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NEW LOOKS AT AN ANCIENT WRIT: HABEAS CORPUS REEXAMINED

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> [T]he traditional characterization of the writ of habeas corpus as an original . . . civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom . . . cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review. Brennan, J.[1]

> [I]t is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent. There has been a halo about the "Great Writ" that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality. Powell, J.[2]

These decade-spanning statements regarding the appropriate role for federal habeas corpus in the collateral review of state criminal convictions represent far more than a shift in judicial philosophy[3] from the "Warren Court" to the "Burger Court."[4] They typify the

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1. Fay v. Noia, 372 U.S. 391, 423-24 (1963) (footnotes omitted).

2. Schneckloth v. Bustamonte, 412 U.S. 218, 275 (1973) (concurring opinion).

3. For an article expounding the thesis that the dissension often evident in fourth amendment cases is indicative of a profound disagreement among the Justices about fundamental principles, *see* Irons, *The Burger Court: Discord in Search and Seizure*, 8 U. RICH. L. REV. 433 (1973).

4. For the purposes of this article, the period of time during which the Supreme Court of the United States may be viewed and aptly described as the "Warren Court" runs from October 5, 1953 to June 23, 1969, the period of time when Earl Warren served as Chief Justice. The ascendancy of the "Burger Court" may be argued as beginning on December 15, 1971, when Justice William H. Rehnquist was sworn in. The Court then consisted of four Nixon appointees—Chief Justice Warren Burger and Associate Justices Harry A. Blackmun, Lewis

persistent debate over the role of the federal courts in the post-conviction review of state judgments that has been remarkable for the polarity that has characterized the opposing viewpoints.[5] In the course of that debate the views of Mr. Justice Powell have slowly but persistently been gaining acceptance. The purpose of this article is to focus briefly on the history of the writ of habeas corpus[6] in the Supreme Court of the United States and in the Virginia Supreme Court, to survey the development of the modern role of habeas corpus, to concentrate on the recent decisions of the United States Supreme Court in *Schneckloth v. Bustamonte*[7] and related cases and of the Virginia Supreme Court in *Slayton v. Parrigan*,[8] and, finally, to attempt to draw some conclusions about the possible direction the courts may and should take in the foreseeable future regarding habeas corpus.

A Brief History of Habeas Corpus

The precise origin of the writ of habeas corpus is not known, but as early as 1199 A.D. orders were issued directing English sheriffs to produce parties before courts.[9] In *Tyrel's Case* in 1214 an order was entered using the words "haberet . . . corpus" to direct a sheriff

F. Powell, Jr., and William Rehnquist; three judicial "liberals"—Associate Justices William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall; and two "swing men"—Associate Justices Potter Stewart and Byron R. White. This assessment of the Court may be somewhat simplistic but it is nevertheless useful in analyzing developments in the fields of criminal law, criminal procedure and habeas corpus.

5. The proliferation of articles concerning habeas corpus has been described by one commentator as "a 'flood of stale, frivolous, and repetitious' law review articles [that] inundate the legal periodicals of our country. . . .", thus paraphrasing the oft-quoted phrase of Mr. Justice Jackson in Brown v. Allen, 344 U.S. 443, 536-37 (1953). Comment, *In Search of the Optimum Writ: A Suggestion for the Improvement of Federal Habeas Corpus*, 22 J. Pub. L. 465, 466 (1973), wherein the author estimates that from "[S]eptember 1964 until August 1973, there were close to 200 symposia, articles, comments, and notes on the general topic of habeas corpus. . . ." *Id.* at 465.

6. There have been through history several different forms of habeas corpus—*ad respondendum*; *ad satisfaciendum*; *testificandum*, *deliberandum*; and *ad faciendum et recipiendum*—most of which are now archaic. *See* 3 W. Blackstone, Commentaries* 129-30; D. Meador, Habeas Corpus and Magna Charta 7-9, 12 (1966) [hereinafter cited as Meador]. When used in this article the term "habeas corpus" is intended to refer to the common law writ of *habeas corpus ad subjiciendum*, often described as the "Great Writ." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).

7. 412 U.S. 218 (1973).

8. 215 Va. 27, 205 S.E.2d 680 (1974).

9. Meador at 8.

to bring a person before the king; such orders were regularly used for the purpose of getting a party before a court so that a case could be tried.[10] In other words, the writ was originally a process by which courts compelled the attendance of parties to facilitate the adjudication of litigation.[11] The role of habeas corpus was constantly changing, however, and by the early seventeeth century:

> [T]he writ of habeas corpus had evolved into an independent writ, not auxiliary to any other proceeding. It was a device whereby a court could inquire into the legality of detention and could order a discharge if the detention was found illegal. The writ had also become differentiated into several new forms. For constitutional history the most important was the *habeas corpus ad subjiciendum*, used where the petitioner was held under a criminal charge. From that point forward, attention focuses on the question of what constitutes unlawful detention.[12]

The first major test of habeas corpus as thus constituted came in *Darnel's Case*[13] in 1627, when four English subjects imprisoned for refusing to make loans to an impecunious Charles I sought release on the ground that the king lacked the authority to hold them solely on his special command. The court accepted the jailer's return and refused to look behind it, although it acknowledged that where the cause for commitment appeared in the return, the court had the power to review the legality of the detention.[14] The prisoners' case was lost but Parliament responded in 1628 with the Petition of Right,[15] which required that the cause of commitment be shown in a return if a prisoner of the Crown was to be detained. Thirteen years later, with the effect of the Petition of Right largely negated by judicial interpretation,[16] Parliament struck again at the king's

10. *Id.*

11. *Id.* at 9; Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042 (1970) [hereinafter cited as *Developments*]; Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 459 (1966) [hereinafter cited as Oaks].

12. MEADOR at 12-13. *See also* 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 114 (1926) [hereinafter cited as HOLDSWORTH].

13. 3 Cobbett's St. Tr. 1 (1627). *See* 9 HOLDSWORTH 114; MEADOR at 13-19. *See also* 6 HOLDSWORTH 34-37.

14. 3 Cobbett's St. Tr. 1, 51-57 (1629).

15. 3 Car. I, c. I (1628).

16. *See, e.g.*, Stroud's Case, 3 Cobbett's St. Tr. 235 (1629); 6 HOLDSWORTH 39 n.6.

power in the Act of 1641[17] abolishing the Star Chamber and removing the power of the king to arrest without "probable cause."[18]

The struggle for dominance between the Crown and the Parliament, in which the writ of habeas corpus had become a symbolic tool, was interrupted by the reign of Cromwell and the Commonwealth from 1649 to 1660. Upon restoration of the monarchy, Charles II exploited defects in the writ to imprison subjects, and Parliament responded with the Habeas Corpus Act of 1679.[19] This Act did not plug all the procedural gaps in the "Great Writ", but it materially strengthened the power of common law courts to release prisoners arbitrarily detained by the king and council. The Act specifically excluded from its coverage persons confined as a result of a criminal conviction.[20] The old test of judicial detentions—the jurisdictional competence of the committing court—was the sole point of inquiry in cases of this nature.[21]

A. Habeas Corpus in America

Although the Habeas Corpus Act itself was never extended to the American colonies, the colonists, with Coke's *Institutes* and *Blackstone's Commentaries* as basic legal treatises, viewed the writ of habeas corpus as a part of the fundamental common law rights of Englishmen, wherever they might be.[22] Following independence from England and up until the time of the Federal Constitutional Convention of 1787, the writ of habeas corpus was mentioned in the constitutions of less than half the states, probably because of the view that the common law writ was so well established as to render

17. 16 Car. I, c. 10, §§ III, VIII (1641).

18. The Act provided that a prisoner would have immediate access to a writ of habeas corpus and the court "shall proceed to examine and determine whether the cause of such commitment appearing upon the . . . return be just and legal, or not. . . ." *Id.* at § VIII.

19. 31 Car. 2, c. 2 (1679). *See generally* 6 HOLDSWORTH 142-63.

20. 31 Car. 2, c. 2, § III (1679).

21. During the course of Mr. Justice Brennan's opinion in *Fay v. Noia*, he stated that "[W]hen habeas corpus practice was codified in the Habeas Corpus Act of 1679, . . . no distinction was made between executive and judicial detentions." 372 U.S. at 403 (citations and footnotes omitted). This view of the historical effect of the Habeas Corpus Act of 1679 is seriously questioned by other authorities. *See* MEADOR at 26-27; Oaks at 454 n.20.

22. MEADOR at 30-31; Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18, 19-21 (1903). For a brief discussion of the writ of habeas corpus in early Virginia see the text accompanying notes 72-88 *infra*.

a constitutional provision unnecessary.[23] In the years following ratification of the United States Constitution, however, practically all the states incorporated into their constitutions provisions patterned after the federal suspension clause.[24]

Surprisingly, the only mention in the United States Constitution of the writ of habeas corpus is in the suspension clause—a provision that arguably serves only to limit the power of Congress.[25] Several authorities have argued, quite persuasively, that at the time of the Constitutional Convention of 1787 no federal writ of habeas corpus was necessary. Each state had the writ available and any person confined within the state was afforded its protection, including federal prisoners.[26] Consequently, it is probable that the framers of the Constitution did not view that document as creating a right to a federal writ, but only as limiting the power of the Congress to suspend habeas corpus as afforded by the states.[27]

In any event, there was nothing in the historical background of the writ of habeas corpus at the time of the Constitutional Convention to indicate that a prisoner convicted by a court of general criminal jurisdiction was ever entitled to the writ. The framers were concerned about the misuse and abuse of executive power and the first Congress undoubtedly did not view the suspension clause as implicitly establishing an affirmative right to the writ. If they had read the clause to do so, they would not have deemed it necessary in the Judiciary Act of 1789[28] to give the federal courts explicit power

23. MEADOR at 31-32; Chafee, *The Most Important Human Right in the Constitution*, 32 BOST. U.L. REV. 143, 146 (1952); Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 247 (1965).

24. Oaks, *supra* note 23, at 249. *E.g., compare* U.S. CONST. art. I, § 9, note 25 *infra, with* VA. CONST. art. I, § 9, note 114 *infra*.

25. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl.2. *See* Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 344-45 (1952) [hereinafter cited as Collings].

26. MEADOR at 32-33; Warren, *Federal and State Court Interference*, 42 HARV. L. REV. 345, 353 (1930). It was not until the middle of the nineteenth century that the Supreme Court ended state court access for federal prisoners. Tarble's Case, 80 U.S. (13 Wall.) 397 (1871); Ableman v. Booth, 62 U.S. (21 How.) 506 (1858).

27. MEADOR at 33; Collings at 344-45. One possible reason for this conclusion and for the fact that no affirmative provision for habeas corpus exists in either the Constitution or the Bill of Rights may be the existence of the sixth amendment, which guarantees the right to a speedy trial and to be informed of the nature and cause of the accusation—everything of substance protected by the Habeas Corpus Act of 1679 in England.

28. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, wherein the federal courts were empow-

and jurisdiction to issue the writ. The conclusion is inescapable that under the United States Constitution, at least as viewed in 1789, a convicted prisoner had no right to habeas corpus. Such a right would have to be established by Congress.[29]

Early cases in the United States Supreme Court recognized the statutory, rather than Constitutional, origins of the power to grant the writ. In *Turner v. Bank of North America*[30] Justice Chase stated:

> The notion has frequently been entertained, that the federal courts derive their judicial power, immediately from the constitution; but the political truth is, that the disposal of the judicial power (except in a few specified instances) belongs to Congress. If Congress has given the power to this Court, we possess it, not otherwise; and if Congress has not given the power to us, or to any other Court, it still remains at the legislative disposal.[31]

Eight years later Chief Justice Marshall dealt with the power of the high court to issue the writ and he concluded that any "power to award the writ by any of the courts of the United States, must be given by written law."[32] The Judiciary Act of 1789 must have been, in his view, the "efficient means by which this great constitutional privilege should receive life and activity. . . ."[33]

In 1830, in *Ex parte Watkins*,[34] Chief Justice Marshall again addressed himself to the scope of the writ when he stated that "no law of the United States prescribes the cases in which this great writ shall be issued. . . . The term is used in the Constitution as one which was well understood. . . ."[35] Although Marshall recognized that the existence of the right to habeas corpus was established by the Judiciary Act of 1789, the scope of the writ was delineated by

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ered to issue writs of habeas corpus to prisoners "in custody under or by colour of the authority of the United States. . . ." *Id.* at 81-82.

29. Collings at 345.

30. 4 U.S. (4 Dall.) 8 (1799).

31. *Id.* at 10 n.1.

32. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).

33. *Id.* at 95. Some years later, in *Ex parte* Vearney, 20 U.S. (7 Wheat.) 38 (1822), the Court held that a contempt conviction by the District of Columbia Circuit Court would not be reviewed on habeas corpus, despite the allegation that the contempt arose from a refusal to answer a question the prisoner considered incriminating.

34. 28 U.S. (3 Pet.) 193 (1830).

35. *Id.* at 201.

the common law, as expressed by the English Act of 1679. In reference to this Act, Marshall stated:

> This statute may be referred to as describing the cases in which relief is, in England, afforded by this writ to a person detained in custody. It enforces the common law. This statute excepts from those who are entitled to its benefit persons committed for felony or treason, plainly expressed in the warrant, as well as persons convicted or in execution.[36]

Of significance to our current understanding of the scope and role of habeas corpus is Chief Justice Marshall's denial of the writ on the ground that the petitioner was committed under a criminal conviction and "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."[37] This was essentially the posture of the writ at the time of the passage of the Habeas Corpus Act of 1867.[38] Nine years later, in *Ex parte Parks*,[39] a federal prisoner was denied habeas corpus relief on the ground that it afforded no relief to a person detained under the judgment of a court of competent jurisdiction. This same view persisted for prisoners detained under state convictions as well as federal prisoners. In 1875 Justice Joseph Bradley, sitting on circuit, granted a state prisoner habeas corpus relief after concluding that a pre-empting federal law deprived the state court of jurisdiction. He added, however, that:

> If it were a case in which the state had jurisdiction of the offense, the general rule of the common law would intervene, and require that the prisoner should be remanded, and left to his writ of error. In such a

36. *Id.* at 201-02. *See also* McNally v. Hill, 293 U.S. 131, 136 (1934).

37. 28 U.S. (3 Pet.) at 203. *See* note 33 *supra*. Over a century later, in *Fay v. Noia*, a majority of the Court made an effort to refute the notion that this was the scope of habeas corpus in England, and at the time of the framing of the Constitution. 372 U.S. at 426. But Mr. Justice Powell, in *Schneckloth*, comments on the *Fay* view in the following incisive terms:

> If this were a correct interpretation of the relevant history, the present wide scope accorded the writ would have arguable support, despite the impressive reasons to the contrary. But recent scholarship has cast grave doubt on *Fay's* version of the writ's historic function. 412 U.S. at 253.

See also MEADOR at 60-61; Oaks, *supra* note 23, at 262.

38. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (now 28 U.S.C. § 2241(c)(3) (1964)).

39. 93 U.S. 18 (1876).

> case, although the judgment were erroneous, the imprisonment would not be in violation of the constitution or laws of the United States.[40]

Ex parte Lange[41] represented the first departure from these historical boundaries when the Court granted relief to a prisoner who had been convicted of a federal offense and had paid the fine imposed, only to be resentenced by the trial court to a year's imprisonment. The Court predicated its grant of the writ on the rationale that the satisfaction of the original sentence terminated the lower court's jurisdiction, thus beginning "a long process of expansion of the concept of a lack of 'jurisdiction.' "[42] Following the same rubric of "jurisdiction" in *Ex parte Siebold*[43] and *Ex parte Wilson*,[44] the Court stated that the constitutionality of the statute under which a prisoner was convicted could be examined and that the total absence of any indictment would entitle a prisoner to relief. These cases all involved federal prisoners, however, and it was not until 1886 that the Court first heard a case from a state prisoner.[45]

An expanding view of due process rights for state defendants coupled with a concern for deference to state judiciaries caused continuing problems for the Supreme Court in deciding habeas corpus petitions. In *Frank v. Mangum*[46] the Court rejected a state prisoner's claim that he had been denied due process by an allegedly mob-dominated trial and affirmed the district court's denial of the writ. However, some new and germinal concepts were introduced by the Court's view that mob domination could result in a denial of due process, in which event the conviction would have been entered by a court without "jurisdiction" and relief could be granted. This was a somewhat radical detour along the road of "jurisdiction." The

40. *Ex parte* Bridges, 4 Fed. Cas. 98, 106 (No. 1862) (C.C.N.D. Ga. 1875). This view of the Act of 1867 as not altering the traditional common law scope of habeas corpus was typical. *E.g.*, Fay v. Noia, 372 U.S. 391, 453 (1963) (dissenting opinion of Justice Harlan); Brown v. Allen, 344 U.S. 443, 532-33 (1953) (concurring opinion of Justice Jackson).

41. 85 U.S. (18 Wall.) 163 (1873).

42. Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 84, 104 (1959) [hereinafter cited as Hart].

43. 100 U.S. 371 (1879).

44. 114 U.S. 417 (1885).

45. *Ex parte* Royal, 117 U.S. 241 (1886). The Court expressed an "exhaustion of state remedies" policy in this case by asserting that a federal writ would normally be denied until completion of state trial court proceedings.

46. 237 U.S. 309 (1915).

result in *Frank* was dictated by the Court's view that the ultimate question under the 1867 Act was whether the prisoner was in custody "in violation of the constitution" and the resolution of that test was determined by the fairness of the state "corrective process" to test federal constitutional claims. The essential inquiry focused on the state's panoply of procedures for adjudicating such claims rather than on the substantive claim itself.[47]

Moore v. Dempsey[48] followed *Frank* by only eight years and the claim of mob domination was similar to that in the earlier case. Despite the fact that the Arkansas Supreme Court had considered the prisoner's federal claim, the Court reversed and ordered the federal district judge to determine the merits of the allegation for himself. The Court did not enunciate any criteria for such a reexamination and it did not specifically overrule *Frank*, but the decision could be explained by the more cursory review of the federal claim in the Arkansas courts than the Georgia courts had afforded in *Frank*.[49] The Court continued to discuss due process claims in terms of the "jurisdiction" of the trial court and it reiterated the caveat that habeas corpus could not be used as a substitute for a writ of error.[50] In *Waley v. Johnston*[51] the Court abandoned the "jurisdiction" fiction and expressly acknowledged that constitutional claims as well as jurisdictional questions were cognizable on habeas corpus review.[52]

The abandonment of the *Frank* definition of habeas corpus review

47. MEADOR at 62-64; *Developments* at 1050.

48. 261 U.S. 86 (1923).

49. Professor Hart views *Frank* as being "substantially discredited" by *Moore* (Hart at 105), while Professor Reitz asserts that *Moore* "overruled" *Frank*. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1329 (1961) [hereinafter cited as Reitz]. Professor Bator, on the contrary, views the two decisions as being consistent, as he ascribes considerable weight to the differing attention paid to the federal claims in the two states. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 489 (1963) [hereinafter cited as Bator]. A different explanation is the change in Supreme Court jurisdiction that took place between *Frank* and *Moore*, whereby due process claims of a state criminal proceedings were no longer reviewable by direct appeal in the Supreme Court but were only cognizable through the discretionary certiorari jurisdiction of the Court. *See Developments* at 1053-54.

50. *See, e.g.*, Moore v. Dempsey, 261 U.S. 86, 91 (1923); Frank v. Magnum, 237 U.S. 309, 326 (1915).

51. 316 U.S. 101 (1942).

52. *Id.* at 104-05.

was finally made clear by the Supreme Court's 1953 decision in *Brown v. Allen*.[53] In *Brown*, a state criminal defendant asserted violations of the fourteenth amendment in the jury selection process and in the admissibility of a confession. The questions were fully litigated in the state courts without success and the United States Supreme Court denied direct review. The prisoner then initiated a habeas corpus petition in the federal district court, attacking not the state procedures for the adjudication of his federal claims, but challenging instead the correctness of the state court decisions. The district court rejected the claims on their merits and the court of appeals and the Supreme Court affirmed.

Under *Frank* there could have been no federal habeas corpus review on the merits and the sole question would have been the adequacy of the state corrective process.[54] The *Brown* decision treated that prior ultimate question as irrelevant and established that on federal habeas corpus filed by a state prisoner the federal courts could review and decide the merits of the alleged federal claim without initial resort to the adequacy of state process question.[55] In addition, the federal district judge was not limited to the state record; he could hold an evidentiary hearing and make new findings of fact.[56]

Brown had no immediate impact despite the contemporaneous enlargement in due process and equal protection rights by the Supreme Court of the United States. One reason for the delayed reaction was the case of *Daniels v. Allen*,[57] a companion case to *Brown v. Allen*. The defendant in *Daniels* had asserted the same federal constitutional claims that were asserted in *Brown* but the prisoner had not previously perfected an appeal of his conviction to the state supreme court. Consequently, the state courts affirmed the conviction without passing on the federal questions. A federal habeas corpus petition was filed, but the Supreme Court denied relief solely on the ground that the petitioner had waived the claims by failing to assert them in accordance with state law and his custody was

53. 344 U.S. 443 (1953).
54. MEADOR at 65-66.
55. 344 U.S. at 508.
56. *Id.* at 463, 503, 506.
57. 344 U.S. 443 (1953).

therefore not "in violation of the Constitution."[58] In essence, the Court's holding had the effect of giving immunity to a state conviction on federal habeas corpus appeal if it was similarly immune from review on direct appeal because it rested on an adequate state ground. One commentator has pointed out that "by this view, such a state conviction is not subject to federal judicial scrutiny at any level by any procedure."[59]

For a decade after *Brown* and *Daniels* the Supreme Court steadily and persistently spawned new rights for state criminal defendants through an expanding view of the due process and equal protection clauses.[60] As long as *Daniels* stood intact, state criminal procedural rules could effectively bar federal collateral relief, and there was a high degree of finality to a conviction where no federal question was raised in the course of the trial and appeal.[61] Finally, in 1963, the issue posed in *Daniels* was met and resolved by a 6-3 decision of the Supreme Court in *Fay v. Noia*,[62] along with the contemporaneous cases of *Townsend v. Sain*,[63] *Sanders v. United States*,[64] and *Jones v. Cunningham*.[65]

In *Fay* and *Townsend*, the beacon lights for those who favor the concept of an expanded federal writ of habeas corpus, the Court formulated a rule that may be summarized as follows: habeas corpus may be invoked by a state prisoner, after the exhaustion of available state remedies, to review alleged violations of federal constitutional claims in state criminal proceedings, regardless of any prior state court determinations of those rights.[66] The federal district court must hold an evidentiary hearing under any of these conditions: (1) the merits of any factual dispute were not determined at a state hearing; (2) the state adjudication of the merits of any such dispute is not fairly supported by the record; (3) the fact-

58. *Id.* at 485.

59. MEADOR at 68-69.

60. *See generally* Whitley v. Steiner, 293 F.2d 895 (4th Cir. 1961); MEADOR at 69; Hart, *supra* note 42; Reitz, *supra* note 49.

61. MEADOR at 69.

62. 372 U.S. 391 (1963).

63. 372 U.S. 293 (1963).

64. 373 U.S. 1 (1963).

65. 371 U.S. 236 (1963).

66. 372 U.S. at 312. *See* Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660, 662 (1970).

finding procedure utilized in the state courts is not adequate for a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not developed adequately at state hearings; or (6) if, for any reason, the prisoner was not afforded a full and fair hearing in the state courts.[67] Even under the *Fay-Townsend* rule, however, a petitioner may still be deemed to have waived his federal claims if he:

> [U]nderstandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the *deliberate by-passing* of state procedures. . . .[68]

Sanders stands primarily for the proposition that the doctrine of res judicata does not serve to bar successive habeas corpus petitions, although the rejection of the same claim in an earlier proceeding may be considered by the habeas court. In *Jones* the Court retreated from its earlier position that habeas corpus could be used only to test actual physical custody by a respondent, and extended habeas corpus to allow relief to a prisoner released on parole.[69]

The immediate effect of the 1963 decisions was to stimulate a vast increase in the number of habeas corpus petitions. In just five years the number of petitions filed by state prisoners rose from 1,903 in 1963 to over 6,300 in 1968, an increase of 286 per cent.[70] This expansion in the number, as well as the role, of habeas corpus petitions led to considerable irritation on the part of state judiciaries and a number of ameliorative proposals, including legislation, were made

67. 372 U.S. at 313. *See* 28 U.S.C. § 2244 for the codification of this rule.

68. 372 U.S. at 439 (emphasis added).

69. 371 U.S. at 243. This represented a substantial break with the past and especially with the prior decision of Wales v. Whitney, 114 U.S. 564 (1885), where the Court had held that a naval officer confined to the city limits of Washington, D.C. was not sufficiently restrained and that:

> Something more than moral restraint is necessary to make a case for *habeas corpus*. There must be actual confinement or the present means of enforcing it. *Id.* at 571-72.

In *Jones* the Court relied primarily on cases involving the use of the writ in child custody cases and cases involving the exclusion of aliens to support its position. *Developments* at 1073 n.6; Oaks at 468-71.

70. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 130 (1968). *See also State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 147 (1970).

but to date all of these proposals have failed.[71] With a few accretions along the way, the 1963 decisions of the Supreme Court constituted the law of federal habeas corpus at the time that the Burger Court came into its ascendancy.

B. Habeas Corpus in Virginia

As previously discussed, the Habeas Corpus Act of 1679 was never extended to the American colonies.[72] In Virginia, however, one of Governor Spotswood's first acts was to extend the writ to the colony in 1710 on behalf of Queen Anne, and both houses of the General Assembly expressed their thanks for her:

> Majesty's late favor to this country in allowing us the benefit of the habeas corpus act, and in appointing courts of oyer and terminer for the more speedy execution of justice and relief from long imprisonment.[73]

Despite this history, the Virginia Constitution of 1776 contained no reference to the writ of habeas corpus,[74] although the writ of habeas corpus *cum causa* had previously been authorized by statute.[75] Prior to the convening of the federal Constitutional Convention in 1787, only five states had passed habeas corpus acts.[76] The writ of habeas

71. *See, e.g.*, S. 917, 90th Cong., 1st Sess. § 702(a) (1968); H.R. 5649, 84th Cong., 1st Sess. (1955). The 1968 Senate bill would have denied federal habeas corpus to state prisoners, or so went the argument by its sponsors. Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 606-07 (1970).

72. *See* text accompanying note 22 *supra*.

73. R. HURD, HABEAS CORPUS 113 (1858); MEADOR at 30-31; A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 58-59 (1930); Collings at 338; Oaks at 338. Governor Spotswood's full proclamation can be found in Carpenter, *supra* note 22, at 24-25. Even prior to this action in 1710, however, a habeas corpus proceeding was held in 1682 involving Major Robert Beverly, Clerk of the burgesses, in connection with the tobacco-cutting riot of that year. SCOTT at 58-59.

74. 2 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 1910-1912 (1877).

75. An Act for establishing a General Court, § 53, 9 Va. Stats. 414 (Hening 1775); Fleming v. Bradley, 5 Va. (1 Call) 175 (1797). The writ of habeas corpus *cum causa* was used for the purpose of removing a civil cause from an inferior court to a superior court. Interestingly, despite Virginia's early adherence to habeas corpus, the writ was suspended during the War of Independence. 10 LAWS OF VIRGINIA 413-14 (Hening 1822).

76. Oaks, *supra* note 11, at 251. See an act directing the mode of suing out and prosecuting writs of habeas corpus, 11 Va. Stats. 408 (Hening 1784). The Virginia act was patterned on the English Habeas Corpus Act of 1679.

corpus received its first mention in a Virginia Constitution when the Constitution of 1830 provided that "the privilege of the writ of *habeas corpus* shall not in any case be suspended," thus providing an absolute prohibition against suspension, unlike the United States Constitution.[77]

The earliest Virginia case dealing with habeas corpus in the sense used in this article appears to be *Ex parte Pool*,[78] which acknowledged the power of a Virginia court to issue a writ of habeas corpus to sailors in the federal navy confined in a Virginia jail for the federal authorities. Another case involving the question of the legality of a state's detention of an individual in the military establishment of the federal government is *United States v. Cottingham*,[79] wherein the Court of Appeals of Virginia affirmed its prior assertion of power to issue the writ, but upheld the denial of such relief by the trial court. An intriguing situation arose in *Mann v. Parke*,[80] where the Virginia Court of Appeals issued a writ of habeas corpus to a confederate soldier who was exempted from military service. This decision was contrary to the prior United States Supreme Court decision in *Ableman v. Booth*,[81] where the Court finally held that a state court could not issue the writ for a federal prisoner. Two other decisions in 1843—*Green v. Commonwealth*[82] and *Cropper v. Commonwealth*[83]—affirmed the right to habeas corpus relief where a criminal defendant is not brought to trial within the required number of terms, and the court therefore has no jurisdiction over the offense.

These cases parallel the decisions during this time of the Supreme Court of the United States in their concentration on jurisdictional questions as being preeminently in the ambit of habeas corpus.[84] For

77. VA. CONST. art. III, § 11 (1830); 2 B. POORE, *supra* note 74, at 1916. *Compare* the Federal Constitution, note 25 *supra*.

78. 4 Va. (2 Va. Cas.) 276 (1821). *See* HURD, *supra* note 73, at 190-91.

79. 40 Va. (1 Rob.) 615 (1843). *See also* United States v. Lipscomb, 45 Va. (4 Gratt.) 41 (1847); United States v. Blakeney, 44 Va. (3 Gratt.) 405 (1847).

80. 57 Va. (16 Gratt.) 443 (1864).

81. *See* note 26 *supra*. Perhaps the Virginia court is articulating the state's rights philosophy exemplified by secession and by the loose confederation and weak central government existing in the Confederate States of America.

82. 40 Va. (1 Rob.) 731 (1843).

83. 41 Va. (2 Rob.) 879 (1843).

84. *See* text accompanying notes 34-40 *supra*. For an interesting case involving the at-

example, in *Ex parte Rollins*[85] the Virginia court expressed the idea that habeas corpus is limited to jurisdictional questions:

> It is a well-established and undisputed principle that mere errors in the proceedings of a court of competent jurisdiction cannot be reviewed on *habeas corpus*. In such case the remedy, if any, is by writ of error or appeal. But where the proceedings under which the party complaining is detained in custody are void, as where the court is without jurisdiction, the same are reviewable on *habeas corpus*, and the party will be discharged.[86]

This theme was reiterated in *Ex parte Marx*:[87]

> The writ of *habeas corpus* is not a writ of error. It deals, not with mere errors or irregularities, but only with such radical defects as render a proceeding absolutely void. It brings up the body of the prisoner with the cause of his commitment, and the court can inquire into the sufficiently [sic] of that cause; but if he be detained in prison by virtue of a judgment of a court of competent jurisdiction, that judgment is in itself sufficient cause. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court or magistrate rendering it had jurisdiction to render it.[88]

The posture of habeas corpus in Virginia remained thus for a number of years. In *McDorman v. Smyth*,[89] the court followed the rationale of *McNally v. Hill*[90] in holding that a writ of habeas corpus would

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tempted use of habeas corpus to recover custody of a slave, see *Ex parte* Ball, 43 Va. (2 Gratt.) 588 (1845).

85. 80 Va. 314 (1885). The court recognized that the unconstitutionality of the statute of conviction would entitle a prisoner to habeas relief.

86. *Id.* at 316.

87. 86 Va. 40, 9 S.E. 475 (1889).

88. *Id.* at 43-44, 9 S.E. at 477. Another oft-cited authority is Lacey v. Palmer, 93 Va. 159, 24 S.E. 930 (1896), wherein the court stated:

> The office of the writ of *habeas corpus* is not to determine the guilt or innocence of the prisoner. The only issue which it presents is whether or not the prisoner is restrained of his liberty by due process of law.
>
> A person held under proper process to answer for an offence erected by a statute enacted within the constitutional power of the Legislature cannot be discharged upon a writ of *habeas corpus*, however clear his innocence may be, but must abide his trial in the mode prescribed by law. *Id.* at 163-64, 24 S.E. at 931.

89. 187 Va. 522, 47 S.E.2d 441 (1948). *See also* Smyth v. Holland, 199 Va. 92, 97 S.E.2d 745 (1957).

90. 293 U.S. 131 (1934).

not lie to review a conviction which was yet to be served and on which the sentence had not begun to run. The court again noted that mere irregularities in the indictment, or other pleadings, would not constitute a ground for habeas corpus relief.[91]

In 1949, in *Smyth v. Godwin*,[92] the Supreme Court of Appeals of Virginia considered a number of major questions involving habeas corpus and ruled that despite the constitutional prohibition against appeals by the Commonwealth, habeas corpus was a civil proceeding and the respondent would be permitted to appeal an adverse decision on a writ of habeas corpus. The court also ruled that the prisoner had the burden of proof, especially as to a claimed knowing use by the Commonwealth of perjured or false testimony and a demonstration of mere inconsistencies would be insufficient to sustain this burden.[93] In *Smyth v. Midgett*,[94] the court reaffirmed its prior view of the role of habeas corpus:

> *Habeas corpus* is a writ of inquiry granted to determine whether a person is illegally detained. Code, § 8-596. It can not be used to perform the function of an appeal or writ of error, to review errors, or to modify or revise a judgment of conviction pronounced by a court of competent jurisdiction. It can not be used to secure a judicial determination of any question which, even if determined in the prisoner's favor, could not affect the lawfulness of his immediate custody and detention. In other words, a prisoner is entitled to immediate release by *habeas corpus* if he is presently restrained of his liberty without warrant of law.[95]

Even prior to the 1963 decisions of the United States Supreme Court expanding the role of habeas corpus, the Supreme Court of

91. 187 Va. at 528, 47 S.E.2d at 445. *See also* Council v. Smyth, 201 Va. 135, 109 S.E.2d 116 (1959); Royster v. Smyth, 195 Va. 228, 77 S.E.2d 855 (1953); Thornhill v. Smyth, 185 Va. 986, 41 S.E.2d 11 (1947); Harmon v. Smyth, 183 Va. 414, 32 S.E.2d 665 (1945).

92. 188 Va. 753, 51 S.E.2d 230 (1949).

93. *Id.* at 768-73, 51 S.E.2d at 236-39. *See also* Penn v. Smyth, 188 Va. 367, 49 S.E.2d 600 (1948).

94. 199 Va. 727, 101 S.E.2d 575 (1958).

95. *Id.* at 730, 101 S.E.2d at 578. The court had previously reasserted this view in Council v. Smyth, 201 Va. 135, 139-40, 109 S.E.2d 116, 119 (1959), relying on Justice Jackson's concurring opinion in Brown v. Allen, *supra* note 53. *See also* Smyth v. Bunch, 202 Va. 126, 116 S.E.2d 33 (1960); Smyth v. Morrison, 200 Va. 728, 107 S.E.2d 430 (1959); Hanson v. Smyth, 183 Va. 384, 32 S.E.2d 142 (1944); Hobson v. Youell, 177 Va. 906, 15 S.E.2d 76 (1941).

Appeals of Virginia dealt with procedural questions in such a way as to remove technical impediments to the writ. In *Morris v. Smyth*,[96] the court ruled that a petition for a writ of habeas corpus cannot be dismissed without calling for a response where the allegations of the petition as pleaded, if true, would entitle the prisoner to relief. In *Cunningham v. Frye*[97] the court decided that, if the alleged issues were based on unrecorded matters of fact, the case should be referred to the sentencing court for a plenary hearing.[98] The year following the 1963 federal decisions the Virginia court, citing Justice Jackson's concurring opinion in *Brown v. Allen*, ruled that a judgment of first degree murder resulting from a manslaughter indictment was not void, but merely voidable, and habeas corpus could not lie since the sole "remedy in such cases is by a writ of error."[99]

In 1964, in *Griffin v. Cunningham*,[100] the court appeared to deviate from its prior positions in the following language:

> We find no merit in the suggestion of respondent that petitioner is not entitled to bring this *habeas corpus* proceeding, but instead should have appealed from the March 19, 1956 judgment of the circuit court. It is well settled that the deprivation of a constitutional right of a prisoner may be raised by *habeas corpus*.[101]

The proposition that the court refers to as being well settled had not, in fact, previously been asserted in earlier decisions of the court, including those cases cited by the court to support the statement.

In *Peyton v. Williams*[102] the Virginia Supreme Court acknowledged that "the concept of the scope of the writ of *habeas corpus* has been expanded in recent years by statutes and court decisions in some of the states, and by the federal courts with regard to what constitutes 'detention' or 'custody',"[103] but the court declined to do

96. 202 Va. 832, 120 S.E.2d 465 (1961).
97. 203 Va. 539, 125 S.E.2d 846 (1962).
98. *See* VA. CODE ANN. § 8-598 (Cum. Supp. 1974).
99. Cunningham v. Hayes, 204 Va. 851, 859, 134 S.E.2d 271, 277 (1964).
100. 205 Va. 349, 136 S.E.2d 840 (1964).
101. *Id.* at 355, 136 S.E.2d at 845.
102. 206 Va. 595, 145 S.E.2d 147 (1965).
103. *Id.* at 601, 145 S.E.2d at 151. *See also* Blowe v. Peyton, 208 Va. 68, 155 S.E.2d 351 (1967).

so itself. Nonetheless, in *Darnell v. Peyton*,[104] the court did expand the preexisting rights of a habeas petitioner by affirming a right to the assistance of counsel during a plenary hearing where "substantial" issues are involved. A persistent claim in habeas corpus petitions has naturally been that the prisoner was denied the effective assistance of counsel. The Virginia Supreme Court has just as persistently tested such a claim by the standard that such "representation was so ineffective as to make the trial a farce and a mockery of justice."[105] Despite criticism of the "mockery" and "farce" rule the Supreme Court of Virginia has adhered to that standard without deviation.[106]

In *Brooks v. Peyton*,[107] the Virginia court reiterated the pre-*Griffin* view of habeas corpus as being limited in its reach to jurisdictional defects. The court said:

> In the present proceeding the petitioner is seeking to employ a writ of habeas corpus as a substitute for an appeal or writ of error. The function of a writ of habeas corpus is to inquire into jurisdictional defects amounting to want of legal authority for the detention of a person on whose behalf it is asked. The court in which a writ is sought examines only the power and authority of the court to act, not the correctness of its conclusions, and the petition for a writ may not be used as a substitute for an appeal or writ of error.[108]

Other recent cases have dealt with such procedural matters as the

104. 208 Va. 675, 160 S.E.2d 749 (1968).

105. Anderson v. Peyton, 209 Va. 798, 799, 167 S.E.2d 111 (1969). *See also* Root v. Cunningham, 344 F.2d 1 (4th Cir. 1965); Ford v. Peyton, 209 Va. 203, 163 S.E.2d 314 (1968); Peyton v. Fields, 207 Va. 40, 147 S.E.2d 762 (1966); Hoffler v. Peyton, 207 Va. 302, 149 S.E.2d 893 (1966); Penn v. Smyth, 188 Va. 367, 49 S.E.2d 600 (1948). This test has recently been criticized by Professor Harvey Bines of the University of Virginia in Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973). Professor Bines suggests a standard similar to that applied in malpractice cases whereby an accused is entitled to "the exercise of the customary skill and knowledge which normally prevails at the time and place" relying on Moore v. United States, 432 F.2d 730 (3d Cir. 1970). 59 VA. L. REV. at 932-33.

106. *See, e.g.*, Slayton v. Weinberger, 213 Va. 690, 691-92, 194 S.E.2d 703, 704-05 (1973); Hern v. Cox, 212 Va. 644, 647, 186 S.E.2d 85, 87 (1972); Davis v. Peyton, 211 Va. 525, 178 S.E.2d 679 (1971); Wynn v. Peyton, 211 Va. 515, 178 S.E.2d 676 (1971); Abbott v. Peyton, 211 Va. 484, 486, 178 S.E.2d 521, 523 (1971); Miracle v. Peyton, 211 Va. 123, 176 S.E.2d 339 (1970); Eller v. Peyton, 210 Va. 454, 171 S.E.2d 671 (1970).

107. 210 Va. 318, 171 S.E.2d 243 (1969).

108. *Id.* at 321, 171 S.E.2d at 246.

inability of habeas corpus to reach a fully served sentence,[109] the fact that an indigent prisoner is not entitled to a free copy of the transcript of his trial without showing a particularized need for same,[110] the discretion resting in the habeas judge as to whether counsel will be appointed on appeal from a denial of habeas relief,[111] and the holding that res judicata does not apply to habeas corpus, although in the absence of a change in circumstances previous determinations of issues will be conclusive.[112]

A striking sidelight to this survey of the development of Virginia law on habeas corpus is the parallel metamorphosis of Virginia's Constitution. As previously pointed out, the Constitution of 1830 contained a blanket prohibition against the suspension of the writ of habeas corpus[113] but this language was subsequently modified to conform to the language of the suspension clause in the United States Constitution.[114] When the Virginia Constitution was last revised in 1971, the revision process was initiated by a Commission on Constitutional Revision which, among other things, recommended that habeas corpus be removed from the original jurisdiction of the Virginia Supreme Court "for the practical reason that it has proved uneconomical."[115] This argument, however, proved unpersuasive as the House of Delegates of the Virginia General Assembly allowed the Virginia court to retain jurisdiction, because they "felt it important that everyone in this State should have the chance to go to some other judge or another court other than the court which sentenced him. . . ."[116] The action of the House was agreed to by the Senate and Article VI, Section 1, is the end result.[117]

109. Moore v. Peyton, 211 Va. 119, 176 S.E.2d 427 (1970); Blair v. Peyton, 210 Va. 416, 171 S.E.2d 690 (1970).

110. McCoy v. Lankford, 210 Va. 264, 170 S.E.2d 11 (1969).

111. Cooper v. Haas, 210 Va. 279, 170 S.E.2d 5 (1969).

112. Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970).

113. See text accompanying note 77.

114. VA. CONST. art. I, § 9 is now substantially similar, with reference to habeas corpus, as U.S. CONST. art. I, § 9 (found at note 25 *supra*).

115. REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 187-88 (1969).

116. PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 120-21, 568, 721, 777 (1973). *See also* PROCEEDINGS AND DEBATES OF THE SENATE OF VIRGINIA PERTAINING TO AMENDMENT OF THE CONSTITUTION 502 (1972).

117. VA. CONST. art. VI, § I.

THE BURGER COURT

Against this broad historical backdrop other forces—political, social, economic—were playing their inexorable roles. Habeas corpus has seldom been a totally obscure writ and many of its developmental plateaus have been accompanied by widespread publicity. It has not only been a legal force for the assertion of individual rights but it has also been a necessarily political instrument in the arena of government. As previously pointed out, habeas corpus was used in England as the testing ground between Parliament and the Crown[118] and in America it became, in microcosm, a symbol of the ebb and flow of power between the federal government and the states. It could be said that the history of federalism is reflected in the development of habeas corpus.

In England the writ had the effect of drawing to the royal courts much of the power from inferior and local courts and it thus became a significant centralizing force just as it has, albeit unconsciously, become a centralizing force in the criminal justice system in America.[119] This effect in the two countries has been compared in the following terms:

> While the centralizing effect of medieval habeas corpus seems to have been salutary for Britain, the apprehensions in some quarters today are that this may be unhealthy for American constitutionalism and hence, in the long run, for liberty under law.[120]

These apprehensions have been shared by many other commentators, few of whom could be classed as reactionary alarmists.[121] More importantly, these concerns have increasingly been shared by a substantial segment of the general public.

During the 1960's the expansion of rights for criminal defendants and the extension of these expanded rights to state criminal defen-

118. *See* text accompanying notes 13-21 *supra*.

119. MEADOR at 74-75.

120. MEADOR at 75.

121. *See, e.g.*, Bator *supra* note 49; Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971) [hereinafter cited as Doub]; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) [hereinafter cited as Friendly]; Santarelli, *Too Much Is Enough*, 9 TRIAL, #3, p. 40 (1973); Symposium, *Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts*, 33 F.R.D. 363 (1963).

dants by the federal courts stimulated a political reaction, expressed through the rhetorical slogans of "law and order" or "crime in the streets" or, as phrased by two astute political theorists, the "Social Issue."[122] The "Social Issue" involved many different elements but its core was the concern of middle income and blue collar voters over crime and personal safety.[123] The reaction manifested itself in the polling booth, and more attention began to be paid to higher police salaries, better criminal investigative techniques and improved criminal justice services.[124] The electorate also stimulated the appointment of more judges described as "strict constructionists." Thus the appointment of four new Justices to the United States Supreme Court heralded a new era in criminal law and in the ongoing transmutation of habeas corpus.

In a short span of four or five years the Burger Court has dealt more with the procedural aspects of habeas corpus than the Warren Court did in a decade. The first significant habeas corpus case decided on procedural grounds by the Burger Court was *Picard v. Connor*,[125] which dealt with the exhaustion of state remedies requirement of 28 U.S.C. § 2254. In *Picard* a state prisoner attacked his indictment on appeal in a state court because the procedures used to amend it were not in compliance with state law. On federal habeas corpus, however, the prisoner alleged that the procedure denied him equal protection of the laws under the fourteenth amendment. The Court held there had been no exhaustion of state court remedies in this situation and Mr. Justice Brennan's majority opinion unequivocally stated:

> We emphasize that the federal claim must be fairly presented to the state courts. If the exhaustion doctrine is to prevent "unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," . . . it is not sufficient merely that the federal habeas applicant has been through the state courts. The rule would serve no purpose if it could be satisfied by raising one claim

122. R. SCAMMON & B. WATTENBERG, THE REAL MAJORITY (1970).

123. *Id.* at 20-21, 35-44.

124. An example of this concern was the passage of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, 683, 1236, which spawned the Law Enforcement Assistance Administration and its state progeny, thereby infusing new vitality into the processes of criminal justice, from crime prevention through parole and other post-sentence services.

125. 404 U.S. 270 (1971).

> in the state courts and another in the federal courts. Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.[126]

The net effect of the Burger Court decisions has been to limit the accessability of federal habeas corpus to prisoners convicted in state courts. For example, the first habeas corpus case, *Boyd v. Dutton*,[127] involving the present membership of the Court resulted in a five-to-four decision with White, Burger, Powell and Rehnquist dissenting. The Court held that a federal evidentiary hearing was required where the facts essential to a full determination of the petitioner's claim, that he was denied counsel at his trial, had not been fully developed during the state habeas corpus hearing. But this holding was limited, however, by the Court a year later in *La Vallee v. Delle Rose*,[128] wherein the petitioner alleged that his confession was involuntary and that the state court had failed to make an adequate determination of the factual issues involved. The federal district court and the court of appeals had agreed with the petitioner but the Supreme Court reversed on the ground that the state court had made an adequate determination and the burden was on the petitioner to establish by convincing evidence that the conclusion was erroneous.

Further restrictions imposed by the decision in *McMann v. Richardson*[129] tended to insulate guilty pleas from collateral attack. The Court held that the entry of a plea of guilty after advice of counsel which "was within the range of competence demanded of attorneys in criminal cases" amounts to a waiver of any claim of coerced confession or other similar pretrial deficit.[130] In *Nelson v. George*[131] the Court determined that a California prisoner, attacking on federal constitutional grounds the validity of a North Carolina conviction supporting a detainer filed against him with California

126. 404 U.S. at 275-76 (citations omitted).

127. 405 U.S. 1 (1972).

128. 410 U.S. 690 (1973).

129. 397 U.S. 759 (1970). *See* Dukes v. Warden, 406 U.S. 250 (1972); Note, *McMann v. Richardson: A Restrictive Delineation of the Habeas Corpus Remedy*, 31 OHIO ST. L.J. 852 (1970); 48 J. URBAN L. 989 (1971).

130. 397 U.S. at 771.

131. 399 U.S. 224 (1970).

penal authorities, must exhaust his California state remedies with regard to his claim that the detainer affects his detention in that state, and in *Slayton v. Smith*,[132] a case from Virginia, the Court ruled that, absent special circumstances, a federal court should dismiss a petition for failure to exhaust available state court remedies rather than retaining the case on its docket pending exhaustion.

The pace of procedural concerns quickened, and the restrictions on habeas corpus increased during the last half of 1972 in the decisions in *Milton v. Wainwright*[133] and *Murch v. Mottram*.[134] In *Milton* the Court was presented with a claim that a confession was involuntary under fifth amendment standards and was additionally obtained in violation of the sixth amendment. The Court decided the case on the basis of the harmless error doctrine[135] with the following conclusive language by Chief Justice Burger:

> The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards. In that process we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.[136]

In *Murch* the Supreme Court decided that a state prisoner had deliberately by-passed state procedures, thus barring federal habeas corpus relief, by failing to assert certain claims in the state habeas hearing. *Neil v. Biggers*[137] presented the intriguing question as to whether an affirmance of a conviction by an equally divided Court would bar subsequent habeas corpus relief. The Court concluded that it would not.

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132. 404 U.S. 53 (1971).

133. 407 U.S. 371 (1972).

134. 409 U.S. 41 (1972). *See* Comment, *Murch v. Mottram: Repetitious Habeas Corpus—A Possible Breakthrough*, 1973 UTAH L. REV. 94 (1973).

135. *See* Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

136. 407 U.S. at 377-78.

137. 409 U.S. 188 (1972). *See* Note, *Criminal Procedure—Equal Affirmance—What Legal Effect on Habeas Corpus*, 24 MERCER L. REV. 953 (1973); 50 J. URBAN L. 519 (1973).

Braden v. 30th Judicial Circuit Court of Kentucky[138] dealt with the troublesome problem as to the proper site for the filing of a habeas corpus petition where the prisoner is detained in one state and is attacking the conviction of another state. Three of the Nixon appointees dissented—Mr. Justice Blackmun concurred, with some reservations—from the decision of the Court allowing a prisoner physically present in a state A to attack, in a federal court in state A, a conviction of state B filed as a detainer against him. In *Hensley v. Municipal Court*[139] the Court, over the strong dissent of Mr. Justice Rehnquist, joined by Justice Powell and Chief Justice Burger, expanded the concept of custody to allow a state prisoner free on his recognizance to attack his conviction.

Two companion cases, *Davis v. United States*[140] and *Tollett v. Henderson*,[141] deal with a question that should become increasingly significant as it may represent a return to the doctrine of *Daniels v. Allen*[142] and a restriction on one of the touchstones of *Fay*. In both cases the Court dealt with claims of systematic exclusion of blacks from grand juries that returned indictments against the prisoners. Henderson had pleaded guilty and the Court ruled that this act constituted a waiver of the grand jury claim despite the fact that there was no knowing or intelligent waiver because neither the prisoner nor his attorney was aware of the allegedly deficient nature of the grand jury selection process.[143] *Davis* was a federal post-conviction proceeding under 28 U.S.C. § 2255, in which the Supreme Court ruled that the claim was barred by Federal Rule of Criminal Procedure 12(b)(2), which provided that a challenge to an

138. 410 U.S. 484 (1973). *See* Comment, *Criminal Procedure: Habeas Corpus—Federal District Court Jurisdiction*, 13 WASHBURN L. REV. 134 (1974); 40 BROOKLYN L. REV. 475 (1973); 41 TENN. L. REV. 167 (1973).

139. 411 U.S. 345 (1973). For the exercise of habeas corpus by a prisoner released on parole, see note 69 and accompanying text *supra*.

140. 411 U.S. 233 (1973).

141. 411 U.S. 258 (1973).

142. *See* note 57 *supra*.

143. In Peters v. Kiff, 407 U.S. 493 (1972), the Court recognized the right of a white petitioner to raise a question of the systematic exclusion of blacks from grand and petit juries, despite the fact that this claim had apparently not been asserted in the state courts. The *Peters* opinion failed, however, to address directly the crucial fact that the jury selection issue was not raised at the original trial despite state procedures requiring the assertion of such a claim at trial. *Tollett v. Henderson* may provide an answer to the question never confronted in *Peters*—whether the failure of petitioner to raise the issue of jury selection in a state court precludes his reliance on it in a federal writ of habeas corpus.

indictment must be made before trial, and no such challenge had been made by Davis. The implications of the *Davis* case, in particular, may be far reaching if the rationale is applied to state court convictions to preclude federal habeas corpus relief if the claim was not properly raised under state statutes or procedural rules.

Preiser v. Rodriguez[144] dealt not only with habeas corpus but also with the rising number of civil rights suits filed by prisoners under 42 U.S.C. § 1983. The Court ruled that a claim by a prisoner dealing with good time credits or similar claims regarding the length of custody were appropriately a claim for habeas corpus relief rather than a civil rights suit and such a claim, unlike a civil rights claim, would have to be asserted first in the state courts under the exhaustion of remedies doctrine. *Donnelly v. De Christoforo*[145] dealt with a challenged argument by a prosecutor, wherein the Court, although somewhat critical of the argument, concluded that they did ". . . not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process."[146]

The pole star, however, for any substantial judicial restructuring of federal habeas corpus remedies must be *Schneckloth v. Bustamonte*,[147] particularly Mr. Justice Powell's concurring opinion in that case. The case involved a search and seizure question and the majority opinion, by Mr. Justice Stewart, disposed of the petitioner's claim on the merits of the allegation. Mr. Justice Powell, however, joined by Chief Justice Burger and Mr. Justice Rehnquist, suggested an alternative ground of decision. Justice Powell argued that the overriding issue was "the extent to which federal habeas corpus should be available to a state prisoner seeking to exclude evidence from an allegedly unlawful search and seizure."[148] The opinion further argued that the sole question in such a case should be "whether the petitioner was provided a fair opportunity to raise and have adjudicated the question in state courts."[149] Justice Powell

144. 411 U.S. 475 (1973). Flannery, *Habeas Corpus Bores a Hole in Prisoners' Civil Rights Actions—An Analysis of Preiser v. Rodriguez*, 48 ST. JOHN'S L. REV. 104 (1973); Plotkin, *Rotten to the "Core of Habeas Corpus": The Supreme Court and the Limitations on a Prisoner's Right to Sue; Preiser v. Rodriguez*, 9 CRIM. L. BULL. 518 (1973).

145. ___ U.S. ___, 94 S.Ct. 1868 (1974).

146. 94 S.Ct. at 1872.

147. 412 U.S. 218 (1973).

148. *Id.* at 250.

149. *Id.*

traced the arguments regarding the correctness of the legal history of habeas corpus as reviewed in *Fay* and he concluded that the Court deserved low marks as a legal historian. Justice Powell continued:

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.
>
> Nowhere should the merit of this view be more self-evident than in collateral attack on an allegedly unlawful search and seizure, where the petitioner often asks society to *redetermine* a claim with no relationship at all to the justness of his confinement. Professor Amsterdam has noted that "for reasons which are common to all search and seizure claims," he "would hold even a slight finality interest sufficient to deny the collateral remedy." But, in fact, a strong finality interest militates against allowing collateral review of search and seizure claims. Apart from the duplication of resources inherent in most habeas corpus proceedings, the validity of a search and seizure claim frequently hinges on a complex matrix of events which may be difficult indeed for the habeas court to disinter especially where, as often happens, the trial occurred years before the collateral attack and the state record is thinly sketched.
>
> Finally, the present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitive federal oversight, we render the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems. The present expansive scope of federal habeas review has prompted no small friction between state and federal judiciaries.[150]

Mr. Justice Powell discussed at some length articles by Judge Friendly[151] and Professor Bator[152] and the dissenting opinion by Jus-

150. *Id.* at 262-63 (footnotes omitted).
151. *See* note 121 *supra*.
152. *See* note 49 *supra*.

tice Black in *Kaufman v. United States*,[153] and he concluded with the following observations:

> Perhaps no single development of the criminal law has had consequences so profound as the escalating use, over the past two decades, of federal habeas corpus to reopen and readjudicate state criminal judgments. I have commented in Part IV above on the far-reaching consequences: the burden on the system, in terms of demands on the courts, prosecutors, defense attorneys, and other personnel and facilities; the absence of efficiency and finality in the criminal process, frustrating both the deterrent function of the law and the effectiveness of rehabilitation; the undue subordination of state courts, with the resulting exacerbation of state-federal relations; and the subtle erosion of the doctrine of federalism itself. Perhaps the single most disquieting consequence of open-ended habeas review is reflected in the prescience of Mr. Justice Jackson's warning that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones."
>
> If these consequences flowed from the safe-guarding of constitutional claims of innocence they should, of course, be accepted as a tolerable price to pay for cherished standards of justice at the same time that efforts are pursued to find more rational procedures. Yet, as illustrated by the case before us today, the question on habeas corpus is too rarely whether the prisoner was innocent of the crime for which he was convicted and too frequently whether some evidence of undoubted probative value has been admitted in violation of an exclusionary rule ritualistically applied without due regard to whether it has the slightest likelihood of achieving its avowed prophylactic purpose.[154]

Mr. Justice Blackmun stated in his concurring opinion that he agreed "with nearly all Mr. Justice Powell has to say in his detailed and persuasive concurring opinion" but he refrained from joining it because it was not necessary to reconsider *Kaufman* at that point.[155] Mr. Justice Stewart similarly stated that he did not deal with the question in Mr. Justice Powell's opinion because he had found "no valid Fourth and Fourteenth Amendment claim in this case."[156]

153. 394 U.S. 217, 242 (1969).
154. 412 U.S. at 274-75 (footnotes omitted).
155. *Id.* at 249.
156. *Id.*

Thus, at least three Justices agreed with Justice Powell and, additionally, it must be remembered that Justice Stewart had dissented in both *Fay* and *Kaufman*.[157]

With the exceptions of *Braden* and *Hensley* the decisions of the Supreme Court since the beginning of the Burger era have represented an effort to constrict the scope of federal habeas corpus to fit the bounds existing for the writ prior to the expansionism of the previous decade. Those exceptions relate only to the definition of "custody" within the context of the federal habeas corpus legislation. Practically every other case has involved the expression of a growing concern for the restoration of a balance between state and federal court systems in criminal justice matters.

Recent Developments in Virginia

The process of reexamining the scope and role of habeas corpus has not been limited to the Supreme Court of the United States. Two recent decisions of the Virginia Supreme Court have redefined the procedural role of habeas corpus in Virginia. *Smith v. Superintendent*[158] raised the question of the standing of a prisoner detained under a recidivism sentence to attack the validity of an underlying conviction on habeas corpus. The court pointed out that counsel is provided for a prisoner in a recidivist proceeding and a full opportunity is provided at that time to attack the validity of the underlying convictions. Consequently, the failure to assert such an allegation during the recidivism proceeding itself results in a conclusive waiver of any objection.[159] In addition the court made some general observations on habeas corpus:

> It is not necessary to cite statistics to demonstrate the extent to which the judicial process in this state has been impeded in recent years by the unrestricted filing of applications for habeas corpus. The proliferation of such applications in this court alone stands as ready proof of the significant extra burden imposed upon our judicial system.
>
> In the interest of speedy justice for all, it is the duty of this court to strive to eliminate every unwarranted impediment to the judicial

157. *See* 372 U.S. at 448; 394 U.S. at 242. Justice Powell reiterated his position in the later case of Cardwell v. Lewis, ___ U.S. ___, 94 S.Ct. 2464 (1974).

158. 214 Va. 359, 200 S.E.2d 523 (1973).

159. *Id.* at 361, 200 S.E.2d at 524-25.

process. On the other hand, reasonable access to the Great Writ should not be lightly denied.

However, as we have seen, an alleged recidivist has the unlimited right to attack in the recidivism proceeding the validity of underlying convictions. He also has the right to the assistance of counsel in such a proceeding. And he has the right to seek an appeal to this court. In light of these circumstances, we consider it a necessary impingement upon the availability of habeas corpus to limit the right to attack a prior conviction, the sentence for which has been fully served, to the recidivism proceeding itself.

If the attack upon such a prior conviction is made in the recidivism proceeding and is unsuccessful, the prisoner may only seek an appeal to this court. But if he does not seek an appeal, he may not later attack the same conviction by habeas corpus, because habeas corpus cannot be used as a substitute for an appeal. *See Brooks v. Peyton*, 210 Va. 318, 321, 171 S.E.2d 243, 246 (1969). And if the attack is not made in the recidivism proceeding, any objection to an underlying conviction, must be deemed to have been waived and cannot be the subject of a subsequent petition for habeas corpus. These rules apply unless, following conclusion of the recidivism proceeding, a new and retroactive constitutional principle is enunciated affecting the validity of such a prior conviction.[160]

Finally, in *Slayton v. Parrigan*,[161] the court dealt with an appeal by the Superintendent of the Virginia State Penitentiary from a grant of habeas corpus relief by the Circuit Court of Dickenson County to a prisoner who successfully urged that he was being illegally detained because of an unnecessarily suggestive pretrial identification procedure. It was admitted that no objection to either the pretrial or in-court identification was made at trial. The prisoner similarly conceded that he had not relayed to trial counsel any of the facts surrounding the allegation, and the habeas court ruled that the trial defense counsel was effective. The Superintendent's central claim on appeal was that the prisoner had no standing to raise a claim not noted at trial, even a claim of constitutional dimensions, in the absence of: (1) a finding of ineffective counsel; (2) a change in the law affecting the claim; (3) a finding that the prisoner was in some way deprived by the state or the court of a fair opportunity to

160. *Id.* at 363, 200 S.E.2d at 525-26.
161. 215 Va. 27, 205 S.E.2d 680 (1974).

present the claim; or (4) a determination that the claim was of jurisdictional dimensions in the narrow sense of jurisdiction. The court responded to this argument in the following terms:

> We agree with the respondent's contention that the petitioner lacked standing to raise on habeas corpus the question whether his in-court identification by Yates was tainted by an impermissibly suggestive pretrial identification when he did not advance that defense at his trial and upon appeal from that conviction.
>
> Assuming, without deciding, that petitioner was subject to an unconstitutional identification procedure, the court below erred, absent a showing of ineffective assistance of counsel in failing to raise that question, in permitting inquiry on this question for the first time in the habeas corpus proceeding.
>
> We have repeatedly held that under Rule 1:8, now Rule 5:7, an objection requiring a ruling of the trial court must be made during trial when identification testimony is offered or it will not be noticed upon appeal. *Poole v. Commonwealth*, 211 Va. 258, 260, 176 S.E.2d 821, 823 (1970); *Henry v. Commonwealth*, 211 Va. 48, 52, 175 S.E.2d 416, 419 (1970).
>
> A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error. *Brooks v. Peyton*, 210 Va. 318, 321-22, 171 S.E.2d 243, 246 (1969); *Smyth v. Bunch*, 202 Va. 126, 131, 116 S.E.2d 33, 37-38 (1960).
>
> It is true we said in *Griffin v. Cunningham*, 205 Va. 349, 355, 136 S.E.2d 840, 845 (1964): "It is well settled that the deprivation of a constitutional right of a prisoner may be raised by '*habeas corpus*.' " But in the interest of the finality of judgments and since the original function of the writ of habeas corpus was to provide an inquiry into jurisdictional defects, we hold that the principle enunciated in *Griffin* is inapplicable when a prisoner has been afforded a fair and full opportunity to raise and have adjudicated the question of the admissibility of evidence in his trial and upon appeal. [citing concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 2059 (1973); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970) [other citations omitted].
>
> The trial and appellate procedures in Virginia are adequate in

> meeting procedural requirements to adjudicate State and Federal constitutional rights and to supply a suitable record for possible habeas corpus review. A prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction. Since the issue of the alleged constitutionally improper pre-trial identification could have been raised and adjudicated at petitioner's trial and upon his appeal to this court, Parrigan had no standing to attack his final judgment of conviction by habeas corpus.[162]

The issue is thus joined. The Virginia Supreme Court has made a calculated decision to restore to the writ of habeas corpus the historical dimensions that attached prior to the developments of the last quarter century. The question then becomes whether Virginia's view of the scope of the writ will be recognized in the federal courts.[163]

CONCLUSION

At the outset of this article it was noted that the role of habeas corpus has been much debated in recent years. That debate has undoubtedly received new shades and tints when viewed through the multi faceted prisms of *Schneckloth* and *Parrigan*. A number of proposals have been made to deal with the warnings of Mr. Justice Jackson in his concurring opinion in *Brown v. Allen* when he said:

> [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. . . . 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.[164]

Some of those proposals have been extreme, including the abolition of habeas corpus. On the other extreme have been advocates of an even greater expansion of federal habeas corpus, such as to the

162. 215 Va. at 29-30, 205 S.E.2d at 682 (footnotes omitted).

163. *See* White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67 (1972).

164. 344 U.S. 443 at 536-37 (1952) (citations omitted).

pretrial stage of state criminal prosecutions.[165] However, most recommendations for reform have reflected moderation[166] and many of the writ's defenders have exhibited a balanced analysis of the problem.[167]

Space does not permit a discussion of all these proposals but most of the attention of both the United States Supreme Court and the Virginia Supreme Court has focused on the analysis of Professor Bator[168] and Judge Friendly.[169] Judge Friendly's basic "thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."[170] He would particularly apply such a rule in search and seizure claims and claims involving voluntary confessions obtained in violation of *Miranda v. Arizona*,[171] both situations where the reliability of the evidence is unquestioned. As noted above,[172] Mr. Justice Powell in *Schneckloth* relied quite heavily on Judge Friendly's article because of the search and seizure issue presented in that case.

Professor Bator's article appears more persuasive and his discussion more to the point on the basic issues involved in federal habeas corpus. Bator postulates that our interminable insistence on repetitive review of criminal convictions reflects a "general and deep-seated uneasiness about the ethical and psychological premises of the criminal process itself."[173] He argues that finality in the criminal

165. *See, e.g.*, Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

166. *See, e.g.*, Bator, *supra* note 49; Doub, *supra* note 121; Friendly, *supra* note 121.

167. *See, e.g.*, Chisum, *In Defense of Modern Federal Habeas Corpus for State Prisoners*, 21 DEPAUL L. REV. 682 (1972); LaFrance, *Federal Habeas Corpus and State Prisoners: Who's Responsible?*, 58 A.B.A.J. 610 (1972); Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 DEPAUL L. REV. 701 (1972); Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956); Wulf, *Limiting Prisoner Access to Habeas Corpus—Assault on the Great Writ*, 40 BROOKLYN L. REV. 253 (1973); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221 (1973).

168. See note 121 *supra*.

169. See note 49 *supra*.

170. Friendly at 142. Judge Friendly relies quite heavily on Justice Black's dissenting opinion in Kaufman v. United States, 394 U.S. 217, 235-36 (1969).

171. 384 U.S. 436 (1966).

172. *See* text accompanying note 151 *supra*.

173. Bator at 442.

process is a critical element and "it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment."[174] The essence of Professor Bator's argument is set forth in the concluding paragraph of his article:

> I continue to resist, in sum, the notion that the inquiry on habeas should be mere repetition, an exact replica, of what has gone before. I do not see that as institutionally justified. If we wish to have an ultimate recourse, if we want to grant the federal courts a roving extraordinary commission to undo injustice, then, it seems to me, all the factors which bear on justice should be put on the scales. If *Brown v. Allen* is to remain the law, it should be modified to make clear that where a federal constitutional question has been fully canvassed by fair state process, and meaningfully submitted for possible Supreme Court review, then the federal district judge on habeas though entitled to redetermine the merits, has a large discretion to decide whether the federal error, if any, was prejudicial, whether justice will be served by releasing the prisoner, taking into account in the largest sense all the relevant factors, including his conscientious appraisal of the guilt or innocence of the accused on the basis of the full record before him.[175]

Thus, §§ 2253 and 2254 of Title 28 should be amended substantially in accordance with the bill advocated by former Attorney General Kleindienst in his letter to the Chairman of the House Committee on the Judiciary.[176] The focus of federal habeas corpus proceedings should be on the fairness of the state process for adjudicating federal constitutional claims. In this regard, it cannot be emphasized too strongly that much in the way of reform of state criminal procedure has taken place in the past decade.[177] In state habeas corpus proceedings the test should be that as articulated by the Virginia Supreme Court in *Parrigan*.[178] As Professor Bator asserted:

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174. *Id.* at 452.

175. *Id.* at 527-28.

176. The recommendations of former Attorney General Kleindienst are contained in the appendix hereto.

177. For example, in Virginia, the new Rules of Criminal Practice and Procedure, effective January 1, 1972, were based largely on the Federal Rules of Criminal Practice and Procedure.

178. Any exceptions to the waiver rule should be similar to those advocated by the Superintendent. *See* text accompanying note 161 *supra*.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders.[179]

This reassessment of habeas corpus is clearly necessary to restore to the administration of criminal justice the elements of stability and finality without which the correctional process has no chance of success.

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179. Bator at 452.

APPENDIX

Justice Department Recommended Amendments to 28 United States Code §§ 2253 and 2254 Based on H.R. 13722

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 153 of title 28 of the United States Code is amended

(a) by amending sections 2253 to 2255 to read as follows:

"§ 2253. Appeal; State and Federal custody.

"In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

"There shall be no right to appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

"An appeal may be taken to the court of appeals from the final order in a habeas corpus proceeding or a proceeding under section 2255 of this title only if the court of appeals issues a certificate of probable cause: *Provided, however*, That the certificate need not issue in order for a State or the Federal Government to appeal the final order.

"§ 2254. State custody; remedies in State courts.

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that either:

"(1)(i) he is in custody in violation of the Constitution of the United States, and

"(ii) the claimed constitutional violation presents a substantial question—

"(aa) which was not theretofore raised and determined, and

"(bb) which there was no fair and adequate opportunity theretofore to raise and have determined, and

"(cc) which cannot thereafter be raised and determined in the State court, and

"(iii) the claimed constitutional violation is of a right which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction: *Provided, however*, That insofar as any constitutional claim of incompetency of counsel is based on conduct of the counsel with respect to constitutional claims barred by the previous language of this subsection, the claim of incompetency of counsel shall to that extent be likewise barred, and

"(iv) the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred;

or

"(2) he is in custody in violation of the laws or treaties of the United States.

"(b) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing a factual determination by the State court shall be admissible in the Federal court proceeding.

"§ 2255. Federal custody; remedies on motion attacking sentence.

"(a) A prisoner in custody under sentence of a court established by Act of Congress may move the court which imposed the sentence to vacate, set aside or correct the sentence, if

"(1)(A) he is in custody in violation of the Constitution of the United States, and

"(B) the claimed constitutional violation presents a substantial question

"(i) which was not theretofore raised and determined, and

"(ii) which there was no fair and adequate opportunity theretofore to raise and have determined, and

"(C) the claimed constitutional violation is of a right

which has as its primary purpose the protection of the reliability of either the factfinding process at the trial or the appellate process on appeal from the judgment of conviction: *Provided*, That insofar as any constitutional claim of incompetency of counsel is based on conduct of the counsel with respect to constitutional claims barred by the previous language of this subsection, the claim of incompetency of counsel shall to that extent be likewise barred, and

"(D) the petitioner shows that a different result would probably have obtained if such constitutional violation had not occurred; or

"(2) he is in custody in violation of the laws of the United States; or

"(3) the sentence was imposed in violation of the laws of the United States; or

"(4) the court was without jurisdiction to impose such sentence; or

"(5) the sentence was in excess of the maximum authorization by law; or

"(6) the sentence is otherwise subject to collateral attack.

"(b) A motion for such relief may be made at any time.

"(c) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been a denial or infringement of the constitutional rights of the prisoner as described in subsection (a) of this section, the court shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"(d) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"(e) The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"(f) An appeal may be taken to the court of appeals from the

order entered on the motion in accordance with section 2253 of this title.

"(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

(b) by amending the analysis at the beginning of the chapter by deleting "2253. Appeal." and inserting in lieu thereof "2253. Appeal; State and Federal Custody."