Vanderbilt Law Review

Volume 19
Issue 3 *Issue 3 - June 1966*

Article 6

6-1966

Federal Habeas Corpus and the State Court Criminal Defendant

Frank W. Wilson

Federal Habeas Corpus and the State Court Criminal Defendant

*Frank W. Wilson**

After tracing the development of federal habeas corpus, Judge Wilson discusses three recent United States Supreme Court decisions which have given rise to a tremendous increase in federal habeas corpus petitions by state prisoners. To keep controversy between state and federal courts at a minimum, he suggests several remedies, including the adoption by the states of post-conviction procedures which will enable a state prisoner to assert all of his federal rights in the state courts.

Federal habeas corpus for state prisoners is one of the most controversial and emotion-ridden subjects in the entire field of criminal law. Considering the period over which this controversy has continued, it is surely one of the oldest unresolved disputes between the state and federal courts. The removal of an action from a state to a federal court may sometimes cause ruffled feelings, but few judges remain long offended at being relieved of trying a lawsuit. On the other hand, when a federal judge reverses a state judge who has been affirmed by the state appellate courts, forcing him to retry the case or free the accused, the sensibilities of even the most ardent supporter of our dual system of federal and state government are tested. Yet this illustration merely touched the surface of the emotional factors involved and gives little or no hint of the real and vexing legal problems encountered.

The controversy has waxed—but rarely waned—for almost a century. As long ago as 1891 the state courts were heatedly protesting "the prostitution of the writ of habeas corpus, under which the decisions of the state courts are subjected to the superintendence of the federal judges . . . ."[1] Even before the era of *Brown v. Board of Education*,[2] *Mapp v. Ohio*,[3] *Gideon v. Wainwright*,[4] and *Escobedo v. Illinois*,[5] federal habeas corpus for state court prisoners was greatly agitating

*Judge, United States District Court for the Eastern District of Tennessee, Southern Division.

1. 25 AM. L. REV. 149, 153 (1891).
2. 349 U.S. 294 (1954).
3. 369 U.S. 643 (1962).
4. 372 U.S. 335 (1963).
5. 378 U.S. 478 (1964).

the more emotional critics of federal authority, straining the relations and taxing the skill, diplomacy, and acumen of both federal and state judges who were seeking less emotion and more reason in composing this problem in federalism.

Habeas corpus, the writ by which anyone restrained of his liberty may petition a court to require that his custodian appear with him in court and account for the legality of his restraint, is as ancient as the common law itself. Its origin is shrouded in the mists of antiquity.[6] While there is some dispute as to the precise occasion which gave birth to the writ, and doubt as to when it initially became entrenched in English law, it had obviously received full recognition in England by the time of the passage of the Habeas Corpus Act in 1679.[7] That act was adopted by Parliament and approved by the Crown in the heat of the struggle over the return of Catholicism to the throne. So intense was this struggle and so doubtful was its outcome that each side consented to its adoption, for fear that they might have occasion to need its protection on the morrow. Churchill described the adoption of the Act of 1679 in the following terms:

> This shortlived legislature left behind it a monument. It passed the Habeas Corpus Act which confirmed and strengthened the freedom of the individual against arbitrary arrest by the . . . government. No Englishman, however great or however humble, could be imprisoned for more than a few days without grounds being shown against him in open court according to the settled law of the land. . . . The descent into despotism which has engulfed so many leading nations in the present age has made the virtue of this enactment, sprung from English political genius, apparent even to the most thoughtless, the most ignorant, the most base.[8]

Habeas corpus was well recognized in America by the time of the founding of our nation. This is shown by the incorporation of the writ by name and without definition into the Constitution. Article I, section 9, clause 2, provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The use of habeas corpus by federal courts was authorized by Section 14 of the Judiciary Act of 1789, but such jurisdiction as was then granted did not extend to petitions from state prisoners. It was not until 1867 that Congress, anticipating difficulty in enforcing Reconstruction measures, authorized a federal court to order the discharge of any person held by a state in violation of the supreme law of the land.[9] Though procedural changes were made in the

6. See Longsdorf, *Habeas Corpus, A Protean Writ and Remedy*, 8 F.R.D. 179 (1948).
7. Habeas Corpus Act, 1679, 31 Car. 2, c.2.
8. 2 CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES 365 (1956).
9. Act of Feb. 5, 1867, Ch. 28, § 1, 14 Stat. 385.

recodification of the Judicial Code in 1948,[10] the statutory language as to the scope of the writ has not been altered since 1867. Interpretation of that statutory language, however, has materially changed.

For many years following the act of 1867, the construction placed upon it by the federal courts was that the writ should issue to a state prisoner only if the state court which committed the prisoner lacked "jurisdiction" to do so.[11] Even this limited superintendence of state court proceedings by federal courts was sufficient to call forth vehement protest from the states.[12] Beginning with the 1915 dissent of Mr. Justice Oliver Wendell Holmes in *Frank v. Mangum*,[13] which by 1923 had in effect become a majority opinion of the Court in *Moore v Dempsey*,[14] federal habeas corpus jurisdiction was extended to a trial lacking in due process by reason of being held under the sway of mob pressures, even though the trial was jurisdictionally correct. A similar result was reached in 1935, in *Mooney v. Holohan*,[15] where the Supreme Court held that the knowing use of perjured testimony to obtain a state court conviction was a violation of due process and therefore a basis for supporting federal habeas corpus. Although the Court continued to speak in terms of lack of jurisdiction upon the part of the state court, federal habeas corpus relief was really being extended to all trials lacking in due process under the fourteenth amendment.

In 1942, the Supreme Court expressly abandoned this stretching of the jurisdictional fiction when it stated in *Waley v. Johnston*:

> [T]he use of the writ in federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.[16]

Since that time, habeas corpus relief for state prisoners in federal courts has been continually broadened by the expanded application of the concept of procedural due process under the fourteenth amendment. At present the procedural requirements which are binding upon state courts are almost identical with the procedural requirements binding upon the federal courts under the Bill of Rights. Every new fourteenth amendment right judicially formulated for defendants in

10. Habeas Corpus Act, 28 U.S.C. §§ 2241-55 (1964).
11. *Ex parte* Siebold, 100 U.S. 371 (1879).
12. *Supra* note 1.
13. 237 U.S. 309, 345 (1915) (dissent).
14. 261 U.S. 86 (1923).
15. 294 U.S. 103 (1935).
16. 316 U.S. 101, 104-05 (1942).

criminal proceedings becomes an additional ground for federal habeas corpus.

Although federal habeas corpus expanded rapidly under the concept of due process, there had early developed an important limitation on the power of the federal courts to entertain applications for habeas corpus from state prisoners. Beginning in 1886, a line of cases in the Supreme Court developed the doctrine that an application for habeas corpus should not be entertained by a federal court until the prisoner has exhausted his state court remedies.[17] This exhaustion of remedies included application to the United States Supreme Court to review the state court proceedings by appeal or certiorari.[18]

In 1948, the Federal Habeas Corpus Act was amended, largely in response to steadily mounting criticism of the expansion of federal habeas corpus supervision of state court trials. Judge John D. Parker, the chairman of the Habeas Corpus Committee of the Judicial Conference of the United States and the sponsor of a number of the amendments, believed that the 1948 revisions[19] would reduce, if not eliminate the "abuses" of federal habeas corpus and overcome much of the criticism.[20]

The 1948 revisions provide that an application for the writ may be made either by the prisoner or by anyone acting upon his behalf.[21] It should be pointed out that venue lies in both the district and division in which the prisoner is held in custody.[22] The return must be made in three days, or for good cause shown, not exceeding twenty days; and the hearing must then be held within five days unless good cause exists for extending the time for hearing.[23] The statute provides that successive petitions need not be entertained where the legality of the detention has been determined upon prior application and no new ground is presented.[24] It was this provision that Judge Parker thought would accomplish something akin to res adjudicata in habeas corpus proceedings. Among the procedural rules laid down is the rule that the certificate of a trial judge setting forth the facts may be admitted in lieu of his appearance as a witness.[25] Also, provision is made for admitting depositions, affidavits, and transcripts of records from the state court proceeding.[26] The federal court may, if necessary, stay

17. *Ex parte* Royall, 117 U.S. 241 (1886); Urquhart v. Brown, 205 U.S. 179 (1907); Mooney v. Holohan, 294 U.S. 103 (1935); *Ex parte* Hawk, 321 U.S. 114 (1944).
18. Darr v. Buford, 339 U.S. 200 (1950).
19. Habeas Corpus Act, 28 U.S.C. §§ 2241-55 (1964).
20. See Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171 (1948).
21. 28 U.S.C. § 2242 (1964).
22. Ahrens v. Clark, 335 U.S. 188 (1948).
23. 28 U.S.C. § 2243 (1964).
24. 28 U.S.C. § 2244 (1964).
25. 28 U.S.C. § 2245 (1964).
26. 28 U.S.C. § 2246 (1964).

the state court proceedings or stay execution of the state court sentence.[27] The "exhaustion of remedies" rule was adopted by providing for federal jurisdiction only when "it appears that the applicant has exhausted the remedies available in the courts of the state."[28] The writ need not actually result in the discharge of the prisoner; indeed, in most cases the grant of the writ is expressly made conditional in order that the state may retry the prisoner in a fashion meeting constitutional demands.[29] The petition, of course, will not lie unless the applicant is presently in custody.[30] Nor will it lie if he is in custody under more than one sentence and the legality of one sentence is not in issue.[31]

Judge Parker's understanding of the accomplishments of the 1948 revisions to the Habeas Corpus Act is as follows:

> Four things of importance are done by the revised Judicial Code relating to the law of habeas corpus: (1) repeated applications of the writ by persons convicted of crime are taken care of by a provision establishing the principle of res adjudicata in a modified form; (2) a simplified procedure is provided for cases which are to be heard; (3) in the case of federal prisoners, provision is made for relief by motion before the sentencing judge and right to habeas corpus in such cases is greatly limited; (4) in the case of state prisoners, resort to lower federal courts is practically eliminated where adequate remedy is provided by state law.[32]

An entirely different interpretation of the habeas corpus statute from that envisaged by Judge Parker was not long in coming. In 1953, the Supreme Court in the case of *Brown v. Allen*[33] squarely held that the state remedies were exhausted so as to permit a federal habeas corpus action when the constitutional issue had *once* been presented to the state courts with a review sought or excused in the United States Supreme Court. Resort to a post-conviction remedy in the state courts was held not to be a prerequisite. The federal trial courts were fully back in the business of supervising the constitutionality of state court proceedings rather than being "practically eliminated" as Judge Parker had so confidently expected.

The revisions of the statute in 1948 accomplished certain procedural reforms, such as eliminating the unseemly spectacle of a state judge having to testify before a federal court upon the conduct of the trial

27. 28 U.S.C. § 2251 (1964).
28. 28 U.S.C. § 2254 (1964).
29. Rogers v. Richmond, 365 U.S. 534 (1961); Irvin v. Dowd, 366 U.S. 717 (1961).
30. Parker v. Ellis, 362 U.S. 574 (1960). The rule is otherwise with regard to a prisoner who has been paroled, *e.g.*, Jones v. Cunningham, 371 U.S. 236 (1963).
31. McNally v. Hill, 293 U.S. 131 (1934).
32. Parker, *supra* note 20, at 173-74.
33. 344 U.S. 443 (1953).

in his court. These revisions, however, failed to meet the main thrust of the criticism of the state court judges and attorney generals—namely, that final judgments of the highest state courts were being reviewed by inferior federal courts in habeas corpus proceedings by a single judge.

In 1954 the attorney generals of forty-one states joined in the case of *United States ex rel. Elliot v. Hendricks*,[34] in an effort to have the Habeas Corpus Act itself declared unconstitutional insofar as it applies to state prisoners. They were, of course, signally unsuccessful. Further proposals for amendment were made by the Judicial Conference of the United States,[35] including a requirement that a three-judge court hear habeas corpus petitions from state prisoners. These proposals aroused as much criticism as they attempted to meet. They were twice passed by the House but each time were rejected by the Senate. And fortunately so, for as subsequent developments have demonstrated, the number of three-judge courts which would have been required would have overwhelmed the federal judiciary.[36]

The stage is now set for the most dramatic definition, if not enlargement, of federal habeas corpus in the history of our federal system. By a striking trilogy of cases in the spring of 1963, the Supreme Court either rewrote or redefined, depending upon one's viewpoint, the modern law of federal habeas corpus. This trilogy consists of the cases of *Townsend v. Sain*,[37] *Fay v. Noia*,[38] and *Sanders v. United States*.[39]

These three cases, when considered together with sections 2241-2255 of the Judicial Code, may not unreasonably be said to constitute the alpha and omega of the present day procedural law of federal habeas corpus as it relates to state prisoners. *Townsend v. Sain* dealt basically with the problem of when, in a habeas corpus proceeding, a rehearing of factual and legal issues would be necessary in the federal court upon issues tried and decided in the state court. *Fay v. Noia* greatly restricted the rule of exhaustion of state court remedies as a restraint upon the power of federal courts to entertain habeas corpus petitions from state prisoners. *Sanders v. United States* dealt with the non-applicability of res adjudicata to habeas corpus proceedings and

34. 213 F.2d 922 (3d Cir.), *cert. denied*, 348 U.S. 851 (1954).

35. REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON HABEAS CORPUS, 33 F.R.D. 363, 365 (1963).

36. At its meeting in September of 1965, the Judicial Conference of the United States withdrew its approval of the three-judge proposal.

37. 372 U.S. 293 (1963).

38. 372 U.S. 391 (1963).

39. 373 U.S. 1 (1963).

established rules with regard to when successive petitions filed by the same prisoner must be heard.[40]

Suppose that a defendant on trial for murder in a state court moves to suppress his confession upon the ground that it was unconstitutionally coerced by administration of drugs. Both an issue of fact and an issue of constitutional law are raised by the motion. After a hearing, the state court overrules the motion to suppress and allows the confession to be introduced. The defendant is convicted and upon appeal his conviction is affirmed by the state supreme court. After exhausting both his appellate and his post-conviction remedies in the state courts, a petition for habeas corpus is filed in the United States district court raising the issue of admissibility of the confession. These were the facts in the *Townsend* case. The district court dismissed the petition on the basis of the state court record, without holding an evidentiary hearing. The Supreme Court held that this was error and remanded the case to the district judge with instructions to hold an evidentiary hearing to determine whether the confession was coerced by the administration of drugs and whether the state trial judge had applied the correct standard of federal constitutional law in admitting Townsend's confession in evidence. The Court held that irrespective of the record made in the state court, "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,"[41] and in such situations "must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in state court, either at the time of the trial or in a collateral proceeding."[42] After holding that "a federal evidentiary hearing is required unless the state-court trier of facts has after a full hearing reliably found the relevant facts," the majority opinion then undertook, in the form of stating "guidelines," to outline and comment extensively upon six situations in which a federal court *must* hold an evidentiary hearing and cannot merely rely upon the record made in the state court.[43] It is to this "cataloging in advance of a set of standards

40. The *Sanders* case, *supra* note 39, involved a petition by a federal prisoner brought under what is referred to in federal practice as a Section 2255 petition (28 U.S.C. 2255) which, while it leaves venue in the sentencing court irrespective of the place of confinement of the prisoner, is in all other respects exactly commensurate with habeas corpus. United States v. Hayman, 342 U.S. 205 (1952). The rules announced in the *Sanders* case were expressly made applicable to habeas corpus proceedings.

41. 372 U.S. at 312.

42. *Ibid.*

43. "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

that are to inflexibly compel district judges to grant evidentiary hearings in habeas corpus proceedings"[44] that the dissent is primarily directed, although the three dissenting justices also felt that the record reflected that the state court had "clearly accorded the petitioner due process in this case."[45]

On the same day that the *Townsend* opinion was announced, the Court also decided the case of *Fay v. Noia*.[46] As mentioned earlier, beginning in 1886 with *Ex parte Royall*,[47] the Court had developed a doctrine that an application for habeas corpus should not be entertained by a federal court until the prisoner had exhausted his state remedies. This rule was written into the statute in 1948 in the following terms:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state.[48]

In 1942 a defendant by the name of Noia, along with two co-defendants, was convicted of murder in a New York state court. The conviction of each defendant was obtained by use of signed confessions. Noia's co-defendants appealed; and although their convictions were affirmed on appeal, eventually, after protracted litigation, they were successful in a post-conviction procedure in setting aside their convictions on the ground that the confessions were coerced. Noia did not appeal, stating as one of his reasons that he was fearful that, if successful, he might receive the death penalty if convicted on retrial. Following the success of his co-defendants in setting aside their convictions, Noia, some fourteen years after his conviction, sought relief in the state court; but it was there held that his failure to appeal had barred him from later attacking the conviction. He then brought an action in the federal court for habeas corpus. The state conceded that his rights under the fourteenth amendment had been violated in the manner in which the confession had been obtained, but relied upon his failure to exhaust his state court remedies as barring his federal court habeas corpus petition under the statute quoted above. In a

by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 313.

44. *Id.* at 326.
45. *Id.* at 334.
46. *Supra* note 38.
47. *Supra* note 17.
48. 28 U.S.C. § 2254 (1964).

sweeping opinion, Mr. Justice Brennan held, *inter alia*, that federal courts have power to grant habeas corpus relief despite the petitioner's failure to have pursued his state court remedies, provided only that no remedy is "presently available" in the state court. As stated by the Court:

> Noia's failure to appeal was not a failure to exhaust 'the remedies available in the courts of the state' as required by Section 2254; that requirement refers only to his failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court.[49]

Earlier contradictory authority, including *Darr v. Buford*, was expressly overruled by the Court. Two other highly significant holdings in the majority opinion were: (1) "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute"[50] and (2) while a federal judge "after holding a hearing of appropriate scope" has discretion to deny relief to a habeas applicant who deliberately by-passed state procedures, no waiver affecting federal rights will be found unless the habeas applicant, "after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state court. . . ."[51] In excellent statements of conflicting views upon the history of habeas corpus jurisdiction and the nature and scope of the habeas corpus writ, the majority and minority opinions in the *Noia* case arrive at opposite legal conclusions. The majority opinion concluded that "the nature of the writ at common law, the language and purpose of the Act of February 5, 1867, and the course of decisions in this court extending over nearly a century are wholly irreconcilable . . . ."[52] with any limit on the power of the federal court to grant the writ because of state procedural default or independent state ground that would bar relief under state law. However, Mr. Justice Harlan, speaking for the minority, after stating that the majority "had turned its back on history and struck a heavy blow at the foundation of our federal system,"[53] concluded that: "There can, I think, be no doubt that today's holding—that federal habeas will lie despite the existence of an adequate and independent nonfederal ground for the judgment

49. 372 U.S. at 399.
50. *Ibid.*
51. *Id.* at 439.
52. *Id.* at 426.
53. *Id.* at 449.

pursuant to which the applicant is detained, is wholly unprecedented."[54]

Within a month after the *Townsend* and *Noia* opinions, the Court handed down its opinion in *Sanders v. United States*,[55] the third case in the modern trilogy of federal habeas corpus. Sanders was a federal prisoner who had been sentenced in 1959 to fifteen years imprisonment upon his plea of guilty to a charge of bank robbery. The guilty plea was entered after he had expressly waived counsel. The following year Sanders filed a petition under section 2255, a federal prisoner's equivalent to a state prisoner's petition for habeas corpus,[56] asserting that he was denied counsel and that he was intimidated and coerced into entering his plea of guilty. The first petition was denied on the basis of the record, without granting an evidentiary hearing. Within nine months Sanders filed a second petition asserting the same grounds but adding that he was mentally incompetent at the time of his plea due to addiction to narcotics. The district court again denied the petition without a hearing, both on the basis of the record and on the basis of the former petition having been denied. The court held that Sanders must have known of the matters relating to narcotics at the time of his first petition and thus had no excuse for his failure to assert them. A divided Supreme Court reversed and remanded the case to the district court for a hearing on the second petition. The majority opinion of the Court, again written by Mr. Justice Brennan, after affirming that a denial of habeas corpus was not res adjudicata at common law, held that controlling weight could be given to the denial of a prior application for federal habeas corpus only if "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits upon the subsequent application."[57] Thus, as stated by the Court: "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement or constitutional rights is alleged."[58] The Court concludes that any other interpretation of a statutory restriction might raise serious constitutional questions.

Mr. Justice Harlan, again speaking for the minority, protests "the implication in the Court's opinion that every decision of this Court in the field of habeas corpus . . . has become enshrined in the Constitution because of the guarantee in Article I against suspension of the

54. *Id.* at 463.
55. *Supra* note 39.
56. See note 40 *supra.*
57. 373 U.S. at 15.
58. *Id.* at 8.

writ"[59] and concludes that "both the individual criminal defendant and society have an interest in insuring that there will at some point be a certainty that comes with an end to litigation and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."[60]

The effect of *Townsend, Noia,* and *Sanders* upon federal habeas corpus litigation, as could well be imagined, has been nothing less than dramatic. In the seventeen-year period between 1941 and 1957, a total of 8,596 habeas corpus petitions were filed in the federal courts, ranging from a low of 134 in 1941 to a high of 814 in 1957. In the fiscal year of 1964, 3,531 habeas corpus petitions were filed by state court prisoners; and in the fiscal year 1965, 4,664 such petitions were filed. Thus, in the two years since *Townsend, Noia,* and *Sanders,* almost as many petitions have been filed as were filed in the entire seventeen-year period between 1941 and 1957. In 1965 prisoner petitions of all types comprised twelve per cent of the civil case load in the federal district courts.[61]

Many criticisms have of course been made of the recent decisions regarding federal habeas corpus. Not all of them are deserving of repetition, for some of them are more the product of emotion than of reason. Suffice it to say that many reasoned criticisms have been made, and it is not without reason that the Conference of Chief Justices of the fifty states calls annually for modification of the law granting habeas corpus jurisdiction to the federal courts over state prisoners. Certainly the dissenting opinions in *Townsend v. Sain, Fay v. Noia,* and *Sanders v. United States* are reasoned criticisms and are deserving of the most respectful consideration. They may even yet have their effect, for as stated by Mr. Justice Douglas upon an occasion when he found his views not to be shared by a majority of the Court, "[H]appily, all constitutional questions are always open."[62]

It would appear, however, that those who look for any fundamental or significant alteration in the federal law of habeas corpus, either through congressional action or from the Supreme Court, may look in vain. With respect to federal legislation, while some procedural improvements may be accomplished, it would appear that the Supreme Court may have read into the Constitution most of its recent holdings in regard to the exhaustion of state remedies, successive petitions for

59. *Id.* at 29.

60. *Id.* at 24-25.

61. ANNUAL REPORT OF DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, at 1-3 (1965).

62. Gideon v. Wainwright, 372 U.S. 335, 345 (1962).

habeas corpus, inapplicability of res adjudicata, and lack of conclusiveness of state court findings. Moreover, recent real or apparent miscarriages of justice in the politically sensitive civil rights field may well have resulted in a national political atmosphere favorable to enlarging federal jurisdiction rather than restricting it. Wholly apart from principles of stare decisis, it would seem to be an even more remote possibility that the Supreme Court might modify its views. As reflected in the recent case of *Henry v. Mississippi*,[63] the Court is fully aware of the criticism its recent decisions in the field of habeas corpus have engendered, but it expects the solution to lie with the states. From the following language of the Court, it is apparent not only that the Court is aware of the criticism, but also that it confidently expects Mohammed to come to the mountain—and not the reverse—and desires to afford Mohammed every opportunity to do so:

> The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries. It has been suggested that this friction might be ameliorated if the states would look upon our decisions in *Fay v. Noia* and *Townsend v. Sain*, as affording an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims. That prospect is better served by a remand than by relegating petitioner to his federal habeas remedy. Therefore, the judgment is vacated and the case is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.[64]

An even more recent and dramatic example of the Court's attitude in this regard is shown in *Case v. Nebraska*,[65] where the Court, after granting certiorari, remanded a state habeas corpus proceeding to afford resort to a newly enacted state post-conviction procedure. Two justices, in concurring, openly expressed approval of the enactment of such legislation broadening the state post-conviction procedure to encompass review of all federal rights of state court prisoners, and they commended such legislation to all states.

It is apparent that the responsibility for resolving the problems which are now arising in increasing volume in the field of federal habeas corpus as it relates to state prisoners is a joint responsibility of the state and federal courts. They are both charged with the responsibility of seeking in good faith to administer the law of federal habeas corpus as it has now been enunciated by the highest court in the land. With mutual respect and tolerance and with a proper regard for comity, the emotional problems, if not the judicial volume of such litigation, can be reduced.

63. 379 U.S. 443 (1965).
64. *Id.* at 453.
65. 381 U.S. 336 (1965).

Other steps can be taken to reduce not only the burden, but possibly the volume of such litigation. If lawyers, judges and law enforcement officers would together rededicate themselves to strictly and scrupulously observing all constitutional rights accorded an accused at every stage of the proceedings, within both the letter and the spirit of the law, the occasion for granting habeas corpus would so dwindle as to significantly affect the volume of filing of such petitions in both the state and federal courts. Each violation of a constitutional right which must be corrected by habeas corpus breeds a multitude of less legitimate habeas progeny.

Another practice which would materially reduce the burden of habeas corpus petitions now flooding the state and federal courts would be the making of explicit and careful findings of fact and conclusions of law on issues involving constitutional rights. The *Townsend* case itself might never have arisen had the trial judge made some findings of fact and a statement of the law upon which he overruled the motion to suppress the confession rather than merely pronouncing, "motion overruled." No less important is the matter of the making and preserving records of evidentiary matters in both criminal and post-conviction proceedings. Resourceful trial judges are devising many other methods for making habeas corpus petitions more informative and more intelligible, and for reducing the likelihood of repeated petitions from the same inmate.[66] That trial judges retain considerable discretion and are afforded considerable opportunity for originality in this regard was recognized by Mr. Justice Brennan in the *Sanders* case.

> Finally, we remark that the imaginative handling of the prisoner's first motion would in general do much to anticipate and avoid the problem of a hearing on a second or successive motion. The judge is not required to limit his decision on the first motion to the grounds narrowly alleged, or to deny the motion out of hand because the allegations are vague, conclusional, or inartistically expressed. He is free to adopt any appropriate means for inquiry into the legality of the prisoner's detention in order to ascertain all possible grounds upon which the prisoner might claim to be entitled to relief.[67]

Finally, among the most promising proposals for reducing federal habeas corpus supervision of state criminal proceedings is the enactment of state legislation providing post-conviction remedies coextensive with the federal remedies. Much of the current difficulty is due

66. Carter, *Pre-Trial Suggestions for Section 2255 Cases*, 32 F.R.D. 393, 398 (1963). See also the court rules and accompanying terms and instructions concerning habeas corpus petitions which have been adopted by the United States District Court for the Northern District of Illinois in 33 F.R.D. 391 (1963).

67. 373 U.S. at 22.

to the fact that the rights which a prisoner can assert in a federal court and the type of habeas corpus hearing available to him there more often than not cannot be asserted or are unavailable to him in state courts.[68] For state courts to be permitted to retain maximum control over the administration of criminal justice, it will be necessary for the states to provide post-conviction remedies which enable a state prisoner to assert all of his federal rights in state proceedings that conform to the requirements of *Noia, Townsend,* and *Sanders.* It was the enactment of such legislation by the state of Nebraska which occasioned the recent remand by the Supreme Court of a prisoner to his state court remedy in *Case v. Nebraska.*[69] To assist states in meeting this problem the Commissioners of Uniform State Laws have drafted a Uniform Post-Conviction Procedure Act.[70] Six states have now enacted the Uniform Act or legislation similar to it.[71] A number of other states are in the process of evaluating their post-conviction procedures and of proposing legislation in the light of recent developments in the law of habeas corpus.[72]

Even so, many of the problems which arise in federal habeas corpus and the controversies they engender will doubtless be with us for the foreseeable future. We must, accordingly, continue to be careful that the problems and controversy do not cause us to "lose sight of the forest for the trees." Habeas corpus is still the greatest instrument for the safeguarding of individual freedom under law yet devised by man. As long as men love freedom, so long will they honor the writ of habeas corpus. As stated by Chief Justice Charles Evan Hughes, "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired."[73]

68. See A.B.A., *Section on Judicial Administration, Effective State Post-Conviction Procedures—Their Nature and Essentialities,* 4-5 (Aug. 1958 Draft); 9B ULA 345-47.

69. *Supra* note 65.

70. UNIFORM POST-CONVICTION PROCEDURE ACT, 9B ULA 352.

71. See ILL. REV. STAT. Ch. 38 §§ 122-1 to -7 (1963); ME. REV. STAT. ANN. tit. 14 § 5502 (1964); MD. ANN. CODE, Art. 27 §§ 645-A to 645-J (Supp. 1964); NEB. LEG. BILL 836, 75th Session; N.C. GEN. STAT. §§ 15-217 to -222; ORE. REV. STAT. §§ 138.510-.680 (1963).

72. The Law Revision Commission for the State of Tennessee has recently drafted a proposed Post-Conviction Procedure Act for Tennessee based upon a revision of the Uniform Post-Conviction Procedure Act as recommended by the Harvard Student Legislative Research Bureau.

73. Bowen v. Johnston, 306 U.S. 19, 26 (1938).

INTENTIONAL
BLANK