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Symposium: State Prisoner Use of Federal Habeas Corpus Procedures

Foreword: Errors of Comity?

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The subject of this symposium is federal habeas corpus, primarily habeas for state prisoners. I first encountered the subject in 1958 when I clerked for a United States district judge in Chicago. On a day when I was the only person in chambers, the Clerk of Court brought in a habeas petition. "I hope it's not too late," he said. "What do you mean?" I asked. "He's scheduled to be executed tonight," he replied. I started to panic; for a moment, I considered forging the judge's signature to a stay of execution. But reason prevailed, and instead I called the Illinois Supreme Court. I learned that the execution had already been stayed. Charles Townsend was not in immediate danger. His case subsequently gained a measure of notoriety.[1]

1958 was not a big year for federal habeas corpus. Although *Brown v. Allen*[2] was five years old, state prisoners had relatively few federal constitutional protections and thus few occasions for seeking federal relief.[3] The next decade, however, saw a due process revolution[4] in which constitutional protections, previously limited to federal criminal proceedings, were extended to state cases[5] and new protections were created and made ap-

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1. Townsend v. Sain, 372 U.S. 293 (1963).

2. 344 U.S. 443 (1953).

3. In 1958 defendants in state criminal cases were protected by federal constitutional principles against bills of attainder and ex post facto laws, U.S. CONST. art. I, § 10; vague criminal statutes, Lanzetta v. New Jersey, 306 U.S. 451 (1939); Herndon v. Lowry, 301 U.S. 242 (1937); conviction for protected activities of speech, Winters v. New York, 333 U.S. 507 (1948); or religion, Cantwell v. Connecticut, 310 U.S. 296 (1940); involuntary confessions, Chambers v. Florida, 309 U.S. 227 (1940); and trial in a mob-dominated atmosphere, Moore v. Dempsey, 261 U.S. 86 (1923). Black defendants were additionally protected against the exclusion of blacks from grand and petit juries. Pierre v. Louisiana, 306 U.S. 354 (1939). Indigent defendants were entitled to court-appointed counsel in capital cases, Powell v. Alabama, 287 U.S. 45 (1932), and, if special circumstances were present, in noncapital cases as well. Betts v. Brady, 316 U.S. 455 (1942). They were also entitled to a free transcript to perfect a first appeal as of right. Griffin v. Illinois, 351 U.S. 12 (1956). In rare situations, tangible evidence obtained by brutality was inadmissible. Rochin v. California, 342 U.S. 165 (1952).

4. *See generally* F. GRAHAM, THE DUE PROCESS REVOLUTION (1970) (hardcover edition entitled THE SELF-INFLICTED WOUND).

5. Exclusion of evidence obtained by unreasonable search or seizure, Mapp v. Ohio, 367 U.S. 643 (1961); prohibition against cruel and unusual punishment, Robinson v. California, 370 U.S. 660 (1962); indigent's right to court-appointed counsel in noncapital felonies regardless of special circumstances, Gideon v. Wainwright, 372 U.S. 335 (1963); privilege against compulsory self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964); right to confront adverse witnesses, Pointer v. Texas, 380 U.S. 400 (1965); right to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967); right to compulsory process, Washington v. Texas, 388 U.S. 14 (1967); right to trial by jury, Duncan v. Louisiana, 391 U.S. 145 (1968); protection against double jeopardy, Benton v. Maryland, 395 U.S. 784 (1969).

plicable to both.[6] Some of these rights were made retroactive, either wholly[7] or in part.[8]

These developments were not received by the states with unalloyed enthusiasm. Although state postconviction processes did exist, their procedural requirements were stringent and the grounds for relief narrow.[9] Thus, they were often useless to the imprisoned who sought the retroactive benefit of constitutional protections. And those who sought prospective protection through the direct appellate process often found that the rights on which they relied were interpreted with a wooden reluctance that bordered on disdain.[10] Into this federalism vacuum, federal habeas was virtually sucked.

As the use of habeas burgeoned, a reaction set in. By strokes of interpretation, the Supreme Court narrowed the federal habeas statute both substantively[11] and procedurally.[12] Recently, Congress has been asked to constrict it even more,[13] and the habeas problem has thus become part of the larger problem of access to the federal courts.

The articles in the present symposium accurately portray the many faces of federal habeas corpus. Judge Rosenn traces the "flow and ebb"[14] of federal habeas jurisdiction and convincingly demonstrates that both are functions of social and political conditions. Professor Saltzburg reminds us that federal habeas jurisdiction is conferred by statute and that the role of federal courts—particularly the Supreme Court—should be, but has not always been, inter-

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6. For example, indigent's right to court-appointed counsel at arraignment in capital case, Hamilton v. Alabama, 368 U.S. 52 (1961); exclusion of intangible evidence (confession) derived from unconstitutional seizure of the person, Wong Sun v. United States, 371 U.S. 471 (1963); indigent's right to court-appointed counsel on first appeal as of right, Douglas v. California, 372 U.S. 353 (1963); indigent's right to court-appointed counsel at preliminary hearing in capital case, White v. Maryland, 373 U.S. 59 (1963); right to counsel as restriction on postindictment effort to elicit incriminating statements, Massiah v. United States, 377 U.S. 201 (1964); right to counsel at custodial interrogation, Escobedo v. Illinois, 378 U.S. 478 (1964); privilege against self-incrimination and right to counsel at custodial interrogation, Miranda v. Arizona, 384 U.S. 436 (1966); clear-cut judicial determination of voluntariness before confession submitted to jury, Jackson v. Denno, 378 U.S. 368 (1964); right to counsel at postindictment lineup, United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); due process protection against use of unreliable identification evidence, Stovall v. Denno, 388 U.S. 293 (1967); right to counsel at sentencing proceeding, Mempa v. Rhay, 389 U.S. 128 (1967); fourth amendment applicable to electronic seizure of conversation, Katz v. United States, 389 U.S. 347 (1967); right to confrontation as restriction on use of one defendant's confession in multidefendant trial, Bruton v. United States, 391 U.S. 123 (1968).

7. For example, Gideon v. Wainwright, 372 U.S. 335 (1963), was made fully retroactive in Pickelsimer v. Wainwright, 375 U.S. 2 (1963); Griffin v. Illinois, 351 U.S. 12 (1956), was made fully retroactive in Eskridge v. Washington, 357 U.S. 214 (1958).

8. For example, Miranda v. Arizona, 384 U.S. 436 (1966), was made applicable to pre-*Miranda* interrogations as long as the trial began after *Miranda* was decided. Johnson v. New Jersey, 384 U.S. 719 (1966).

9. *See generally Symposium on Post-Conviction Remedies*, 27 OHIO ST. L.J. 237 (1966).

10. *See* Herman, *Foreword and Afterword*, 27 OHIO ST. L.J. 237, 243 (1966).

11. Stone v. Powell, 428 U.S. 465 (1976) (federal habeas not available for fourth amendment issue that petitioner had full and fair opportunity to litigate in state court).

12. For example, Rose v. Lundy, 455 U.S. 509 (1982) (habeas petition must be dismissed if it contains both exhausted and unexhausted claims); Wainwright v. Sykes, 433 U.S. 72 (1977) (habeas petitioner who failed to object at trial must show cause and prejudice).

13. *See* Remington, *State Prisoner Access to Postconviction Relief—A Lessening Role for Federal Courts; An Increasingly Important Role for State Courts*, 44 OHIO ST. L.J. 287 (1983).

14. The quoted words are from Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980).

pretive rather than creative. Professor Remington explores the federal-state tension wrought by habeas review and notes the one-sided effort to ameliorate it by restricting access to the federal courts. Professors Yackle and Robbins dig more deeply into the tension problem by taking on the exhaustion requirement and the certificate of probable cause for appellate review. Finally, Professor Meador suggests that much of the habeas problem might be resolved by conferring on the federal appellate courts the authority to review directly the constitutional-criminal decisions of state courts of last resort.

The reading is not light. It is, however, important, for it deals with the enforcement of rights that are the core of the relationship between the individual and the state.

In 1966 the *Ohio State Law Journal* published a student symposium on postconviction remedies.[15] In a foreword to that symposium, I made an observation that bears repeating today:

> Each of [the cases in which post-conviction relief has been granted] demonstrates that the criminal process is agile enough to catch up with its mistakes. Unfortunately, each of these cases also demonstrates that the process is not sufficiently agile to avoid mistakes. Well-founded concern for the adequacy of post-conviction procedures should not be permitted to obscure the fact that such procedures are but a cure for an illness in a specific case and that they neither eliminate nor prevent the disease on a wholesale basis. The critical problem is not cure but prevention . . . .[16]

There would be less tension—indeed, far fewer occasions for federal habeas relief—if state courts vigorously enforced federal constitutional rights in criminal cases. "[I]n a system of constitutional federalism the states have to be willing to carry their fair share of the load without being forced to do it."[17]

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15. *Symposium on Post-Conviction Remedies*, 27 OHIO ST. L.J. 237 (1966).
16. Herman, *Foreword and Afterword*, 27 OHIO ST. L.J. 237, 242 (1966).
17. L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT 69 (1973).