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FEDERAL JUDICIAL CONTROL OF STATE CRIMINAL JUSTICE

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It is pretty generally agreed that many matters which in the past were regarded as lying wholly within state control, are now being subjected gradually to national authority. A recent phase of this development has to do with federal judicial review of state criminal administration. By means of the reviewing process, the federal judiciary occasionally nullifies those court convictions which are an essential element of the state's police power. The preservation of the public peace, repose and good order under this power is one of the most important obligations thrust impliedly upon the states by the federal constitution.

There are basically two procedures by which the federal courts exert their influence over state criminal justice. One of these is by reviewing state convictions on appeal; the other is by testing them under writs of habeas corpus. On appeal, the United States Supreme Court consults the record of the case made below, after which it either affirms, modifies or reverses the judgment rendered there. In a habeas corpus proceeding, the federal courts make a collateral examination of the judgment, the object of which is to ascertain whether it has been found properly from a more or less mechanical standpoint. The courts in this type of proceeding are expected to concern themselves with the extrinsic rather than the intrinsic aspects of such determinations. Though state officials are heard to inveigh against both of these devices for scrutinizing their criminal trials, they reserve their stronger criticism for the habeas corpus process.

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The origin of the habeas corpus writ is somewhat uncertain. But one thing about its inception which appears secure is that it first emerged in medieval England. The courts of that country brought it into being somewhere in the fourteenth century, and continued to nurture it for two hundred years or so while it assumed a fairly definite shape. In the seventeenth century, during the era of Stuart despotism, the writ was given a more concrete and stabilized form by the British Parliament. By the Habeas Corpus Act of 1679 that body endowed it with a statutory quality and eminence.

For many decades the writ was used in England primarily as a brake upon executive action.¹ Situations would arise wherein the king's officers would seize a person without the slightest color of law, thrust him into prison, and keep him there until the prosecuting attorney saw fit to bring him to trial. Sometimes the period of delay would run into years. But with the advent of the habeas corpus device, such arbitrary procedures suffered a rebuff. Through the use of this invention, a court could compel the jailor to bring a prisoner before it, and if it then found the appropriate detention process lacking or defective, would set the accused free.

The writ, however, was also directed now and then against judicial conduct. It was used, for example, where two courts claimed jurisdiction over the same person.² In such an instance, the one asserting the superior authority would issue the writ virtually ordering the lower court to send up for trial a defendant whom it was holding for that purpose. Usually the subordinate tribunal complied with the mandate from above.

But if there was involved merely the question whether a particular court or any court, under the law, had jurisdiction over the prisoner, the issue was resolved by the trial judge with right of appeal to a higher bench. An issue of this sort was not regarded as the proper subject for a habeas corpus proceeding. Likewise, where it was alleged that the defendant had been denied certain procedural rights, the matter was ad-

1. The late Justice Robert Jackson stated in one of his more recent opinions: "The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial." *Brown v. Allen*, 344 U.S. 433, 533 (1953). See also Longsdorf, *Habeas Corpus: A Protean Writ and Remedy*, 8 F.R.D. 179 (1949); Goodman, *Use and Abuse of the Writ of Habeas Corpus*, 7 F.R.D. 313 (1948); Wyzanski, *The Writ of Habeas Corpus*, 243 ANNALS 101 (1946); Note, *Federal Habeas Corpus for State Prisoners*, 55 COL. L. REV. 196-209 (1955).

2. Howard, *Habeas Corpus*, 7 ENCYCLOPEDIA OF SOCIAL SCIENCES 233ff. (1932).

judicated in the criminal action rather than in a special habeas corpus proceeding such as is permitted today in this country. Nor would the writ be granted where it was claimed that a court had failed of jurisdiction because it was acting under an invalid law, the reason being of course that an act of Parliament or settled principle of the common law was seldom, if ever, questioned judicially in England on grounds of unconstitutionality. The scope of the writ in our early colonies, it might be added here, was substantially as broad as it was in the mother land.

Instances in which federal intervention in state criminal proceedings by habeas corpus is actually necessary always have been and still are relatively few. These few invariably pertain to attempts by a state to interfere with the execution of the sovereign national power. They rarely concern the purported civil rights of individuals, which the federal government is charged with protecting. Any attacks upon these usually can be litigated and determined under writs of certiorari directed by the Supreme Court to the highest state court.

The first Congress, realizing the true function of the writ, strictly limited its issuance by the federal judiciary whenever a prisoner held under state process was involved. In the Judiciary Act of 1789 Congress provided that the writ should "in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."³ In other words, this section allowed the writ to be granted in behalf of a person in a state jail and under state process only when he was needed to give testimony in a federal court.

The first effort to make the writ available as a direct limitation upon state criminal power took place in 1833. There occurred that year the celebrated nullification controversy in South Carolina, during which several federal officials were arrested for attempting to execute the United States tariff laws in that state. Congress, in order to free these men and also to protect others enforcing the national authority, empowered federal judges to grant writs of habeas corpus to all persons so detained by a state. The statute involved provided for the issuance of the process to a prisoner in

3. 1 STAT. 82 (1784).

jail on account of an act he had "done or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof."⁴ While the measure may have had a broader connotation, it was designed principally to release persons incarcerated for carrying out a federal law or mandate.

Nine years later, the use of the writ was expanded to cover situations which threatened to disturb our amicable international relations. This expansion stemmed from the arrest of a British subject named Alexander McLeod, who in 1841 was charged by New York state with killing an American citizen for having given aid to the insurgents in the 1837 rebellion against the Canadian government. The British foreign office on that occasion demanded the immediate release of McLeod, asserting that he had committed the homicide while executing a valid command of the English government. Our state department, while sympathizing with the British position, felt constrained nevertheless to deny the request, giving as the reason for its refusal that, under our constitutional system, the trial of McLeod was entirely a concern of New York state. Fortunately, for our amity with England and Canada, the New York jury in 1842 acquitted the defendant and the incident was closed. Congress, however, was determined to forestall a repetition of this occurrence, and immediately authorized the federal courts to grant a writ of habeas corpus to any person in state custody alleging imprisonment for an act done pursuant to the order of a friendly government.⁵

Thus by the time Congress was ready to widen again the coverage of the writ, there were essentially three situations in which a federal court through its issuance might release a prisoner from state confinement. It might release him if 1) he was needed to testify in a federal court, 2) he had been arrested by a state for attempting to enforce a federal law, or 3) he was being restrained in his liberty by a state for acts done under the authority of a friendly power.

The next extension of the writ came in 1867 during the tragic Reconstruction days in the South. To protect the newly liberated negroes, the so-called scalawags and the northern carpetbaggers from illegal arrest

4. 4 STAT. 634 (1833).

5. 5 STAT. 539 (1842).

and incarceration at the hands of the Southern governments, Congress enacted one of the most sweeping measures of its kind. The law in question authorized federal tribunals to issue the writ to any prisoner "in custody in violation of the constitution, laws, or treaties of the United States."⁶ That the law was of the catch-all variety, fashioned to bring every type of state criminal action based upon a federal claim under the survey of the national tribunals, was attested by Chief Justice Salmon P. Chase. When discussing this law in the famous *McCordle* case, the Chief Justice remarked:⁷

This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and every judge every possible case of privation of liberty, contrary to the national constitution, treaties, or laws. It is impossible to widen this jurisdiction.

But broad and comprehensive as the coverage of this law might be, the use of the federal habeas corpus writ was still restricted to those situations where a positive federal authority was involved, or where the states were either forbidden to exert certain powers or were circumscribed in exercising them. Essentially, the only such powers at the time amenable to federal control were those mentioned negatively or otherwise in section 10 of article one, sections one and two of article four and the thirteenth amendment of the Constitution. This limited employment of the writ, however, soon ceased, for in 1868 came the fourteenth amendment with its unbounded capabilities. That amendment's vague, nebulous and all-embracing due process clause, its privileges and immunities provision and its equal protection section gave Congress and the courts almost limitless authority to curb nearly every kind of state action.

The Habeas Corpus Act of 1867, it should be stated here parenthetically, was not conceived entirely in a spirit of good will and impartiality, as anyone familiar with the history of the Reconstruction era is aware. Nor for that matter was the fourteenth amendment. Both were adopted when the memories of Andersonville and Libby were still green, and the other hates and animosities engendered by the War between the States remained unabated. The law of 1867 was designed, as it soon became apparent, to

6. 14 STAT. 385 (1867).

7. *Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 325 (1868).

protect primarily those in sympathy with the new Reconstruction policy of Congress and was not meant as a safeguard for those who disagreed with it. The *McCardle* case well illustrated this attitude.⁸

Although given a wide grant of power in habeas corpus matters, the federal courts for a number of years used it sparingly as applied to state criminal cases. For the most part, the power was exercised only in those instances where the state had assumed a jurisdiction which it did not constitutionally possess, as the term was historically understood. Supreme Court Justice Joseph Bradley stated the prevailing practice in 1880 in *Ex parte Siebold*:⁹

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the prisoner or cause, or some other matter rendering its proceeding void.

Justice Bradley did not make clear what some of the "other matters" might be like, to which he alluded here, but it is obvious that he felt that the federal habeas corpus power under existing law was strictly circumscribed and limited primarily to jurisdictional questions.

But shortly after the foregoing decision was handed down, the Supreme Court began tampering with this general rule in two ways. First, it commenced giving the term jurisdiction a much broader connotation than it enjoyed when used in its historic sense. Second, it initiated the concept of

8. This case arose in 1867 with the arrest of William H. McCardle in the South for criticizing the military officials in command in that area. When he was tried there before a military tribunal, he sought a writ of habeas corpus to challenge the jurisdiction of that court. The writ was denied and he appealed from this denial to the United States Supreme Court. However, while this appeal was pending, Congress withdrew the appellate power of this high tribunal to hear such cases. It did so out of fear that the court might feel constrained to declare the law under which the military tribunal was created, and inferentially all other Reconstruction measures, unconstitutional. The Act repealing the Supreme Court's appellate power was enacted March 27, 1868. 15 STAT. 82 (1868). A short time thereafter when the question of the validity of the repeal law itself was presented to the Supreme Court, that body, having no desire to lock horns with Congress, which was in an ugly mood, proceeded, after considerable procrastination, to hold the measure valid. *Ex parte McCardle*, 7 Wall. 514 (1869). Sixteen years later, long after the Reconstruction period had come to a close, Congress restored this appellate power to the Supreme Court. 23 STAT. 437 (1885).

9. *Ex parte Siebold*, 100 U.S. 371, 375 (1880).

courts "losing" jurisdiction in the course of a proceeding, even though they had possessed it at the start of an action. In 1885, the Supreme Court held, for example, that a court forfeited its jurisdiction if it failed to indict a prisoner through a grand jury, where such a jury was constitutionally established. This ruling was based on the theory that the grand jury is as much a part of the court as the judge himself, without whom obviously the court would be incomplete and hence lacking in jurisdiction.¹⁰ The court found, however, almost simultaneously, that neither failure to provide a legally constituted grand jury,¹¹ nor denial of compulsory process to a prisoner caused a forfeiture of jurisdiction; in each such case, it held, there was involved a mere matter of irregularity rather than one of constitutionality.¹²

But though the Supreme Court of the eighteen hundred eighties was unable to discern any relationship between denial of compulsory process as provided in the sixth amendment and jurisdiction, the same court of the nineteen hundred thirties saw a definite association between jurisdiction and another right protected by that amendment, namely, the right to counsel. In 1932 the Supreme Court began holding that compulsory appointment of counsel for certain defendants was part of due process,¹³ and intimated that a lack of due process might cause forfeiture of jurisdiction. In a more recent decision¹⁴ the Court, speaking through Justice Black, went a step farther and declared bluntly that neglect to appoint

10. *Ex parte Wilson*, 114 U.S. 417 (1885); *Ex parte Bain, Jr.*, 121 U.S. 1 (1887). It is somewhat puzzling how a grand jury indictment, which is only a procedural right, and therefore waivable by the defendant, can have any relation to the matter of jurisdiction. *U.S. v. Gill*, 55 F.2d 399 (D. N.M. 1931); *Patton v. U.S.*, 281 U.S. 276 (1929); *Edward v. State*, 45 N.J.L. 419 (1883); *State v. Longo*, 132 N.J.L. 515, 41 A.2d 317 (1945); *De Gayler v. Corwin*, 314 Mass. 525, 51 N.E. 2d 251 (1943). It is puzzling also since in many jurisdictions such an indictment is not even required, and hence no longer regarded universally as a fundamental right.

11. The grand jury in the particular case in point was illegal because it included an ineligible alien. *Ex parte Harding*, 120 U.S. 782 (1882); *Keizo v. Henry*, 211 U.S. 146 (1908).

12. *Ex parte Harding*, *supra* n. 11. See also *Cooke v. U.S.*, 267 U.S. 517 (1925). In 1906 the Supreme Court held that invasion of the defendant's privilege against self-incrimination constituted no jurisdictional defect. *Matter of Moran*, 203 U.S. 96 (1906).

13. *Powell v. Alabama*, 287 U.S. 45 (1932).

14. *Johnson v. Zerbst*, 304 U.S. 458 (1938). See also *Wade v. Mayo*, 334 U.S. 672 (1948); *Foster v. Illinois*, 332 U.S. 134 (1947); *Tomkins v. Missouri*, 323 U.S. 458 (1945); *Betts v. Brady*, 316 U.S. 455 (1942); *De Meerleer v. Michigan*, 329 U.S. 663 (1947); *Marino v. Ragen*, 332 U.S. 56 (1947).

counsel for most indigent defendants rendered the trial court incomplete and hence deprived of any jurisdiction it may have had.¹⁵

The federal courts in late years have been paying less attention to the jurisdictional factor and giving more heed to allegations of lack of due process and of "fundamental fairness"¹⁶ when issuing writs of habeas corpus. They are allowing the writs, for example, where it is charged that a confession has been obtained by inducement, fraud, trickery or duress.¹⁷ They are also granting them where the complaint is that the prisoner has been convicted on false testimony known to be such by the prosecutor,¹⁸ or was tried under the alleged influence of mob violence.¹⁹ Some legal authorities argue that the courts by using these grounds for issuing the writ have actually abandoned altogether the jurisdictional element. Attorney General H. R. Fatzer of Kansas, however, questions this diagnosis; he thinks rather that the courts have extended the meaning of the term jurisdiction to include due process of law. "The term 'jurisdiction' ", asserts the Attorney General, "has been so extended in the Federal courts that it has come to be synonymous with 'with due process of law', and if due process is violated, the Federal courts have held that jurisdiction is lost and the writ will issue."²⁰

Most federal habeas corpus proceedings dealing with state convictions originate in the district courts, though the appellate tribunals may also grant them. The district court usually issues the writ only after a conviction has been returned in a state court and later examined under a writ

15. Recently, the United States Supreme Court has held that it is part of due process of law for a state, at its own expense, to furnish an indigent defendant with a copy of the record of his trial to be used on appeal. The court ruled thus despite the fact that an appeal is usually more a matter of grace than of right. *Guffin v. Illinois*, 351 U.S. 12 (1956).

16. *Johnson v. Zerbst*, *supra* n. 14; *Sweeney v. Woodall*, 344 U.S. 86 (1952); *Carter v. People of the State of Illinois*, 329 U.S. 173 (1946); *Gibbs v. Burke*, 337 U.S. 773 (1946).

17. *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Brown v. Allen*, 344 U.S. 433, 483 (1953); *Waley v. Johnson*, 316 U.S. 101 (1942); *Stroble v. California*, 343 U.S. 181 (1952); *Hawk v. Olsen*, 326 U.S. 271 (1945).

18. *Lesser v. New York*, 304 N.Y. 903 (1953), 305 N.Y. 569 (1953); *U.S. ex rel. Lesser v. New York*, 34 F. Supp. 730 (W.D. N.Y. 1940); *Lesser v. Hunt*, 117 F.2d 30 (2d Cir. 1941).

19. *Powell v. Alabama*, 287 U.S. 45 (1932). See also Holtzoff, *Collateral Review of Convictions in Federal Courts*, 25 B.U.L. REV. (1945).

20. *Hearings before Sub-Committee No. 3 of Committee on Judiciary of House of Representatives on H.R. 5649*, 84th Cong., 1st Sess., pp. 55ff. (1955).

of certiorari by the United States Supreme Court. However, once this process is complete, the district court, under the habeas corpus writ, may have a veritable field day, probing into every nook and cranny of a state criminal trial. It may then retry old issues which have been decided previously by the state judge and jury and affirmed not only by the state appellate courts but also directly or indirectly by the United States Supreme Court. Or, it may try new issues related to the case, which were not adjudicated by the state court in the original proceeding and of which that tribunal never heard.²¹ These federal courts in fact have used the writ for so many various and sundry purposes and on so many different occasions that it might appropriately be called the "wild ass of the law." This term incidentally was originated by a Kentucky state judge²² to describe the writ of error coram nobis, which recently has come in for considerable abuse at the hands of some state courts. Where no other process is available to serve a given situation this one will be invoked by these tribunals.

There is a large segment of opinion among the bar and state officials opposing this virtually unrestricted use of the federal habeas corpus writ to scrutinize state criminal judgments. This group is not hostile to any and all examinations of such judgments under the writ but believes rather that they should be held to the minimum. It feels that the process should be allowed only in those cases where a state fails to provide an appropriate technical procedure by which attacks upon their judgments on federal grounds can be reviewed by the United States Supreme Court on appeal from their highest courts under certiorari.

The procedural devices commonly used in the state judicial systems to review criminal judgments are the writ of error, the writ of habeas corpus, the writ of error coram nobis and the simple motion to set aside a judgment or otherwise reopen the case.²³ The writ of error, however, is employed usually by a higher state tribunal only to examine the record made in the lower court, which means that certain matters which lie de hors that record will not reach the United States Supreme Court for examination on appeal.

21. *Id.* at 109. *Reports of the Habeas Corpus Committee of the Conference of Chief Justices*, Chicago, Illinois, August 14, 1954.

22. Judge Sims in *Anderson v. Buchanan*, 292 Ky. 810, 823, 168 S.W.2d 48 (1943).

23. *Hearings, op. cit. supra* n. 20, pp. 63ff. See also *Carter v. People of the State of Illinois*, 329 U.S. 173 (1946); *The Uniform Post-Conviction Procedure Act*, 69 HARV. L. REV. 1289 (1952); FRANK, *CORAM NOBIS* (1953).

The habeas corpus writ, in turn, is granted generally in state courts solely for the purpose of scanning the jurisdiction of the trial court, and consequently here also certain matters *de hors* the record may fail to reach the Supreme Court on appeal. The writ of error *coram nobis*, while available to test matters not known to the trial court, nevertheless often is restricted by a time limitation, which prevents a defendant in either the original or the appellate court from making use of certain facts pertinent to his case that belatedly have come to his attention. The simple motion may possibly suffer from any or all of these infirmities.

At present the law permits the federal courts to issue the writ only after all available remedies in the state forums for reviewing alleged deprivations of federal rights have been exhausted, or where there is either an absence of any state corrective processes by which claims of this sort may be reviewed, or circumstances have rendered such processes ineffective. The pertinent statute reads as follows:²⁴

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

It is fairly well established by the Supreme Court that the term "exhaustion of state remedies" includes an appeal to that court on writ of certiorari.²⁵ In other words, the phrase signifies that after the Supreme Court has denied an appeal on certiorari, then and only then, may a defeated defendant have recourse to habeas corpus. However, under existing procedures, as just stated,²⁶ once the "exhausting" process is complete, the prisoner may sue out as many writs of habeas corpus or for whatever pur-

24. 28 U.S.C. § 2254 (1952).

25. *Darr v. Burford*, 339 U.S. 200 (1945).

26. See page 116.

poses he desires. These writs may deal with new matters or they may concern old ones already adjudicated through the state courts and the United States Supreme Court. It is to compel such new matters to be determined first in the state courts wherever possible and to prevent the re-trial of the old issues that limiting the scope of the writ is being urged.

Those who sponsor curbing the use of the writ generally are ready to adopt the proposal suggested recently by the Conference of Chief Justices, the Association of Attorneys-General and the Judicial Administration Section of the American Bar Association. The proposal would amend section 2254 as follows:²⁷

A justice of the Supreme Court, a circuit judge, or a district judge, shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court, only on a ground which presents a substantial Federal constitutional question (1) which was not theretofore raised and determined, (2) which there was no fair and adequate opportunity theretofore to raise and have determined, and (3) which cannot thereafter be raised and determined in a proceeding in the State court, by an order or judgment subject to review of the Supreme Court of the United States on writ of certiorari.

An order denying an application for a writ of habeas corpus by a person in custody pursuant to a judgment of State court shall be reviewable only on a writ of certiorari by the Supreme Court of the United States. The petition for the writ of certiorari shall be filed within thirty days after entry of such order.

This proposed amendment essentially required six conditions to be met before a writ of habeas corpus may be issued by the federal courts in State criminal cases. First, a substantial and not a frivolous or perfunctory federal question must be involved. Second, the question at issue must be one which has not been raised before in a state court. If it has been so raised and carried through the United States Supreme Court on certiorari, it may never be brought up again. Third, the question must have been one which could not have been raised or determined in a state court proceeding, subject to review by the United States Supreme Court, for the

27. *Hearings, op.cit., supra* n. 20, pp. 1, 7.

reason that no fair opportunity for it to be raised has been afforded. If it is one that could have been so raised and determined, and a fair opportunity has been given for this purpose but the defendant has not availed himself of it, he should not be allowed to do so later by a writ of habeas corpus. Fourth, even if the question has not been raised and no fair opportunity has been offered for it to be done, it must appear that the question cannot therefore be determined by an order or judgment capable of being reviewed by the Supreme Court under certiorari. Fifth, the writ, if permitted under the rules set forth above, shall be reviewable only by the United States Supreme Court, and not first by the United States Court of Appeals as present practice allows. Sixth, the petition for the writ of certiorari must be filed within thirty days after the entry of the state court order.

One of the effects of the amendment would be that federal judges, henceforth willing to carry out the spirit of the amendment, probably could keep many more state criminal proceedings out of the federal courts than they presently do. They could, in good conscience, dismiss spurious and even doubtful petitions for writs of habeas corpus in summary fashion. A second result would be that, where a matter had been determined once in a state court with certiorari to the United States Supreme Court, it could not be renewed time and time again as is now permitted. It would not be given the second, third and even fourth "bite" which it is now frequently accorded. A third effect would be that the prisoner would not be allowed to raise on separate and distinct occasions issues known to him to exist at one and the same time. He would be required to raise them simultaneously, and then be foreclosed from pressing some of them at later dates. A fourth result would be that the burden would fall on the defendant to show that there is no way by which he can go back to the state courts and obtain relief by normal review to the United States Supreme Court, when he alleges that the state failed in the first instance to furnish him with a fair opportunity to have his case adjudicated by the state judiciary with such review to the Supreme Court.²⁸ A fifth effect would be the by-passing of the United States Court of Appeals on appeals from a district court writ, thereby eliminating one important step in the final disposal of a case. Appeals from the district court henceforth would go

28. *Id.* at p. 52.

directly to the Supreme Court. A sixth would be that, with the time limited within which the petition for certiorari must be filed, the defendant could no longer let his appeal lie dormant for an extended period and then revive it only after all other efforts at liberation had failed and the gallows trap was perhaps about to be sprung.

But salutary as these efforts to curb the use of the writ might appear, they probably would not be as effective as their sponsors have hoped. It doubtless would be found that the present inordinate delays in the federal courts have not been materially eliminated or shortened. For, under the new scheme, a federal court would still be required to examine each habeas corpus petition, even though it might later deny it, in order to ascertain whether it complies with the requirements of the amendment.²⁹ If the presiding judge should be hypersensitive on the subject of civil rights, he might insist upon a thorough investigation of the government's allegation that the prisoner had not so complied; and in that case, a number of days might be consumed in taking testimony. Then too, every time a district judge denies a petition, the defendant could continue to ask the United States Supreme Court for writ of certiorari, which it sometimes would grant.

Furthermore, under the proposed arrangement many federal district courts, when dismissing petitions for the writ, undoubtedly would not give them the same thorough attention they do now. In that event the Supreme Court would be required to make its own investigation of the merits of each almost de novo and without the benefit of the "spade work" which the federal district courts now provide. Also, whatever aid this tribunal had been receiving from the court of appeals in such cases would be lost, since that bench would be stripped of its jurisdiction over matters of this type. In other words, the two lower federal courts would no longer serve as masters, as it were, making findings and reporting them to the Supreme Court to be availed by it in making its own determinations. United States Court of Appeals Judge Jerome Frank summed up the situation this way to the Judiciary Committee of the House of Representatives:³⁰

Experience has shown that the Supreme Court does not now have time carefully to consider all of the many certiorari petitions

29. *Id.* at 74. See statement of Irving Ferman.

30. *Id.* at 16.

filed with it. . . . The virtue of the now existing procedure is this: The Federal district Court and the Federal court of Appeals have carefully canvassed the case before the Supreme Court is asked to pass on it. The opinions of the lower courts greatly aid the Supreme Court in determining whether to grant review.

A few live cases should illustrate the confusion and delay which state criminal administration encounters from the excessive granting of federal writs of habeas corpus as well as appeals and writs of certiorari. In order to appreciate the full significance of the condition thus created it might be well to chronologize in tedious detail one representative case and summarize several others. The confusion and delay mentioned here, it should be pointed out, result not so much because the federal courts actually discharge many state prisoners but rather because they provide them with a forum in which to practice dilatory tactics. The case selected for the purpose at hand is designated as the *State of Utah v. Neal*, in which the chain of events runs as follows:³¹

May 23, 1951, Neal killed Sgt. Owen T. Farley; October 2, 1951, trial began in Utah Third District Court; October 4, 1951, Neal found guilty of first degree murder; October 16, 1951, motion for new trial denied and Neal sentenced to die on December 13, 1951; notice of appeal filed with Utah Supreme Court and stay of execution granted pending appeal; February 15, 1952, appeal filed in Utah Supreme Court; October 6, 1952, case argued before Utah Supreme Court; March 28, 1953, conviction affirmed by Utah Supreme Court; July 20, 1953, petition for rehearing filed; October 29, 1953, petition denied; November 5, 1953, Utah Supreme Court stays execution pending application to the United States Supreme Court for writ of certiorari; May 4, 1954, United States Supreme Court denied writ of certiorari; May 15, 1954, Neal sentenced to die June 19, 1954; June 4, 1954, petition for writ of habeas corpus filed with United States District Court of Utah; June 11, 1954, United States District Court denied petition; June 16, 1954, appeal to United States Court of Appeals,

31. See *Id.* at 46ff.; *Don Jesse Neal v. Beckstead, Sheriff*, 3 Utah 2d 403, 285 P. 2d 129 (1955). The chronology of this case, for the most part, was compiled by Hon. E. R. Callister, Attorney General of Utah, for congressional subcommittee.

Tenth Circuit, stay of execution granted by Court of Appeals; June 22, 1954, United States Court of Appeals affirms district court's denial of application for writ of habeas corpus; June 23, 1954, Neal sentenced to die on August 3, 1954; July 23, 1954, Utah State Board of Pardons denies appeal for commutation of sentence; July 28, 1954, petition for writ of habeas corpus filed with Utah Supreme Court, denied same date; July 31, 1954, stay of execution granted by United States Supreme Court Justice Tom Clark; April 4, 1955, United States Supreme Court denied petition for writ of certiorari of both Utah Supreme Court's denial of the petition for writ of habeas corpus and of the Federal Court of Appeals' affirmance of the United States District Court's denial of a writ of habeas corpus; April 8, 1955, Neal sentenced to die on May 9, 1955; April 19, 1955, petition for writ of habeas corpus filed in United States District Court of Utah; April 29, 1955, petition for writ of habeas corpus and stay of execution denied by United States District Court; May 2, 1955, motion to vacate United States District Court judgment and a stay granted by that Court; May 7, 1955, motion to vacate United States District Court's stay of execution taken under advisement of Tenth Circuit Court of Appeals and a stay granted by that court; May 23, 1955, petition for writ of habeas corpus argued before Tenth Circuit Court of Appeals; May 26, 1955, petition for writ of habeas corpus denied by Tenth Circuit Court of Appeals, which, however, granted stay of execution until June 15, 1955; June 27, 1955, District Court of Utah denied petition for writ of coram nobis, and denial was upheld by Utah Supreme Court; writ of certiorari denied by United States Supreme Court; Neal executed July 1, 1955.

Two similar cases in Utah which ran virtually the same gamut as the *Neal* case were *State v. Braasch* and *State v. Sullivan*. Seven years after their trials the defendants involved were finally executed on May 11, 1956.³²

32. *State v. Braasch and Sullivan*, 229 P. 2d 289 (Utah 1951). See *Hearings*, *supra* n. 20. Other comparable cases are *Hawk v. O'Grady*, 290 N.W. 911 (Neb. 1940); *People v. Adamson*, 210 P. 2d 13 (Calif. 1949); *Smith v. Baldi*, 362 Pa. 222 (1948); 344 U.S. 561 (1953); *People v. Wells*, 202 P.2d 53 (Calif. 1949); *Ex parte Wells*, 90 F. Supp. 855 (N.D. Calif. 1950); *State v. Wilson*, 231 P.2d 288 (Wash. 1951).

One of the most interesting and illustrative of these cases arose seven years ago in Pennsylvania.³³ The defendant had been convicted of first degree murder in September of 1949. His conviction was appealed to the United States Supreme Court, which denied certiorari. A short time later, the prisoner sought a writ of habeas corpus in a lower Pennsylvania court but was rebuffed there. Soon thereafter the state supreme court likewise denied the writ; and once again the United States Supreme Court refused certiorari. These proceedings were followed by a petition for a writ of habeas corpus to a federal district court, which after a hearing covering four hundred pages of testimony, rejected the application. The prisoner then asked for executive clemency, but the Governor of the Commonwealth declined to grant it. Subsequently, a petition for a habeas corpus writ was presented to the Supreme Court of Pennsylvania, which that tribunal was unwilling to entertain. This denial was followed by a plea to United States Supreme Court Justice Harold R. Burton for a stay of execution. Justice Burton turned down the request with this statement:

Upon examination of this petition, the record of the Supreme Court of Pennsylvania and the proposed petition for writ of certiorari, I find no substantial basis for granting the stay of execution and it is accordingly ordered.

One would expect that the decision of Justice Burton would have ended the matter, but not so. The very next day a second petition for a writ of habeas corpus was filed with a federal district court, the grounds on which it was based being the same as those presented to the state supreme court and to Justice Burton. The district judge granted a stay of execution and held a three-day hearing, after which he denied the petition. The petitioner later appealed to the United States Circuit Court of Appeals, which sent the case back to the district court for a further finding of fact. After another lengthy hearing the district court once more dismissed the petition. Again the United States Court of Appeals came to the rescue, and this time remanded the case to the district court for issuance of the writ of habeas corpus. The Commonwealth sought a writ of certiorari from the United States Supreme Court, but was refused it. This denial meant that a new trial was necessary, and shortly thereafter it was held. Once more

33. *Commonwealth v. Thompson*, 367 Pa. 102, 79 A.2d 401 (1951).

the defendant was convicted of first degree murder and sentenced to death by the Pennsylvania trial court.³⁴

In a similar New York case,³⁵ there was involved the question of the voluntariness of certain confessions. The prisoner, it was alleged, had been duped or coerced into making one of the admissions. A few hours after completing this admission he made several others, which all agreed lacked the element of direct compulsion. There was some question, however, whether these had been influenced by the former. The first jury hearing the case decided that there had been no coercion connected with any of the confessions, but the state court of appeals thought otherwise, holding that the initial one was tainted with force and deception. This tribunal, moreover, was not certain of its effects upon the subsequent confessions, and sent the case to a new jury to determine that issue. This jury brought in a verdict of guilty, thereby in effect deciding that the second confessions were free from any infirmities associated with the first. This verdict the court of appeals, with two judges dissenting, accepted. Certiorari to the United States Supreme Court was asked but denied.

A short time after this denial, the defendant requested a writ of habeas corpus from a federal district court, still claiming that the second confessions were bad. That court refused the writ. The United States Court of Appeals affirmed the denial, but was overruled by the United States Supreme Court. This body, with three justices dissenting and one not participating,³⁶ found that the subsequent confessions were infected with the same poison as the first. Justice Black, alluding in his prevailing opinion to the ruling enunciated by the various New York state courts, the federal district court and the United States Court of Appeals sustaining the verdict, stated tersely: "With this ruling we cannot agree."³⁷ In other words, Black was saying that five justices now were deciding that the juries which twice had heard the evidence regarding the subsequent con-

34. *Hearings*, *supra* n. 26, at 59ff. U.S. *ex rel.* Thompson v. Dye, 103 F. Supp. 776, 778 (W.D. Pa. 1952), 203 F.2d 429 (3d Cir. 1953), 345 U.S. 960 (1953), 113 F. Supp. 807 (W.D. Pa. 1953), 208 F.2d 565 (3d Cir. 1953), 123 F. Supp. 759 (W.D. Pa. 1954), 221 F.2d 763 (3d Cir. 1955); Commonwealth of Pennsylvania v. U.S. *ex rel.* Cleveland Thompson, 350 U.S. 875 (1955); See also Commonwealth of Pennsylvania v. Darcy, 362 Pa. 259, 66 A.2d 663 (1949).

35. *People v. Leyra*, 302 N.Y. 353 (1951), 304 N.Y. 468 (1952), 345 U.S. 918 (1953), 345 U.S. 946 (1953); *Leyra v. Denno*, 347 U.S. 556 (1954).

36. Minton, Reed and Burton dissented. Jackson did not sit.

37. *Leyra v. Denno*, 347 U.S. 556, 561 (1954).

fessions, the trial judges who refused to set aside the verdicts in the case, four of the New York Court of Appeals judges, the federal district judge, the judges of the United States Court of Appeals and three of their own colleagues were completely mistaken as to the finding of fact in the matter. At the third trial, which was conducted without benefit of any of the confessions, the jury convicted the defendant once more. The New York State Court of Appeals, however, by a four to two vote, reversed, holding that without the second confessions there was insufficient evidence to support a verdict of guilty.³⁸

Another comparable case concerned the notorious kidnapper Roger Touhy.³⁹ Touhy had been convicted in 1924 by an Illinois jury, and his conviction had been upheld by the appellate courts of that state. On appeal to the United States Supreme Court, he was refused a writ of certiorari. Twenty years later, after a substantial number of pleadings in the interval had been denied in several different courts, the defendant, whose attorney apparently had been following the trend of judicial thinking wherein civil rights were involved, sued out a writ of habeas corpus in a federal district court in Illinois. The presiding judge in that proceeding decided in an opinion of 611 pages that the evidence at the original trial had been insufficient to sustain the conviction, and proceeded to release Touhy on bail. In so doing, he tacitly concluded that the Illinois jury, the trial judge, the three judges of the Intermediate Illinois Appellate Court, the seven judges of the Supreme Court of Illinois, and even the nine justices of the United States Supreme Court all had erred in the early nineteen thirties in sending Touhy to prison. The United States Court of Appeals, however, immediately reversed the district judge to the extent of requiring the defendant to remain in custody until the final disposition of the case. The Supreme Court denied Touhy certiorari. In July, 1955, the court of appeals overruled the district court and dismissed the writ of habeas corpus.

Of the other cases of this variety, the one which has attracted the most publicity and attention is that of Caryl Chessman, convicted rapist-

38. *New York v. Leyra*, 1 N.Y.2d 199 (1956).

39. *Hearings*, *supra* n. 20, at p. 12. *U.S. ex rel. Touhy v. Ragen*, Warden, 348 U.S. 945 (1955); *U.S. ex rel. Touhy v. Kipp*, 348 U.S. 941 (1955), 200 F.2d 195 (7th Cir. 1954). See also *U.S. v. Ragen*, 224 F.2d 611, 618 (9th Cir. 1955) for digest of proceedings in Touhy case.

murderer in California. His particular case has been in and out of the state and federal courts approximately eight years. Its record is replete with writs of habeas corpus, state and federal, appeals, denials of writs of certiorari, granting of such writs, rehearings, and every other conceivable type of proceeding even remotely pertinent to the matter. In the latest attempt during January, 1956, to obtain a new trial, Federal Judge Louis E. Goodman turned down Chessman's plea with the caustic comment that his claim was a "complete fabrication" and based upon "false and perjurious" charges.⁴⁰ Judge Goodman's ruling just recently was upheld by the United States Court of Appeals, and it was thought in most legal circles that this matter had finally been put to rest. Any such notion, however, proved to be illusory for just recently the United States Supreme Court has agreed to review the decision of this lower appellate tribunal. In many such cases as these it can be stated with a large measure of truth that the only way the state can enforce the death sentence is to precipitate its execution between the denial of a habeas corpus petition by one court and the granting of a stay by another.

The exasperation of the state judges at federal interference with their criminal administration has been expressed vigorously by more than one of them. But probably none of them has stated it more effectively than Justice F. Henri Henriot of the Utah Supreme Court in the case of *Ex parte Sullivan*:⁴¹

The United States District Court heard the evidence presented to it, and if it had jurisdiction, as it claims, it very well could have granted or denied the petition. Why it did neither, but chose to permit this case to find haven again in this court by way of petition anew, is a matter of conjecture here and matter of opinion there. In permitting and encouraging its voyage back to the Supreme Court of Utah, the Federal Court, in a judgment punctuated by opinion, has intimated strongly that else we do its bidding *it* quite assuredly will, creating the anomaly of two courts

40. *Chessman v. Teets*, 138 F. Supp. 761, 765 (N.D. Calif. 1956). See also *Matter of Chessman*, 128 F. Supp. 600 (N.D. Calif. 1955), 219 F.2d 162 (9th Cir. 1955), 221 F.2d 276 (9th Cir. 1955), 350 U.S. 3 (1955).

41. *Ex parte Sullivan*, 253 P.2d 378 (Utah 1953); *Hearings*, *supra* n. 20 at p. 47. The italicized "it" belongs to Justice Henriot.

having concomitant jurisdiction, the one to survive the refusal of the other to agree.

The free use made by federal judges of their habeas corpus power permits all but the dullest criminals to shuttle their cases back and forth between state and national courts and also within the federal judicial hierarchy for a number of years. Lack of ingenuity to concoct and conceive new grounds or variations of old ones for obtaining the writ constitutes the only bar to these people remaining under the aegis of the federal tribunals for an almost indefinite period. The techniques to be employed in such instances are relatively simple, and a not-too scrupulous lawyer no doubt would make use of them.

One of the most effective pieces of strategy is for the prisoner to make some sort of confession, which the prosecutor will be certain to use against him. At the same time, he should retain a young untried attorney, who can front in court for an experienced but absent counsel. It would be well also for him to watch carefully to see whether the names of anyone of his particular profession, religion, race or economic status are in the jury pool from which the panel trying him is drawn. It would likewise be advisable for him to have a number of his friends stand in the rear of the court room and, until removed, shout periodically, "hang him", or some similar words of violence toward him. Nor would a fist fight with one of his prison guards be entirely amiss. These proposals may appear to be somewhat facetious and lacking in any possibilities of practical application, yet, with some of our federal jurists in their present frame of mind, they are by no means as devoid of merit and effectiveness as might be imagined.

The potency of the confession ruse should not be underestimated. It is always possible for the prisoner to allege that his confession has been extracted through trickery, fraud and force, in which case he is certain to obtain a sympathetic response from some member of the federal judicial system. A charge of this sort should result in a stay of execution and perhaps one, two or even three appeals. Even if he fails to secure redress, the defendant still has gained time, which may be all important to him, and he is not foreclosed from making a second attempt on precisely the same grounds or from essaying another tack.

If the confession approach fails, the prisoner should then plead that his youthful attorney, though willing, was actually incompetent. This claim should be good also for a trip or two through the state courts as

well as through the United States Supreme Court on certiorari, and then back to the federal district court, to the United States Court of Appeals and the United States Supreme Court in a habeas corpus proceeding. The fact that his fledgling counsel was the prisoner's own choice will not deter some judge from granting the habeas corpus writ; he will do so on the theory that a defendant on trial for his life or faced with a long term sentence is entitled as a matter of due process to be advised by a qualified lawyer, regardless of all other considerations. If his plea is granted, the prisoner may be set entirely free, or allowed to traverse again, under the guidance of a more tested advocate, the long legal journey from arraignment in the magistrate's court to the final disposition of his case in the United States Supreme Court.

Not the least effective of the prisoner's claims will be that he was tried before a jury drawn from a pool in which his religious faith, race, or calling, as the case may be, was not properly represented. The law now decrees that a Negro, for example, is not given a fair trial if the names of people of his race are omitted completely or inequitably from the jury pool, and many judges are quick to discern this type of discrimination whenever pleaded. It has been strenuously urged and almost successfully so that an accused is likewise denied an impartial trial if members of his economic and social stratum are excluded.⁴² The Supreme Court, to be sure, has denied this contention but by a very narrow margin, and this fact should encourage rather than discourage a hard pressed prisoner to invoke this plea. In so doing, there is a strong possibility that he will find a judge who will agree with him, and also hope with him, that the Supreme Court in a new case may reverse its earlier decision. It has been known before to do that very thing.

If all of the efforts here mentioned prove futile, the prisoner then should ask for a writ of habeas corpus on the ground that the court convicting him was dominated by a mob threatening to lynch him and even assault the court. He might well couch his position in the language of Justice Holmes: "Counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and the State courts failed to correct the wrong."⁴³ The mere cry of "hang him" is certain to arouse

42. *Fay v. New York*, 332 U.S. 261 (1947). See also *Foley, Class Discrimination in Selection of Jurors*, 5 CATHOLIC U.L. REV. 151-172 (1955).

43. *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

the suspicion of at least one judge that all was not right in the court room, and cause him to insist upon a thorough investigation of the charge. An appeal or two should follow as a matter of course, irrespective of whether the writ is eventually sustained or rejected.

The fistic encounter with the prison guard, spurious as it may be, is capable of producing the same effect as the charge of mob intimidation. Such an allegation has just enough flavor of lack of due process, or perhaps of cruel and unusual punishment, to arouse a judge or two to action and insist upon a thorough examination of it. However, if even this attempt fails to liberate the prisoner, he is not at the end of his tether, for he may still fall back upon such old standbys as the court lacking jurisdiction over the crime of the prisoner, or acting under an unconstitutional law. It should be stated here that to obtain the maximum benefits and results, each of these objections must be raised separately and at different times, as well they may under present procedures. To dispose of them in one proceeding would vitiate the effectiveness of the time element, prevent the defendant from finding a sympathetic judge should the first few prove disinterested, and eliminate all possibility of exhausting or discouraging the prosecuting attorney who might be willing eventually to settle for a plea to a lesser charge.

One of the most serious results of federal interference with state criminal judgments is the injury done to the prestige, dignity and morale of the state trial judge. An unhealthy situation is created by this type of intervention whether it be produced by a habeas corpus proceeding or by review on appeal or under a writ of certiorari, though the first of these doubtless provides the more devastating effect. A state trial judge may represent the highest trial court of the state, and hence possess a coordinate jurisdiction with the federal district judge, and yet, when his official conduct in a criminal case is called to question, be bandied about by the latter like an ordinary litigant. Under present practice, the federal judge honestly may feel compelled to examine a state jurist in order to ascertain whether a charge of want of due process, of forced confession or of some other similar act of deprivation is true. It may be that there is involved a dispute of fact between counsel for the defendant and the state judge regarding what occurred in the court room at the trial and on which the written record is silent. Federal Court of Appeals Judge John J. Parker of

the Fourth Circuit has described the plight of the state judge as follows:⁴⁴

If heard at all in the habeas corpus litigation, it is required that he [state judge] be heard as an ordinary witness. From this resulted the unseemly spectacle of Federal District Courts trying the regularity of proceedings had in courts of coordinate jurisdiction and the state trial judges appearing as witnesses in defense of the proceedings had in their courts.

United States Representative James C. Murray of Illinois, in a statement to the House Judiciary Committee, painted an even more depressing picture of the dilemma in which state judges, and state prosecutors too for that matter, frequently find themselves:⁴⁵

Under the present situation no lawyer's reputation is safe. No prosecuting official's record in office is protected, no matter how notable. No judge is protected from slanderous attacks of the fertile mind of an incarcerated prisoner. In Illinois we have had our most distinguished criminal lawyers charged with being incompetent, without opportunity to defend such a charge. We have some of our finest State prosecuting officials charged with knowingly using perjured testimony and required to defend such charges. We have had some of our most distinguished judges required to appear before Federal District judges in response to groundless charges of State prisoners.

A very disconcerting feature of this type of federal review is that it may subject state judges, prosecuting officers and even jurors to possible civil and criminal suits for their official conduct. This is especially true where the claim is advanced that the court in handling a criminal matter violated a prisoner's federal constitutional right or has acted without jurisdiction. Technically speaking, where an official proceeds without jurisdiction he is not an official at all but merely a brash private citizen intruding where he has no business. It goes without saying that a private individual who participates in the illegal restraint of a person may become liable for false arrest charges.

Mr. Justice Jackson was among those who recognized the delicate

44. Parker, *Limiting Abuse of Habeas Corpus*, 8 F.R.D. 171 (1949), quoted in *Hearings*, *supra* n. 20 at p. 43.

45. *Hearings*, *supra* n. 20 at p. 65.

situation in which state officials may find themselves when administering criminal justice. On this point he declared:⁴⁶

We [Supreme Court Justices] may look upon this unstable prospect [setting aside state convictions under habeas corpus] complacently, but state judges cannot. They are not only gradually being subordinated to the Federal Judiciary, but Federal Courts have declared that state officials and other officers are personally liable to Federal prosecution and to civil suits by convicts if they fail to carry out this court's constitutional doctrines.

The jurist then mentioned a specific court of appeals decision⁴⁷ where it had been held that federal laws enforced in federal courts imposed a personal liability upon state judicial officers. Such a result, had declared that court, "is of fateful portent to the judiciary of the several states."⁴⁸ Federal judges, however, it should be noted, enjoy complete immunity in similar situations and therefore need not worry about answering for their illegal or unconstitutional conduct.⁴⁹ Another federal court of appeals did nothing to allay the uneasiness of state judges by asserting that in cases where they are accused of illegal action, "wilfulness and intent are presumed and inferred from the result of the action."⁵⁰

Years ago the late Justice Marshall Harlan wrote on this theme in a similarly ominous vein. He seemed to be admonishing state judges, prosecutors and jurors to be especially careful when flirting with illegal acts and unconstitutional laws, lest they suffer dire consequences. In one of his opinions Harlan had this to say:⁵¹

That the petitioner is held under the authority of the state cannot affect the question of power or jurisdiction of the circuit court to inquire into the cause of his commitment and to discharge him, if he be restrained of his liberty in violation of the constitution. The

46. *Brown v. Allen*, 343 U.S. 433, 534 (1953). See also *Ex parte Commonwealth of Virginia*, 100 U.S. 339 (1879); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *Dynes v. Hoover*, 20 How. 65 (1858); *Home Telephone Company v. City of Los Angeles*, 227 U.S. 278 (1913); *Scott v. McNeal*, 154 U.S. 34, 46 (1894).

47. *Brown v. Allen*, 343 U.S. 433, 535 (1953).

48. *Picking v. Pennsylvania Railroad*, 151 F.2d 240, 250 (3d Cir. 1945).

49. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

50. *Koehler v. United States*, 189 F.2d 711 (5th Cir. 1951), 342 U.S. 852 (1951).

51. *Ex parte Royal*, 117 U.S. 241, 249 (1880).

grand jurors, who found the indictment, the court into which it was returned, and by whose orders he was arrested, and the officer who holds him in custody, are all, equally with individual citizens, under a duty for the discharge of which the state could not release them, to respect and obey the supreme law of the land. . . .

Fortunately, for the cause of orderly administration of justice, few civil or criminal prosecutions have been instituted against state judges, prosecutors or jurors when acting in their purported official capacities. However, these people can never be entirely certain that a rash of such undertakings may not some day erupt, and this thought necessarily must have a sobering and restraining influence upon them and all persons inclined to offer themselves for public duty. A few prosecutions of this sort might cause members of the bar to refuse service as judges or district attorneys and laymen to hesitate to become sheriffs or jurors. Nor are state officials protected necessarily by the lapse of time. For it seems that even though a decade or so has passed since his conviction or confinement began, the prisoner may still bring action against those participating in his illegal incarceration.

Another disturbing aspect of federal intervention in this type of case is the growing practice of a lone federal judge operating far from the scene of the original trial to make findings of fact and actually decide cases on the basis of written records made in the trial court or of stale evidence taken by him years after the alleged offense was committed. At times, in so doing, he must "look back of and beyond the records into unreported proceedings conducted by other judges, with witnesses, lawyers and other court officers long since dead and scattered";⁵² or, he is required to search for pertinent facts "when time has dulled memories, when death has stilled tongues and records are unavailable."⁵³ The state juries and trial judges, on the other hand, have not been forced in such cases to reply on an inanimate transcribed record or cloudy recollections of remote happenings. Rather, they have been able to predicate their verdicts on the utterances and conduct of the live characters in the flesh whose testimony about immediate events and whose entire demeanor they have been in a position to scrutinize in minute detail. They have seen the parties squirm in the

52. *Dorsey v. Gill*, 148 F.2d 857 (C.C.A. D.C. 1945).

53. *Wade v. Mayo*, 334 U.S. 672, 694 (1948).

witness chair under close cross-examination, flush, hesitate to answer or perhaps exhibit feigned anger, none of which actions the pen can describe adequately, and yet which may speak far more eloquently than even the spoken word.

Justices and judges in the federal appellate echelons must approach perforce all cases originating in the state tribunals more or less in an atmosphere of artificiality and abstraction. They are forced frequently to hear cases third and fourth hand, and must resort to guesses, surmises and conjectures in arriving at their decisions. Invariably, they must let their imaginations do substitute for actual observation.

Not the least serious consequence of federal interference with state judgments is the release of hardened criminals through the application of abstract constitutional rights or of refined technicalities, thus robbing all jurisdictions of the opportunity of bringing them to justice. After being liberated, the prisoner in some instances is not required to face the state tribunal again where errors in his trial may be corrected, and the federal court, which has freed him, of course, has no authority to try him for the crime charged. Justice Rufus W. Peckham, disturbed by these implications years ago, was prompted to comment:⁵⁴

It is an extremely delicate jurisdiction given the federal courts by which a person under indictment in a state court, and subject to its laws, may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom, and thus a trial by the state courts of an indictment under the laws of the state be finally prevented.

Justice Samuel Miller, in the celebrated case of *Cunningham v. Neagle*,⁵⁵ decided toward the close of the last century, indicated the frustration which might envelop state criminal administration through the intervention of federal tribunals. In that case, the defendant Neagle was charged by the state of California with killing one David S. Terry. Neagle's defense was that he had been deputized by the President of the United States to guard Supreme Court Justice Stephen J. Field, who had been threatened by Terry, and that the homicide had occurred in the performance of this

54. *Baker v. Grice*, 169 U.S. 284, 291 (1898).

55. *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890).

duty. It was on this ground that Neagle asked his release from state custody. The United States Circuit Court sitting in California, without a jury and in an *ex parte* proceeding, complied with Neagle's request, thereby determining the question of fact whether Neagle had acted in his private capacity and with intent to commit murder, or merely had executed his official duty. In short, a federal tribunal rather than a state court, found him not guilty; the state court was never afforded the opportunity to pass on the issue.

Justice Miller stated the court's position in the matter in these words:

To the objection, made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is that if the prisoner is held in the state courts to answer for an act which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California. When these things are shown, it is established that he is innocent of any crime against the laws of the state, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The circuit court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury be impaneled to render a verdict on them.

There can be little quarrel with Miller's position in this particular case. For in it was involved the sovereign authority of the federal government to execute its own powers and functions; in a sense, its very ability to survive was at issue. In such a situation that government must be able to determine the extent and scope of its own prerogatives, even to the point of freeing a prisoner held in state custody.⁵⁶ But where the question is one of the purported procedural rights of an individual and the sovereign authority of the federal government is not at stake, an entirely different situation obtains. The issue then is whether the state, which has been entrusted with the preservation of the public peace and repose of

56. There is no doubt that the federal courts may determine pertinent facts in habeas corpus proceedings without the aid of a jury. No one has a constitutional right to a jury in such cases, and even if he did, the prisoner could waive it, as Neagle probably would have done. Whether an issue of this sort should be heard *ex parte* without giving the state the opportunity to answer at the original hearing raises the question of proper respect of one jurisdiction for the other.

the community, shall be allowed to exert itself unfettered by national interference. Serious doubt arises whether it can perform this duty if it is to be subjected to continuous harassments and interventions from the outside. Being closely associated with the police power, the state judges and courts are in a far more advantageous position than their federal counterparts to offer fair and equitable solutions to the issues arising therefrom.

Federal judicial intervention in state criminal proceedings frequently not only adds nothing to the prestige of the state courts but succeeds in tarnishing the lustre of our national tribunals. This has been particularly true where the United States Supreme Court has descended from its lofty perch to adjudicate a trivial matter which might be termed "police court stuff", or what Justice Minton would call "a piddling case,"⁵⁷ when it should be devoting its energies and talents to questions involving broad legal principles. Nor has the Court improved itself in the eyes of the people when it has converted itself temporarily into what one Justice has designated as a "super-legal-aid bureau."⁵⁸ This type of conversion has occurred where a defendant has alleged representation by inadequate counsel and the Supreme Court has been called upon to decree that he be supplied with a suitable one. One one occasion a court of appeals judge felt compelled to deny that the higher federal courts were "glorified parole boards"⁵⁹ designed to secure the release of certain prisoners from state custody.

Numerous arguments are advanced from time to time not only for retaining federal interference with state criminal judgments but even for enlarging it. One such argument assumes that the federal courts alone are interested in, capable of, and deserving to be trusted with, protecting the liberties of the people. Such an attitude or charge casts a serious reflection upon the integrity and qualifications of our state tribunals and at the same time does umbrage to the intelligence of the voters. This contention necessarily must be predicated on the notion that the electorate is lacking in competence to select officials adapted morally and talent-wise to safeguard both the public and the individual interests. In support of this claim, it must be conceded that unfit and dishonest state judges and dis-

57. *Offutt v. United States*, 348 U.S. 11, 18 (1954).

58. *Uveges v. Commonwealth of Pennsylvania*, 335 U.S. 437, 450 (1948).

59. *U.S. ex rel. Feeley v. Ragen*, 166 F.2d 976, 981 (7th Cir. 1948).

trict attorneys at times have been chosen. However, it should also be pointed out that this practice has not been confined to state personnel, for a number of federal judges appointed by the president with the advice and consent of the Senate have been shown to be incompetent, corrupt, biased and ready to play politics with justice. Some of them have been impeached, and a few even convicted.

The belief that the federal judiciary possesses greater judicial talent, wisdom, virtue and sense of fairness than our state courts finds little acceptance among the legal fraternity. The membership of that group is well aware that a large number of our ablest and most respected jurists are on the state benches, to which they have been elevated as a result of long and tried periods of service in the legal arena, whereas numerous federal judges have come to their high positions as strictly political accidents and have remained true to type to the end. Large numbers of the latter might have fared poorly at the hands of both the voters and the bar associations asked to pass on their qualifications. Moreover, there are a few lawyers who would not be willing to match the skill, learning and sagacity of the incumbents of many of our highest state courts with those of the United States Supreme Court. The same thing can be said of trial judges in the two respective jurisdictions. Any claim that federal jurists are endowed with an inherent infallibility or occult powers was dispelled recently by Justice Jackson, who knew his judges and courts well. The Justice put it in this manner:⁶⁰

Reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but are infallible only because we are final.

On the occasion of making this observation, Jackson was prompted to remark that some members of the federal hierarchy were guided frequently by their personal whims about justice and not by settled rules and principles in deciding habeas corpus as well as other judicial questions. A federal habeas corpus proceeding he characterized, for example, as an "ad hoc determination of due process of law issues by personal notions of justice

60. *Brown v. Allen*, 343 U.S. 433, 540 (1953).

instead of known rules of law."⁶¹ He felt impelled also to declare that the expansion of the Supreme Court's power in this area had reached the point "where any state conviction disapproved by a majority of this court, thereby becomes unconstitutional and subject to nullification by habeas corpus."⁶² He was likewise constrained to say: "The belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of the Justices."⁶³

At the same time Justice Jackson was criticizing his own colleagues for lacking objectivity, Chief Judge John J. Parker, referred to above, was commending state judges for possessing it. Judge Parker, who had enjoyed a long span of experience in both state and federal courts as advocate and judge, ventured this opinion: "The state courts are by and large just as patriotic and just as learned as the federal courts, and if a man has any real merit in his contention that he has not had a fair trial, he will get that contention corrected in the state courts."⁶⁴ Chief Justice Melville Fuller, for more than twenty years presiding justice of the nation's highest tribunal, is credited with making an analogous observation. He is reported to have declared that there was no reason to suppose that state courts were not aware of the great principles of the federal constitution designed to protect life and liberty as the federal courts, nor that the state courts would not give them effect.⁶⁵

Those urging the continuance of federal control over state criminal justice insist that it is necessary in order to prevent certain injustices which emanate occasionally from the state courts. To buttress their position, they single out a couple of decisions. They allude, for example, to the recent court case of *De Meerleer v. Michigan*,⁶⁶ in which Justice Frankfurter, speaking for the Supreme Court, rebuked Michigan's highest tribunal for upholding a conviction of a defendant for whom no counsel had been

61. *Id.* at 532.

62. *Id.* at 534.

63. *Id.* at 535.

64. *Hearings, op. cit.*, *supra* n. 20 at p. 10.

65. *Id.* at 17.

66. *De Meerleer v. Michigan*, 313 Mich. 548, 21 N.W.2d 849 (1946); *Daniels v. Allen*, 344 U.S. 443, 511 (1953); *Marion v. Ragen*, 332 U.S. 56 (1947). Twenty years after his conviction it was discovered that Marion had been deprived of his right to counsel at his original trial.

appointed. They likewise mention the celebrated *Scottsboro* case in which the United States Supreme Court several years earlier made a similar criticism of the Alabama Supreme Court.⁶⁷

In the Michigan case, the conviction of the defendant was upheld unanimously by the state supreme court, which consisted of eight able and qualified judges. All of these judges concurred in the prevailing opinion which read:⁶⁸

Our examination of the record requires the conclusion that De Meerleer freely and voluntarily pleaded guilty to the charge of murder at the time the court sentenced him to life imprisonment. . . . Nor was he denied any constitutional right of representation, or public trial or orderly and due process of law. There can be no doubt from the testimony produced prior to the sentence that De Meerleer was guilty of the crime of murder.

In the *Scottsboro* case, where in addition to the claim of lack of counsel there was adduced the allegation of mob pressure, not only the trial judge and the Supreme Court of Alabama⁶⁹ but also two of the nine justices of the United States Supreme Court found no evidence of unfairness in the proceeding. The two justices vigorously dissented from the prevailing opinion.

From these two experiences naturally arises this query: What reason is there to believe that the Michigan court was wrong and the United States Supreme Court right, or that the Alabama judges and two high federal justices were incorrect and the seven other Supreme Court justices were not? A further question is: In such cases as these, where there are as many judges supporting one side of an issue as the other, should not the benefit of the doubt be resolved invariably in favor of constitutionality rather than unconstitutionality?

Although injustices unquestionably have been done by state courts and will continue to be made, the records of the state judges, on the whole, for effectuating justice have been amazingly good. Even the proponents of federal intervention in state criminal proceedings when confronted with

67. *Powell v. Alabama*, 287 U.S. 45 (1932).

68. *People v. De Meerleer*, *supra* n. 66.

69. The Chief Justice dissented.

pertinent statistics are compelled to concede this to be true. According to Hon. Henry P. Chandler, Director of the Administrative Office of the United States Courts, during the nine years from 1946 through 1954, four thousand eight hundred forty-nine applications for federal writs of habeas corpus to set aside state convictions were presented to the national tribunals, only 79, or one and six-tenths per cent, of which were granted. And of these seventy-nine, the federal courts gave the petitioners relief in but a handful.⁷⁰ In other words, to use the baseball vernacular, the batting average of the state courts has been somewhat above .990.

It would appear, therefore, that if even the federal courts themselves must admit that the state tribunals have been correct at least 98.6 per cent of the time when their convictions have been challenged, it is not completely amiss to surmise that the state courts may have been right in those few cases where the writs were granted and the prisoners discharged. To state the proposition a little differently, can it be said that courts, which have been correct admittedly in nearly ninety-nine per cent of cases, could have been so badly mistaken in the lone one per cent that injustices would have resulted necessarily had their judgments been sustained rather than set aside?

One solution to the indiscriminate interference by federal courts with state judicial administration is for these tribunals to practice the art of self-denial far more than they now do. The federal district courts could easily refuse to entertain petitions for writs of habeas corpus or grant stays of execution except in extreme cases. The Supreme Court, for its part, might indulge in a similar policy of self-abnegation by denying writs of certiorari on appeals in state criminal cases save where there is a patent violation of a constitutional right. Whether such demonstrations of forbearance on the part of those judges who have strong prejudices on the subject of civil rights and are ready to grant writs of habeas corpus or writs of certiorari at the slightest provocation are too much to expect is an open question.

If the federal courts refuse to exercise self-restraint in issuing the writ, Congress may be required to assert itself in the matter. It may be compelled to curtail substantially or completely by law their powers in this respect. The curtailment might be accomplished by returning the writ to the status

70. *Hearings, op. cit., supra* n. 20, at 21.

it enjoyed under the law of 1789, as was suggested by the Association of Attorneys General in 1953.⁷¹ Or, should this remedy appear too severe, Congress might repeal the law of 1867 and thus return the process to the position it possessed prior to the enactment of that statute. The writ then would be governed by not only the law of 1789 but also the acts of 1833 and 1842.

But even such congressional action would still leave state criminal judgments at the mercy of the United States Supreme Court. This tribunal under certiorari would continue to review such judgments and thereby keep criminal administration more or less in a state of constant suspense and uncertainty. No one logically can object to having that court review these judgments where the state tribunals obviously have taken jurisdiction over matters reserved by the constitution or law for federal control; nor could there be any justifiable complaint where this bench hears appeals involving the express prohibitions imposed on the states by the fundamental law such as those pertaining to ex post facto laws, bills of attainder, and involuntary servitude. But when it seizes upon such a vague and undefined concept as due process of law and gives it interpretations which spell out jurisdictions foreign to our jurisprudence and designed to encompass within the federal judicial embrace numerous subjects which can be handled more competently on a state level, a different situation presents itself, and gives the states real grounds for grievance.

The most effective way of course, to restrict the federal judicial power over state criminal cases is to repeal the fourteenth amendment, or at least revise it so that it can no longer be used as the authority for the present more or less free-for-all federal intervention in such matters. Congress then would be unable to endow the federal courts with the broad comprehensive power of review which they now have; nor could such courts ever assert that they possessed it under a self-executing constitutional authority. With the national tribunals thus restrained, the general administration of criminal justice would be turned back to the states, which would be allowed to maintain law and order with a minimum of harassment. A cardinal principle of good administration incidentally is that authority should go hand in hand with responsibility.

71. *Id.* at 60.

State courts, as previously stated, have on rare occasions wrought injustices, and they will continue to do so. But just as one swallow does not make a summer, so does not an infrequent infringement of private rights warrant allowing federal tribunals to hang like the sword of Damocles over the heads of their state counterparts, ready to fall at the slightest intimation of error. Such a condition, after a while, can become insufferable.

In this country with its humane and intelligent population, it is difficult to imagine the voters within a state tolerating for long a truly evil condition which outrages the general public's sense of decency and fair play. If such a condition should exist, the voters doubtless would see to it that their lawmakers enact the necessary corrective legislation and that judges and prosecutors are selected who will administer justice in an enlightened and even-handed manner. That the people can be so trusted was well expressed not so long ago by a prominent historian:⁷²

Our own experiences . . . justifies Jefferson's faith that men need no masters—not even judges. It justifies us, too, in believing that majority will not imperil minority rights, either in theory or in operation.

72. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 82 (1943).