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NOTES

THE WRIT OF HABEAS CORPUS

In 1915, the Supreme Court of the United States in what has come to be considered a breakthrough decision discarded the restrictions on habeas corpus review that had previously existed. The Court held that it would look beyond the question of whether the state court had jurisdiction over the defendant, to determine whether the state court had given the defendant "due process of law" under the fourteenth amendment. In so doing, it stated:

> But this does not mean that that decision [of the state court] may be ignored or disregarded. To do this, as we have already pointed out, would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or the innocence of the prisoner, or the truth of any particular fact asserted by him, but whether the State, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phrase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state court's, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.[1]

Thirty-nine years later, the Supreme Court reversed a decision of the New York Court of Appeals by holding that a confession of the defendant was, as a matter of fact, coerced. The Court stated: "The question for our decision is therefore whether the present confessions were so coerced. The question can only be answered by reviewing the circumstances surrounding the confessions."[2]

The difference in approach taken by the Supreme Court in these two cases is fundamental. In the former, the Court looked only to the procedural aspect of whether the state allowed the defendant a fair opportunity to present his claim. In the latter, it redetermined the facts which had already been determined on the merits by the court system of New York, the federal district court, and the federal circuit court. The Supreme Court reversed them all.

It is the purpose of this paper to discuss in detail the reasons for this fundamental change in the Court's attitude, the nature of the change,

[1]Frank v. Mangum, 237 U.S. 309, 334 (1915).
[2]Leyra v. Denno, 347 U.S. 556, 558 (1954).

the problems it has led to, and those that it will possibly lead to in the future.

Prior to the Civil War, there was no authority in federal judges to entertain petitions of habeas corpus alleging detention under state law.[3] However, in 1867, an act was passed vesting federal courts with this power, but it was repealed the following year and no cases came before the Supreme Court under it.[4] The act was not re-established[5] until 1885.[6]

The first case arising under the new statute was *Ex parte Royall*[7] which enunciated the rule that the writ would not lie until the petitioner had exhausted all his state remedies.[8] On the rationale that, in the interest of comity, the state ought to be allowed to pass on the federal questions first, the rule was later extended to hold that if the state did pass on the federal question the proper procedure was to appeal to the United States Supreme Court, rather than to ask for a writ of habeas corpus.[9] A corollary to this rule was established in 1891 to the effect that the writ of habeas corpus could not be used to relitigate an issue already decided in the state courts.[10] The reasoning was grounded in the belief that federal district courts should not serve the function of an appellate court for state findings of fact, nor should the writ of habeas corpus serve the purpose of a writ of error. Thus until 1915, the writ of habeas corpus would lie only to correct jurisdictional errors. In that year the decision of *Frank v. Mangum*[11] was handed down.

Petitioner in that case was convicted of murder and sentenced to death. His petition for a new trial alleged mob domination which resulted in intimidation of the jury and thus deprived him of a fair trial. The new trial was denied and an appeal taken. The Georgia Supreme Court took depositions and made an extensive investigation into the matter, determined the contention to be unfounded, and affirmed the conviction.[12] After several unsuccessful attempts to gain relief through post-conviction remedies in Georgia, a writ of habeas corpus was asked of the federal district court which was denied. Eventually the case reached the United States Supreme Court. The Court affirmed the conviction primarily on the ground that the Georgia Supreme Court had already adjudicated the issue. The Court stated:

[3]*Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845).

[4]Act of Feb. 5, 1867, ch. XXVII, 14 STAT. 385.

[5]Act of March 3, 1885, ch. 353, 23 STAT. 437.

[6]During this time there was habeas corpus litigation under the Act of 1789. However, this statute was construed to apply only to jurisdictional issues. *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1822). The Court in that case stated at page 202: "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject although it should be erroneous."

[7]117 U.S. 241 (1886).

[8]This rule was subsequently enacted into law by Congress. 28 U.S.C. § 2254 (1958).

[9]Urquhart v. Brown, 205 U.S. 179 (1907).

[10]*In re* Wood, 140 U.S. 278 (1891).

[11]237 U.S. 309 (1915).

[12]Frank v. State, 141 Ga. 243, 80 S.E. 1016 (1914).

> [W]e hold that . . . a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial . . . cannot in this collateral inquiry be treated as a nullity, but must be taken as setting forth the truth of the matter, certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court upon full investigation determined them to be will not be deemed sufficient to raise an issue respecting the correctness of that determination. . . .[13]

The Court however, put an end to one previously important aspect of habeas corpus by deciding that the writ need not be based only on jurisdiction. The Court stated: "[I]f the State, *supplying no corrective process,* carries into execution a judgment . . . based on a verdict . . . produced by mob domination, the State deprives the accused of his life or liberty without due process of law."[14] (Emphasis added.)

The decision stands for the rule that the writ of habeas corpus will lie whenever the state does not provide a means of correcting its own legal errors. The case is directed toward providing a method whereby it can be made reasonably certain that the defendant was convicted in an error-free atmosphere. The Court does not take the next step and determine whether there has, in fact, been an error-free trial.[15] If, however, the state court never determines whether there has been an "error-free atmosphere," then the Supreme Court will set the conviction aside. This was done in *Moore v. Dempsey,*[16] a case presenting the Supreme Court with the same issue as was presented in the *Mangum* case[17] except that the Arkansas Supreme Court had rejected the contention of mob violence without an independent investigation. The Court stated:

> But if the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.[18]

[13]*Frank v. Mangum, supra* note 11, at 335.

[14]*Ibid.*

[15]Although such an approach has been deemed unduly restrictive by Professor Curtis R. Reitz in his article, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 HARV. L. REV. 1315 (1961), it would seem that a state court with its ability to take depositions is in a much better position to determine a *factual* issue than is the United States Supreme Court. On the other hand, if the factual issue is never litigated, then it would seem there has been a failure to supply a corrective process.

[16]261 U.S. 86 (1923).

[17]*Supra* note 11.

[18]*Moore v. Dempsey, supra* note 16, at 91.

Many writers have contended that the *Moore* case discredits *Frank v. Mangum*.[19] The case is definitely ambiguous and this is an easily justified position. However, it is important to remember that in the *Mangum* case,[20] the contention of the petitioner was argued and evidence taken, while in the later case, the contention of mob domination was rejected by looking only at the record. It is very difficult to visualize the effects of mob domination being reflected in the record, with the result that looking only to the record does not seem to meet the "corrective process" test required by the *Mangum* case.[21]

The problem of the adequacy of the state record has been adjudicated many times and has provided the federal courts with many of their most difficult problems. By 1952 however, it was well established that a writ of habeas corpus would lie if the petitioner's allegations were such that they would not show in the record. The position was well stated in *Waley v. Johnston:* "The issue here [whether the defendant had been coerced into pleading guilty] was appropriately raised by the *habeas corpus* petition. The facts relied on are *de hors* the record and their effect on the judgment was not open to consideration and review on appeal."[22] A later *per curiam* decision stated a more general rule:

> Where the state courts have considered and adjudicated the merits of . . . [the petitioner's] contentions, and this Court had either reviewed or declined to review the state court's decision, a federal court will not ordinarily re-examine upon writ of habeas corpus the question thus adjudicated. . . . But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus. . . .[23]

This then, was the state of the law prior to 1952. Before turning to the recent expansion of the above rules, certain collateral matters should be disposed of. A major issue before the Court concerned the scope to be given to the "exhaustion of state remedies" doctrine as enunciated by *Ex parte Royall*.[24] The controversy centered around the question of whether it was necessary to go directly to the Supreme Court from an adverse state court decision and if so, what effect should be given to a

[19]See, *e.g.*, Hart, *The Supreme Court 1958 Term. Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959). This position is also elaborated on by the Supreme Court in Fay v. Noia, 372 U.S. 391, at 421 n. 30 (1963).

[20]*Supra* note 11.

[21]For an exposition of this view, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 488 (1963); *Fay v. Noia*, *supra* note 19, at 448 (Harlan, J., dissenting.)

[22]316 U.S. 101, 104 (1942).

[23]*Ex parte* Hawk, 321 U.S. 114, 118 (1944).

[24]*Supra* note 7.

denial of certiorari. In 1950, the Supreme Court held that a person had not exhausted his state remedies until he had applied for a writ of certiorari from the Supreme Court and was barred from aid in the federal courts if he did not so apply.[25] The Court acknowledged the conflict in interest between state and federal courts concerning the recognized right of federal courts to determine federal constitutional issues, stating:

> Solution was found in the doctrine of comity between courts, a doctrine which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty . . . have had an opportunity to pass upon the matter.[26]

The Court then denied the writ because the petitioner had not asked the Supreme Court to review the state court conviction by a writ of certiorari prior to asking the federal district court for a writ of habeas corpus. The Court expressly refused to decide what weight should be given to a denial of certiorari, stating only that the denial should not be res judicata. However, two Justices in a concurring opinion and Frankfurter in a dissenting opinion, stated that the denial should be given no weight.[27]

In 1953, the Supreme Court handed down the now famous case of *Brown v. Allen*[28] involving three petitions for habeas corpus from the state of North Carolina. Two of the appeals were factual, involving the question of jury discrimination against the Negro defendants. The third appeal involved the legal question concerning the failure to perfect an appeal within the required time limit, the appeal having been filed one day late. Eventually all the convictions were affirmed but not until the Supreme Court had broken much new ground. The significance lies in the almost casual acceptance of the rule that the Supreme Court should decide the cases on the merits even though this had already been done by the Supreme Court of North Carolina. The Court was not concerned with whether the state had provided the petitioners with an adequate "corrective process" but rather whether the state court had correctly decided the factual issues involved. It is difficult to find the test the Court sets up within the opinion itself,[29] but it has generally been interpreted to lay out the rule that a federal district judge may grant a new hearing on the merits of the petitioner's claim, even though the state court has litigated the issue on the merits adversely to the petitioner, whenever

[25]Darr v. Burford, 339 U.S. 200 (1950).

[26]*Id.* at 204.

[27]Brown v. Allen, 344 U.S. 443 (1953) later decided the issue in accordance with this position.

[28]*Ibid.*

[29]Actually the word ''opinion'' is highly inaccurate since there were two majority opinions, the first of which, entitled the ''Opinion of the Court'' espouses Mr. Justice Reed's minority position, four concurring opinions and two dissents, with Mr. Justice Black leading the list by writing one concurring opinion, one dissent, and concurring in the other dissent.

there are "unusual circumstances"[30] or "a vital flaw . . . [is] found in the process of ascertaining such facts in the state court. . . ."[31]

Concerning the other major issues in the trial, the Court held that if the petitioner violated the procedural time limit for filing an appeal he was thereafter barred from receiving a writ of habeas corpus. The Court stated:

> The writ of habeas corpus in federal courts is not authorized for state prisoners at the discretion of the federal courts. It is only authorized when a state prisoner is in custody in violation of the Constitution of the United States. 28 U. S. C. § 2241. That fact is not to be tested by the use of habeas corpus in lieu of an appeal. To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime.[32]

This latter position was reaffirmed in a rather peculiar 1959 case.[33] The defendant having been convicted of murder in a highly publicized trial, asked for a new trial on the ground the adverse publicity had deprived him of a fair trial. The motion was overruled because the defendant had escaped from jail and was still at large. The Supreme Court of Indiana affirmed. Habeas corpus was denied on the ground that there was an adequate state ground for the conviction which barred looking into the constitutional issue. The United States Supreme Court granted certiorari and reversed, sending the case back to the circuit court for a determination on the merits of the constitutional claim.[34] The problem in the case concerned the ground on which the Indiana court had based its decision. The circuit court had decided that the Indiana court had based its decision[35] on the procedural aspect of the case, and that the escape barred adjudication of the constitutional issue.[36] The Supreme Court disagreed stating: "On the contrary, the opinion to us is more reasonably to be read as resting the judgment on the holding that the petitioner's constitutional claim is without merit."[37] Having decided that the state court based its decision on the constitutional rather than the procedural aspect of the case, the Court found no difficulty in deciding it was error for the federal courts not to relitigate the constitutional claim. There were four dissenting Justices who thought the Indiana court had rested the decision on the procedural issue. They pointed to the fact that the first seven pages of the Indiana opinion were devoted to it while only the latter two pages discussed the constitutional question. The dissent

[30] *Supra* note 27, at 463.
[31] *Id.*, at 506 (Frankfurter, J., concurring.)
[32] *Id.*, at 485.
[33] Irvin v. Dowd, 359 U.S. 394 (1959).
[34] The Seventh Circuit ultimately affirmed the conviction in 271 F.2d 552 (7th Cir. 1959).
[35] Irvin v. State, 236 Ind. 384, 139 N.E.2d 898 (1959).
[36] 251 F.2d 548 (7th Cir. 1958).
[37] *Supra* note 33, at 403.

also pointed to the transition sentence between the procedural and constitutional portions of the case which reads: "Our decision on the point under examination makes it unnecessary for us to consider the other contentions of the appellant; however, because of the finality of the sentence in the case we have reviewed the evidence to satisfy ourselves that there is no miscarriage of justice in this case."[38]

Regardless, however, of how the Indiana court meant to decide the case, the rule of the *Dowd* case is clear: an adequate, independent state procedural basis for conviction will bar federal interference.

This then is how the law stood until March 18, 1963, when the Supreme Court handed down two cases which drastically changed the law of habeas corpus.[39] The first of these cases, and probably the most significant, sets out certain situations in which a federal district judge *must* hold an evidentiary hearing. The second, *Fay v. Noia,* holds that state procedures cannot act as a bar to the granting of a writ of habeas corpus.

In *Townsend v. Sain,* the defendant, convicted of murder and robbery, appealed, alleging that he had been convicted by the use of a coerced confession. The Illinois Supreme Court upheld the conviction on the ground that the confession was voluntary.[40] The Supreme Court denied certiorari. The defendant then applied for post-conviction relief from the Illinois courts which was denied on the theory that the decision concerning coercion was res judicata. Certiorari was again denied. Petitioner next sought a writ of habeas corpus from the federal district court which was denied and affirmed by the Seventh Circuit. The Supreme Court granted certiorari, vacated the judgment and "remanded for a decision as to whether, in the light of the state court record, a plenary hearing was required."[41]

On remand, the federal district judge did not grant a hearing stating that "he was satisfied from the state court records before him that the decision of the state courts holding the challenged confession to have been freely and voluntarily given by petitioner was correct. . . ."[42] The district court concluded: "Justice would not be served by ordering a full hearing or by awarding any or all of [the] relief sought by Petitioner."[43] The Seventh Circuit again affirmed, holding however, that a federal district judge can inquire only into the undisputed portions of the record.[44] The Supreme Court granted certiorari to determine if the Seventh Circuit applied the correct test.

[38]*Supra* note 35, 139 N.E.2d at 902.

[39]Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963).

[40]People v. Townsend, 11 Ill.2d 30, 141 N.E.2d 729, 69 A.L.R.2d 371 (1957).

[41]*Townsend v. Sain, supra* note 39, at 296. See Townsend v. Sain, 359 U.S. 64 (1959), where the judgment was vacated and the case remanded.

[42]*Townsend v. Sain, supra* note 39, at 297.

[43]*Ibid.*

[44]Townsend v. Sain, 276 F.2d 324, 329 (7th Cir. 1960).

In the petition for habeas corpus, petitioner alleged that he had new evidence that had not been brought out at trial. Two questions are then ultimately presented by the case: (1) Did the defendant have any new evidence, and; (2) If so, *must* the federal courts grant an evidentiary hearing to determine its validity. The Court answered both questions in the affirmative and remanded the case for a determination on the merits of the petitioner's claim.

Petitioner in the *Sain* case was a nineteen-year-old dope addict with a mentality barely above that of a moron. To relieve his withdrawal symptoms, the police, after his arrest, allowed a doctor to administer a shot of hyoscine and phenobarbital. Hyoscine is more commonly called scopolamine and known to most people as "truth serum." Petitioner contended that the court, in determining the voluntariness of his confession, was not told that hyoscine was a truth serum, and further that it was not common or proper to administer this combination to an addict suffering withdrawal symptoms. The prosecution conceded there was no direct mention made of the identity of hyoscine and scopolamine but thought the omission harmless since the effect of hyoscine was described by three medical expert witnesses at the trial. Further the police medical doctor testified that it was common practice for him to administer the mixture to those suffering withdrawal pains and that he had never seen it have the effect petitioner contended it had on him. The state denied that the effect of the drug was correctly stated by petitioner.

The Court held this was a sufficient dispute of fact not passed on by the Illinois Supreme Court to warrant a plenary hearing to determine the truth of the allegations. The Court then laid down the following test:

> Where the facts are in dispute, the federal court in habeas corpus *must* hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in the state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.[45] (Emphasis added.)

In discussing this test it is important to note that the rule is mandatory and not discretionary with the federal judge. The Court further states: "In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge."[46]

This, then, is an extreme broadening of the scope of habeas corpus. The "exceptional circumstances" and "vital flaw" tests of *Brown v. Allen* are overruled.[47] The federal courts now have unlimited discretion to

[45]*Townsend v. Sain, supra* note 39, at 312.
[46]*Id.* at 318.
[47]*Townsend v. Sain, supra* note 39, at 313.

overturn a state court's finding of fact and in many instances a hearing is mandatory.

In an attempt to clarify and particularize the test set out above, the Court listed the following situations in which a plenary hearing must be granted:

> (1) [T]he merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[48]

The second aspect of the Court's holding is perhaps more novel than what has been stated above. This concerns the legal aspects of the rules laid down by the state court and held controlling by them. The Court states:

> Reconstruction [of the state court's findings] is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions. Since the decision . . . *may* rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts.[49] (Emphasis added.)

When the facts and law are so blended that the two concepts cannot be separated and it is not clear on what the state court based its decision, the Supreme Court has this to say:

> If *any* combination of the facts alleged would prove a violation of constitutional rights and the issue of law on those facts presents a difficult or novel problem for decision, any hypothesis as to the relevant factual determinations of the state trier involves the purest speculation. . . . Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held.[50] (Emphasis added.)

In other words, there is no presumption raised that the judge decided the law correctly. In fact the opposite conclusion is reached; namely, the federal district court is instructed to raise the presumption that the state supreme court did not know the law and hence decided the petitioner's claim incorrectly.

[48]*Ibid.*
[49]*Id.* at 314.
[50]*Id.* at 315.

The companion case of *Fay v. Noia*[51] is concerned with a related aspect of habeas corpus; what is to be done if a valid state procedural law prevents the constitutional claim from being litigated? Noia was convicted, along with two others, of murder and was sentenced to life imprisonment. The other two defendants appealed and eventually had their convictions reversed on the ground that the confessions involved were coerced.[52] Noia, however, *deliberately* did not appeal his conviction. After the reversal of the other two convictions, Noia applied for post-conviction relief from New York which was denied because of his failure to appeal within the required time limit. Petitioner then asked for a writ of habeas corpus which was denied because he had not exhausted his state remedies by virtue of his failure to appeal.[53] The circuit court reversed, questioning the validity of the lower court's holding but deciding that the circumstances of the case were so exceptional that compliance with the section [28 U. S. C. section 2254 (1958)] could be waived.[54] The Supreme Court granted certiorari; affirming the decision of the Second Circuit but on different grounds. The Court stated:

> We hold: (1) Federal courts have *power* under the federal habeas statute to grant relief despite the applicant's failure to have pursued a state remedy not available to him at the time he applies; the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute.[55]

Thus an adequate and independent state ground will no longer bar review or reversal via habeas corpus by the federal courts. The Court next concluded that the exhaustion of state remedies as required by 28 U. S. C. section 2254 applies only to those available at the time the writ of habeas corpus is applied for. And finally, the Court decided that the failure to appeal cannot be looked upon as a waiver of the right to ask for a writ of habeas corpus. In setting up limitations on the rule, the Court stated that one who has "deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts"[56] may in the discretion of the federal district judge, be denied a writ of habeas corpus. But this choice must be the petitioner's own and not his counsel's.[57] Further, neither neglect nor inadvertence will be a bar to the granting of the writ.[58] Thus, whatever interest the state may have in

[51]372 U.S. 391 (1963).
[52]U.S. *ex rel.* Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955); People v. Bonino, 152 N.Y.S.2d 298, 135 N.E.2d 51 (1956).
[53]Fay v. Noia, 183 F. Supp. 222 (1960).
[54]Fay v. Noia, 300 F.2d 345 (2d Cir. 1962).
[55]*Fay v. Noia*, *supra* note 51, at 398.
[56]*Id.* at 433.
[57]*Id.* at 439.
[58]*Ibid.*

setting up a system of procedure designed to facilitate an orderly administration of justice, it must fall before the defendant's right to have his constitutional guarantees.

The actual facts in the *Noia* case show an even greater liberalizing than do the tests set out above. Noia had *deliberately* waived his right of appeal. The reasons for this waiver are unclear although the Supreme Court states that for Noia to have appealed would have meant there was a substantial chance of retrial and a death sentence.[59] "His was the grisly choice of whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."[60]

The Court does point out however, that the possibility of an enhanced sentence on retrial will not always be a valid reason for deciding not to appeal. Rather "each case must stand on its facts."[61]

The present law of habeas corpus can be summarized as follows:

1. Where there is a dispute of fact involving a constitutional question, a plenary hearing must be granted on an application for a writ of habeas corpus to determine if the petitioner has been deprived of his constitutional rights, unless the state court has fully adjudicated the issue.

2. If the state court has given a full review on the merits, the federal district judge has the discretion to retry these facts and decide against the state court.

3. The petitioner need not ask the Supreme Court for certiorari before asking for a writ of habeas corpus.[62]

4. State procedure must fall before a constitutional right, even though the failure to comply with a state procedural rule was negligent or sometimes, even if it was wilful.

Before turning to the consequences of this liberal trend, it is interesting to note some of the possible reasons for such an expansion. Perhaps the one most often given concerns the expansion of the meaning

[59]The validity of this approach is problematical for three reasons:

1. The orginal trial conviction was based only on the confessions with the result that a reversal would have left the state with no evidence with which to convict a second time. Although the convictions of Caminito and Bonino were reversed, neither was retried as the state had presented no evidence but the coerced confessions now unavailable. *Fay v. Noia, supra* note 51, at 395 n.1.

2. The New York Federal District Court inquired into the reasons for the failure to appeal but made no findings. Noia, however, testified that he did not wish to saddle his family with a financial burden. Only Noia's lawyer brought up the possibility of the death sentence on re-trial. *Fay v. Noia, supra* note 51, at 386 n.3.

3. The Court mentions the comments of the trial judge when he sentenced Noia and although the judge did state he had considered disregarding the jury's recommendations, the fact is that he did not.

[60]*Fay v. Noia, supra* note 51, at 440.

[61]*Ibid.*

[62]*Fay v. Noia, supra* note 51, overruled *Darr v. Burford, supra* note 25, in this respect.

of "due process of law" as embodied in the fourteenth amendment. The writ of habeas corpus can be looked upon as a means of enforcing these guaranteed rights. It might logically be asked why the Supreme Court does not take the case directly from the state supreme court. There are several reasons why it does not. One is the sheer volume of work this would entail. If all the writs that now come before the lower courts were to come directly to the Supreme Court, the already difficult task would be made completely impossible.[63] Secondly, many of the issues raised are such that by their nature, the record does not contain sufficient information to judge the matter. Suppression of evidence, perjured testimony, and inadequate counsel are among the problems that do not find their way into the record.

A second major reason for the expansion of habeas corpus is fundamental to a basic change in our society. For many years now, there has been a steady barrage of literature challenging the ability of our court system to arrive at a consistently correct verdict. Books such as *Not Guilty* by Judge Jerome Frank and Barbara Frank have performed a service by pointing out weaknesses in our judicial process. They have, as a by-product, left lawyers and judges alike with a feeling that perhaps the verdict pronounced is wrong. This, coupled with various sociological and psychological studies tending to show the emotional prejudices that govern man and the studies showing the unreliability of peoples' senses have all combined to make courts extremely reluctant to accept a judgment as final. There is always the nagging doubt that perhaps *this* man is not guilty.

In discussing this problem, it must be remembered that a distinction should be made between legal certainty and absolute certainty. This latter can never be accomplished, for all men are subject to the same possibility of error. Constant relitigation of the same issue doesn't necessarily materially decrease the chance of error. It only allows a higher court to make the error. The processes of law should not aim at this perfection but rather should attempt to set up a system that is socially acceptable and reasonably probable to come to the correct solution.[64] The courts have not recently been concerned with providing a rational framework within which legal certainty can be found. Rather the emphasis has been toward finding the "absolute truth of the matter." Also, many people tend to consider a pronouncement by a court freeing an individual as correct while they look upon a conviction as questionable. A recent case and the comment by a distinguished judge concerning it will serve as an illustration. The petitioner had been convicted of first degree murder and had never appealed, although he had alleged at trial his confession was coerced through police brutality. While serving his sentence he petitioned a federal district judge in Washington for a writ

[63]Reitz, *Federal Habeas Corpus: Post Conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 464 (1960).
[64]Bator, *Finality in Criminal Law*, *supra* note 21.

of habeas corpus. The judge carefully considered *Brown v. Allen*[65] and decided to hold a hearing and determine the evidence for himself.

> He heard the witnesses and being convinced that the police officers were not telling the truth, made finding that Gonzales' claim of coercion was supported by the evidence, and that the alleged beating did in fact occur and cause the confession. He held that Gonzales was illegally detained and must be granted a new trial or released.[66]

Gonzales was never tried again because the state had insufficient evidence for conviction without the confession. Judge Pope cites the incident with approval indicating that the district judge had indeed found the meritorious habeas applicant. Yet how can he be so sure? The state trial court chose to take the word of several policemen over that of the defendant. The jury was convinced beyond a reasonable doubt. Yet the federal district judge chose to take the word of the defendant over that of the police.

A point is reached in any litigation when the processes of the legal system have made a factual determination as close to absolute certainty as possible. At this point, legal certainty has been reached and the chance of error minimized as much as possible. To redetermine or relitigate at this point will not increase the number of absolutely correct decisions. It will only increase the number of defendants that are set free.

In seems inescapable that the federal district judge's chance of coming to the correct conclusion is the same as that of the jury which first decided the case. If we assume as an arbitrary figure that a jury will correctly decide that a person is guilty in ninety-nine out of every 100 cases, then a decision should be allowed to stand unless it can be shown that another court can increase this percentage. If another court cannot increase the percentage, then by reversing or deciding differently, it will be releasing ninety-nine guilty persons in order to release one innocent. In the *Gonzales* case, the federal district court had the same evidence before it and based its decision on the same legal principles. It shows no reason to be able to more correctly decide the case than did the original jury.

It is well established that some guilty must go free so as not to convict the innocent. But does this mean that the same facts ought to be constantly relitigated on the chance that some one judge or one particular court may be convinced by the defendant's uncorroborated statements? Such a procedure will certainly set more defendants free, but will it increase the percentage of "actually correct" decisions? It would

[65]*Supra* note 27.

[66]Address of Judge Walter L. Pope, Conference of the Ninth Judicial Circuit, August 2, 1962, in *Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts,* 33 F.R.D. 363, 420 (1963). [hereinafter cited as *Habeas Corpus and Post Conviction Review*]. The case was affirmed on appeal with the court refusing to look to the merits of the matter. Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955).

seem that as long as it is realized there can never be actual certainty in criminal matters, the concept of letting the guilty go free to protect the innocent ought to dictate that all defendants be acquitted and all prisoners set free. If this is patent nonsense, then where should the line be drawn? It is contended that the line ought to be drawn at that place where the percentage of actually correct decisions ceases to go up. To ascertain this, it is necessary to direct one's attention not to the actual facts of the case involved but rather to the methods and procedures by which the defendant was convicted. If they are reasonably calculated to ascertain the truth, then the results of that decision ought to stand. At that point, the process of justice will have ground its way to a solution and overturning that decision will not lead to a higher percentage of "correct" solutions. It will only lead to a releasing of more defendants. A certain percentage of these will be innocent, but it is contended the percentage will not be any greater than it would be if all the prisoners in the penitentiaries were set free.

The role of the Supreme Court in this field should only be to determine if the processes used by the state courts were reasonably calculated to determine the truth of the matter. The Supreme Court should not attempt to substitute its interpretation of the facts for those of the state court. As Justice Jackson stated in concurring in *Brown v. Allen*:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[67]

The federal court system, it is contended, should consider a policy of judicial self-restraint. It should limit its participation to exercising control only over the methods by which the state courts operate and should not concern itself with the ultimate truth or falsity of any given set of facts. As triers of fact, they are no better than a state court and are correct in no greater a percentage of the cases.

A third major reason for the expansion of the federal habeas corpus jurisdiction is the gross inadequacy of state post-conviction remedies for handling federal constitutional claims.[68] For many defendants, "the federal habeas corpus remedy is the only possible forum for adjudication of [constitutional] rights."[69] Only two post-conviction remedies are generally available. The state writ of habeas corpus is an extremely limited

[67]*Supra* note 24, at 540.
[68]*Fay v. Noia, supra* note 51, is an outstanding example.
[69]Reitz, *supra* note 63, at 464.

common law writ which tests only the jurisdiction of the authority imposing the restraint.[70] It is, by its very nature, ineffective to handle questions of due process.[71] The other is the writ of error coram nobis. Although it has occasionally been used as a means of vindicating a petitioner's constitutional rights in state court,[72] the common law scope of the writ was such that it would not issue to test constitutional issues.[73]

While both habeas corpus[74] and coram nobis have been somewhat expanded in light of the recent trend in the Supreme Court of the United States, there is much left to be done.[75] As long as it is left undone, the job of testing constitutional issues in post-conviction procedures must go to the federal courts by default. The two recent Supreme Court habeas corpus cases are good illustrations. In *Townsend v. Sain*,[76] petitioner was not allowed a hearing on his claim of newly discovered evidence because the issue of coercion was res judicata. This was so even though petitioner was utilizing one of the most modern post-conviction remedy procedures in the county.[77] *Fay v. Noia*[78] provides a second example. Noia was denied post-conviction relief because his "failure to pursue the usual and accepted appellate procedure to gain a review does not entitle him later to utilize . . . *coram nobis*."[79]

The importance that the Supreme Court attaches to the need for post-conviction remedies can be gathered from noting that at least four of the six times habeas corpus will issue,[80] according to the test laid down in the *Sain* case,[81] would be eliminated by adequate post-conviction remedy procedures. The 1953 Conference of Chief Justices, while attacking the enlargement of federal habeas corpus, recognized that little could be done to restrict the scope of federal habeas corpus until state procedures were corrected. The Conference adopted unanimously that part of a report of a committee on habeas corpus calling for sweeping state re-

[70] 1 BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES §§ 29-33 (1913).

[71] Montana is typical in this respect. REVISED CODES OF MONTANA, 1947, § 94-101-14 states that the writ will not lie "if it appears that he [the habeas corpus applicant] is detained in custody— . . . 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree."

[72] *E.g.*, Randall v. Whitman, 88 Ga.App. 803, 78 S.E.2d 78 (1953).

[73] Briggs, "*Coram Nobis*"—*Is it Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings*, 17 MONT. L. REV. 160 (1956). See also the description of the nature of the writ in Commonwealth *ex rel.* Spader v. Myers, 190 Pa. Super. 62, 152 A.2d 787 (1959).

[74] See, *e.g.*, People v. Adamson, 34 Cal.2d 320, 210 P.2d 13 (1949).

[75] For a summary of what the various states are doing to correct procedural deficiencies, see Reitz, *supra* note 63, at 466-472.

[76] *Supra* note 39.

[77] Illinois Post-Conviction Hearing Act, ILL. ANN. STAT. ch. 38, §§ 122-27 (Smith-Hurd 1964).

[78] *Supra* note 51.

[79] 170 N.Y.S.2d 799, 804, 148 N.E.2d 139, 143 (1958).

[80] See discussion, *supra* note 48.

[81] *Supra* note 39.

forms.[82] If such procedures tend to lengthen litigation and prolong finality, there seem to be necessary evils inherent in the problem of protecting constitutional rights. As Judge Irving R. Kaufman stated: "Finality is a good thing but justice is even better."[83]

The fourth and final reason seen by this writer for the expansion of the writ of habeas corpus concerns the respective merits of the federal and state court systems as seen by the United States Supreme Court. This is illustrated by a recent Supreme Court case.[84] The case turned on whether a litigant who had filed his case in federal court could return to federal court for a determination of federal questions after he had been sent to a state court for determination of state-law issues.[85] The Supreme Court recognized that the constitutional issue involved will often be decided by how the facts are found and then continued: "Limiting the litigant to review here [from a state court's determination of the facts] would deny him the *benefit* of a federal trial court's role in constructing a record and making fact findings."[86] (Emphasis added.) In concurring in the result, Mr. Justice Douglas is even more explicit. He states: "Today we put federal jurisdiction in jeopardy. As the Court says there are many advantages in a federally constructed record. Moreover, federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges."[87]

The trend demonstrated by the recent Supreme Court cases has resulted in many problems and much opposition. Perhaps the biggest problem has been the increasing number of habeas corpus applications that the federal courts must pass on. Since 1940, the number of petitions filed has increased steadily from 127[88] to 1,232 in 1962.[89] Between 1946 and 1952, 3,702 petitions were applied for but only sixty-seven were granted.[90] With an already overworked judiciary[91] and every reason to believe that the number of habeas corpus applications will increase, there is cause for concern. However, even more striking, perhaps, is the

[82]Report of the Conference of Chief Justices, Aug. 14, 1954, printed in H. R. Rep. No. 1293, 85th Cong., 2d Sess. 7 (1958).

[83]*The Supreme Court and its Critics*, Atlantic, Dec. 1963, p. 47.

[84]England v. State Bd. of Medical Examiners, 84 S.Ct. 461 (1964).

[85]The Court held that the litigant could return to federal court, but later litigants would have to expressly state that they wished to return.

[86]*Supra* note 84, at 465.

[87]*Id.* at 471.

[88]Speck, *Statistics on Federal Habeas Corpus*, 10 OHIO ST. L.J. 337 (1949). Also shown are the following years and number of petitions: 1943, 269 petitions filed; 1948, 543 petitions filed; and, 1952, 541 petitions filed.

[89]*Fay v. Noia, supra* note 51, n.2 (Clark, J., dissenting). Also given are the following years: 1960, 872 petitions filed, and 1961, 906 petitions filed.

[90]Brown v. Allen, 344 U.S. 443, 498 (1953).

[91]An interesting study of this problem has been made by Professor Hart, *The Time Chart of the Justices, supra* note 19, at 85-94. In the article the author finds that each Supreme Court Justice has available 1728 hours of working time to cope with this load. The October, 1957, term saw for the first time the number of cases reach 1765 and thus pass the number of working hours. This allows one hour per case per justice or a total of nine hours to hear oral arguments, discuss, research and write opinions.

drop in percentages of petitions granted from 2.8% in 1946 to 1.8% in 1952[92] and an over-all average from 1946 through 1957 of 1.4%.[93] Although the figures vary sufficiently to be suspect, if true, they show that the number of petitions applied for must double just to release the same number of prisoners. In other words, the 500 plus applications in 1946 resulted in success for only fifteen applicants while the 1,200 plus in 1962, using the 1957 percentage, resulted in the release of only seventeen prisoners. An increase of 700 applications resulted in the release of only two extra prisoners. Justice Jackson foresaw this situation when he stated in a concurring opinion in *Brown v. Allen:*

> [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own. Judged by our own disposition of habeas corpus matter, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.[94]

It is further to be noted that the granting of the habeas corpus petition does not insure freedom. A study of the years 1949-1952 "shows that out of 29 petitions granted, there were only 5 petitioners who were released from state penitentiaries."[95] Finally, it is interesting to note that Joliet prison in Illinois churns out 3,000 legal documents per year that some court must consider.[96] One might legitimately wonder if the gain is worth the energy expended.

A related problem concerns the vast number of petitions that must be accorded hearing in which the claim is wholly without merit and in many instances an empty lie. Mr. Justice Pope, senior circuit judge of the Ninth Circuit lists several such examples, one of which is worth reproducing here:

> Take the case of Price whose petition against the warden, Johnston, was passed upon by the Supreme Court on May 24, 1948.[97] When he filed his fourth petition in the District Court, it was dismissed without a hearing. He appealed and his case promptly became a cause celebre. The appeal was heard twice, once before a panel of the court when Price was allowed to appear and argue for himself, and again before the whole court sitting in bank. The District Court was affirmed. The Supreme

[92]*Brown v. Allen, supra* note 90, at 537 n.10 (Jackson, J., concurring).

[93]*Fay v. Noia, supra* note 51, at 852 n.1 (Clark, J., dissenting).

[94]*Supra* note 90, at 536.

[95]*Brown v. Allen, supra* note 90, at 498. Mr. Justice Frankfurter in concurring quoted from *Habeas Corpus in the Federal Courts Brought by State Prisoners,* AD. OFFICE OF THE U.S. COURTS 4 (Dec. 16, 1952).

[96]*Habeas Corpus and Post Conviction Review,* 33 F.R.D. 363, 411 (1963).

[97]334 U.S. 266 (1947).

Court reversed and remanded the case to the District Court. By now Price had become almost as famous as Chessman. The opinion of the Supreme Court began with these words:

"The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty."

The only trouble with these noble words was that, true as they were, they had no possible application to Price. When the District Court heard the evidence, it found that Price's claim that the prosecution had knowingly used perjured testimony was utterly false; no such thing had occurred. And when Price appealed again, Judge Denman, who had dissented from the earlier affirmances, wrote the opinion affirming the denial of the writ, demonstrating that the claim was utterly frivolous.

Price was not a complete loser as every prisoner knew. His name had made headlines; he had trips to the courthouse; he could gloat that he won a case in the Supreme Court. So why should not some other prisoner try the same thing?[98]

Other examples can be found in Justice Jackson's concurring opinion in *Brown v. Allen* where he states: "Certainly the use of the federal courts as aids in such delaying tactics as evidenced here does not elevate the stature of the writ of habeas corpus. We have no mythical abuse here but a very real problem of harrassment of the state."[99]

The test laid out in the *Sain* case[100] does much to compound the problem. As will be remembered, the case stated instances where a hearing must be granted. Six instances were listed.[101] All of them turn on allegations of fact. It is to be wondered if the federal judge can ever meet these tests without a hearing on the merits.

The requirements for making application for the writ of habeas corpus are quite easy.[102] A person who wishes to apply needs only a verified affidavit. The facts he alleges are pretty much up to his own discretion or imagination. If he wishes to claim a coerced confession, he need only to allege he was beaten or whipped using a rubber hose so as to leave no incriminating marks. Perhaps the prisoner would rather add variety and allege a prosecution witness committed perjury. The prisoner then types it up on a prison typewriter (or perhaps he wishes the air of sincerity of the handwritten paper) and sends it to the nearest district

[98]*Supra* note 96, at 414.
[99]*Supra* note 90, at 537 n.11.
[100]Townsend v. Sain, 372 U.S. 293 (1963).
[101]*Supra* note 100, at 313.
[102]28 U.S.C. § 2242 (1958) provides in part: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known."

judge. A hearing now *must* be held. A few hours are wasted in the hearing and the prisoner returns to jail. He has gained a few hours outside the prison, added a bit of variety to his life with the added enticement that some judge might take his word over that of the police. At least he has had some fun. Further, this is done at no risk to himself. Even if he is occasionally caught perjuring himself, this is insignificant to the convict serving a long term.

A second major problem that has developed is the delay in federal and state courts. Some of the cases already discussed show this problem. Petitioner in the *Sain* case[103] was convicted in 1955. In 1957, the Supreme Court denied certiorari to the state court.[104] It then took five more years to reach the U. S. Supreme Court which sent the case back for a hearing on the merits. Petitioner in *Rogers v. Richmond*[105] was convicted in 1954. It took seven years to prosecute the writ of habeas corpus to the Supreme Court. Again the Supreme Court only decided that the wrong standard had been used in determining the admissibility of a confession. Perhaps, however, the worst abuse in this respect is found in the *Noia* case.[106] The three defendants were convicted in 1942 and it was not until 1955 that Caminito was finally released.[107] At this point Noia started the proceedings that resulted in the 1963 decision. By 1963 Noia had been in jail for twenty-one years.

There are several points to be noted as a result of these cases. For the innocent prisoner, it is a long time to spend in prison for a crime he did not commit. For the guilty, it allows evidence for a retrial to disappear. If Mr. Noia is guilty, conviction on retrial twenty-one years after the commission of the crime is highly unlikely. And this is a very common situation. *Rogers v. Richmond* is an illuminating example.[108] Connecticut had used to determine the admissibility of a confession a test based on the probable truth or falsity of the confession (a test also used by Montana). In determining this to be an incorrect standard, the Court stated:

> Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed.[109]

The test to be applied is "[W]hether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be

[103]*Supra* note 100.
[104]Townsend v. Illinois, 355 U.S. 850 (1957).
[105]365 U.S. 534 (1961).
[106]*Supra* note 51.
[107]U.S. *ex rel.* Caminito v. Murphy, 222 F.2d 698 (1955).
[108]*Supra* note 105.
[109]*Id.* at 541.

answered with a complete disregard of whether or not petitioner in fact spoke the truth."[110]

How long is this "independent corroborating evidence" going to last? Mr. Rogers will be retried on a charge of murder ten years after the shooting. Is that evidence still going to be available?

Also a delay of ten years or more limits the number of prisoners benefitted by habeas corpus to those sentenced to long prison terms. One does not need to read far in a study of habeas corpus to notice the similarity of crimes involved in the cases. Of the cases discussed in this article, Noia, Rogers, Leyra, Irvin, Townsend, Frank, and two of the four petitioners in *Brown v. Allen* were convicted on murder charges. The other two petitioners in *Brown v. Allen* were sentenced to death for rape, leaving only Darr who was not given either life imprisonment or a death sentence. (Darr received only eighty years.) It has been said that the wheels of justice grind exceedingly slowly but perhaps they ought to grind with less discrimination.

However, it should be noted that some of the delay may well have been eliminated by the *Sain* case.[111] Allowing a writ of habeas corpus to issue without the necessity of first asking the Supreme Court for a writ of certiorari will aid some. More important however, is the requirement that federal district courts must hold a hearing. Although this requirement is very likely to clog lower federal court calendars, it has the advantage of requiring the court to decide the allegation on the merits at a much earlier point in the proceedings, and thus avoid continued litigation.[112]

The third and final problem caused by the expansion of federal habeas curpus jurisdiction to be discussed is the increasing dominance of the role played by federal courts with the corresponding eclipse of that sphere left to the states.

The idea of two distinct court systems, one judging state matters and the other federal matters, is unique to this country. The theory has always been that each is the final arbiter in its own field. However, with the recent expansion of the fourteenth amendment, there has been a steady encroachment by the federal judiciary into what had earlier been considered as within the sole province of state courts. In criminal matters, it has reached the point where one can say with some validity, that state courts are merely inferior federal courts. It has reached the stage where one federal judge can overrule the combined decision of all the state courts that tried the matter.[113]

It is often said that since federal judges can only release a prisoner

[110] *Id.* at 544.

[111] *Supra* note 100.

[112] This benefit could be largely lost if the Supreme Court refused to accept the district court's interpretation of the facts. See *e.g.*, Leyra v. Denno, 347 U.S. 556 (1954).

[113] In a recent Montana case, a federal district judge released the defendant after his conviction and affirmance by state courts. Application of Tomich, 221 F. Supp. 500 (D. Mont. 1963).

when his constitutional rights have been violated, that federal courts ought to be given the final decision. Yet such an answer is much too superficial to be of much aid. The problem is more complicated. In actuality, it is rare in a criminal case that a state court does not decide a constitutional question and seldom that the federal question does not in turn embrace state law which is clearly constitutional.[114] This close interrelation of state and federal questions leads to many complex problems in civil as well as in criminal cases. To answer these problems and make federalism work in the criminal law field requires close co-operation between state and federal jurisdictions. Yet it is all too common for state courts to react to the recent trend as did Chief Justice Weygandt of the Ohio Supreme Court when he stated: "Our penitentiary has as many curbstone lawyers as any other state penitentiary, but we at least have a consistent record in Ohio that we have never allowed one of these writs of habeas corpus."[115]

If state courts are going to take pride in refusing to clean their own house, and are going to obey Supreme Court decisions only grudgingly, then many needed reforms are going to be made by the federal courts and state courts will relinquish by default their right to an independent criminal judiciary. State legislatures and courts must realize that the concept of criminal justice is changing, and that the law which only a few years ago gave adequate protection to the accused now falls far short of providing even minimal protection under the Constitution. Lawyers, judges, and legislators can argue rationally or emotionally on the subject of "federal encroachment" but as long as they do not act, that "federal encroachment" will continue.[116]

Specifically, this means that state criminal procedures must undergo extensive changes to provide a person charged with a crime more complete protection. Concerning federal habeas corpus proceedings, it means that state post-conviction remedies must be expanded.[117] If the states would create their own corrective procedures, many cases now reaching federal courts with a resultant release of the defendant could be disposed of on the state level.

However, it does seem that the federal courts have gone too far in overturning state decisions. The abuse of a state rule of procedure, no matter how valid, no matter how necessary for orderly court procedure, can no longer be used to deprive a person of a federal right. Yet there must

[114]*E.g., Fay v. Noia, supra* note 51; Darr v. Burford, 339 U.S. 200 (1950).

[115]Reitz, *supra* note 63, at 472.

[116]Mapp v. Ohio, 367 U.S. 643 (1961) is an excellent example. Anyone who reads this case and is familiar with the earlier cases concerning the fourteenth amendment and the exclusionary rule cannot help but be struck by the fact that had Ohio been more willing to conform to the present trend, society would not now be facing the possible retroactive release of all prisoners who were convicted in violation of the fourteenth amendment. For a discussion of this problem, see, *Collateral Attack of Pre-Mapp v. Ohio Convictions Based on Illegally Obtained Evidence in State Courts,* 16 RUTGERS L. REV. 587 (1962).

[117]For a summary of what has been done see *Reitz, supra* note 63, at 466-472.

come a time when the interests of society in an orderly state court system outweight the interests of those who would abuse that system. There must come a time when the interests of society in keeping criminals off the street overcomes that criminal's right to abuse the law of the state's appellate procedure under the guise of a constitutional right.

Mr. Justice Cardoza once stated: "The criminal is to go free because the constable blundered."[118] This is not quite so true today. Often the question should be: "Should the criminal go free because the Supreme Court changed its position?" It is no longer completely accurate to say that the police officer violated the Constitution in his action. All that can often be said is that the police officer failed to predict what the Supreme Court would hold ten years later. Has there really been a violation of a constitutional right when a state court interprets the case law correctly, thereby upholding a conviction, and later the Supreme Court overrules or severely limits the cases relied on? The average life of a Supreme Court decision is twenty-three years.[119] *Darr v. Burford*[120] was overruled only thirteen years after it was handed down. *Wolf v. Colorado*[121] lasted only twelve years.[122] Will the writ of habeas corpus now lie for legitimate convictions under these overruled cases? The problem here is much too fundamental to be answered by concluding there is an overriding federal policy. The Constitution is a living document meant to be expanded. But this expansion ought to be consistent with established procedure and people should be able to rely on what the Supreme Court has said.

CONCLUSION

A constant relitigation of the same facts serves no useful purpose if the tribunal which first acted did a competent job. As discussed earlier[123] a point is reached in litigation of cases where a factual redetermination of the issues is not going to improve the percentage of correct decisions. This is especially true where the second hearing to determine the facts occurs many years after the original conviction. If this is assumed as a basic premise, then it follows that the federal court when presented with a writ of habeas corpus ought not to concern itself with the factual matters involved but rather should look to the adequacy of the process by which the defendant was convicted. In other words, the writ of habeas corpus should be directed primarily to those areas in which the nature of the alleged violation goes to the failure to provide a constitutional process, *i. e.*, one that is likely to have failed to provide a

[118]People v. Defore, 224 N.Y. 13, 150 N.E. 585, 587 (1924).

[119]Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 757 (1949).

[120]*Darr v. Burford*, *supra* note 114.

[121]338 U.S. 25 (1949).

[122]It was overruled by *Mapp v. Ohio*, *supra* note 116.

[123]Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963), and accompanying text.

reasonably adequate tribunal in which to determine guilt or innocence. Thus, an allegation that the petitioner was not represented by adequate counsel would be properly entertained by a federal district judge. The same result would follow if the defendant claimed the trial was dominated by a mob or that a witness had perjured himself. On the other hand, if these matters had been raised by the defendant in the state courts and there had been a factual determination made against him, this ought to end the matter. The federal courts should intervene only in those instances when there has been an allegation, untested in state courts, that the machinery by which the facts were found was deficient.[124]

If the federal courts would limit their inquiry to a determination of the competency of the fact finding tribunal, and the states would undertake a thorough revision of their post-conviction remedies, most of the problems heretofore discussed would be eliminated. The accused would receive the benefit of a quicker determination of his claims while the federal judiciary would be relieved of the mounting numbers of petitions for writs of habeas corpus. But this can happen only if state and federal judges and legislators are willing to attempt to understand the problems faced by the others. It can never happen if each looks upon the other with distrust and suspicion. And all too often, it is the latter, rather than understanding and cooperation, which governs attempts to solve the problems facing our federal system.

GORHAM SWANBERG.

[124]It ought to be remembered at this point that most substantive changes in criminal law on the constitutional level are made by direct appeal to the Supreme Court. Thus, any change in habeas corpus procedures will not in any way affect the ways in which normal law is made and changed.