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MODERN ADMINISTRATIVE PROPOSALS FOR FEDERAL HABEAS CORPUS: THE RIGHTS OF PRISONERS PRESERVED

DONALD P. LAY*

I. THE CHALLENGE TO THE WRIT

The urgent need to provide speedy trial has today stimulated legislators, court administrators and concerned members of the legal profession to seek out and eliminate the causes of intolerable delays in affording justice. Increasing the number of judgeships, reducing the size of petit juries and improving the administrative processes of the courts are among the continuing recommendations advanced by some as solutions to the "crowded docket." Others regard these suggestions as merely treating the symptoms, and not the underlying causes of the disease which afflicts our system of criminal justice. In the rush for speedy justice, these reformers recommend that we can relieve the clogged docket only by eliminating those meritless post-conviction petitions which, according to Dean Pollak, do nothing more than "squander the energies and budgets of the federal courts."1 Commendable as that goal may be, great care must be taken in achieving it, lest in closing the courtroom door to preserve one right, we deny, perhaps, an even more important one.

Foremost among the "villians" which have allegedly trespassed on judicial time is the great writ of habeas corpus.2 Paradoxi-

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2. The term "habeas corpus" as used throughout this article is intended to include those proceedings brought under 28 U.S.C. § 2255 (1948).

701
cally, the apparent evil of the writ's villainy is its availability and scope. Though much has been done of late to extend the scope of the writ, this expansion is not a wholly modern phenomena. As far back as *Ex Parte Yerger*, it was noted: "[T]he general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States; and this tendency, . . . has been constant and uniform." Today, masses of prisoners, newly aware of their rights, have sought their freedom by filing petitions in such volume as to literally stagger our judicial system. It is argued that by enlarging the writ to claims and uses not previously constitutionally compelled we have imposed on ourselves “a self-inflicted wound”; that we must now turn back to free the dockets of the “gigantic waste of effort” involved in processing the “frivolous” plea, or the judicial process will completely bog down in handling old business to the exclusion of the new.

Speedy trial is, undeniably, a fundamental need to the just administration of our criminal laws. More than five centuries ago the Magna Carta articulated this entitlement as basic to our juridical system. Yet, habeas corpus is equally important to our concepts of justice, for if the one ensures the prompt process through our criminal courts, the other guarantees a prompt release from custody should that process result in a wrongful deprivation of liberty. Indeed, Blackstone commented on the importance of the writ by noting that the act which lifted habeas corpus from the common law and embodied it among the British statutes has been frequently considered “another Magna Charta.” The tradition of this high regard has been entrenched in the United States Constitution.

3. 75 U.S. (8 Wall.) 85, 102 (1868).
7. 3 BLACKSTONE, COMMENTARIES 135 (2nd ed. 1768).
8. U.S. CONST. art. I, § 9, cl. 2. For an in-depth coverage of the development
Recognizing this heritage, Chief Justice Salmon Chase once remarked: "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom."  

Should, then, the pressing problems of our over-crowded dockets transcend the importance of the great writ? Justice Rutledge, in dissenting against those who would restrict the writ out of considerations of "[w]ise judicial administration of the federal courts," aptly pointed out the comparative weightlessness of these claims:

The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Besides executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy of judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.

To this a majority of the Court later added: "The prevention of undue restraints on liberty is more important than mechanical and unrealistic administration of the federal courts."

Proponents of a restricted habeas corpus, however, do not seek to deprive the populace of all access to the great writ. Instead, it is asserted that the writ must be restored to its "exalted position" as an "exceptional remedy" where it can no longer serve as the plaything of prisoners who regard it as nothing more than "a fix-it kit" suitable for passing the time of confinement, for educating themselves in the niceties of criminal law and for obtaining occasional trips outside the prison walls. Thus, it is argued, if those who seek the writ for frivolous purposes can be "screened out" from those who have meritorious claims, the number of petitions which have inundated our courts can be reduced to manageable proportions and then, theoretically, our problems will be solved. The result aimed for is undisputably sound. No system can long endure if excessive abuses of its privileges are condoned. As Mr. Justice Jackson stated: "The writ has no enemies so deadly as those who sanction the

9. Ex parte Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).
11. Id. at 189 (dissenting opinion of Justice Rutledge) (emphasis added).
abuse of it, whatever their intent.”13 The methods chosen to deter such abuse and, indeed, the very definition of “abuse” itself must be carefully selected. “The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by indiscriminating generalities.”14 These words, spoken by Justice Frankfurter, caution against a treatment that would characterize certain cases “indiscriminately as frivolous.”15 As Justice Walter Shaeffer has reminded us:

The aim which justifies the existence of habeas corpus is not fundamentally different from that which informs our criminal law in general, that it is better that a guilty man go free than that an innocent one be punished.16

It is not our purpose here to blindly disavow the existence of the frivolous appeal; nor do we mean to understate the burdensome task imposed upon our judicial processes by the current deluge of habeas petitions. The problem is real. Its immensity requires solution. However, where access to the courts is at stake, the solution cannot be ill chosen or hastily constructed. Caution should thus be sounded against the too easy answer of denying the writ to certain types of claims in order to lessen the volume of pleas. Indiscriminate reduction of the number of these pleas, though designed to lessen this din, may in the end mute even the promises of our Constitution. Surely more is expected of us than turning a deaf ear in order to solve our problems. We cannot “rush” men to “justice” and, thereafter, ignore their pleas that in our haste we have trampled on their rights.

Thus, we should examine the objections to the writ as it presently stands, and evaluate in constructive fashion those reforms which suggest limiting its scope. Hopefully, one or two tentative suggestions can then be offered which, though perhaps not curative of the problem, will yet preserve the availability of present procedures while at the same time diminish the strain upon our judiciary.

14. Id. at 498 (separate opinion of Frankfurter, J.).
15. Id. at 499.
II. ATTACKS ON HABEAS CORPUS

Two primary arguments are often sounded against the present day use of the writ: (1) the need for finality in our system of jurisprudence; and (2) the concern for restraints on encroaching federalism in a dual system of justice.

A. THE NEED FOR FINALITY

The concept of finality has taken many forms. It appears in the forefront of the arguments urging the need for repose. It serves as the basis for the claim that confidence in a legal system is directly proportional to the probability a judgment will stand. Finality is also viewed as a necessary tool for molding that mental attitude which makes prisoners adaptable to rehabilitation. Each of these roles must be analyzed separately.

(1) Repose: The principle that all litigation must someday come to an end is a familiar doctrine in the area of civil litigation. In Angel v. Bullington it was said:

If tolerated, our federal system would afford fine opportunities for needlessly multiplying litigation. . . . The doctrine of res judicata is a barrier against it. Litigation is the means for vindicating rights, but it may also involve unwarranted friction and waste. The doctrine of res judicata reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion.17

Even in the field of criminal litigation, the guarantee against double jeopardy prevents the prosecutor from seeking successive convictions for the same crime. However, when finality enters the arena of habeas corpus, a conflict ensues. Here conventional principles of res judicata do not control18 and a prisoner may at any time raise new issues concerning the validity of his detention.19 As a result, a single conviction may lead to a prolonged attack on issues raised in the name of constitutional rights. Some prisoners have been known to file as many as fifty petitions in hopes of gaining the relief promised by the writ. The irritation and annoyance caused by these successive filings have led to the comment that "this total lack of finality . . . is itself an affront to the notion of a system

which promptly administers criminal justice." Viewed as "an exploitation of the court system" critics have noted that today's writ has not only escaped the bounds of its historic tradition, but rather it "serve[s] more often than not to frustrate justice rather than to promote it." Hence, the need for repose. Professor Paul M. Bator explains the importance of repose in this fashion:

Repose is a psychological necessity in a secure and active society, and it should be one of the aims—though, let me make explicit, not the sole aim—of a procedural system to devise doctrines which, in the end, do give us repose, do embody the judgment that we have tried hard enough and thus may take it that justice has been done. There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility. Somehow, somewhere, we must accept the fact that human institutions are short of infallible; there is reason for a policy which leaves well enough alone and which channels our limited resources of concern toward more productive ends.

The truth of this statement cannot be denied. Discerning that point at which we can "leave well enough alone" presents the very crux of the problem. Though he did not fully sanction today's uses of the writ, Mr. Justice Harlan warns: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." Where, then, is the proper point of repose?

The rules of res judicata provide an artificial answer to this inquiry. It is obvious that these rules have only limited utilization in the field of habeas corpus. Justice Harlan, who argued that the interests of concluding litigation may outweigh "the competing interest in re-adjudicating convictions," admitted that "the consequences of injustice—loss of liberty and sometimes loss of life—are far too great to permit the automatic application of an entire body of technical rules whose primary relevance lies in the area of civil litigation." The relative unimportance of reaching an "unshaka-

20. Remarks of Justice Department, supra note 6, at 11-12.
22. Id.
25. Id. at 683.
ble decision" by applying these civil law concepts has been aptly expressed as follows:

[T]he manifest utility within their proper sphere, of res judicata, collateral estoppel and the rest of that unfriendly but expeditious tribe, should not so dazzle the beholder as to stimulate their application, outside that sphere. These concepts, like stare decisis, stem from the principle that 'in most matters it is more important that the applicable rule . . . be settled than that it be settled right.'

Just the converse is true here.

Still, it is argued, finality can be achieved without resort to the principles of res judicata—indeed, the two are not the same at all. By simply limiting the claims cognizable in a habeas corpus proceeding to those falling within a pre-defined class of rights, the scope of the writ will be so modified that many imprisoned individuals will be prevented from seeking its remedy and thus an "irreversible finis" can be stamped on their litigation file. Two statements of the Supreme Court provide a proper frame of reference for evaluating this argument. The first concerns the relative value of finality interests: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged" (emphasis added). The second points up the invalidity of tests which would limit the type of claim cognizable in habeas corpus:

The approach adopted by the court in Thornton [that claims of improper admission of illegally secured evidence are not cognizable in this type proceeding] and pressed upon us here exalts the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights. Such regard for the benefits of finality runs contrary to the most basic precepts of our system of post conviction relief (emphasis added).

Does this mean, then, that finality, itself, has no place in our present criminal process; that we must devote our full scale attention to each and every petition filed without regard to repetitiousness? A review of our present system reveals that we have, indeed, embodied this notion in our concept of habeas corpus—though perhaps not to the ultimate degree some would advocate. In Sanders v. United States we are told: "Nothing in the traditions of habeas


29. Bator, supra note 23, at 441.

30. Supra note 26, at 8.

DE PAUL LAW REVIEW

[Vol. XXI:701
corpus requires the federal courts to tolerate needless piecemeal litigation, or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.'\textsuperscript{82} Hence, rules have been devised to prevent the misuse and abuse of this process.\textsuperscript{83} Such rules, however, in attempting to insure that the ends of justice will be done, do not set forth an absolute termination point which, once reached, can never be passed. The wisdom of this approach is revealed when after repetitive petitions are filed it suddenly becomes apparent that the insistent petitioner has some merit to his claim.\textsuperscript{84} As Judge Walter Pope reminds us: "We must needs . . . dredge much barren ground to find a little gold."\textsuperscript{85}

Our vigilance in protecting the rights of the accused has caused us to forego much that is desirable in the concept of finality. If this alertness has today so sapped our energies that we now must seek repose from our constant watch, who, then, will keep guard?

(2) Confidence in the Legal System: When has justice been done? If our processes provide no categorical answer to this inquiry, have we tacitly admitted their inadequacy to assure that goal? More importantly it would seem, the absence of ultimate finality is a recognition of judicial fallibility and a sensitivity to the destructive impact final judgments can have on the lives of other men.

Early in our nation's history James Madison proudly noted that what distinguishes our system from others is its deep-seated concern, not only for the minorities, but for the obnoxious individual as well.\textsuperscript{88} Judge Cuthbert Pound best summarized this when he said: "Although the defendant may be the worst of men; . . . the rights of the best of men are secure only as the rights of the most vilest (sic) and most abhorrent are protected."\textsuperscript{87} We have built into

\begin{itemize}
\item[32.] Supra note 26, at 18.
\item[33.] See 28 U.S.C. § 2254(d) (1948). In addition to the provisions of this section the rule of waiver often precludes raising certain claims on collateral attack. See Lay, Problems in Federal Habeas Corpus Involving State Prisoners, 45 F.R.D. 45, 55-67 (1968).
\item[34.] See, e.g., Harris v. Brewer, 434 F.2d 166 (8th Cir. 1970); Parker v. Sigler, 413 F.2d 459 (8th Cir. 1969), rev'd and rem'd 396 U.S. 482 (1970).
\item[35.] Pope, Suggestions for Lessening the Burden of Frivolous Applications, 33 F.R.D. 409, 419 (1962) (hereinafter cited as Pope).
\item[36.] Federalist Papers, No. 10.
\item[37.] People v. Gitlow, 234 N.Y. 132, 158 (1922) (dissenting opinion) aff'd 268 U.S. 652 (1925).
\end{itemize}
our judicial processes certain procedural safeguards for the purpose of
insuring that the denial of guaranteed rights does not go uncor-
rected. Habeas corpus forms a substantial part of that guarantee.
Its beneficiary may well be the obnoxious criminal defendant. Yet,
we are told that the lack of ultimate finality reflects badly upon our
system:

What is involved is a repetitious, indefinite, costly process of judicial screening,
rescreening, sifting, resifting, examining and re-examining of state criminal judg-
ments for possible constitutional error . . . . No other nation in the world has so
little confidence in its judicial systems as to tolerate these collateral attacks on
criminal court judgments.88

Does not this difference point out our significant distinction? Dean
Pollack, of Yale University Law School, has observed that a com-

munity which fails to insist upon scrupulous observance of proced-
ural safeguards is a community that "has lost track of the purposes
which brought it into existence."99 Indeed, the Supreme Court has
told us: "The history of liberty has largely been the history of ob-
servance of procedural safeguards."40 Surely if our certainty in-
creases as these safeguards are withdrawn, we are merely nurturing
false confidence.

Professor Bator contends that doctrines which tend to make our
judgments more tentative reflect a vain search for ultimate certitude
and imply a lack of confidence about the possibilities of justice.
He states:

[O]ur fear (and, in some, conviction) that the entire apparatus of the criminal
process may itself be fundamentally unjust makes us peculiarly unwilling to accept
the notion that the end has finally come in a particular case; the impulse is to
make doubly, triply, even ultimately sure that the particular judgment is just, that
the facts as found are 'true' and the law applied 'correct.'41

Sober reflection upon why we have devised a system which allows
a continual questioning of its processes discloses that our purpose is
not so much to remove the discomfiting doubt or to achieve the
ultimate assurance, as it is to give safeguard to rights not readily
visible or easily acknowledged. Granted we must do all we can
to provide a "reasoned and acceptable probability that justice will
be done," but we cannot stop there and refuse to provide machiner-

38. Doub, supra note 4, at 326.
41. Bator, supra note 23, at 443.
ies for the rescue of even one man who may have suffered unjustly by the workings of such a system. We would not send two astronauts to the moon without providing them with at least three or four back-up systems. Should we send literally thousands of men to prisons with even less reserves? Undeniably our systems are not fail-safe. They never can be. However, with knowledge of our fallibility and a realization of past errors, we can hardly insure our confidence by creating an irrevocable end to the guilt-determining process. Professor Bator states:

I do not counsel a smug acceptance of injustice merely because it is disturbing to worry whether injustice has been done. What I do seek is a general procedural system which does not cater to a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system.\(^4\)\(^2\)

In view of the procedures already in effect which offer a form of limited finality, yet which are cognizant of possible error, it is our belief that we have achieved that end.\(^4\)\(^3\)

(3) **Rehabilitation of the Prisoner:** The success of a prisoner's "correctional" process can be measured only by the degree to which

42. *Id.* at 453.

43. Two other aspects of the confidence problem have also been raised:

1. **Public Confidence**

Judge Friendly has remarked: "It is difficult to urge public respect for the judgments of criminal courts in one breath and to countenance free reopening of them in the next." Friendly, *supra* note 5, at 149.

If habeas corpus were simply the "free reopening" of convictions, a decline in public respect would be understandable. Clearly, more is involved than this. The respect of the public and their confidence in the machineries of the legal process can only be gained by educating them to at least a layman's knowledge and understanding of the reasons which underlie it. The technical bases for the writ and the procedures for its use do not attract the interest of the general public, nor are they favorably treated by the press. What Judge Schaefer said of the public understanding of other procedural rules is true also of habeas corpus: "The interest of the press and of the other media of communication starts and stops with the sensational. To them, and to the public, details of procedure are dull. That the rights we most cherish originated in procedural rules and depend upon them for survival has not made these rules more glamorous. The public rarely knows or cares about them. If it does, it is because of the excitement generated by an individual case; and in that context rules of procedure are likely to be regarded as loopholes through which the criminal escapes." Schaefer, *supra* note 16, at 4-5.

If we seek to obtain confidence and respect by catering to uninformed cries for finality, we can easily forfeit all other goals in the trade.

2. **Judicial Confidence**

We also hear that in allowing the relitigating and overturning of closed decisions, we are undermining the confidence of both state and federal judges in the soundness and integrity of their judgments. See Bator, *supra* note 23, at 506. In a system where checks on the judgments of some men are devised as protections of the rights of others, there is hardly room for such arguments.
he can be retrained and readied for readmittance to society. The argument for finality urges that we cannot begin to work toward these goals until the prisoner is made aware that the road to release through overturning his conviction is no longer open; that his desire for freedom will be fulfilled only by submitting to the corrective systems. As Justice Harlan put it:

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.\textsuperscript{44}

Judge Friendly has related: "Unbounded willingness to entertain attacks on convictions must interfere with at least one aim of punishment—a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation."\textsuperscript{45} However, it is difficult to perceive that a prisoner who is procedurally barred from raising a constitutional right will consequently acknowledge that he is justly subject to sanction. There is in this logic an assumed nexus between judicial finality and rehabilitation which seems euphoric. Considering the situation as it is, we should pause to ask, can the convict be made to accept his need for rehabilitation by simply refusing him further access to the judicial process? The 8th circuit has recently recognized: "Judicial anathema will never surpass a prisoner's unending quest for release as an effective limitation on fragmented consideration of his claims."\textsuperscript{46} It seems unrealistic to say that channeling the quest for freedom away from the courtroom door will necessarily turn the prisoner's attention toward the processes of rehabilitation. Even the prisoner who willingly submits to the desired corrective process (a self-realization of a past wrong) would prefer his immediate freedom. Justice Schaefer has noted an even more serious possibility: "[P]risoners whose energies are directed to getting out of the prison by judicial process are not so likely to be concentrating on other methods of getting out which may be less socially acceptable."\textsuperscript{47}

\begin{itemize}
  \item \textsuperscript{44} Supra note 26, at 24-25.
  \item \textsuperscript{45} Supra note 5, at 146.
  \item \textsuperscript{46} Harris v. Brewer, 434 F.2d 166, 169 (8th Cir. 1970).
  \item \textsuperscript{47} Schaefer, supra note 16, at 22.
\end{itemize}
There exists substantial likelihood that denying access to post-conviction courts may be more detrimental to the possibilities of rehabilitation than beneficial. It has been judicially recognized that when offenders believe a system is unfair, rehabilitation can be seriously impeded. If we foreclose habeas corpus to challenges of certain constitutional rights which, when asserted at the trial level would have prevented a conviction, we may well be arbitrarily breeding resentment and disrespect for the system which will undermine and finally destroy the hope of rehabilitation entirely.

B. ENCROACHING FEDERALISM

In Harris v. Nelson the Supreme Court observed: “The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.” Since the Act of 1867 which first gave the federal courts power to inquire into state convictions through habeas corpus, the Supreme Court has sought to give meaningful interpretations to this power. In 1949, the Honorable John J. Parker, Chief Judge of the United States Court of Appeals for the Fourth Circuit, noted that as a result of the then recent decisions of Moore v. Dempsey, Mooney
v. Holohan,” 294 U.S. 103 (1935). Johnson v. Zerbst,” 304 U.S. 458 (1938). Bowen v. Johnston,” 306 U.S. 19 (1939). Waley v. Johnston,” 316 U.S. 101 (1942). It was with great relief that Judge Parker viewed the enactment of that part of 28 U.S.C. § 2254 which required an exhaustion of state remedies before federal habeas corpus could be brought. Not long after these comments, however, the Supreme Court decided in Brown v. Allen” 344 U.S. 443 (1953). that the federal court is not bound by the findings of fact or law made by the state tribunal, that the federal judge may take new evidence “in his discretion” and that all constitutional claims raised by state petitioners are cognizable in a federal habeas corpus proceeding. As Mr. Justice Frankfurter stated in his opinion: “The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.” 58. To many this observation indicated that the Court was bent on a course destructive of the delicate balance in federal-state relations. 59. Within ten years the Court again set out to define in broad terms the powers of the federal court in reviewing state convictions. Townsend v. Sain” 372 U.S. 293 (1963). set forth in explicit detail those

52. 294 U.S. 103 (1935).
53. 304 U.S. 458 (1938).
57. 344 U.S. 443 (1953).
58. Id. at 508.
59. The alarm evoked by this decision was embodied in a proposal known as H.R. 5649 which, if adopted, would have greatly restricted the federal habeas corpus jurisdiction in state cases. Considerations of federalism had prompted this legislation. A pronouncement of the Conference of Chief Justices in 1952 expressed this fear: “[T]he multiplicity of these procedures available in the inferior Federal Courts to [state convicts whose convictions have been affirmed by the highest state courts and whose petitions for review have been denied by the Supreme Court of the United States] and the consequent inordinate delays in the enforcement of criminal justice as the result of said Federal decisions will tend toward the dilution of the judicial sense of responsibility, may create grave and undesirable conflicts between Federal and State laws respecting fair trial and due process, and must inevitably lead to the impairment of the public confidence in our judicial institutions. . . .” Opponents of H.R. 5649 warned against the curtailment of habeas corpus and suggested other solutions to the apparent conflict. See Pollak, supra note 1, and Schaefer, supra note 16. Ultimately the bill died.
instances when a federal court must grant an evidentiary hearing and reemphasized the federal judge's duty not to defer to the state court's findings of law; and his discretion to give deference to the state court's finding of facts only if reliable procedures were used in making the latter. Fay v. Noia, decided that same year, loosened the restrictions of the exhaustion of state remedies doctrine embodied in § 2254 by holding that the applicant need only exhaust those state remedies still open to him at the time he files his application in federal court.

Great reliance was placed on the mandates of the Supremacy Clause, the importance of the role of the writ, and the sound judgment of the federal judges. However, throughout these decisions the Court was cognizant of the potential impact these broad powers may have on federal-state relations. As expressed in Townsend:

> There is every reason to be confident that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, will not abuse that discretion. We have no fear that the hearing power will be used to subvert the integrity of state criminal justice or to waste the time of the federal courts in the trial of frivolous claims.

The salutary result of these decisions is that they have provided the impetus for an increased awareness of federal rights in state post-conviction proceedings. The Honorable Oscar R. Knutson, Chief Justice of the Supreme Court of Minnesota, recently voiced this recognition by stating:

> Since Fay v. Noia and Townsend v. Sain the mandate has been clear to us that a hearing on constitutional issues raised by an inmate of an institution must be provided somewhere and if the state court does not do so it is up to the federal courts to provide such a hearing.

In my state we have felt that it was the duty of the state courts to handle these matters where they involve a state prosecution and we have tried to do the best we can to comply with the requirements of the decisions of the Supreme Court of the United States so that there would be a minimal need on the part of the federal courts to replough the same ground that we had ploughed, at least for the same crop, provided that we ploughed deep enough.

And even were this not the result, the need for a federal review to insure against the violation of federally guaranteed rights is basic to our system. Professor Bator has criticized the Brown v. Allen

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62. Supra note 60, at 318.
decision stating it is "unseemly for a federal district judge to reverse the action of the highest court of the state . . . without principled institutional justification for his power." This seemingly overlooks Mr. Justice Frankfurter's truism that federal habeas jurisdiction "is not a case of a lower court sitting in judgment on a higher court" but merely "one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than state law." Professor Bator answers that this does not meet the issue.

Of course federal law is higher than state law. But that does not automatically tell us that it is better for federal judges to pronounce it than state judges, much less than once a state judge has done so on a fair and rational investigation, this should be disregarded and done over again by a federal judge.

Thus, he asks:

Is there any sense in which the federal courts will, in the abstract, be more 'correct' with respect to issues of federal law than state courts? Surely not. There is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscious, or learned with respect to the applicable federal law than his neighbor in the state courthouse.

The argument, though balanced by the recognition that the federal judge has a "differently defined set of institutional responsibilities" which can bring objectivity, freshness and independence to the proceedings, proclaims that more is needed before federal tribunals should be empowered to redetermine facts and law "in cases where there is no reason to suspect failure on the part of the state to provide a full and conscientious adjudication of the federal claim."

There are several difficulties with this analysis. It must first be remembered that if there is no reason for such a redetermination, the commands of Brown, Townsend and Noia do not require it. Second, it should be recalled that the institutional justifications which Professor Bator recognizes, but deems less persuasive to the result, were put forth early in our judicial history as strong cause to deny state courts the "final say" in matters of federal rights. In rejecting arguments of encroaching federalism raised against the assertion of the Supreme Court's appellate powers in cases of state

64. Bator, supra note 23, at 505 (emphasis added).
65. Supra note 57, at 510.
67. Id. at 509.
68. Id. at 510.
69. Id. at 511.
criminal convictions, Chief Justice John Marshall pointed out the need for federal supervision of federal rights:

No government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws . . . . Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances under which our constitution was formed—nothing in the history of the times—which would justify the opinion, that the confidence reposed in the states was so implicit, as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.70

The institutional considerations were these:

States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazarding too much, to assert, that the judicatures of the states will be exempt from the prejudices by which the legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many states, the judges are dependent for office and for salary, on the will of the legislature. The Constitution of the United States furnishes no security against the universal adoption of this principle.

When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose, that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of Congress. These prosecutions may take place, even without a legislative Act. A person making a seizure under an act of Congress, may be indicted as a trespasser, if force has been employed, and of this, a jury may judge. How extensive may be the mischief, if the first decisions in such cases should be final?71

Additional considerations of "uniformity" and "correctness" in defining the federal law further prompted Marshall's decision.72 Concededly, this landmark opinion dealt with the necessity that there be federal appellate power over state tribunals in order to preserve constitutional guarantees, but the same considerations which were then found to support that power against claims of excessive federalism today support the federal habeas corpus power against similar arguments.

It would be presumptuous to claim that federal judges are more competent, conscientious, or learned than their state brethren in the area of federal rights. Yet the need for a federal habeas tribunal

71. Id. at 385.
72. Id. at 414.
transcends the relative abilities of its magistrates. Although the procedures of federal habeas corpus cannot guarantee the "correct" result in the ultimate sense, they can guarantee that individual liberty will never be subordinated to lesser goals of the state criminal process. Indeed, Professor Amsterdam has said: "The processes of state criminal administration are designed to ignore or destroy such federal guarantees of civil liberty as free speech, free resort to the ballot, free access to the streets." He warns:

[If it is true that constitutional restrictions on the state criminal process presents a particularly fertile field for valuable interaction of federal and state law in the state courts, it is also true that they present a particularly strong adversity of state and federal interests, and hence a particularly strong risk that federal rights will suffer if left in state hands.]

This is not to say that our present state courts are not striving to satisfy all of the mandates of recent constitutional decisions. Certainly the contrary is true. Yet, it is the risk that some state tribunals, now or in the future, will place a differing construction on federal rights or find cause to subordinate those rights to more imminent state goals which federal habeas corpus is designed to prevent.

It may be true that our present post-conviction process meets former Attorney General Mitchell's description of "a hydra of excess procedure." However, long ago John Marshall recognized that if state courts were given final jurisdiction over federal causes, the result would be "'a hydra in government from which nothing but contradiction and confusion can proceed.'"

The appellate jurisdiction of the Supreme Court in state criminal cases was recognized by Marshall as a necessary means to prevent this "hydra." However, this cannot provide the exclusive solution. Reliance on direct review as the sole means of vindicating constitutional rights would provide a purely illusory form of relief. The

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75. Id. at 836.
78. Professor Mishkin pointed this out when he said: "[E]ffective enforcement
great volume of the Supreme Court's work precludes hearing most of these petitions. Thus, habeas corpus stands as the only other available means of enforcing federal guarantees after trial and appeal. Professor Bator queries that if the intent of federal habeas corpus, in state cases, is to provide a federal district court substitute for certiorari, why is there a need for such a procedure for federal prisoners who have already had the opportunity to have their federal claims decided in the first instance by a federal tribunal? This misses the mark. "The right . . . is not merely to a federal forum but to full and fair consideration of constitutional claims." Justice Harlan summarized the underlying rationale of recent habeas decisions in this fashion:

The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state systems to toe the constitutional mark.

His observation that the writ as it presently stands "serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards," has caused Judge Friendly to comment that this is "an exceedingly serious indictment of the lower federal courts, for which I perceive no adequate factual

of federal guarantees directed at state criminal procedures can only be had through the availability of federal habeas corpus. Reliance upon direct review by the Supreme Court as the exclusive means of enforcement would be illusory. The sheer volume of the Court's work, not to mention inadequacy of some state procedures for presenting these questions, would preclude adequate vindication of these constitutional rights. . . . [E]ffective enforcement of such constitutional guarantees will only be possible through use of the federal habeas corpus channel." Mishkin, Forward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 HARv. L. REV. 56, 86-87 (1965) [hereinafter cited as Mishkin].

80. Kaufman v. United States, 394 U.S. 217, 228 (1969). The opinion explains: "The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners." Id. at 226.
83. Friendly, supra note 5, at 162.
We respectfully disagree. The present writ is not meant to be an "indictment"; its intent is to guarantee every individual a fair and plenary process. Fay v. Noia explains: '[The Great Writ's] root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment.'
The writ is the vehicle for insuring that accounting.

Federal habeas corpus demands no more of state officers than is expected of federal officers—that they observe the mandates of our Constitution. The review undertaken to insure that observance, despite complaints of encroaching "federalism" and unwarranted "indictment," forms an integral part of those guarantees. Rules which would restrict a state prisoner's access to the federal writ should be tested by Mr. Justice Frankfurter's caution:
The complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other, are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others.

III. PROPOSALS TO CURTAIL THE USE OF THE WRIT

Although many changes have been suggested throughout the years—ranging from placing a statute of limitations on the writ to disposing of the writ entirely and relying solely on executive clemency—no drastic curtailments have been imposed thus far. Today, however, a dialogue has arisen which seriously threatens the scope of the great writ. Modification of the bounds of habeas corpus to eliminate the "frivolous" petition is now being urged as "an essential element in the search for the prompt administration of criminal justice." This current discussion exhorts us to narrow the bounds of habeas corpus by limiting the type of constitutional right cognizable in such a proceeding. By so curtailing the writ, it is urged, we can free the judiciary from the wasteful duty of considering belated claims that have no bearing on the guilt or innocence of the applicant and no relationship to the fairness of the procedure utilized in obtaining his conviction. Complaints of constitutional vio-

84. Supra note 61, at 402.
85. Supra note 57, at 498.
86. Remarks of the Department of Justice, supra note 6, at 18.
87. See Friendly, supra note 5; Remarks of the Department of Justice, supra note 6; and Mitchell, supra note 21.
lations which lack these elements are thus deemed "frivolous." The approach is explained thus:

It defies good sense to say that after government has afforded a defendant every means to avoid conviction, not only on the merits but by preventing the prosecution from utilizing probative evidence obtained in violation of his constitutional rights, he is entitled to repeat engagements directed to issues of the latter type even though his guilt is patent. A rule recognizing this would go a long way toward halting the inundation; it would permit the speedy elimination of most of the petitions that are hopeless on the facts and the law, themselves a great preponderance of the total, and of others where, because of previous opportunity to litigate the point, release of a guilty man is not required in the interest of justice even though he might have escaped deserved punishment in the first instance with a brighter lawyer or a different judge.88

The crux of this argument is that certain constitutional violations deserve continuing judicial attention while others do not.

The "constitutional" label no longer assists in appraising how far society should go in permitting relitigation of criminal convictions. It carries a connotation of outrage—the mob-dominated jury, the confession extorted by the rack, the defendant deprived of counsel—which is wholly misplaced when, for example, the claim is a pardonable but allegedly mistaken belief that probable cause existed for an arrest or that a statement by a person not available for cross-examination came within an exception to the hearsay rule.89

This reasoning suggests that constitutional guarantees are to be scaled in accordance with their ability to protect the innocent and insure the reliability of the fact finding process. The result of this suggestion would be to bar from collateral relief such claims as improper admission of illegally secured evidence and failure to give the proper in-custody warnings of constitutional rights. The Department of Justice has offered this explanation:

The principal types of claims which would be barred under such legislation would be those stemming from the case of Miranda v. Arizona, and those stemming from claims of unlawful search and seizure. It is generally agreed by those who have studied the subject that the exclusionary rule based on Miranda and on Weeks v. United States and Mapp v. Ohio is not designed to ensure the fairness of the trial, but rather designed to discipline police officers. Indeed, some of the most convincing and reliable type of evidence available are the voluntary statements of a criminal defendant which might be excluded under Miranda, and the sort of documentary evidence, or the fruits or instrument of a crime itself which might be excluded under the rule of Weeks or Mapp.90

88. Friendly, supra note 5, at 157.
89. Id. at 156-57.
90. Remarks of the Department of Justice, supra note 6, at 23-24.
Under this proposal, impairment of the validity of the fact-finding process and a "colorable showing of innocence" would thus become the new criteria (with some exceptions) for seeking relief on habeas corpus. Nor would it be enough in making the latter claim that the applicant show that, absent admission of reliable but illegally secured evidence, he would have been found "legally innocent." Under these tests the revelation of factual guilt provided by this tainted evidence would be sufficient to prevent this plea.

The merits of this suggestion are twofold: (1) it seeks to protect the "factually" innocent by allowing a collateral opportunity for overturning a conviction; and (2) it would theoretically tend to reduce the number of petitions presently flooding our courts. Space does not permit an in-depth exploration of all the ramifications of such a proposal. However, the two major premises upon which it seems to rely should be analyzed. These are: (1) the exclusionary rule serves no purpose other than to deter police from engaging in unacceptable conduct; and (2) the Supreme Court in giving retroactive application to only those newly pronounced constitutional rights which affect the validity of the factfinding process has provided an adequate guide to which rights should remain open for vindication on habeas corpus.

91. Friendly, supra note 5, at 160-64.

92. There exists no statistical data which demonstrates that barring post-conviction attack on Mapp and Miranda rights would appreciably cut down on the number of petitions filed. It is doubtful that belated assertions of these claims account for more than a de minimus number of the post-conviction petitions filed. These rules are now so crystallized and well known by defense lawyers that they are generally asserted in the original trial proceeding. It is axiomatic that every defendant will assert his constitutional claims at the earliest possible stage of the proceedings. See Harris v. Brewer, 434 F.2d 166, 169 (8th Cir. 1970) stating: "It seems virtually inconceivable that a prisoner who seeks his liberty will not allege every known basis which might support his release."

Moreover, of those petitions raising such claims after prior litigation, many are filed by state prisoners attacking the state court's determination of their federal rights. Federal review of these claims after the petitioner has exhausted his rights of direct state appellate review is, of course, required to obtain uniformity of interpretation of the Constitution. To attempt by legislation to totally foreclose federal review of these claims would cast umbrage on the Supremacy Clause of the Constitution; and, of course, any legislative attempt to bar inferior federal court review of these issues would cast an irresponsible burden on the United States Supreme Court. If no inferior federal court review were available, conceivably every state case would have to be reviewed on the merits else there would result a partial abdication of the Supreme Court's concern over a state's obedience to the federal Constitution.
THE EXCLUSIONARY RULE

The logic supporting the argument that collateral relief should be unavailable to prisoners who belatedly claim the benefit of the exclusionary rule rests on the premise that the sole purpose of the rule is to serve as a disciplinary measure. Indeed, Professor Amsterdam tells us:

The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in "exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of federal law-enforcing officers".®

Thus, he cautions us that there is "a strong public interest in convicting the guilty" which reaches the tipping point of outweighing the competing public interest in "deterring official illegality" at the stage of collateral attack.® The argument is that the deterrent value of the rule is effectively served at the trial and appeal levels; but when a case reaches post-conviction stages corrective application of the rule is "beyond the point of diminishing returns."® In effect, the question is asked, "What lesson are officials to learn by releasing criminals many years after their convictions were obtained and even longer after the illegal conduct occurred?"

It is axiomatic that if all we hope to achieve by the exclusionary rule is future prevention of the constable's blunder, and the denial of benefits from official wrongdoing, the later such a "medicament" is applied the less effective it will be. The main difficulty with this approach is the assumption that the exclusionary rule has one purpose only. By viewing the rule as vindicating no personal entitlement of the accused, we focus on the safeguard and ignore the right it seeks to protect. The real and compelling reason for the rule conceives of more than deterrence:

When a search impermissible under the Fourth Amendment results in the seizure of evidence, exclusion of the fruits of that unconstitutional invasion is required not merely in hope of deterring unconstitutional searches in the future, but in order to vindicate the right of privacy guaranteed by the Fourth Amendment.®

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94. Id. at 389.
95. Id. at 390.
Indeed, the rule is not interested in the guilt or innocence of the accused; it focuses on a right guaranteed to everyone irrespective of culpability:

The application of [the exclusionary] rule is not made to turn on the existence of a possibility of innocence; rather, exclusion of illegally obtained evidence is deemed necessary to protect the right of all citizens, not merely the citizen on trial, to be secure against unreasonable searches and seizures.  

Requiring a colorable showing of innocence will not vindicate this right. While the protection of the unaccused finds its form in the deterrent aspect of the rule, the vindication of the right of the accused can be achieved only by exclusion of the illegally secured evidence. Deterrence as to him comes too late. The damage has already been done. Yet, it is argued, the “damage” yielded reliable evidence which proves his guilt. Query is made, “Does the convicted felon then deserve to have vindicated a right of privacy which served only to conceal evidence of his crime?” The argument has appeal—if the end justifies the means. In effect we are told to ignore the fourth amendment guarantees whenever they are extended to the “obnoxious” individual. However, the dignity of each individual must remain of equal importance under a government such as ours, or the dignity of all is endangered. Mapp v. Ohio tells us that the “right of privacy [is] no less important than any other right carefully and particularly reserved to the people . . . [that this right promotes] principles of humanity and civil liberty,” and the fourth and fifth amendments express “‘supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.’” More particularly as to the right of the accused, Mapp emphasized that:

The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence. . . .

This purpose remains true even in collateral attack. Professor Mishkin has recognized:

The functions of habeas corpus change significantly when the relevant constitutional requirements are not those seeking to assure the reliability of the conviction

99. Id. (quoting Feldman v. United States, 322 U.S. 487, 489-90 (1944)).
100. Id. at 657.
process, but rather those seeking to advance other objectives, such as respect for human dignity and integrity. It is not that constitutional guarantees of this latter kind are any less important; the contrary may well be true. Indeed, it is precisely the importance of these guarantees which justifies the granting of federal habeas corpus for their violation.  

Mr. Justice Frankfurter asserted that the fourth amendment has "a place second to none in the Bill of Rights," that it is not just "a kind of nuisance, a serious impediment in the war against crime." Should we give this amendment a secondary position in a plenary system of criminal justice? It has been argued:

Our rejection of the availability of collateral review for claims of unreasonable search and seizure (in the absence of exceptional circumstances) is not attributable to a low regard for the significance of the Fourth Amendment in our times and civilization. On the contrary, the magnitude of the Fourth Amendment in our constitutional constellation has prompted unusual remedies by Congress, as well as the courts. . . . The corollary, however, is a contraction of the need for enlarging collateral review in order to assure effective vindication of the constitutional interests involved.

The necessity of this corollary as a logical consequence of the availability of pre-trial and at-trial remedies is not apparent. Separating out violations which infringe upon the bounds of the fourth amendment for the purpose of denying collateral, though not direct, relief effectively relegates this guarantee to the ranks of a secondary privilege. Even more apparent is the obvious and somewhat self-impeaching contradiction contained within a system which expresses its repugnance at such a violation by foregoing convictions based upon unconstitutional evidence, but which condones such convictions if the error is not righted on direct appeal. The taint of a constitutional violation does not become attenuated by the exhaustion of direct remedies. The existence of habeas corpus belies this belief. And, if this is true as to one type of constitutional violation, it should be true as to all.

Excluding the Miranda type cases from habeas corpus is even more difficult to justify. The thrust of Miranda was motivated by illegal police conduct and the desire of the Court to effectively deter

101. Mishkin, supra note 78, at 86.
the same, but the principle of that decision, now recognized as salutary by many law enforcement agencies, is that the right of counsel attaches at the critical stage of the proceeding. As with the lineup cases (Gilbert, Wade, Stenno and Foster), the application of the Miranda rule serves to prevent misleading facts from prejudicing the judgment of the jury. The fact finding process may be directly affected by the failure to timely advise a criminal defendant of his fundamental rights—particularly his right to have counsel present at the time he is to be questioned. Ignoring this effect of the Miranda case on the guilt-determining process, misjudges the role early access to counsel plays in securing reliable evidence.

THE TESTS FOR RETROACTIVITY

It has been said that in scaling down our constitutional values "the Supreme Court has given us the lead." Reference is made to those decisions which determine the effect new constitutional doctrines have on past conduct. It is urged that when the Court felt that a newly pronounced rule did not directly affect the reliability of the fact finding process, as in the cases of Mapp and Miranda, no retroactive application was accorded. In such cases even direct appellate review as to these rights was denied to prisoners convicted before the new doctrines were pronounced. Hence, it is argued:

[It is] a far less onerous rule to say that constitutional claims of this nature may be fully litigated in the trial and appellate stages, with the additional right to seek review in the Supreme Court of the United States, but that they shall not thereafter be subject to relitigation.

It is true that whether a new rule is to be applied retrospectively depends upon whether the past fairness of the trial and integrity of the fact finding process become suspect under the new standards. Where there is little likelihood that unreliable or coerced evidence would be condoned by not enforcing the rule, the Court has withheld its retroactive application. However, retrospective application of constitutional rules is more complex than this analysis reveals.

Equally significant in considering retroactive effect is: (1) whether "[t]he principle that a coerced confession is not admissible in a trial

104. Friendly, supra note 5, at 153.
105. Remarks of the Department of Justice, supra note 6, at 25.
which predated the arrests as well as the original convictions . . . 
and (2) whether the accused and the governmental officials were acting in reliance upon the law then prevailing at the time of the arrests or convictions. The decisions of Mapp and Miranda placed into effect new standards of police conduct with the expectation that thereafter compliance would insure the integrity of a defendant's rights. It is now expected that police activity will be conducted in reliance upon these rules. If it is not, the remedies of our judicial processes seek to protect the defendant by preventing a conviction which relies upon such lawless conduct. These remedies are embodied in collateral as well as direct appeal. The Supreme Court, in Kaufman v. United States, considered and rejected arguments that the tests of retroactive relief should govern which rights are cognizable in a post-conviction proceeding. The Court there stated:

The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. No such service is performed by extending rights retroactively. Thus, collateral relief, unlike retroactive relief, contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process.

Moreover, the considerations of finality voiced in the retroactivity decisions—the administrative necessity of leaving long settled convictions lie unquestioned—were also rejected in Kaufman with the remark that the weight to be accorded the benefits of finality is not "as controlling in the context of post-conviction relief as in the context of retroactive relief."

These countervailing arguments deserve strong consideration before legislation is considered which might impose the tests of retroactive relief upon those of post-conviction relief. The fact that relief may be denied retroactively to prisoners whose convictions were legitimately obtained by standards then operative provides a wholly different circumstance from that of denying relief collateral to a man whose conviction was illegitimately obtained in disregard of standards then operative. This is so despite the fact that in the latter instance the defendant is given full opportunity to make his

107. Id. at 637.
109. Id. at 229.
110. Id. at 228-29.
complaint at trial and on appeal. The worth of a standard is its ability to hold true despite changes of circumstances which are not basic to its existence. If we allow the exigencies of an overburdened judiciary to outweigh the standards developed by our judicial process for maintaining the dignity and privacy of every citizen, we disclose a fickle interest in the latter. The tests of retroactive relief were not intended as a guide to deny recognized rights on collateral attack. "[A]ccepting the results that an unconstitutional procedure has reached in the past does not uphold such a system for the future."111

The attack on habeas corpus has long been premised on concepts of judicial finality and of excessive federalism. Now added is the impropriety of litigating, on post-conviction appeal, claims unrelated to guilt or to the reliability or integrity of the fact finding process. Ostensibly these contentions may have some appeal, yet before adopting them fully it might be well to reassert the words of Dean Pollak voiced almost twenty years ago:

Just below the surface, however, lurks the less plainly articulated but perhaps more deeply felt belief that the Supreme Court has grievously erred in the sequence of great cases which utilized habeas corpus to probe trial records for fundamental error. Somewhat circuitously the suggestion is deftly made that the real onus for current "abuse" of habeas corpus must rest with those Justices who insistently and ceaselessly require that state trial procedures conform with the mandates of the Fourteenth Amendment.

If the Court has been too vigilant, curtailing habeas corpus would do much to redress the balance. But those who see in these great cases judicial statesmanship of a high order—slowly educating the bench, the bar, police, prosecutors and the mass of citizens to the highest traditions of Anglo-American law—should look sceptically at attempts to circumvent the writ. Justice Black has put the matter simply and well: "[I]t is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. . . . Perhaps there is no more exalted judicial function."112

IV. EXISTING MEANS TO HANDLE THE FRIVOLOUS PETITION

Our system of legal justice is being sorely tested. As technology expands, populations explode and civilization matures, new rights and duties emerge in multiplicands unheard of just a few years ago.

112. Pollak, supra note 1, at 66.
Consequently, our court system is at times strained by the effort to accommodate all of the conflicts which inevitably arise in a society so sensitive of its entitlements. The field of criminal justice, perhaps, best represents this trend of expansion and recognition of basic rights. Today the rights of the criminal defendant are closely protected and even the convicted person has the assurance that there is still a judicial forum to correct any injustice.

There is no doubt that the flood of habeas petitions which arise from this right-consciousness consumes many judicial man-hours and challenges the abilities of courts to cope with their own calendars. What is even more cause for concern is that many of these petitions are groundless attempts to seek release. It is this concern which has provoked the present day demand for some type of curative legislation or remedy by which the courts can circumvent the so called "frivolous" petition. Yet in acknowledging the immediacy of the need to better segregate the frivolous from the meritorious plea, we must caution against hastily choosing means which will result in abrogation of our developing recognition of criminal rights. Provisional solutions continue to evolve from many different forms of changes within our system. Not all of these can be presently recognized or even predicted. It is suggested that in the procedural and substantive steps recently taken we are already on the better road to ultimately diminishing the frivolous plea. The full effect of these measures in reducing the dimensions of the dilemma has not been realized. A few deserve brief mention.

(1) Procedural Safeguards: Police compliance with the newly announced standards of investigative conduct, as well as trial and appellate court conformity to now established constitutional standards, better insures that an accused's rights will be observed from the moment he comes into contact with the criminal process. With consciousness of basic rights foremost in the minds of those responsible for proving as well as determining guilt, there will be less opportunity for the defendant to find fault with his original convic-

113. As Mr. Justice Powell recently observed: "The current flood of petitions for post-conviction relief already threatens—because of sheer volume—to submerge meritorious claims and even to produce a judicial insensitivity to habeas petitioners." Boyd v. Dutton, 40 U.S.L.W. 3392 (Feb. 22, 1972) (dissenting opinion of Powell, J.).
tion. Hence, fewer meritorious claims will arise on post-trial motion, thereby enabling the courts to more easily identify and reject the frivolous claims.

(2) Improved Trial Procedures: Those who condemn the broadened use of habeas corpus tend to overlook the upgrading effect post-conviction procedure has had on the overall dignity of the criminal process. Today judicial alertness to a defendant's rights motivates every trial court to "toe the constitutional mark" in an attempt to avoid post-conviction attack. The direct effect has been to increase the probability of a fair trial in the first instance and to eliminate later complaints of this nature. The Omnibus Pretrial Hearing is only one vehicle which effectively enables the trial judge to touch all bases of constitutional claims, thereby establishing a voluntary and knowing waiver of such claims or, alternatively, furnishing an ample record which in later review succinctly relates the basis of the defendant's grievance. In the unlikely event the matter is not raised in direct appellate review, the need for a post-conviction evidentiary hearing can be eliminated and speedy determination of the petition facilitated by review of the earlier omnibus record.

(3) Appellate Remand: Procedures enabling an appellate court to remand for an evidentiary hearing whenever a constitutional claim is raised for the first time on appeal eliminates the necessity of eventually determining such a claim on a post-conviction petition. The numerous benefits to be obtained by the parties from hearing the issue at a time when the witnesses are still available and the evidence is fresh cannot be too greatly emphasized. Moreover judicial manpower is also benefited by the added advan-

114. The Tenth Circuit has pointed out: "Failure to exercise extreme care to protect the rights of the accused at every step of the proceedings before and during trial may, and often does result in a costly and time-consuming post-conviction collateral attack. We ought to be as sure as we can that nothing is done or left undone to give rise to post-conviction complaints, based on the denial of constitutional safeguards to a fair and impartial trial." Johnson v. United States, 333 F.2d 371, 372-73 (10th Cir. 1964).


116. Id. at 17-20. See also Lay, Problems in Federal Habeas Corpus Involving State Prisoners, 45 F.R.D. 45, 64-67 (1968).
tage of consolidating review on the post-trial claim with the merits on appeal.  

(4) **State Post-Conviction Acts:** The likelihood of a federal court undertaking a full scale evidentiary hearing in post-conviction appeals by state prisoners decreases in those instances where the state has provided a full and adequate procedure for the determination of these claims. Although *Fay v. Noia* emphasized the federal judge’s power to reject the state court’s findings of fact as well as law, common sense decrees that no judge wishes to make work for himself if he can discern that the state court which heard the claim afforded full and fair process to the petitioner. Recent Supreme Court decisions have given the states impetus to revise their post-conviction legislation in conformance with the newly announced standards. Many of these revisions are too recent to yet produce any significant effect on the number of federal petitions, but it seems reasonable to anticipate that these new acts will decrease, or at least in many instances facilitate, the amount of federal business.  

(5) **Restricted Grounds for Certain Complaints:** Recent decisions of the Supreme Court as well as decisions of the circuit courts of appeals have served to narrow the bases for collateral attack on certain types of constitutional claims. For example, in *McMann v. Richardson*, the Supreme Court held that “a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus.” This determination effectively excludes numerous complaints which are based solely upon a miscalculation of the defendant and his counsel as to the admissibility of such a confession. Other decisions, such as *Brady v. United States* and *North Carolina v. Alford*, prevent collateral attacks on guilty pleas by persons who contend that they would not have

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pleaded guilty except for their fear of a greater penalty.\textsuperscript{122} As *Alford* indicates, under certain circumstances a valid guilty plea may be entered even though at the same time the defendant protests his innocence. These opinions further emphasize that a petitioner has a heavy burden to upset a plea of guilty made when represented by competent counsel. Since these decisions, post-conviction petitions to set aside pleas of guilty have noticeably decreased in the courts of appeals.\textsuperscript{123} In this same vein, relief on the ground of incompetency of counsel has been limited to only those situations "when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation."\textsuperscript{124} Another example of restriction placed on the habeas petitioner is the requirement that a state procedural deficiency under *Jackson v. Denno*\textsuperscript{125} be supported by averments which, if true, would require the conclusion that a confession was involuntary.\textsuperscript{128}

In 1962 Senior Circuit Judge Walter Pope of the Ninth Circuit analyzed the reasons for the great volume of habeas petitions in this manner:

Although the Supreme Court's jealous regard for the protection of the accused may have supplied the bases for collateral attacks upon judgments, I think that the great volume of the applications, particularly the frivolous ones, may well be due to the manner in which the judges may have handled them.\textsuperscript{127}

Today that criticism should no longer be true. It seems certain that as state and federal judges utilize the above procedures and in-

\textsuperscript{122} As *Brady* indicates there is little difference between the result of the rule therein set forth and several other situations within our criminal process which do not impinge on voluntariness. *Supra* note 120, at 751.

\textsuperscript{123} For example, after *McCarthy v. United States*, 394 U.S. 459 (1969) many post-conviction appeals were filed attacking pleas of guilty made in federal court allegedly in violation of Rule 11 of the Federal Rules of Criminal Procedure. Thereafter, several reversals by the circuit courts of appeals brought to the attention of the district courts the necessity and value of strict compliance with this rule. See e.g., *United States v. Cody*, 438 F.2d 287 (8th Cir. 1971) and *United States v. Sanders*, 435 F.2d 1282 (10th Cir. 1970). Adherence to Rule 11 by district courts has now served to lessen appreciably the volume of post-conviction attacks on pleas of guilty.

\textsuperscript{124} *Scalf v. Bennett*, 408 F.2d 325, 327-28 (8th Cir. 1969).

\textsuperscript{125} *Procunier v. Atchley*, 400 U.S. 446 (1971).

\textsuperscript{126} *Procunier v. Atchley*, 400 U.S. 446 (1971).

\textsuperscript{127} *Pope*, *supra* note 35, at 414.
novate even more practicable processes, the judicial burden in handling these claims will be tremendously eased.

V. RIGHT OF COUNSEL—A MUCH NEEDED INNOVATION

The most frequent complaints of judges—state and federal, trial and appellate—concerning post-conviction appeals are the sheer volume of such petitions; the difficulty experienced in comprehending the confusing, and at times unintelligible, allegations of the pro se petition; and the time wasted in dealing with repetitive filings of frivolous petitions. Although these conditions cannot be easily explained away or simply solved, it seems apparent that some of the present difficulties encountered in handling these pleas can be eliminated thereby facilitating the procedures of the habeas court.

Reducing the overall volume of habeas petitions will no doubt take many adjustments within our system. As expressed earlier, factors are already at work in both the post-conviction and pre-conviction levels which should have a measurable effect in either reducing the number of claims or in enabling quick identification of the frivolous petition. However, it should also be pointed out at this stage of our discussion that the present day volume of habeas writs is not all attributable to the conventional collateral attacks on convictions. Today many prisoners use the habeas petition to seek relief only from conditions of their confinement which allegedly violate federal rights. The Supreme Court has recently held that even though such complaints are styled as habeas petitions, these suits are actually in the nature of civil rights actions and not subject to the exhaustion of remedies requirement applied to state prisoners who seek federal habeas corpus.128

Administrative statistics, relied upon so heavily by some as proof of the need to curtail habeas corpus, do not reveal how much of the current explosion of prisoner petitions is due to the use of this writ as a civil rights vehicle. A survey of recent federal reporters discloses that a great percentage of the judiciary's present contact with the writ involves resolution of these civil rights complaints.

Recognizing this as one of the chief factors for the inundation of the courts by habeas petitions, we should be cautious in devising

solutions which seek to dilute or circumscribe the scope of the writ itself. Suggestions directed at eliminating certain grounds for attacking convictions may do little to lessen the quantity of prisoner complaints. How we may reduce the volume of prisoner petitions alleging violation of civil rights is beyond the scope of this article. The primary answer to this dilemma may lie in the achievement of prison reforms. Not until drastic changes are effected within our prison complexes will the volume of these complaints lessen.

One of the most onerous of administrative problems in the post-conviction area is the processing of petitions which are often repetitive, frivolous or unintelligible. It is to these aspects of the problem that the following suggestions are directed.

When one views other areas of civil litigation, it is not too difficult to understand why prisoner petitions occupy so much judicial time. Fundamentally it is important to recognize that the prison population is the only segment of the general public which does not have immediate access to legal assistance. The Supreme Court has tacitly recognized this by holding that prisons must maintain adequate law libraries for the inmate’s use and that prisoner’s cannot be denied the services of the “jailhouse lawyers” who render aid in drafting petitions. Although these decisions properly tend to encourage free access to legal knowledge and counseling, they offer a poor substitute for trained, qualified assistance and counseling from members of the bar. The end result of these decisions is that there now exists an effusive catalyst to the unintelligible volume of pro se petitions which daily besiege our trial courts. Partial knowledge of the law leads only to misunderstanding and frustrated attempts to secure its benefits. The self-annointed “jailhouse lawyer,” though presently necessary as an adjunct to the prisoner’s access to the courts, has often served only to accentuate the current problem and, indeed, to point up the real need to provide proper legal assistance at the “critical” stage where assistance will be most helpful—the period before the petition is filed.

Certainly if every negligence claim or every contract dispute had to be processed by first filing a petition in a court of the law, the

vast machinery of court administration would virtually explode. Courts directly benefit from the fact that most potential litigants first present their problems to competent lawyers who then engage in the necessary investigation and legal research to properly counsel the client in the merits of his case. Where indigency or the merits of the claim do not motivate private counsel to pursue the issue, only the most frustrated claimants will seek to petition the court himself.

There would be much merit if we could emulate this practice in the area of post-conviction litigation. First, if trained counsel were available to consult before the petition is filed he could determine and thereafter advise the claimant that his supposed grievance is actually meritless and will not find favor in the courts. By this early advice the attorney might effectively dissuade the prisoner from filing his petition. Second, where the claim has merit, a thorough investigation by counsel at the outset may reveal that the claimant has more than one ground for claiming relief. In framing the petition all of these grounds could be included and thus determined in one hearing thereby avoiding the abhorred piecemeal and repetitive litigation. Third, a competent lawyer will clearly set forth the factual and legal nature of the petitioner's grievance enabling the court, as well as the opposing parties, to effectively meet and determine the issues raised. These and many other benefits are undeniably obtained whenever legal counsel is sought before litigation is commenced.

Under our present system post-conviction applicants, most of whom are indigents, are denied access to legal assistance until the court decides that a sufficient issue has been raised to warrant appointment of counsel. The habeas judge is required to sift through and decipher the multitude of petitions. Prepared in confusing layman legalese the petitioner hopes to raise defects which allegedly occurred in the sometimes complex litigation which resulted in his conviction. It is little wonder that the necessity of dealing with these petitions has been called by one judge "the most irritating and the most disagreeable task which I have been called

131. See the review of different state procedures set forth in Roach v. Bennett, 392 F.2d 743, 748 (8th Cir. 1968).
upon to perform as a judge."\textsuperscript{132} The label of "frivolous" is easily attached to such petitions when busy judges cannot even discern the applicant's complaints.\textsuperscript{133} Dean Pollak has recognized:

Indeed the probability that the proportion of meritorious cases is significantly greater than the statistics indicate suggests that what is needed is to provide more rigorous federal judicial scrutiny rather than to confront the prisoner with new obstacles to relief.\textsuperscript{134}

Of equal significance is the demand requirement of more rigorous legal attention to the needs of the claimant in order to help him determine the initial merit of his claim and frame his petition. Mr. Justice Frankfurter, drawing from his experiences with \textit{pro se} petitions for certiorari, was prompted to set forth liberal standards for habeas courts in determining whether a petitioner has made a \textit{prima facie} case.\textsuperscript{135} He cautioned:

Care will naturally be taken that the frequent lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented. District judges have resorted to various procedures to that end. Thus, a lawyer may be appointed, in the exercise of the inherent authority of the District Court . . . , either as an \textit{amicus} or as counsel for the petitioner, to examine the claim and to report, or the judge may dismiss the petition without prejudice.\textsuperscript{136}

In \textit{Sanders v. United States}, the Court also attempted to deal with the fact that many habeas petitions are ill-drawn by requiring habeas courts to be cognizant of this:

An applicant for such relief ought not to be held to the niceties of lawyers' pleadings or be cursorily dismissed because his claim seems unlikely to prove

\textsuperscript{132} Pope, \textit{supra} note 35, at 409.
\textsuperscript{133} \textit{See} remarks of Justice Powell, \textit{supra} note 113.
\textsuperscript{134} Pollak, \textit{supra} note 1, at 54.
\textsuperscript{135} In the course of his separate opinion in \textit{Brown v. Allen}, Mr. Justice Frankfurter noted the difficulties encountered by the Supreme Court in handling \textit{pro se} petitions for certiorari: "These petitions for certiorari are rarely drawn by lawyers; some are almost unintelligible and certainly do not present a clear statement of issues necessary for our understanding, in view of the pressure of the Court's work. The certified records we have in the run of certiorari cases to assist understanding are almost unknown in this field. Indeed, the number of cases in which most of the papers necessary to prove what happened in the State proceedings are not filed is striking. Whether there has been an adjudication or simply a perfunctory denial of a claim below is rarely ascertainable. Seldom do we have enough on which to base a solid conclusion as to the adequacy of the State adjudication. Even if we are told something about a trial of the claims the applicant asserts, we almost never have a transcript of these proceedings to assist us in determining whether the trial was adequate." 344 U.S. 443, 493-94 (1953).
\textsuperscript{136} \textit{Id.} at 502.
meritorious. That his application is vexatious or repetitious, or that his claim lacks any substance, must be fairly demonstrated.\textsuperscript{137}

It was further noted in \textit{Sanders} that "the imaginative handling of a prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion."\textsuperscript{138}

Analysis of our habeas system reveals that we have deprived our courts of the most beneficial aide which other areas of litigation rely upon heavily—the services of a lawyer \textit{prior} to the commencement of suit. It seems hardly imaginative at all to suggest that we remedy the present situation by taking the simple step of providing counsel to any indigent prisoner who feels he has a grievance to present to a habeas court.

Today, the Criminal Justice Act provides federal courts with authority to appoint counsel in post-conviction proceedings.\textsuperscript{139} A few courts now summarily do so as a petition is received even before determining its merits. Engaging counsel at this stage provides assistance to the court when it reaches the stage where it must review the allegations and judge their substance. Even this practice deprives both the petitioner and the court of valuable and available expertise which should be available \textit{before} the petition is framed. By limiting access to counsel to a point \textit{after} the petition is received, we in no way attempt to discourage the frivolous petition. Instead we deliberately clog our dockets with repetitious and unintelligible claims. Many of these could be clarified, consolidated or entirely eliminated by adequate counseling prior to the filing.

Perhaps some will think it utopian to believe that we can decimate this burdensome problem by merely giving the petitioner a better legal tool with which to make his claim. However, this suggestion is not entirely original. Some states have successfully adopted a statewide public defender system which provides early representation of habeas petitioners. The State of Minnesota follows this procedure\textsuperscript{140} and it is notable that that state is the source

\textsuperscript{137} 373 U.S. 1, 22 (1963).
\textsuperscript{138} — at —.
\textsuperscript{139} 18 U.S.C.A. § 3006A(g) (Supp. 1972).
\textsuperscript{140} A letter recently received from Chief Justice Oscar R. Knutson of the Supreme Court of Minnesota indicates that the statewide Public Defender system established in that state handles the majority of post-conviction cases for indigents. He states: "I think that the fact that every indigent inmate who wishes to consult
of one of the lightest volumes of federal habeas cases in the entire Eighth Circuit.

The means of implementing this suggestion can be varied. It would not be too complex a process to require a prisoner who seeks legal consultation regarding his post-conviction claims to request appointment of counsel from the clerk of the sentencing court. Thereupon, the prisoner's previous trial or appellate counsel would be appointed to assist him and to remain available on all post-conviction matters. It might be said that it is unrealistic to think that a prisoner would desire to be represented by the same counsel in collateral proceedings who was unsuccessful in defending him in direct proceedings. However, it should be remembered that the philosophy behind post-conviction acts in placing jurisdiction in the original trial court rather than in the custodial court was not only to relieve the custodial court from the heavy burden of hearing all such pleas, but also to give the original trial judge an opportunity to give plenary review to the complaint.\(^\text{141}\) The same reasoning recommends the assistance of the original trial counsel in reviewing the post-conviction claim. Clearly, he will know more about the original criminal proceeding than any other lawyer, and most certainly he will be able to explain adequately to the prisoner why certain claims were not raised or techniques not pursued at the trial level. In many instances, the original trial counsel is called upon to testify at the post-conviction hearing on the reasons for his trial strategy thus providing evidence which negates completely what otherwise appears to the prisoner to have been a procedural deficiency on the attorney's part. It is entirely plausible that a prisoner will be completely dissuaded from making a claim of such a deficiency if he has the opportunity to sit down and discuss these contentions with his attorney prior to seeking court review. However,

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141. See Barry v. Sigler, 373 F.2d 835, 838 (8th Cir. 1967).

with a member of our Public Defender's staff has the opportunity to do so does help to dispose of these cases. As you know, there are a great many inmates who insist on proceeding whether there is any merit to their petitions or not simply because they have everything to gain and nothing to lose. I suppose if one had money to hire private counsel who informed him there was no chance of reversal he would drop the matter rather than waste his money, but that is not true where the services are free. So we proceed on the theory that if he presents anything in a petition which, if established on an evidentiary hearing, would entitle him to relief, our court must give him a hearing.”
in the also plausible event that the prisoner is not satisfied to entrust his post-conviction claims to the same attorney who represented him in the direct proceedings, it would be a simple procedure for him to reapply for appointment of different counsel. Similarly, if counsel finds no merit to petitioner's claims but is unable to convince him to refrain from filing, he could seek permission to withdraw by following the procedures set out in \textit{Anders v. California}. Although that case dealt with appointed counsel on direct review, substantial guidelines could be drawn from the following language:

[I]f counsel finds [the appellant's] case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

As the Court noted in \textit{Anders} this approach induces the court to "pursue all the more vigorously its own review" and it does not leave the petitioner to "shift entirely for himself while the court has only the cold record which it must review without the help of an advocate." These same benefits can be gained by the courts when a preliminary analysis of the case is presented by counsel in a frivolous habeas situation and, moreover, the benefit accrues even before the petition is filed.

The merits of providing for pre-filing consultations should be apparent:

(1) The lawyer may well discourage the filing of frivolous claims;

(2) Where an applicant has obvious merit to his claims, the lawyer can investigate and seek out all available grounds, thereby consolidating in one petition claims which would otherwise find their way piecemeal into later proceedings;

\footnotesize{142. This is, of course, particularly true where the petitioner desires to attack his conviction for an alleged denial of effective assistance of counsel.}

143. 386 U.S. 738 (1967).

144. \textit{Id}. at 744.

145. \textit{Id}. at 745.

146. \textit{Id}..
By applying his pleadings skills the lawyer can make clear to the court as well as to the governmental officials the factual basis of each legal claim he asserts and the authorities upon which he relies in making these claims.

By informing the court that he wishes to withdraw because he considers the applicant's claims to be frivolous, the lawyer can alert the court to a more vigorous review without briefing a case against his client.

In short, by providing habeas applicants with early access to the legal profession we not only assure protection to the individual to right a grievous wrong, but we employ the officers of the court to properly assist the court.

Much of the burdensome task encountered by the judiciary has been brought upon itself by the failure to afford legal assistance to prisoners at a stage which is "critical" to the solution of the problem. We have little to lose and much to gain by employing such a system. There is still ringing force in Mr. Justice Sutherland's statement in *Powell v. Alabama*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceeding against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Surely, before we partially close the courtroom door to applicants who do not have "approved" constitutional claims, the least the law can afford to do is to provide once again the right to counsel at a meaningful stage of the proceeding. Moreover, the administration of our courts can reap untold benefits.

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147. 287 U.S. 45, 69 (1932).