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APPORTIONMENT OF THE JUDICIAL RESOURCES IN CRIMINAL CASES: SHOULD HABEAS CORPUS BE ELIMINATED?

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THE problems with which this article deals arise from our dual federal-state relationship; from the jurisdiction to determine federal claims, which jurisdiction Congress has distributed to both state and federal courts; from jurisdiction granted to the Supreme Court of the United States to review errors of federal law in state court judgments; from federal habeas corpus proceedings under which state court convictions are reviewed and sometimes set aside, where such convictions are in violation of the Constitution of the United States; and from civil rights actions in which lower federal courts supervise and control the disciplinary procedures and conditions in state prisons. In my judgment, habeas corpus should not be eliminated but its misuse should be curbed. Should this be accomplished, there would undoubtedly be an opportunity for better apportionment of judicial resources.

I

Historically, such cases as *Ex Parte Watkins*[1] propounded the effect that the *Great Writ* was available only to review judgments of conviction which were void for lack of jurisdiction. "Consequently, only challenges of nonjudicial detentions without proper legal process or of confinement by the judgment of a court without competence in the matter could be heard on federal habeas corpus."[2]

The expansion of the scope of the writ began, perhaps, in *Ex*

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1. 28 U.S. (3 Pet.) 193 (1830).

2. *See, Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1045 (1970).

Parte Siebold.[3] There, the Court reaffirmed the jurisdictional nature of the inquiry, stating:

> The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under a conviction and sentence of another court is the want of jurisdiction in such court over the person of the cause, *or some other matter rendering its proceedings void*.[4]
>
> An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment.[5]

This general rule stated in *Watkins* and *Siebold* was then slowly eroded. In *Frank v. Mangum*,[6] the Court, apparently not entirely abandoning the jurisdictional concept, held that the original jurisdiction of the state's criminal court could be lost if, during the course of the trial, the defendant was deprived of his constitutional rights. To the same effect is *Johnson v. Zerbst*,[7] which also held that Congress had expanded the rights of a habeas petitioner so as to provide for a more searching investigation with authority of the court, upon determining the facts, to "dispose of the matter as law and justice require."[8] *Moore v. Dempsey*[9] held that a conviction in violation of the due process clause was void.

Habeas corpus no longer lay only for jurisdictional defects in the trial court's proceedings. In *Waley v. Johnston*,[10] the Court abandoned this notion, and said:

> 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.[11]

Soon, however, even this "exceptional circumstances" doctrine gave way to the availability of the writ to remedy any violation of federal constitutional rights. *Brown v. Allen*[12] held that all federal

3. 100 U.S. 371, 375 (1879).
4. *Id.* at 375. Emphasis added.
5. *Id.* at 376-77.
6. 237 U.S. 309 (1915).
7. 304 U.S. 458 (1938).
8. 28 U.S.C. § 2243.
9. 261 U.S. 86 (1923).
10. 316 U.S. 101 (1942).
11. *Id.* at 105.
12. 344 U.S. 443 (1953).

constitutional questions raised by state prisoners were cognizable in federal habeas corpus.[13]

The Supreme Court has also held that the doctrine of res judicata does not prevent a habeas court from relitigating issues of law or fact which have been resolved previously in the state system, or at the federal trial or appellate level. The district judge has power to determine anew the facts of a case:

> Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application. On the other hand, State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding. It is precisely these questions that the federal judge is commanded to decide.[14]

> Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus.[15]

This expansion of federal habeas corpus jurisdiction reached its climax with the 1963 trilogy of *Townsend v. Sain*,[16] *Fay v. Noia*,[17] and *Sanders v. United States*.[18] *Townsend* held that it was the duty of the district court to conduct an evidentiary hearing if a state court petitioner did not receive a "full and fair" hearing in the state court, but nevertheless made it clear that the judge could find the facts *de novo*, even if the petitioner had received such a full and fair hearing in the state court. Moreover, the Court outlined six situations in which a hearing must be held. *Fay* held that waiver of a federal claim could be had only by considered choice of the petitioner, and that the exhaustion of remedies requirement referred to currently available state court remedies only. And finally, *Sanders* held that a second or subsequent habeas petition could be denied on the basis of a previous petition's denial only if the same issues were again advanced, the prior determina-

13. Kaufman v. United States, 394 U.S. 217 (1969), held that all constitutional claims are also grounds for Section 2255 relief for federal prisoners.

14. Brown v. Allen, 344 U.S. 443, 506 (1953), Mr. Justice Frankfurter, concurring.

15. *Id.* at 508-09.

16. 372 U.S. 293 (1963).

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

18. 373 U.S. 1 (1963).

tion was on the merits, and if justice would not be served by reaching the merits. Thus, habeas relief did not differ significantly from relief which one could seek under direct appeal.

II

Concurrently with the enlargement of the habeas jurisdiction, there was a great expansion of the constitutional rights of persons accused of crime. These expanded rights included application of a number of the provisions of the Bill of Rights to state criminal trials, provisions which previously had been held not to apply;[19] the assistance of counsel in state criminal cases;[20] the prohibiting of comment by prosecutors on the failure of defendant to take the witness stand, which comment was permissible under the Constitution of a state;[21] the prohibiting of in-custody interrogation of suspects by police, except under specific guidelines adopted by the court;[22] expanded concepts of coerced confessions;[23] expanded due process rights;[24] the right to confrontation;[25] the right of jailhouse lawyers to prepare and file habeas corpus petitions, including briefs;[26] the right to counsel at lineups[27] and at preliminary hearings;[28] various search and seizure rights;[29] and the creation by the Supreme Court of a new federal remedy for asserting a claim for

19. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Gideon v. Wainwright, 372 U.S. 335 (1963); Pointer v. Texas, 380 U.S. 400 (1965).

20. Gideon v. Wainwright, 372 U.S. 335 (1963).

21. Griffin v. California, 380 U.S. 609 (1965); Tehan v. Shott, 382 U.S. 406 (1966).

22. Miranda v. Arizona, 384 U.S. 436 (1966).

23. Spano v. New York, 360 U.S. 315 (1959).

24. Brady v. Maryland, 373 U.S. 83 (1963), suppression by prosecution of evidence favorable to the accused; North Carolina v. Pearce, 395 U.S. 711 (1969), vindictive sentence on retrial; Boykin v. Alabama, 395 U.S. 238 (1969), coerced plea of guilty; Giglio v. United States, *cert. granted* 401 U.S. 936 (1972, No. 70-29), prosecution's duty to present material evidence.

25. Bruton v. United States, 391 U.S. 123 (1968); Pointer v. Texas, 380 U.S. 400 (1965).

26. Johnson v. Avery, 393 U.S. 483 (1969).

27. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).

28. Coleman v. Alabama, 399 U.S. 1 (1970).

29. Chimel v. California, 395 U.S. 752 (1969); Mapp v. Ohio, 367 U.S. 643 (1961).

damages against federal officers for the alleged violation of the accused's Fourth Amendment rights.[30]

This remedy could easily be expanded to embrace any amendment, or even any provision of the Constitution. That it will result in an avalanche of suits filed in the already heavily burdened Federal Courts, was stated by Mr. Justice Blackmun in his dissent. Mr. Justice Black expressed fears that "such suits might deter officials from the *proper* and honest performance of their duties." To put it mildly, this remedy has resulted in the opening of a Pandora's box. This is evidenced by the decision of the Second Circuit, on remand,[31] which decision removes immunity rights of federal officers that were thought by many courts to exist, and the decision subjects the officers to the heavy burden of defending themselves in such suits. As pointed out by Chief Justice Burger in his dissent, the creation of such new remedies had best be left to Congress, which could make provision for the proper handling of the litigation and could adopt provisions to protect the public interest.

It is indeed fortunate that the Supreme Court made many of its rulings prospective in application,[32] otherwise there would have been a mass exodus from the prisons.

That all of these decisions have placed a heavy burden on the federal courts is an understatement. The observations by Mr. Justice Jackson in his concurrence in *Brown v. Allen*[33] would appear to be accurate:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own.[34]

In a footnote to this comment, Mr. Justice Jackson observed:

> There were filed in federal district courts during 1941 one hundred twenty-seven

30. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971); Bivens v. Six Unknown Fed. Narcotics Agents, — F.2d — (2d Cir., Docket No. 32537, decided March 8, 1972).

31. *Id.*

32. *See, e.g.*, Adams v. Illinois, — U.S. — (1972, No. 70-5038); Desist v. United States, 394 U.S. 244 (1969); Stovall v. Denno, 388 U.S. 293 (1967); Tehan v. Shott, 382 U.S. 406 (1966); Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).

33. 344 U.S. 443 (1953).

34. *Id.* at 536.

petitions for habeas corpus challenging state convictions; in 1943 there were two hundred sixty-nine; in 1948 five hundred forty-three; in 1952 five hundred forty-one.[35]

Two decades later one cannot help but agree with Judge Friendly's observations on the number of petitions, and with Mr. Justice Jackson's comment:

Despite the safeguard intended to be afforded by the requirement of a certificate of probable cause, there were over twice as many *appeals* by state prisoners in 1969 as there were *petitions* in 1952. A similar explosion of collateral attack has occurred in the courts of many of the states. If 541 annual petitions for federal habeas corpus by state prisoners were an 'inundation', what is the right word for 7,500?[36]

An examination of available statistics reveals the extent of this increase in inmate-generated petitions filed in the federal courts in the last decade. In 1961 habeas petitions filed in the district courts by state prisoners totaled 1,020, whereas federal prisoners filed 868 such petitions. By 1971, these filings amounted to 8,372 and 1,671 respectively. In addition, in 1961 federal inmates filed 560 motions to vacate sentence under 28 U.S.C. § 2255, and by 1971 these filings totaled 1,335. Civil Rights actions have also risen in number. In 1966, when statistics first became available, state prisoners filed 218 such petitions, and federal inmates filed 15. By 1971 the total filings had grown to 2,915 by state prisoners, and 214 for federal prisoners.[37]

Nor is this increase in number of petitions filed limited to the district courts; appeals from the granting or denial of these petitions now occupy a significant portion of the workload of courts of appeal. In 1971 there were 1,665 appeals of state prisoners filed in courts of appeal, amounting to 13% of the total filings. Of these, 1,149 were in forma pauperis appeals by state prisoners from the denial of habeas corpus relief.[38]

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35. *Id.* at 536, n.8.

36. *See*, Friendly, *Is Innocence Irrelevant? Collateral Attack On Criminal Judgments*, 38 U. CHI. L. REV. 142, 144 (1970).

37. Figures taken from the 1971 Annual Report of the Administrative Office of the United States Courts, § II.

38. 1971 Annual Report, *supra*, note 34 at II-13, 14. Filings in the U.S. Courts of Appeals for the last three years were as follows:

	1969	1970	1971
Appeal from denial of habeas, state prisoner*	900	1099	1149
Appeal from denial of habeas, federal prisoner*	107	47	128
Appeal from § 2255 Motion to Vacate Sentence*	103	81	69
Direct Application for writ of habeas corpus	22	54	36

* *In Forma Pauperis.*

The latest report of the Administrative Office of the United States Courts reveals that the number of habeas corpus filings may be stabilizing, but that the increase is being absorbed by Civil Rights petitions:

> The volume of prisoner filings, after doubling in the last five years—and nearly hitting 16,000 in 1970—has apparently stabilized. Total state and federal prisoner matters deposited in federal courts in 1971 edged up a mere 269 cases, from 15,997 to 16,266. That is only a 1.7 percent increase. Last year's increase was 24 percent. Within the total picture, however, state habeas corpus petitions have taken a surprising downturn and a new subcategory of prisoner filing—civil rights—has moved sharply upward.[39]

Thus, one sees that not only habeas corpus actions have been increasing in number, but prisoner actions under the Civil Rights Statute, § 1983, have also been intensified (complaining about state prison conditions and disciplinary proceedings). Moreover, the Supreme Court has recently granted certiorari in *Morrissey v. Brewer*,[40] a case involving the validity of state parole procedures, which could conceivably lead to an avalanche of petitions by those presently incarcerated.

Certainly a large percentage of the increase in habeas petitions by state prisoners after 1963 can be attributed to the decisions in the *Townsend, Fay,* and *Sanders* trilogy, and to the concurrent expansion (by judicial decisions) of the rights of the accused. Undoubtedly these decisions have necessitated a great expenditure of time and effort through additional hearings in district courts. Furthermore, they have aggravated the federal-state relationship and have resulted in a public reaction unfavorable to the judiciary, the reaction being that the courts have shown greater concern for the rights of the criminal than for the protection of society. Consequently, there has been great disrespect for the law and a substantial increase in the crime rate, which even endangers national security.

The principles of law enunciated in these decisions are, of course, intended to achieve commendable results, *i.e.*, judicial procedures ensuring that the constitutional rights of the accused are protected, for, as Mr. Justice Frankfurter appropriately emphasized, "[T]he history of liberty has largely been the history of observance of pro-

39. *Id.* at II-45.

40. 443 F.2d 942 (8th Cir.), *cert. denied*, 40 U.S.L.W. 3288 (1971).

cedural safeguards."[41] But in protecting the rights of the accused, the rights of society and of the victims to security in their persons and property ought not be forgotten. Nevertheless, these decisions have created a situation in which petitioners can (and do) litigate continually the validity of their incarceration. Finality in the criminal process takes place only upon the release or demise of the prisoner. Such conditions led Chief Justice Burger to say, in remarks to the American Bar Association:

> The public is tired of the spectacle of appeals that lag for years and repeated appeals whose chief purpose is delay. I must repeat what I said to you at St. Louis last August: *There must be finality at some point.*[42]

Such a statement reflects the frustration of many judges over the large number of frivolous, meritless, and repetitious petitions that continually emanate from prisoners. The mere citation of decisions under sections 2254 and 2255 in 28 U.S.C.A. fills two volumes in fine print. (This is not to mention the concern felt by many federal judges over the extent to which they must continually pass upon questions of law that have already been decided by the highest court of a state). This frustration is worsened by the fact that the same petitioner can, and often does, file repetitive habeas applications, alleging repeatedly the same grounds for relief. This situation reveals the tension that exists between the well-known positions expressed by two eminent jurists:

> It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.[43]

> It has been said of habeas corpus cases that one who searches for a needle in a haystack is likely to conclude that the needle is not worth the effort. That emphasis distorts the picture. Even with the narrowest focus it is not a needle we are looking for in these stacks of paper, but the rights of a human being.[44]

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41. McNabb v. United States, 318 U.S. 332, 347 (1943).

42. Chief Justice Burger, "State of the Federal Judiciary," Address delivered in New York, N.Y., July 5, 1971; *see also*, Dissent by O'Sullivan, J., in Goodwin v. Cardwell, 432 F.2d 521, 523 (6th Cir. 1970), in which there is outlined the history of Townsend's (of Townsend v. Sain fame) 17 years of efforts at post-conviction relief. Add to it the latest and successful effort, Townsend v. Twomey, 322 F. Supp. 158 (N.D. Ill. 1971) which has been appealed by the state. *See also*, Attorney General John N. Mitchell's Address, *Restoring the Finality of Justice*, JUDICATURE, Dec. 1971, Vol. 55, No. 5.

43. Mr. Justice Jackson, concurring in Brown v. Allen, 344 U.S. 443, 537 (1953).

44. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956).

It is rather apparent that both of these judges are correct. The real task of our legal system is to devise procedures that provide a greater degree of finality in litigation, assist in sorting out the frivolous petitions, and reduce their number, while ensuring that the rights of any individual are not violated; rather, we must ensure existence of procedures that will provide better opportunity to find the "needle" or petition deserving redress.

For these reasons it would not be advisable to abolish habeas corpus in view of the fact that there are occasional cases in which a person's rights under the Constitution have been violated, and habeas corpus is his only effective remedy.

III

As before stated, a significant portion of habeas corpus and section 2255 motions filed are not the prisoner's first petition; and often too, no new grounds are alleged in these subsequent petitions. Although issues of fact and law previously resolved can be relitigated on habeas corpus, principles of finality, such as "identical grounds" or "abuse of remedy" rules, can operate in some instances to bar a subsequent application.[45] These principles were initially designed to encourage a petitioner to set forth all of his claims in one application; nevertheless, there seems to be little reason inherent in the post-conviction process for a prisoner not to set forth in his first application, in the best possible way, all grounds which he thinks might have merit:

> Most prisoners, of course, are interested in being released as soon as possible; only rarely will one inexcusably neglect to raise all available issues in his first federal application. The purpose of the "abuse" bar is apparently to deter repetitious applications from those few bored or vindictive prisoners whose intent is to harass, to attract attention, or simply to get out of prison for a day to testify in an evidentiary hearing.[46]

Consequently, it would seem that if a first petition is adequately presented, a bar on subsequent applications would not take away from petitioner the opportunity to litigate, fairly and completely, his federal claims in habeas corpus. Although such an approach is eminently plausible, the law as it now exists pays only lip service

45. 28 U.S.C. § 2244 (Supp. IV, 1969).

46. *Supra* note 2, at 1153-54.

to this one-petition requirement, because, in fact many petitions do not adequately present all of a petitioner's grounds.

Sanders v. United States enunciated the circumstances under which a prior petition is dispositive and the district court can summarily dismiss any subsequent petition. First, the new petition must contain the same "ground" which was determined "adversely to the applicant" in a prior habeas corpus or section 2255 proceeding. The Court broadly interpreted "ground" to mean any claim depending upon the same set of facts, whether or not supported by different legal theories or combinations of those facts.[47] Moreover, the prior claim must have been rejected on the merits; thus, a dismissal for lack of jurisdiction, improper pleading, or failure to exhaust state court remedies, would be insufficient to bar a subsequent application. Finally, the Court requires the district court to determine that "the ends of justice would not be served" by reaching the merits of a subsequent application.[48] Although the petitioner has the burden of showing that "justice" would be served by a second determination on the same ground, this criteria essentially allows the judge, in his discretion, to hold a second hearing. In order to make elaborate determination required by *Sanders*, however, a judge must look into the allegations and facts, and spend time evaluating the case. Often very little extra effort, short of an evidentiary hearing, would be required to deal with the application on its merits.

There are, of course, a number of reasons why a petitioner fails to present claims adequately in his first petition, even though his efforts are made in good faith. Some prisoners lack education; in such case petitioner's first efforts may be nearly incomprehensible, sometimes written by pencil on tissue paper and so lacking in such specificity or relevant facts that the petition results in summary dismissal. Later, perhaps after contacting a jailhouse lawyer, or when counsel is appointed for him, the petitioner is able to present his claims in such a way that they merit a hearing, or at least deserve a second disposition on the merits, even if his claims do not ultimately entitle him to relief. Another may simply be ignorant as to

47. Sanders v. United States, 373 U.S. 1, 16 (1963).

48. *Id.* at 15.

applicable law, and mistakenly fails to present his best claims. Years later, for any number of reasons, such a petitioner may realize that his best claims remain. These examples suggest in part why many prisoners file successive petitions which have to be determined.

Even if a prisoner files only one application, often considerations of timing make it difficult to reach an adequate conclusion concerning the claims alleged, because the petition is brought long after the trial. This can happen because a prisoner does not realize that he has a claim, perhaps, until he meets someone in a similar situation, or contacts a resident jailhouse lawyer. Occasionally, the petitioner may simply delay in order to diminish the possibility of retrial.

IV

In order to reduce the burden of multiple petitions, to assist those same prisoners in presenting their claims in the best possible manner, and to ameliorate the difficulties outlined above, the following proposals are suggested:[49]

Title 28, U.S.C. Section 2254 should be amended so as to provide:

1. Counsel shall be appointed for any indigent applicant to advise him of his rights and to represent him at the hearing and in in any appeal.
2. An applicant shall set forth in his application or in any amendment thereto, prior to or at the hearing, all claims which he may have for violation of his rights under the Constitution, laws or treaties of the United States. Any claims not so set forth shall be deemed to have been waived and the court shall not have jurisdiction to consider the same in any subsequent proceeding, unless the claim not previously set forth is based on newly discovered evidence which, in the exercise of reason-

49. For additional proposals (although different from those offered here) which are designed to deal at one hearing with all of a petitioner's federal claims, see: *A.B.A. Project on Minimum Standards for Criminal Justice*, "Standards Relating to Post-Conviction Remedies," Jan. 1967; 1968 Report of the Judicial Conference on Habeas Corpus, 33 F.R.D. 363, 382; Hon. James M. Carter, "Pre-Trial Suggestions for Section 2255 Cases," 32 F.R.D. 391. *See also*, Younger, *State v. Uncle Sam*, 58 A.B.A. JOURNAL 155.

able diligence could not have been presented at the time of the hearing, and is presented to the state court within the time of the hearing, and is presented to the state court within the time limited by state law, but in the absence of such law not later than two years after his conviction.

3. The application for the writ shall be filed within sixty days after all available state remedies have been exhausted, or within sixty days after his conviction in the state court has become final under the laws of that state, whichever is later.
4. The judgment of the District Court shall, subject to the right of appeal, be final as to all issues raised or which might have been raised in the proceeding, with the exception of a claim based on newly discovered evidence, as provided in 2 above.
5. In all cases in which the application has been denied, the applicant may, within ten days thereafter, file in the Court of Appeals a motion for leave to appeal, which leave shall be granted if the court finds that a substantial question is presented.

At present there is no limitation of time within which a state prisoner may file in the federal court an application for writ of habeas corpus. The petitioner may wait as long as he pleases before invoking his federal remedy; sometimes several years elapse before an application is filed. The time limitation proposed would coordinate federal habeas corpus with the state appellate or post-conviction process and would eliminate unnecessary delay.

Under the foregoing proposal, where petitioner has newly discovered evidence, he must present his claim first to the state court within the time limited therefor by state law, and in the absence of such law, then not later than two years following the date of his conviction, which is the federal limitation on newly discovered evidence. Rule 33, Federal Rules of Criminal Procedure. The proposal requiring leave to appeal from a denial of the writ, should facilitate the disposition of frivolous appeals. Res judicata is a time-honored principle of law universally applied in civil cases. A cogent reason why it should not be applied in criminal cases as well does not exist. Closely related to res judicata is collateral estoppel, which was recently applied by the Supreme Court against

a state in a habeas corpus proceeding to review a state court conviction. In *Ashe v. Swenson*,[50] the Supreme Court held that the state was foreclosed from relitigating in a second trial an issue determined in the first trial, although each trial was for a different offense. While this ruling favored the defendant, it could be invoked against a defendant in an appropriate case, for it is a poor rule which does not work both ways, but rather favors only one party.

We are here talking about a defendant who has been convicted by a jury in a state court, who has made a direct appeal to the state court of appeals and the state supreme court, and who has the right to petition for certiorari in the Supreme Court of the United States, and who then invokes the state's post-conviction proceedings for a collateral attack on his judgment of conviction, federal habeas corpus, and federal appellate procedures. After all of these procedures have been exhausted, it ought to be time for the case to come to a conclusion. What more should be provided? Such procedures in which we now indulge, are unheard of in England, wherein lies the source of our common law.

The proposals above outlined provide both to petitioners and to the administration of criminal justice, a greater number of benefits than those provided under our present system. There is no reason why these proposals should be limited to state prisoners, for there would flow from their application desirable consequences to federal inmates as well. The applicable provisions of section 2255 should be amended also, to provide for substantially the same procedures in dealing with motions to vacate sentence brought by federal inmates.

The first, and perhaps the most important benefit to be gained from this proposed hearing, is that it would impart finality into the criminal justice process. Then, one could no longer criticize the American system of criminal justice, with words approximating those of a former Attorney General:

> [P]risoners are almost entirely free under present law to have their convictions relitigated again and again on the basis of alleged constitutional infirmities . . . . This is an exploitation of the court system. Today's notions of habeas corpus are not only inconsistent with the writ's historic tradition, but serve more often than

50. *Ashe v. Swenson*, 397 U.S. 436 (1970).

not to frustrate justice rather than to promote it. . . . [T]he use of collateral attack, which was intended only as an extraordinary remedy, must be brought under manageable control in order to restore some balance to the judicial process.[51]

In addition, greater finality would have its impact on the process of rehabilitation, for finality has been characterized aptly as the beginning of the rehabilitative process, the ". . . realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation. . . ."[52]

This single-hearing procedure would also result in greater fairness in the criminal justice system for all persons involved. First, it would be fairer to the prosecution than is the present system, in that when prejudicial error is found and a conviction is set aside, the prosecution would have a practical opportunity for a retrial. Today, while proceedings drag on, witnesses die, people move away from trial locations, and memories fade. Only during the first few years following the conviction is retrial a feasible alternative. The proposed sixty-day limitation on the filing of an application for writ of habeas corpus, would result in fewer instances wherein retrial is not feasible.

Second, the proposed hearing procedures would be fairer to the inmate—particularly the poor inmate—than is the present system. Each prisoner would be informed by counsel of his opportunity for this hearing, and its significance would be explained to him. No inmate would have to search in the dark for violations of his rights, or rely on the questionable talents of a jailhouse lawyer for redress, because counsel would be available for all; and each prisoner would have the benefit of a federal court review of his federal constitutional claims, separate and apart from the stresses and strains of the guilt-determining process.

Finally, the proposals are fair to the courts themselves. The number of petitions filed would diminish, particularly those incomprehensible petitions drawn by the nearly illiterate inmate who has no idea what a petition for writ of habeas corpus entails; instead, petitions would be submitted by counsel.

Hopefully too, counsel would perform a screening function and

51. Mitchell, *supra* n.39 at 204.

52. Bator, *Finality In Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

would endeavor to convince prisoners who have only frivolous claims, that it would be a waste of time to litigate. Moreover, where new evidentiary hearings are had, factual determinations would be made more easily than is now often the case when events long past must be reconstructed.

Another factor contributing to decrease the number of habeas corpus petitions would be the drastic reduction in successive petitions; and most such petitions (or petitions filed after expiration of the sixty-day limit) could be summarily dismissed without an examination of the merits.

Also, this type of hearing would tend to assuage, at least in part, the bitter feelings that have arisen in the past between state officials and courts, and the federal judiciary. Federal courts would no longer be required continually to examine the validity of state convictions long after trial; finality would allow state correctional agencies to proceed with their lengthy and difficult task of prisoner rehabilitation.

Since any reversal would occur relatively closer to the conviction, state defendants would no longer be released without the state's having the viable alternative of retrial. Because this proposed review of the conviction would become an institutionalized part of the criminal justice process, at a definite time, both state and federal planning would be facilitated, and states would be able to anticipate, in some rational manner, this one efficient and speedy review of federal constitutional claims.

Finally, for those who value coherent, rational systems, this proposed hearing would restore some semblance of order to the federal post-conviction process.

In order to further provide a better apportionment of judicial resources and to assure greater adherence to the principle of federalism, it is suggested that state prisoners be required to exhaust their state remedies before resorting to federal courts in civil rights actions. This simple expedient, already required in § 2264 habeas corpus proceedings, would result in many civil rights actions being finally resolved in courts of the state where the controversies arose. This would relieve the federal courts of the unpleasant task

and the steadily increasing burden of supervising conditions of confinement and disciplinary procedures of state penal institutions, a job which was never intended for the judiciary. The notion that federal judges are more competent than state judges to handle these cases is pure nonsense.

V

Whether or not one accepts the proposals set forth above for improvement of the federal habeas corpus process, one cannot dispute the fact that better, more comprehensive state court post-conviction procedures would go a long way toward easing the heavy burden that habeas corpus places on federal courts, and would help also to provide improved federal-state relations.

In 1958 the Conference of State Chief Justices, reacting to the Supreme Court's decisions involving state prisoners, recommended:

> State statutes should provide a post-conviction process at least as broad in scope as existing Federal Statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under Federal habeas corpus statutes.[53]

In addition, it has long been acknowledged that such improved state procedures would be helpful to the federal courts. "[T]here is a widespread feeling that the major reason for the increasing burden on the federal courts is the failure of some states to provide an adequate forum for the protection of constitutional rights."[54]

Consequently, if all of the states would adopt procedures affording comprehensive post-conviction relief, and would do so in coordination with federal courts, the result could not help but be beneficial. Perhaps a giant step toward these goals came with the Chief Justice's proposal, made at St. Louis, for the creation of a State-Federal Judicial Council in each state. The idea for this kind of cooperation has been so well received that at last count there were in existence at least forty such Councils.[55]

A good example of the results which can be accomplished by co-

53. H.R. Rep. No. 1293, 85th Cong., 2d Sess. 7 (1958).

54. *See*, The Burden of Federal Habeas Corpus Petitions from State Prisoners, Note, 52 Va. L. Rev. 486, 501 (1966); *see also*, Freund, *Remarks at Symposium on Federal Habeas Corpus*, 9 UTAH L. REV. 27, 30 (1964).

55. Burger, *supra* note 39.

operation between state and federal courts is the improved post-conviction procedures adopted by the Supreme Court of Missouri.[56]

Without question, our present post-conviction procedures are in need of drastic change in order to eliminate inordinate delay and to effect some semblance of finality in post-conviction procedures. It is hoped that the proposals offered in this article will be of some assistance to those who are engaged in the awesome task of bringing about meaningful improvement in the administration of criminal justice.

56. Oliver, *"Post-Conviction Applications Viewed by a Federal Judge—Revisited,"* 45 F.R.D. 199 (1968).