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The Effect of Jackson v. Virginia on Federal Habeas Corpus Review of State Convictions

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THE EFFECT OF
JACKSON V. VIRGINIA
ON FEDERAL HABEAS CORPUS REVIEW OF
STATE CONVICTIONS

By its recent decision in *Jackson v. Virginia,* the Supreme Court has overturned precedent in holding that "in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." The new standard, which the majority declared to be compelled by *In re Winship,* sparked a spirited dissent and is likely to refuel an already hot controversy over the limits of federal habeas corpus jurisdiction.

The facts of the case were not complicated. It was undisputed at the trial that the defendant, Jackson, had shot and killed the victim. However, he set out a somewhat improbable defense based upon claims of self-defense or, in the alternative, intoxication so as to counter state allegations of premeditation which would have made the crime first degree murder under Virginia law. This was rejected by the state trial judge who was sitting as the finder of fact. Jackson's appeal on the grounds of insufficient evidence to support his conviction was denied by the Virginia Supreme Court, thus affirming his thirty-year sentence and exhausting his state remedies.

Accordingly, the arena shifted to the federal courts, where petitioner raised the same claim. Both the United States District Court and the Fourth Circuit Court of Appeals, in unpublished decisions, applied the standard set out in the case of *Thompson v. City of Louisville,* usually referred to as the

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2 *Id.* at 2792.
5 A summation of the petitioner's contentions is provided by Justice Stewart:

> When asked to describe his condition at the time of the shooting, he indicated that he had not been drunk, but had been "pretty high." His story was that the victim had attacked him with a knife when he resisted her sexual advances. He said that he had defended himself by firing a number of warning shots into the ground, and had then reloaded his revolver. The victim, he said, then attempted to take the gun from him, and the gun "went off" in the ensuing struggle. He said that he fled without seeking help for the victim because he was afraid.

99 S. Ct. at 2785.
6 He declared himself "convincing beyond a reasonable doubt." *Id.*
7 *Id.* n.5.
“no evidence” rule.\(^9\) However, while the District Court found no evidence, the Court of Appeals found “some” and reversed the District Court, thus reinstating the conviction.\(^10\) The Supreme Court granted certiorari\(^11\) to clear up the question of the effect of \textit{Winship} on the \textit{Thompson} no evidence rule.\(^12\)

In 1977, Justice Stewart first raised the issue in the case of \textit{Freeman v. Zahradnick},\(^13\) in a dissent from a denial of certiorari:

On direct review of state court convictions, this Court reviews the application of the “voluntariness” standard to the historical facts to determine whether a confession was admissible, or the application of First Amendment standards to the facts as found to determine whether the conduct in issue was constitutionally protected, to take but two examples. The same rule is applied to federal habeas corpus actions. . . . It is not immediately apparent why application of the beyond a reasonable doubt standard of \textit{Winship} to the historical facts should be any more immune from constitutional scrutiny. If, after viewing the evidence in the light most favorable to the State, . . . a federal court determines that no rational trier of fact could have found a defendant guilty beyond a reasonable doubt of the state offense with which he was charged, it is surely arguable that the court must hold, under \textit{Winship}, that the convicted defendant was denied due process of law.\(^14\)

Now in \textit{Jackson}, two years after the \textit{Zahradnick} dissent, Justice Stewart is speaking for the majority.\(^15\) His logic is persuasive as he fleshes out the argument originally set forth in the earlier case. He begins with the basic \textit{Winship} principle that “no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”\(^16\) This constitutional right and its protection are of sufficient importance to merit the abandonment of the \textit{Thompson} rule:

That the \textit{Thompson} “no evidence” rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. “[A] mere modicum of evidence may satisfy a ‘no evidence’ standard . . . .” \textit{Jacobellis v. Ohio}, 378 U.S. 184,

\(^{9}\) See text accompanying note 87 infra.

\(^{10}\) 99 S. Ct. at 2786.

\(^{11}\) 99 S. Ct. 609 (1979).

\(^{12}\) 99 S. Ct. at 2786.

\(^{13}\) 429 U.S. 1111 (1977).

\(^{14}\) Id. at 1111-12.

\(^{15}\) Joining Justice Stewart in the majority opinion were Justices Marshall, Brennan, White, and Blackmun. Like Stewart, Marshall and Brennan had dissented in the \textit{Zahradnick} case, finding no evidence under \textit{Thompson} but also protesting “the Court’s refusal to consider the novel and important issue of constitutional law” raised by Justice Stewart. Id. at 1120.

\(^{16}\) 99 S. Ct. at 2788.
202, 84 S. Ct. 1676, 1686, 12 L. Ed. 2d 793 (Warren, C.J., dissenting). Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a “mere modicum.” But it could not seriously be argued that such a “modicum” of evidence could by itself rationally support a conviction beyond a reasonable doubt. The Thompson doctrine simply fails to supply a workable or even a predictable standard for determining whether the due process command of Winship has been honored.17

However, having boldly championed the need for the new standard of review, the majority found the evidence sufficient to satisfy the new “no rational trier of fact” standard, saying:

Under the standard established in this opinion as necessary to preserve the due process protection recognized in Winship, a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.18

In a strong dissent,19 Justice Stevens lays out three major areas of disagreement with the majority opinion: 1) the standard adopted was not necessary to the decision; 2) the result reached is “not logically compelled” by Winship; 3) the new standard “threatens serious harm to the quality of our judicial system.”20

This comment will attempt to demonstrate that the faults complained of by the dissent are not substantial. On the contrary, the decision gives much-needed interpretation to an important aspect of federal habeas corpus jurisdiction. However, the practical consequences of the employment of the Jackson standard are problematic.

I

The first fault the dissent finds with the majority position is that, strictly speaking, the formulation of a new constitutional standard for federal habeas corpus review of claims of evidentiary insufficiency in state convictions was not necessary for the outcome of the case.21 As we have seen, since the Court found sufficient evidence to meet the new, stricter standard, there would have been enough to satisfy the more lenient Thompson standard as well. Justice Stevens accuses the majority of having “formulated a new

17 Id. at 2790.
18 Id. at 2793.
19 The dissent was joined by Chief Justice Burger and Justice Rehnquist.
20 99 S. Ct. at 2793.
21 Id.
constitutional principle under the most dangerous possible circumstances—i.e., where the exercise of judicial authority is neither necessitated nor capable of being limited by . . . some broader set of identifiable experiences with the evil supposedly involved.”

In support of this contention, Justice Stevens cites the concurring opinion of Justice Brandeis in Ashwander v. Tennessee Valley Authority. In that case the majority, per Chief Justice Hughes, found the legislation setting up the TVA constitutional even though this determination was not necessary to the decision of the case. Justice Brandeis began by agreeing with the “conclusion on the constitutional question announced by the Chief Justice” but felt that the Supreme Court tradition of avoiding decisions on constitutional grounds unless absolutely necessary should be adhered to. The opinion, lavishly supported by citations, sets out seven rules of caution in order to avoid “passing upon a large part of all the constitutional questions pressed upon [the Court] for decision.” These included, inter alia, the rules that “[t]he Court will not ‘anticipate a question of constitutional law in advance of the necessity of deciding it’ ” and “[t]he Court will not ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’”

However, this classic procedure has not been invariably followed, as the existence of the Brandeis concurring opinion demonstrates. In addition, if we are to be scrupulous in limiting the use of judicial principles to the context in which they originated, Brandeis was concerned about abandoning established practice when passing upon the constitutionality vel non of an act of Congress. One can readily understand the need for greater caution in that context, so as to avoid tipping the federal balance of powers in assuming too large a role in overseeing the acts of the branch of government constitutionally entrusted with the power to pass laws for the good of the people. These considerations are not as important in the discarding of the “no evidence” rule. Stare decisis has been traditionally relegated to a lesser role in constitutional litigation, where a constitutional principle is said never to be decided finally until it is decided correctly.

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22 Id. at 2794.
24 Id. at 341.
25 Id. at 346.
26 Id. at 346-47. Both of these rules were culled from the case of Liverpool, N.Y. & P.S.S. Co. v. Emigration Commrs, 113 U.S. 33 (1885).
27 For other examples, see generally L. LUSKY, BY WHAT RIGHT? ch. 15 (1975).
28 See Justice Cardozo's concurring opinion in St. Joseph Stock Yards v. United States, 298 U.S. 38, 94 (1936), wherein he stated: “The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. See the cases collected by Brandeis, J., dissenting in Burnett v. Colorado Oil & Gas Co., 285 U.S. 393, 407, 408; 52 S. Ct. 443, 76 L. Ed. 815.” See generally RHODE & SPAETH, SUPREME COURT DECISION MAKING at 35-39 (1976).
As to the argument that this was not the proper case in which to change the standard, it can be argued in reply that since the announced change of standard would not affect the outcome of any case where the evidence was either non-existent (thus compelling a reversal under either standard) or sufficient to comply with either standard (as in the *Jackson* decision), only a case in the difficult-to-define area in between could support the announcement of the new standard. However, the circuits were too badly in need of guidance to wait for that event. Opposition to the new test must stand on firmer constitutional ground than that of mere deviation from traditional, but discretionary, practice.

II

Justice Stevens then contends that *Winship* and *Thompson* are not inconsistent. He portrays *Winship* as setting a standard for trial and *Thompson* one for appellate review. He distinguishes the cases further by showing that "in *Winship*, the Court pointed out the breadth of both the historical and the current acceptance of the reasonable-doubt trial standard. In this case, by contrast, the Court candidly recognizes that the federal courts of appeals have 'generally' rejected the habeas standard that it adopts today." His final argument is the existence of two post-*Winship* Supreme Court cases which rely on the *Thompson* standard, *Vachon v. New Hampshire*, and *Douglas v. Buder*.

The question of trial versus appellate standards relates to what might be termed the central issue of the case, namely, whether the *Winship* standard is important enough to merit the federal invasion of the findings of state finders-of-fact. A consideration of this matter is best left until after an overview of the development of federal habeas corpus powers.

The reason for the federal courts' general rejection of the standard announced in *Jackson* was the fact that a different, Supreme Court-mandated standard (*Thompson*) already existed, whereas there was no such controlling standard before *Winship*. If the Court must wait until legal principles are as well-established as the beyond a reasonable doubt standard of *Winship* was before giving them formal recognition, it will rarely, if ever, set down or change a constitutional standard, and this would be an abdication of its role as high court of the nation.

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29 *Compare* the differing interpretations of the "no evidence" rule in *Speigner v. Jago*, 603 F.2d 1208 (6th Cir. 1979) and *Wilson v. Parratt*, 540 F.2d 415 (8th Cir. 1976), and note how both differ from the rule as set out in *Jackson*.

30 99 S. Ct. at 2795-96.

31 *Id.* at 2796.


34 See notes 50-82 and accompanying text infra.
Finally, an examination of the two cases cited by Justice Stevens reveals that in both of them the claim of evidentiary insufficiency was upheld. *Buder* was simply a short per curiam opinion which applied the *Thompson* standard and found no evidence in a case where none was to be found. However, the *Vachon* court found no evidence to support the state conviction of a man for the sale of an obscene button to a minor, notwithstanding the fact that it was undisputed on the record that the defendant owned and operated the store at which the button was bought. Thus, the *Vachon* decision, while purporting to apply the no evidence test, could be interpreted as requiring an evaluation of the evidence. This was, in fact, the way it was read by the Sixth Circuit, which cited it in support of its statement in *Speigner v. Jago* that “after *Winship*, the term ‘no evidence’ must be interpreted to include some notion of degree or weight of the evidence.”

We must go beyond the Stevens characterization of *Winship* as “merely extend[ing] to juveniles a protection that had traditionally been available to defendants in criminal trials in this Nation.” Obviously, *Winship* must be viewed as more than a juvenile court standard case. Analysis must start with the principle set down in the *Winship* opinion by Justice Brennan: “we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” Our focus will be on more recent considerations of the *Winship* standard and its meaning.

For the most part, the issue in post-*Winship* cases has been how the use of certain procedures (especially jury instructions) related to the defense’s opportunity to raise a reasonable doubt in the mind of the trier of fact. The record in this area shows no overall consistency. Non-unanimous jury verdicts, instructions involving a common law inference, and a “presumption of truth” instruction as to prosecution witnesses were held not to hinder the defense’s opportunity to raise the doubt sufficiently to create due process implications; while an instruction to ignore defense testimony unless it was believed true beyond a reasonable doubt, the prevention of the defendant’s attorney from making a closing argument, and the trial of an accused while wearing “prison garb” were held to effectively deny

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36 603 F.2d 1208 (6th Cir. 1979).
37 Id. at 1212.
38 99 S. Ct. at 2795.
39 397 U.S. at 364.
44 Estelle v. Williams, 425 U.S. 501 (1976). However, in this case, the defendant was held to have waived this right by not demanding a different set of clothing at the trial.
the defense that opportunity. It was further held in *Mullaney v. Wilbur* that the *Winship* standard applied to every element of the crime. Attempts to extend the *Winship* standard to proof of voluntariness of confessions and the civil adjudication of obscenity were both unsuccessful. There has been no unanimity—virtually all the cases cited above were marked by dissenting opinions.

However, the more the Court debates over applications or extensions of the *Winship* standard, the more firmly established Justice Brennan's holding quoted above becomes. And as Justice Stewart points out in *Jackson*:

> Congress in [28 U.S.C.] § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal constitutional law. . . . The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting . . . the belief that . . . "finality" . . . is simply not to be achieved at the expense of a constitutional right — is not one that can be so lightly abjured.

In this passage, Justice Stewart adheres to the expansive view of federal habeas power which is of comparatively modern origin. It is significant that Justice Stevens does not take exception to it, but instead bases his dissent on the grounds already noted.

We will return to this point after an examination of the history of the writ of habeas corpus which will serve to highlight the particular concerns raised by the invocation of federal habeas corpus jurisdiction over state prisoners.

### III

The history of the "great writ" is itself a matter of some dispute. However, it is clear that it had already been established in England both in the common law and later by statute before 1700, thus becoming part of the United States's inherited, common law tradition. After the Revolution and the dissolution of the Articles of Confederation, habeas corpus was

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46 421 U.S. 684 (1975). The holding of *Mullaney* may have been weakened by the decision in *Patterson v. New York*, 432 U.S. 197 (1977), allowing the states to make insanity an affirmative defense, thus shifting the burden of proof to the defendant.

40 *Lego v. Twomey*, 404 U.S. 477 (1972), holding that proof of voluntariness of a confession by a preponderance of the evidence is sufficient.


48 99 S. Ct. at 2791.

49 See text following note 71 infra.

50 As it was termed by Chief Justice Marshall in *Ex parte Bollman* and *Swartwout*, 8 U.S. (4 Cranch) 75, 95 (1807).

made one of the rights guaranteed in the Constitution and jurisdiction to issue the writ was granted to the federal courts by the first session of Congress in Section 14 of the Judiciary Act of 1789.

After the legitimacy of this power was upheld, Chief Justice Marshall set the standard for its proper exercise in *Ex Parte Watkins*. Marshall distinguished the prior cases on the ground that "in no one of these cases was the prisoner confined under the judgment of a court." Therefore, Marshall’s view of the common law colored by federalist concerns was that:

> [t]he judgment of a court of record whose jurisdiction is final, ... is as conclusive on this court as it is on other courts. 

... An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not ... if the court has general jurisdiction of the subject, although it should be erroneous.

Most observers see this as setting up a standard by which habeas corpus claims should be judged in order to determine whether or not to entertain them. The use of this standard, coupled with the fact that Congress had not yet granted to the federal courts the power to exercise habeas corpus jurisdiction over state prisoners, severely curtailed the utility of the writ. The situation changed somewhat after the Civil War, when the Judiciary Act of Feb. 5, 1867 was passed by Congress, containing the following language: “the several courts of the United States ... shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution or any treaty or law of the United States.” This jurisdiction over state prisoners was withdrawn in 1868, only to be restored in 1885.

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52 U.S. CONST. art. I, § 9, cl. 2.
53 Ch. 20, § 14, 1 Stat. 92 (1789).
54 See *Ex parte* Bollman and Swartwout, 8 U.S. (4 Cranch) 75 (1807); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795). The writs were granted in all three cases.
56 *Id.* at 208.
57 *Id.* at 202-03.
58 Justice Brennan, speaking for the Court in Fay v. Noia, 372 U.S. 391 (1963), considered *Watkins* to be just another case establishing the power of the Court to issue the writ. *Id.* at 407. This ignores the fact that it was the first major case to deny the writ to a prisoner, and that it specifically denied the power of the Court to question the judgment of a court of competent jurisdiction.
59 Ch. 28, § 1, 14 Stat. 385-86 (1867).
60 *Id.* (emphasis added). In Fay v. Noia, Justice Brennan cited the *Congressional Globe* for the proposition that this act was intended to give the federal courts “all the powers that can be conferred upon them” in order to enforce the new constitutional amendments. 372 U.S. at 415-17.
61 Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 (1868). This compelled the decision in *Ex parte* McCordle, 74 U.S. (7 Wall.) 506 (1869), wherein the repealing act was declared constitutional and the appeal therefore dismissed for lack of jurisdiction.
Throughout this period the Watkins standard remained unchanged, although the interpretation of it was loosened somewhat with the analysis espoused in *Ex parte Siebold*, that since an unconstitutional law "is void and as no law, the conviction under it is not merely erroneous, but is illegal and void." This enabled the Court to hold that a lower court judgment based on such a law was not rendered by a court of "competent jurisdiction," thus allowing habeas corpus to be granted.

By the early 1900's, the jurisdictional standard was being stretched to the limit. The cases of *Frank v. Mangum* and *Moore v. Dempsey* serve to illustrate this point. Both dealt with allegations by the respective petitioners that their trials were so dominated by mob passion that they were denied due process of law. *Frank* held that the jurisdiction inquired into was not merely that of the trial court, but the whole state court system, including its procedure for handling federal constitutional claims. However, it was held that if the state had a proper scheme for consideration of constitutional claims, federal review of those claims on habeas corpus was precluded. The *Moore* opinion did not even use the word "jurisdiction," but spoke instead of determining whether or not "the whole proceeding is a mask." If it was, then the federal habeas corpus court could "secure to the petitioners their constitutional rights," even to the point of overturning a judgment that was jurisdictionally valid.

The jurisdictional standard, although it continued to be used, had been effectively killed by *Moore*. It was finally buried in *Waley v. Johnson*, to be replaced by a broader, more flexible test:

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

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63 100 U.S. 371 (1880).
64 Id. at 376-77.
65 See Bator, supra note 4, at 473, where he contends that the lack of direct appeal for federal prisoners was the major reason for what he calls the "softening" of the jurisdictional standard.
67 261 U.S. 86 (1922).
68 Id. at 91.
69 Id. The majority in *Fay v. Noia* saw *Moore* as overruling *Frank*, but this is not universally accepted. See Bator, supra note 4, at 488-89.
71 316 U.S. 101 (1942).
72 Id. at 104-05. The *Waley* court cited *Moore* in support of its view.
Thus, the new test was twofold: habeas corpus relief would be granted upon a showing of unconstitutional conviction plus absolute need, i.e., no other procedure in existence to protect the rights of the accused. Compared to a literal interpretation of the jurisdictional test, the new standard would seem to provide would-be petitioners with greatly increased access to the federal habeas corpus system, especially after the Waley-Moore standard was extended to state prisoners in Ex Parte Hawk.78

Yet the “modern” flood of habeas corpus claims was not touched off until the case of Brown v. Allen.74 Both Justice Reed (for the Court) and Justice Frankfurter (in an influential concurring opinion)75 affirmed the standard as set out above, then went further and read into the Habeas Corpus Act76 broad powers to, in effect, retry state adjudications without consideration of the adequacy of state trial or review procedures.77 This case was followed by Fay v. Noia78 which, by sanctioning an expansive view of the history of the exercise of habeas corpus power, converted the strong weapon constructed by Brown v. Allen into one of nearly mystic significance.79

Brown, Fay, and their Sixties progeny80 had the effect of making the writ a major conduit for protection of many of the “new” constitutional rights that the Supreme Court incorporated into the Due Process Clause of the fourteenth amendment, as well as the prevention of police abuse under the fourth amendment.81 Although use of the writ to attack searches and seizures has been curtailed somewhat by the decision in Stone v. Powell,82 Brown and Fay still define the applicable limits of the power of federal courts to entertain the writ.

81 321 U.S. 114 (1944).
84 344 U.S. 443 (1953).
87 Id. at 488.
77 Justice Reed emphasized the discretion of the federal court to hold the state proceedings proper and thus leave their findings untouched, 344 U.S. at 463-64. In a separate opinion, Justice Frankfurter presaged the expansive Fay view of the nature of the writ in safeguarding constitutional rights, id. at 497-513.
89 Fay imbued the writ with so much power that it was not to be deterred by the presence of an adequate state ground, e.g., the failure of the defendant to appeal to the state courts within the required time. Id. at 472-76 (Harlan, J., dissenting).
81 See generally L. Lusky, supra note 27, at ch. 10.
IV

Next, we will examine the *Thompson* line of cases to see the evolution of the “no evidence” standard set out therein.

The facts of *Thompson v. City of Louisville* brand the case as somewhat unusual. Stated simply, Thompson was arrested for loitering while waiting for a bus in a Louisville bar, of which he was a regular patron. When he objected to the arrest, he was charged with disorderly conduct. The above facts (and a record showing fifty-four previous arrests) constituted the sum total of the evidence presented by the city at Thompson’s trial; yet he was found guilty and fined ten dollars on each charge. Kentucky courts could not review cases involving a penalty of less than twenty dollars per charge, but because of the substantiality of the question presented and the likelihood that it would be otherwise mooted, the Supreme Court in effect took direct review from the Louisville Police Court. The Court overturned the conviction on the grounds of evidentiary insufficiency and laid down the following standard to be used in the judging of future such claims:

The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. Decision of this question turns not on the sufficiency of the evidence, but upon whether this conviction rests upon any evidence at all.

One is struck by the starkness of the phrase “any evidence at all.” At first blush, such a standard would seem to present a nearly insurmountable hurdle to those seeking to bring such a claim to the attention of the Court. However, the Supreme Court’s first major decision involving application of the *Thompson* standard, *Garner v. Louisiana*, showed that the standard was more capable of being met than its wording would seem to indicate. This case, involving the convictions of participants in a lunch counter sit-in on charges of disturbing the peace, reached the Supreme Court in much the same manner as did the *Thompson* case. After reviewing the record, the Court, in an opinion by Chief Justice Warren, found “no evidence” to support the convictions, despite the presence in the record of

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83 *362 U.S. 199 (1960).*
85 Thompson would have served time in jail at the rate of two dollars per day if he did not pay the fine, and thus would have been released in ten days. *362 U.S.* at 201.
86 This was done through an elaborate series of stays granted by the Police Court in Louisville, the Kentucky Circuit Court, and the Kentucky Court of Appeals. *Id.* at 202.
87 *Id.* at 199.
88 *368 U.S. 157 (1961).*
89 *Id.* at 159-61.
the testimony of the lunch counter manager to the effect that he feared "disturbances" if the protesters remained at the all-white counter. In dissent, Justice Harlan pointed out that the interpretation of Thompson used by the majority dramatically differed in effect from a literal "no evidence" standard; the latter would preclude any review once evidence was found, whereas the evidence, once found, was tested for credibility by the Garner majority. He went on to warn the Court as follows: "This case [Thompson] is bound to lead us into treacherous territory, unless we apply its teaching with utmost circumspection . . . ."

The Court seemed to find Harlan persuasive, for in Edwards v. South Carolina it refused to entertain a Thompson "no evidence" claim in a case involving a similar fact pattern to that of Garner, saying: "Whatever the merits of this contention [insufficiency of the evidence] we need not pass upon it in the present case. The state courts have held that petitioners' conduct constituted breach of the peace under state law and we may accept their decision as binding upon us to that extent."

This slight withdrawal from the Garner position paved the way for its complete abandonment in Shuttlesworth v. City of Birmingham, where it was stated that "[t]he proposition for which [Thompson] stands is simple and clear. It has nothing to do with concepts relating to the weight or sufficiency of the evidence in any particular case."

The author of the Shuttlesworth opinion was Justice Stewart, and it is his literal interpretation of the words "no evidence" which has been followed by the lower federal courts ever since. Perhaps he knew best how truly incompatible the idea of guaranteeing the Winship right through federal habeas corpus was with the literal application of the Thompson standard, which dictated that once a "modicum" of evidence was discerned in the record (assuming that the "reasonable doubt" instruction had been given), the reviewing court could not entertain claims of insufficiency of the evidence. Of course we have seen how in Vachon, the Court weighed the evidence, found it insufficient, and avoided Thompson by labeling the inadequate evidence as "no evidence." Thus, without the Jackson opinion,

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90 Warren's reply: "his fear is completely unsubstantiated by the record." Id. at 171.
91 The manager's testimony was relevant. Therefore under a true "no evidence" standard, its weight or persuasiveness should not have mattered.
92 368 U.S. at 190.
94 Id. at 235.
95 382 U.S. 87 (1965).
96 Id. at 94.
97 "So long as the reasonable doubt instruction has been given at trial, the no-evidence doctrine . . . remains the appropriate guide . . . to apply. . . ." 99 S. Ct. at 2788 (Stevens, J., dissenting). Of course, this will no longer be true after Jackson.
98 See text following note 34 supra.
the *Thompson* standard would likely have gone the way of the old jurisdictional standard, with only lip service being paid to its strictures.

V

An important point remains to be made: the above cases were all brought to the Supreme Court on direct review. The *Thompson* standard for reviewing the findings of the state trier of facts, as originally formulated, was intended to apply in all federal appellate review of state court decisions; it was not set out as being merely a standard of habeas corpus review. However, the sole opportunity for the lower federal courts to make use of the standard is in that setting. It is remotely possible, since the *Jackson* decision was limited to habeas corpus review and since, as we have seen, the writ of habeas corpus holds a unique position in American jurisprudence, that the new standard will not be applied by the Supreme Court on cases of direct review. However, this seems unlikely; the analysis in *Jackson* can be applied with equal force to direct review situations.

So, the important effect of the overruling of the *Thompson* standard will be upon the exercise of the habeas corpus power by the lower federal courts. The question now to be considered is how much of an effect the changing of the standard will have on habeas corpus cases, and what that effect will be. The majority states that "the burden that is likely to follow from acceptance of the *Winship* standard has, we think, been exaggerated." The dissent responds:

It is true that in practice there may be little or no difference between a record that does not contain at least some evidence tending to prove every element of an offense and a record containing so little evidence that no rational factfinder could be persuaded of guilt beyond a reasonable doubt. . . . But this only means that the new rule will seldom, if ever, provide a convicted state prisoner with any tangible benefits. It does not mean that the rule will have no impact on the administration of justice. On the contrary, I am persuaded that it will be seriously harmful both to the State and Federal Judiciaries.

Of course, this is the prelude to a "floodgates" argument. This type of objection has been part of every dissent from every extension of federal habeas corpus power from Justice Jackson's in *Brown v. Allen* to Justice Stevens's in *Jackson*. Well-intentioned though these arguments may be, there is something fundamentally wrong with the knowing denial of admittedly important rights because of the inadequacy of the judicial system.
to handle the caseload. Once a right is recognized and given constitutional stature, its protection should be of paramount importance. If the system cannot keep pace, then it must be either improved or its capacity enlarged. If this cannot be done, then other, less important aspects of federal court jurisdiction should be curtailed.\textsuperscript{104}

An interesting question is what effect the \textit{Jackson} standard might have on the doctrine of \textit{Stone v. Powell},\textsuperscript{105} which held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at trial."\textsuperscript{106}

In the text of the \textit{Jackson} opinion, Justice Stewart notes:

In sum, counsel for the State urges that this type of constitutional claim should be deemed to fall within the limit on federal habeas corpus jurisdiction, identified in \textit{Stone v. Powell}... with respect to Fourth Amendment claims. We disagree.

\ldots

The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in \textit{Stone v. Powell}... The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence.\textsuperscript{107}

So, the two cases are seen as consistent by the majority. The effect of \textit{Jackson} on \textit{Powell} is therefore likely to be little or none; the watchword is still any constitutional claim that is "central to the basic question of guilt or innocence."

A more interesting question is why \textit{Powell} did not have more of an effect on \textit{Jackson}? After \textit{Powell}, observers were portending a dim future for federal habeas corpus. After all, the \textit{Powell} majority had adopted the restrictive view of the history of habeas corpus put forth by the dissenter

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\textsuperscript{104} Consider the following argument:

The much-heralded "flood" of writ petitions and the resulting "burden" on the federal courts have been greatly exaggerated. \ldots

\ldots Of the 8281 prisoner petitions terminated by court action in fiscal 1970, 95.1\% were terminated before trial \ldots

More fundamentally, the very premise of any argument that federal judges are too burdened by prisoner petitions should be challenged. The premise is that they would be better spending their time on something else. Critics of habeas corpus rarely ask whether there are other aspects of federal court jurisdiction that could be more appropriately eliminated in order to ease federal court congestion. One conspicuous category is that of state law personal injury actions filed under the diversity of citizenship jurisdiction. In fiscal 1970, 13,794 of these actions were filed.\ldots

Chisum, \textit{supra} note 4, at 698-99.

\textsuperscript{105} 428 U.S. 465 (1975).

\textsuperscript{106} Id. at 494.

\textsuperscript{107} 99 S. Ct. at 2790-92.
in *Fay*, and cries for further curtailment of the use of the writ were plentiful. Yet, although it gave an approving cite to *Powell*, the *Jackson* Court reaffirmed the expansive interpretation of the habeas corpus statute. Perhaps the *Powell* decision will presage the abandonment of the exclusionary rule, rather than a greater erosion of federal habeas corpus power.

What of the practical effects of the new standard? How will it be administered? Let us examine the amount of evidence deemed sufficient to support a finding of competence on the part of the defendant (as opposed to insanity) under the various standards we have examined. First, *Brooks v. Rose*, a Sixth Circuit decision applying the *Thompson* standard. In this case, the defense produced four experts who testified that the defendant was rendered temporarily insane due to a head injury. The state did not directly counter this, but relied upon the testimony of the witnesses to the murder as to the defendant's behavior during the killings. The jury returned a verdict of guilty, and this was affirmed by the federal appeals court, Judge Weick saying that "the jury was not bound to accept the psychiatrists' testimony, and could disregard it." Thus there was sufficient evidence in the record to support possible inferences of sanity by the jury when reviewed under a "no evidence" standard (i.e., where any evidence at all is sufficient to support a verdict).

This case was explicitly overruled by the previously mentioned *Speigner v. Jago* (over the vehement dissent of Judge Weick), which equated "no evidence" with "some notion of degree or weight of the evidence." Thus, the *Speigner* majority not only changed the way the Sixth Circuit interpreted the words "no evidence," but it implicitly changed the amount of evidence needed to support a finding of mental competence as well. It seems safe to say that under *Speigner* (which predated *Jackson*) more evidence was needed than was presented in *Brooks*.

Finally, notice *Moore v. Duckworth*, a post-*Jackson* Supreme Court case in which lay testimony was found fully "sufficient to support a jury finding beyond a reasonable doubt that the petitioner was sane at the time of the killing." Obviously there is no direct connection between these cases, but they serve to illustrate the differing standards of review.

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108 428 U.S. 474-78.
110 520 F.2d 775 (6th Cir. 1975).
111 Id. at 780.
112 603 F.2d 1208 (6th Cir. 1979). See text accompanying notes 35 & 36 supra.
113 603 F.2d at 1212.
115 Id. at 3089-90.
There will surely be no difference in the actual outcome of most cases. Where the federal courts had formerly dismissed claims of evidentiary insufficiency because of Thompson, they will now consider them — only to find the great majority to be unfounded. A case in point is Davis v. Campbell. After noting the Jackson decision and its effect on the consideration of claims of evidentiary insufficiency, the Eighth Circuit looked to the record, found two doctors testifying for competency and two for insanity, and found this to be sufficient evidence to satisfy the Jackson standard. In practice, then, it is doubtful whether there will be any significant change in reversal trends.

It seems that the bottom line of the Jackson decision is that, while it was necessary in order to make it clear to the federal courts that the Winship standard applies to habeas corpus claims, the dissent has a point after all — it will not be until the first conviction is overturned under the Jackson standard that we will really have a clear idea of what constitutes evidence from which no rational trier of fact could find proof of guilt beyond a reasonable doubt.

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116 608 F.2d 317 (8th Cir. 1979).
117 However, the Davis court did state that prior to Jackson, it was simply rejecting all claims of evidentiary insufficiency on the authority of Thompson. Id. at 319 n.5.