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State Courts and the Federal System

Griffin B. Bell[*]

I. Introduction

One of the more important aspects of federalism lies in the relationship which has been established between state and federal courts. The interworkings of the judicial process involve power in some instances and principles of comity in others. The purpose of this article is to examine this relationship, including possible areas of abrasion resulting from the interworkings between the two court systems.

At the time of the founding of the Republic, the only courts were those maintained by the states. However, the Constitution superimposed the Supreme Court over the state courts in matters arising under the Constitution and the laws and treaties of the United States.[1] The added federal rights under the Constitution resulted in dual citizenship—state and federal.[2] While state rights are normally vindicated in the state courts, federal rights enjoy concurrent status and may be vindicated in the state courts as well as in a federal forum. This posture of citizenship is a part of our system of federalism which may be characterized as having more than one center of power and responsibility.[3] Even though there are usually three such centers (federal, state, and local), in the court system we are concerned generally with only the federal and state levels.

The state courts are largely responsible for the administration of the laws in this country.[4] The supremacy clause of the Federal Constitution dictates that state courts must accord federal rights to their litigants.[5] However, this requirement would be implicit in the Consti-

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1. U.S. CONST., art. III; THE FEDERALIST No. 82, at 555-56. (Cooke ed. 1961) (Hamilton); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 303 (1816).

2. The resulting dual citizenship was not too different from that found in Rome and the provinces. A familiar biblical example is St. Paul, who had extra rights of citizenship because he was Roman born. His successful challenge of the centurion was on this basis. *Acts* 22:24-29.

3. *See* Bell, *Federalism in Current Perspective,* 1 GA. L. REV. 586 (1967).

4. In fiscal year 1968, a total of 102,163 eivil and criminal cases were commenced in the federal district courts: 71,449 civil and 30,714 criminal. Non-federal prisioner petitions totaled 8,301 during this period. 1968 ANN. REP. ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, 113, 124. This total is to be compared with state court filings in 1967 in Fulton County (Atlanta), Georgia alone: 72,933 civil cases and 12,471 criminal cases in state courts of record. (Includes small claims court and misdemeanors).

5. U.S. CONST. art. VI, § 2.

tution even in the absence of the supremacy clause. Alexander Hamilton made this clear in *The Federalist No. 33* when, speaking of the controversy over the supremacy clause and the necessary and proper clause, he stated:

> These two clauses have been the sources of much virulent invective and petulant declamation against the proposed constitution, they have been held up to the people, in all the exaggerated colours of misrepresentation, as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated . . . and yet strange as it may appear, after all this clamour, to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and vesting it with certain specified powers. . . .[6]

The authorities demonstrate that there was little or no debate at the constitutional convention concerning the supremacy clause.[7] Indeed, it may seem ironic in present day context that the clause was proposed by the backers of the New Jersey Plan, the persons most opposed to a strong central government. One of the features of the Virginia Plan, whose proponents favored a strong central government, was the Council of Revision, which would have been able to negate any state law which it deemed contrary to the Constitution. The backers of the New Jersey Plan, who considered this too great an intrusion on the prerogatives of the states, were able to defeat the proposals for such a Council. At that point, in the words of Professor Rossiter, the proponents of the New Jersey Plan "presented the Supremacy Clause as a consolation prize to Madison," thus proving "that they wished the common government well."[8] Thus the supremacy clause was accepted by all with little question, being willingly offered by the supporters of a weak central government and willingly accepted by the supporters of a strong national government. However, during the struggle for ratification, the supremacy clause became a point of great contention, and men such as Robert Whitehill of Pennsylvania said that it "eradicates every vestige of state government—and was intended so—it was deliberate."[9] It was to this type of opposition that Hamilton directed *The Federalist No. 33.*

6. The Federalist No. 33, *supra* note 1, at 204.

7. *See* M. Farrand, The Framing of the Constitution of the United States (1913); C. Rossiter, 1787—The Grand Convention (1966).

8. Rossiter, *supra* note 7, at 176, 197, respectively.

9. *Id.* at 284.

The focus of *The Federalist No. 82* is directly on the relationship between the national government and the state courts. Hamilton understood that only experience would bring a concord:

> The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may in a particular manner be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent WHOLE.[10]

An examination of that experience, as it relates to state and federal courts, points up the ascendency of the lower federal courts vis-a-vis state courts in the area of federal rights. This ascendency is apparent in three particular areas: federal habeas corpus for state prisoners; the removal of cases from state to federal courts; and the use of the injunctive process by federal courts in state criminal proceedings.[11]

II. Federal Habeas Corpus for State Prisoners

The federal district courts,[12] which administer the federal criminal statutes in the context of federal statutes and the Constitution, are subject to the supervisory power of the Supreme Court and the federal courts of appeal.[13] This supervisory power has not, however, been applied to the state courts, whose attributes of sovereignty are

10. The Federalist No. 82, *supra* note 1, at 553. On the question of concurrent jurisdiction of state courts over cases arising "under the laws of the union," Hamilton suggested the possibility of direct appeals from state courts to inferior federal courts. *Id.* at 555-57.

11. Since this article is addressed to the role of state courts in the federal system, as distinguished from federal limitations on state legislative power, the question of federal preemption does not fall within its scope. Although not discussed here, one phase of preemption does, however, bear directly on the power of the state courts—the state injunctive remedy in labor disputes. *See* Comment, *The Changing Face of Federal Pre-emption in Labor Relations*, 36 Fordham L. Rev. 731-45 (1968). Another matter that will not be discussed is the certification to state courts of questions of state law arising in federal cases. *See* Clay v. Sun Insurance Office Ltd., 363 U.S. 207 (1960). *See generally* Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 Yale L.J. 850 (1964).

12. The importance of the history of federal habeas corpus for state prisoners is indicated by the rise in state habeas corpus petitions in federal courts since the decision of Fay v. Noia, 372 U.S. 391 (1963). These petitions increased from 1,292 in 1962 to 7,364 in 1967. In fiscal year 1968, habeas corpus and other civil appeals by non-federal prisoners totaled 1,248, which constituted 16.7% of the 7,396 appeals from the federal district courts.

13. La Buy v. Howes Leather Company, 352 U.S. 249 (1957); Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115 (1956); McNabh v. United States, 318 U.S. 332 (1943); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966).

such that the only federal limitations on them arise from the Constitution, treaties, or laws of the United States. The supremacy clause, standing alone, might not disturb this sovereignty except in the area of direct appeal to the Supreme Court,[14] and it probably would not suffice to give federal courts at any level habeas corpus jurisdiction or authority otherwise to consider collaterally the federal claims of state prisoners theretofore tried in state courts. Therefore, it remained for Congress to vest jurisdiction in the federal courts over such matters.

This development of federal court habeas corpus jurisdiction came in three stages, the first two by way of statute. In the Judiciary Act of 1789[15] Congress invested the federal courts with habeas corpus jurisdiction over federal prisoners. The sovereignty of the state courts over state prisoners was not disturbed until 1867 and the occurrence of events following the Civil War. The Congress then gave the federal courts broad habeas corpus jurisdiction in state prisoner cases.[16]

The Supreme Court had almost immediately exercised its habeas corpus jurisdiction under the Judiciary Act of 1789 in the cases of federal prisoners.[17] Prior to the 1867 Act the Court recognized that no federal court was empowered to issue the writ in the case of a state prisoner.[18] However, despite the Act, it was not until 1886 that a federal habeas corpus case involving a state prisoner reached the Supreme Court.[19] In *Ex parte Royale*[20] the prisoner was under a state indictment, but had not been tried. The Supreme Court af-

14. The Constitution contemplated that trials in state courts would be subject both to the Federal Constitution and to appeals to the Supreme Court. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 303 (1816); THE FEDERALIST No. 82, *supra* note 1, at 555-56.

15. 1 Stat. 82 (1789).

16. 14 Stat. 385 (1867). For a short history of the federal habeas corpus statutes, see *In re* Brosnahan, 18 F. 62, 70-71, 81 (C.C. W.D. Mo. 1883), where Justice Miller discusses the Judiciary Act of 1789, the Act of 1833 (known as the Force Bill), the Act of 1842, and the Act of 1867. *See also* Fay v. Noia, 372 U.S. 391, 401 n.9 (1963); Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1953). Today, the power to grant the writ exists in ". . . the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . ." when the prisoner is ". . . in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C.A. § 2241(a)(c)(3). Query whether the power to grant the writ as to federal prisoners is not implicit in U.S. CONST. art. I, § 9, which provides that the writ of habeas corpus shall not be suspended?

17. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807) (illegal detention—prisoners discharged); *Ex parte* Burford, 7 U.S. (3 Cranch) 447 (1806) (illegal detention—prisoners discharged); United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795) (federal prisoner admitted to bail).

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

19. From 1868 to 1885 the Supreme Court had no jurisdiction to review habeas corpus decisions of the circuit courts under the 1867 Act. *See* 15 Stat. 44 (1868); 23 Stat. 437 (1885); *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); *but cf. Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869).

20. 117 U.S. 24 (1886).

firmed the denial of the writ on the ground that the state had not been given the opportunity to decide the federal questions which might arise. The power of the federal courts to grant the writ was emphasized, but the emphasis was in terms of discretion:

> That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.[21]

This case gave rise to the exhaustion of state remedies doctrine—still the most severe qualification on federal habeas corpus in state prisoner cases.[22]

The third stage, a broader federal remedy for state prisoners, was slow in coming to fruition, notwithstanding the 1867 Act, and was generally unavailable to state prisoners for the next half century.[23] One author, alluding to the fact that the grant of the remedy to state prisoners was usually limited to those instances where the state court lacked jurisdiction, stated:

> We can summarize the law as of 1915 this way: If a [state] court of competent jurisdiction adjudicated a federal question in a criminal case, its decision of that question was final, subject only to appeal, and not subject to redetermination on habeas corpus. There existed a few classes of issues (principally the constitutionality of the statute creating the offense) which were labeled jurisdictional though they did not really bear on the competence of the committing court; these were, however, strictly limited. . . .[24]

The development of a broader federal remedy for state prisoners, really the implementation of the 1867 Act, was left for a series of Supreme Court decisions in this century. A slight break came in the case of *Frank v. Mangum*,[25] when the Court affirmed the district court's refusal to grant the writ which was applied for on the ground that the state trial was "mob dominated."[26] The Court did suggest that in those cases where a state tribunal had failed to supply corrective processes for the full and fair litigation of federal questions

21. *Id.* at 252.

22. *See* SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS 110-26 (1965); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding,* 74 HARV. L. REV. 1315, 1325-27 (1961).

23. *See* Fay v. Noia, 372 U.S. 391, 410 & n.17, 411 & nn. 19 & 20 (1963).

24. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 483-84 (1963).

25. 237 U.S. 309 (1915).

26. As an historical footnote, Leo Frank, the applicant, was later taken from a Georgia prison and hanged by a mob. BUSH, GUILTY OR NOT GUILTY 72-73 (1952).

(whether or not jurisdictional) in a state criminal proceeding, the federal court, on a habeas hearing, might inquire into the merits in order to determine whether the detention was unlawful.[27] However, the Court was of the opinion that the state had afforded a sufficient corrective process through its procedures for motions for new trial and appeal. Consequently, the Court did not review the facts itself.

Frank was the first recognition that a federal habeas court was authorized to look behind the bare record of a trial proceeding and conduct a factual hearing to determine the merits of alleged deprivations of constitutional rights.[28] Justice Holmes, joined by Justice Hughes, dissented on the ground that the federal court should have made an independent factual determination on the issue of mob-domination, and since there was an actual subversion of justice, the right involved fell under the due process clause of the fourteenth amendment. This categorization of the cause of action again involved lack of jurisdiction in the state trial court, but it was jurisdiction lost by the absence of due process of law. This fourteenth amendment assertion by the dissent, together with the majority's suggested independent federal habeas hearing procedure, signalled the beginning of a broad federal habeas remedy for state prisoners.

Mr. Justice Holmes' dissent in *Frank* became his majority opinion in *Moore v. Dempsey*,[29] where the Court reversed a district court's dismissal without hearing of a petition for habeas corpus. As in *Frank*, the applicants claimed that their state trial was mob-dominated. The Court held that the Arkansas corrective process, even if perfected and given allegations that the trial was void, would not suffice to "... allow a judge of the United States to escape the duty of examining the facts for himself."[30] *Mooney v. Holohan*[31] expanded the due process clause basis for the writ from mob-domination to include state prosecution use of known perjured testimony. Although leave to file a petition for an original writ of habeas corpus in the Supreme Court was denied on the failure to exhaust state remedies, the due process basis received the imprimatur of the Court. A very real breakthrough for state prisoners came in *Brown v. Allen*,[32] when the Court fully considered three state prisoners' petitions for the writ by reaching and rejecting the federal claims presented on the merits. There was no backing or filling. The claims alleged in the three cases were: systematic exclusion of Negroes from the juries, coerced con-

27. *Cf.* Bator, *supra* note 24, at 486-87.
28. Peyton v. Rowe, 391 U.S. 54, 60 (1968).
29. 261 U.S. 86 (1923).
30. *Id.* at 92.
31. 294 U.S. 103 (1935).
32. 344 U.S. 443 (1953).

fessions, and a procedural defect which prevented a state court appeal from being decided on the merits. These claims had all been previously adjudicated by the state courts. The Court affirmed the action of the lower court in denying the writs, but the power of federal courts to redetermine the merits of federal constitutional questions theretofore decided in state criminal proceedings was firmly established,[33] and was evidenced subsequently by a gradual increase in petitions by state prisoners.[34]

The several opinions in *Brown v. Allen* resulted in a somewhat unclear decision, and it remained for the Court in *Fay v. Noia*[35] to bring reasoning and order to the subject. Prior to this decision two schools of thought had been developing: one school viewed as unsettling the idea of review by federal district courts of opinions of the highest courts of the states on federal questions, while on the other hand, there was a considerable body of opinion to the effect that federal questions should be determined in federal courts as a matter of course. The Court in *Fay v. Noia* and *Townsend v. Sain*,[36] decided the same day, took a middle ground. The federal courts were given the last word on federal questions, but much latitude was left to the state courts to administer state prisoner federal questions. The result was a form of pragmatism in the combination of quasi-abstention and a delegated hearing process from federal to state courts.

Mr. Justice Brennan, writing for the majority of five in *Fay v. Noia*, analogized the federal writ of habeas corpus, as available to state prisoners, with the common law writ and especially *Bushell's* case.[37] He then concluded that habeas corpus reached any restraint stemming from criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable.[38] The

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33. *See* Schaefer, *Federalism and Criminal Procedure*, 70 HARV. L. REV. 1, 20-21 (1956), to the effect that the Act of 1867 vested the federal courts with plenary power to vindicate all fourteenth amendment rights of state prisoners despite the Supreme Court's occasional use of the language of jurisdiction.

34. Fay v. Noia, 372 U.S. 391, 446 n.1 (1963) (Justice Clark dissenting) shows the increase in the number of habeas corpus applications filed in district courts by state prisoners in the following figures, taken from REPORTS OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS: 1941–127, 1945–536, 1950–560, 1955–660, 1960–872, 1961–906, 1962–1232.

35. 372 U.S. 391 (1963).

36. *Id.*

37. 124 Eng. Rep. 1006 (C.P. 1670).

38. Some examples of the federal rights meeting this standard are: general due process under the fourteenth amendment, Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use of perjured testimony by prosecution); fourth amendment rights against unreasonable searches and seizures, Linkletter v. Walker, 381 U.S. 618 (1965); fifth amendment right against self-incrimination and prosecutorial comment, Tehan v. Shott, 382 U.S. 406 (1966); sixth amendment right to a proper jury trial, Brown v. Allen, 344 U.S. 443 (1953); sixth amendment right to counsel, Gideon v. Wainright, 372

writ was not limited to inquiries into jurisdiction, but also was held to embrace denials of due process. Justice Brennan surmised that with respect to state prisoners, Congress intended by the Act of 1867 to extend the habeas corpus power of the federal courts to its constitutional limit. It was then determined that such limitations as had been engrafted on the habeas procedure in state prisoner cases flowed from comity, not limitations of power, and envisioned only the postponement rather than the relinquishment of federal habeas corpus jurisdiction. Jurisdiction could not be ousted by what the state court might decide. Those decisions which had been based on the exhaustion-of-state-court-remedies principle were likened to a doctrine of abstention "whereby full play would be allowed the states in the administration of their criminal justice without prejudice to federal rights enwoven in the state proceedings."[39]

The Court then proceeded to define the scope of the remedy. The exhaustion principle was reaffirmed,[40] but made applicable, under the doctrine of *Mooney v. Holohan,* only if there was a presently available state remedy as distinguished from a remedy that might have been available at the time of the state trial. The requirement that certiorari to the Supreme Court must have been sought was stricken as a part of the exhaustion principle,[41] and the independent-and-adequate-state-ground doctrine as applied to Supreme Court review of state cases was rejected as a basis for declining to exercise federal habeas power. The Court reiterated that res judicata was inapplicable in habeas proceedings. This settled rule is based upon the idea that habeas corpus is available only in those cases in which the proceeding being tested is not merely erroneous, but so fundamentally lawless as to be void. In sum, the Court in *Fay v. Noia* stated that the manifest federal policy was that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review, even in the case of state judgments. The principle of waiver of constitutional rights in the state trial was equated with the standard of deliberate by-passing of state procedures. Such a bar was a part of the discretion vested in the federal courts by statute

U.S. 335 (1963); sixth amendment right to appellate counsel, Worts v. Dutton, 395 F.2d 341 (5th Cir. 1968); eighth amendment right to bail, Sellers v. Georgia, 374 F.2d 84 (5th Cir. 1967); eighth amendment right to be protected from cruel aud unusual punishment, Hill v. Nelson, 1 CRIM. L. REP. 2321 (N.D. Cal. Aug. 24, 1967), Adderly v. Wainwright, 1 CRIM. L. REP. 2295 (M.D. Fla. Aug. 9, 1967); Robinson v. California, 370 U.S. 660 (1962).

39. Fay v. Noia, 372 U.S. at 419 (1963).

40. The federal statute incorporating the exhaustion principle is 28 U.S.C. § 2254 (1964).

41. Overruling Darr v. Burford, 339 U.S. 200 (1950). This requirement has been seriously erroded, if not rejected, in Brown v. Allen, 344 U.S. 443, 489-97 (1953).

to dispose of the matter as law and justice require and under equitable principles.[42] Moreover, this bar was to be narrowly construed. Mr. Justice Brennan pointed to the structure of the state and federal court relationship in federal habeas matters as it was defined in *Brown v. Allen* by Mr. Justice Frankfurter:

> [No] binding weight is to be attached to the State determination. The congressional requirement is greater. The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.[43]

Although *Fay v. Noia* set the procedural stage for the unusual increase in federal habeas corpus cases involving state prisoners, it was not the sole cause of the increase. The refurbishment of the fourteenth amendment, which made more federal constitutional rights available to state prisoners, set the substantive stage.[44] At first blush, the problem would seem to be that the state courts have been niggardly in according federal constitutional rights to their citizens. However, upon further examination, this postulate appears to be the exception rather than the rule. The small number of successful petitioners in the federal courts indicates that the state courts are, in the main, properly administering federal constitutional rights. Mr. Justice Clark's dissenting opinion in *Fay v. Noia* notes that in the period from 1946 to 1957, petitioners were successful in only 1.4 per cent of the cases brought in the federal district courts.[45]

The circumstance that the substantial majority of federal habeas petitions are without merit, perforce, poses a problem for both the federal and state court systems. Under the superintending sweep of power granted to the inferior federal courts by the 1867 Habeas Act

42. 28 U.S.C. § 2243 (1964). "The court shall summarily hear and determine the facts, and dispose of the matter as law and justice requires."
43. 344 U.S. at 508.
44. Witherspoon v. Illinois, 391 U.S. 510 (1968) (hanging juries); Stovall v. Denno, 388 U.S. 293 (1967) (counsel on confrontation by witness); Berger v. New York, 388 U.S. 41 (1967) (admissibility of evidence obtained by wiretapping and electronic surveillance); Miranda v. Arizona, 384 U.S. 436 (1966) (confession); Sheppard v. Maxwell, 384 U.S. 333 (1966) (prejudicial publicity); Griffin v. California, 380 U.S. 609 (1965) (self incrimination and prosecutorial comment); Douglas v. Alabama, 380 U.S. 415 (1965) (confrontation of adverse witnesses); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of adverse witnesses); Escobedo v. Illinois, 378 U.S. 478 (1964) (confession); Jackson v. Denno, 378 U.S. 368 (1964) (confession); Aguilar v. Texas, 378 U.S. 108 (1964) (stiffened requirements for search and arrest warrants); Coleman v. Alabama, 377 U.S. 129 (1964) (conduct of prosecution); Arnold v. North Carolina, 376 U.S. 773 (1964) (conduct of prosecution); Brady v. Maryland, 373 U.S. 83 (1963) (conduct of prosecution); Douglas v. California, 372 U.S. 353 (1963) (counsel on appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (illegal search and seizure); Griffin v. Illinois, 351 U.S. 12 (1956) (provision of transcript).
45. 372 U.S. at 445 (citing H.R. REPORT No. 548, 86th Cong., 1st Sess. (1959)).

and *Fay v. Noia*, every state prisoner is now entitled to an extra review by the federal courts of claims asserting fundamental federal rights. The approach must be to devise an orderly system of procedure as between the two systems. The problem arises not from the fact that the federal inferior courts are reviewing state court judgments, but rather from the existence of concurrent jurisdiction over the federal rights.

Problems which arose from the increase in petitions for writs of habeas corpus and the need for procedural accommodation were partially answered by the suggestion that state post-conviction remedies be established or refined in order that the exhaustion-of-state-remedies doctrine might be invoked by the federal courts in an effort to afford state courts the first say in their prisoner cases.[46] The states, by and large, have established post-conviction remedies to this end,[47] but, as *Fay v. Noia* makes clear, the federal habeas jurisdiction is not ousted, only postponed. The state prisoner may still pursue his federal court remedy after exhausting his state court remedies. Thus, the prisoner has the possibility of two habeas hearings in addition to direct review in the original state proceeding.[48] It is no answer to denigrate the habeas cases or the federal rights being asserted.[49] The facts of rapid population growth and expanding court dockets do dictate the need for an efficient and better approach

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46. *See* Case v. Nebraska, 381 U.S. 336, 337 (1965) (Clark, J., concurring); Meador, *Accommodating State Criminal Procedure and Federal Post Conviction Review*, 50 A.B.A.J. 928 (1964).

47. For a good discussion of state post-conviction remedies, see the concurring opinion of Justice Clark in Case v. Nebraska, 381 U.S. 336, 337-41 (1965), and Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 442, 428-33 (1967). Several states have since added provisions for post-conviction review. *See* TEX. CODE CRIM. PROC. art. 11.07 (1966); GA. CODE ANN. § 50-127 (Supp. 1967).

48. There is credible evidence that the federal remedy is subject to abuse through repeated applications. One federal prisoner filed 54 separate petitions for the writ in the District Court for the North District of Georgia during the period Oct. 1964—Dec. 1967; another 13 in the period August 1965—Nov. 1967; and still another 5 in the period Sept. 1966—Sept. 1967. Letter from Chief Judge Morgan, N.D. Ga., to Chief Judge Brown, Fifth Circuit, January 3, 1968. The records of the United States Court of Appeals for the Fifth Circuit for the period July 1964—March 1968, show a total of 220 applications for the writ by 82 state and federal prisoners. The number of petitions filed by these applicants ranged from 2 to as many as 19 by one state prisoner.

49. In Brown v. Allen, Justice Jackson, concurring in the result, said that the court had trivialized the writ to the extent that floods of stale, frivolous, and repetitious petitions would inundate the dockets of the courts and that the occasional meritorious application would be buried in a flood of worthless ones. He stated: "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." 344 U.S. 443, 537 (1953). Justice Schaefer took issue with this statement, saying that the search was not for a needle but for the rights of a human being. Shaefer, *supra* note 33. Experience has taught that there is a modicum of truth in both positions.

to safeguard federal rights, but with less lost motion.

The procedural accommodation as between the state and federal systems may be succinctly stated. *Fay v. Noia* lays out the scope of the federal habeas remedy. In accordance with the exhaustion-of-state-remedies doctrine, the state court is given the first opportunity to assess the federal rights claim. For this purpose, the state courts have established post-convention remedies. After an adverse state habeas court judgment, the state prisoner may then proceed in the federal court.

The Supreme Court issued important guidelines on the habeas powers of the federal court in *Townsend v. Sain*. First, the court pointed to the power in the federal courts to try the facts anew:

> The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew.[50]

The court delineated those instances when a federal habeas corpus hearing is mandatory:

> The appropriate standard . . . is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. . . .[51]
>
> We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[52]

The court then distinguished between the federal habeas court relying on state findings of fact and conclusions of law:

> Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas . . . .[53]

50. 372 U. S. at 312 (1963).
51. *Id.*
52. *Id.* at 313.
53. *Id.* at 318.

In *Sanders v. United States*,[54] decided shortly after *Fay v. Noia* and *Townsend v. Sain*, the Supreme Court rounded out its reinterpretation of the federal habeas corpus law and procedure by dealing with those situations involving successive applications for the writ. Adverting to its holding in *Salinger v. Loisel*,[55] the Court said:

> We there announced a governing principle; while reaffirming the inapplicability of *res judicata* to habeas, we said: "each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, and even given controlling weight, are . . . a prior refusal to discharge on a like application." . . . The petitioner's successive applications were properly denied because he sought to retry a claim previously fully considered and decided against him . . . .[56]

The substance and rationale of *Sanders* gave rise to the statute on finality of habeas determinations.[57] The teachings of *Fay v. Noia* (exhaustion of state remedy) and *Towsend v. Sain* (when federal habeas hearing required) have been embraced by statute.[58] These enactments were 1966 amendments to the Federal Habeas Corpus Act and are addressed to more efficient federal habeas procedures, as well as to the definitive role of state and federal courts in their respective functions as parts of a whole system of justice.

III. Removal of Cases from State to Federal Courts for Trial

Another division of the judicial phase of federalism involves the removal of cases, before trial, from state courts to federal courts. This notion had its inception in the Judiciary Act of 1789,[59] but was then restricted to private civil litigation. As a statutory remedy based on the idea of concurrent jurisdiction, it has been in continuous use since that time.

The present removal jurisdiction is found in several statutes: (1) the general removal provision for civil actions;[60] (2) the provision permitting federal officers being sued or prosecuted to remove the

54. 373 U.S. 1 (1963).
55. 265 U.S. 224 (1924).
56. 373 U.S. at 9.
57. 28 U.S.C. § 2244 (1964), *as amended*, (Supp. II, 1965-66).
58. 28 U.S.C. § 2254 (1964), *as amended*, (Supp. II, 1965-66). *See also* Statute Note, 45 Tex. L. Rev. 592 (1967).
59. 1 Stat. 79 (1789). Removal jurisdiction is not directly provided for in art. III. For a history of the removal statutes and their constitutional basis, see Hart & Wechsler, The Federal Courts and the Federal System 40, 379-80, 1019-21 (1953).
60. 28 U.S.C. § 1441 (1964).

civil action or the criminal prosecution from the state to the federal courts;[61] (3) the provision for removal of foreclosure actions against the United States;[62] and (4) the provision for removal of civil actions or criminal prosecutions in civil rights cases.[63] The principal friction in federal-state court relations springs from this latter civil rights removal provision in section 1443.[64]

Literally hundreds of state criminal prosecutions were removed from state to federal courts under this section during the period 1963-65.[65] A modus operandi was established by the federal district courts wherein hearings were held to determine whether the allegations contained in the removal petitions as they related to civil rights could be sustained. If so, the cases were to be dismissed; if not, the cases were to be remanded to the state courts for trial.[66] New light was brought to the problem, however, in 1966 in two significant decisions decided by the Supreme Court.

In *Georgia v. Rachel*,[67] the case was removed to the federal court by a defendant being prosecuted in the Georgia courts for trespass while allegedly asserting rights under the public accommodations section of the 1964 Civil Rights Act, which specifically prohibited such prosecutions.[68] The Supreme Court held that the statutory right to equal public accommodations and the right not to be prosecuted for claiming such accommodations were the type of actions envisioned for removal under section 1443 (1). On the other hand, in *City of Greenwood v. Peacock*,[69] dccided the same day, the Court rejected removal where the basis for the petition was deprivation of general constitutional rights. The defendants, charged with obstructing public streets in a civil rights demonstration, contended that the Mississippi statute under which they were charged was unconstitutional both on

61. 28 U.S.C. § 1442 (1964). The privilege of removal was extended to members of the Armed Forces under certain eircumstances in 1956. 28 U.S.C. § 1442a (1964).

62. 28 U.S.C. § 1444 (1964).

63. 28 U.S.C. § 1443 (1964).

64. The section reads: "Any of the following civil actions or criminal proseeutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embraeing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof; (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

65. Increase from 18 in 1962 to 1,192 in 1965. 1965 ANN. REP. ADMINISTRATIVE OFFICE OF UNITED STATES COURTS 213-17.

66. *See, e.g.*, Cochran v. City of Eufaula, 251 F. Supp. 981 (M.D. Ala. 1966); McMeans v. Mayor's Court, 247 F. Supp. 606 (M.D. Ala. 1965).

67. 384 U.S. 780 (1966).

68. 42 U.S.C. § 2000a-2 (1964).

69. 384 U.S. 808 (1966).

its face and as applied, and that they were being prosecuted as a part of the state's policy of racial discrimination. In a companion case, defendants who were being prosecuted for assault and disturbing the peace contended that the state prosecution was for the sole purpose of deterring them from the exercise of their right under the first amendment to protest racial segregation. The Court held that these cases were not removable under section 1443(1), since that section was applicable only to those cases involving violation of rights conferred by civil rights legislation.

The Court in *Rachel* had stated that the right to public accommodations was a specific statutory right of racial equality, but in *City of Greenwood,* it was decided that equal civil rights does not include broad constitutional guaranties, such as first amendment rights. The Court went on to point out in *City of Greenwood* that there is no specific federal law conferring an absolute right on private citizens to obstruct a public street, to contribute to the delinquency of a minor, to drive an automobile without a license, or to bite a policeman—even if the alleged offender is a civil rights advocate. Likewise, the Court found that, unlike the situation in *Rachel,* no federal law confers immunity from state prosecution on such charges. The Court, noting the overlap with section 1442, held that section 1443(2) is available only to federal officers and to persons assisting such officers in their official duties.[70] The sum of *Rachel* and *City of Greenwood* is that removal in civil rights cases is restricted to those cases where the right allegedly violated by the state is a specific statutory right of racial equality.

These decisions resulted in the remand of a multitude of pending removal cases. Moreover, the lower federal courts are now engaged in effectuating *Rachel* and *City of Greenwood* in varying and analogous factual situations; several decisions of the United States Court of Appeals for the Fifth Circuit may be cited by way of example.

In *Achtenberg v. Mississippi*[71] removal was permitted where the defendant, charged with the crime of vagrancy, alleged in their removal petition that they were arrested while seeking to enjoy equal public accommodations in a city library and in a restaurant. In *Wyche v. Louisiana*[72] the defendant was charged with burglary for entering a highway truck stop without authority with the intent to commit a battery. The court, following *Rachel,* granted removal on the basis of the defendant's allegations that he was seeking public

70. *Id.* at 820, n.17.

71. Achtenberg v. Mississippi, 393 F.2d 468 (5th Cir. 1968).

72. Wyche v. Louisiana, 394 F.2d 927 (5th Cir. 1967).

accommodations in the restaurant. In *McClanahan v. Louisiana*[73] the defendant was charged with disturbing the peace and resisting arrest. The removal petition alleged the denial of the right to an unbiased judge, prosecutor, and trial atmosphere (there was no claim of involvement in civil rights activity). The court of appeals, finding *City of Greenwood* controlling, dismissed the petition.[74] *Whatley v. City of Vidalia*[75] extended *Rachel* to include removal of a state trespass prosecution where defendants sought to encourage voter registration activity. The court equated the Voter Rights Act of 1965[76] with the public accommodations statute in that it proscribed intimidation for the purpose of interfering with the right of a person to vote or to urge or aid others to vote or attempt to vote.[77]

In *Shuttlesworth v. City of Birmingham*,[78] the defendant, who was charged with loitering, was denied removal on the grounds he did not allege that he was denied a fair hearing in the Alabama courts on his right under any law providing "equal civil rights," as defined in *City of Greenwood.* The court pointed out that those rights which inhere in every citizen are not rights arising under a law providing for "equal civil rights" within the meaning of section 1443(1).

IV. Federal Injunctions in State Court Prosecutions

From the earliest days of the Republic, Congress has been cognizant of the use of the federal injunction to stay proceedings in the state courts. Section 2283,[79] the successor to a 1793 Act which prohibited such injunctions, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

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73. McClanahan v. Louisiana, 399 F.2d 695 (5th Cir. 1968).
1968).

74. The appeal was dismissed for want of jurisdiction since it did not fall under § 1443, the only removal provision contemplating appeals from remand orders. *See* 28 U.S.C. § 1447(d) (1964).

75. 399 F.2d 521 (5th Cir. 1938).

76. 42 U.S.C. § 1973i(b) (1964).

77. Davis v. Alabama, 399 F.2d 527 (5th Cir. 1968).

78. Shuttlesworth v. City of Birmingham, 399 F.2d 529 (5th Cir. 1968).

79. 28 U.S.C. § 2283 (1964) is the successor to Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335, which provided that no writ of injunction might be granted on the part of federal courts to stay proceedings in any state court. This section was later amended to make an exception for proceedings in bankruptcy. Act of March 3, 1911, ch. 265, 36 Stat. 162. The provision, as amended, was carried forward as § 720 of the Revised Statutes (1874), § 265 of the Judicial Code (1911), and as 28 U.S.C. § 379 (1940). Section 2283 resulted from the revision of the Judicial Code in 1948. Act of June 25, 1948, ch. 155, 62 Stat. 968. The history of the section together with

The exceptions to the section 2283 proscription are important. The first exception, allowing federal courts to stay state proceedings, "where necessary in aid of its jurisdiction," is necessary to protect prior federal jurisdiction and to give the federal courts the power to stay proceedings in state cases which are removed to the federal courts.[80] The second exception, allowing federal courts to stay a state proceeding "to protect or effectuate its judgments," was intended to restore the basic power of federal courts to enjoin the relitigation of cases and controversies theretofore fully adjudicated by such courts.[81]

In *Ex parte Young*[82] the Supreme Court held that the lower federal court had jurisdiction to enjoin state officers who were about to commence proceedings of either a civil or criminal nature to enforce an unconstitutional state transportation rate enactment. Since the prosecution had not commenced in the *Young* case, the holding is not contrary to section 2283, which deals only with stays sought after prosecution has commenced.[83] More recently, in *Dombroski v. Pfister*[84] the Court extended the latitude of this judicially created exception to the prohibitions of section 2283. In that case, involving an injunction to restrain prosecution which had not commenced and which was under the Louisiana Subversive Activities Act, the Supreme Court reversed a three-judge district court and concluded that the complaint alleged irreparable injury such as would justify equitable relief, thus restraining the prosecution. This holding was premised on the finding that the statute under which the threatened prosecution was to take place was unconstitutionally vague and that it contained an invalid presumption. The Court cautioned that a federal injunction interfering with the state's good faith administration of its criminal laws is peculiarly inconsistent with the federal framework of the Constitution and emphasized that an irreparable injury must be found if the federal injunction is to issue. The facts indicated that the first amendment rights which were under harassment and deprivation would be "chilled" while the state prosecution was proceeding.

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the exceptions which had been statutorially or judicially created to it are fully discussed by the Supreme Court in Toucey v. New York Life Ins. Co., 314 U.S. 1181 (1941), and Amalgamated Clothing Workers of Am. v. Richmond Bros., 348 U.S. 511 (1955).

80. *See* Julian v. Central Trust Co., 193 U.S. 93 (1904) (prior federal jurisdiction); Structural Steel and Forge Co. v. Union Pacific R.R., 269 F.2d 714 (10th Cir. 1959) (removed case). *See also* WRIGHT, FEDERAL COURTS, § 47 at 155-57 (1963).

81. H.R. REP. No. 308, 80th Cong., 1st Sess. 181 (1947); and MOORE, COMMENTARY ON UNITED STATES JUDICIAL CODE, ¶ 0.03 (49) (1949). This power had been lost in Toucey v. New York Life Ins. Co., 314 U.S. 18 (1941).

82. 209 U.S. 123 (1908).

83. This distinction was pointed out by the Court. *Id.* at 162. *See also* Dombroski v. Pfister, 380 U.S. 479, 484 n.2 (1965).

84. 380 U.S. 479 (1965).

Section 2283 was expressly found inapplicable.[85]

The *Dombrowski* case has received little following. In the recent case of *Cameron v. Johnson*,[86] the dissenting justices were of the opinion that the Court had ignored *Dombrowski.* In *Cameron* the defendants had been engaged for some weeks in picketing a voter registration office located in a courthouse in Mississippi. The Mississippi legislature, in the interim, passed a criminal statute prohibiting picketing in such a manner as would obstruct the entrance to courthouses or public buildings. The sheriff, prior to the passage of the statute, had permitted picketing on certain parts of the courthouse grounds, but after the statute was passed, the pickets were dispersed. While attempting to picket the courthouse again, the defendants were arrested for violating the statute. Seeking a declaratory judgment that the statute was unconstitutional on its face because of vagueness and overbreadth, the defendants pleaded for injunctive relief against the enforcement of the statute in pending or future criminal prosecutions. The Supreme Court vacated the judgment of the three-judge district court which had denied relief, and remanded the case for further consideration in the light of *Dombrowski.* Upon rehearing, the district court again denied relief. On the subsequent appeal the Supreme Court affirmed and concluded that the statute was not unconstitutional on its face and that the record did not establish the plaintiff's charges of bad faith or selective enforcement of the statute. The Court pointed out that *Dombrowski* recognized the continuing validity of the maxim that a federal district court should be slow to act where its power is invoked to interfere by injunction with threatened criminal prosecutions in a state court.[87] The Court viewed *Dombrowski* as "presenting a situation of the 'impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment in order to discourage appellant's activities' . . ."[88] Although this statement seems to limit the *Dombrowski* holding, the district court's action in *Cameron v. Johnson* was affirmed

85. Another leading case on the subject of an injunction where the state prosecution had not commenced is Douglas v. City of Jeanette, 319 U.S. 157 (1943), where the Court upheld a district court's refusal to enjoin the application of a city ordinance to religious solicitation through threatened criminal prosecution, even though the same ordinance was the same day held unconstitutional in another case. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943).

86. 390 U.S. 611 (1968) (Fortas, J., dissenting).

87. *Id.* at 618. The Court cited Douglas v. City of Jeanette, 319 U.S. 157 (1953) and Zwickler v. Koata, 389 U.S. 241 (1967). In *Zwickler,* involving first amendment rights, a district court abstention order was reversed in a suit seeking declaratory relief and an injunction against a pending state prosecution. The Court said that the prayer for declaratory judgment should be considered irrespective of the prayer for injunctive relief.

88. 390 U.S. at 619.

on the ground that it was factually distinguishable from *Dombrowski.*

The decision in *Cameron v. Johnson* in no way rests on section 2283, although the prosecution of at least some of the plaintiffs had commenced before the federal injunction was sought. Mr. Justice Fortas, in dissent, noted that the majority did not reach the issue of section 2283 and pointed to *City of Greenwood,*[89] where the Court stated obliquely that first amendment rights might be protected by an injunction in circumstances where the state prosecution would deny such rights.[90] In the per curiam opinion vacating *Cameron v. Johnson,*[91] the district court was directed to consider whether section 2283 barred an injunction and whether section 1983, the Civil Rights Statute,[92] created an exception to section 2283. The district court concluded that section 2283 was a bar.[93] When *Cameron* was next considered, the majority of the Court found it unnecessary to resolve this question.[94] This set of circumstances casts some doubt on the continuing efficacy of section 2283 in first amendment cases.

The recent case of *Dilworth v. Riner*[95] bears on the section 1983 question. This case held that section 2283 did not bar a stay of prosecutions instituted by Mississippi for breach of peace resulting from an attempt to obtain rights under the public accommodation sections of the Civil Rights Act of 1964. There, as in *Rachel,* the statute immunized prosecutions. The Court of Appeals for the Fifth Circuit held that section 2283 did not require that an act of Congress creating an exception to section 2283 specifically refer to section 2283 or to the subject matter of federal stays. Rather it was sufficient if it clearly appeared from the federal statute than an exception was indicated. Moreover, the court reasoned that *Douglas v. City of Jeanette* would not avoid the injunction, since it rested on the principles of comity and there could be exceptions based on genuine and irreparable damages.[96]

The federal courts have the clear power to enjoin state court criminal prosecutions or civil actions in the state courts, although the dictates of federalism are such that federal courts must be slow

89. 384 U.S. 808 (1966).
90. 390 U.S. at 628 n.5.
91. 381 U.S. 741 (1965).
92. 42 U.S.C. § 1983 (1964).
93. Cameron v. Johnson, 262 F. Supp. 873, 877-78 (S.D. Miss. 1966), *citing* Baines v. City of Danville, 337 F.2d 579 (4th Cir. 1964).
94. 390 U.S. at 613 n.3.
95. 343 F.2d 226 (5th Cir. 1965).
96. On § 2283 as a rule of comity, see T. Smith & Son v. Williams, 275 F.2d 397 (5th Cir. 1960); MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE, § 0.03(49) 407-10 (1949). It is settled that § 2283 does not apply to suits brought by the United States for injunction. Leiter Minerals, Inc. v. United States, 352 U.S. 220 (1957).

to use this power. Comity is a court-fashioned rule to this end, and section 2283 is a reaffirmation of this rule. Neither goes to the distribution of power as between state and federal courts, and both Congress and the courts may fashion exceptions to the rule of comity. Whether civil rights cases resting on section 1983 are such exceptions is an open question. Nevertheless, the federal courts are otherwise subject to the rule of caution springing from principles of comity, which applies where injunctions are sought to stay state proceedings.

V. Conclusion

Courts on all levels are under a constitutional duty to make the American system of justice effective, and constant attention to the letter and spirit of federalism is necessary. The continuing responsibility resting on the state courts is to make federal rights, as well as state rights, secure. The plan of federalism is that state courts have the first opportunity to respond to claims of federal rights in habeas matters, while the federal courts have a corresponding duty in the same area once the state courts have had their opportunity. Under the plan, the federal courts do not trench on the state courts in performing this function. It is a concurrent responsibility. In the area of staying state court action through the use of the federal injunctions, federalism requires a cautious approach on the part of the federal courts. On the other hand, in the area of removal cases, Congress has established concurrent jurisdiction in the federal courts with respect to certain rights and questions, as well as in diversity cases.

The fourteenth amendment refurbishment process has made the Constitution more meaningful. The courts, state and federal, must implement the process through more efficient but orderly procedures. This is the demand of federalism.