying costs.[170] In particular the Court noted that the availability of review would act as an impetus to improved grand jury selection procedures, a more substantial benefit than that involved in *Stone*.[171] At the same time, the Court indicated that the costs of granting habeas review in *Rose* would be substantially less than those in *Stone*, because of the possibility in *Rose* of retrial on the same evidence.[172] The Court further distinguished *Stone* on the ground that *Rose* involved a constitutional right rather than a judicially created remedial measure.[173] The Court in *Rose* thus did not read *Stone* as always foreclosing habeas relief when the petitioner's claim is unrelated to the guilt determination process. Rather, review of such claims is foreclosed when the costs of habeas review outweigh the benefits derived thereby.[174]

These cases indicate that during the first few years following the *Stone* decision the Court adhered to the guilt/innocence rationale. No further substantive restrictions of the scope of the writ occurred during this period. The Court's use of the guilt/innocence rationale appeared to demonstrate that claims related to the guilt determination process would not be subject to restriction. Later cases, however, would indicate a change in approach.

C. Recent Federal Habeas Corpus Decisions

A series of decisions by the Supreme Court during the 1981 Term reflect a changing attitude toward the proper scope of federal habeas corpus. These cases, though mainly concerned with the procedural prerequisites of habeas review,[175] cast considerable doubt on the future of the guilt/innocence rationale as the determinant of the substantive scope of federal habeas review. In the first such case, *Rose v. Lundy*,[176] Noah Lundy was convicted in state court of rape and other sex crimes. Lundy petitioned in federal district court for a writ of habeas corpus. He alleged four grounds for relief, all of which were related to the guilt determination process.[177] Lundy had exhausted his state remedies on only two of the claims. Despite the statutory rule requiring exhaustion of state reme-

169. *Id.* at 560-61.

170. *Id.* at 564. *But see* United States *ex rel.* Barksdale v. Blackburn, 610 F.2d 253 (5th Cir. 1980). *Blackburn* involved a claim of grand jury discrimination. In addressing the issue of whether federal habeas corpus should be available for such a nonguilt related claim, the court cited *Rose* as a rejection of the guilt innocence rationale. 610 F.2d at 257. This decision, however, was reversed on rehearing. United States *ex rel.* Barksdale v. Blackburn, 639 F.2d 1115 (5th Cir.), *cert. denied*, 454 U.S. 1056 (1981).

171. 443 U.S. at 563. The Court commented that granting federal habeas review of grand jury discrimination claims would have both an educative and a deterrent effect on state officials who are charged with running the grand jury selection system. *Id.*

172. *Id.* at 564.

173. *Id.* at 561-62.

174. Thus, the guilt/innocence rationale of *Stone* requires federal courts to hear the merits of guilt related claims on habeas, but allows federal courts to bar review of nonguilt related claims when hearing those claims yields little benefit to society.

175. *See supra* note 136 and accompanying text.

176. 455 U.S. 509 (1982).

177. *Id.* at 511. Lundy's four grounds consisted of one based on the sixth amendment's

dies,[178] the district court granted the writ as to all four claims, and the Court of Appeals for the Sixth Circuit affirmed.[179] The issue before the Supreme Court was whether the federal habeas statute requires "total exhaustion" of claims, and thus mandates dismissal of a petition such as Lundy's where two of the four claims presented for federal review have not been exhausted at the state level. The Court interpreted the habeas statute to require total exhaustion of state remedies as to all claims before habeas review is available.[180] The Court based its interpretation principally on considerations of comity;[181] requiring total exhaustion encourages state prisoners first to seek full relief in state courts, giving those courts a chance to review and correct any constitutional errors prior to federal court review.[182]

It should be emphasized that the holding in *Lundy* does not bar any substantive claim from habeas review, but merely postpones the review until after any state remedies are exhausted. The Court clearly indicated that Lundy would be entitled to federal review on all four of his habeas claims if he first returned to state court on the two unexhausted claims.[183] In authorizing review of all four guilt related claims, subject to exhaustion, the *Lundy* decision implicitly agrees with the rationale in *Stone* that claims related to the guilt determination process are cognizable on federal habeas review.

The *Lundy* decision does, however, reflect a recent tendency of the Court to restrict access to the habeas corpus remedy by raising procedural hurdles such as the total exhaustion rule. This tendency can be seen in part III-C of the Court's opinion.[184] That section, which commanded only a plurality of the Court,[185] dealt with rule 9(b) of the habeas statute.[186] Rule 9(b) gives federal judges the power to dismiss a subsequent habeas petition when the petitioner's failure to bring all his claims in the first petition constituted an abuse of the writ.[187] The Court held that rule 9(b) could preclude federal habeas review of a prisoner's unexhausted claim, even if guilt related, if the prisoner deletes that claim from his petition in order to obtain speedy federal relief on an exhausted claim.[188] This hold-

---

right of confrontation, two based on prosecution misconduct, and one based on improper jury instructions. *Id.*

178. 28 U.S.C. § 2254(b)-(c) (1976). Subsections (b) and (c) require a prisoner to exhaust his state remedies before a writ of habeas corpus may be granted. *Id.*

179. 455 U.S. at 513 & n.4.

180. *Id.* at 522.

181. *Id.* at 518. The doctrine of comity " 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' " *Id.* (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

182. 455 U.S. at 518-19.

183. *Id.* at 520.

184. *Id.* at 520-21.

185. *Id.* at 538 & n.*. The controversy over the scope of habeas corpus generated five separate opinions on this occasion.

186. 28 U.S.C. § 2254, rule 9(b) (1976).

187. *Id.*

188. 455 U.S. at 520-21.

ing forces a habeas petitioner who brings "mixed" claims[189] to choose between preserving all of his constitutional claims while remaining in prison during the time-consuming exhaustion process at the state level, or obtaining a speedy federal hearing on his exhausted claims subject to forfeiture of his unexhausted claims. Part III-C of the *Lundy* opinion thus operates to bar otherwise cognizable federal habeas claims through an application of procedural rules.[190]

In *Sumner v. Mata*[191] the Supreme Court applied section 2254(d) of the habeas statute, which requires federal habeas courts to presume the correctness of state court factual determinations.[192] Mata was convicted in state court of murdering a fellow prison inmate. He petitioned for a writ of habeas corpus, alleging that the photographic identification procedure used at trial was impermissibly suggestive. The federal district court denied the writ and the Court of Appeals for the Ninth Circuit reversed.[193] The Supreme Court vacated the judgment of the Ninth Circuit and remanded the case, stating that section 2254(d) requires a habeas court to presume the correctness of the state court's findings of fact unless the findings fall within eight listed exceptions.[194] The Court determined that the Ninth Circuit had made findings of fact at odds with the state court find-

189. A mixed petition is one that includes both exhausted and unexhausted claims. *See id.* at 519-20.

190. For example, a prisoner petitions for a writ of habeas corpus based on two grounds, (1) discrimination in the grand jury selection process and (2) denial of the right to confrontation. The grand jury discrimination claim has been exhausted in the state courts, but the confrontation claim has not. Rather than spend several more months in prison while he appeals to the state courts on the confrontation issue, the prisoner decides to delete the claim from his habeas petition. After review of the grand jury discrimination claim on the merits the district court denies the writ. If the prisoner then brings a subsequent petition based on the confrontation claim the district court may dismiss the petition under the Court's ruling in *Lundy*. Thus, a claim which is clearly guilt related may be barred from habeas review.

191. 455 U.S. 591 (1982) (per curiam).

192. 28 U.S.C. § 2254(d) (1976). Section 2254(d) provides that "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct . . . ." *Id.* The section then lists eight exceptions to this presumption. *Id.*

193. Mata v. Sumner, 611 F.2d 754 (9th Cir. 1979). Judge Sneed dissented from the majority opinion, which was ultimately reversed, arguing that habeas relief should not be extended to this case. Judge Sneed cited *Stone* for support, but then acknowledged that the rationale of *Stone* did not go as far as he wanted to. He recognized that some other rationale must be advanced for a limitation of habeas corpus that restricts review of even guilt related claims. *Id.* at 762 (Sneed, J., dissenting).

194. Sumner v. Mata, 449 U.S. 539, 544-46 (1981). The eight exceptions are:

> (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 where 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

ings.[195] The Court held that such disregard for the state court's findings of fact was impermissible under section 2254(d) unless one of the exceptions listed in that section applied.[196] On remand the Ninth Circuit declined to apply an exception and stated that it accepted the trial court's findings of fact. The court of appeals again held that the writ should be granted, however, based on application of the law to the facts.[197] The case returned to the Supreme Court, which summarily vacated the judgment of the court of appeals, holding once again that the Ninth Circuit had disregarded the state court's findings of fact.[198]

As in *Lundy*, the Court's refusal to grant the writ rested on procedural grounds and did not expressly restrict the substantive scope of federal habeas corpus. The disturbing aspect of *Mata*, however, is the broad definition given to "findings of fact" as that concept is used in section 2254(d).[199] The broad definition forces federal habeas courts to accept as correct many state court determinations that are arguably conclusions of law. The *Mata* decision has been criticized for restricting the scope of habeas review through the use of this procedural device.[200]

The next Supreme Court decision concerning the scope of habeas review was *United States v. Frady*.[201] Nineteen years after being convicted of murder in a federal trial court, Frady collaterally attacked his conviction under section 2255 of the habeas statute,[202] the federal prisoner counterpart of section 2254. Frady claimed that cases decided subsequent to his trial had disapproved jury instructions identical to those used in his trial. Frady contended that the improper instructions had resulted in an im-

---

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

(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 consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

28 U.S.C. § 2254(d) (1976).

195. 449 U.S. at 543.

196. *Id.* at 552.

197. Mata v. Sumner, 649 F.2d 713, 715-16 (9th Cir. 1981). The Ninth Circuit stated: "[T]he explicit presumption of correctness of state court findings of *fact* embodied in § 2254(d) . . . is not invoked in this case. We disagree with the state court over the *legal and constitutional significance* of certain facts." *Id.* (emphasis in original).

198. 455 U.S. at 596-98.

199. The heart of the problem with *Mata* is that findings of fact are not always clearly discernible from conclusions of law. The Court acknowledged this problem in its opinion: "Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the fact findings made by the state courts." *Id.* at 597-98.

200. *See* Reynolds, *supra* note 17, at 289.

201. 456 U.S. 152 (1982).

202. 28 U.S.C. § 2255 (1976).

proper murder conviction. The federal district court denied relief on the grounds that Frady should have challenged the jury instructions on direct appeal or in one of his many earlier motions.[203] The Court of Appeals for the District of Columbia reversed,[204] holding that although Frady had not objected to the jury instructions at trial, Federal Rule of Criminal Procedure 52(b) allowed relief for "plain error" in jury instructions.[205] The Supreme Court reversed the court of appeals and denied Frady's motion.[206] The Supreme Court held that the "plain error" standard of rule 52(b) is intended for use on direct appeal, not in a collateral attack.[207] The Court stated that the proper standard for obtaining relief based on trial errors to which no contemporaneous objection was made is the "cause and actual prejudice" standard laid down in *Wainwright v. Sykes*.[208] Under that standard a convicted defendant must show both cause for his double procedural default[209] and actual prejudice resulting from the errors.[210] The Supreme Court found that Frady had suffered no actual prejudice as a result of the improper jury instruction since he had failed to demonstrate that a proper instruction would have resulted in a different verdict.[211]

Frady, although decided on procedural grounds, is arguably consistent with the guilt/innocence rationale of *Stone* since the Court stated that proof of an unjust verdict would have satisfied the actual prejudice requirement and entitled Frady to habeas review.[212] Justice Brennan argued in his dissent, however, that the Court's conclusion that Frady had received a fair trial, notwithstanding the faulty instruction, was colored by the Court's hostility toward the federal habeas corpus remedy.[213]

Engle v. Isaac[214] involved an issue similar to that in *Frady*. *Isaac*, however, concerned state rather than federal prisoners. As in *Frady*, the prisoners in *Isaac* failed to object to a jury instruction at trial and either failed to raise the constitutional challenge on direct appeal, or were barred from doing so by state procedural rules.[215] The prisoners then petitioned for

---

203. *Id.*
204. Frady v. United States, 636 F.2d 506 (D.C. Cir. 1980).
205. FED. R. CRIM. P. 52(b).
206. 456 U.S. at 175.
207. *Id.* at 164.
208. *Id.* at 167; *see supra* notes 154-55 and accompanying text.
209. The petitioner has defaulted twice when no contemporaneous objection is made, once by failing to make his claim at the trial court and the second time by failing to appeal the trial court judgment.
210. 456 U.S. at 167-68.
211. *Id.* at 170-72.
212. *Id.* at 170. The "actual prejudice" element of the standard adopted in *Frady* is directly linked to the guilt/innocence question. An innocent person obviously has been prejudiced by an unconstitutional confinement, whereas a guilty person has not. The Court noted the relation of guilt to actual prejudice, stating: "We perceive no risk of a fundamental miscarriage of justice in this case." *Id.* at 172.
213. *Id.* at 186-87.
214. 456 U.S. 107 (1982).
215. None of the three defendants in *Isaac* had challenged the constitutionality of the jury instruction at trial. An Ohio procedural rule bars appellate consideration of objections not made contemporaneously at trial. OHIO R. CRIM. P. 30. Two of the defendants appealed their convictions, but did not raise a challenge to the jury instruction. The third

habeas relief in federal district court, which was denied.[216] The court of appeals reversed, holding that the convicted defendants had met the *Wainwright v. Sykes* "cause and actual prejudice" standard.[217] The Supreme Court reversed the court of appeals and held that the prisoners had not made a sufficient showing of cause for the state level procedural default.[218]

Isaac is a particularly foreboding decision with respect to the continued vitality of *Stone*'s guilt/innocence rationale. In *Isaac* the Court held that failure to raise a constitutional claim at trial, either because previous decisions indicate the futility of raising the claim or because the defendant is unaware of his constitutional claim, does not constitute sufficient cause to justify federal habeas review.[219] As Justice Brennan noted in dissent, the Court's definition of cause sets a demanding standard[220] and may often make federal habeas review unavailable to prisoners who are arguably innocent.[221] The *Isaac* majority expressly declined to follow the guilt/innocence rationale in deciding the question before it[222] and based its decision instead on an extended discussion of the costs associated with habeas relief.[223]

These Supreme Court decisions, handed down during its latest term, are based on procedural grounds and do not explicitly address the issue of the substantive scope of habeas review. These cases do, however, reveal the Court's hostility toward federal habeas review. By continually raising procedural hurdles, the Court has imposed a substantial restriction on the availability of federal habeas corpus review. Unfortunately for the unjustly confined prisoner, these procedural restrictions operate even where the claim asserted is based on the integrity of the guilt determination process.

---

defendant, Isaac, challenged the jury instruction on appeal, but his challenge was rejected because he had failed to make the objection at trial. 456 U.S. at 112-16.

216. 456 U.S. at 116-17.

217. Isaac v. Engle, 646 F.2d 1122 (6th Cir.), *adhered to on rehearing en banc*, 646 F.2d 1129 (1980); Hughes v. Engle, 642 F.2d 451 (6th Cir. 1980); Bell v. Perini, 635 F.2d 575 (6th Cir. 1980); *see supra* notes 154-55 and accompanying text (discussion of *Wainwright* cause and actual prejudice standard).

218. 456 U.S. at 135.

219. *Id.* at 130-34.

220. *Id.* at 144. Justice Brennan predicted that "it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause.'" *Id.*

221. *Id.* at 147. Justice Brennan noted:

> *Sykes* promised that its cause-and-prejudice standard would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the *victim of a miscarriage of justice*." 433 U.S., at 91 . . . . Today's decision, with its unvarnished hostility to the assertion of federal constitutional claims, starkly reveals the emptiness of that promise.

Id. at 148 (emphasis added).

222. *Id.* at 129.

223. The Court discussed federal habeas corpus and its conflict with finality and federalism interests. *Id.* at 126-29 & nn.31-32. Justice Brennan noted and criticized the Court's failure to follow the guilt/innocence rationale. *Id.* at 149 (Brennan, J., dissenting). "[T]he Court ignores the manifest differences between claims that affect the truthfinding function of the trial and claims that do not." *Id.*

V. CONCLUSION: BEYOND *STONE*

A review of the common law and early statutory history of the writ of habeas corpus reveals that this extraordinary form of relief developed in response to the fundamental unfairness of confining persons whose guilt or innocence had not been fairly determined. The Supreme Court broadened the scope of the writ in *Brown v. Allen*[224] and *Fay v. Noia*.[225] This expansion of habeas review was not necessary to accomplish the historical objective of preventing fundamental unfairness, but rather was a way of protecting constitutional rights. Eventually, however, the Court began to retreat from this expansive treatment, limiting availability of the writ for claims unrelated to the guilt determination process under the guilt/innocence rationale of *Stone v. Powell*.[226] Recent decisions indicate an even more restrictive approach to habeas corpus review and a deemphasis of the guilt/innocence dichotomy in determining availability of federal relief. These cases have raised procedural barriers greatly restricting the access of prisoners to the writ of habeas corpus. In many of these cases access to the writ has been restricted without regard to whether the petitioner's claim attacks the guilt determination process.

Procedural and substantive restrictions on the scope of federal habeas corpus are improper when they deny habeas review to a prisoner who claims that constitutional error has infected the integrity of the guilt determination process. Such restrictions frustrate the historical purpose of the Great Writ as the liberator of unjustly confined persons. The Court's recent hostility toward habeas corpus is due in part to the societal costs involved with its use. These costs are not new, however, and have been recognized by the Court for some time. Congress has likewise been aware of these costs, but has declined to alter significantly the federal habeas statute, which remains in much the same form as its predecessor of 1867.[227] In light of these factors the Court's restriction of habeas corpus review as to claims impugning the guilt determination process is not statutorily authorized and may in fact be statutorily proscribed. At the very least, limitation of federal habeas corpus with respect to guilt related claims, should not be accomplished without further consideration of the historic purpose of the writ and better reasoning than the Court has thus far advanced. Otherwise Justice Brennan's prediction that *Stone v. Powell* laid the "groundwork . . . for a drastic withdrawal of federal habeas jurisdiction"[228] may soon become a reality.

---

224. 344 U.S. 443 (1953).
225. 372 U.S. 391 (1963).
226. 428 U.S. 465 (1976).
227. Limitation of federal habeas corpus has been proposed in various bills in Congress; however, none has ever been enacted. *See, e.g.*, S. 567, 93d Cong., 1st Sess. (1973); H.R. 11,441, 92d Cong., 1st Sess. (1971); S. 917, 90th Cong., 2d Sess. § 702 (1968); S. REP. NO. 1797, 89th Cong., 2d Sess. (1966).
228. Stone v. Powell, 428 U.S. 465, 517 (1976) (Brennan, J., dissenting).