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Shutting the Federal Habeas Corpus Door

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nation and state. The balancing test has hitherto involved the Court in making fine decisions of economic policy, and the Court's activism in rooting out discrimination has left the states few economic tools to effect economic and social policy. In *Hughes,* the Court may be indicating that it will allow the state a wide range of discretion in the use of certain limited policy tools. Positive incentives, such as bounties and subsidies, might be attractive to the Court since there are built in political limits on the use of subsidies. After all, bounty-subsidy money comes out of the state budget and must compete with other interests. Thus, subsidy programs must contend with countervailing forces which do not confront discriminatory regulations or taxes. In addition, positive incentives may be felt to be particularly suited to pursuing goals of social policy as they are often seen as being less coercive, and hence less likely to arouse political opposition.

By labeling the Maryland statutory scheme an exercise of its proprietary powers and by holding such an exercise beyond the intended scope of the commerce clause, the Court precluded use of the balancing test developed under the commerce clause cases. While it is commendable that the Court may wish to return some measure of policy discretion to the states, it seems unfortunate that the Court abandoned the option to review the economic impact of policies such as Maryland's. Such policies can be disruptive of trade and can lead to competitive retaliation. It would seem that the "balancing test" developed under the commerce clause cases could also be effective in reviewing state attempts to further public welfare through exercise of state proprietary powers. The test was designed to give important state interests their appropriate weight. The Court should not have abandoned the test in *Hughes.*

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In a recent decision the Supreme Court has halted the prior trend of increasing the scope of federal review available to state prisoners. The case broke with a substantial history of decisions by denying habeas corpus to state prisoners who asserted fourth amendment violations. The author suggests that the rationale of

the holding implies that there will be further limitations placed upon federal review of state decisions which contain issues of federally created rights.

State prisoners filed petitions for writs of federal habeas corpus under 28 U.S.C. § 2254,[1] alleging that unconstitutionally obtained evidence had been admitted against them at trial in violation of their fourth amendment rights.[2] Respondent Powell was found guilty of second degree murder in a California state court; respondent Rice was found guilty of first degree murder in a Nebraska state court. In each case the state trial and appellate courts denied that there were illegal searches and seizures and refused to apply the exclusionary rule to the seized evidence. Powell sought habeas corpus relief from the United States District Court for the Northern District of California, alleging that the vagrancy ordinance under which he was arrested and searched was unconstitutionally vague.[3] The district court denied habeas corpus but was reversed by the United States Court of Appeals for the Ninth Circuit on the ground that the arrest was invalid and admission of the illegal evidence was not harmless error.[4] Rice sought habeas corpus relief from the

1. For purposes of this article, the term "habeas corpus" (except for the historical perspective) refers to the federal statutory writ of habeas corpus, 28 U.S.C. §§ 2241-55 (1970). Writs of habeas corpus may be granted by the Supreme Court, any Justice thereof, the district courts and any circuit judge within their respective jurisdictions. *Id.* § 2241(a). The prisoner must be in custody in violation of the Constitution or laws of the United States under color of authority in a state or federal jurisdiction. *Id.* § 2241(c). If a state prisoner petitions for relief, he must be in custody in violation of the Constitution or a law or treaty of the United States and have exhausted his state remedies without finding relief. *Id.* §2254 (a), (b).

Habeas corpus in the historical perspective refers to the common-law writ of *habeas corpus ad subjiciendum*, known as the "Great Writ." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.).

2. The fourth amendment assures that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV.

3. Powell was arrested for violation of a Henderson, Nevada vagrancy ordinance which provides:

> Every person is a vagrant who: (1) Loiters or wanders upon the streets or from place to place without apparent reason or business and (2) who refuses to identify himself and to account for his presence when asked by any police officer to do so (3) if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

96 S. Ct. at 3039 n.1.

The search incident to Powell's arrest produced a gun which was used to convict him of second degree murder. *Id.* at 3040.

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

United States District Court for Nebraska, alleging that the warrant which authorized the search of his home was issued without probable cause.[5] The district court granted Rice relief and was affirmed by the United States Court of Appeals for the Eighth Circuit.[6] On certiorari, the United States Supreme Court *held,* reversed: When the state has provided an opportunity for a full and fair hearing of a fourth amendment claim, a state prisoner will not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. *Stone v. Powell,* 96 S. Ct. 3037 (1976).

The main purpose of a prisoner's petition for a writ of habeas corpus is to gain immediate relief from illegal confinement. The petition tests whether the prisoner has been deprived of his liberty without due process.[7] Federal habeas relief is available to a state prisoner only when the prisoner alleges he is being restrained in violation of the Constitution or some law or treaty of the United States.[8] The right to petition for habeas corpus is one of the few personal rights specifically enumerated in the Constitution.[9] The writ's function as guardian of individual liberty has made it the vehicle to the Supreme Court for many criminal justice problems and today makes it the subject of a raging judicial battle.

The history of habeas corpus has followed the ebb and flow of power between the federal government and the states.[10] Colonial Americans viewed habeas corpus as the fundamental common law right to inquire into the legality of detention; that is, whether confinement was imposed without proper legal process or by courts lacking jurisdiction.[11] The Judiciary Act of 1789 codified the com-

5. The search warrant was held invalid because the supporting affidavit did not meet the *Aguilar-Spinelli* test. 96 S. Ct. at 3041. *See* Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). Police found, in plain view, evidence used to convict Rice of first degree murder.

6. Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975), *aff'g* 388 F. Supp. 185 (D. Neb. 1974).

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

8. 28 U.S.C. § 2254(a) (1970).

9. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion, the Public Safety may require it." U.S. CONST. art. I, § 9 cl. 2. For a discussion of the constitutional history of habeas corpus, see Chafee, *The Most Important Human Right in the Constitution,* 32 B.U.L. REV. 143 (1952); Paschal, *The Constitution and Habeas Corpus,* 1970 DUKE L.J. 605, 607-17.

10. *See* Miller & Shepherd, *New Looks at an Ancient Writ: Habeas Corpus Reexamined,* 9 U. RICH. L. REV. 49 (1974).

11. *Id.* at 52.

mon law writ.[12]

After the Civil War the Court began to expand the writ's scope—partly because of deficiencies in the Court's power to review federal convictions. By 1867, Congress had vested federal courts with jurisdiction to entertain state prisoners' petitions for writs of habeas corpus.[13] As due process concepts evolved over the next three generations, so did the scope of constitutional rights. Federal court review centered on two theories. First, federal collateral review was necessary to assure that constitutional issues were correctly decided by state courts, unprejudiced by the question of guilt or innocence. Second, federal judges were best suited to decide constitutional issues because of their expertise and because they were removed from public pressure.[14]

The propriety of federal court review for state prisoners was decided in the 1953 case of *Brown v. Allen.*[15] The Supreme Court held that federal courts have authority to review claims of denial of federal rights already litigated by the state forum where federal constitutional issues are presented, and that this could be done without initial resort to the adequacy of state process. Furthermore, the federal judge could hold an evidentiary hearing and make new findings of fact. The Court's rationale was that it had a duty to protect federal constitutional rights.[16]

In 1963, the Warren Court decided three cases which greatly expanded the availability of habeas corpus relief for state prisoners. In *Fay v. Noia*[17] and *Townsend v. Sain*[18] the Court formulated the rule that "habeas corpus may be invoked by a state prisoner, after

12. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201-02 (1830). This Act extended only to prisoners held in custody by the United States.

13. Act of Feb. 5, 1867, ch. 28, § 14, 14 Stat. 385 (current version at 28 U.S.C. § 2241(c)(3) (1970)). This Act was limited to state criminal proceedings in which cognizable issues of common law habeas corpus existed. *See* Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian,* 33 U. CHI. L. REV. 31 (1965).

14. *See* Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood,* 6 CUM. L. REV. 363 (1975).

15. 344 U.S. 443 (1953).

16. *Id.* at 474. *Brown* had a delayed reaction because its companion case, Daniels v. Allen, 344 U.S. 443 (1953), held that the prisoner had waived his constitutional claims by failing to assert them in accordance with state law (he had not perfected his appeal) and his custody was, therefore, not "in violation of the Constitution." *Id.* at 485.

17. 372 U.S. 391 (1963).

18. 372 U.S. 293 (1963).

the exhaustion of available state remedies, to review alleged violations of federal constitutional claims in state criminal proceedings, regardless of any prior state court determinations of those rights."[19] *Townsend* compelled federal district courts to hold full evidentiary hearings if any of the several conditions were present, including the lack of a full and fair state hearing.[20] The third case, *Sanders v. United States*,[21] established that the traditional notion of finality in criminal cases would not prevent reapplication for federal habeas corpus relief. Together these cases established that a prisoner bringing a federal habeas corpus petition was entitled to multiple, independent, federal determination of his constitutional claims on both procedural and substantive grounds.

The development of federal rights and their protection continued in 1969, when *Kaufman v. United States*[22] held that fourth amendment claims could be raised by federal prisoners seeking relief under 28 U.S.C. § 2255.[23] The Court reasoned that the scope of habeas corpus since 1867 had included all constitutional claims and that the purpose of section 2255 had not been to cut back the scope of review for federal prisoners, but rather, it was intended to minimize difficulties in obtaining a forum. The Court found no significant difference between the rights of federal and state prisoners to

19. Miller & Shepherd, *supra* note 10, at 59; *see* Townsend v. Sain, 372 U.S. 293, 312 (1963).

20. *Townsend* held that a

> federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.
>
> (1) There cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant.

372 U.S. at 313. For the codification of this rule, see 28 U.S.C. § 2254 (1970).

21. 373 U.S. 1 (1963). *Sanders* allowed a rehearing to be held unless the prior federal proceeding met three criteria: (1) issues presented were identical; (2) the decision was made on the merits at an evidentiary hearing; and (3) justice would not be served by reviewing the merits of the subsequent application. *Id.* at 15-17.

22. 394 U.S. 217 (1969).

23. 28 U.S.C. § 2255 (1970) authorizes federal prisoners to use a simplified procedure for obtaining relief from illegal detention.

assert fourth amendment violations on collateral attack. This rapid expansion of federal due process and equal protection rights under the Warren Court stimulated strong political reaction. Critics contended that there was a flood of petitions clogging federal courts, that the finality of criminal judgments was disturbed, and that friction was created between federal and state courts.[24]

The Burger Court has moved to check this expansion, and the net effect has been to limit state prisoner's accessability to federal habeas corpus relief.[25] In *Schneckloth v. Bustamonte*[26] the majority disposed of the fourth amendment claim on the merits. Mr. Justice Powell, concurring, suggested a substantial judicial restructuring of federal habeas corpus relief. He argued that since claims of unconstitutional searches do not concern the reliability of the questioned evidence, and the deterrent function of the exclusionary rule is not served by permitting collateral attack, such claims should not be allowed habeas review. Absent a colorable claim of innocence, the sole question in fourth amendment habeas cases should be "whether the petitioner was provided a fair opportunity to raise and have adjudicated the question [his constitutional claim] in state courts."[27] Mr. Justice Powell argued that the habeas corpus statute should be reinterpreted by balancing the interest in insuring that justice is done through habeas relief against the costs of having that forum available.

Schneckloth left open the question of whether federal courts would continue to entertain habeas corpus petitions raising fourth amendment claims. *Stone v. Powell* answers that question in the negative. Fourth amendment violations can no longer be asserted on collateral attack unless the state failed to give a full and fair hearing. The Court in *Stone* divides its argument between its view of the history and purpose of habeas corpus and the history and purpose of the exclusionary rule.[28] The 6-3 decision delivered by Mr.

24. Carroll, *supra* note 14, at 372; Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Santarelli, *Too Much Is Enough*, 9 TRIAL, May/June 1973, at 40.

25. Miller & Shepherd, *supra* note 10, at 70.

26. 412 U.S. 218 (1973).

27. *Id.* at 250 (Powell, J., Burger, C.J., and Rehnquist, J., concurring). *See* Friendly, *supra* note 24.

28. The history of the exclusionary rule and its relationship to the fourth amendment are of importance to *Stone's* decision but are not the subject of this article. For discussions

Justice Powell demonstrates strong hostility toward both protections.[29]

Stone v. Powell asserts that habeas was historically limited to inquiries into the jurisdiction of a court to confine a prisoner.[30] The Court acknowledges both the expansion of the scope of habeas corpus[31] and the current jurisdiction of district courts to hear fourth amendment petitions,[32] but holds that the discretion to do so is restricted to procedural inquiries.[33] It finds authority for this discretionary restriction in the equitable nature of habeas corpus as recognized in *Frank v. Mangum*[34] and *Fay v. Noia*.[35]

The Court reasons that during the expansion of the substantive scope of the writ, the Supreme Court failed to exercise its discretion to limit full review for particular categories of constitutional claims. However, the Court acknowledges that prior to *Kaufman v. United States*,[36] a substantial majority of the federal courts[37] did make exceptions to full review and found collateral review of fourth amend-

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of the exclusionary rule's history, purpose, and effectiveness, see Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI L. REV. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Wright, *Must the Criminal Go Free If the Constable Blunders*, 50 TEX. L. REV. 736 (1972); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740 (1974).

29. Mr. Justice Powell was joined by Justices Stewart, Blackmun, Rehnquist and Stevens. Mr. Chief Justice Burger filed a concurring opinion. Mr. Justice Brennan filed a dissenting opinion in which Mr. Justice Marshall joined. Mr. Justice White filed a dissenting opinion. Three other opinions filed the same day as *Stone* limited the efficacy of the exclusionary rule. *See* United States v. Janis, 96 S. Ct. 3021 (1976) (noted in 31 U. Miami L. Rev.—(1977)); United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976); South Dakota v. Opperman, 96 S. Ct. 3092 (1976).

30. 96 S. Ct. at 3042.

31. *Id.* at 3042-44.

32. *Id.* at 3045.

33. *Id.* at 3052.

34. 237 U.S. 309 (1915). *Frank* recognized federal habeas relief if the state had failed to provide a full and fair litigation, regardless of the propriety of the state's jurisdiction.

35. 372 U.S. 391 (1963). *Fay* compelled federal courts to consider the merits of almost all federal constitutional claims. It also recognized the equitable nature of habeas relief if the petitioner had deliberately bypassed orderly state procedures on direct review. The holdings in *Fay* and *Frank* expanded the scope of habeas relief. This appears in direct conflict with the Court's current use of them as authority for restriction.

36. 394 U.S. 217, 225 (1969); *see* note 22 *supra* and accompanying text.

37. *See* the cases cited by the Court, 96 S. Ct. at 3044.

ment violations inappropriate under section 2255. The rationale was that fourth amendment claims are "different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable . . . .'"[38] While the Court rejected this rationale in *Kaufman*, the *Stone v. Powell* Court finds it persuasive.

The thrust of the Court's argument regarding the purpose of habeas corpus is that in order to invoke collateral relief, a convicted defendant should assert a constitutional claim bearing on innocence.[39] *Kaufman* is reexamined and effectively overruled. *Mapp v. Ohio*[40] is interpreted as requiring exclusion of unconstitutionally gathered evidence at trial and reversal of conviction upon direct review of such evidence is admitted.

The Court draws a dividing line between direct review and discretionary collateral review.[41] It concludes that 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.[42] The Court is able to reach this conclusion by limiting the rationale for *Mapp's* exclusionary rule to deterrence of police misconduct.[43] The history of the exclusionary rule is interpreted as that of "a judicially created means of effectuating the rights secured by the Fourth Amendment."[44] *Silverthorne Lumber Co. v. United States*[45] which is considered the origin of the "fruit of the poisonous tree" doctrine, is only discussed parenthetically. The Court undermines judicial

38. 96 S. Ct. at 3044, *citing* Kaufman v. United States, 394 U.S. 217, 224 (1969).

39. 96 S. Ct. at 3044 & n.11.

40. 367 U.S. 643 (1961). In *Mapp* the Supreme Court held that the exclusionary rule is an essential part of the right to be free from unreasonable searches and seizures guaranteed by the fourth and fourteenth amendments. "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Id.* at 655.

41. 96 S. Ct. at 3051.

42. *Id.* at 3046, 3048.

43. *Id.* at 3047.

44. *Id.* at 3046.

45. 251 U.S. 385 (1920). In *Silverthorne* the Supreme Court held that information obtained from an illegal search cannot be used as the basis for a subpoena of documents. Justice Holmes wrote: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.* at 392.

integrity[46] as a basis for the rule, and finds that the concern for judicial integrity "has limited force as a justification for the exclusion of highly probative evidence."[47] Post-*Mapp* cases are cited which hold that the exclusionary rule is not a constitutional right.[48] *Stone* emphasizes that the purpose of the exclusionary rule is to deter police misconduct. As a deterrent, the Court reasons, it is a remedial device and should be restricted to those areas where its remedial objectives are best served.

The Court relies heavily on the rationale of *United States v. Calandra.*[49] In *Calandra,* the Court decided that a grand jury witness may not refuse to testify because the questions asked are based on information obtained from him in an unlawful search. The Court balanced the potential injury to the historic role and function of the grand jury against the potential contribution to the effectuation of the fourth amendment through deterrence of police misconduct. In applying this balancing approach to collateral review of fourth amendment claims, the *Stone* Court gives weight to the costs of application including diversion from the ultimate question of guilt or innocence, the exclusion at trial of reliable evidence, the freeing of guilty parties, and the resulting disrespect for the law.[51]

Stone v. Powell adheres to the utility of the exclusionary rule on direct appeal as in *Mapp v. Ohio,*[52] but the Court decides that police misconduct is not effectively deterred by determining fourth amendment issues on collateral review. The rationale that the exclusionary rule is a judicial device for deterring constitutional violations, as opposed to a constitutional ingredient of the fourth amendment, is fundamental to the decision.

In a strong dissent, Mr. Justice Brennan argues that the significance of *Stone* is the closing of a federal forum for vindicating federally guaranteed rights.[53] The rationale that relief should be denied

46. For a discussion of judicial integrity, *see* Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. REV. 1129 (1973).

47. 96 S. Ct. at 3047. Two Justices would limit the scope of the exclusionary rule to bad faith conduct. *Id.* at 3055 (Burger, C.J., concurring); *id.* at 3072 (White, J., dissenting).

48. *See* the cases cited by the Court, *id.* at 3048.

49. 414 U.S. 338 (1974). For a discussion of *Calandra* and the exclusionary rule, see Adelson, *Criminal Procedure,* 1974 ANN. SURVEY OF AM. L. 153.

50. 96 S. Ct. at 3049-52.

51. *Id.* at 3049-51.

52. 367 U.S. 643 (1961).

53. 96 S. Ct. at 3056.

for constitutional violations other than those which are "guilt-related" could well be extended. An expansion of the *Stone* rationale might include restrictions on claims of double jeopardy, entrapment, self-incrimination, *Miranda*[54] warnings, and use of invalid identification procedures.[55]

No guidelines are given for the determination of what a full and fair hearing might mean.[56] In the instant case, Powell was arrested pursuant to an allegedly unconstitutionally vague city ordinance. The record does not explain why the trial judge rejected this allegation, and the state appellate court failed to address this issue. Thus Powell's hearing was deficient under the statutory standards[57] for lack of a full and fair hearing. In Rice's case, the state upheld a supporting affidavit for an arrest warrant that both federal courts found deficient under prevailing constitutional standards.[58]

In *Stone v. Powell* the Burger Court has limited the constitutional safeguards previously guaranteed criminal defendants. The rationale portends further restrictions on habeas corpus jurisdiction and decreasing federal review of state criminal proceedings. While the majority exhibits its growing trust in the ability of state courts to apply federal constitutional principles, it also implicitly encourages strong criminal prosecution. The time of concern for due process in criminal cases has passed, and the time of crime control appears at hand.

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54. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
55. 96 S. Ct. at 3062-63.
56. *See* notes 18-20 *supra* and accompanying text.
57. 28 U.S.C. § 2254 (1970); *see* notes 18-20 *supra* and accompanying text.
58. 96 S. Ct. at 3041-42.