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Advisory Committee on Sentencing and Review: American Bar Association Project on Minimum Standards for Criminal Justice: Standards Relating to Post-Conviction Remedies

Daniel J. Meador
University of Alabama Law School

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO POST-CONVICTION REMEDIES (TENTATIVE DRAFT). Recommended by the *Advisory Committee on Sentencing and Review.* Chicago: American Bar Association. 1966. Pp. xii, 123. Paper, $2.

If the American Bar Association (ABA) had undertaken to formulate standards for criminal justice twenty or thirty years ago, post-conviction remedies would hardly have been on the agenda. The very term would have been unfamiliar and largely meaningless. There was no conception of a general system of judicial review in criminal cases after a direct appeal had been taken or the time for appeal had expired. The accepted notion was that, apart from truly exceptional situations, a criminal proceeding was concluded—and due process satisfied—after a full hearing in the trial and appellate courts of proper jurisdiction. The exceptional situations were those in which the defendant was in effect not given a real hearing, as in a mob-dominated proceeding, or, under certain circumstances, those in which he was not provided with counsel. To meet the need for post-conviction review of the occasional cases which raised questions of this nature, the federal courts pressed into service the writ of habeas corpus, and the state courts made use of either habeas corpus or other venerable common-law writs. Given the rarity of the occasion and the limited nature of the questions, these writs could, with some judicial manipulation, serve adequately as a remedy.

What has happened during the past two or three decades to change this situation is now well known, though not altogether understood. The exceptional situations, rather than remaining exceptional, have turned out to be only the forerunners of an elaborate complex of constitutional rights for defendants and, at least in the federal courts, of a vastly broadened system of collateral review by which these burgeoning rights can be vindicated outside the traditional channels of trial and appeal. The result, fully realized only within the last few years, has been to subject state convictions to the potential of an almost routine federal district court review. This prospect has had unsettling effects on the state criminal process. It has exerted pressures on the states to devise for themselves broader post-conviction remedies than they were otherwise ready to adopt in order to attempt to retain greater control over their criminal cases and to protect the integrity of their judgments.

State reactions to these pressures have varied. Some jurisdictions have done nothing to create post-conviction procedures in the modern sense, retaining only the common-law writs which in their classic form are ill-adapted for the review of convictions on the numerous grounds now available. Others have taken one or another of the

common-law writs and judicially fashioned a somewhat broader system of post-conviction remedies. Still others have adopted, through statute or rule of court, post-conviction procedures geared more or less to the type of litigation stimulated by the expansion of the Fourteenth Amendment and the increased availability of federal habeas corpus. No state, however, has as yet developed a completely satisfactory procedure. Thus, by the time the ABA launched its project on minimal standards of criminal justice in 1965, the problems of federal-state relationships, finality of convictions, and the rising tide of prison litigants were among the most discussed issues concerning the courts and criminal procedure. The common focus of these issues is post-conviction litigation.

It was, then, in response to the felt concerns of the day that the ABA Advisory Committee on Sentencing and Review[1] produced *Standards Relating to Post-Conviction Remedies* as its initial report. In giving early attention to this subject, the committee said that "it anticipated the emphasis placed by Justices Brennan and Clark in *Case v. Nebraska*, 381 U.S. 336 (1965) on speedy improvement in state systems for post-conviction relief as the best way to decrease federal intervention in the handling of complaints of injustice made by state prisoners" (p. vii). The Committee quite clearly agrees with those Justices that state post-conviction systems are, on the whole, inadequate to meet today's needs. Their attitude and entire report rest on a series of assumptions, namely, that federal judicial involvement in state criminal cases is undesirable, that federal habeas corpus will not be reduced in scope, and that the best way to limit federal post-conviction interference is for the states to develop systems of review at least as broad as federal habeas corpus. In short, the committee assumes that it is primarily the existence of federal habeas corpus which makes desirable the establishment of state procedures patterned after the 1963 Supreme Court decisions which recast the federal writ in its present form.[2] If there is any shortcoming in this excellent study, it is the failure to probe beneath these assumptions to the heart of the post-conviction problem—the degree of finality to be accorded convictions. However, the committee did recognize this as being the key question (p. 5), and, for reasons discussed below, may have acted wisely in making these assumptions and thus limiting the scope of its report.

Apart from the pressures created by the expanded federal habeas

1. This Advisory Committee consists of Judge Simon E. Sobeloff (Chairman), James V. Bennett, Dean C. Clyde Ferguson, Jr., Jack P. F. Gremillion, Judge Florence M. Kelley, Judge Theodore B. Knudson, Judge Edwin M. Stanley, William F. Walsh, and Prof. Herbert Wechsler. The reporter on post-conviction remedies is Prof. Curtis R. Reitz of the University of Pennsylvania Law School.

2. Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

corpus remedy, the committee suggests another source of impetus for its proposals. Changes in the constitutional criteria governing criminal prosecutions have resulted in a situation in which many persons presently in prison were put there under procedures that are no longer constitutionally permissible. A post-conviction procedure is the only way to afford relief to such prisoners, and, therefore, without regard to federal habeas corpus, the states are under pressure to establish such remedies to deal with these transitional problems (p. 1). Whether states *ought* to afford relief to convicted persons claiming past infringement of newly formulated rights turns on a judgment as to whether these rights should be given retroactive effect. The committee thinks they should "where sufficient reasons exist" [Standard 2.1 (vi)]. One sufficient reason in the committee's view, and the only one it mentions, exists in cases in which "the change in law sets a new minimum standard of reliability in the guilt determining process" (p. 38). By incorporating this into its standards, the committee has adopted the view that retroactivity is a function of the post-conviction remedy, rather than an aspect of the newly-born right itself. Although the Supreme Court has not adopted this view,[3] it is submitted that it is in fact the better approach to the problem.

Given these various assumptions, this report is an admirable job. Perhaps the best words for it are "comprehensive" and "realistic." Standards are laid down for every imaginable aspect of post-conviction litigation; they deal not only with judicial practices, but also with the litigants and their counsel. For example, the standards go beyond in-court procedures to cover such matters as the counseling of penitentiary inmates (Standard 3.1), the responsibilities of court-appointed attorneys following an adverse decision [Standard 4.4(b)], and the procedures that are needed to fit the facts of today's in forma pauperis prisoner litigation. In short, the report abandons the concepts inherited from habeas corpus in favor of direct, simplified means for resolving the sorts of issues now being presented.

The committee begins by recognizing two major realities. One is that post-conviction litigation, largely as a result of federal habeas corpus, has today become an established, routine part of the criminal process, and thus, functionally, is neither a "civil" remedy nor an "extraordinary" proceeding. The other is that the initial step in such litigation nearly always is taken by indigent laymen in prison without legal counsel. Recognition of these twin actualities has a significant effect in designing a procedure for post-conviction litigation. For example, since such litigation is a continuation of the criminal process, the venue of the hearing is placed in the court in which the challenged conviction was rendered [Standard 1.4(b)], and the

3. *See* Linkletter v. Walker, 381 U.S. 618 (1965).

respondent is the State, not the individual warden (Standard 1.3). And since we are dealing with uncounseled laymen, little importance is attached to pleadings, and there is a pervasive emphasis—more so even than that found in modern procedure generally—on getting to the merits of claims and disposing of them on that basis.[4]

Despite this emphasis, the standards do contemplate two situations in which a court might decline to decide the merits: (1) where the claim has been "fully and finally litigated in the proceedings leading to the judgment of conviction" [Standard 6.1(a)]; and (2) where there has been an "abuse of process" [Standards 6.1(c) and 6.2(b)]. The meaning which the committee gives these two phrases is worthy of note.

The standards declare that for this purpose an issue "has been fully and finally litigated when the highest court of the state to which a defendant can appeal as of right has ruled on the merits of the question" [Standard 6.1(a)(ii)]. In other words, even if a petitioner fully litigated the identical issue at his trial, he is not precluded from a post-conviction hearing, if he did not also take an appeal, or if he did appeal and the appellate court for one reason or another did not pass on the issue. Thus, a person is afforded a second evidentiary hearing at the trial level. It can quite reasonably be asked why this should be allowed, assuming that there was a fair opportunity to appeal and counsel was available. In light of the committee's position that, "in the main, post-conviction remedies exist to try fundamental issues that have not been tried before" (p. 86), is it not going an unnecessary step beyond this to say that a full and fair hearing during the original prosecution in the trial court is itself insufficient to prevent a duplicating hearing later?

The committee gives no explicit answer to this; however, one may surmise from the tenor of the report that it would probably respond that justice will be better served and most efficiently administered by a court's proceeding to decide the merits of a post-conviction claim than by its spending the same amount of time, or more, determining whether a fair opportunity to appeal had been in fact afforded following an earlier trial. Put differently, if one of the major concerns about repetitious litigation is the consumption of judicial time, a case can be made for the proposition that in the type

4. In this respect, as in others, the standards depart from the Uniform Post-Conviction Procedure Act, even as revised in 1966. An important difference in form between the two is that the Uniform Act is a proposed piece of legislation ready to be enacted, whereas the standards are general guides, some of which must be implemented through legislative action and some through judicial action: to make fullest use of the committee's standards cooperative efforts on the part of the legislature and the courts of a state are required. However, as the committee indicates (p. 102), the extent of agreement between the act and the committee's standards outweighs the extent of difference. An appendix to the report contains a helpful, section-by-section comparison of the act and the standards.

of situation here under consideration judicial time is no more consumed, and may actually be saved, by again litigating the merits. The court cannot, in any event, avoid a hearing. It must either hear evidence on the circumstances of the defendant's failure to appeal or on the merits of defendant's claim. Given that choice, the committee's view, although not specifically articulated with reference to this appeal problem, is that justice is better served by ruling on the merits (p. 3). It is difficult to quarrel with this conclusion, however uncomfortably the idea of a second trial-court hearing of the same issue may rest amidst traditional notions of adjudication. Indeed, there is much to be said for the attitude that since post-conviction litigation is thrust upon us, like it or not, the courts should accept it and not expend time fencing over threshold procedural questions.

An "abuse of process" sufficient to preclude a determination of the merits of a post-conviction claim can occur, according to the standards, as a result of a non-assertion of the claim either at the original prosecution stage or in a previous post-conviction proceeding. In either case the claim, whether factual or legal, must be one which the petitioner "knew of and which he deliberately and inexcusably failed to raise" at the earlier time [Standards 6.1(c) and 6.2(b)]. By this standard and the accompanying commentary, the committee joins the Supreme Court in rejecting the postulate of the common-law adversary system that a right can be lost simply by not being asserted at the appropriate point in the proceedings.[5] This issue, usually cast in terms of "forfeiture" or "waiver," has been a fighting point in the post-conviction arena for some years. One of the most useful portions of the committee's report is that which clarifies the terminology and the concepts surrounding this point (pp. 36-37, 88-89).

The committee's analysis proceeds from a distinction between "foreclosure by judgment" and "voluntary relinquishment." The former results from the procedural law of the forum concerning the raising of questions and the finality of judgments. By not asserting a claim in the time and manner prescribed by procedural rules, a defendant was traditionally said to have "forfeited" or "waived" the claim and to be foreclosed by the judgment. The committee, however, prefers to use the term "waiver" to refer only to a voluntary relinquishment, that is, to a situation in which the defendant intelligently and understandingly foregoes a right. This distinction can be a crucial one when a federal constitutional right is claimed by a state prisoner, for the question of whether the assertion of that right is foreclosed by the prior judgment of conviction is a matter to be decided under state law, whereas the issue of whether there has been

5. *See* Fay v. Noia, 372 U.S. 391, 427-39 (1965).

a waiver—in the voluntary relinquishment sense—is itself a federal constitutional question.

The foreclosure by judgment situation is the more troublesome one. There is a widespread, and historically respectable, view that, given representation of the defendant by counsel, the entry of the conviction finally settles (subject to direct appellate review) not only all questions actually litigated, but also all those which might have been litigated. The committee expressly rejects this view, except in cases in which the post-conviction court finds that there was a deliberate and inexcusable failure to raise the issue—an abuse of process.

There are two aspects of the abuse of process standard that remain unclarified. First, what does "inexcusable" mean, and what does it add to "deliberate"? If a defendant has deliberately not raised an issue at his trial (assuming some acceptable dictionary meaning of "deliberate"), why should he be allowed to assert it after final judgment? In other words, if the choice not to assert the right was deliberate, why inquire into whether the choice was also inexcusable? The second unclarified point is whether the defendant himself must have personally made the decision not to raise the question at trial or whether he will be bound by his counsel's decision. The report uses only the word "he." It would have been helpful to know whether the committee means to adopt the "deliberate by-pass" concept from *Fay v. Noia*,[6] which literally calls for a decision by the defendant himself, rather than his attorney. Perhaps the committee intentionally left the matter ambiguous, which is a fair way of describing the present state of the federal habeas corpus law on this point. The commentary states that a right "ought never to be deemed waived by silence or inaction" (p. 37); but then it proceeds to say that troublesome difficulties will remain, "notably in matters of trial strategy where the choices of defense counsel have the potential of being construed as waivers of defendants' rights" (p. 37). Cited, among other cases, is *Henry v. Mississippi*,[7] a decision which raised still unresolved questions as to whether this aspect of *Fay v. Noia* was being watered down to the extent of reinstating some of counsel's traditional control over the litigation.

Whether or not the committee intended by its abuse of process standard to adopt precisely the federal habeas corpus position (whatever that is), it is clear that the spirit of the committee's standard is the same as the spirit manifested in *Fay v. Noia*: foreclosure by judgment is rejected; post-conviction adjudication on the merits is not to be denied if the only objection is that defendant could have litigated the question at his trial but did not do so. Regrettably, the commentary, which incisively delineates the differing meanings of

6. *Id.* at 438-39.
7. 379 U.S. 443 (1965).

waiver, does not explain *why* the committee takes this position. An immediately obvious reason is the presence of federal habeas corpus. If a state court should refuse a post-conviction adjudication on the basis of some concept of waiver or foreclosure narrower than the deliberate by-pass concept of *Fay v. Noia* and *Henry v. Mississippi*, the effect would be simply to pass the petitioner along to a federal court where there would be no such bar. To prevent this, the states should employ a standard which at least approximates the federal test. In other words, we are once again drawn back to the committee's basic assumption that broad state post-conviction remedies are desirable in order to reduce federal judicial intervention.

While the prevailing federal practice is a solid enough practical reason for the states to adopt more relaxed views on foreclosure, it is not altogether satisfying for those who reflect a bit more deeply on the question. For them, the inquiry moves one more step: Why, even under federal habeas corpus procedure, should a convicted person be entitled after final judgment to litigate an issue which he had a fair opportunity to litigate, with counsel, at his trial? There are at least two explanations, though the committee does not mention them.

One rests on a recently arrived at value judgment (which, in fact, may be no more than a visceral feeling) that the adverse consequences of a criminal conviction are so much more serious than the consequences of civil litigation that the ordinary rules regarding the foreclosing of issues should not be applied; stated somewhat differently, the consequences are sufficiently serious to justify overriding the traditional procedural rules and the general desire for orderly, one-time litigation. Nevertheless, looking at the facts, it is doubtful that a conviction today has more adverse effects on an individual than it had in the past when the foreclosure-by-judgment principle was intact. Actually the effects are probably less disastrous because of the trend toward more humane sentences: fines, suspended sentences, and probation are now common; capital punishment is on the way out; and the average sentence is probably shorter. Nor is there a sound basis for thinking that the failure to raise meritorious issues at trial is more frequent now than in the past; on the contrary, *Gideon v. Wainwright*[8] requires counsel in all serious cases, thus affording considerable assurance—at least more than was previously available—that rights will be asserted. In essence, then, the discarding of the foreclosure-by-judgment concept, introduced by *Fay v. Noia* in 1963 and potentially carried over to the states by the committee's standards, does not rest on changes in factual conditions, but rather on a change of attitude about the criminal process. For

8. 372 U.S. 335 (1963).

reasons not very well articulated anywhere, many people—perhaps most people, including a majority of the Supreme Court and presumably of this advisory committee—have come to think it better to let an accused have a second chance at raising important issues such as those concerning constitutional safeguards. Inadvertence or oversight in not asserting such matters at the first opportunity is believed to be an insufficient basis for denying another opportunity for their assertion. This attitude is reinforced by the belief that in most cases the failure to raise a meritorious constitutional claim at the original trial is, in fact, due to nothing other than inadvertence, mistake, or ignorance. This appraisal is probably realistic, although there will be situations in which trial tactics can suggest that a point not be raised, as *Henry v. Mississippi* acknowledges.

This leads to a second, but also unarticulated, explanation for the position of the committee and of the Supreme Court—a lack of confidence in the bar. Feelings of this sort are uncomfortable to discuss and are not often voiced openly, certainly not formally in judicial opinions or in published reports such as the one presently under consideration. But if one considers at length the design of post-conviction remedies, as reflected in federal habeas corpus and in the committee's standards, and attempts to root out the ultimate *why* of it all, he comes almost inescapably to this lack of confidence as one of the factors without which the no-foreclosure feature of the post-conviction system would not make much sense. In England, where mutual confidence is high both within the bar and between the bench and the bar, a procedural rule undercutting finality of judgments to this extent is probably unthinkable. Whether such a rule is sound in this country depends on whether there is a solid factual basis for the assumption that there are widespread, serious inadequacies among lawyers defending criminal cases. While we lack organized empirical data, every lawyer and judge has his own observations and impressions, and perhaps collectively this is enough. After all, such is the basis upon which men act in fixing many public policies. It is common knowledge that the educational backgrounds, intellect, and abilities of lawyers are highly uneven, as is the level of preparation and performance in particular cases. The question for anyone evaluating the reach of post-conviction remedies is whether he is satisfied that these levels dip so low in a sizeable enough number of cases that a system for post-final judgment review should be constructed to protect against lawyers' deficiencies. In any event, this problem should be thought about explicitly and discussed openly. The legal profession purports to be a learned calling which controls its membership in terms of both competence and character. Thus, it is not surprising that there is some uneasiness about writing

into law an arrangement resting on lack of confidence in legal practitioners.

It is readily apparent that adherence or non-adherence to the traditional concept of foreclosure of issues by judgment is a major key to the scope of a post-conviction remedy. The other equally important key concerns the grounds which can be relied on to invoke the remedy, that is, the sorts of claims that may be litigated at the post-conviction stage. By manipulating the foreclosure rule, the grounds for relief, or both, we can broaden or narrow the scope of the remedy and correspondingly weaken or strengthen the finality of convictions. For example, providing numerous grounds for attack on convictions would not greatly weaken finality if issues which could have been raised at trial are foreclosed by the judgment of conviction. On the other hand, even though very few grounds of attack are made available, finality might be markedly weakened by rejecting foreclosure by judgment. The committee's standards, following the pattern of federal habeas corpus, contemplate a broad remedy, at the price of finality of convictions. To achieve a maximum breadth, the standards strike along both paths: they prescribe a large catalogue of grounds for attack and, at the same time, discard the foreclosure by judgment concept. The only two checks, as mentioned earlier, may be showings by the State of a prior full and final litigation of the issue or of an abuse of process.

The grounds for relief provided in the committee's standards are more extensive than those existing under the federal habeas corpus procedure where the sole theory available to a convicted state prisoner is that he is being held in custody in violation of the United States Constitution. Thus, although the standards allow claims that "the conviction was obtained or sentence imposed in violation of the Constitution" [Standard 2.1(a)(i)], they include in addition numerous other grounds for relief (Standard 2.1). One of the more interesting suggestions is that "evidence of material facts, not theretofore presented and heard" be included [Standard 2.1(a)(v)]; ordinarily, this has been a matter for a new trial motion under limited circumstances. Here again, though, one is left wishing that the committee had undertaken to explain a bit more fully *why* it recommends these grounds for relief. It is hardly self-evident that every violation of the Constitution, prior to entry of final conviction, justifies giving relief after the conviction has been entered.

As with the foreclosure or waiver problem, an immediate reason is clearly the existence of federal habeas corpus. Unless the state post-conviction remedy is designed to adjudicate all of a prisoner's constitutional claims, a federal court will adjudicate them. But again, as with the foreclosure problem, this is not altogether an intellec-

tually satisfying answer. Why should a federal court, or any court, allow the post-conviction litigation, for example, of whether certain evidence was obtained by the State unconstitutionally, in a case where the defendant was represented by counsel and in all other respects had a fair trial? Considering the realities, questions of this sort can be meaningfully addressed only to the Supreme Court or to Congress, for unless federal habeas corpus is reshaped, the pressures will remain on the states to have post-conviction remedies of equal scope, and under such circumstances debate over the proper scope of state remedies seems academic.

What is needed, then, if the matter is to be gotten at root and branch, is a more thoroughgoing study of the federal post-conviction remedy for state prisoners. This is particularly important if we accept the committee's premise that whatever the scope of the federal remedy, the state remedy should be at least as broad. On this premise, the proposed standards and the commentary are excellent. But the really tough questions concerning finality and the criminal process are not reached unless we get to the federal writ.

The committee rightly notes that "[t]he essential problem is the degree of finality to be accorded to criminal judgments, a vexing problem of many strands" about which "[t]here is only a beginning of scholarly evaluation in depth . . ." (p. 34). If such a study were pursued, it might be fruitful to explore making distinctions between various constitutional rights for the purpose of determining which could be asserted through post-conviction procedures and which could not be. A similar distinction is being made and discussed in connection with the retroactivity problem. The committee's standards suggest retroactive effect if the constitutional issue relates to the reliability of the guilt-determining process. Why not apply that test in identifying grounds for post-conviction relief? One can rationally argue by analogy to the harmless error rule that the interests in finality should prevail where the constitutional violation has not touched the reliability of the procedures and evidence by which the defendant was found guilty.

The committee mentions that "the relevance of inquiry into the degree of prejudice that an applicant suffered in the proceeding under challenge" is among "the less fully articulated questions of post-conviction review" (p. 34). But it then suggests that all of the presently recognized federal constitutional grounds are sufficiently fundamental so that prejudice can be assumed. This needs a more discriminating examination. The assumption that all of a defendant's constitutional rights are "fundamental" had much more validity two decades and more ago than now. Then, the constitutional limitations on criminal prosecutions were relatively few, and they were indeed of a fundamental nature. Today, however, there is a

progressive move toward converting the Fourteenth Amendment and the Bill of Rights into "a code of criminal procedure."[9] When we are dealing with a comprehensive, detailed code, it becomes less convincing to call everything in it fundamental. The right to counsel, for example, can fairly be called fundamental in the sense that the assertion of all other rights depends upon it, and that it goes to the essence of a fair and full hearing. Is there not, however, a distinction which can rationally be made for purposes of post-conviction attack between an infringement of the right to counsel and, for example, the introduction into evidence by the State of a pistol obtained from the defendant's house under circumstances making the search illegal in a case in which the defendant had counsel and a full opportunity to litigate the issue at trial?

Lack of confidence in the bar has been mentioned in connection with the rejection of the judgment-foreclosure rule. The same attitude about the quality of lawyers may affect decisions as to availability of grounds for post-conviction relief. If any constitutional issue were removed as a ground for post-conviction review, it would have to be with the understanding that defendant had counsel at trial so that he could have litigated the issue there. It is but a small step, then, to say that counsel means "competent" counsel, or even "effective" counsel. To put an extreme case, if it were shown that the defendant's lawyer was drunk during the trial, we would be uncomfortable, to say the least, in contending that the defendant nevertheless should not be able to assert a constitutional claim through a post-conviction procedure. The effect of making certain constitutional issues not available as grounds for post-conviction relief would be to transform the post-conviction proceeding into a forum for evaluating trial counsel. In other words, rather than reducing post-conviction litigation, this would, as a practical matter, simply shift the focus of the inquiry in many cases from the merits of the constitutional issue to the performance of the defense counsel. Convicted prisoners are often both litigious and ingenious. Trial counsel have already become fairly frequent subjects for post-convention attacks, and they would probably become so more often if petitioners were prevented from litigating the merits of some of the presently available constitutional claims in post-conviction proceedings.

Given a choice between litigating all constitutional claims on their merits and litigating the competence or performance of lawyers, many of the bench and bar would no doubt opt for the former. Such issues are more manageable and familiar; moreover, no one can look with enthusiasm on the prospect of making lawyers and

9. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

their work the subjects of constant court attacks. Besides, if the assumption of no confidence is well founded, it is possible that more convictions might be upset on the basis of inadequate defense counsel than on the merits of the various constitutional issues now available as grounds for post-conviction relief.

The committee might reasonably have considered that an in-depth examination of the finality problems surrounding federal habeas corpus was beyond its terms of reference. Its job, after all, was to formulate standards for state post-conviction remedies. In order to do that within the time expected, the committee seems justified in making the realistic assumption that federal habeas corpus will probably be with us in its present form for some time to come: all efforts to alter the Supreme Court's 1963 decisions broadening the writ have failed, and Congress instead has now codified a large part of those decisions.[10] Because of this course of events, it seems fair to say that public opinion has ratified what the Court has done. American society evidently has grave doubts about making convictions too final, and it evidently approves abandonment of the idea of foreclosure by judgment as to constitutional issues in criminal cases. The committee's standards thus are probably coincident with prevailing national attitudes about the criminal process and, at the same time, are themselves evidence of these attitudes.

Whatever the proper scope of post-conviction remedies should be, there is a pressing need—if any such remedies are to be allowed at all—for specifically designed modern statutory machinery in this area. Adoption of specially designed procedures would not only improve the administration of justice, but would also relieve the courts of the headaches of utilizing habeas corpus and other common-law writs in distorted roles which they were never designed to play. Even with the imaginative judicial surgery which has been employed, the "great writ" is still in certain aspects anomalous as a remedy for attacking convictions. It simply does not quite fit. These kinks can be ironed out in a statutory remedy aimed at reviewing convictions in their modern context, thereby leaving habeas corpus to its historic role of providing a means of challenging illegal detention not pursuant to a conviction.

As a blueprint for state legislative draftsmen and state courts, the standards and commentary are excellent. They address themselves to all the troublesome questions, such as whether the judge presiding at the prosecution should preside at the post-conviction hearing [Standard 1.4(c)], whether a heavier sentence should be permissible on a re-trial [Standard 6.3(a)], and whether a sentence not being served should be subject to attack (Standard 2.3). They recommend useful procedures such as discovery [Standard 4.5(b)] and pre-

10. 28 U.S.C. § 2244 (Supp. II 1965-1966).

hearing conferences [Standard 4.6(a)]. Finally, they put salutary stress on the State's obligation to supply the court with helpful information in response to every petition [Standards 4.2(a) & 4.3(a)]. Comprehensively and realistically, the standards cover every nook and cranny of post-final judgment review. While one might differ on some details of the procedures recommended, the committee's work is undeniably valuable, for here, at last, in one well-organized document, are all of the ideas and innovations which have been bantered about in recent years, plus some fresh suggestions, for making efficient this new phase of the criminal process.

Daniel J. Meador,
Dean,
University of Alabama Law School