St. John's Law Review

Volume 44, April 1970, Number 4 Article 4

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FEDERAL HABEAS CORPUS: EASING THE TENSION BETWEEN STATE AND FEDERAL COURTS

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I

Although of ancient vintage, the writ of habeas corpus, embedded in our legal system by the Federal Constitution,[1] was not specifically defined by that document. Indeed, it remained for Congress and the courts to determine its proper function. Inasmuch as the constitutional provision appeared in article I, which established the form and powers of the Congress, it might have been urged that the intention of the framers was directed toward the actions of the federal government alone.[2] However, both the fourteenth amendment, declaring that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,[3]

and the supremacy clause, stating that the Constitution and the laws made thereunder are the supreme law of the land, binding the judges in every state and superseding any state constitution or law to the contrary,[4] have nullified that construction. The ancient writ thus emerged as a viable instrument for the effectuation of these constitutional mandates.

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This article is based on the panel discussion on the same subject before the Appellate Judges' Conference of the Section of Judicial Administration of the American Bar Association at the convention held at Dallas, Texas, on August 9, 1969. The panel members were Louis H. Burke, Justice of the Supreme Court of California, Floyd R. Gibson, Judge of the Court of Appeals for the Eighth Circuit, Stanley A. Weigel, Judge of the District Court, Northern District of California, and the author. I am deeply indebted to the members of the panel for their contributions to the discussion, upon which this article largely depends. They are not bound, however, for any of the views expressed herein, for which I take complete responsibility.

1 U.S. CONST. art. I, § 9. It is the only form of process mentioned in the Constitution. The Constitution of the State of New York has a similar provision. *See* N.Y. CONST. art. I, § 4.

2 The argument is strengthened by the provisions of section 10 of article I of the Constitution, dealing with the limitations of the powers of the states. No prohibition against the suspension of the writ by a state is made, even though other kinds of state action are specifically forbidden, *i.e.*, bills of attainder, ex post facto legislation, or a law impairing the obligation of contract.

3 U.S. CONST. amend. XIV, § 4.

4 U.S. CONST. art. VI, § 2.

II

Although proposed to the states two years earlier, the fourteenth amendment did not come into force until 1868. In the interim, Congress conferred upon the federal courts habeas corpus jurisdiction over state prisoners,[5] whereas previously the federal judiciary had been empowered to issue the writ only for the benefit of federal applicants.[6] Today, the federal statute broadly extends the power of the writ to "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions"[7] when the prisoner is "in custody in violation of the Constitution or laws or treaties of the United States. . . ."[8] Despite this expansive language, a question of interpretation inevitably arises — a question which perennially attends the enforcement of federal rights on the state level: What federal rights survive a final judgment of conviction in a state court, where federal claims were asserted by the defendant and adjudicated against him? Or to put it differently, and perhaps more correctly, to what degree may the federal courts *review* a state court conviction through the use of the writ of habeas corpus?

Several important considerations underlie this question of interpretation. First, it is undoubtedly true that the federal courts, under the constitutional analysis of power heretofore discussed, could, as a pure exercise of sovereignty, utilize habeas corpus to review a state criminal conviction whenever a non-frivolous federal claim is asserted by the affected prisoner. Second, the exercise of this power bears the sobering weight of the relative strains between the states and the central government; there are occasions when the accommodation of the several systems within the Union reflects a call for discretion. Third, the pragmatic need for the most efficient use of judicial manpower and legal process is a particularly demanding interest in a society where the volume of litigation is rapidly increasing. Fourth, great weight has recently been placed upon the evident benefits arising from the uniform enforcement of federal rights throughout the states.[9] Fifth, the vitality of the widely accepted principle that the criminal law ought to be swiftly and certainly enforced may be impeded by the increasing availability of habeas corpus relief.[10]

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[5] 14 Stat. 385 (1869).

[6] *Cf. Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845). *See generally* Bell, *State Courts and the Federal System*, 21 VAND. L. REV. 949, 951-53 (1969).

[7] 28 U.S.C. § 2241(a) (1964).

[8] *Id.* § 2241(c)(3) (1964).

[9] *Cf.* Hopkins, *The Formation of Rules: A Preliminary Theory of Decision*, 35 BROOKLYN L. REV. 165, 168-69 (1969).

[10] This consideration, and others, are discussed in Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

The reconciliation of these somewhat conflicting objectives by the federal judiciary has resulted in a rule which, while affording recognition to the legitimate interests of state legal processes, compels obeisance to the supremacy of the federal system in the determination of the scope and content of federal rights. The development of this rule has, of course, produced tensions in its wake between the federal and state judicial systems. The purpose of this article is to examine the nature of these tensions and consider the means by which they may be ameliorated.

III

While federal judges have utilized habeas corpus to oversee state criminal convictions since 1923,[11] this process did not assume extensive proportions until *Brown v. Allen*[12] was decided by the United States Supreme Court in 1953. The *Brown* Court held that state adjudications of federal claims could not be accepted as binding by the federal courts, *i.e.*, that an alleged violation of a federal constitutional right must be appraised by a federal tribunal independently of the findings of the state court. As the Court noted, "[i]n determining whether a confession has been used by the state in violation of the constitutional rights of a petitioner, a United States court appraises the alleged abuses by the facts as shown at the hearing or admitted on the record."[13] Ten years later, in the companion cases of *Fay v. Noia*[14] and *Townsend v. Sain*,[15] the Court formulated a definitive rule which may be synthesized as follows: the remedy of habeas corpus may be invoked, after the exhaustion of available state remedies, to consider violations of federal constitutional rights in state criminal proceedings which result in judgments of conviction, notwithstanding any state determination of those rights.[16] And a full evidentiary hearing must be held by the federal district court under any of the following conditions: (1) where the merits of a factual dispute were not determined at the state hearing; (2) where the state determination is not fairly supported by the record; (3) where the fact-finding procedure used by the state court is not adequate for a full and fair hearing; (4) where there is a substan-

11 Moore v. Dempsey, 261 U.S. 86 (1923), held that the federal district judge must make a factual examination of the state prisoner's claim that his trial would be lacking in due process because of the influence of a mob. *Cf.* Frank v. Mangum, 237 U.S. 309 (1915), where a similar claim was dismissed because the state processes were said to be adequate remedies.

12 344 U.S. 443 (1953).

13 *Id.* at 475.

14 372 U.S. 391 (1963).

15 372 U.S. 293 (1963).

16 *Id.* at 312.

tial allegation of newly discovered evidence; (5) where the facts were not adequately developed at the state court hearing; or (6) where, for any reason, it appears that the state court did not afford the prisoner a full and fair hearing.[17] However, even under *Noia* and *Townsend*, a habeas applicant is still deemed to have waived his federal claims if he

> understandably and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the *deliberate by-passing* of state procedure . . . .[18]

The potential effects of the *Noia-Townsend* rule[19] were aptly demonstrated even before its promulgation in 1963. For example, in the related cases of *People v. Wade*[20] and *People v. Kiernan*,[21] two nonconvicts, were accused of participating in a jail break in which both a policeman and a jail guard were killed. They were convicted of first degree murder in 1942 and sentenced to life imprisonment. At their trial the defendants repudiated and contested, on the ground of coercion, the confessions implicating them in the crime. The jury, of course, implicitly rejected their contentions, and, although the same point was raised on appeal, the appellate division affirmed the conviction.[22] Initially, Wade alone appealed, again raising the same claim. The New York Court of Appeals affirmed his conviction,[23] and a subsequent application for certiorari was denied by the United States Supreme Court.[24]

In 1955, Wade's application for *coram nobis* relief, alleging that the prosecution had suppressed evidence at his trial, was denied by the appellate division and shortly thereafter his petition for a writ

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17 *Id.* at 313.

18 372 U.S. at 439 (emphasis added). Later in 1963, the Supreme Court held in Sanders v. United States, 373 U.S. 1 (1963), that the doctrine of res judicata does not apply to successive habeas corpus petitions and that the court should dispose of each petition in the exercise of discretion, through which the denial of an earlier petition based on the ground now presented may be considered.

19 The rule has been substantially codified in 28 U.S.C. § 2244 (1964). It is not necessary for the petitioner to have raised the claim of a federal right in the appeal from the judgment of conviction; the constitutional violation may first be submitted in the petition under the statute. Kaufman v. United States, 394 U.S. 217 (1969).

20 291 N.Y. 574, 50 N.E.2d 660 (1943), *reargument denied*, 292 N.Y. 577, 54 N.E.2d 693 (1944).

21 6 N.Y.2d 274, 160 N.E.2d 503, 189 N.Y.S.2d 215 (1959).

22 People v. Wade, 265 App. Div. 867, 38 N.Y.S.2d 369 (2d Dep't 1942); People v. Kiernan, 265 App. Div. 866, 38 N.Y.S.2d 370 (2d Dep't 1942).

23 People v. Wade, 291 N.Y. 574, 50 N.E.2d 660 (1943), *reargument denied*, 292 N.Y. 577, 54 N.E.2d 693 (1944).

24 Wade v. New York, 320 U.S. 789 (1943), *reh'g denied*, 320 U.S. 815 (1944).

of certiorari was similarly denied by the Supreme Court.[25] He then addressed two petitions to the federal district court, contending that his federal right of due process had been violated by both the suppression of evidence[26] and the utilization of the coerced confession.[27] Neither he nor the state introduced any new evidence with respect to the coerced confession claim, and the district court denied both petitions. However, on appeal, the writ was sustained, and Wade was discharged from custody.[28] The Second Circuit found, on the facts as revealed by the trial record, that the confession had been coerced, and that, absent the confession, the evidence was insufficient to sustain conviction.

A further confrontation between the state and federal courts followed on Kiernan's appeal, taken some years after Wade's. Despite Wade's success in his habeas corpus proceeding, Kiernan's appeal was fruitless and his conviction affirmed by the New York Court of Appeals.[29] Moreover, Kiernan's application for certiorari to the Supreme Court was denied, but with the significant addendum that it was "without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court."[30] Kiernan, of course, immediately commenced a habeas corpus proceeding in the appropriate district court. Again, no new evidence relating to the validity of the confession was introduced, and both the prisoner and the prosecution relied on the state trial record. The district court, finding no distinction between Kiernan and Wade as to the facts in the record concerning their confessions, and considering itself bound by the Second Circuit's determination with regard to Wade, sustained the writ of habeas corpus and discharged Kiernan.[31]

Thus, a conviction of some sixteen years standing, well beyond the reach of the appellate process, was annulled through the vindica-

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25 Wade v. New York, 352 U.S. 974 (1957).

26 United States *ex rel.* Wade v. Jackson, 153 F. Supp. 781 (N.D.N.Y. 1957) (suppression of evidence petition).

27 United States *ex rel.* Wade v. Jackson, 144 F. Supp. 458 (N.D.N.Y. 1956) (coerced confession petition).

28 United States *ex rel.* Wade v. Jackson, 256 F.2d 7 (2d Cir. 1958), *cert. denied*, 357 U.S. 908 (1958).

29 People v. Kiernan, 6 N.Y.2d 274, 160 N.E.2d 503, 189 N.Y.S.2d 215 (1959). The conviction was unanimously affirmed. The opinion declared that a reading of the record did not sustain a conclusion that Kiernan's statement was coerced. The opinion ends:

> We do not regard the evidence as to the circumstances surrounding his confession sufficient to hold that his confession was involuntary *as a matter of law*, and the use thereof as evidence a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

Id. at 275-76, 160 N.E.2d at 504, 189 N.Y.S.2d at 217.

30 Kiernan v. New York, 363 U.S. 824 (1960).

31 United States *ex rel.* Kiernan v. La Vallee, 191 F. Supp. 455 (N.D.N.Y. 1961).

tion of a federal right. It might be expected that profound disagreement with the result, approaching the level of resentment, would have been aroused in the states. First, usual practice looks to the review of error within a comparatively short time after judgment, and a deviation from that practice presents elements of prejudice both to the prisoner and to the community. Second, where the scope of the right is the same under state and federal standards, the state's rejection of a claim is a determination which would, unless it overlooked the requirements of the standard, normally be final. In *Wade* and *Kiernan*, for example, the New York rule measuring the admissibility of a confession and denying force to a coerced confession is substantially the same as the federal rule;[32] yet, the federal court found that the common standard had been violated—a conclusion contrary to that reached by the New York courts on the same facts.[33] Third, since the denial of certiorari by the Supreme Court in the usual appellate process is usually regarded as at least some indication that the claim of violation of the federal right was not crucial, the question arises whether the federal system should undertake a second examination of the claim. Fourth, and least significant, the notion of review, implying error, is irksome to the court being reviewed.[34]

All of these grounds of tension are undoubtedly inherent in any setting which contemplates a coincidence of jurisdiction in separate court systems over the same subject matter. Overlapping breeds conflict and irritation. The final word must inevitably be spoken by one of the systems, and if it differs from the outcome arrived at by the other, a questioning of the determination can be anticipated.[35]

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32 One difference between the two exists in the effect to be given to a delay in arraignment. New York treats the delay as one element to be considered by the trier of fact in deciding the validity of the confession, People v. Snyder, 297 N.Y. 81, 74 N.E.2d 657 (1947); the federal courts may find the delay alone sufficient to impair the confession, McNabb v. United States, 318 U.S. 332 (1943); Upshaw v. United States, 335 U.S. 410 (1948). That factor was not, however, decisive in the reasoning of the federal court.

33 The Court of Appeals for the Second Circuit laid emphasis on the length of the questioning—some twenty-three hours, the failure of the prisoner to have food, inconsistencies in statements made during the questioning, medical testimony concerning injuries suffered by the prisoners, and declarations made by the prosecutor during his summation which the court found were unsupported by the evidence. United States *ex rel.* Wade v. United States, 256 F.2d 7, 12-14 (2d Cir. 1948).

34 As Finley Peter Dunne in his role as Mr. Dooley is said to have remarked, an appeal is where one court is asked to show its contempt for another. *Cf.* United States *ex rel.* Kiernan v. La Vallee, 191 F. Supp. 455, 456 (N.D.N.Y. 1961).

35 The depth of the questioning is reflected by the many articles on the subject. *See* Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trials*, 113 U. PA. L. REV. 793 (1965); Bator, *supra* note 10; Desmond, *Federal and State Habeas Corpus: How to Make Two Parallel Judicial Lines Meet*, 49 A.B.A.J. 1166 (1963); Mayers, *Federal*

The nature and severity of the questioning, however, can be tempered when the two systems attempt to mitigate the tensions between them, recognizing respective duties, the advantages which each has in the disposition of cases, and the course of action which may mutually be pursued to accommodate the objectives of a sound criminal process within both systems.

IV

It would be incorrect to overstate the problem; and there is a tendency to stress the exceptional and ignore the usual. The truth is that federal intervention in state convictions has not led to a wholesale reversal of state convictions. As Mr. Justice Clark recognized, dissenting in *Fay v. Noia*, only 1.4 percent of the petitions in habeas corpus have resulted in the granting of any relief.[36] In *Brown v. Allen*, Mr. Justice Frankfurter similarly noted that out of some 3,702 petitions filed during a four-year period, only five had made out a case for the discharge of the prisoner.[37] Nevertheless, the paucity of success has not discouraged state prisoners, and the filing of petitions in habeas corpus has assumed increasing momentum. When *Fay v. Noia* was decided in 1963, approximately 1,900 petitions were filed; in 1968 the number of petitions had risen to over 6,000, and during the latter months of 1968 more petitions were filed than during the corresponding period of the previous year.[38]

The burden of litigation which this influx of petitions has cast upon the federal courts is enormous — even more so, if, under the rubrics of *Townsend v. Sain* and *Fay v. Noia*, the state court procedures have been found inadequate and evidentiary hearings become necessary. Here, the ground of tension weighs heavily in favor of the federal courts, for the burden of habeas corpus applications would be reduced, at least in part, by proper regard for constitutional procedures in the state courts.

Review of State Convictions: The Need for Procedural Re-appraisal, 34 GEO. WASH. L. REV. 615 (1966); Meador, *Impact of Federal Habeas Corpus on State Trial Procedure*, 52 VA. L. REV. 286 (1966); Meador, *Accommodating State Criminal Procedure and Federal Post Conviction Review*, 50 A.B.A.J. 928 (1964); Silver, *The Supreme Court, the State Judiciary and State Criminal Procedure: An Example of Uncreative Federalism*, 41 ST. JOHN'S L. REV. 331 (1967); Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422 (1966); Note, *State Post Conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U.L. REV. 154 (1965).

36 372 U.S. 391, 445 n.1 (1963).

37 344 U.S. 443 (1953).

38 1968 REPORT OF DIRECTOR OF ADMINISTRATIVE OFFICE OF UNITED STATES COURTS 100. It was noted also that in 1968 appeals by nonfederal prisoners increased by more than one-third, so that there were more than 1200 cases on appeal in habeas corpus applications in the circuit courts of appeal.

But the incorporation of federal constitutional protections into state criminal systems has unquestionably contributed more heavily to the burden thrust upon the federal courts than any other cause. Each time the Supreme Court has announced a new doctrine binding on the states, as in the cases of *Mapp v. Ohio*,[39] *Jackson v. Denno*,[40] *Gideon v. Wainwright*,[41] and *Stovall v. Denno*,[42] to cite but a few, courts have been inundated with petitions seeking habeas corpus relief based on that doctrine. Indeed, the experience of both state and federal judges reveals that many prisoners file repetitive petitions which frequently are contradictory in their statements of the facts upon which relief is sought, or which omit allegations of vital facts which require denial of preceding applications. As a customary procedure, an application for post-conviction relief in the state system (whether by *coram nobis* or habeas corpus) is made to the court of original jurisdiction, followed by an appeal by the unsuccessful prisoner, a habeas corpus application in the federal district court, and upon denial, review by appeal in the federal system. Hence, discounting entirely the review available through the appeal of the judgment of conviction, the prisoner's conviction, in a typical case, may receive the scrutiny of four courts. The number is multiplied when the prisoner engages in separate applications based on varying grounds.

The loss in judicial man hours occasioned by this circuitous and time consuming procedure is incalculable. Yet, no panacea for the loss has been suggested, nor is it likely that the duplication of effort can be significantly reduced under prevailing procedures. A process limited exclusively to state courts runs counter to the supreme power of the federal courts to assess and enforce claims of federal rights; a process limited to the federal courts alone ignores the fact-finding determinations in the state courts and, in addition, fails to recognize and utilize available remedies at the state level. As has been declared by the Supreme Court in *Sanders v. United States*,[43] the principle of res judicata does not warrant the denial of repetitive petitions out of hand. Proposals, often advanced, that a time limit for the filing of habeas corpus applications be imposed by statute, or that the prisoner be required to state in one petition all grounds for relief which are known to him, or which could have been discovered with due diligence, seem

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39 367 U.S. 643 (1961) (illegal search and seizure).
40 378 U.S. 368 (1964) (procedural requirements for admissibility of confession).
41 372 U.S. 335 (1963) (right to counsel).
42 388 U.S. 293 (1967) (confrontation by witness).
43 373 U.S. 1 (1963).

doomed under the constitutional provision that the writ may not, under ordinary circumstances, be suspended.[44]

Nor is it likely that the ever-increasing load of petitions will be diminished in the immediate future. Manifestly, the Supreme Court has not retarded the pace at which federal criminal standards are being integrated into the state systems. Indeed, the prohibition against the out-of-hand exclusion of jurors in trials involving the death penalty for their disbelief in capital punishment,[45] the right to the transcript of the evidentiary hearing on appellate review,[46] the application of the double jeopardy clause in the fifth amendment,[47] and the use of the confession of a codefendant in the trial of several defendants jointly indicted,[48] are illustrative of the continued incorporation of federal standards within recent years.

Moreover, there are signs of federal intervention in areas untouched by these decisions. For example, in *Boykin v. Alabama*,[49] the defendant had been indicted in Alabama on five counts of common-law robbery, a crime punishable by death. Represented as an indigent by court appointed counsel, he pleaded guilty to all five counts, and was sentenced to death by the jury. The Supreme Court reversed, holding that a guilty plea must be supported on the record by an affirmative showing that it was intelligently and voluntarily made. As the trial judge had accepted Boykin's plea without probing into the record, and as Boykin had not addressed the court at the time, proof that the plea was made with full understanding of its effect was lacking. Both the majority[50] and dissenting[51] opinions clearly indicate that the duty of the state judge in accepting a guilty plea is precisely the same as that of a federal judge under rule 11 of the Federal Rules of Criminal Procedure.[52] Thus, *Boykin* may be the harbinger of an ex-

44 An aspect of this problem, frequently forgotten, is its effect on the prisoner. He is compelled to use a procedure which shuttles him from court to court, and requires him to file papers which he usually prepares in longhand, in a form replete with legal verbiage and bound by rules not easily understood by laymen. From the point of view of law as a consumer product, the process cannot be defended, except as a kind of therapy. *Cf.* Johnson v. Avery, 393 U.S. 483, 498 (1969). *See also* Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963).

45 Witherspoon v. Illinois, 391 U.S. 510, *reh'g denied*, 393 U.S. 898 (1968).

46 Long v. District Court, 385 U.S. 192 (1966). Moreover, a transcript of the hearing must be furnished for use on a subsequent petition to an appellate court. Gardner v. California, 393 U.S. 367 (1969).

47 Benton v. Maryland, 395 U.S. 784 (1969).

48 Bruton v. United States, 391 U.S. 123 (1968).

49 395 U.S. 238 (1969).

50 *Id.* at 243.

51 *Id.* at 245.

52 FED. R. CRIM. P. 11. In substance, rule 11 provides that the court shall not accept a plea of guilty "without first addressing the defendant personally and determining that

plicit form of uniform criminal procedure impressed upon the states through the federal rules.

Should *Boykin* be applied retroactively, it is certain to invite petitions for post-conviction relief in the myriad of cases in which convictions resulted from guilty pleas. The doctrine quite clearly calls for the evaluation of the record at the time of the acceptance of the plea, and where it is deficient under the standards of rule 11,[53] an evidentiary hearing may be required. Accordingly, the work load of both state and federal courts may be expected to increase as a result of the *Boykin* doctrine.

A second area of potential intervention appears from the decision of *United States ex rel. Herrington v. Mancusi*,[54] wherein the relators challenged, by habeas corpus, the subject matter jurisdiction of the New York Supreme Court, contending that the crimes of which they were accused — in one case murder for the slaying of the relator's mother-in-law, and, in the second, sodomy and incest committed against the relator's daughter — were, under New York law, within the exclusive jurisdiction of the Family Court. This lack of jurisdiction, according to their petitions, violated their federal right of due process.

The Court of Appeals for the Second Circuit, although affirming the denial of their applications, acknowledged the entry of the relators' claim into a new aspect of federalism. The opinion by Chief Judge Lumbard stated that no federal court had ever granted a writ on the ground of lack of jurisdiction which resulted solely from the provisions of a state statute.[55] It should be noted that the court did not refuse to intervene because of the delicacy of the relationship between the two systems. Rather, it sustained the denial of relief on the conclusion that the state law, as presently construed by state courts, did not so clearly establish the lack of jurisdiction as to justify intervention. Thus, the critical factor in the decision was not the court's lack of power, but the absence of a clear base for the exercise of that power.

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the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea"; moreover, it may not enter judgment on the guilty plea unless there is a factual basis for the plea. Prior to 1969, it had been held that the failure of the court to comply strictly with the rule would not invalidate the plea. Stephens v. United States, 376 F.2d 23 (10th Cir.), *cert. denied*, 389 U.S. 881 (1967). In McCarthy v. United States, 394 U.S. 459 (1969), it was held that a guilty plea accepted without compliance in every respect to the rule must be set aside. *McCarthy* was said not to be retroactive in Halliday v. United States, 394 U.S. 831, *reh'g denied*, 395 U.S. 971 (1969).

[53] For the substance of a record that is sufficient under federal standards, see Baker v. United States, 404 F.2d 787 (10th Cir. 1968); *cf.* Hulsey v. United States, 369 F.2d 284 (5th Cir. 1966).

[54] 415 F.2d 205 (2d Cir. 1969).

[55] *Id.* at 209.

It remains open, therefore, for the federal courts to enforce state law on the issue of jurisdiction, even though state courts may decline to grant relief on that ground.

V

Although grounds of tension, arising from the doctrines expounded as incidents to the invocation of federal habeas corpus relief, may be present in the federal-state court relationship, that does not mean that the tension is inevitable, or that it may not be lessened by appropriate actions of the courts in both systems. There is, first, the necessity for each to recognize and respect the duties and functions of the other. These differ and reflect factors of varying value in the constitutional scheme, which can, and should, not only be reconciled but also harmonized.

The authors of the Federal Constitution constructed a pattern of separate yet concurrent divisions of power. Generally, the enforcement of criminal law was charged to the states, while the federal courts had cognizance of conduct conceived to be inimical to federal power; but the jurisdiction also encompassed federal constitutional rights since these transcended state boundaries and hence received final embodiment in the federal system. When the vindication of a federal right impinges on state criminal process, the state's enforcement of that right must be, as a matter of definition, the subject of federal scrutiny; otherwise, the federal right conceivably could be subject to conflicting interpretations, thus rendering equal protection an empty concept. Yet, the determination of the facts is a matter over which the state judicial system ought to have a preemptive authority.

It is in this context that the federal system's function to define and enforce federal rights must, perforce, be acknowledged by the state courts; and it should be beyond dispute that the content of those rights may expand or contract as the Supreme Court faces novel circumstances requiring a new perspective. Conversely, the function of the state system generally to enforce the criminal law must be acknowledged by the federal courts, and the more advantageous position of the state forums to make findings of fact should not be disrupted by the parallel action of the federal courts with the resultant possibility of inconsistent findings.[56]

[56] *But see* Note, *Supreme Court Review of State Court Findings of Fact*, 55 HARV. L. REV. 644 (1942). The review of state findings of fact in criminal cases occurred in full force in Chambers v. Florida, 309 U.S. 227 (1940), although the rule was tempered in Lisenba v. California, 314 U.S. 219, 238 (1941), so that review was said to be permissible in the face of conflicting evidence in the state court only where the finding was so

The accommodation of the functions of the dual systems can be achieved by means of several approaches; all of which have the capacity to dissolve the tension which may be precipitated whenever the two systems in turn confront the disposition of the same case.

1. State courts in deciding applications for post-conviction relief should state briefly the grounds relied on by the prisoner and the reasons for denial. This does not require that the court write an opinion or expatiate at length on the reasons for denial. The statement of the grounds urged by the prisoner provides courts (whether federal or state) passing on subsequent applications of the prisoner with information which facilitates the disposition of the claims presented. If the state court denies the petition without explanation, the inference may be that it was based on the merits, even though it may actually have been denied for failure of the prisoner to comply with procedural rules.[57] Moreover, a statement of the grounds for the application furnishes the background for a comparison of various petitions made by the prisoner in his repetitive assaults on the conviction.

2. The federal and state systems should collaborate in the establishment of a data bank which would contain the history of the prisoner's applications in both systems. Upon the referral of a pending application to the data bank, a chronicle of the prisoner's applications would be disclosed — indicating the grounds upon which they were brought, their disposition, and the reasons assigned thereto. Efforts have already been directed toward the organization of such a central index.

In New York, for example, the State Judicial Conference and the Federal Regional Conference (Second Circuit) have appointed joint committees composed of state and federal judges to study the structure of a data bank for precisely such a purpose. The committee has approved the establishment of this device and has prepared a form detailing the required information to be forwarded to the data bank by the court after it has decided a prisoner's application for post-conviction relief. The data bank has been operative since July 1, 1970.

The information available from the data bank should materially reduce the time and research of courts in the consideration of applications of a repetitive petitioner.

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lacking in support in the record that to give the finding effect would result in fundamental unfairness.

[57] Castro v. Kilinger, 373 F.2d 847 (9th Cir. 1947), requires a federal district judge to assume, when a state court has denied a petition without indicating the reason, that the denial was on the merits.

3. The federal courts should give effect to the position of the state courts as fact finders by requiring that evidentiary hearings, so far as practicable, be held in the state courts. Certain pragmatic advantages accrue from such a procedure. The state records will be more accessible in the state courts, and witnesses will presumably not be required to travel as far as they would if their testimony were to be received in the federal courts.

Beyond these advantages, the procedure has the benefit of tacitly recognizing the authority of the state courts by minimizing potential interference in their work, while simultaneously introducing them into the habeas corpus process. Furthermore, it relieves the federal system of lengthy hearings, and places the burden upon the state courts where it properly belongs.

This is not to say that the federal courts are surrendering their jurisdiction to the state system. As has been noted, the ultimate responsibility of determining federal rights must lie with the federal courts. The fact finding referral to the state courts would still be at the direction and under the broad supervision of the federal courts.

Some federal courts have already invoked the procedure. For example, the Court of Appeals for the Fifth Circuit has affirmed the denial of habeas corpus relief without prejudice to an application to the state court, on the theory that state mechanisms should be more fully employed.[58] The use of this practice on a wider scale would reduce duplication of effort, and foster greater cooperation between the two systems.

4. The number of petitions for habeas corpus relief could be decreased by the discriminating application of the doctrine of retroactivity. As noted previously,[59] a Supreme Court decision mandating the absorption of a federal constitutional right into the state criminal law stimulates a flood of petitions by state prisoners whose convictions antedated the pronouncement. Since the state courts were unaware of the necessity of vindicating the federal right at the time the prisoner was tried and convicted (and the conviction reviewed), the retroactive enforcement of the right has always carried a measure of frustration.

This is not to advocate a doctrine which totally rejects the concept of retroactivity. The distinction may be drawn, however, in the quality

[58] Peters v. Rutledge, 397 F.2d 731 (5th Cir. 1968); Milton v. Wainwright, 396 F.2d 214 (5th Cir. 1968). The same court has also granted habeas corpus relief, unless the state court permits an out-of-time appeal, thus escaping the dilemma posed by *Fay v. Noia*. Beto v. Martin, 396 F.2d 432 (5th Cir. 1968).

[59] *See* text accompanying notes 39-42 *supra*.

of federal rights in each particular case. Some rights, as, for example, those specified in the fourth amendment, are truly immunities — a protection for the individual against oppressive actions by the state. Thus, the vindication of the right (or immunity) deters its continued violation by vacating the conviction of the person asserting the claim. Under this standard, the issue of whether a crime was committed is not relevant. Here, retroactivity should be limited to cases still in the appellate process and not extended to habeas corpus relief.

But where the violation of the right substantially affects the issue of guilt — as in the cases of the denial of counsel or the inadequacy of the representation by counsel — it would seem unfair not to grant retroactivity.[60]

The doctrine, not constitutionally mandated,[61] has not been accorded consistent treatment in the area of the absorption of federal rights. By way of illustration, although the assertion of the exclusionary rule in *Mapp v. Ohio*[62] was not followed by retroactivity,[63] the rule in *Miranda v. Arizona*[64] was accompanied by a limited retroactivity, *i.e.*, only to those defendants whose trial had not commenced.[65] Since both the right to be protected against illegal search and seizure and the right against incrimination in the absence of proper warning are immunities which are designed to safeguard the individual against unconstitutional investigatory methods, neither should have been given retroactive application under the analysis of the effect the violation had on guilt. On the other hand, the right to be confronted under proper precautions by witnesses for the purpose of identification would seem to relate directly to the question of guilt. Yet that right was not afforded retroactive application.[66]

The latest statement from the Supreme Court on this thorny subject suggests that the guilt-determining process may at last be the touchstone by which retroactive effect is determined. In *Desist v. United States*,[67] the Court denied retroactivity to the rule announced in *Katz v. United States*[68] that the fourth amendment, binding on the states, embraced eavesdropping — a result consistent with the refusal

60 *See* Mishkin, *Foreward, the Supreme Court, 1964 Term, the High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).
61 Linkletter v. Walker, 381 U.S. 618, 629 (1965).
62 367 U.S. 643 (1961).
63 Linkletter v. Walker, 381 U.S. 618, 629 (1965).
64 384 U.S. 436 (1966).
65 Johnson v. New Jersey, 384 U.S. 719 (1966).
66 Stovall v. Denno, 388 U.S. 293 (1967).
67 394 U.S. 244 (1969).
68 389 U.S. 347 (1967).

to grant retroactivity to *Mapp v. Ohio*. In considering the problem, the Court said that three factors controlled the solution: (1) the purpose to be served by the new standards; (2) the extent of reliance by the authorities on the previous rule; and (3) the effect of retroactivity on the administration of justice.[69] Though the second factor may be irrelevant to the distinction resting upon the validity of the fact-finding process determining guilt or innocence, surely the other two factors are inextricably woven into that distinction.

It is submitted that the integrity of the fact-finding process should be, in the end, the standard by which retroactivity ought to be determined. By limiting retroactivity under this analysis the number of habeas corpus petitions would be materially decreased.

5. Finally, and perhaps most importantly, the possibility of tension between the two systems can be lessened by opening the channels of communication. Noteworthy here have been the joint committees created by the New York Judicial Conference and the Second Circuit Regional Conference with respect to the establishment of a data bank. The Federal Judicial Center, under the direction of former Mr. Justice Clark, has sponsored a study at William and Mary Law School, under the supervision of an advisory committee of both federal and state judges, to investigate the hypothesis that refusals by the federal courts to intervene in state convictions depend on the adequacy of post-conviction remedies in the states. In the Ninth Circuit, conferences between state and federal judges are held for the purpose of discussing mutual problems. In Minnesota, informal meetings of federal district judges and state judges have taken place.

The extension of this kind of closer relationship and direct communication throughout the circuits would undoubtedly promote a better understanding and a higher degree of acceptance of the roles of each system in the administration of the criminal law. It is hoped that the Federal Judicial Center, which is already studying problems arising in both systems,[70] will broaden the channels of intercommunication by sponsoring regional conferences of federal and state judges at which the acute points of pressure inducing tension can be objectively and candidly examined.

VI

It is surely an ideal of criminal law that it be enforced evenly within the system. Like other ideals, it may not be capable of full re-

[69] Desist v. United States, 394 U.S. 244 (1969), *quoting* Stovall v. Denno, 388 U.S. 293, 297 (1967).

[70] For example, the law center is involved in the examination of procedures for discipline of state and federal judges.

alization, but at least the system should have the power to obtain compliance with its standards, so that the ideal will be approached. As the national structure admits of two coexisting systems, the ideal still remains, but under two auspices. The individual case, in which federal constitutional rights are asserted, tests the compatibility of the systems, and the accommodation of the procedures in the systems must be a necessary objective, if both systems are to survive.[71]

During the last twenty years, the function of the federal courts as an instrument of achieving the equal protection of constitutional rights throughout the nation has expanded enormously. The function of the state courts has accordingly been altered, and this has brought about adjustments in the two systems. While a period of adjustment is usually a period of tension, this is by no means inevitable. If the two systems are willing to recognize the appropriate function of each and to make adjustments in response thereto, the underlying causes of frustration can be eliminated. The suggestions made here do not exhaust the range of the adjustments which in fact can be made; they merely furnish a starting point from which other and more inventive devices can be launched.

[71] The federal judiciary has been keenly aware of the criticisms made concerning the use of habeas corpus and have considered recommendations for change. *See, e.g.*, Lay, *Problems of Federal Habeas Corpus Involving State Prisoners*, 45 F.R.D. 45 (1968); *Applications for Writs of Habeas Corpus and Post Conviction Review of Sentence in the United States Courts*, 33 F.R.D. 363 (1963).