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Review of The Law and Process of Post-Conviction Remedies by Ira P. Robbins

Larry Yackle

BOOK REVIEW

The Law and Processes of Post-Conviction Remedies. By Ira P. Robbins.[1] St. Paul, Minnesota: West Publishing Co. 1982. Pp. xvii, 506.

Reviewed by Larry W. Yackle[2]

There are days when the availability of the federal writ of habeas corpus as a vehicle for challenging criminal convictions collaterally seems assured. The arrival of Professor Robbins' new casebook is itself strong, affirmative evidence. At last a major publishing house has acknowledged that the great body of habeas corpus statutes, rules, and precedents warrants a full-length, hard-bound casebook for classroom use. Implicitly, surely, the publisher assumes that the post-conviction writ is here to stay, that it forms a stable and legitimate part of our jurisprudence.[3] At the same time, some members of the Court, particularly Chief Justice Burger and Justice Rehnquist, have launched a multi-faceted assault on the availability of federal collateral review.

The Chief Justice focuses upon the reliability and finality of state court judgments of factual guilt. Once a state judge or jury has reached a conviction judgment, he is loath then to upset that judgment, effectively, by identifying legal error in collateral proceedings in the federal forum. On the one hand, he makes a fundamental value judgment, preferring the ascertainment of factual guilt to the protection of constitutional safeguards that may, or may not, enhance the state courts' pursuit of accurate results. He questions whether federal habeas is not, after all, an "endless quest for technical errors unrelated to guilt or innocence."[4] On the other hand, he finds that the delay associated with post-conviction review poses an intolerable challenge to the finality of state criminal judgments. Legal error may not be discovered until years after the state court trial. By then, the case is cold. Memories fade, witnesses and evidence are lost, and the possibility of convicting the petitioner in a new trial is undercut accordingly. In this regard, the Chief Justice argues that the applicable rules should be amended to permit summary dismissal of petitions raising stale claims "when delay has prejudiced the State's ability to retry the

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1. Professor of Law, American University, Washington College of Law.

2. Professor of Law, University of Alabama.

3. I have tried to describe the system of federal post-conviction review in an annually supplemented manual on the subject. L. YACKLE, POST-CONVICTION REMEDIES (1981).

4. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A. J. 290, 292 (1981).

petitioner."[5] These views are hardly innovative. They have been sounded before in various quarters, and they have been roundly rejected by the judiciary of a society that treasures respect for constitutional safeguards guaranteeing fair treatment even to the guilty and that resists the notion that it is ever "too late" to worry about the violation of constitutional rights.[6]

Anticipating, perhaps, that attempts to abrogate post-conviction habeas or to narrow its scope forthrightly are unlikely to succeed, Justice Rehnquist has taken a different tack. At virtually every opportunity, he has seized upon the most technical bases for denying post-conviction review in the federal forum. It seems plain that if he could manage the necessary majority from among his colleagues, he, too, would forestall the routine pursuit of federal habeas relief as a sequel to state criminal trial and direct review. His resort to rigid technical barriers presents an alternative, procedural route to that substantive end. Justice Rehnquist's progress along that path bears watching for it is his approach, not Chief Justice Burger's, that poses the more serious threat to the maintenance of post-conviction habeas. He would eschew any frontal assault and, instead, attack at the flank, throwing up procedural barriers wherever possible. Professor Robbins' book, good as it is, may have a slim market even now.[7] If Justice Rehnquist has his way, there may be no market at all.[8]

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5. Spalding v. Aiken, 103 S. Ct. 1795, 1796 (1983) (statement concerning the denial of certiorari).

6. The Nixon Administration proposed legislation that would have limited the scope of federal habeas to claims related to factual guilt, but Congress failed to act on the bill. S. 567, 93rd Cong., 1st Sess. (1973). The Nixon bill was discussed and criticized in Meyer & Yackle, *Collateral Challenges to Criminal Convictions*, 21 U. KAN. L. REV. 259, 270 n.37 (1973). The Court's decisions in the wake of Stone v. Powell, 428 U.S. 465 (1976), have steered wide of any suggestion that habeas should be confined to "guilt-related" claims. *See infra* notes 62-67 and accompanying text. Regarding finality, the rules the Chief Justice would amend were themselves proposed by the Court and adopted by Congress as recently as 1976. Rule 9(a) of the § 2254 rules, effective since 1977, permits summary dismissal for unreasonable delay only when the respondent is prejudiced in responding to the applicant's habeas allegations. On the general question of tardy claims, the Court said in United States v. Smith, 331 U.S. 469, 475 (1947), that habeas is available "without limit of time," and more recently in Jackson v. Virginia, 443 U.S. 307, 323 (1979), that the habeas courts' duty to entertain federal claims reflects "the belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right. . . ."

7. Few American law schools now offer courses concerned primarily with federal habeas corpus. Existing courses are usually tied to clinical programs in which students assist prison inmates under the supervision of faculty. *See* Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363 (1974). Professor Robbins developed his course materials when he was Director of the Kansas Defender Project, the oldest prisoner assistance clinic in the country. *See* Wilson, *Legal Assistance Project at Leavenworth*, 24 LEGAL AID BRIEFCASE 254 (1966). *Cf.* Johnson v. Avery, 393 U.S. 483, 495-96 (1969) (Douglas, J., concurring) (mentioning the Kansas program).

8. State post-conviction remedies *might* survive the demise of federal habeas corpus, but the operation of an individual state's procedures would be unlikely to demand a law school course. At all events, this particular book, concerned almost entirely with federal post-conviction habeas, would hardly be suitable.

Even the casual observer knows that post-conviction habeas has always been a controversial subject. The debate regarding its desirability has long raged and rages still in any available forum.[9] At present, however, there is a difference. Just as teaching materials have become available for ordinary law school courses, Justice Rehnquist seems prepared to dismantle the system of federal post-conviction review that forms the core of those materials and, indeed, the structure of American criminal justice. The question on the floor is whether Justice Rehnquist can persuade the other Justices to ally themselves with him. The answer to that question, if there is one, lies in an appraisal of post-conviction habeas as it has evolved in this century and an exploration of the Supreme Court's record in the field in the last decade.

On close examination, the available evidence suggests that Justice Rehnquist will fail in the task he has apparently set for himself. The other Justices are more willing to condemn post-conviction habeas in their rhetoric than to alter the system of collateral review in any substantive way. Their tendency is to nip at the beast, to worry it, but rarely to seek lethal holds. Several Justices have complained in print that post-conviction habeas is costly, that it antagonizes the state courts and frustrates the finality of their judgments. Yet when the full Court has addressed the system of post-conviction review, little genuine damage has been done. The post-conviction writ is alive and well and likely to stay that way. Accordingly, I come away convinced that Professor Robbins' book treats materials of enormous, current significance.

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9. The post-conviction writ is currently threatened from another direction. The Reagan Administration has proposed extensive amendments to the habeas statutes which would dramatically restructure the present system of federal collateral review. The Administration's Habeas Corpus Reform Act was first presented to Congress in a communication from the Attorney General on March 3, 1982. The package was introduced in the Senate by way of S. 2216, 97th Cong., 2d Sess. (1982) and in the House by way of H.R. 6050, 97th Cong., 2d Sess. (1982). Hearings were held in the Senate on April 1, 1982. *See The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982). Essentially the same program was introduced on several later occasions—until all pending bills died when Congress concluded. More recently, the Administration's proposals have been introduced in the 98th Congress as part of the Comprehensive Crime Control Act of 1983. S. 829, 98th Cong., 1st Sess. (1983). The Judiciary Committee has approved the habeas proposals and reported them to the full Senate as S. 1763. *See* S. REP. No. 226, 98th Cong., 1st Sess. (1983). The same legislative package has also been submitted in other bills. *See* S. 217, 98th Cong., 1st Sess., 129 CONG. REC. S401 (daily ed. Jan. 27, 1983); H.R. 50, 98th Cong., 1st Sess., 129 CONG. REC. H41 (daily ed. Jan. 3, 1983). I have voiced my appraisal of the Reagan program elsewhere. Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983). *See also* Sallet & Goodman, *Closing the Door to Federal Habeas Corpus: A Comment on Legislative Proposals to Restrict Access in State Procedural Default Cases*, 20 AM. CRIM. L. REV. 465 (1983).

Presumably, Professor Robbins will treat the Administration's proposals in a supplement. At the same time, he should enlarge his present offerings to take account of important new decisions. Rose v. Lundy, 455 U.S. 509 (1982) (adopting the "total" exhaustion rule in habeas); Engle v. Isaac, 456 U.S. 107 (1982) (applying the Court's present analysis for abortive state proceedings); United States v. Frady, 456 U.S. 152 (1982) (extending that analysis to cases in which federal prisoners raise claims that might have been but were not presented at trial in federal court and rejecting the application of the federal "plain error" rule in federal post-

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The criminal justice system in the United States today contemplates post-conviction review in federal habeas corpus as a key enforcement device for constitutional standards implicated in state criminal prosecutions. The cases and materials admirably selected and arranged in Professor Robbins' book tell the story of how that came to be. The federal courts were not given authority to entertain challenges to invalid state custody until 1867.[10] Even then it was unclear whether the federal writ would be available after trial, rather than before, and, certainly, whether the habeas jurisdiction would permit the lower federal courts to superintend the criminal justice system generally.[11] Those propositions were established later and as a result of judicial, not legislative, innovation.[12]

Although Justice Black resurrected the "incorporation" theory to serve as the theoretical basis for the Warren Court's substantive interpretations of the fourteenth amendment as it applies in state criminal cases,[13] it was Justice Frankfurter who, in *Brown v. Allen*,[14] constructed the procedural mechanism through which the Court's decisions could be implemented.[15] Even as he resisted wholesale intrusions by the federal courts into the ordinary enforcement of state criminal law, Justice Frankfurter recognized that acceptance of new federal

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conviction proceedings). Indeed, it appears that in 1982 a casebook on post-conviction remedies was both overdue (in light of the great body of materials already in existence) and premature (in light of the pendency of so many important cases). And this in addition to the Administration's interest in legislative action.

10. Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385. Prior to the Civil War, under authority established by the Judiciary Act of 1789, the federal courts were limited to examining challenges to invalid *federal* custody. 1 Stat. 81-82. I lay aside in this review the persuasive, but controversial, contention that the suspension clause provides a *constitutional* basis for issuing the writ. *Compare* Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605 *with* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?* 40 CALIF. L. REV. 335 (1952).

11. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

12. The literature on these developments, in addition to Professor Bator's work, is excellent and voluminous. *See* Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970). Of course, as might be expected, observers differ on even basic issues. Professor Peller, for example, has mounted a powerful attack on the Bator thesis, *supra* note 11, that post-conviction habeas was essentially inaugurated in Brown v. Allen, 344 U.S. 443 (1953). Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C. R.—C. L. L. REV. 579 (1982).

13. Adamson v. California, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting). *See* G. GUNTHER, CONSTITUTIONAL LAW 476-88 (10th ed. 1980).

14. 344 U.S. 443 (1953).

15. The opinion denominated as that of the Court was written by Justice Reed. It was, however, Justice Frankfurter's separate opinion that spoke for the majority regarding the critical question of the effect state court proceedings would be accorded in federal habeas corpus. 344 U.S. at 488. In an effort to obtain an empirical base for the habeas structure he wished to establish, Justice Frankfurter conducted a survey of 126 cases entertained by the district courts

standards, announced by an increasingly unpopular Supreme Court, would require *some* federal backstop. Plainly, the Court itself could not hope to supervise scores of local courts. Indeed, for that reason, Justice Frankfurter insisted that Supreme Court discretionary refusals to review criminal convictions on writ of certiorari should be accorded no meaning whatever touching the merits.[16] The working assumption, appreciated by anyone familiar with the Court's caseload, was that the Court sits not to correct errors made below, but to orchestrate the development of federal law using cases of the moment as vehicles for change when it is needed.[17] Day-to-day review of the state courts' work must come from the lower federal courts, acting as surrogates.[18] No one proposed, of course, that the federal courts should displace the state courts entirely or that the habeas jurisdiction should ultimately result in the effective removal of federal issues to the federal forum, leaving the state courts with responsibility only for making state law determinations and ascertaining factual guilt.[19] That would have been theoretically unsound and practically unworkable.[20] The federal courts sitting in habeas were to pose an effective *threat* of review, thereby forcing the states to take seriously their responsibility to respect federal safeguards.[21] There was and is little evidence that the state courts would vigorously enforce the Court's new standards but for the incentive provided by the federal habeas courts waiting in the wings.[22]

Once the system of federal post-conviction review was in place and the state courts were convinced that they must meet their obligations

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during the Supreme Court's October 1950 Term. He set forth his results in an appendix to his opinion in *Brown*. *Id.* at 514. The study convinced Justice Frankfurter that the federal habeas courts could reasonably be recruited to the service for which he wanted them, without undue interference with the ordinary functioning of the state criminal courts. A decade later, the famous partnership between Chief Justice Warren and Justice Brennan fleshed out the Frankfurter framework in the great trilogy of habeas cases decided in 1963. *See infra* note 30.

16. 344 U.S. at 489-97.

17. P. FREUND, THE SUPREME COURT OF THE UNITED STATES 16 (1961) (stating the obvious truth that the Court's primary responsibility is to decide questions that transcend the needs and interests of the parties to the dispute which provides the occasion for judicial pronouncement).

18. Stone v. Powell, 428 U.S. 465, 526 (1976) (Brennan, J., dissenting).

19. *See* Nettles v. Wainwright, 677 F.2d 410, 413 (5th Cir. 1982) (stating that neither the Constitution nor the federal habeas statute contemplates such a plan).

20. Congress could, presumably, provide for the determination of *all* federal issues in the federal forum, but the more likely means to that end would be an expansion of the federal courts' removal jurisdiction. *See* Greenwood v. Peacock, 384 U.S. 808, 833 (1966); *accord* Wainwright v. Sykes, 433 U.S. 72, 106 (1977) (Brennan, J., dissenting). Inasmuch as it is often the very purpose of procedural safeguards to ensure the reliability of fact-finding at trial, it would be foolish in the extreme to propose that the state courts might ascertain the facts by any procedure they please, leaving the federal habeas corpus courts thereafter to effectively upset the state courts' judgments in virtually every instance.

21. Desist v. United States, 394 U.S. 244, 262-64 (1969) (Harlan, J., dissenting).

22. *See* Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286, 290-91 (1966). It was hardly coincidental, for example, that the Court's momentous decisions in Gideon v. Wainwright, 372 U.S. 335 (1963), and Fay v. Noia, 372 U.S. 391 (1963), were announced on the same day.

or find their judgments effectively upset, an entirely rational, even efficient, partnership could emerge.[23] The state courts would have initial responsibility for developing the facts relevant to federal claims and spreading those facts on the record.[24] If they were unable to do so in the ordinary course of trial and direct review, they would be encouraged to establish post-conviction remedies of their own for the purpose.[25] The state courts would also make the first determination of federal "mixed" and legal questions arising from the facts[26] based on the long-standing requirement in habeas corpus that state judicial remedies be exhausted before applicants seek federal relief.[27] So long as the facts were fairly found, through process giving the assurance of accuracy, they would be accepted by the federal courts. In Justice Frankfurter's terms, only factual findings arrived at in state proceedings having some "vital flaw" would be rejected in favor of a de novo, federal evidentiary hearing.[28] Later, in *Townsend v. Sain*,[29] Chief Justice Warren announced more exacting standards for determining whether federal fact-finding would be mandatory.[30] State court determinations of legal questions would not be accepted in the same way, but after thorough and sensitive state court adjudication it could be expected that the federal courts would be able to render independent judgment with some dispatch. If all went as planned, there would be few instances in which a different decision on the merits would be reached. The system was more complex than this, of course. The

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23. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L. J. 1035 (1977).

24. *See* Brown v. Allen, 344 U.S. 443, 503-07 (1953) (Frankfurter, J., for the majority) (indicating that the state courts may determine the relevant facts in the course of exhaustion but that often there is no adequate record of their work upon which the federal habeas courts can rely).

25. The Court has never held explicitly that the states *must* provide post-conviction review of criminal judgments. *Cf.* Case v. Nebraska, 381 U.S. 336 (1965) (avoiding the issue). *But see* Note, *Effect of the Federal Constitution in Requiring State Post-Conviction Remedies*, 53 COLUM. L. REV. 1143 (1953) (presenting the constitutional arguments). Indeed, in McKane v. Durston, 153 U.S. 684 (1894), even the availability of direct review by appeal was held not to be constitutionally mandatory. *Cf.* Young v. Ragen, 337 U.S. 235, 239 (1949) (referring to the requirement that the states provide some "clearly defined method by which [litigants] may raise claims of denial of federal rights"). State collateral review mechanisms have, however, been established in most jurisdictions. *See* Avichai, *Collateral Attacks on Convictions (I): The Probability and Intensity of Filing*, 1977 A.B.F. RES. J. 319 (surveying the operation of post-conviction procedures in four states).

26. *See* Brown v. Allen, 344 U.S. 443, 506 (1953) (Frankfurter, J., for the majority).

27. *Ex parte* Royall, 117 U.S. 241 (1886). The exhaustion doctrine, established by the Court itself in the *Royall* case, was written into the habeas statutes in 1948. 28 U.S.C. § 2254 (1976).

28. Brown v. Allen, 344 U.S. 443, 506 (1953) (Frankfurter, J., for the majority).

29. 372 U.S. 293 (1963).

30. The *Townsend* decision formed, with Fay v. Noia, 372 U.S. 391 (1963), and Sanders v. United States, 373 U.S. 1 (1963), the great trilogy of "guideline" decisions rendered by the Supreme Court in the same year. In *Townsend*, the Court set forth standards for determining when a federal evidentiary hearing was mandatory; in *Noia*, the Court fashioned its response to procedural default in state court; and in *Sanders*, the Court established rules for disposing of successive applications for federal post-conviction relief.

exhaustion doctrine's application in a range of situations caused no end of difficulties,[31] and in order to ensure against the frustration of federal claims through unsympathetic fact-finding, the federal habeas courts required broad discretion to conduct their own evidentiary hearings when appropriate.[32] Still, a fundamentally sound division of labor was established. That framework promised to strike the proper balance between state interests and prerogatives on the one hand and federal concerns for the protection of individual liberty on the other.[33]

The resolution of the difficulties presented by abortive state proceedings illustrates the point.[34] If, for example, a prisoner failed to observe a state contemporaneous objection rule and the state courts, for that reason, refused to entertain a tardy federal claim, the federal effect of the state judgment, based on procedural grounds, was problematic. After a brief flirtation with the exhaustion doctrine as the proper frame of reference,[35] at least some Justices turned to the rules governing direct review in the Supreme Court, concluding that state judgments resting upon adequate and independent state grounds should foreclose habeas review of federal claims that might have been, but were not, treated in state court.[36] That approach was flawed for a number of reasons. It sent entirely the wrong signal to the state courts concerned. The Court had established in *Brown* that state judgments on the merits of federal claims would be re-examined in federal habeas. Deference to state procedural grounds of decision suggested that the habeas forum would be barred if the state courts could manage to avoid the merits and to rest judgment, unfavorable to the prisoner, on a state procedural basis. At best, such an approach embraced the anomalous "philosophy" that the federal courts should "grant a second review where the state has granted one but . . . deny any review at all where the state has granted none."[37] At worst, it encouraged the states to throw up procedural barriers to the adjudication of federal claims in order to take advantage of opportunities to

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31. *Compare, e.g.*, Darr v. Burford, 339 U.S. 200 (1950) (holding that state prisoners must seek discretionary review in the Supreme Court of the United States as part of the exhaustion of *state* remedies) *with* Brown v. Allen, 344 U.S. 443, 488-97 (1953) (Frankfurter, J.) (holding for the majority that the Court's summary denial of certiorari should not be taken as a judgment on the merits) *and* Fay v. Noia, 372 U.S. 391, 435-38 (1963) (overruling *Darr*).

32. Townsend v. Sain, 372 U.S. 293, 318 (1963).

33. *See* Ellis v. Dyson, 421 U.S. 426, 440 n.6 (1975) (Powell, J., dissenting) (justifying habeas on the ground that prisoners' paramount interest in freedom from "custody" warrants the *relitigation* of federal claims).

34. *See* Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961) (coining the term and suggesting the analysis later adopted in *Noia*).

35. *E.g.*, Irvin v. Dowd, 359 U.S. 394 (1959) (apparently applying the doctrine to state remedies that had been available to the prisoner in the past). *See* Hart, *supra* note 12, at 112-14 (criticizing the analysis in *Irvin* and proposing that the exhaustion doctrine applied only to state procedures still available to the prisoner at the time a federal petition was filed).

36. Irvin v. Dowd, 359 U.S. 394, 412 (1959) (Harlan J., dissenting).

37. Brown v. Allen, 344 U.S. 443, 552 (1953) (Black, J., dissenting).

foreclose state litigation, and federal post-conviction review into the bargain, whenever a would-be habeas petitioner failed to comply with state rules of procedure.[38]

For these reasons and more, the Court subsequently abandoned the adequate state ground doctrine.[39] In its place, *Fay v. Noia*[40] held that abortive state proceedings would preclude federal habeas review of the merits only if the petitioner's default constituted a "deliberate bypass" of state procedures.[41] The standard, borrowed from the law of constitutional waiver generally, was that the prisoner must have knowingly and intentionally relinquished the opportunity to litigate further in state court.[42] Only if the petitioner had personally participated in a deliberate decision to forego further state litigation could federal habeas review be foreclosed.[43] The *Noia* approach was ingenious. It protected both state and federal courts from manipulative litigants and at the same time prevented state procedural barriers from frustrating the adjudication of federal claims. By refusing to give federal effect to most forfeiture sanctions in state court, *Noia* encouraged the states to eliminate procedural snarls and to reach the merits of federal claims. By requiring that the petitioner participate personally in any default later judged a "deliberate bypass," *Noia* sharply reduced the likelihood that a blameless defendant might suffer the consequences of counsel's procedural blunders. It was as plain then as it is today that most procedural defaults can be traced to defense counsel.[44] Thus it might have been possible to hold in some cases that counsel's mistakes constituted ineffective assistance, an independent basis upon which habeas relief might be granted. It was far more

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38. Hart, *supra* note 12, at 118.

39. More recently, the Court has revived the doctrine in habeas cases in which the procedural default occurred at the trial stage of state proceedings. See Wainwright v. Sykes, 433 U.S. 72 (1977), discussed *infra* in the text accompanying notes 75-79.

40. 372 U.S. 391 (1963).

41. *Id.* at 438. It seems clear that even this much deference to state procedural default/forfeiture rules was accorded grudgingly. Justice Brennan's elaborate opinion for the Court in *Noia* signalled that prisoners suffering abortive state proceedings would in the future be able routinely to gain federal habeas review of their underlying federal claims. Indeed, it would be rare that a habeas court, applying essentially the "clean hands" doctrine borrowed from chancery, would refuse to entertain a claim because it had been deliberately held back in state court and "saved" for the federal forum. *See id.* at 439 (insisting that the "deliberate bypass" rule should not be taken as an invitation to "introduce legal fictions into federal habeas corpus" by adopting rules by which procedural default not constituting a deliberate choice might be *deemed* a "waiver" of further state process).

42. *Id.* at 439; *cf.* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (cited in *Noia* as furnishing the applicable standard).

43. *Noia*, 372 U.S. at 439; *accord* Humphrey v. Cady, 405 U.S. 504, 517 (1972) (noting that any "waiver"of state process "must be the product of an understanding and knowing decision by the petitioner himself"). *See generally* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966).

44. *See* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 984 (1965) (ascribing most counsel error to "inadvertence" tied to "ineptitude" or "an understandable failure of competent lawyers fully to perceive legal niceties in the rush of litigation").

effective, however, to overlook errors for which the prisoner bore no responsibility and to permit the federal courts to reach the merits of underlying federal claims that were foreclosed in state court through the operation of a forfeiture sanction imposed for counsel's default.[45]

II

It is against this background that Justice Rehnquist's widely-noted forays against the post-conviction writ must be understood. A few examples from his recent opinions in the field will suffice to demonstrate his overarching distaste for federal collateral review. As one might expect, he has been most vociferous when speaking for himself alone. Dissenting from the denial of certiorari in *Coleman v. Balkcom*,[46] for example, he argued that post-conviction habeas in death penalty cases has resulted in a "stalemate in the administration of federal constitutional law" and urged the Court to grant review in more capital cases in order to determine the merits and cut off further resort to the lower federal courts.[47]

Other similar instances in which he has attempted to undercut the writ are less well known. In an opinion in chambers in *McCarthy v. Harper*,[48] Justice Rehnquist stayed the mandate of the Ninth Circuit, which had awarded habeas relief to the petitioner, because no judge had issued a certificate of probable cause for an appeal.[49] Then, in *Jeffries v. Barksdale*,[50] he dissented from the denial of certiorari in another habeas case, arguing again that since no certificate of probable cause had been issued, the case was not properly within the Court's appellate jurisdiction. The prisoner's petition for certiorari, he insisted, should have been *dismissed* on that ground, rather than *denied*—as though the Court *had* jurisdiction and had simply decided not to entertain the merits. The *Jeffries* dissent soon earned Justice Rehnquist a measure of facial egg. In the next case, *Davis v. Jacobs*,[51]

45. The *Noia* approach brilliantly answered virtually all questions. It circumvented state forfeiture rules that might otherwise have frustrated the adjudication of federal claims, permitting the federal habeas courts to ignore such rules without actually holding them unconstitutional. *Cf.* Daniels v. Allen, 344 U.S. 443, 557-58 (1953) (Frankfurter, J., dissenting) (arguing that the prisoner should not have been denied a federal forum because the state forfeiture sanction applied in state court was so harsh as to violate the due process clause). Similarly, it permitted adjudication of the merits without a threshold determination that counsel's failure to comply with state law constituted ineffective assistance. *But see generally* Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973) (suggesting that the development of substantive sixth amendment standards was retarded in the process).

46. 451 U.S. 949 (1981).

47. *Id.* at 957. *See also* Estelle v. Jurek, 450 U.S. 1014 (1981) (Rehnquist, J., dissenting); Spenkelink v. Wainwright, 442 U.S. 1301 (1979) (Rehnquist, J.) (in chambers); Evans v. Bennett, 440 U.S. 1301 (1979) (Rehnquist, J.) (in chambers).

48. 449 U.S. 1309 (1981).

49. *Id.* at 1310. *See* 28 U.S.C. § 2253 (1976).

50. 453 U.S. 914 (1981).

51. 454 U.S. 911 (1982).

he was forced to acknowledge that in *House v. Mayo*,[52] the Court had held that a certificate of probable cause is necessary only to the exercise of the Court's statutory certiorari jurisdiction and that the Court can entertain a habeas case using its authority to issue the common law writ without one. Presented with ample authority for the course of action adopted by the full Court in *Jeffries*, he could only urge, unpersuasively, that *House* be overruled.[53]

In yet another instance of what may charitably be called inadequate research, Justice Rehnquist dissented from the denial of certiorari in *Duckworth v. Owen*.[54] He argued that the circuit court had effectively held that the states were constitutionally bound to observe the Federal Rules of Evidence in their own courts. It was, however, plain, at least implicitly, that the circuit had merely held that a federal habeas corpus court properly follows the federal rules in a federal evidentiary hearing.

At best, Justice Rehnquist's penchant for fly-specking the work of the lower courts in habeas bespeaks a general distaste for federal collateral review and an inclination to limit the operation of post-conviction habeas wherever possible. At worst, his opinions reveal a cynical attempt to frustrate habeas in any convenient manner. His sentiments, clearly expressed in another dissent in *Snead v. Stringer*,[55] can hardly be mistaken: "It is scarcely surprising that fewer and fewer capable lawyers can be found to serve on state benches when they may find their considered decisions overturned by the ruling of a single federal district judge on grounds as tenuous as these."[56]

Other Justices, to be sure, have occasionally expressed sympathy with Justice Rehnquist's position. Justice Powell has insisted that in some instances the benefit of habeas review is "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice."[57] Justice Blackmun has complained that the "common-law scholars of the past" would hardly recognize the writ today.[58] Justice O'Connor, the author of most of the Court's recent habeas decisions, is, if anything, even more sympathetic to Justice Rehnquist's views. She has been at pains to consider the "costs" of post-conviction review in habeas and, indeed, has voiced the suspicion that "[s]tate courts are understandably frustrated when they faithfully apply exist-

52. 324 U.S. 42 (1946).
53. 454 U.S. at 917-18.
54. 452 U.S. 951 (1981).
55. 454 U.S. 988 (1981).
56. *Id.* at 993-94.
57. Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting) (quoting Stone v. Powell, 428 U.S. 465, 494 (1976)).
58. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 501 (1973) (Blackmun, J., concurring).

ing constitutional law only to have a federal court discover, during a [habeas corpus] proceeding, new constitutional commands."[59]

To date, however, Justice Rehnquist has been unable to convince his colleagues to join him in a campaign against post-conviction habeas generally. In the *Coleman* case, for example, Justice Stevens responded to Rehnquist's dissent in a rare opinion concurring in the Court's decision to deny certiorari review. In measured language, he pointed out that death penalty cases are hardly appropriate instances in which to "experiment with accelerated procedures."[60] In *Davis*, Justice Stevens again took the floor against the Rehnquist position, explaining that it makes little practical difference whether the Court *dismisses* a petition for statutory certiorari or *denies* one for the common law writ. Any effort to explain the Justices' true intentions in all cases would be burdensome and fruitless.[61]

Most importantly, laying aside the Justices' opinions, there is little indication in their decisions that they are in retreat from basic principles. For a time, the decision in *Stone v. Powell*[62] was mistaken for the

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59. Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982).

60. 451 U.S. at 953. I acknowledge the evidence in some recent cases that the full Court has neglected Justice Stevens' advice and bowed to pressures for expedition in habeas cases involving death row petitioners. *See, e.g.*, Alabama v. Evans, 103 S. Ct. 1736 (1983) (dissolving a stay issued by a district court); Brooks v. Estelle, 103 S. Ct. 1490 (1982) (denying an eleventh hour request for a stay of execution even though a district judge had issued a certificate of probable cause for an appeal); *see also* Goldberg, *The Supreme Court Reaches Out and Touches Someone—Fatally*, 10 HASTINGS CONST. L.Q. 7 (1982) (discussing similar haste in other cases).

It is too early to tell whether the Justices mean actually to push the lower courts toward truncated adjudication in capital cases. The most important precedent to date is Barefoot v. Estelle, 103 S. Ct. 3383 (1983), handed down at the very end of the October 1982 Term. Speaking for a majority that included Justice Rehnquist but not Justice Stevens (on this issue), Justice White offered something for everybody. The question at bar, pretermitted *sub silentio* in *Brooks*, was whether the Fifth Circuit had acted properly in denying a stay of execution to a death row prisoner whose habeas petition had been denied by the district court. In *Barefoot*, as in *Brooks*, the district judge had issued a certificate of probable cause for an appeal, thus indicating that the appeal had substantial merit. On the one hand, Justice White approved the circuit's practice of determining the stay question at the same time it considered the merits of the appeal and denying the stay without clearly affirming the district court's denial of habeas relief. *See* 103 S. Ct. at 3391-93. That, to be sure, was to accept expedited review in capital cases. On the other hand, Justice White reaffirmed the rule that when a district judge issues a certificate, the prisoner must be given an opportunity to address the merits on appeal, and the circuit must in fact decide the merits. If the appeal cannot receive due consideration before the prisoner's scheduled execution, a stay must be issued. *Id.* at 3394.

I should have preferred a different result. In cases in which a federal judge has found sufficient merit in an appeal to warrant the issuance of a certificate, it seems only reasonable to ask the circuit court to treat the merits in the usual course of business. Haste begets error. It is possible that *Barefoot* will be taken as a signal to bring less vigor to the consideration of habeas corpus claims put by death row prisoners. Justice Stevens, for his part, joined Justice Marshall's bitter dissent on the threshold question in that case. *Id.* at 3400 (Stevens, J., concurring in the majority's judgment on the merits of the appeal). Still, it remains to be seen whether the lower courts will read *Barefoot* in the same way.

61. 454 U.S. at 914-15.

62. 428 U.S. 465 (1976).

advance force of a general assault upon *Brown*.[63] In *Stone*, the Court held that a state prisoner may not be granted habeas relief on the ground that evidence seized in violation of the fourth amendment was introduced at trial, if the state provided an opportunity for "full and fair" litigation of the exclusionary rule claim in state court.[64] To the extent that *Stone* deferred to state court judgments on the merits, and focused the habeas courts' attention upon the state court procedures employed to produce those results, it seemed reasonable to predict that the same analysis would be exported to other cases, in which other claims unrelated to the prisoner's "factual guilt" or other judge-made procedural rules were in issue.[65] More recent decisions, set forth in Professor Robbins' book, make it clear that the Court has nothing of the sort in mind.[66] On reflection, *Stone* appears to be only another in a line of recent cases in which the Court has undercut not habeas, but the fourth amendment exclusionary rule.[67]

Nor do the Court's cases regarding fact-finding in state court bode ill for the writ. The Justices have steered well clear of *Townsend*,

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63. *See* Letter from the Congressional Research Service to Senator Charles Mathias (July 13, 1976), *printed in Federal Habeas Corpus: Hearings on S. 1314 Before the Subcomm. on Improvements in the Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 13, 17-19 (1978) (comparing the analysis in *Stone* to then-Assistant Attorney General Rehnquist's 1973 testimony on behalf of a Nixon administration bill that would have limited the issues cognizable in habeas); *cf. Stone*, 428 U.S. at 515-18 (Brennan, J., dissenting) (worrying that the majority's analysis might eliminate a range of issues from the scope of the writ).

64. *Stone*, 428 U.S. at 494. The definition of the *Stone* "opportunity" for "full and fair" litigation has evaded confident and uniform treatment in the lower courts. *See* Shoemaker v. Riley, 103 S. Ct. 266 (1982) (White, J., dissenting from the denial of certiorari) (noting the divided authorities and arguing that the Court should resolve existing conflicts among the circuits); *cf.* Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1 (1982) (arguing that "systemic" fourth amendment claims can be entertained in the federal forum).

65. *See* Cover & Aleinikoff, *supra* note 23. In an apparently important footnote in *Stone*, Justice Powell wrote that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government." 428 U.S. at 491 n.31. *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (Powell, J., concurring).

66. *See, e.g.*, Rose v. Mitchell, 443 U.S. 545 (1979) (declining the invitation to extend *Stone* to claims of race discrimination in the selection of grand jurors—even though such claims do not go to the reliability of fact determination at trial); Brewer v. Williams, 430 U.S. 387 (1977) (passing over an opportunity to apply the *Stone* analysis to a sixth amendment exclusionary rule claim).

67. *E.g.*, United States v. Calandra, 414 U.S. 338 (1974) (refusing to permit grand jury witnesses to object to questions based upon information obtained in violation of the fourth amendment); *cf.* Mackey v. United States, 401 U.S. 667, 702 n.9 (1971) (Harlan, J., concurring) (arguing that fourth amendment exclusionary rule claims should not be entertained in habeas); Kaufman v. United States, 394 U.S. 217, 231 (1969) (Black, J., dissenting) (same). Judge Celebrezze has recently expressed the view that *Stone* is based, simply enough, on the judgment that if a fourth amendment claim has been considered at trial and on direct review in the state courts, and the question still seems close enough to warrant a petition for federal habeas relief, the outcome, whatever it might be, will not serve the purpose of encouraging police officers to adhere to identified and identifiable fourth amendment standards. Riley v. Gray, 674 F.2d 522, 525-26 (6th Cir.), *cert. denied sub nom.* Shoemaker v. Riley, 103 S. Ct. 266 (1982). *See generally* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980) (exploring *Stone* in some depth).

failing even to take up the question *when* a federal evidentiary hearing must or should be held.[68] The only activity has occurred in cases demanding a construction of section 2254(d).[69] The primary case is *Sumner v. Mata*, which reached the Court twice. Justice Rehnquist wrote for the Court initially, but he was clearly unable to deal the writ more than passing damage. *Mata I* [70] held, first, that findings by state appellate courts are entitled to the presumption described in the

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68. *See supra* text accompanying notes 28-30; *cf. In re* Wainwright, 678 F.2d 951, 953 (11th Cir. 1982) (stating that *Mata* "in no way speaks" to the threshold questions "if and when a federal habeas court may hold an evidentiary hearing").

69. *Developments in the Law*, *supra* note 12, at 1122 n.46 (explaining that the statute does not deal with the question whether a federal evidentiary hearing must or should be held but rather "assumes that a hearing is to be held and attempts to decide if the state's factual conclusions are to be deemed presumptively correct at that hearing"). *Accord*, LaVallee v. Delle Rose, 410 U.S. 690, 701 n.2 (1973) (Marshall, J., dissenting).

Section 2254(d) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (1976).

70. 449 U.S. 539 (1981).

statute and, second, that when the lower federal courts do not accord the presumption to state findings they must explain why in an opinion. There was language in *Mata I* suggesting, but hardly holding, that state determinations of "mixed" questions might be treated as findings of fact subject to the presumption.[71] Yet when the case came back before the Court a year later in *Mata II*,[72] a *per curiam* expressly limited the presumption to findings of primary, evidentiary fact.[73] All told, the Court's disposition of *Mata* was consistent with pre-existing understandings of section 2254(d).[74]

Only in its response to abortive state proceedings has the Court departed markedly from the Warren Court's framework. While *Noia* abandoned the adequate state ground doctrine as the appropriate reference for contending with petitioners who committed procedural default in state proceedings, the Court resurrected that doctrine in *Wainwright v. Sykes*.[75] In another opinion by Justice Rehnquist, the Court held that if the state courts refused to consider a prisoner's federal claim because of procedural default at trial, the federal courts should defer to the state's procedural ground of decision, unless the prisoner demonstrates "cause" for the default and "prejudice" from the error that went uncorrected.[76] The "cause" and "prejudice" stan-

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71. *Id.* at 552 (stating that a circuit court must provide a written explanation of the "2254(d) factors" when it reaches a different "result" from that of the state courts on the "issue of impermissibly suggestive identification procedures"); *see also id.* at 556-58 (Brennan, J., dissenting) (complaining that the disagreement below was over the "constitutional significance" of "primary" facts rather than the facts themselves).

72. 455 U.S. 591 (1982).

73. *See* Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. 1981) (treating a suggestive identification claim on the merits without mention of *Mata*).

This is not to suggest, of course, that the difference between factual and "mixed" questions is always clear. The subsequent history of *Mata* itself is illustrative. After the second remand, the circuit again considered the question of the deference owed to state court findings and once again disagreed internally about the nature of key determinations made by the state courts. *Compare* Mata v. Sumner, 696 F.2d 1244, 1251 (9th Cir. 1983) (majority opinion) (accepting the Supreme Court's guidance concerning some issues but insisting that the suggestiveness of pre-trial identification procedures was a "mixed" question to which the statutory presumption could not apply) *with id.* at 1262 (Sneed, J., dissenting) (curiously insisting that the state court determination regarding suggestiveness *was* subject to the presumption). The Court's more recent *per curiam* in Maggio v. Fulford, 103 S. Ct. 2261 (1983), only adds fuel to the fire. *See id.* at 2264-65 (White, J., concurring in the judgment) (reading the *per curiam* to apply the presumption to the question of a defendant's competency to stand trial and insisting that competency was a "mixed" question to be determined independently by the federal court); *accord id.* at 2265 (Brennan, J., dissenting) (joined by Stevens, J.); *id.* at 2266 (Marshall, J., dissenting). I have outlined my own views (and worried that the Court itself disagrees with me) in another forum. See YACKLE, *supra* note 3, at 233-34 (1983 Supp.).

74. The Court's most recent full dress decision, Marshall v. Lonberger, 103 S. Ct. 843 (1983), adds little to the discussion.

75. 433 U.S. 72 (1977).

76. *Id.* at 84. The "cause" and "prejudice" standards had been developed in previous cases. *See* Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973). The Court made it clear in Engle v. Isaac, 456 U.S. 107, 129 (1982), that *both* "cause" and "prejudice" must be established.

dards were, accordingly, substituted for the "deliberate bypass" rule—in cases controlled by *Sykes*.[77] In such cases the federal habeas courts no longer ask whether petitioners themselves "waived" the opportunity to litigate federal claims in state court.[78] They ask, instead, why default occurred and what effect it had on the case—imposing a "forfeiture" of federal habeas if "cause" and "prejudice" are not shown.[79]

Importantly, however, the Court has not held that innocent petitioners will always be held accountable for the sins of defense counsel. Deliberate defaults committed for strategic advantage will foreclose federal habeas under *Sykes*, whether or not the petitioner participated personally in counsel's decision to forego state process.[80] Counsel's unintentional defaults, committed out of ignorance or neglect, may not have the same effect.[81] The question is not free from doubt. In

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77. The *Sykes* analysis is not necessarily applicable in all procedural default cases. Justice Rehnquist's opinion carefully skirted *Noia* on its own facts, 433 U.S. at 88 n.12, and the lower courts have divided over whether, or the extent to which, the "deliberate bypass" rule survives. Of the several available bases for reconciling *Sykes* and *Noia*, the argument that they address procedural defaults occurring at different stages of state proceedings is most persuasive. The default in *Sykes* took place at trial, when counsel's failure to raise a claim prevented the trial court from avoiding or curing error and when it would have been difficult to involve the defendant in counsel's tactics anyway. The default in *Noia* occurred after trial, when there was no way for the state courts to avoid or cure error without another trial and when matters were in relative repose so that the client might have been consulted. *See Sykes*, 433 U.S. at 91-92 (Burger, C.J., concurring) (insisting that the "deliberate bypass" rule "was never designed for" and is "inapplicable to" cases in which the error asserted occurred at trial); *id.* at 94-95 (Stevens, J., concurring) (arguing that *Noia* had never been applied consistently to demand that the defendant participate in trial tactics). *Compare* United States *ex rel.* Spurlock v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (concluding that "the rumors of *Fay's* death are not greatly exaggerated") *with* Holcomb v. Murphy, 701 F.2d 1307, 1310 (10th Cir. 1983) (insisting that the Supreme Court "knows how to overrule a case if it wishes to do so"). *See also* Forman v. Smith, 633 F.2d 634, 638-39 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) (distinguishing a failure to appeal at all from a failure to raise a particular claim on appeal—and suggesting that *Noia* governs only the former); *cf.* Grace v. Butterworth, 635 F.2d 1, 5 n.3 (1st Cir. 1980), *cert. denied*, 452 U.S. 917 (1981) (declining to "take sides" in the controversy).

78. *See supra* text accompanying notes 40-43.

79. The government's briefs in recent habeas cases have pursued the shift from "waiver" to "forfeiture." *See, e.g.*, Brief for the United States, Engle v. Isaac, 456 U.S. 107 (1982).

80. This follows logically from *Sykes'* treatment of *Noia*. In Justice Rehnquist's telling, *Noia* encouraged "sandbagging" by defense counsel. The tactic is deliberately to build error into a case by failing to alert the state courts to a federal claim. In some instances, the client will be acquitted anyway. If that does not happen, counsel will raise the federal claim that was "saved" for federal habeas corpus. Of course, even the *Noia* "deliberate bypass" rule would foreclose habeas review of the claim if the prisoner participated in counsel's strategy. That being the case, the only "sandbagging" that *Noia* could have encouraged is intentional procedural defaults about which the client is not told. Although I find his thinking convoluted, I understand Justice Rehnquist to have intended *Sykes* to catch *that* kind of "sandbagging" and thus to hold prisoners accountable for trial-level procedural defaults—even if they did not participate in the strategy adopted by defense counsel.

81. I have to think that, if "sandbagging" is the difficulty, then federal habeas review will be foreclosed only for deliberate defaults in state court. An analysis of abortive state proceedings that seeks to discourage counsel from "saving" federal claims for the federal forum cannot

Engle v. Isaac,[82] the Justices passed over an opportunity to hold squarely that counsel's careless errors can bring about the forfeiture of both state process and federal habeas review. Writing for the Court, Justice O'Connor refused in *Isaac* to accept counsel's argument that they had not been aware of an available federal claim in time to raise it and had, accordingly, committed procedural default through ignorance. Citing the authorities in existence at the time of trial, Justice O'Connor held, in effect, that counsel had known of the claim and simply had not raised it.[83] No "cause" for that deliberate default having been shown, she invoked the forfeiture sanction contemplated

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reasonably be applied when counsel's default was unintentional. *See* Garrison v. McCarthy, 653 F.2d 374, 378 (9th Cir. 1981); Runnels v. Hess, 653 F.2d 1359, 1364 (10th Cir. 1981). The Fifth Circuit's treatment of the issue is ambiguous at best. When Tyler v. Phelps, 622 F.2d 172 (5th Cir. 1980), first reached the court, the case was remanded for a determination whether "cause" had been established for counsel's default at trial. In a critical footnote, the court indicated that "cause" *should* be found if the default arose from ignorance, mistake, or a misunderstanding of the applicable law. *Id.* at 178 n.9. The first opinion was withdrawn, however, upon rehearing. In a new opinion, the court found it unnecessary to remand the case after all. Reexamination of the record had convinced the court that the petitioner had already been afforded an opportunity to demonstrate "cause" and that he had failed to do so. Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981). While the court's failure to repeat in its second opinion the substance of the crucial footnote in its first is perplexing, it is impossible to conclude with confidence that the omission was intended as a decision on the vital question whether ignorance or neglect may constitute "cause" within the meaning of *Sykes*. Importantly, the second opinion expressly declined to speculate on the true motivations behind the default at bar. *Id.* at 1101 n.9. *Cf.* Honeycutt v. Mahoney, 698 F.2d 213, 220 n.8 (4th Cir. 1983) (Murnaghan, J., dissenting) (reading the second opinion in *Tyler* to imply that "cause" would have been found if counsel had "candidly admitted" that he had been unaware of the federal claim).

82. 456 U.S. 107 (1982).

83. *Id.* at 133. I suspect that some will quarrel with my reading of *Isaac*. Inasmuch as the petitioners in the consolidated cases before the Court argued, in part, that their lawyers had *not* been aware of the federal claims they might have raised regarding jury instructions, it may be contended that when Justice O'Connor failed to find "cause," she effectively decided that unintentional defaults *can* foreclose federal habeas review. I think, on the contrary, that the Court's actual language supports my thesis:

> We do not suggest that every astute counsel would have [raised] . . . the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as a cause for a procedural default.

Id. at 133-34. I have argued elsewhere that the first five sentences of the excerpt were written in response to the prisoners' argument that their lawyers rendered ineffective assistance. If that claim had been sustained, "cause" surely would have been found. Ineffective assistance regarding procedural default surely constitutes a sufficent, but not a necessary, basis for "cause." The last sentence addresses the prisoners' alternate argument that counsel's inadvertence, short of a sixth amendment violation, established "cause" for the default. Here, however, Justice O'Connor's previous holding that in these cases defense counsel *had* been aware of the claim at the time of trial controls. I do not understand *Isaac* to speak to a question not before the Court—whether genuine ignorance or neglect will establish "cause" within the meaning of *Sykes*. *See* Yackle, *supra* note 9, at 657-60.

by *Sykes*. In this context, too, the Court's actual holdings fall well short of the dramatic changes that Justice Rehnquist would prefer.[84]

Professor Robbins supplies ample materials on these and other developments.[85] He draws on the rich literature in the field and, in provocative questions and notes, delves into the arcane intricacies of modern post-conviction practice.[86] The complexity exists, he implic-

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84. *Compare* Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (stating that the meaning of "cause" and "prejudice" would be elaborated in future cases) *with* Engle v. Isaac, 456 U.S. 107, 135 (1982) (stating that "cause" is not a "rigid" concept but will yield to the demands of assuring against a miscarriage of justice). *See generally* Comment, Lundy, Isaac *and* Frady: *A Trilogy of Habeas Corpus Restraint*, 32 CATH. L. REV. 169 (1982); Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981 (1982).

For a discussion of Rose v. Lundy, 455 U.S. 509 (1982), in which significant damage to the post-conviction writ *was* done, see Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393,424-40 (1983).

85. I find his introductory offerings regarding overarching, philosophical issues useful to put in perspective both the critical role that habeas plays in the criminal justice system and the price that society necessarily pays for the increased assurance that federal constitutional standards are respected. The price is undeniably high. In theory, habeas corpus operates upon the person of the custodian, demanding justification for a citizen's detention whenever the validity of that confinement is questioned. The focus, then, is not directly on the judgment upon which a prisoner's sentence rests, but on the validity of the applicant's custody *simpliciter*. Fay v. Noia, 372 U.S. 391 (1963). For that reason, habeas is available on a continuing basis. The resulting subordination of state interests in the "finality" of criminal judgments has generated considerable concern over the years. *See* Bator, *supra* note 11. I find the values protected by the writ well worth the price. While I suspect Professor Robbins does as well, he is scrupulous in giving voice to divergent points of view.

86. The book offers, for example, good illustrations of the complexity that can accompany the jurisdictional requirement that habeas applicants be in "custody" at the time they apply for federal relief. In addition, there are good materials on the nonjurisdictional, but equally important, requirement that federal habeas applicants exhaust state judicial remedies. Still, I should have preferred a deeper investigation of the intricacies of both doctrines, and greater attention to the relationship between the two.

Taking the "custody" requirement first, the most difficult questions arise when prisoners attempt to challenge present sentences to confinement that were influenced by allegedly invalid prior convictions and when prisoners confined in one state attempt to challenge convictions obtained in another. The essential questions are these: In whose "custody" are such prisoners for purposes of habeas corpus litigation? Once the custodian is identified, and the *subject matter* jurisdiction of a particular district court is assured, does that court have *personal* jurisdiction of the custodian? If so, how? *See* Carter v. Hardy, 526 F.2d 314, 315 (5th Cir.), *cert. denied*, 429 U.S. 838 (1976) (stating the general rule that a petitioner is no longer in "custody" under, and thus cannot challenge, a conviction the sentence for which has already been served). *But see* United States v. Tucker, 404 U.S. 443 (1972) (making it clear that a petitioner's *present* sentence can be attacked on the ground that it was affected by a prior conviction the sentence for which has expired). *Compare* Harrison v. Indiana, 597 F.2d 115, 118 (7th Cir. 1979) (illustrating that even when the gravamen of the challenge is the invalidity of a previous conviction the present habeas attack is in theory focused on the prisoner's current confinement and the relief sought is at least a reduction in sentence) *with* Jackson v. Louisiana, 452 F.2d 451, 453 (5th Cir. 1971) (apparently finding a prisoner currently confined under a different sentence still to be in "custody" under a previous conviction the sentence for which has been served—if that prior conviction invalidly influenced the length of the prisoner's present sentence) *and* Carter v. Estelle, 677 F.2d 427, 450-51 n.22 (5th Cir. 1982) (stating that it is "unsettled" in the Fifth Circuit whether the use of an earlier conviction for enhancement purposes satisfies the "custody" doctrine for an attack on the former conviction itself), *cert. denied*, 103 S. Ct. 1508 (1983). *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 500 (1973) (holding that a prisoner confined in one state but challenging actions taken by the authorities in another state can petition for habeas relief in a federal district court in *either*—on the ground that the prisoner is in the

itly suggests,[87] primarily because habeas litigation is often undertaken by undereducated prison inmates proceeding pro se.[88] The very ignorance of "jailhouse lawyers," however understandable, can generate some of the most perplexing procedural questions faced by the federal bench—questions made no less baffling by the knowledge that they

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"custody" of the confinement state authorities by virtue of physical detention and in the "custody" of the authorities in the other state by and through a "detainer" filed by those authorities with the confinement state warden). *Compare* Norris v. Georgia, 522 F.2d 1006, 1012 (4th Cir. 1975) (holding that while a petitioner may challenge the actions of foreign state authorities in the district of confinement those authorities are not necessarily within the personal jurisdiction of a district court in the confinement state and thus any habeas relief issued by that court cannot run to them) *with id.* at 1014 (Winter, J., concurring & dissenting) (arguing that a "detainer" filed by foreign state authorities suffices to establish both "custody" and *in personam* jurisdiction in the confinement district). *Cf.* Ott v. Ciccone, 326 F. Supp. 609, 612 (W.D. Mo. 1970) (finding similar difficulties arising in cases in which prisoners attempt to challenge actions taken by federal parole authorities residing in Washington by way of habeas petitions in the district of confinement).

The exhaustion doctrine constitutes an overlay, raising still further questions. In interstate cases, which state's remedies must be exhausted prior to federal habeas litigation? Those in the state of confinement? Conviction? Both? Neither? *See Jackson*, 452 F.2d at 454 (requiring a California prisoner seeking habeas relief in a district court in Louisiana on the theory that a prior Louisiana conviction was preventing him from obtaining parole in California to exhaust California remedies before seeking relief from a federal court in either state). *Compare Braden*, 410 U.S. at 489 (noting that the Alabama prisoner at bar had exhausted Kentucky state remedies before seeking federal habeas relief against Kentucky authorities in a district court sitting in Kentucky) *with* Nelson v. George, 399 U.S. 224, 229-30 (1970) (requiring a California prisoner attacking the effect being given a "detainer" filed by North Carolina authorities to exhaust California remedies before seeking federal habeas relief in a district court in California). *But see* Sacco v. Falke, 649 F.2d 634 (8th Cir. 1981) (apparently requiring the exhaustion of *Ohio* remedies before permitting a prisoner serving a *federal* sentence in a *state* penitentiary in North Dakota to seek vaguely-defined relief from actions taken by *Ohio* authorities).

87. The book's initial chapters treat the problems presented by pro se and forma pauperis litigation in the federal courts. *See generally* Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655 (1978); Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 U. KAN. L. REV. 493 (1970); Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 157 (1972).

88. P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 56 (1979) (reporting that "more than 78.8%" of the petitioners studied had not been represented by counsel). The Court has never held that there is a constitutional right to counsel in post-conviction proceedings. *Cf.* Boyd v. Dutton, 405 U.S. 1, 7 n.2 (1972) (Powell, J., dissenting) (stating that there is no such right in *state* post-conviction proceedings). *But cf.* Roach v. Bennett, 392 F.2d 743, 747-48 (8th Cir. 1968) (holding that in exceptional circumstances the appointment of counsel may be necessary to fundamental fairness); *accord* United States *ex rel.* Wissenfeld v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960); *cf. also* Bounds v. Smith, 430 U.S. 817 (1977) (holding that prisoners' constitutional entitlement to access to the courts requires penal authorities to provide inmates with *either* counsel or a prison library to use in representing themselves). *See generally* Comment, *Right to Counsel in Criminal Post-Conviction Review Proceedings*, 51 CALIF. L. REV. 970 (1963); Comment, *Right to Counsel in Federal Collateral Attack Proceedings: Section 2255*, 30 U. CHI. L. REV. 583 (1963). Under current practice, counsel is appointed only after a pro se petitioner makes out a colorable claim. Johnson v. Avery, 393 U.S. 483, 487 (1969); *see* 28 U.S.C. § 1915(d) (1976) (establishing statutory authority). Counsel *must* be appointed, however, in any case in which effective use of discovery techniques requires it, 28 U.S.C. § 2254 R. 6(a) (1982), or in which a federal evidentiary hearing is to be held, 28 U.S.C. § 2254 R. 8(c) (1982). In federal post-conviction proceedings counsel may be furnished and compensated under the Criminal Justice Act. 18 U.S.C. § 3006A(g) (1976).

might have been avoided by professional counsel.[89] Congress has occasionally adopted legislation designed to streamline the habeas process,[90] and in 1976 two sets of procedural rules were promulgated to guide the district courts.[91] Those guidelines are woven into the materials when they are relevant. In sum, students are treated to an elaborate illustration of the way in which cooperative federalism can work. These materials would be excellent teaching tools notwithstanding their genuine significance in the concrete world of American criminal justice. Their exploration promises to sharpen the analytical skills and tune the judgment of anyone who would understand the making and enforcement of legal standards in a bifurcated system. Equally important, the materials Professor Robbins presents very much *do* describe the criminal justice system as it actually operates. While other books, intended for standard courses in criminal procedure[92] or federal jurisdiction,[93] may touch upon post-conviction remedies—a topic that sits somewhere between the two fields[94]—this book offers, for the first time, a thorough exploration of the fundamental structure within which federal issues are actually determined in the United States today.

III

Professor Robbins concludes his casebook with a chapter entitled "The Future of the Great Writ." The leading case in that chapter is *Stone*, an unfortunate choice for reasons already noted. Realistically, the writ's future depends upon Justice Rehnquist's ability to attract support to his cause. To date, the evidence is mixed. While some of

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89. ROBINSON, *supra* note 88, at 56-63 (discussing the difficulties caused by pro se litigants).

90. The best illustration is the revision of the Judicial Code in 1948 which recognized a diluted res judicata doctrine in habeas, simplified the conduct of evidentiary hearings, codified the exhaustion doctrine, and established a post-conviction remedy in the nature of coram nobis for use by federal prisoners attacking federal convictions and sentences.

91. Rules Governing Section 2254 Cases in the United States District Courts (governing habeas applications challenging state court judgments); Rules Governing Section 2255 Proceedings in the United States District Courts (controlling post-conviction motions filed by federal prisoners attacking federal judgments). *See generally* Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977) (providing some glimpses of the legislative history).

92. *E.g.*, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE, ch. 27 (5th ed. 1980); F. MILLER, R. DAWSON, G. DIX & R. PARNAS, CRIMINAL JUSTICE ADMINISTRATION, ch. 26 (2d ed. 1982).

93. D. CURRIE, FEDERAL COURTS, ch. 7(3) (3d ed. 1982); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, ch. X (2d ed. 1973).

94. Recently published casebooks in the general field of civil rights legislation may include materials on habeas corpus. But, again, the treatment is necessarily superficial. *See, e.g.*, C. ABERNATHY, CIVIL RIGHTS, ch. I (1980) (noting habeas only in the course of explicating the civil rights statutes); T. EISENBERG, CIVIL RIGHTS LEGISLATION, ch. 5 (1981) (treating habeas as an illustration of conflicts that arise between the state and federal courts).

the Justices now sitting do not share the enthusiasm for habeas that was much in evidence when *Townsend* and *Noia* were decided, the full Court has resisted wholesale departures in this field. The essential radicalism of Justice Rehnquist's position, and the want of support for it in the cases, will lead, one should hope, to its failure.[95]

No one who reads the federal advance sheets can deny that federal habeas corpus presents difficulties. Though far fewer habeas petitions are filed than some seem to suppose, the number of applications for relief is sizeable, and it is plain that many demand the expenditure of substantial judicial resources before disposition.[96] Of course, the sheer weight of habeas litigation alone hardly makes the case against collateral review. Critics must demonstrate that many applications are without merit and that judicial resources are thus squandered upon them. There the argument breaks down. For, again, anyone who reads the advance sheets knows that the greater proportion of judicial time in habeas cases is spent wrestling with threshold procedural matters of extraordinary complexity. Two distinct responses to the problems presented by habeas corpus have been offered to date. The first proposes to educate would-be lawyers in habeas lore, so that in the future prisoners might be represented by attorneys who can avoid procedural difficulty in the first instance or thread their way through it when necessary. In this context as in so many others, the efficient course, and the course that promises long-term benefits to all concerned, is the course of fairness to the currently weak. The way to

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95. The debate within the Court has not gone unnoticed in the lower courts, though the divergent opinions among federal judges rarely refer directly to the Rehnquist opinions upon which I want to focus. *Compare* United States *ex rel.* Jones v. Franzen, 676 F.2d 261, 268 (7th Cir. 1982) (Posner, J., concurring) (complaining that the federal habeas courts routinely relitigate questions of fact) *with* Goode v. Wainwright, 670 F.2d 941, 941 (11th Cir. 1982) (Godbold, C.J.) (acknowledging the "sharply differing views over whether our law *ought to provide*" for post-conviction habeas review but pointing out that "the law of our country *does provide for it*" and that "federal court judges take an oath to carry out that law") (emphasis in original). *See generally* Martin v. Blackburn, 521 F. Supp. 685 (E.D. La. 1981) (blaming Congress for the operation of post-conviction habeas); Darden v. Wainwright, 513 F. Supp. 947 (M.D. Fla. 1981) (same). On occasion, the debate becomes colorful. *Compare In re* Bizzard, 559 F. Supp. 507, 512 (S.D. Ga. 1983) (declaring that the "incredible ease and related expense of a prisoner's access to the court is not more misplaced than in this case" in which the prisoner might better adopt a "dedication to self-betterment and the values of his parents" than continue his "war with society") *with* Gibson v. Zant, 547 F. Supp. 1270, 1271 (M.D. Ga. 1982) (viewing habeas as "just one of many distasteful tasks that Congress has assigned to state citizens serving as United States District Judges and that must be performed. . . regardless of their personal likes or dislikes"), *aff'd*, 705 F.2d 1543 (11th Cir. 1983).

96. We would do well to distinguish post-conviction attacks upon state criminal convictions from other kinds of "prisoner petitions" with which they are occasionally confused. *See* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979). Collateral attack petitions make up a very small part of the federal caseload, and their numbers have remained roughly constant over the last few years. While civil rights actions filed by state prisoners increased 115.6% between 1971 and 1982, habeas challenges to state convictions increased only 17.4% in the same period. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 103 (1982). In 1982, *all* state prisoner-initiated lawsuits accounted for only 12.1% of the full civil caseload. *Id.* at 100.

bring habeas into control is to provide indigent petitioners with the means to cope with the system they face—competent professional representation. If that were done, we would be more entitled than we are now to demand that habeas petitioners turn square corners as they pursue federal relief. In the end, the federal courts would waste less time on misguided doctrines, themselves intended to enhance efficiency but actually having precisely the opposite effect, and comparatively more time would be spent on the merits of constitutional claims.[97]

The second response is, on reflection, no response at all. Cynically, we can continue to insist upon procedural barriers and related doctrinal wrinkles that only frustrate pro se petitioners. We can *say* that we expect prisoners to understand the complexities with which they are presented and in that light box them out of the federal forum when, in fact, they do not understand and fail to comply. We can express surprise and impatience when, in their attempts to satisfy, prisoners actually create theoretical problems that, in turn, require judicial effort to resolve. To persist in this vein is to make matters worse and to feed an understandable, but wholly unjustifiable, suspicion that federal collateral review is not worth the price we pay for it. With due respect, I must conclude that this is what Justice Rehnquist intends. There being no other tenable explanation for his insistence on procedural niceties of doubtful utility in this of all fields, I conclude that he would bury post-conviction habeas in artificial procedural demands that cannot reasonably be met. The goal is not greater efficiency but an effective end to the enterprise.

The fundamental point of this discussion bears repeating. Post-conviction review of state judgments by the federal habeas courts constitutes a vital component of American criminal justice. It is time that law schools recognize as much and offer courses to bring the truth home to students and would-be practitioners in the criminal courts. Now that a good casebook is available on the national market, perhaps such courses will be offered more widely. If that happens, the system's efficiency will surely be enhanced. For, again, federal habeas corpus has long suffered from professional neglect. Petitioners have

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97. A word from Professor Wright should suffice:

> It is not obvious that it is a wise use of precious federal judicial time, or a service to the states and the notion of federalism, to have many or most habeas corpus petitions disposed of on procedural grounds. If the federal courts are free to reach the merits, they will find in the overwhelming bulk of the cases that the petition should be denied because the state courts have faithfully applied the commands of the Federal Constitution. A rebuff to the prisoner on procedural grounds leaves a cloud, however frivolous, over the state conviction and is simply an invitation to the prisoner to try and try again in the hope that sometime, somehow, he can push the right combination of buttons and obtain a decision on the merits.

Wright, Book Review, 81 MICH. L. REV. 802, 809-10 (1983) (reviewing W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980)).

coped as best they can alone, but the consequence has been extraordinary, and unnecessary, complexity. This, in fact, may be the one field in which the introduction of lawyers may actually simplify matters, contributing to the maintenance of the structure that Justice Frankfurter began to build decades ago.[98]

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98. If there is any indication from the Court regarding the future of the writ, I think it is in Justice Stevens' occasional statements linking the issues cognizable in habeas with the proper response to abortive state proceedings. *See* Rose v. Lundy, 455 U.S. 509, 538 (1982) (dissenting opinion). On several occasions, he has suggested that the Court should not routinely open federal habeas to all constitutional claims, subject to the *Sykes* standards for determining the effect of procedural default in state court—equally applicable no matter what issue is raised. Instead, the scope of the writ should be narrowed to particularly serious violations of the Constitution, which should be cognizable in habeas even if they were not preserved properly at trial. *Accord* Wainwright v. Sykes, 433 U.S. 72, 95-96 n.3 (Stevens, J., concurring). While Justice Stevens has thus far failed to attract other Justices to his position, he did manage to place some vague language tending toward his personal view in an opinion for the Court in Henderson v. Kibbe, 431 U.S. 145 (1977). *But see* United States v. Frady, 456 U.S. 152 (1982) (declining one available opportunity to achieve Justice Stevens' essential result by applying the federal "plain error" rule in collateral proceedings).

On the one hand, I prefer Justice Stevens' forthright attempt to address the critical issues in this field to Justice Rehnquist's campaign to frustrate habeas review in a maze of procedural complexity. The key questions are whether, or the extent to which, the lower federal courts should be open for the relitigation of federal claims. Serious approaches to habeas should acknowledge as much. On the other hand, I find Justice Stevens' answer, the suggestion that the substantive scope of habeas should be narrowed, disturbing. There are alternatives. One is to strip away the procedural underbrush that has grown up in the last twenty years and return to the framework envisioned by *Noia*, *Townsend*, and *Sanders* in 1963. *See supra* note 30. Another is to reexamine the habeas jurisdiction as only a component of a larger scheme for orchestrating the distribution of authority and responsibility between the federal and state courts. I intend in a future paper to attempt such a reexamination and in that light to defend the general availability of federal habeas corpus as a sequel to state court adjudication of federal claims arising in state criminal prosecutions.