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Is There an End in Sight in the Captain's Spyglass - The Quest for Finality

John R. Brown

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IS THERE AN END IN SIGHT IN THE CAPTAIN'S SPYGLASS? THE QUEST FOR FINALITY*

JOHN R. BROWN**

Whither, O splendid ship, thy white sails crowding,
Leaning across the bosom of the urgent West,
That fearest not sea rising, nor sky clouding,
Whither away, fair rover, and what thy quest?¹

STARTING EACH DAY we are bombarded with chaos and crisis. A few months ago it was the Falklands. More recently it is whether to freeze or unfreeze nuclear weapons. And lurking in the background of this armament controversy are questions of peace in the Middle East and the Far East, the position of the Soviets and our handling of foreign affairs. But of all these questions, and the many more that soon come to mind, with the possible exception of concern over economic affairs, the one problem which occupies every American's mind is the question of crime. Americans today are not concerned about crime generally, nor crime as a fascinating sociological problem. Their concern has to do with crime here and

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now, crime in their homes, crime in the streets and crime in high places.

Because crime, criminals and criminal conduct are the grist of the judicial mill, judges come face-to-face with the problems of what the courts can or should do. In addressing the problems of crime, my concern is not with the sociological causes of crime, which is a problem for sociologists. Nor am I concerned with the refinement of the principal purposes and means for punishment, which is a problem for penologists. To me the critical problem comes down to one simple word: finality, or more accurately, the lack of finality.

LACK OF FINALITY:

*Delay is Ruining Us.* Delays have dangerous ends.

Unlike so many aspects of the law, lack of finality is not one that baffles the non-lawyer or calls for any elaborate definition. Lack of finality is something which all of us know, whether on or off the bench, or as citizens, taxpayers, and observers.

Before I begin the scenario on death cases, I want to make clear that although the Supreme Court has to bear the ultimate responsibility for these frustrations and delays in death cases, the Supreme Court is not to blame. The fact is that in *Furman v. Georgia,* with each justice writing a concurring or dissenting opinion to the sparce per curiam reversal, the

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* Some idea of the volume of criminal cases filed and to be disposed of is revealed by the statistics showing the total number of cases commenced in the United States district courts both in the nation as a whole and in the Fifth Circuit (and later in the Eleventh), bearing in mind that federal district courts try only cases involving federal crimes which are statutorily defined:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NATIONAL</th>
<th>5TH CIRCUIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980</td>
<td>39,115</td>
<td>9,951</td>
</tr>
<tr>
<td>1981</td>
<td>42,437</td>
<td>11,394</td>
</tr>
<tr>
<td>1982</td>
<td>44,787</td>
<td>5,309 (6,584 in 11th Cir).</td>
</tr>
</tbody>
</table>

* A. Lincoln, 1862.

* W. SHAKESPEARE, HENRY VI, Act III.

* 408 U.S. 238 (1972).
Court revolutionized the law of capital punishment. By way of Furman, it was almost as though capital punishment was being ordained for the first time. The Court was concerned with the way capital punishment was being handled, particularly in the states. Imposition and execution of the death penalty was seen by the Court as too capricious with little if any rational basis for distinguishing between those to whom death was imposed and those to whom a sentence of life or less was imposed. This concern with the effectuation of the death penalty has led to a number of important and very serious cases. These cases include those pertaining to the selection and exclusion of jurors for conscientious scruples against the death penalty, the split trial on guilt/innocence and sentencing, the jury instructions essential to channeling a rational choice by the jury and many related problems. Obviously with new and unexplored serious problems emerging in dealing with this entirely new constitutional problem of imposing the death penalty, it takes time, patience and devotion by these nine over-worked justices and this means some delay. Even so, the result is bad for the American people.

To the annoyance of the non-lawyer public, the routine is all too familiar. A sensational murder takes place. With effective police work, the perpetrator is found and charged. A trial is held, conducted by a conscientious, intelligent judge, before a jury honestly thought to have all of the qualifications required by the Constitution. The trial ends with the awesome finality of the somber pronouncement of the death penalty by the judge. This pronouncement is followed by the usual ap-
peal to the higher court, intermediate or final, in the jurisdiction concerned. The initial appeal is shortly followed by application for review by the United States Supreme Court, claiming violation of a number of constitutional guarantees. With the overwhelming burden of cases before the Supreme Court, making it impossible in every death case for the Court to then determine whether a constitutional error has been made, the Supreme Court denies its discretionary review.

But the end is not yet in sight. Indeed, after two attempts to have that "final" jury verdict reversed, we have not yet even seen the open end of the tunnel. The convicted person then returns to the court in which he was tried to present his petition for writ of habeas corpus, one of the most precious rights that all citizens have and which we dare not jeopardize out of some supposed dissatisfactions or frustrations flowing from its use or abuse. Upon this petition, the case must then wind its way again through the state appellate process, either intermediate or final or both. The cautious lawyer for the accused naturally pursues every avenue open to him to once again secure a ruling from the United States Supreme Court. Occasionally the Supreme Court will take a case at this stage. But more times than not, the Court will simply deny the permissive discretionary review and either expressly or impliedly call for the exploration of the case in a United States district court.

The case then comes back to the United States district court located either in the district where the person was tried or having jurisdiction over the place of his confinement. Thus begins a virtual rehash of the complaints which have been made on the initial appeal and in the state habeas proceedings. New restrictive rules emerge, nearly all of which are designed to require that the case must have been fully exhausted in the state tribunals as a condition for federal court review. Commendable as these so-called technical rules are in reducing opportunities for abuse of the Great Writ, each has within itself further complications, including repeated

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12 U.S. Const. art. I, § 9, cl. 2 (known as the Great Writ).
appeals.

During this review by a United States district court, the case's handling may call for presentation of extensive testimony, bearing sometimes on the occurrence itself, but more likely on the manner in which the case was tried. The review often includes the performance of counsel, his adequacy, and the circumstances which give rise to claims of constitutional violations. After the hearing, the United States district judge decides the case and either grants or denies the writ of habeas corpus. The loser, either the petitioner or the state government, very likely will appeal to one of the twelve United States courts of appeals.

Once appealed to a court of appeals, more and more delay is inescapable. This delay includes obtaining the record, preparation of briefs, and the submission of the case either on briefs or on oral argument before a panel of three judges followed by a written opinion of the court. Again, almost invariably, the loser will seek review by the Supreme Court of the United States.

Overburdened as they are with 5,000 cases on the so-called miscellaneous docket, it is backbreaking for the nine justices of the United States Supreme Court to review these applications to determine whether further argument and review is warranted. In the majority of cases, the Supreme Court will deny the application for review. If the effect of the Supreme Court's denial of review is to affirm the judgment of the court of appeals in which the writ of habeas corpus was denied, one would expect that within a reasonably short period of time, the prisoner would be resentenced in the state court, a new date of execution prescribed and shortly the execution would take place.

But, alas, that infrequently occurs. The prisoner is returned to death row and either through new counsel entering the case or through his long-time counsel, a new theory is contrived. Sometimes the new theory is based on intervening decisions of the Supreme Court. In any event, the lawyer with the elastic conscience demanded by the awesome finality of an execution, commences a new, or continues the old habeas petition. Under
the federal statutes which require the exhaustion of any new contention in the state tribunals, this means the petitioner must frequently start all over again in the state courts, go through its various levels once again to the Supreme Court of the United States and back again to the United States district court. Once again the case becomes subject to review by a federal court, usually a single judge, to determine whether in the light of the new claims, the state system has adequately protected the constitutional rights of the accused. The case is then appealed to the court of appeals for its determination, and further efforts are made in the Supreme Court of the United States with the possibility of either a decision there or a remand to the court of appeals or to a district court once again to amplify the habeas.

At each of these stages, the sentencing authority — sometimes the governor, sometimes the presiding state judge — has to refix the date and time of execution. As each of these dates approach, the petitioner seeks a stay of execution. Considering the irretrievable finality of an execution, it is not unnatural that these are granted somewhat liberally. Also, again quite naturally, counsel acting for a petitioner purposely awaits until the very eleventh hour to seek a stay. Counsel knows that the judge from whom the stay is sought will feel under such tremendous pressure that, to assure a ventilation of the claims, he will grant another stay. Once the stay is granted, it means that the sentencing must take place all over again, which, in turn triggers a repetition of the whole process.

Finality for a death penalty case does not come until execution. It should come as no surprise that this tedious process which I have described has resulted in practically no executions. The annual rate of recorded executions in this country has slowed from a high of 199 in 1935 to a mere handful each year in the mid-1960s. As a practical matter, there was a moratorium on executions from 1967 until 1977 when Gilmore was executed in Utah. In 1979, two other prisoners, Spenkelink in Florida and Bishop in Nevada, were put to death. In

1981 Judy was executed in Indiana. This means there were no executions in 1980 and one in 1981. On information from the Bureau of Justice Statistics, there were 228 new death sentences handed down in 1981. At the end of 1981, a total of 838 persons were on death row nationwide. The conservative estimate is that there are now more than 1,000 persons awaiting execution of the death sentence. Many of these persons have been on death row for more than a decade. That statistic, in itself, poses serious questions of the eighth amendment's constitutional guarantee against cruel and unusual punishment!

Although death cases provide the most spectacular example of interminable delay after trial, conviction and affirmance, delay is ever present in the hundreds of other non-capital but violent crimes. These include robbery, rape, arson, kidnapping and extortion. This accursed lack of finality deplored by all reveals a contemporary cancer infecting the body politic, not just the body of the law, *corpus juris*. The question, therefore, arises: what causes the delay? Is it constitutional? Yes, in part. Is it legislative in origin? Yes, to a great extent. Is it judge-made? Do judges and courts have much responsibility? Yes, to a great extent, as they conscientiously undertake to interpret and apply constitutional requirements and legislative mechanisms. Each of these factors coalesces in the oversimplified but simple conclusion that it is the writ of habeas corpus that brings this delay about.

Posing the question and giving an answer so simply, I must assure the reader that I do not propose to repeal or obliterate the "Great Writ," as it is called in England and the United States. The Constitution recognized the writ in the suspension clause of article I, section 9. Section 14 of the Judiciary Act of 1789 authorized use of the writ by federal courts. The

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17 U.S. CONST. art. I, § 9, cl. 2
16 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81 (1789).
15
writ was greatly expanded in 1867 to empower federal courts to grant the writ "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."\(^a\) As actually applied for a long time, the writ would issue only if the court that committed the prisoner lacked "jurisdiction" to do so. This concept, never entirely rigid, underwent a great expansion with the celebrated decisions in Moore v. Dempsey in 1923,\(^b\) and Mooney v. Holohan in 1935,\(^c\) and culminated in 1942 in the sweeping declaration:

\[
\text{[t]he use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.}
\]

The 1948 revision of the Judicial Code included for the first time the statutory requirement that state remedies must first be exhausted,\(^d\) a major problem still haunting use of the writ. In 1963, the Supreme Court dealt broadly and generously with the necessity for a federal court hearing in Townsend v. Sain.\(^e\) The Court listed six circumstances in which a hearing would be required.\(^f\) Not entirely overlapping, the six circumstances listed in Townsend are closely related to the eight factors in the 1966 amendments to the Habeas Act, section 2254(d).\(^g\)

In the years since 1963, there has been a substantial expansion in the application and use of the writ with only an occa-

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\(^a\) Act of February 5, 1867, ch. 28 § 1, 14 Stat. 385 (1867).
\(^b\) 261 U.S. 86 (1923).
\(^c\) 294 U.S. 103 (1935).
\(^g\) Id. at 313.

\(^\text{As Professor Wright noted, "Townsend speaks of making a hearing mandatory while the statute is in terms of circumstances dispelling the presumption of correctness . . . ." HANDBOOK supra note 17 at 243, n.55.}\)
sional retrenchment. The two most notable are Stone v. Powell\(^2\) and Wainwright v. Sykes.\(^2\) Stone held that if the state has provided an opportunity for a full and fair litigation of a fourth amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional manner was introduced at his trial.\(^3\) Wainwright, dealing with the consequences of a failure to comply with the state's contemporaneous objection rule, held that habeas was not available unless cause was shown for failure to comply with the local rule and prejudice.\(^4\)

This massive expansion in use of the writ, with only slight retrenchment, means that every conviction affirmed by the state appellate courts may become the subject of a federal habeas corpus petition. Each case's ultimate outcome is uncertain and there can be no finality until that federal proceeding has followed its torturous course. On the shoulders and judicial conscience of hundreds of federal judges rests the burden of deciding the ultimate validity of a conviction which remains open to question. The validity of a jury's verdict remains up in the air even though the case has been affirmed by the state's highest court. The case is subject to the possibility of a federal court decision which, years after the event and long after the disappearance or death of critical witnesses, may send the case back to the state trial court. The sheer figures, covering not only the entire United States \(^3\) but those

\(^{3}\) 428 U.S. at 494.
\(^{4}\) 433 U.S. at 90-91.

\(^{3}\) Federal habeas corpus petitions attacking state convictions in all of the United States district courts were:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960*</td>
<td>872</td>
</tr>
<tr>
<td>1970**</td>
<td>9,063</td>
</tr>
<tr>
<td>1980**</td>
<td>7,031</td>
</tr>
<tr>
<td>1982**</td>
<td>8,059</td>
</tr>
</tbody>
</table>

*See Annual Report of the Director or Administrative Office of the United States, Table C-2.* ** See Id. Table 20. For the Fifth Circuit (and now Eleventh) the number of state Habeas Corpus petitions in the District Courts was as follows:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>1960</td>
<td>62</td>
</tr>
<tr>
<td>1970</td>
<td>1,801</td>
</tr>
</tbody>
</table>
in the Fifth and Eleventh Circuits closer to home, are staggering. They demonstrate to the most untutored, unlearned lay person why spectacular cases of violent crimes are still open and why they drag on and on.

For the purposes of this discussion, I draw from this brief resume of the development of the writ of habeas corpus, its undulating expansion, retraction, re-expansion and retrenchment one very significant impression. The celebrated quip, the "Constitution is what the Justices say it is," is certainly true as to habeas corpus. Even after Congress deliberately amended the Act to make federal habeas available to state prisoners, little application of the writ was made for half a century. Additionally, although judges considering federal habeas in a specific case are necessarily confined to asserted constitutional defects, the process leading to the issuance of the writ of habeas corpus is not itself of a constitutional nature. Thus, Congress has the legitimate and significant responsibility for declaring legislatively the manner, method and means for enforcement of the writ. Congress has in fact exercised its power with regard to the writ on a number of occasions including in 1948 and 1966.

Congress has wide powers under article III, especially regarding the establishment and jurisdiction of lower federal

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER</th>
</tr>
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<tbody>
<tr>
<td>1960</td>
<td>27</td>
</tr>
<tr>
<td>1970</td>
<td>297</td>
</tr>
<tr>
<td>1975</td>
<td>470</td>
</tr>
<tr>
<td>1980</td>
<td>294</td>
</tr>
<tr>
<td>1981</td>
<td>365</td>
</tr>
<tr>
<td>1982</td>
<td>414 (241 5th Cir.,173 11th Cir.)</td>
</tr>
</tbody>
</table>

See Table.


The process is subject, of course, to satisfaction of the Suspension Clause. U.S. Const. art. I, § 9, cl. 2.
courts. And of course, Congress possesses authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States . . . ." Congress may, thus, constitutionally prescribe the time or means in which rights can be asserted by a party before the federal courts. As the Supreme Court in *Yakus v. United States* stated: "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

Widespread dissatisfaction with lack of finality and the other criticisms of the use of the writ of habeas corpus among members of the Congress, the executive department and courts have led to the introduction of a number of bills in the Congress. The two categories I will deal briefly with are S. 2216, a bill to reform habeas corpus procedures, and those relating to the Exclusionary Rule.

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88 See South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966) and several cases cited therein.
86 *Id.* at 444.
80 See 21 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4261 at 588 (1978): Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions re-examined by a single federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its ability. *Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means to redressing constitutional violations.*

*Id.* (emphasis added).

Chief Justice Burger echoed concern with the state of finality in his December 1981 Year End Report on the Judiciary in which he states that "the administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases," and urged congressional limitations "to claims of manifest miscarriages of justice." Many years earlier Justice Harlan had sounded the same concern in *Mackey v. United States*:

Both the individual criminal defendant and society have an interest in insuring that there will be at some point the certainty that comes with the end of litigation. No one, not criminal defendants not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Attorney General Jim Smith of Florida pungently described Florida as "one of two states out of which the book on abuses of the writ of habeas corpus is being written. Texas is the other." He pointed out the startling fact that Florida and Texas "produced 35 percent of all petitions for the writ filed in the United States in 1980 . . . and 46 percent of all the evidentiary hearings held in such actions." He summed up his concern stating that "[a] flood has been unleashed that must be curtailed if we expect to restore finality and public confidence to our criminal justice system."

Justice Powell, concurring in *Schneckloth v. Bustamonte* put his experienced judicial finger on both delay and what it
is doing to public respect for the judicial system and the integrity of state courts when he stated:

[T]he present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems.  

The Attorney General's Task Force Report on Violent Crime made significant findings and recommendations for reform of habeas corpus:

Public confidence in the criminal justice system tends to be eroded by a perception that the law allows a virtually endless stream of attacks on the conviction, first, by direct appeal, and second, by easy accessibility of the federal writ of habeas corpus . . . . In the present state of criminal procedure in this country, the formerly extraordinary remedy of collateral attack on a criminal judgment and sentence has become not only ordinary but commonplace.

The function and purpose of the administration bill, S. 2216, was summarized by Jonathan C. Rose, Assistant Attorney General, Office of Legal Policy. The bill is essentially an amendment to 28 U.S.C. § 2254, the present habeas law. The "bill would amend 28 U.S.C. § 2254 so as to require deference to the result of a full and fair adjudication of a claim in state proceedings." To be full and fair the state adjudication "must reflect a reasonable determination of the facts based on the evidence presented to State courts, a reasonable Federal law, and a reasonable application of the law to the facts."  

Appropriate allowances would be made for readjudication in cases of subsequent discovery of new evidence and subsequent retroactive changes in the law as announced by the Supreme Court and declared by it to be retroactive. Next, a time limi-
tation is imposed on access to the writ of federal habeas corpus. The limitation would be done by an amendment to 28 U.S.C. § 2244. The one year limitation period is to begin running from the time state remedies are exhausted.

A habeas court is also given the right to consider unexhausted claims. In addition, S. 2216 provides that certification of probable cause would have to be granted by the Court of Appeals (or a judge thereof) not by the district court as is now the case. And finally, the proposed bill codifies and extends the rule of Wainwright v. Sykes.

55 Id.
56 Id.
57 Id.
58 Announced almost at the same time as the April 1 hearings were being conducted, there is no indication of any view on Rose v. Lundy, 455 U.S. 509 (1982).
59 See Wainwright v. Sykes, 433 U.S. 72 (1977). The administration, by supplemental memorandum, substantially accepted a statutory definition of “full and fair adjudication” by adding a new sub-section (h) to § 5 of the bill, which reads as follows:

4. The definition of a “full and fair adjudication” appearing in the Administration's initial submission to Congress at pages 36-41 should be codified and put in the text of the bill.

This is a sensible suggestion. It would avoid problems of the effectiveness of a definition appearing in legislative history, which were noted by a number of speakers at the hearings. We should accordingly have no objection to adding the following at the end of section 5 of S. 2216 [footnote omitted]:

(d) by adding a new subsection (h) reading as follows:

“(h) An adjudication of a claim in state proceedings is full and fair in the sense of subsection (d) of this section unless—

(1) the adjudication did not involve a decision of the claim on the merits;

(2) the adjudication involved an unreasonable interpretation of federal law, and unreasonable determination of the facts in light of the evidence presented, or an unreasonable disposition resulting from the application of the law to the facts;

(3) the adjudication was conducted in a manner inconsistent with the procedural requirements of federal law that are applicable to state proceedings;

(4) new evidence is produced which could not have been produced at the time of the adjudication through the exercise of reasonable diligence, where a reasonable doubt is established that the disposition of the claim would have been the same had such evidence been produced in the state proceedings; or

(5) a retroactively applicable change in federal law which is binding on the courts of the state has occurred subsequent to the adjudication, where a reasonable doubt is established that the disposition of the claim would have been the same had the
Of course, in addition to the testimonial support for the bill, there was strong and vigorous opposition. The opposition first asserted that there was no real need for the bill because the courts were not "clogged" as claimed. This argument goes to the burden on the courts, not to the problem of public dissatisfaction or lack of confidence in the judicial system because of this frustrating lack of finality. And, in any event, judges on the firing line will resolutely refute these assertions. There was strong opposition to the definition of "fully and fairly adjudicated" with the general assumption that this is a matter which should be left to the Supreme Court. Likewise, the opponents thought it best to leave to the Supreme Court a case by case application of Wainwright v. Sykes.°° Severe criticism was also made of the one year limitation provision, the opponents' belief being that the present habeas Rule 9(b) is adequate.

The exclusionary rule legislative proposals are, and are thought to be, closely related to the general problem of habeas. This is so because evidence obtained in violation of the fourth amendment is frequently of a decisive nature which either calls for granting of the writ, or often, the practical legal inability to prosecute the case, even though such excluded evidence does not go to the truth finding process.

Although the Supreme Court, in United States v. Ross,°°° overruled Robbins v. California°° after only one year,°°° the administration was concerned that the cases reflected an unrealistic attitude that the exclusionary rule would motivate even conscientious law enforcement officials to flawlessly apply law which the courts still debated. The significance of this concern is reflected in the fact that in the current Supreme Court term

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6 See supra note 42.
°°° 456 U.S. at 826.
that started in October of 1982, 8 of 23 criminal cases in which petitions for certiorari have been granted involve the fourth amendment and the exclusionary rule.\textsuperscript{64}

Without exception, since 1956 the Court has stated emphatically that deterrence is the only rationale for the exclusionary rule. In \textit{Stone v. Powell}\textsuperscript{65} the Court described the exclusionary rule as "a judicially created means of effectuating the rights secured by the Fourth Amendment"\textsuperscript{66} and the Court added "post-\textit{Mapp} decisions have established that the rule is not a personal constitutional right".\textsuperscript{67}

The exclusionary rule bills fall into three basic categories. The first category, the good faith bills, is best represented by Senator Thurmond's Bill, S. 2231.\textsuperscript{68} The bill states that any search or seizure evidence shall be admissible in a federal court "if the search or seizure was undertaken in a reasonable, good faith belief that it was in conformity with the Fourth Amendment to the Constitution of the United States."\textsuperscript{69} The purpose of S. 2231 is to eliminate the application of the exclusionary rule where the deterrent purpose is not served because the evidence was obtained either pursuant to a search warrant or a seizure undertaken by officers in the reasonable and good faith belief that their actions were lawful. This proposal is very similar to the one adopted by the Fifth Circuit in Part II of \textit{United States v. Williams}.\textsuperscript{70} In \textit{Williams} the Fifth Circuit declared:

Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in

\textsuperscript{64} Constitutional Alternatives to the Exclusionary Rule, September 23, 1982 (unpublished speech).
\textsuperscript{65} 428 U.S. 465 (1976).
\textsuperscript{66} Id. at 482.
\textsuperscript{67} Id. at 486.
\textsuperscript{69} Id.
\textsuperscript{70} 622 F.2d 830 (5th Cir. 1980)(en banc).
a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence.\(^7\)

The second category, the "substantiality test" bills, are best represented by S. 101\(^7\) which prohibits the exclusion of evidence "solely because that evidence was obtained in violation of the fourth amendment unless the court finds as a matter of law" an intentional or substantial violation of the Constitution.\(^7\) S. 101 traces its roots to the American Law Institute Model Code of Pre-arraignment Procedure of 1975.

The final category of bills is best characterized by S. 751\(^4\) which totally eliminates the exclusionary rule and provides that evidence "shall not be excluded on the grounds that such evidence was obtained in violation of the Fourth Amendment."\(^7\) This bill also contains provisions allowing actions for actual and punitive damages by the victim against the offending officers.\(^7\) All of the exclusionary rule discussion has been the subject of Judge Wilkey's extensive writings.\(^7\)

**FINALIZING FINALITY**

Having described in detail the nature of the problem and its consequences and some of the congressional efforts to deal with it, the question remains: What should be done? The answer for me is relatively simple: I can expound, as indeed I have, and intimate at least some tentative conclusions, which I am sure I have, but these do not decide the questions. This

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\(^7\) Id. at 846-47.
\(^7\) Id.
\(^7\) Id.
is the rule placed on me as a United States Circuit Judge. Also, fretting, as most of us occasionally do, over some recent pronouncement of a new principle or an extension of an old principle, I must under my oath, faithfully carry out every decision of my superiors, the United States Supreme Court. Nonetheless, circumscribed as I am by these constraints which go with the office, I still have over a quarter of a century's experience as a judge and hope that somehow it has given me some wisdom which, within the first amendment, if not article III, I can freely express.

Several of my beliefs are significant. The first is that I believe firmly that this whole problem is one calling for early, earnest, deliberate consideration and action by the Congress. Fortunately, there seems to be a recognition by large numbers of congressmen that it is time for them to speak and act. Without a doubt, I think it clear that Congress has the power to act. Indeed, the 1867 amendments created our 1982 problems. Congress regularly, without opposition, and with no subsequent judicial question, prescribes not only the underlying substantive right, but the time and manner of the enforcement of the right. What Congress may not do is to lay down standards which in application offend some constitutional right or guarantee. In 1948 and especially in 1966, Congress undertook to do this in the very problem of federal habeas review of state convictions.

While indeed it was long in coming, one need not speculate on the decisive consequences of the 1966 congressional action. In *Sumner v. Mata,* the Supreme Court decisively gave effect to the presumption of correctness of the State court's findings. The court dealt primarily with section 2254(d). The correctness of the decision of the Ninth Circuit was tested entirely in the light of the statute, not by underlying and overpowering constitutional principles. Concluding that section 2254(d) applies to factual determinations made by state courts, whether trial or appellate, the Supreme Court stated:

77 Id. at 552.
78 Id. at 543-44.
“[t]his interest in federalism recognized by Congress in enacting section 2254(d) requires deference by federal courts to factual determinations of all state courts.”81 The Court continued by reasoning that “the Court of Appeals reached a conclusion which was in conflict with the conclusion reached by every other state and federal judge after reviewing the exact same record. Reading the court’s opinion in conjunction with section 2254(d), it is clear that the court could not have even implicitly relied on paragraph 1 through 7 of section 2254(d) in reaching its decision.”82

The Court made clear that in the 1966 amendments Congress specified that, in the absence of enumerated exceptions, the burden would rest upon the petitioner to establish by convincing evidence that the state court factual determination was erroneous.83 The Court recognized that Congress, not the Court, meant to insure that a state finding would not be overturned in such a situation and that “in order to insure that this mandate of Congress is enforced”84 the Court prescribed specific but rather unusual conditions for district court fact findings under section 2254(d).85

I am equally convinced that there is no basis for the objection asserted by some that Congress should not act for fear that in acting it might do more harm than good. Using the broad, general language typical of the 1966 amendments and now included as proposed amendments in S. 221686, a case might arise in which the constitutional claim is not within the statute but which for exceptional reasons should be recognized. If that should occur, there is no doubt that the federal courts and the Supreme Court will have the power to determine that within such a case application of the detailed restrictions of S. 2216 are unconstitutional. The needed reform statute should not be condemned as a whole simply because, in a particularized situation, it could not be squared with the

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81 Id. at 547.
82 Id. at 548-49.
83 Id. at 551.
84 Id.
85 Id. at 539.
constitution. Ample basis would exist for severability.

Legislation is also needed and quite appropriate to further define terms including those used by the United States Supreme Court. Thus, in Wainwright v. Sykes, the Court, declining to define "cause" and "prejudice," held in effect that one having failed to comply with a state contemporaneous objection rule had no right to federal habeas relief unless he showed cause and prejudice. In the few years intervening, these two relatively simple terms have given rise to scores of cases, some of which reach surprising results. The effect of many of these cases is to do away with, in actuality, the principle of Wainright v. Sykes.

The proposed statute requires that there be "actual prejudice" and that the failure to raise the claim properly, was "the result of state action in violation of the constitution . . . ." State action is assumed to embrace ineffectiveness of counsel under the Sixth Amendment. Broad as the words are, we nevertheless will still give some latitude to federal district courts, leaving initially for their interpretation the congressional Act.

Although the time period of the statute of limitations provision is obviously a policy question for Congress, it is certainly within my judicial province to urge that some limitation, specific in nature, is needed. Although the continued incarceration of a person 20 years after an affirmed conviction, because of a constitutional error announced in the 19th year and previously both unknown and unpredictable, causes some uneasiness, one must again regard the public good which calls mini-

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Id. at 90-91.


Id.

Hearings on Exclusionary Rule, supra note 77.
mally for confidence by the people in the system of criminal justice. More often than not in such situations the reversal by habeas corpus does not either spell or intend the dismissal of the charges. But in fact it may amount to that because of the passage of time, the dimming of memory of witnesses, their disappearance, or often death. There are differences in the various bills, some providing that the limitation period begin when all state remedies are exhausted, others after the final judgment of the state court. The likely beginning time will be the date when all state remedies are exhausted, certainly now a well-known event.

With respect to the exclusionary rule, I am not under the same sort of wraps. After all, the Fifth Circuit has spoken in part II of Williams. Our court now believes in and follows the good faith exception. But, however contrived or statutorily phrased, faithful adherence to the declarations of the Supreme Court permits the operation of the exclusionary rule only in those cases in which deterrence of the officer is a factor. Wherever and whenever deterrence is not a factor the loss of highly probative, sometimes decisive, evidence is too high a price to pay for the actions of the officer even though years later they are held to be unconstitutional. Congress should take the Court at its word, recognizing that the exclusionary rule is not of constitutional origin or stature and is subject to legislative adjustment just as all other federal rules of evidence are.

Is there an end in sight in the captain's spyglass? Well, the end may not be in sight but clearly visible is the dome of the United States capital and the likelihood that the Congress, within the confines of the Constitution, will bring its judgment, wisdom and experience to bear on this awful problem of a lack of finality and spare the public the anguish of waiting forever and ever for the final day of judgment.

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** 622 F.2d 830 (5th Cir. 1980).
*** 622 F.2d 830 (5th Cir. 1980).
" Id."


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The quest for finality, for scholars, for lawyers, for judges and for all is worth the struggle.
Comments, Casenotes
and
Statute Notes