HABEAS CORPUS REFORM: CAN HABEAS SURVIVE THE FLOOD?

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Habeas Corpus, n. A writ by which a man may be taken out of jail and asked how he likes it.[1]

Fortunately for us all, Mr. Bierce's description of habeas corpus is somewhat inaccurate. Modern habeas corpus does not deal with a prisoner's guilt or innocence, but with the constitutional propriety of his incarceration; the basic issue which the writ evokes is whether or not the prisoner has been deprived of his liberty by means which comport with the requirements of due process.[2] Federal habeas relief is available only when persons allege they are being restrained in violation of the Constitution or of some law or treaty of the United States, by either a federal or state authority.[3] The writ is an invaluable device for ensuring individual rights[4] the importance of which has

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[1] A. BIERCE, THE ENLARGED DEVIL'S DICTIONARY 126 (1967). For an interesting insight into the man that was Ambrose Bierce, see Hillman, *Ambrose Bierce Hated Lawyers and Everybody Else*, 5 JURIS DOCTOR 51 (February 1975).

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

[3] For purposes of this Article, the term "habeas corpus" refers to the federal statutory writ of habeas corpus *as codified*, 28 U.S.C. §§ 2241-54 (1970). Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. *Id.* § 2241(a). The prisoner must be in custody under color of authority in a state or federal jurisdiction in violation of the Constitution or laws of the United States. *Id.* § 2241(c). Petitioner must allege such violations and his application will be subjected to an evidentiary hearing to evaluate its merits. Once the application has been denied following such an evidentiary hearing, the petitioner may reapply for relief, but this reapplication need not be entertained by a court of the United States unless it alleges and is predicated on a factual or other ground not adjudicated at the earlier hearing, and unless the judge or justice is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground for relief or otherwise abused the writ. *Id.* § 2244(b). In a habeas proceeding, the final order shall be subject to review by the court of appeals for the circuit where the proceeding is had. *Id.* § 2253. If the application is from a state prisoner in custody under the laws of that state his petition shall not be entertained by a federal forum unless he is in custody in violation of the Constitution and he has already exhausted the remedies available in the state system as to each issue upon which his claim is based without sufficient relief having been found. *Id.* §§ 2254(b),(d).

[4] A citizen's right to the writ of habeas corpus is one of the few personal rights specifically enumerated in the Constitution:

> 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.

been emphasized since the inception of the Union.[5] As our legal systems have developed, habeas corpus has borne many critical questions of individual rights to the Supreme Court and the resolution of those questions has been a vital factor in shaping our criminal justice system. As a consequence, the writ has been an important catalyst to that system's development.[6]

The writ's function as a guardian of liberty and a shaper of justice has, however, mired it in controversy. Thus, instead of being beatified, the "Great Writ"[7] has been bitterly attacked as a debilitating, justice-destroying, court-clogging hydra.[8] The debate over the function of the writ has never been more intense than it is today. Recent discussion of the writ has generated a veritable mountain of literature.[9] Nonetheless, the author maintains a defense of the "Great Writ" could not be more timely, because the clamor of voices calling for the writ's restriction has grown louder.[10]

U.S. CONST. art. I, § 9 cl.2. For excellent discussions of the constitutional history of habeas corpus, *see generally* Chafee, *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952); Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607-17.

[5]As Chief Justice Charles Evans Hughes once wrote:

> 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.

Bowen v. Johnston, 306 U.S. 19, 26 (1939).

[6]*See, e.g.*, Johnson v. Bennett, 393 U.S. 253 (1968) (unconstitutionality of certain alibi instructions); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at sentencing and at parole revocation proceedings); Stovall v. Denno, 388 U.S. 293 (1967) (constitutional requirements for properly conducted show-ups); Davis v. North Carolina, 384 U.S. 737 (1966) (constitutional requirements for properly conducted show-ups and standards for voluntariness of confession); Sheppard v. Maxwell, 384 U.S. 333 (1966) (constitutional requirements for a fair trial where extensive pre-trial publicity is involved); Pate v. Robinson, 383 U.S. 375 (1966) (right to hearing on the issue of mental competency to stand trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel at trial).

[7]At common law, habeas corpus was one of the four extraordinary writs, and was available only when no other avenue to relief was open. M. GREEN, BASIC CIVIL PROCEDURE 242 (1972).

[8]*See generally*, Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A.J. 323 (1971) [hereinafter cited as Doub]; Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) [hereinafter cited as Friendly I]; Huffstedler, *Comity and the Constitution*, 47 N.Y.U. L. REV. 841, 852-53 (1972); Santarelli, *Too Much is Enough*, 9 TRIAL 40 (May/June 1973) [hereinafter cited as Santarelli]; Weick, *Apportionment of the Judicial Resources in Criminal Cases: Should Habeas Corpus Be Eliminated?*, 21 DE PAUL L. REV. 740 (1972) [hereinafter cited as Weick].

[9]*See* note 8 *supra*.

[10]*See, e.g.*, Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974) [hereinafter cited as Friendly II]; Miller & Shepherd, *New Looks at an Ancient Writ; Habeas Corpus Re-Examined*, 9 U. RICH. L. REV. 49 (1974) [hereinafter cited as Miller & Shepherd].

This Article contains a discussion of the problems generated by federal habeas corpus in its application to state prisoners, since it is in this context that the writ is most often utilized, and because it is to this aspect of the writ's application that the most severe criticism is directed. The Article is in four sections. The first deals with the development of modern habeas corpus from common law[11] to its present status. Major criticisms of the writ and defenses to these criticisms are presented in the second section. The third section examines the more important proposals for habeas reform and the degree of their possible effectiveness and finally, the fourth section presents the author's suggested solutions to the habeas corpus controversy.[12]

DEVELOPMENT OF HABEAS CORPUS

The words habeas corpus first appeared around 1220 A.D. in an order directing an English sheriff to bring before the Court of Common Pleas certain parties to a trespass action.[13] Originally the words were used to describe a mesne action for appearance of parties at judicial proceedings. Not until 1679, when Parliament passed the Habeas Corpus Act was the term expressly applied to the rights of "persons restrained of liberty by other than criminal or civil process."[14] Under English common law the writ was restricted in its application to issues of nonjudicial detention without proper legal process or confine-

[11]There are numerous excellent treatments of the history of the common law writ and its incorporation into our legal system. *See generally*, D. MEADOR, HABEAS CORPUS AND THE MAGNA CHARTA 7-9 (1966); Carpenter, *Habeas Corpus in the Colonies*, 8 AM. HIST. REV. 18 (1903); Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1040-48 (1970) [hereinafter cited as *Developments—Federal Habeas Corpus*].

[12]Before beginning the discussion a caveat is in order. Modern America is presently experiencing a period of increased crime and the writ of habeas corpus comes into conflict with the present concept of law and order in America. The idea of releasing a convicted criminal because of a so-called technicality does not gain approval in a society whose leaders call for longer prison terms and whose legislators seek re-enactment of the death penalty. *See, e.g.*, N.Y. Times, Sept. 25, 1974, § L, at 20, col. 1 (remarks of President Ford); *id.*, Sept. 24, 1974, § L, at 18, col. 3 (remarks of Attorney General Saxbe); Browning, *The New Death Penalty Statutes: Perpetuating a Costly Myth*, 9 GONZAGA L. REV. 651, 705 (1974) (new death penalty legislation has been enacted in 28 states); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974).

Any discussion of habeas corpus must deal with issues more lasting than the present reactionary sentiment, issues which will remain with us as long as we live in a free and democratic society. Few such discussions have come forth in recent years and this perhaps is why we tend to lose sight of the traditional goal of individual liberty.

[13]BRACTON'S NOTE BOOK 85 (1887).

[14]Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55, 62 (1934) [hereinafter cited as Glass].

ment by courts lacking jurisdiction in the matter.[15] The writ passed to the American colonies by way of colonial charter but was not officially extended to England's colonies until 1861, long after the American Revolution.[16] The equivalent of the common law writ of habeas corpus was enacted by the First Congress in the Judiciary Act of 1789.[17]

Until immediately after the Civil War, the Supreme Court continued to view the writ of habeas corpus from its common law perspective. At this time, however, the Court began to expand its jurisdiction. This occurred at least partially because of the deficiencies in the Court's power to review federal convictions and to prevent trial judges from inflicting unwarranted penalties upon persons under criminal indictment. Although this may not fully explain the Court's motives in extending the writ's availability, a very real change was wrought in those postwar years.[18] Of even greater significance is the fact that, by 1867, Congress had vested federal courts with jurisdiction to entertain state prisoners' habeas corpus petitions in all state criminal proceedings in which cognizable issues of common law habeas corpus existed.[19] Federal courts, nonetheless, were not quick to aggressively exercise their expanded jurisdiction, and common law issues still remained the recognized bases for a habeas corpus petition under the then-existing concept of due process. As due process gradually took on a new shape the writ of habeas corpus evolved with it,[20] and the view that state prisoners' constitutional rights deserved attention became prevalent. This evolution was partially the result of the criticism that federal issues were frequently misconceived because of inadequate fact finding methods or insufficient trial records as the case passed through the state courts.[21]

Basically, the concept of federal court review has always been rooted in two theories: (1) that federal collateral review is important to assure that state court solutions to questions involving constitutional rights are correct and not clouded by any

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[15]*Developments—Federal Habeas Corpus, supra* note 11, at 1042-43.

[16]Glass, *supra* note 14, at 63.

[17]Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82. *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830).

[18]H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1313-15 (1953).

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

[20]*Developments—Federal Habeas Corpus, supra* note 11, at 1049-55.

[21]*Id.*, at 1057.

question of guilt or innocence of the defendant; and (2) that federal courts have a special fitness for deciding constitutional issues because federal judges are experts in federal law and independent of public pressures, allowing their adjudications to be objective, conscientious, and sympathetic to the individual in question.[22]

The question of the propriety of federal court review for state prisoners was squarely decided in the 1952 case of *Brown v. Allen*.[23] The Supreme Court made it clear that federal courts have authority to review claims already litigated by the state forum where federal constitutional issues are presented under a petition for a writ of habeas corpus, regardless of whether the state court decided the issue on its merits or simply refused the request for relief.[24] The contemporary version of habeas corpus relief is the product of the pre-*Brown* evolution and the work of the Warren Court during the early 60's. In 1963 the Supreme Court decided three cases which served to mold habeas corpus into its current form by increasing its availability and desirability to state prisoners.

The first of the three was *Fay v. Noia*,[25] in which Justice Brennan, writing for the Court, addressed three critical issues: (1) the efficacy of the independent and adequate state ground requirement that the prisoner have state as well as federal grounds for his petition; (2) the reasonableness of the requirement that the prisoner must have exhausted all state procedures for review and release before his petition may be viewed by a federal court; and (3) the possible waiver of habeas corpus remedies should the petitioner fail to raise an issue during his litigation under state administrative and judicial procedures. In resolving these issues, Justice Brennan found the adequate state

22Chisum, *In Defense of Modern Federal Habeas Corpus for State Prisoners*, 21 DE PAUL L. REV. 682 (1972) [hereinafter cited as Chisum].

23344 U.S. 443 (1953).

24*Id.* at 508. Earlier decisions, for example, Frank v. Mangum, 237 U.S. 309 (1915), had looked at the adequacy of the state corrective process, in determining whether relitigation by the federal court was proper. *Brown* clearly enunciated the role of the federal habeas corpus and found it to be totally independent of the state system. Adequacy of state process was no longer the touchstone.

Brown also clarified the federal-state relationship in the area of the exhaustion of state remedies requirement. In 1948, the judicially engrafted exhaustion requirement was codified. 28 U.S.C. § 2254(c) (1970). In construing that codification, the Court reasoned that the exhaustion requirement did not mandate resort to state collateral relief systems where the issues which would have been presented collaterally had already been decided on direct state review. 344 U.S. at 447-50.

25372 U.S. 391 (1963).

ground rule to be a function of appellate review, and thus inapplicable to federal habeas corpus proceedings. The Court further held the exhaustion requirement to be limited in its application "to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court."[26] As a necessary adjunct to these two rulings, Justice Brennan emphasized the fact that a federal court is vested with discretion to dismiss a habeas petition should it feel that an applicant had deliberately bypassed orderly state procedures.[27]

In the second of these cases, *Townsend v. Sain*,[28] the Supreme Court tackled the problem of evidentiary hearings. The federal habeas corpus statute requires that a petitioner be allowed to present his arguments at an oral hearing on the merits of his case whenever his petition is not summarily denied and probable cause has been shown.[29] Once the court hearing the claim has denied the petition either summarily or after evidentiary hearing on the merits, the petitioner may reapply to another court of proper jurisdiction. That court, however, has discretion to refuse to hear the petition unless it presents new questions of fact or law. In its opinion in *Townsend,* the Supreme Court set out guidelines for determining the specific instances when a hearing on the merits is required,[30] and the district court's power to order such a hearing even when the state had provided a full, fair, and reliable hearing was reiterated.[31]

In the third case, *Sanders v. United States*,[32] the Warren Court discussed the applicability of traditional notions of final-

[26]*Id.* at 399. This ruling allowed Noia access to a federal forum. The lower courts had refused him relief because of his failure to make a timely application for appeal.

[27]*Id.* at 438-39. In so doing, the Court made the waiver test of Johnson v. Zerbst, 304 U.S. 458 (1938), specifically applicable to the deliberate bypass question. In Henry v. Mississippi, 379 U.S. 443 (1965), the Court seems to suggest that the test for waiver in habeas cases may be less rigid than the *Johnson v. Zerbst* test.

[28]372 U.S. 293 (1963).

[29]28 U.S.C. § 2244 (1970).

[30]Chief Justice Warren, writing for the majority, listed six specific instances wherein a full federal evidentiary hearing is required. In so doing, he repudiated the *Brown v. Allen* tests of "exceptional circumstances and vital flaws." 372 U.S. at 313. The requirements of *Townsend v. Sain* are codified, though arguably in different terms at 28 U.S.C. § 2254(d) (1970).

[31]The Court continued:

> In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. . . . In every case he has the power, constrained only by his sound discretion to receive evidence bearing upon the applicant's constitutional claim.

372 U.S. at 318.

[32]373 U.S. 1 (1963).

ity in criminal cases to habeas corpus proceedings. Briefly, the basic tenet of the finality concept is that a point must be reached where a prisoner is left with no other remedy or alternative and must begin his sentence. In *Sanders* the Court held that the finality argument would not prevent reapplication for federal habeas corpus relief unless the prior federal proceeding met three criteria: (1) the issues first presented must be identical to those in the subsequent application; (2) the previous decision must have been made on the merits of the petitioner's case at an evidentiary hearing; and (3) the ends of justice would not be served by reviewing the merits of the subsequent application.[33] *Sanders* allows the petitioner to evade the impact of the finality concept, because even after the denial of relief under federal habeas corpus a petitioner may reapply under another line of attack and thereby delay the finality of his case.

This trilogy of cases announced that a prisoner bringing a federal habeas corpus petition was entitled to multiple, independent, federal determination of his constitutional claims on both procedural and substantive grounds. By removing the haze from the scope and availability of the writ, the Warren Court gave real meaning to habeas corpus. In the years following 1963 it continued the process of refinement in the areas of criteria,[34] procedure,[35] and concepts of substantive applications,[36] answering the challenge offered by Justice Hugo Black when he wrote:

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[33]*Id.* at 15-17. The finality effect of prior habeas procedure is codified at 28 U.S.C. § 2244 (1970). The opinion in *Sanders* provided basic rules for lower courts to utilize in the interpretation of those sections.

[34]The statute, as a jurisdictional prerequisite, demands that the applicant be "in custody." 28 U.S.C. § 2241(c) (3) (1970). The Court's decisions in Peyton v. Rowe, 391 U.S. 54 (1968) and Carafas v. LaVallee, 391 U.S. 234 (1968) began the shift away from former requirements of actual confinement. In *Peyton*, the court overruled an earlier decision, McNally v. Hill, 293 U.S. 131 (1934), which required a prisoner sentenced to consecutive terms to wait until actual service on the second sentence had begun before attacking the illegality of the conviction leading to that second sentence. The Court found that a prisoner serving consecutive sentences is "in custody" for purposes of section 2241(c) (3) and hence may challenge the conviction leading to a future sentence. In *Carafas*, the Court overruled still another earlier decision, Parker v. Ellis, 362 U.S. 574 (1960). In so doing, the Court found that a release of a petitioner subsequent to the institution of a habeas proceeding did not moot the case or render satisfaction of the "in custody" requirement impossible. The collateral disabilities and burdens which flow from a conviction were found to be sufficient restraints to satisfy the statute.

[35]Harris v. Nelson, 394 U.S. 286 (1969) (clarifying both the scope and availability of conventional civil discovery in habeas corpus proceedings).

[36]Johnson v. Avery, 393 U.S. 483 (1969) (affirming the right of prisoners to assistance in the preparation of post-conviction pleadings); Kaufman v. United States, 394 U.S. 217 (1969) (affirming the right of a federal prisoner to raise all types of constitutional claims on collateral attack).

> [I]t is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution. . . . Perhaps there is no more exalted judicial function.[37]

While the Warren Court moved to liberalize the writ of habeas corpus,[38] the present Burger Court has moved to check this liberalization and place the writ in a more conservative light.[39] In the brief years of its existence, the Burger Court has had numerous opportunities to construe the procedural aspects of habeas corpus, and in the majority of situations it has either maintained the status quo,[40] or signalled a retreat.[41] The present Court appears to agree with many modern critics of the writ that the societal values of present day America would best be served by returning the writ to its historic function of remedying "unjust" incarceration.[42] In *Schneckloth v. Bustamonte*,[43] Justice Powell indicated that the effect of such a return would mean the exclusion of fourth amendment claims from the scope of federal collateral review,[44] thereby restoring the constitutional balance of shared responsibility between state and federal

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[37]Brown v. Allen, 344 U.S. 443, 554 (1953).

[38]*See, e.g.*, Coleman v. Alabama, 399 U.S. 1 (1970); Chimel v. California, 395 U.S. 752 (1969); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Stovall v. Denno, 388 U.S. 293 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

[39]One of the most notable steps along this path has been the Burger Court's retreat from the exclusionary rule. *See* Oregon v. Hass, 95 S. Ct. 1215 (1975); Neil v. Biggers, 409 U.S. 188 (1972); Boyd v. Dutton, 405 U.S. 1 (1972); *Death of the Warren Court; The Suppression of the Exclusionary Rule; The Doctrine of Suggestive Identification*, 32 NLADA BRIEFCASE 78 (Oct. 1974).

[40]Miller & Shepherd, *supra* note 10, at 68-76.

[41]Preiser v. Rodriquez, 411 U.S. 475 (1973); Tollett v. Henderson, 411 U.S. 258 (1973); LaVallee v. Delle Rose, 410 U.S. 690 (1973); Murch v. Mottram, 409 U.S. 41 (1972); Milton v. Wainwright, 407 U.S. 371 (1972); Picard v. Connor, 404 U.S. 270 (1971). For an excellent discussion of all habeas corpus decisions rendered by the Burger Court, see Miller & Shepherd, *supra* note 10, at 68-76.

[42]The most instructive decision of the Burger Court is *Preiser v. Rodriquez*, 411 U.S. 475 (1973), wherein Justice Stewart, joined by Chief Justice Burger and Justices White, Blackmun, Powell and Rehnquist, defined the relationship between section 1983 actions and habeas corpus. In defining the crux of habeas corpus to be the very fact or duration of imprisonment, the opinion restricted what had been an extensive use of section 1983 actions by prisoners attacking constitutional violations leading to longer duration imprisonment. In so doing, the exhaustion of remedies requirement was reconstituted as an obstacle to prisoners seeking relief. *See generally* Flannery, *Habeas Corpus Bores a Hole in Prisoners' Civil Rights Actions—An Analysis of Preiser v. Rodriquez*, 48 ST. JOHN'S L. REV. 104 (1973); Plotkin, *Rotten to the "Core of Habeas Corpus": The Supreme Court and the Limitations on a Prisoner's Right to Sue, Preiser v. Rodriquez*, 9 CRIM. L. BULL. 518 (1973).

[43]412 U.S. 218 (1973). In the majority opinion, the "totality of circumstances" test for fourth amendment claims was reiterated. *See* 52 N.C. L. REV. 633 (1974).

[44]412 U.S. at 258.

courts.[45] Justice Powell's approach has been actively supported by Chief Justice Burger, and Justices Blackmun and Rehnquist.[46] Thus, at the present time, four members of the Supreme Court favor proposals restricting the writ's availability by eliminating fourth amendment claims from the scope of review.[47] As the Burger Court flourishes, this assent to restriction may become a judicial mandate.

Criticism and Defense

As a result of the Warren Court's treatment of the writ, the number of habeas filings showed a marked increase.[48] This in

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[45]*Id.* at 265. This restoration is very important in Justice Powell's eyes. As an example of strained federal-state relations, he cites remarks made by Justice Paul Reardon of the Massachusetts Supreme Judicial Court. Justice Reardon noted bluntly that among the problems causing friction "the first without question is the effect of federal habeas corpus proceedings on State courts." He then spoke of the "humiliation of review from the full bench of the highest State appellate court to a single United States District Court Judge." Justice Reardon then concluded that such broad federal powers encourage the "growing denigration of the State courts and their functions in the public mind." *Id.* at 264.

[46]Two decisions of the 1973 term appear to have expanded the "in custody requirements" liberalized by the Warren Court in Carafas v. LaVallee, 391 U.S. 234 (1968), Peyton v. Rowe, 391 U.S. 54 (1968), and Jones v. Cunningham, 371 U.S. 236 (1963). In Hensley v. Municipal Court, 411 U.S. 345 (1973), the Court held that a person released on their own recognizance was nonetheless "in custody" because of the restraints and impairments thereby imposed. In Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), the Court clarified the problem of interstate detainers. It ruled that a prisoner's physical presence was not an invariable prerequisite to the exercise of habeas jurisdiction and that the "custody" requirement is fulfilled so long as the Court had jurisdiction over the prisoner's present custodian. Thus, for detainer purposes the Court found an agency relationship between the state holding the prisoner and state demanding him.

In both of the decisions, Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist continued to call for a restriction of the writ in their attempt to return it to the traditional functions. 411 U.S. at 353-54 (Justice Blackmun concurring). *Id.* at 354-55 (Justice Rehnquist, joined by the Chief Justice and Justice Powell dissenting). 410 U.S. at 502 (Justice Rehnquist, joined by the Chief Justice and Justice Powell, dissenting).

[47]A recent manifestation of this trend was presented in Lefkowitz v. Newsome, 95 S. Ct. 886 (1975). The case involved the effect of a guilty plea on habeas corpus availability. Although earlier, in Tollett v. Henderson, 411 U.S. 258 (1973), the Supreme Court had, in effect, cut off habeas relief following a guilty plea, the collateral attack was allowed by the majority because New York law permitted post-guilty plea appellate review. 95 S. Ct. at 888-89.

The claim sought to be raised was one arising under the fourth amendment; consequently, Justice Powell, joined by the Chief Justice and Justice Rehnquist, reaffirmed their conviction that fourth amendment claims are beyond the scope of habeas review.

In the only other habeas corpus decision of the 1974 Term, the Court in a per curiam opinion held that a petitioner need not resubmit a claim to the state court when subsequent to a decision invalidating the statute that the petitioner had attacked on direct appeal. Francisco v. Gathright, 95 S. Ct. 257 (1974).

[48]Pre-trilogy habeas corpus was not a popular subject for legal writers. Since the mid-1960's, however, habeas corpus is certainly on the hit parade of legal subjects. In the main, the writing has been highly critical of the expanded writ and has sought its restriction. The critics have included academicians, judges and practicing lawyers. *See generally* Doub, *supra* note 8; Friendly I, *supra* note 8; Miller & Shepherd, *supra* note

turn gave a new impetus to the writ's critics. The major criticisms are threefold and may be termed the flood, finality, and friction criticisms.[49]

The so-called flood[50] criticism is based on the alleged consequences of the wide availability of the modern writ of habeas corpus. Simply stated, this argument consists of three points. The first is that the broad scope and alleged limitless availability of the modern writ have led to a staggering volume of habeas filings, the great majority of which are frivolous.[51] The second and third points of this argument are that the volume of habeas filings imposes an inordinate burden upon federal courts, which in turn results in the misallocation of judicial resources[52] and cursory review of habeas petitions.[53] The flood criticism has a certain degree of statistical validity; there is little question that, numerically, the disposition of habeas corpus petitions from state prisoners constitutes a significant part of the federal case

10; Mitchell, *Restoring the Finality of Justice*, 32 ALA. LAW. 367 (1971) [hereinafter cited as Mitchell]; Santarelli, *supra* note 8; Weick, *supra* note 8.

The writ in its present state is not totally without supporters. *See generally* Chisum, *supra* note 22; Lay, *Modern Administrative Proposals For Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 DE PAUL L. REV. 701 (1972) [hereinafter cited as Lay I]; Tuttle, *Reflections on the Law of Habeas Corpus*, 22 J. PUB. L. 325 (1973).

[49]This is not to say that these arguments are the only ones raised against the modern writ or that all critics necessarily subscribe to all three. However, the arguments of flood, finality and friction, in varying forms, represent the major thrust of habeas criticism today.

[50]The flood has also been described variously as a tidal wave and an avalanche. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973) [hereinafter cited as Shapiro].

[51]The statements about frivolous petitions are legion and often quite emotional. One commentator writes:

> Intent upon escape a prisoner may petition on and on. . . . Writ writing prisoners turn new constitutional interpretations into imaginative but almost always frivolous claims.

Santarelli, *supra* note 8, at 40. *See also* 119 CONG. REC. 1305 (daily ed. Jan. 26, 1973) (remarks of Senator Hruska); *Hearings on S. 895 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., at 102 (1971) [hereinafter cited as *Hearings on S. 895*].

[52]FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 13 (1972) [hereinafter cited as FREUND COMMITTEE REPORT]; *Hearings on S. 895, supra* note 51, at 101.

In a letter from former Attorney General Richard Kleindienst read into the Congressional Record by Senator Hruska, we find the following:

> And as District Attorney Frank Hogan of New York has said: "Our old cases come back in a great wave threatening to engulf the gasping trial courts already up to their chins in current business."

119 CONG. REC. 1305 (daily ed. Jan. 26, 1973).

[53]As Justice Jackson wrote:

> It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.

Brown v. Allen, 344 U.S. 443, 537 (1953) (Justice Jackson concurring).

load.[54] This argument's initial semblance of validity fades quickly in light of more thorough analysis. Actually, the judicial resources expended have yet to reach the proportions envisioned by critics arguing this issue. In fact, legal commentators have noted that the disposal of most habeas corpus petitions involves little of the federal judiciary's time.[55] Since the majority of applications are disposed of either prior to or immediately after the respondent's answer is filed,[56] their observations appear to be correct.

Two recent studies of federal habeas corpus in the states of Massachusetts[57] and New York[58] give a firm basis to the defense that habeas filings are not as resource consuming as some critics would contend. The Massachusetts study shows an extensive use of the summary dismissal by the district courts. In 1970, 51 percent of all habeas petitions filed in Massachusetts were dismissed on the basis of the petitioner's pleadings alone and in 1972 the

[54]As an example, in 1960 there were 871 habeas corpus petitions filed by state prisoners and the number of petitions from state prisoners seeking either release from custody or redress of grievances represented only 1.4 percent of all civil filings and 2.2 percent of all filings where the United States was not a party. By 1973 the number of habeas petitions filed had increased by some 900 percent to 7,784 and the number of petitions from prisoners seeking habeas remedies increased to 12.9 percent of all civil filings and 17.8 percent of all filings where the government was not a party. The filings since 1966 show the speed of this increase:

HABEAS CORPUS PETITIONS FILED, BY YEAR, 1966-1973

Year	1966	1967	1968	1969	1970	1971	1972	1973
Number	5,339	6,201	6,488	7,359	9,063	8,372	7,949	7,784

The number of habeas petitions filed in 1973 represents a 45 percent increase over those filed in 1966. It appears that the 9,000 petitions filed in 1970 represent an aberration and that the number of petitions has levelled off at the 7,500 - 8,000 level. 1960 ADMINISTRATIVE OFFICE, U.S. COURTS, ANN. REP. 116; *id.* at 130, Table 20 (1973); *id.* at 132, Table 21 (1973) [hereinafter cited as ANN. REP.].

From 1966 (218) to 1973 (4,174) the number of prisoner civil rights actions increased some 1,814 percent. In 1973, in Preiser v. Rodriquez, 411 U.S. 475 (1973), the Supreme Court clarified the relationship between federal habeas corpus and the federal civil rights act, 42 U.S.C. § 1983 (1970). Due to this decision the use of section 1983 by prisoners was limited to an action attacking confinement; it is to be expected that some of the civil rights actions will appear instead as habeas corpus petitions.

[55]LaFrance, *Federal Habeas Corpus and State Prisoners: Who's Responsible?*, 58 A.B.A.J. 610, 611-12 (1972).

[56]Chisum, *supra* note 22, at 698; Shapiro, *Where Have all the Lawyers Gone?*, 9 TRIAL 41 (May/June 1973) [hereinafter cited as TRIAL].

[57]Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973) [hereinafter cited as Shapiro].

[58]Hermann & Zeigler, *The Invisible Litigant: An Insider's View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 159 (1972) [hereinafter cited as Hermann & Zeigler]. This study is limited to pro se applications; however, according to the authors, the data can be extrapolated to include all habeas corpus petitions:

> [A]lmost all the actions designated . . . "prisoner petitions" are brought pro se, and conversely, almost all pro se applications are brought by state prisoners.

Id. at 169 n.42. The methodology used in this study is outlined in Hermann & Zeigler at 199 n.183.

figure was 32 percent.[59] The New York study, which dealt with pro se[60] complaints, showed that two-thirds of such complaints were terminated in summary fashion, many without a responsive pleading.[61] Because both studies show a negligible demand for responsive pleadings, the validity of the often heard argument that an inordinate amount of time is spent in responding to prisoner petitions is somewhat questionable. Statistics on the frequency of evidentiary hearings are also revealing. In Massachusetts, an oral hearing of some kind is held in only 38 percent of the habeas cases filed,[62] while in New York almost all such cases are determined without any sort of hearing.[63] Even more revealing are the national statistics, which show that in 1973 only two and one-half percent of all habeas petitions filed reached the evidentiary hearing stage.[64] Thus, though large numbers of habeas petitions enter the judicial pipeline, by the time a responsive pleading is filed, the flood has been reduced to a trickle; and by the time a petition reaches the evidentiary hearing stage, the trickle has been reduced to a drip.[65]

Nevertheless, the fact that the expenditure of judicial resources in processing habeas petitions may be less than posited has little to do with the real problem presented by the flood of frivolous petitions: their effect on the meritorious claim. This

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[59]Shapiro, *supra* note 57, at 332. Shapiro suggests that the decline from 51 to 32 percent is the direct result of the increased use of magistrates to process habeas corpus cases. This procedure was specifically proscribed by the Supreme Court in Wingo v. Wedding, 94 S. Ct. 2842 (1974).

[60]*Pro se* is the Latin term meaning "for one's self." These filings are made by the prisoner without the aid of an attorney.

[61]Hermann & Zeigler, *supra* note 58, at 201-02. This figure includes both applications from state prisoners and federal prisoners.

[62]Shapiro, *supra* note 57, at 336.

[63]In the fifty cases reviewed by Hermann and Zeigler, no hearings were held. Hermann & Zeigler, *supra* note 58, at 201.

[64]Ann. Rep., *supra* note 54, at 358, Table C-4 (1973). The Annual Report lists the 2.5 percent figure as describing those habeas corpus cases which were terminated prior to trial, at pre-trial. No attempt is made to equate notions of trial with notions of an evidentiary hearing.

[65]It is difficult to assess the resource expenditure involved in the processing of appeals involving habeas petitions. Certainly a habeas appeal is no more complicated than most and certainly less complicated than many federal fields such as anti-trust and school desegregation. Some circuits make extensive use of summary calendar type proceedings for speedy resolutions of habeas appeals. Such procedures act as an important preservative of judicial resources.

The Fifth Circuit utilizes such a procedure through its rule 18 (United States Court of Appeals, 5th Circuit Rule 18). The rule is well described in both Ferguson v. Dutton, 477 F.2d 121 (5th Cir. 1973) and Isbell Enterprises v. Citizens Casualty Co. of New York, 431 F.2d 409 (5th Cir. 1970). The rule allows for disposition of a case on the brief and without oral argument. In fiscal year 1969, 39 habeas petitions out of a total of 63 were classified as Summary II cases, resolvable without oral argument. In fiscal year 1970, 93 out of 158 were similarly classified.

problem is clearly a substantial one[66] and its "needle in the haystack" effect is compounded by the fact that a meaningful legal issue may be submerged in a poorly drawn petition.[67] Since no right to counsel in habeas corpus actions has been articulated, most habeas petitions are initially pro se,[68] and although courts are often lenient in construing applications for habeas relief,[69] the awkwardly drawn petition, coupled with the sheer weight of numbers, seriously impedes the aggrieved applicant. This problem must be solved, but caution is in order. As Judge Donald P. Lay[70] recently remarked:

> The problem is real. Its immensity requires solution. However, where access to the courts is at stake, the solution cannot be ill chosen or hastily constructed. Caution should thus be sounded against the too easy answer of denying the writ to certain types of claims in order to lessen the volume of pleas. Indiscriminate reduction of . . . these pleas, though designed to lessen this din, may in the end mute even the promises of our constitution.[71]

The second major criticism is the lack of finality in criminal proceedings caused by the contemporary writ. At its core the concept of finality calls for an adjudication which can be labelled "final," beyond which no possible recourse exists.[72] Because of the ready access to the writ there is never a final judgment in the strictest sense of the word; a petitioner may file an unlimited number of petitions attacking various aspects of his conviction.[73] This lack of finality, according to many critics, is a dangerous and debilitating by-product of the writ's expanded application.[74]

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[66]Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 24 (1956).

[67]*Cf.* Johnson v. Avery, 393 U.S. 483, 488 (1969). *See Developments—Federal Habeas Corpus, supra* note 11, at 1197-1205.

[68]Hermann & Zeigler, *supra* note 58, at 169 n.2.

[69]*See, e.g.*, Haggard v. Alabama, 494 F.2d 1187 (5th Cir. 1974); McEachern v. Henderson, 485 F.2d 694 (5th Cir. 1973).

[70]Judge, United States Court of Appeals, Eighth Circuit.

[71]Lay I, *supra* note 48, at 704; *See also* Brown v. Allen, 344 U.S. 443, 512-13 (1953) (Justice Frankfurter); TRIAL, *supra* note 56, at 42; Schaefer, *supra* note 66, at 25.

[72]As stated by Chief Justice Warren Burger: "The public is tired of the spectacle of appeals that lag for years and repeated appeals whose chief purpose is delay. . . . There must be finality at some point." Burger, *The State of the Federal Judiciary — 1971*, 57 A.B.A.J. 855, 859 (1971).

[73]Sanders v. United States, 373 U.S. 1 (1963).

[74]The most vitriolic statement appears in Doub, *supra* note 8, at 326:

> Conviction in the state courts now has become merely the starting point of interminable litigation. . . . What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, resifting and examining and reexamining of state criminal judgements for possible constitutional

The most authoritative work discussing the subject of finality in relation to habeas corpus is by Professor Paul M. Bator.[75] Initially finding that the decisions of the Supreme Court have withdrawn finality from criminal adjudication, he proceeds to list four primary reasons why finality is an important and overriding consideration. Professor Bator's first justification for finality is that it is necessary to preserve resources, "not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system."[76] Secondly, he views the finality concept as a "crucial element" of an effective criminal law.[77] Thirdly, Professor Bator argues that finality may be a necessary requisite to prisoner rehabilitation.[78] And finally, the Professor feels that a need for finality also flows from considerations of psychological repose, which embody the concept that "we have tried hard enough and thus may take it that justice has been done."[79]

Undoubtedly the call for finality has appeal. All members of the legal profession seek an efficient use of judicial resources, effective criminal law, rehabilitation of offenders, and confidence in our judicial system. However, the question remains: Is the substance of the finality argument sufficient to impose the

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> error. . . . No other nation in the world has so little confidence in its judicial system as to tolerate these collateral attacks on criminal court judgments.

Id.

[75]Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) [hereinafter cited as Bator]. Much of Professor Bator's article is based on his argument that the criminal justice process can never be totally error free. Thus he argues that if the existence of a mistake vel non determines the lawfulness of a judgment, then we are inevitably swept into a series of endless litigations because the possibility of mistake always exists. *Id.* at 447.

Thus we are left with ostensibly a moral question: Do we allow continued nonfinality in habeas corpus in searching for the paradigm mistake or do we cut off the search because it is too detrimental to traditional interest? *See e.g.*, Friendly I, *supra* note 8, at 146-50.

[76]Bator, *supra* note 75, at 451. According to the author: "The presumption must be that if a job can be done well once, it should not be done twice." *Id.*

[77]*Id.* at 452. Again in the author's words:

> Surely it is essential to the educational and deterrent functions of criminal law that we will be able to say that one violating the law will swiftly and certainly become subject to punishment, just punishment.

Id.

[78]*Id.* The first step in achieving that aim (rehabilitation of offenders) may be a realization that he is justly subject to sanction, that he stands in need of rehabilitation.

[79]*Id.* More recent commentaries have suggested that "confidence in our legal system" and "public exasperation" are also important elements of the finality arguments. Mitchell, *supra* note 48, at 373; Santarelli, *supra* note 8, at 40. These concepts are, however, implicit in Professor Bator's arguments and merely restatements of his general premises.

concept of finality upon habeas corpus where none presently exists?

The first of Professor Bator's arguments, that dealing with the expenditure of resources, has already been addressed at some length, but a comparison at this point between habeas and diversity cases may serve to further illustrate the finality argument's lack of validity. In 1973, of the 98,560 cases commenced in federal district courts, 26 percent were brought under diversity jurisdiction,[80] while only 12.9 percent were habeas filings of state prisoners.[81] The most critical figure in this comparison involves the number of cases requiring pre-trial or trial activities in both areas. While two and one-half percent of the state prisoner petition cases reach the pre-trial or trial stage,[82] 44 percent of the diversity cases require such resource expenditures.[83] If demands for the consumption of judicial resources must be reduced, self-interest in our scheme of constitutional protection dictates the retention of broad habeas corpus access[84] over similarly structured diversity jurisdiction, simply because habeas litigation involves constitutional claims and pure diversity litigation does not.[85] This solution to the expenditure of resources

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[80] ANN. REP., *supra* note 54, at 324, Table C-2 (1973).

[81] ANN. REP., *supra* note 54, at 132, Table 21 (1973).

[82] ANN. REP., *supra* note 54, at 358, Table C-4 (1973).

[83] The following table depicts the figures for 1970-1973:

TRIAL COURT DATA

Year	1973	1972	1971	1970
Total cases commenced, number	98,560	96,173	93,396	87,321
Diversity cases commenced, number	25,860	24,109	24,620	22,854
Diversity cases commenced, percent of total	26%	25%	26%	26%
Diversity cases terminated by court action, number	15,047	14,555	12,969	12,316
Diversity cases terminated after pre-trial, number	6,636	6,059	5,436	5,324
Diversity cases terminated after pre-trial, percent of total	44%	42%	42%	43%

ANN. REP., *supra* note 54, at 359, Table C-4 (1973); ANN. REP., *supra* note 54, at 322, Table C-4 (1972); ANN. REP., *supra* note 54, at 282, Table C-4 (1971); ANN. REP., *supra* note 54, at 245, Table C-4 (1970).

[84]

> If there is a burden, cut elsewhere or appoint more judges, especially those who sit within the jurisdiction of large state prisons and therefore bear the brunt of prisoner cases. But it is less mischievous and less candid to advocate curtailment of fundamental rights on the ground that judges are overworked.

Wulf, *Limiting Prisoner Access to Habeas Corpus—Assault on the Great Writ*, 40 BROOKLYN L. REV. 253 (1973) [hereinafter cited as Wulf].

[85] There is a significant outcry against retention of federal jurisdiction over diversity cases in situations where resolution of non-federal business causes an overburden. *See* Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125, 1126 (1973);

problem appears even more appropriate upon the realization that the traditional justification for the exercise of diversity jurisdiction, the fear of bias to out-of-state litigants, is no longer valid.[86]

The second and third of Professor Bator's propositions, those involving effective law enforcement and offender rehabilitation, pose difficult questions, not only with respect to habeas corpus but also as they touch upon our overall approach to criminal justice. The effectiveness approach stresses the undermining of our system of justice which might result from a legal process that in effect allows for no imposition of a *final* punishment.[87] This argument is overly simplistic in its definition of punishment, because in the great majority of cases the habeas petitioner is physically confined in a state correctional institution,[88] deprived of his liberty, and subject to difficult and often demeaning conditions.[89] The mere possibility that he may gain release at some indefinite time through habeas proceedings does not make his confinement any less of a punishment, and the fact that the prisoner may have been denied a constitutional right during litigation of his case indicates that he may not deserve such punishment. There is, therefore, little evidence that the broad availability of habeas corpus relief has a harmful effect upon the deterrent quality of our system of criminal law. While many may be ready to grasp every available straw in order to curb the alarming rise in America's crime rate, we should not forget that the writ's sole purpose is to guarantee that confinement will be imposed only upon those deserving of such punishment under our laws and our Constitution.

Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499 (1928); Friendly II, *supra* note 10, at 640-41; ALI STUDY OF DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 105-10 (1969).

[86]*See* note 85 *supra*.

[87]Bator, *supra* note 75, at 452.

[88]Custody is a concept rooted in habeas corpus. Only minor exceptions exist to the general rule that the petitioner be "in custody" before relief can be granted. The exceptions are generally stated in Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Hensley v. Municipal Court, 411 U.S. 345 (1973); Carafas v. LaVallee, 391 U.S. 234 (1968).

[89]The conditions in American state correctional institutions have been under constant criticism. At best, our state prison systems remove offenders from society and store them in minimally humane conditions. *See generally* R. CLARK, CRIME IN AMERICA 212-312 (1970) [hereinafter cited as R. CLARK]; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS 337-49 (1973); Burger, *We Refuse Responsibility for the People We Imprison*, STUDENT LAWYER, Mar. 1973, at 13-14.

The rehabilitation approach fails similarly, because the contention that an offender must recognize the justness of his conviction as a prerequisite to rehabilitation smacks of the puritanical call for religious penitence.[90] This concept turns on the theory that at some point the prisoner must consciously submit to lawful correctional authority and that as long as he can hope for release under a habeas writ he will not submit to such authority, and further, that this lack of submission will prevent him from benefiting by his prison experiences. Such an argument is strictly speculative and not verified by any statistical evidence. Consequently, while such an attitude may pervade contemporary correctional thinking,[91] it is without factual basis and should not be allowed to affect discussions concerning habeas corpus or the ability of the petitioner to be rehabilitated. In fact, there is strong evidence that penal institutions breed crime rather than eliminate it.[92] Any call for finality based on a rehabilitation argument is weak from its inception because of the treatment given petitioners by prison officials and the shortcomings of our correctional institutions as a whole.

Lastly, Professor Bator offers the doctrine of repose as supportive of his call for finality. This doctrine involves both the mental state of those in the judicial system as well as the mental attitude of the petitioner. At the heart of the finality criticism is the warning that the lack of a final decision, after which all parties may rest their minds with a knowledge that the future is

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[90] *See* Cressy, *Adult Felons In Prison*, in PRISONERS IN AMERICA 117, 119 (Ohlin ed. 1973); K. MENNINGER, CRIME OF PUNISHMENT 233 (1971) [hereinafter cited as MENNINGER].

[91] *See* Wilwording v. Swenson, 404 U.S. 249, 251 (1971); Johnson v. Avery, 393 U.S. 483, 488-90 (1969).

[92] R. CLARK, *supra* note 89, at 213-14; J. CULL & R. HARDY, INTRODUCTION TO CORRECTIONAL REHABILITATION (1973); Scott, *An Overview of Crime; A Smorgasbord of Crimes and Solutions*, in CRIMINAL REHABILITATION, WITHIN AND WITHOUT THE WALLS 5-9 (Scott ed. 1973); Nussbaum, *The Rehabilitation Myth*, 40 AM. SCH. 674, 676 (1971). Judge Friendly, in one of his works, comments that the lack of rehabilitation in our modern correctional systems is a "separate and serious problem demanding our best thought but irrelevant to the problem [habeas corpus] here." Friendly I, *supra* note 8, at 142. The author strongly disagrees insofar as lack of rehabilitation is used as an argument for limiting the availability of habeas corpus. In reality, correctional officials deliberately add to the tension between access to post-conviction relief and rehabilitation of the petitioner, because there is often an unwritten policy in prisons of excluding inmates with pending habeas writs from various rehabilitative programs. Chisum, *supra* note 22, at 696. However, even if such exclusion did not exist the question arises as to how effective our correctional institutions are in their efforts at rehabilitation, regardless of the attitude of the inmate.

The case, however, should not be overstated because there are certain to be some prisoners who may adopt the attitude that they will be released through habeas corpus and therefore should seek no benefit from correctional methods. *Id.* at 697.

certain, has a tendency to erode the effectiveness of our criminal system.[93] Even though this doctrine is valid in many respects, close scrutiny reveals the fallacy of its application as a justification for the denial of habeas relief. As has been stated throughout this Article, the basic policy promoted by habeas corpus is that of protecting constitutional rights and guarantees.[94] While repose and finality may be viable concepts in other areas of criminal law, they have no place "where life or liberty is at stake and infringement of constitutional rights [are] alleged."[95] Where allegations of deprivations of constitutional rights are present, deprivations which may lead to the total and dehumanizing loss of personal liberty, the benefits conferred by repose are far outweighed by the detrimental effects of mindless adherence to the principle of finality. This would only serve to destroy that which it is supposed to protect, the rights of the individual.[96]

The last and perhaps weakest of the three major criticisms of habeas corpus is that it creates friction between state and federal courts. The basis of this argument is that state courts resent the collateral review given state criminal convictions by federal courts through habeas corpus because they feel that their dignity is in question, especially when state supreme court decisions are collaterally reviewed by federal courts inferior to the United States Supreme Court.[97] But this resentment is not representative of the majority of state judges, regardless of what might be said concerning organized opposition.[98] Where such resentment does exist, it is not usually directed at habeas corpus, but at the Supreme Court for creating the substantive and procedural rights which seem to delay and complicate modern criminal pro-

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[93]Sanders v. United States, 373 U.S. 1, 8 (1963).

[94]*See generally* Chisum, *supra* note 22; *Developments—Federal Habeas Corpus*, *supra* note 11.

[95]Sanders v. United States, 373 U.S. 1, 8 (1963).

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> Our vigilance in protecting the rights of the accused has caused us to forego much that is desirable in the concept of finality. If this alertness has today so sapped our energies that we now must seek repose from our constant watch, who, then, will keep guard?

Lay I, *supra* note 48, at 708.

[97]The conflict that has arisen between state and federal judges is based mainly on the fact that after a petitioner is given a hearing in state court, his petition is heard over again in federal court as if it were an original proceeding. Knutson, *State-Federal Relations in Minnesota*, 50 F.R.D. 427, 436 (1970) [hereinafter cited as Knutson].

[98]*See Hearings on H.R. 5649 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 84th Cong., 1st Sess., at 32 (1955).

cedure.[99] Another factor which must be conisdered is that any friction existing is probably due more to the basic nature of our dual judicial system than to any one area of its existence. The Constitution presented us with both state and federal court systems, each with delegated spheres of influence, and whenever one system seeks to extend its reach, the other feels the intrusion.[100] This extension is normally on the part of federal courts, courts of limited jurisdiction, since any move to increase federal jurisdiction is naturally viewed as an intrusion upon the general jurisdiction of the state courts.[101] Therefore, each new move to expand federal habeas corpus review of state convictions causes sparks of friction to fly.[102]

Although there is little doubt that habeas corpus has, in many instances, worked to increase federal-state friction, the ultimate issue is one of values. Should the detriment of increased friction outweigh the possible benefits of federal review and protection of constitutional rights? The answer to this question must be "No."[103] Friction is inevitable in any system of federal collateral review,[104] and while it may be minimized, it can never be eliminated.[105] Any attempt to minimize this inherent friction would do immense damage to rights of a constitutional nature without creating a sufficient decrease in inter-system friction. Since the advantages of such a minimal decrease would not outweigh the disadvantages resulting from the accompanying restriction of individual rights, its use as a justification for an attack on habeas corpus is without reason. Because the federal judiciary exists to identify and protect individual rights, and

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[99]Chisum, *supra* note 22, at 693-94.

[100]Frankfurter, *supra* note 85, at 500. Federal courts are constantly made aware of this problem. *See, e.g.*, United States *ex rel.* McNair v. New Jersey, 492 F.2d 1307 (3d Cir. 1974); United States *ex rel.* Cleveland v. Casscles, 479 F.2d 15 (2d Cir. 1973).

[101]*See, e.g.*, Whiteley v. Warden, 401 U.S. 560 (1971); People v. Wade, 265 App. Div. 867, 38 N.Y.S.2d 369 (1942) (memorandum decision), *aff'd per curiam*, 291 N.Y. 574, 50 N.E.2d 660 (1943), *cert. denied*, 352 U.S. 974 (1957); United States *ex rel.* Stephen v. Shelley, 430 F.2d 215 (2d Cir. 1970); Desmond, *Symposium—Habeas Corpus Proposals for Reform*, 9 UTAH L. REV. 18, 21-22 (1964).

[102]Or, as phrased by Mr. Doub:

> There is perhaps no single attribute of federal judicial power more abrasive of the relations of the states and the Federal Government than the overexpansion of the great writ . . . as applied to state prisoners.

Doub, *supra* note 8, at 326.

[103]*See* Chisum, *supra* note 22, at 691-93.

[104]*Id.* at 694.

[105]*See generally* Brennan, *Some Aspects of Federalism*, 39 N.Y.U. L. REV. 945 (1964); Hopkins, *Federal Habeas Corpus: Easing the Tension Between State and Federal Courts*, 44 ST. JOHN'S L. REV. 660 (1970); Knutson, *supra* note 97.

because federal courts are manned by judges institutionally isolated from collateral pressures, any friction produced by habeas corpus review is bearable.

POPULAR RECOMMENDATIONS

The identification and discussion of problems surrounding the writ of habeas corpus have spawned a multitude of proposals for reform, the majority of which seek to restrict the writ's scope and availability at both the district and appellate court levels. These proposals are quite varied. Some, which have as their purpose the enhancement of the writ's efficacy, advocate only minor changes.[106] Others, whose sponsors seek to have the writ returned to its common law confines, call for complete abrogation of the contemporary writ of habeas corpus.[107] This section of the Article contains sketches of the leading proposals for habeas reform and comments pertinent to their probable effectiveness as solutions to the problems attending the writ's current availability and scope.

Basically, the major proposals for reform may be placed in three categories: (1) those calling for elimination of certain types of claims;[108] (2) single hearing proposals calling for the application of res judicata to habeas corpus;[109] and (3) proposals calling for the creation of an administrative or judicial body to conduct the initial federal review of habeas corpus petitions.[110]

In order to appreciate the wide variety of proposals which have been offered, a comparison of three presentations may be helpful. They concern the work of Judge Donald P. Lay of the Eighth Circuit, Judge Shirley M. Hufstedler of the Ninth Circuit, and Charles S. Desmond, formerly Chief Justice of the New York Court of Appeals. Judge Lay strongly advocates providing

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106*See, e.g.*, Lay I, *supra* note 48, at 732-39.

107Desmond, *Symposium: Habeas Corpus—Proposals for Reform*, 9 UTAH L. REV. 18, 19 (1964).

108Friendly I, *supra* note 8, at 142; S. 567, 93d Cong., 1st Sess. (1973) (proposals). Under these two proposals, fourth amendment, *Miranda*, and *Wade-Gilbert* type claims would not be cognizable in habeas corpus.

109Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597 (1974) [hereinafter cited as Haynsworth I]; Haynsworth, *A New Court to Improve the Administration of Justice*, 59 A.B.A.J. 841 (1973) [hereinafter cited as Haynsworth II]; Weick, *supra* note 8, at 750. Such proposals would require a prisoner to raise all issues which could have been raised on his first application or be thereafter barred from raising them. *See also* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON THE COURTS, ch. 6, at 112-37 (1973) [hereinafter cited at TASK FORCE REPORT: COURTS].

110FREUND COMMITTEE REPORT, *supra* note 52, at 14.

counsel to indigent habeas petitioners as a matter of right. This, he believes, would eliminate many frivolous petitions and help in the formation of relevant legal issues for presentation at a hearing.[111] Judge Lay considers the problem of frivolous petitions to be of paramount concern and his proposals are structured accordingly. The Judge does not, however, suggest restricting access to the writ as a tolerable solution; he instead proposes full utilization of existing mechanisms to prevent the frivolous petition from being filed. In order to accomplish this, he advocates: (1) providing counsel to indigent habeas petitioners as a matter of right; (2) maximum utilization of existing procedural safeguards;[112] (3) improvement of pre-trial and trial procedures, with particular emphasis on the omnibus hearing;[113] and (4) the initiation of procedures enabling an appellate court to remand a case for an evidentiary hearing whenever a constitutional claim is initially raised on appeal.[114] For proponents of the modern writ of habeas corpus, Judge Lay's proposals have great appeal, because their implementation would require neither restricting the writ's current scope and availability nor substantially changing the existing habeas corpus statute or procedure.

In contrast, Judge Hufstedler's proposals[115] for reform are procedural in nature. Her proposals, if accepted, would have particularly important and practical consequences. Calling the present routine "procedural nonsense," the Judge proposes alternative procedures. She suggests the foreclosure of all applications to the Supreme Court for direct review of state decisions in both civil and criminal cases. Judge Hufstedler then proposes that all applications for direct review of criminal convictions, after state procedure has been exhausted, be directed to a

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111Lay I, *supra* note 48, at 704.

112By insuring protection of basic rights at the investigative state, Lay reasons that there will be less opportunity for the defendant to find fault with his original conviction. *Id.* at 728.

113Such improvement in procedures will enable the trial judge to touch all bases of constitutional claims, thereby establishing knowing and voluntary waiver of such claims or alternatively furnishing an ample record which on later review, clearly outlines the defendant's grievance. *Id.* at 729. The omnibus pre-trial hearing has already been hailed as an important step in improving the quality of the criminal justice process. *See* Clark, *The Omnibus Hearing in State and Federal Courts*, 59 CORNELL L. REV. 761 (1974).

114Lay I, *supra* note 48, at 729-30; *See also* Lay, *Problems of Federal Habeas Corpus Involving State Prisoners*, 45 F.R.D. 45 (1969) [hereinafter cited as Lay II].

115Judge Hufstedler is a member of the American Bar Association Special Committee on Coordination of Judicial Improvements.

lower federal court. Finally, she proposes that federal appellate review of state habeas decisions be eliminated and that all federally grounded collateral attacks on state decisions be limited to cases of federal habeas corpus.[116] These proposals, in the extreme, could heavily restrict federal review of state proceedings while at the same time accelerate the process of exhausting state habeas procedures. They would not, however, change the scope or availability of the writ.

Certainly the most radical proposal generated by the habeas corpus debate is that of Justice Desmond. Citing the flood, finality, and friction arguments as controlling, he recommends total repeal of the statute making federal habeas corpus available to state prisoners.[117] Justice Desmond not only advocates a return to the traditional notions of habeas corpus, but also tentatively suggests the implementation of a five-year statute of limitations for habeas actions.[118] Since Justice Desmond's proposal is based on all three of the major criticisms which have been directed against the writ, it is susceptible to the countervailing considerations previously discussed in this Article.[119]

The preceding proposals indicate that habeas corpus has received consideration from each major segment of the political spectrum. Ranging from Judge Lay's more liberal concept of the writ, through the Hufstedler proposals and to Justice Desmond on the far right, it thus becomes clear that habeas corpus is in need of change, but the problem is not one of whether or not to reform the writ, but which area of thought most correctly expresses the direction which needs to be taken. Review of other current proposals reveals that it is not easy to choose this direction simply by deciding between the liberal, moderate, and conservative approaches.

While the judiciary has been responsible for the more recent extensions of the writ's application, Congress has increas-

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[116]Hufstedler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841, 852-53 (1972).

[117]Desmond, *Symposium: Habeas Corpus—Proposals for Reform*, 9 UTAH L. REV. 18, 19 (1964).

[118]Judge Desmond cites *In re* Mills, 135 U.S. 263 (1890) and *Ex parte* Siebold, 100 U.S. 371 (1879) as examples of the traditional notions of habeas. Both cases offer a "jurisdictional" test of availability of the writ. Thus, under a jurisdictional test, only the jurisdiction of the trial court would be reviewable.

[119]In the text accompanying notes 13-22 *supra*, the argument for a return to the common law concept of habeas corpus was criticized as inconsistent with the constitutional concepts of due process.

ingly sought to guide the writ's development with its legislative hand. Early congressional efforts were mainly directed toward a clarification of judicial extensions of the scope of the writ,[120] but more recent efforts have been oriented toward popular issues of law and order and have consequently led to calls for legislative restriction of habeas corpus.[121] The Justice Department, in conjunction with the National Association of Attorneys General,[122] recently drafted legislation calling for a sweeping revision of the federal habeas corpus statute. This proposal was introduced to Congress in both 1972[123] and 1973[124] as part of a legislative package drafted in response to the contemporary criticisms of habeas corpus.[125]

120For example, the exhaustion requirement, a doctrine judicially developed from the Supreme Court decision in *Ex parte* Royall, 117 U.S. 241 (1886), was codified in 1948 as 28 U.S.C. § 2254(h). The guidelines covering mandatory evidentiary hearings under the habeas statute represents partial codification of the Supreme Court decision in Townsend v. Sain, 372 U.S. 293 (1963). *See Developments—Federal Habeas Corpus, supra* note 11, at 1122 n.46.

121There were some early legislative attempts to severely restrict habeas corpus jurisdiction. In 1955, H.R. 5649, 84th Cong., 1st Sess. (1955) was introduced. Under the proposals contained in the resolution, habeas corpus would not issue if: (a) the prisoner had a prior fair and adequate opportunity to raise the federal questions in a state proceeding; or (b) there was under the state procedure a presently available post-conviction remedy in which federal questions could be raised and preserved for submission to the Supreme Court on appeal. Professor Pollak frames the intent of the proposed statute:

> The legislative purpose was to squeeze the would-be applicant for habeas corpus between the Scylla of implied waiver and the Charybdis of Supreme Court denial of certiorari.

Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 58 (1956) [hereinafter cited as Pollak]. Professor Pollak's article contains an in-depth discussion of H.R. 5649, 84th Cong., 1st Sess. (1955).

In 1959, the Congress attempted another foray into the field of habeas corpus. H.R. 3216, 86th Cong., 1st Sess. (1959). This Bill, if enacted, would have required: (1) the convening of a three-judge court to process habeas petitions; (2) direct appeal to the Supreme Court; and (3) the incorporation of certain res judicata concepts into federal habeas corpus. H.R. 3216 is described at length in Reitz, *Federal Habeas Corpus: Post-Conviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 513-24 (1960) [hereinafter cited as Reitz].

Supporters of habeas corpus restrictions have also tried to entail habeas corpus modifications to other legislative proposals. *See, e.g.*, Speedy Trial Bill, S. 895, 92d Cong., 1st Sess. (1971).

122Both of these agencies were instrumental in promoting the earlier attempts at revision. *See,* Pollak, *supra* note 121, at 51; Reitz, *supra* note 121, at 514 n.307.

123S. 567, 93d Cong., 2d Sess. (1972) (introduced by Senators Scott and Hruska); H.R. 13,722, 92d Cong., 2d Sess. (1972) (introduced by Representative Wiggins).

124S. 567, 93d Cong., 1st Sess. (1973) (introduced by Senators Hruska and Scott). There was also a flurry of house resolutions which closely paralleled the Hruska-Scott legislation. H.R. 3329, 93d Cong., 1st Sess. (1973) (introduced by Representative Wiggins); H.R. 6573, 93d Cong., 1st Sess. (1973) (introduced by Representative Moyne); H.R. 7084, 93d Cong., 1st Sess. (1973) (introduced by Representative Downing).

125119 CONG. REC. 1305-06 (daily ed. Jan. 26, 1973) (remarks by Senator Hruska).

With emphasis on finality,[126] the proposed amendments would, if enacted, severely restrict the writ's current scope and availability by limiting the types of constitutional claims cognizable in habeas corpus proceedings. Under these bills, the only claims cognizable under habeas corpus petitions would be: those which had not previously been raised[127] and which dealt with substantial constitutional rights;[128] those which protected the reliability of the fact-finding process at trial, or of the appellate process;[129] and those which raised the violation of rights as causative of a different outcome than that which might have occurred otherwise.[130] The imposition of these restrictions on federal habeas review would eliminate collateral review of such commonly raised questions as the admissibility of confessions,[131] illegally obtained evidence[132] and lineup identifications made in the absence of a lawyer.[133] Also, issues concerning the denial of jury trials in contempt or petty offense cases,[134] and those concerning the voluntariness of confessions and guilty pleas[135] would be deleted from the list of issues cognizable under habeas petitions.

These legislative proposals have raised a torrent of comment among both the critics and defenders of the modern writ.[136] As might be expected, those commentators who see the problems of constant relitigation of claims, undermining of rehabilitative efforts, and creation of federal-state tensions as critical issues in modern criminal law have welcomed these proposals as needed reform. However, other commentators who strongly favor habeas corpus in its present state fear the proposed amendments because of their potentially damaging effect upon the writ's historic role in the protection of human rights. These commen-

126S. 567, 93d Cong., 2d Sess. (1972) is thoroughly described in 61 GEO. L.J. 1221 (1973).

127S. 567, 93d Cong., 1st Sess. § 2(a) (1973), to be codified as 28 U.S.C. §§ 2254(a)(1) (i)-(ii).

128*Id.*

129*Id.*, to be codified as 28 U.S.C. §§ 2254(a)(1) (i),(iii).

130*Id.*, to be codified as 28 U.S.C. §§ 2254(a)(1) (i),(iv).

131Miranda v. Arizona, 384 U.S. 436 (1966).

132Katz v. United States, 389 U.S. 347 (1967); Mapp v. Ohio, 367 U.S. 643 (1961).

133Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Escobedo v. Illinois, 378 U.S. 478 (1964).

134Frank v. United States, 395 U.S. 147 (1969); United States v. Barnett, 376 U.S. 681 (1964).

135Miranda v. Arizona, 384 U.S. 436 (1966); Rogers v. Richmond, 365 U.S. 534 (1961); Haley v. Ohio, 332 U.S. 596 (1948); Brown v. Mississippi, 297 U.S. 278 (1936).

136*See, e.g.*, Friendly II, *supra* note 10; Wulf, *supra* note 84; *Developments—Federal Habeas Corpus, supra* note 11.

tators attack the amendments as a reactionary evil wrought by widespread concern over the increasing crime rate.[137] The intensity of this controversy dissipated when the 93d Congress adjourned without taking action on these bills. When Congress once again considers the proposals, however, the flame of controversy will probably be rekindled.

Presently, the most widely publicized proposal for reforming habeas corpus by limiting the cognizable issues is that of Judge Henry M. Friendly of the Second Circuit Court of Appeals. Judge Friendly calls for the restriction of habeas availability by permitting federal collateral review of state prisoners' petitions only in those cases where the state prisoner supplements his constitutional plea with a "colorable claim of innocence."[138] The Judge suggests that his concept of habeas corpus would be more congruent with the writ's true role, vindicating the innocent and wrongly imprisoned, and that adoption of the colorable claim of innocence criteria would "restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by its current excesses."[139] The adoption of Judge Friendly's proposal would serve to increase the burden on the

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[137]TRIAL, *supra* note 56, at 41-42; Wulf, *supra* note 84, at 257-64; 61 GEO. L.J. 1221 (1973).

[138]Friendly I, *supra* note 8, at 142. The standard, "colorable showing of innocence" would require:

> that the petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Id. at 160.

[139]*Id.* at 143.

[140]Judge Friendly's approach would eliminate *Miranda*, *Mapp* and *Wade-Gilbert* type claims from consideration in habeas corpus through his "colorable claim of innocence" requirement. The requirement, however, would not be applicable in four areas:

(1) Where the criminal process itself had broken down;

(2) Where the denial of constitutional rights is claimed on the basis of facts which are foreign to the record and their effect on the decision was not open to consideration of review on appeal;

(3) Where the state failed to provide proper procedure for making a defense at trial and on appeal; and

(4) Where there are new retroactive constitutional developments relating to criminal procedure.

Friendly I, *supra* note 8, at 151-54. Judge Friendly emphasizes that his colorable claim of innocence idea applies to both state and federal prisoner petitions. *Id.* at 167.

petitioner,[140] and to eliminate review of the most commonly litigated habeas issues.[141]

A compelling argument against the elimination of certain claims from habeas corpus is based upon the concept of governmental accountability. Habeas corpus is viewed by many members of the judiciary as an essential element in the protection of our individual rights from governmental deprivation. As Justice Brennan has remarked:

> Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. . . . Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment. . . .[142]

Proposals similar to those of Judge Friendly's and those presented in the previously discussed legislation would greatly diminish the value of the writ as a restraint upon the improper exercise of governmental authority.[143] Any attempt to assign second class status to certain rights by labeling them non-guilt or innocence related,[144] by indicating that they are related to the reliability of the fact finding process,[145] poses a danger to the entire system of criminal justice.[146]

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[141]Judge Lay disagrees. It is his contention that there exists no statistical data which demonstrates that barring post-conviction attack on *Mapp, Miranda* and *Wade-Gilbert* grounds, would appreciably cut down on the number of petitions filed. Lay I, *supra* note 48, at 721 n.92.

In Professor Shapiro's study of federal habeas corpus in Massachusetts, statistics show that the above type claims constitute between 25 and 50 percent of the total number of habeas petition filings. Shapiro, *supra* note 57, at 336.

[142]Fay v. Noia, 372 U.S. 391, 401-02 (1963).

[143]Judge Lay provides an excellent analysis of this side effect of these proposals. Fourth amendment *Miranda* and *Wade-Gilbert* claims have an extremely important function as a deterrent to illegal police conduct. Further, the *Miranda* and *Wade-Gilbert* rules serve to prevent misleading facts from prejudicing the judgement of the jury. Lay I, *supra* note 48, at 719-27.

[144]This guilt or innocence relation is the one posited by Judge Friendly through his colorable claim of innocence standard. Friendly I, *supra* note 8.

[145]These are the tests appearing in the proposed legislation, S. 567, 93d Cong., 1st Sess. (1973), as well as in the REPORT OF THE TASK FORCE ON COURTS, *supra* note 109.

[146]Or as stated by Professor Mishkin:

> The functions of habeas corpus change significantly when the relevant constitutional requirements are not those seeking to assure the reliablity of the conviction process, but rather those seeking to advance other objectives, such as respect for human dignity and integrity. It is not that constitutional guarantees of this latter kind are any less important; the contrary may well be true. Indeed, it is precisely the importance of these guarantees which justifies the granting of federal habeas corpus for their violation.

Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 86 (1965).

Other of the writ's reform-minded critics assert the single hearing concept as the foundation for sound reform. This concept is based on the thesis that in all habeas corpus cases, one hearing in which all issues may be weighed and examined for validity would serve to protect the petitioner's rights, and at the same time lessen the problems of flood, friction, and finality. This approach would replace the present method of repeated collateral review by affording the petitioner only one chance at gaining his freedom, after which resort to other remedies would be foreclosed.[147]

Among the proponents of this concept is Judge Paul C. Weick of the Sixth Circuit. Judge Weick agrees with Judge Lay and many other commentators in the call for the appointment of mandatory counsel for indigent petitioners,[148] but beyond this common premise their theories diverge greatly. Judge Weick's offering evinces acceptance of the finality, friction[149] and flood criticisms,[150] and would work a complete restructuring of the habeas statute. He recommends the implementation of a single hearing approach which includes a statute of limitations[151] and limited principles of res judicata.[152] In Judge Weick's view, the single hearing procedure has fairness as its greatest asset—fairness to prosecutors; fairness to inmates; and fairness to courts.[153] This procedure would streamline habeas corpus, but, at the same time, it would tend to increase the possibility of unknowing and involuntary waiver, because once the single hearing was

[147]Although the single hearing concept takes many forms, depending upon the attitudes of the different reformers, the one binding factor, the common thread, is the emphasis on finality. Each proposal has finality as its basic justification, and regardless of the technical apparatus by which it would be put into effect, the single hearing concept would end the present continuous litigation of habeas cases.

[148]Weick, *supra* note 8, at 750.

[149]*Id.* at 744-45.

[150]*Id.* at 747.

[151]Under Judge Weick's proposal, a petitioner is required to set forth all of his claims in his initial petition under penalty of implied waiver. There is an exception made where the claim is based on newly discovered evidence, but in no case can a request for federal collateral relief be brought more than 2 years after the date of conviction. *Id.* at 750-51.

[152]The district court's determination would be final as to all claims that could have been raised by the petitioner at his single hearing. Judge Weick also delves into the appellate process by requiring that the petitioner show that he is raising a "substantial" question before his appeal will be heard. *Id.* at 751.

[153]According to Judge Weick, the prosecutor is afforded a practical opportunity for retrial, an opportunity which presently does not exist because of the time delays involved in post-conviction proceedings. Further, the inmate is afforded federal review of his constitutional claims, separate and apart from the guilt determining process. Finally, there is fairness to the courts because the number of petitions would be diminished, and those filed would have had legal assistance in their preparation. *Id.* at 753.

held any claims overlooked would be barred. Such a result would serve the end of judicial economy at the expense of the petitioner's freedom. Judge Weick's proposal would serve to worsen the prisoner's plight by burying him even deeper in the mass of frivolous petitions and giving him a one shot chance to present his case.

Similarly to Justice Charles Desmond's previously discussed attack on habeas relief at the district court level, a task force of the National Advisory Commission on Criminal Justice Standards and Goals proposes radical changes at the appellate level. In its 1973 Report[154] the Task Force on Courts calls for abolition of the motion for new trial and abandonment of the traditional distinction between direct appeal and collateral attack.[155] Under its proposal there would be a single review hearing in which all alleged defects in the trial proceeding could be examined and settled with finality. This procedure would allow for further review only in narrowly defined and exceptional circumstances where compelling reasons for such extended review could be shown.[156] Once the state's comprehensive, single review hearing had been completed, review would be available by a federal court of appeals only if the petitioner could either establish a colorable claim of innocence or demonstrate the unreliability of the state fact-finding process.[157]

Another proposal for habeas reform which utilizes the single hearing approach, one less radical than that of the Task Force on Courts, has been put forth by Judge Clement Haynsworth of the Fourth Circuit.[158] Under his proposal, a petitioner would be entitled to one federal collateral hearing, during which he would be required to present all of his claims. A collateral hearing on claims not presented at this hearing would be allowed only under very limited circumstances.[159] Judge Haynsworth feels that this single hearing system of review would accomplish the important societal goals of improving the quality of justice and avoiding the deficiencies of the present system of

154TASK FORCE REPORT: COURTS, *supra* note 109, ch. 6, at 112-37. This chapter deals specifically with review of trial court proceedings.

155*Id.*, at 113. One member of the Task Force, Mr. Stanley Van Ness, dissents from this portion of the report dealing with unified review procedures. *Id.*

156*Id.* The exceptional circumstances are outlined *id.*, at 128.

157*Id.*

158Haynsworth I, *supra* note 109; Haynsworth II, *supra* note 109.

159Haynsworth II, *supra* note 109, at 844.

collateral review.[160] This may be true, but at the same time these limitations on issues cognizable would greatly diminish accessibility to the writ.

These single hearing proposals pose problems for habeas corpus because of their insistence in imposing traditional concepts of finality into habeas review. Albeit those which take the route of res judicata are not as severely detrimental as the "claim of innocence" or "reliability" proposals, habeas corpus is, and always has been, a vehicle which looks beyond procedural niceties in order to prevent infringement of individual liberties.[161] Injection of res judicata concepts into habeas corpus proceedings would silence meritorious claims for no other reason than that the petitioner was too ignorant to raise them in his first hearing.[162] For this reason, the implementation of the single hearing proposals would constitute an unnecessary and dangerous move toward limiting the writ's power to protect individual rights against governmental and judicial abuse.

Judge Haynsworth's proposals do not stop with the single hearing concept, but go further by calling for the creation of a National Court of Criminal Appeals, as an intermediate appellate court, with jurisdiction to review by writ of certiorari all federal question issues in both federal and state cases,[163] and all post conviction proceedings where a criminal conviction or term of imprisonment is at issue.[164] Appeals from state superior court decisions in criminal cases could then be made directly to the National Court of Criminal Appeals whenever they meet the

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[160]Haynsworth I, *supra* note 109, at 606.

[161]Brown v. Allen, 344 U.S. 443, 554 (1953) (Black, J.).

[162]Judge Weick argues that mandatory appointment of counsel will eliminate this fear that a petitioner may lose his claims by not raising them. Counsel, the Judge believes, will be able to discover and frame the relevant legal issues and thus prevent future waiver. Weick, *supra* note 8, at 753-54. While the author heartily endorses mandatory appointment of counsel, he does not see that single step as preventing the possible forfeiture which may occur through the single hearing procedure. Counsel may be disinterested or incompetent, or conversely, the prisoner may be unable at the time of appointment to fully articulate his grounds. In those instances, the single hearing procedure would work irreparable harm.

[163]Judge Haynsworth's proposal would have the National Court of Criminal Appeals handle both federal collateral and direct review, as well as appeals from state court judgements affirming convictions. This article is concerned with his proposal only as it affects the processing of habeas corpus petitions.

In his first article, Judge Haynsworth describes the writ's problems in terms of the volume of petitions which leads to a drain on judicial resources, the exacerbation of state-federal relations and the anti-rehabilitative effects of lack of finality. Haynsworth II, *supra* note 109, at 842-43. In his most recent work, he places strong emphasis on the unfairness of the present system to the prisoner litigant. Haynsworth I, *supra* note 109, at 602-03.

[164]Haynsworth II, *supra* note 109, at 842.

limitations of state post conviction review.[165] Judge Haynsworth's national court proposal has certain merit; however, as some of his critics have agreed, there are more direct and less complicated means of solving the habeas problem without replacing the present forums available in the contemporary system of relief.[166]

One final proposal merits consideration, that of the Federal Judicial Center's Study Group on the Caseload of the Supreme Court, popularly known as the Freund Committee. In its 1972 report, the Freund Committee presented the problem of frivolous petitions as the most serious criticism surrounding the writ:

> It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk.[167]

As a solution, the Committee recommended the use of a non-judicial, administrative federal agency to investigate and assess prisoner complaints concerning the denial of constitutional rights prior to federal court review.[168] Its investigation would be followed by a series of mediation conferences in an attempt to reach an extra-judicial settlement, and only if all mediation efforts failed would the prisoner be permitted to file a habeas corpus petition in the appropriate federal court. All investigative results would be made available to the federal district court to use in its decision making process regardless of whether such results were favorable or unfavorable to the prisoner.[169] Implementation of this proposal would not limit access to the writ[170] as such, and more importantly, it would provide a more detailed initial determination than is currently available.[171]

A satisfactory solution to the writ's present ills can be found without restricting access to the writ or effecting procedural re-

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[165]Haynsworth II, *supra* note 109, at 844.

[166]Friendly II, *supra* note 10, at 636.

[167]FREUND COMMITTEE REPORT, *supra* note 52, at 14.

[168]The institution would be headed by an official of high rank, would be fully staffed, and would have subpoena and visitatorial powe . *Id.* at 17.

[169]The Report contemplates a three month period for the handling of complaints. Observance of this three month waiting period would be a jurisdictional prerequisite to a habeas filing. *Id.*

[170]59 A.B.A.J. 139, 141 (1973).

[171]*See* Shapiro, *supra* note 57; Hermann & Zeigler, *supra* note 58.

organization. Proposals calling for implementation of mandatory appointment of counsel,[172] and for creation of a non-judicial agency to investigate and assess prisoner complaints[173] offer viable alternatives and have the potential of making the writ of habeas corpus of greater benefit to both the prisoner and the courts.

A Proposal For Reform

In this section, the author's own three-pronged attack on the problems of habeas corpus is presented. Unlike most of the aforementioned proposals, the following recommendations allow the use of presently available capabilities to benefit the prisoner as well as the courts. Each area of this attack is designed to best serve the concept of habeas relief in its new and expanding role with as little burden upon the courts and the petitioner as possible. Specifically, implementation of the author's proposal would entail: (1) elimination of the exhaustion of state remedies as a prerequisite to review; (2) formation of an investigative agency to weed out frivolous petitions before they reach federal district courts; and (3) mandatory appointment of counsel in all cases found to be meritorious by the investigative agency.

The exhaustion of state remedies requirement places a great and unnecessary burden upon the state prisoner, and it is this doctrine which is the root of much unfairness in the present habeas corpus system. Basically, the doctrine requires that a state prisoner's federal constitutional claim be raised first before a state tribunal,[174] either by way of direct appeal or post convic-

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[172]This particular problem is emphasized by Judge Haynsworth. *See* Haynsworth I, *supra* note 109, at 602-03.

[173]*See* note 156 *supra*.

[174]Though now codified, the exhaustion requirement is of judicial origin. *Ex parte* Royall, 117 U.S. 241 (1886).

In Picard v. Connor, 404 U.S. 270 (1971), the Supreme Court reaffirmed the longstanding rule that an applicant, seeking to exhaust, must present exactly the same claim to the state that he seeks to vindicate in the federal forum: "The rule would serve no purpose if it could be satisfied by raising one claim in the state courts and another in the federal courts." *Id.* at 276.

Justice Douglas has criticized the *Picard* decision as an over-technical application of the exhaustion requirement. *Id.* at 278.

In order for exhaustion to be complete, the state's highest court must make a final determination, although not necessarily on the merits. United States *ex rel.* Montgomery v. Brierley, 414 F.2d 552 (3d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970). *See also* Kelley v. Swenson, 481 F.2d 86 (8th Cir. 1973) (petition is not required to seek an en banc hearing of the state's highest court in order to satisfy the exhaustion requirement); Ross v. Craven, 478 F.2d 240 (9th Cir. 1973) (denial of certiorari by state's highest court is sufficient for exhaustion).

tion remedy,[175] before it can be raised in a federal forum.[176] Practically, this doctrine imposes a seemingly insoluble procedural blockade upon a prisoner seeking relief.[177] The unsuspecting prisoner is shuttled from court to court as his litigation drags on, causing him untold anguish and unnecessarily burdening both state and federal courts.[178] An examination of recent

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The Supreme Court has made it clear that a petitioner need not seek Supreme Court review of his state conviction as part of the exhaustion requirement. Fay v. Noia, 372 U.S. 391, 435 (1963), overruling Darr v. Burford, 339 U.S. 200 (1950).

The harshness of the exhaustion doctrine is mitigated somewhat by the "futility" exception. This exception allows access to a federal court without exhaustion where it is evident that under prevailing state law, presentation of the claim to the state court would be an exercise in futility. Wilwording v. Swenson, 404 U.S. 249 (1971); Mercado v. Rockefeller, 502 F.2d 666 (2d Cir. 1974); Sarzen v. Gaughan, 489 F.2d 1076 (1st Cir. 1973); Makarewicz v. Scafati, 438 F.2d 474 (1st Cir. 1971).

A corollary to the futility exception allows waiver of the exhaustion doctrine where the state has caused an excessive delay in the processing of the petitioner's claims in the state court. *See* West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); Prescher v. Crouse, 431 F.2d 209 (10th Cir. 1970).

A problem arises when exhausted claims are mixed with non-exhausted ones. The courts appear to have split over the question of whether the exhausted claims should be heard, or whether the hearing should be postponed until all the claims have been presented to the state system. *See* Blunt v. Wolff, 501 F.2d 1138 (8th Cir. 1974) (requiring all claims to be presented to the state system before hearing any of them); Singleton v. Estelle, 492 F.2d 671 (5th Cir. 1974); Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973) (both allowing consideration of the claims which had been fully presented even though coupled with claims which had not been).

For excellent discussions of the exhaustion requirement, *see generally* R. SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS, § 22, at 110-26 (1965); *Developments—Federal Habeas Corpus, supra* note 11, at 1093-103.

[175]A petitioner is only required to exhaust those remedies which are still available to him. Fay v. Noia, 372 U.S. 391, 434-35 (1963).

[176]Once the petitioner is in the federal forum, a federal judge is charged with the task of making an independent federal adjudication of the constitutional claim. Townsend v. Sain, 372 U.S. 293, 309-12 (1963); Davis v. Heyd, 479 F.2d 446 (5th Cir. 1973).

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> The most glaring defect [of the writ] stems from the requirement of the exhaustion of state remedies. A state prisoner with a federal claim must pursue the claim through the entire state court system. . . . He then must begin again a relitigation of his claim through the federal system. . . . If, in the process, it is found that the claim asserted in the federal court was not the claim asserted in and considered by the state courts, he is returned to the state court system to start all over again.

Haynsworth I, *supra* note 109, at 602.

[178]A recent Second Circuit case is a good example of the hardship, unfairness and procedural insensibility that the exhaustion doctrine works. In Ralls v. Manson, 503 F.2d 491 (2d Cir. 1974), the Court of Appeals for the Second Circuit reversed a district court decision granting a writ of habeas corpus to the petitioner Ralls, who had been sentenced to life imprisonment in December 1970 following a conviction for first-degree murder. An appeal from the judgement of conviction was filed immediately and after 10 months, the petitioner requested and received the appointment of a new attorney. In January of 1972 the state requested and received an extension of time for filing a responsive pleading to the appeal which continued until 1973. The trial record was finally transmitted to the Connecticut Supreme Court in October 1973, three years after the trial. Ralls finally filed a federal habeas petition which was granted in May of 1974, Ralls v. Manson, 375 F. Supp. 1271 (D. Conn. 1974), but this decision was reversed by the Second Circuit in July of 1974 because it was informed by the State of Connecticut that argument on Ralls' state appeal had been set for the following October. Ralls now must await his state appellate decision and retrace his steps. The comment

federal habeas decisions serves to emphasize the severity of this burden upon prisoners seeking relief and underscores the absurdity of the exhaustion requirement.[179]

Despite the obvious hardship placed on all parties involved, the exhaustion doctrine has not often been a source of criticism concerning habeas procedure[180] because it is viewed as an important symbol of the respect which the federal system holds for state court adjudications[181] and the principles of federalism.[182] In more practical terms, adherence to these principles of comity implies federal recognition of the vested interest which a state has in maintaining its criminal justice system and requires that a federal court never overturn a state court conviction on constitutional grounds without first giving the state system an opportunity to correct those errors.[183] Such an argument is difficult to overcome. There are, however, compelling reasons to do so when the practical effect of this doctrine is inordinate delay and minimal relief.[184]

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of Judge Lumbard about Mr. Ralls' first encounter with the exhaustion puzzle must apply to his second trip through the maze as well:

> The procedural history in this case shows not so much that the state prisoner has failed to exhaust his remedies but that the pursuit of those remedies has exhausted him.

503 F.2d at 494 (Lumbard, J., concurring).

[179]*See, e.g.*, the tale of the famous *Hawk* case as related in H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1490 (2d ed. 1973) (Petitioner's fifth attempt at post-conviction relief was remanded to the state court, primarily because of the inadequacy of the state record); Barry v. Sigler, 373 F.2d 835 (8th Cir. 1967) (Petitioner, after working through the federal system was sent back to exhaust his state remedies. He had begun to utilize his state remedies but after a long delay sought relief in the federal system. The long delay was found to have been due to failure to notarize his petition for post-conviction relief. Nonetheless, he was required to return to state court). For an interesting discussion of the *Barry* case see Lay II, *supra* note 114, at 52-54.

[180]Most recently, Professor Shapiro, while extensively criticizing the doctrine, nonetheless called for its retention. Shapiro, *supra* note 57, at 355-61. He makes five suggestions for improvements in the doctrine, such as elimination of the lack of exhaustion as a ground for dismissal when the petition is plainly lacking in merit, increased use of the futility doctrine as well as increased informal communication between state and federal courts.

[181]The exhaustion doctrine is not jurisdictional. Fay v. Noia, 372 U.S. 391, 419-20 (1963); Bowen v. Johnson, 306 U.S. 19, 27 (1939); *Ex parte* Royall, 117 U.S. 241, 249-50 (1886).

[182]Notions of the importance of respect for state courts to our federal system have been emphasized from the days of the constitutional convention. *See, e.g.*, THE FEDERALIST No. 82, at 534-38 (Modern Library ed. 1974) (A. Hamilton); *Ex parte* Royall, 117 U.S. 241, 248 (1886); Corell v. Heyman, 111 U.S. 176, 182 (1884); Robb v. Connolly, 111 U.S. 624, 637 (1884).

[183]Picard v. Connor, 404 U.S. 270, 275 (1971); Wilwording v. Swenson, 404 U.S. 249, 250 (1971); Fay v. Noia, 372 U.S. 391, 419-20 (1963); Darr v. Burford, 339 U.S. 200, 294 (1950); Bowen v. Johnston, 306 U.S. 19, 27 (1939).

[184]Certainly, such a statement runs the risk of minimizing the importance of comity. "The effect of federal habeas corpus on federal-state relations and the delicacy

State courts are no longer adequate adjudicators of constitutional claims in post-conviction matters because of two factors, the inadequacy of state post-conviction remedies[185] and the unconscious institutional bias of state judges.[186] At the present time only 28 states have enacted legislation which might be classified as providing adequate post-conviction relief.[187] Present state post-conviction remedies are obsolete and resort to them is costly and uncertain.[188] Normally, state remedies take the form of common law writs; for example, coram nobis,[189] which is outdated and provides an insufficient remedy.[190] The inadequacy of state remedies is compounded by poor records[191]

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with which habeas jurisdiction should be exercised needs no elaboration." Shapiro, *supra* note 50, at 358.

[185]There are numerous commentators who see the state court system as performing admirably in the field of post-conviction relief. *See, e.g.*, Bator, *supra* note 18, at 511; Desmond, *Symposium—Habeas Corpus—Proposals for Reform*, 9 UTAH L. REV. 18, 21 (1964).

[186]

> The supposition that the judge who has overlooked or disparaged constitutional conventions presented on pre-trial motions to suppress evidence or in the course of trial will avidly entertain claims of his own error after completion of the trial and guilty verdict defies common sense.

Friendly I, *supra* note 8, at 155.

[187]They are Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, West Virginia, and Wyoming. *See State Post-Conviction Remedies and Federal Habeas Corpus*, 12 WM. & MARY L. REV. 149 (1970). Since 1970 at least five states have been added to the list. *See* IOWA CODE ANN. §§ 663A.1 - 663A.12 (Pamphlet 1975); N.Y. CRIM. PRO. LAW §§ 440.10 *et seq.* (McKinney 1971); OKLA. STAT. ANN. tit. 22 § 1080 (Supp. 1974); S.C. CODE §§ 17-601 to 17-612 (Supp. 1974); WIS. STAT. ANN. § 974.06 (Spec. Pamphlet 1975).

[188]ABA STANDARDS RELATING TO POST-CONSTRUCTION REMEDIES 2 (1968).

[189]At common law coram nobis was applied to writs of error directed to another branch of the same court from the full bench to the court at nisi prius.

[190]*See, e.g.*, ALA. CODE tit. 15, §§ 1-43 (1958). Alabama habeas corpus relief is limited to two issues: (1) relief due to improper reasons for conviction; and (2) relief from excessive bail. *Id.* All cases in Alabama involving constitutional claims must be heard under the common law writ of error coram nobis and relief is restricted to errors having a direct effect upon the outcome of the trial and police investigative procedures. Trial procedure is drawn out and involves taking a claim through the different levels of the state court system.

[191]

> Even if a post-conviction remedy is available in the state courts . . . and it is adequate to reach the kind of error which the Supreme Court regards as a fundamental constitutional defect, the record is frequently quite unclear. These defendants are characteristically indigent, the records are in a messy state, and the transcripts may be incomplete or ambiguous.

Freund, *Symposium—Habeas Corpus—Proposals for Reform*, 9 UTAH L. REV. 27, 28 (1964).

and the lack of data on existing post-conviction mechanisms, especially at the trial court level.[192]

The general statutory and functional inadequacies of state post-conviction procedures and remedies are multiplied by the presiding state court judge in post-conviction relief cases. The state judge, hampered by inadequate state procedures, burdened by large numbers of petitions and charged by the people of the state with enforcement of criminal laws, faces an overwhelming task in giving a serious and fair hearing to state prisoners' constitutional claims. No doubt some succeed in providing such a hearing, but many fail, not because of a conscious effort to do so, but because of an institutionalized bias in favor of protecting state convictions.[193] This bias is present, regardless of whether the petition for post-conviction relief enters the system at the trial or appellate levels. Affirmance of the trial court decision is usually a matter of course because the same institutionalized bias prevails.[194]

Where state remedies for post-conviction claims are insufficient and the increasing flow of litigation causes extremely overworked state judges to view such relief dimly, the state prisoner seeking to overturn his conviction on constitutional grounds has little hope for success. The promise of an imminently fair and impartial hearing on his federal claims has become illusory because resort to the state court system for post-conviction relief does little more than create a mandatory delay, often of long duration, before federal review can take place. The functional futility of resort to the state court system for post-conviction remedies for constitutional infringements, coupled with the hardship and uncertainty that the associated delay imposes on the prisoner, seem to battle the considerations of comity

[192]The UNIFORM POST-CONVICTION PROCEDURE ACT (1965) prescribes that the post-conviction proceeding is commenced by filing a petition with the clerk of the court in which the conviction took place. This Act serves as the basis for modern state post-conviction relief statutes. 12 WM. & MARY L. REV. at 179.

[193]Friendly I, *supra* note 8, at 156.

[194]Professor Reitz undertook an extensive case study of 35 decisions where the applicant was denied relief in the state system but was successful in his federal attack. Reitz, *supra* note 122, at 461-513. In all his examples, state appellate courts furnished no assistance. He also refers to a rather infamous remark made by a Chief Justice of the Ohio Supreme Court:

> Our penitentiary has as many curbstone lawyers as any other state penitentiary, but we at least have a consistent record in Ohio . . . we have never allowed one of these writs of habeas corpus.

Id. at 472.

to at least a draw. Because the costs of the exhaustion doctrine so outweigh its federal-state relations benefit, the exhaustion doctrine should be eliminated. The exhaustion requirement has already been eradicated in civil rights actions,[195] and in habeas corpus itself there are mounting exceptions.[196] The fall of exhaustion would leave the states with concurrent jurisdiction over state prisoners' claims of unconstitutional incarceration, but no forced resort to the state system would take place. A substantial benefit which would result from abrogation of the exhaustion requirement would be elimination of the duplicate adjudication currently demanded by the present system.[197] Without exhaustion, re-litigation and the accompanying waste of judicial resources would be removed from the process.

Inherent in the call for elimination of the exhaustion doctrine is the concept that the prisoner seeking vindication of constitutional rights receives better treatment in the federal system.[198] Since the federal courts are the primary protectors of the Constitution,[199] it is their business to adjudicate these claims.

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[195]In Monroe v. Pape, 365 U.S. 167, 183 (1961), the Supreme Court held that there was no requirement for exhaustion of state remedies in actions brought under federal civil rights statutes. The Court found the federal remedy to be supplementary to the state remedy and hence found no reason for an exhaustion requirement, remarking that the state remedy need not be sought and refused before the federal one is invoked. There are clear implications that the Court was referencing those situations in which a state remedy, though adequate in theory, was not available in practice because of prejudice, passion, neglect or intolerance. *See* 68 COLUM. L. REV. 1201, 1204 (1968).

This "adequate in theory, but unavailable in practice" describes the present dilemma the state prisoner faces in exhausting state remedies. Of course, *Monroe v. Pape* dealt with civil rights redress which was arguably totally unavailable in many states.

The Supreme Court has not required prisoners to exhaust in section 1983 actions, but has recently emphasized the necessity for exhaustion in habeas. Preiser v. Rodriquez, 411 U.S. 475 (1973).

[196]The author is referring to the continuing vitality of the futility doctrine. *See generally Developments—Federal Habeas Corpus, supra* note 11, at 1097, 1103.

[197]Presently, the same claims are litigated in state forums and then re-litigated in the federal system. As Judge Knutson of the Minnesota Supreme Court has remarked:

> In these days of overburdened judges and lack of sufficient judicial manpower to handle an ever-increasing load, it makes little sense for both of us [state and federal judges] to spend time on a case if the petitioner is given an adequate hearing somewhere.

Knutson, *supra* note 97, at 430.

[198]Relief in federal courts is, of course, not astoundingly high. One study shows that in only 4 percent of the cases filed is the relief, which is sought, granted. ANN. REPORT, *supra* note 54, at 132 (1971).

The low possibility of relief has been attributed to the prisoner's present inability to compete, without counsel, in the legal system. Jacob & Sharma, *Justice After Trial: Prisoners, Need for Legal Services in the Criminal-Correctional Process,* 18 KAN. L. REV. 493, 521 (1970) [hereinafter cited as Jacob & Sharma].

[199]Brown v. Allen, 344 U.S. 443, 498-500 (1953) (Frankfurter, J.). *See also,* Lay I, *supra* note 48, at 716, and Brennan, *Some Aspects of Federalism,* 39 N.Y.U. L. REV. 945, 957 (1964), where Justice Brennan remarks:

Federal judges are not infallible,[200] but their neutrality toward and distance from state criminal justice systems frees their decision-making ability. These factors, coupled with their life tenure and responsibility to a federal constitution rather than to state politics, make it clear that federal judges are better suited to adjudicate state prisoners' constitutional claims.[201] Allowing a prisoner to initiate his federal claim in federal court is both more sensible and more efficient.

The problem of the flood of frivolous petitions is not eased at all by elimination of the exhaustion requirement. In fact, it is entirely possible that the problem will be intensified by such a measure. Prisoners, freed from the requirement of resort to state courts, may proceed to file federal petitions in even greater numbers, thereby increasing the detriment caused by the sheer weight of numbers. It is important to fashion a remedy that is directly responsive to the problem of the flood and its possible harm. Thus, as a further improvement in habeas corpus procedure, a federal agency should be created to investigate and assess prisoner complaints cognizable under federal habeas corpus statutes.[202]

There is ample precedent for creation and utilization of such an agency to process complaints of deprivation of federal rights before they reach the federal district court level. In 1964, Congress created the Equal Employment Opportunity Commission to process employment discrimination complaints.[203] Generally, the proposed prisoner petition agency would function in a similar manner.[204] The agency would be the federal system's

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I would remind you that Congress had no thought of requiring state prisoners to seek relief in state courts when enacting that statute in 1867. On the contrary, Congress contemplated that the single forum for redress of their federal claims was a federal court.

Id.

[200] *See* Bator, *supra* note 75, at 509.

[201] Dyer, *State Trial Courts From a Federal Viewpoint*, 45 FLA. B.J. 472, 474-75 (1971). Chisum, *supra* note 22, at 686. An added ingredient is that the population is accustomed to "unpopular" decisions by federal judges. State judges facing re-election or re-appointment are not similarly situated.

[202] The proposal is essentially that recommended by the Federal Judicial Center Study Group. *See* FREUND COMMITTEE REPORT, *supra* note 52, at 14. While the author is primarily interested in this agency's handling of state prisoner applications, the agency would also handle the petitions of federal prisoners.

[203] The structure, power and duties of the Equal Employment Opportunity Commission are set forth at 42 U.S.C. §§ 2000e-1 to -15 (Supp. III, 1973).

[204] The Equal Employment Opportunity Commission has accumulated an extremely large backlog of cases which are causing severe administrative problems. For a possible comparison, it is interesting to note that in fiscal year 1973, 10,800 complaints would probably have been filed with the prisoner petition agency. This total represents

entry point for claims of state prisoners. It would not be a substitute for any part of the existing federal system, but it would supplement this system, especially federal district courts. Whenever a claim is raised by a state prisoner, it would be reviewed by the agency's staff of lawyers and paralegals during a 180 day period. This review would entail a thorough investigation, which would be carried out to find and evaluate the merits of the case and the constitutional violations alleged to have occurred at any stage of the process leading to conviction.[205] Upon completion of the investigation, the agency would make a finding as to the validity of the claim. In the case of a meritorious claim, the agency would seek to resolve the matter through mediation with the state authorities, but should such mediation fail, the petitioner would then be free to seek judicial resolution of his claim.[206] In the case of a finding against the petitioner, he would still be free to seek review by a federal district court, but all findings of the agency would be presented to the court to aid it in reaching its decision.

The agency proposal has much to commend it, because it relieves the judiciary of the burden of dealing with frivolous petitions by functioning as a screen, and, through detailed investigation, separating the meritorious petitions from the frivolous ones.[207] The agency proposal solves the problem of the flood of frivolous petitions without making the writ less available. The state prisoner would still have full access to the writ, but the drain on judicial resources would be diminished.[208]

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all filings by federal and state prisoners under either habeas corpus or motion to vacate sentence statutes. ANN. REP., *supra* note 54, at 130, Table 20 (1973).

By contrast, the Equal Employment Opportunity Commission received 32,840 new charges in that same year. 1973 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ANNUAL REPORT 36.

[205]The agency would have limited subpoena powers, similar to those of other federal agencies. *See* 29 U.S.C. § 161 (1970).

[206]Under the author's proposal, resort to the administrative agency would be a jurisdictional prerequisite to habeas corpus relief. The author would favor a 180 day time period between the filing of the complaint with the agency and the filing of the habeas petition, as the jurisdictional time limit. If the agency takes longer than 180 days to process the complaint, the prisoner would be allowed to file without an agency report, since the waiting period would have expired. Hopefully, 180 days would be ample time to allow investigation and resolution.

In essence, the author is substituting an administrative exhaustion requirement for the former one involving state remedies. However, the maximum delay under administrative exhaustion is 180 days, and during the 180 days, a federal agency is investigating the allegations.

[207]There is a possibility that the number of petitions filed in federal court will decrease. Of course, the only true test is that of time.

[208]One possible weakness of this proposal must be noted. There are tremendous institutional differences between courts and federal agencies. A federal agency may well

These proposals for change in the field of habeas corpus require one more element to be complete. There is a severe need for a provision requiring appointment of counsel in habeas corpus cases because, at present, the prison population is the only segment of the general public which does not have immediate access to legal assistance in criminal proceedings.[209] The lack of appointed counsel often means that the prisoner is forced to compete in a system for which he is totally unprepared; as a result meaningful legal issues available to him often go unarticulated.[210] The agency proposal eliminates the need for counsel at the preparation stage, because agency personnel would be available to assist the petitioner in framing and articulating the issues involved in his complaint. The petitioner would still require legal assistance should he resort to the courts following the agency's decision, so counsel should be appointed in all cases where the prisoner petition agency finds the petitioner's claim to be meritorious. In the cases where the agency's finding was adverse, the court would retain discretion to appoint counsel.[211] Thus, the agency proposal, if coupled with a provision for mandatory appointment of counsel, would ensure effective assistance to a prisoner litigant seeking to redress his deprivation of constitutional rights.

CONCLUSION

Throughout the development of habeas corpus one thing has been evident, the increasing emphasis placed on individual rights. This emphasis has been evident in all areas of constitutional law. Habeas corpus is no exception and should not be made one by those critics who would seek to restrict constitutional rights in order to benefit the procedures created to protect such rights. In the author's judgment, implementation of restrictive proposals would fairly exemplify the old addage: "cutting off your nose to spite your face." Federal habeas corpus for state prisoners is an important and valid extension of federal jurisdiction, well within the traditional functions the writ was

be ineffective in its attempts to deal with state judges and prosecutors. Nonetheless, an agency could provide a valuable screening function.

[209] Lay I, *supra* note 48, at 733.

[210] Jacob & Sharma, *supra* note 198, at 495.

[211] The use of the meritorious/non-meritorious finding as the criterion for appointment provides a more meaningful guide to the judge than his ability to sift through mountains of petitions to find merit. *See id.*, at 524.

created to serve.[212] The courts were created to protect constitutional rights and protect them they should, regardless of the problems presented and whatever the cost.

However, to say that any reform of habeas corpus is unnecessary would be a mistake. The problems of frivolous petitions, fairness to the prisoner, finality, and friction do present valid reasons for seeking some change in the habeas procedure, but not, as some critics demand, in the present nature of the writ itself. Habeas corpus must be reformed by finding solutions which would make it less cumbersome rather than those which would impair its vitality. This may impose more work on the system, and although this consequence may seem damning to some, it is not the function of the judiciary to please its critics, but to serve those who seek its protection in times of need.

Hopefully, this author's proposed solutions will serve to awaken the realization that the judiciary's function is not only to protect society from men who seek to destroy it, but also to protect men from society. Where there is a breakdown in this responsibility, there is a breakdown in the basis of the democratic system. Because of this responsibility, the salvation of habeas corpus relief lies not in its restriction, but in its continued broad accessibility and scope. As one noted jurist has written:

> It has been said of habeas corpus that one who searches for a needle in a haystack is likely to conclude that the needle is not worth the effort. That emphasis distorts the picture. Even with the narrowest focus it is not a needle we are looking for in those stacks of paper, it is the rights of a human being.[213]

That search for human rights, with habeas corpus as the vehicle, must continue unabated.

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[212]*See* Fay v. Noia, 372 U.S. 391, 401-02, 408 (1963).
[213]Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956).

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