STATE COURT WITHDRAWAL FROM HABEAS CORPUS

Federal habeas corpus for state prisoners has often brought into conflict two basic constitutional principles: a full and fair state trial for those accused of crime and a state's prerogative of determining the precise contours of its criminal procedure. The efforts of one state prisoner, Don Anthony White, to obtain release from allegedly unconstitutional imprisonment have caused one state court to attempt a new solution to the conflict.

White was convicted in May, 1960, of murder in the first degree and sentenced to death. In February, 1964, the Washington Supreme Court denied his petition for habeas corpus without ordering a hearing. White then petitioned the federal district court for a writ of habeas corpus. His petition alleged that he was denied counsel and that his confession was coerced—claims which had not been presented to any Washington state court. The state moved to dismiss, maintaining that White had failed to exhaust his state remedies. The district court did not dismiss, maintaining that White had failed to exhaust his state remedies. The district court did not dismiss, but rather

2 State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962), cert. denied, 375 U.S. 883 (1963). White's primary defense during his jury trial was insanity, in support of which he introduced considerable psychiatric testimony and his medical history which disclosed several periods of confinement at state mental institutions. On appeal, he contended that Washington should abandon the M'Naghten rules and adopt the insanity test employed in United States v. Currens, 290 F.2d 751 (3d Cir. 1961). See Model Penal Code §4.01 (Proposed Official Draft, 1962). He also objected to the admissibility of certain psychiatric testimony, failure to disqualify a juror and the sufficiency of the evidence.
3 White raised as constitutional objections two claims which might later have been cognizable under habeas corpus: (1) that the admission of two tape recordings of his confession made by a concealed microphone violated his fifth amendment privilege against self-incrimination which, since Malloy v. Hogan, 378 U.S. 1 (1964), has been protected by the fourteenth amendment against abridgement by the states; and (2) that the Washington statute providing that the penalty for first degree murder should be life imprisonment, though the jury in its discretion might fix the penalty at death, was a denial of equal protection, because the jury's decision might be based on constitutionally improper criteria such as race.
5 See White v. Rhay, 399 P.2d 522, 536-37 (Wash. 1965) (dissenting opinion). Presumably, the petition also contained those federal allegations denied by the Washington state court in White's first state habeas corpus petition. See note 3 supra.
ordered that the case be held in abeyance, subject to petitioner’s submission of a new application to the state supreme court.  

Although seven of the nine members of the Washington Supreme Court voted for dismissal of White’s second application, no more than four judges could agree upon a rationale. Judge Donworth, writing for four members of the court, asserted that the court lacked jurisdiction of the subject matter of the proceeding and that, even if jurisdiction were present, it would not be exercised, since the court would be rendering an advisory opinion. The finding of a lack of state jurisdiction was based upon the

or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

During the course of the argument on the state’s motion, counsel and the court agreed that White should return to the state court to present his unexhausted allegations. Letter from Stephen C. Way, Assistant Attorney General for the State of Washington, to the University of Pennsylvania Law Review, Dec. 14, 1965, on file in the Biddle Law Library, University of Pennsylvania.

The court was following a procedure which has been, since Fay v. Noia, 372 U.S. 391 (1963), and Townsend v. Sain, 372 U.S. 293 (1963), increasingly employed to give states an opportunity to reexamine their post-conviction remedies in light of recent Supreme Court decisions. See Note, State Post-Conviction Remedies and Federal Habeas Corpus, 40 N.Y.U. L. Rev. 154, 192-93 (1965) [hereinafter cited as State Post-Conviction Remedies]. The Ninth Circuit specifically approved this procedure where a petition such as White’s contained both exhausted and unexhausted claims, noting that state court release of the applicant would result in a dismissal of the federal petition. Blair v. California, 340 F.2d 741, 745 n.8 (9th Cir. 1965).

In the district court the state also argued that the newly discovered constitutional violations alleged by White had been waived at trial. White v. Rhay, 399 P.2d 522, 536 (Wash. 1965) (dissenting opinion). Since the state court had not as yet passed upon the redefinition and expansion of waiver contained in Fay v. Noia, supra at 439, it is probable that the federal court hoped to obtain a state determination of both the facts and the question whether the new waiver standard would be employed in state collateral proceedings. Exactly what standard the Washington courts had employed prior to Noia is not clear. Washington has passed upon waiver only in the context of an allegation that the habeas applicant had been denied counsel. In these instances the formulation applied was whether the applicant had “completely and intelligently” waived his right. E.g., Friedman v. State, 51 Wash. 2d 92, 316 P.2d 117 (1957). In Wilken v. Squier, 50 Wash. 2d 58, 309 P.2d 746 (1957), however, though the court employed the competent and intelligent formulation, it cited with approval Johnson v. Zerbst, 304 U.S. 458, 464 (1938), where waiver was defined as “an intentional relinquishment or abandonment of a known right or privilege,” a test applied by Noia. 372 U.S. at 439. Washington courts have not yet decided whether the two formulations are to be considered equivalent.

When a Washington habeas applicant alleges a constitutional violation, the supreme court, in which all petitions are originally filed, usually enters an order of reference, directing the petition to the superior court (the state trial court) where the applicant was convicted for a hearing on the allegations. State Post-Conviction Remedies 183 n.149. White requested that the order of reference issue, a request which the state did not oppose. The supreme court’s dismissal was sua sponte. Letter from Stephen C. Way, Assistant Attorney General for the State of Washington, to the University of Pennsylvania Law Review, Dec. 14, 1965, on file in the Biddle Law Library, University of Pennsylvania.

Judge Donworth, writing the opinion of the court, stated “[A] majority of the court is of the opinion that . . . this court presently has no jurisdiction of the subject matter of this proceeding.” White v. Rhay, 399 P.2d 522 (Wash. 1965). The alignment of the judges does not support this statement. Judges Hill, Weaver and Ott joined in Judge Donworth’s opinion. Id. at 530. The concurring opinions of both Judge Hamilton and Judge Hale insist that the court had jurisdiction. Id. at 530, 531. Chief Judge Rosellini apparently concurred, without reservation, in Judge Hale’s opinion. Id. at 535. The two dissenters, Judges Finley and Hunter, also found that the court had jurisdiction.
premises that jurisdiction once assumed by a federal court is exclusive and that exhaustion of state remedies must be present for the federal court to assume jurisdiction. This view of the jurisdictional question is, however, plainly wrong and diametrically opposed to that expressed by the Ninth Circuit in *Blair v. California*, in which the court relied upon earlier decisions declaring that a district court may hold an application for writ of habeas corpus in abeyance for a reasonable time to allow petitioner to exhaust his state remedies with regard to a particular issue. In essence, Judge Donworth's opinion regarded the jurisdiction of the state court and

10 *Id.* at 524. The court insisted that a federal court has only two alternatives—either to assume jurisdiction and hold a hearing or to dismiss the petition. *Id.* at 525. This conclusion is at variance with statements of several federal courts. Cf. *Dorsey v. Gill*, 148 F.2d 857, 865-66 (D.C. Cir.), *cert.* denied, 325 U.S. 890 (1945), where the court stated that a federal judge faced with a habeas corpus petition has ten alternatives.


The Washington court buttressed its conclusion that it lacked jurisdiction by noting that the district court had retained jurisdiction. *Id.* at 527. Dismissal of the petition for this reason is the product of an excess of technicality. Had the district court merely dismissed the application without prejudice, any jurisdictional objection would have been obviated.

11 *Id.* at 526. The Supreme Court does not regard exhaustion as a jurisdictional requirement. See *Darr v. Burford*, 339 U.S. 200 (1950); Sokol, *Federal Habeas Corpus § 22.2*, at 114 (1965); *cf.* *Bowen v. Johnston*, 306 U.S. 19, 27 (1939) (exhaustion doctrine "not one defining power but one which relates to the appropriate exercise of power"). One court has explicitly stated: "Section 2254 does not deny jurisdiction where state remedies have not been exhausted. That section provides only that the application shall not be 'granted' unless it appears that the state remedies have been exhausted." *Duffy v. Wells*, 201 F.2d 503, 504 (9th Cir. 1952), *cert.* denied, 346 U.S. 861 (1953). (Emphasis added.)

12 340 F.2d 741 (9th Cir. 1965).

Where a state prisoner has not exhausted his state court remedies before applying for a federal writ of habeas corpus, the district court may usually either dismiss the application for that reason, or hold it in abeyance while affording the applicant a reasonable opportunity to exhaust his state remedies . . . In view of the rather novel exhaustion-of-remedies issue which is involved in this case . . . we believe the latter course is preferable here.

*Id.* at 745. The "novel" issue in *Blair* was whether the state court regarded *Douglas v. California*, 372 U.S. 353 (1963), as retroactive, a question not yet decided by the state court. Thus, *Blair* bears a striking analogy to *White* where the district court was probably asking the Washington state court to rule upon the applicability of *Fay v. Noia*, 372 U.S. 391 (1963). See note 6 supra.


The *Blair* view is supported by the language of 28 U.S.C. § 2243 (1964), providing in part that: "The court shall . . . dispose of the matter as law and justice require." Most federal courts have construed this permissive mandate to allow any appropriate order. See *Duffy v. Wells*, supra at 505; *United States ex rel. LaMarca v. Denno*, 159 F. Supp. 486 (S.D.N.Y. 1958); *cf.* Application of Wyckoff, 196 F. Supp. 815 (S.D. Miss. 1961).
that of the federal court as mutually exclusive, never mentioning the state constitution which is the source of the state court jurisdiction.14

The conclusion that the state court would be rendering an advisory opinion is equally puzzling.16 This determination, based upon a finding that the state court was being asked whether White had exhausted his state remedies,16 ignores the fact that the petition in no manner asked for a ruling on exhaustion, but requested that the state court entertain White's claim on the merits.17 The opinion discusses the result of the state court's failure to pass upon the merits of the application,18 confusing this issue with the validity of the constitutional allegations presented by petitioner. Furthermore, it seems clear that had the court reached the merits of White's petition, its opinion would not have been advisory in the traditional sense.19

14 Wash. Const. art. 4, § 4 provides that: "The supreme court shall have original jurisdiction in habeas corpus . . . ." Judge Hale, concurring, insisted that not only was jurisdiction conferred by the state constitution, but that it could also be derived from the "organic law" set forth in the United States Constitution and by inheritance from the common law. 399 P.2d at 531.

15 If correct, the logical extension of this position would force any state court presented with a habeas corpus petition raising federal constitutional questions to decline to rule upon its merits on the theory that any ruling would constitute an advisory opinion. The White opinion, at least impliedly, seems to recognize this result by its citation of In re Horn v. State, 52 Wash. 2d 613, 328 P.2d 159 (1958), to support its conclusion. 399 P.2d at 528. The applicant in Horn was later granted the writ by a federal court, though at the time he petitioned the state court, he had not as yet filed a federal petition. Simply stated, the White opinion seems to imply that the possibility of federal review of the state court decision renders any state court determination advisory. See notes 20-21 infra and accompanying text. In an identical context, no other state court has regarded its opinions as advisory. See notes 10, 12 supra.

16 399 P.2d at 530.

17 Id. at 528; see notes 6-7 supra. The order of the district court stated explicitly that petitioner was afforded the opportunity to return to the state court to present "such issues" as were challenged by the state upon the grounds of failure to exhaust state remedies. Id. at 523.

18 For federal purposes, the result of the state court's failure to reach the merits constitutes exhaustion of White's state remedies. Fay v. Noia, 372 U.S. 391, 435 (1963); Blair v. California, 340 F.2d 741 (9th Cir. 1965). After the state court dismissal in White, the district court entered an order granting White a federal hearing. Letter from Chief Judge Charles C. Powell, United States District Court for the Eastern District of Washington, to the University of Pennsylvania Law Review, Jan. 31, 1966, on file in the Biddle Law Library, University of Pennsylvania.

The state court also stated that "comity" required that the federal court dispose of the petition. 399 P.2d at 529. It is ironic that the exhaustion doctrine, the very reason for federal court's disposition, is also founded upon the doctrine of "comity." Darr v. Burford, 339 U.S. 200, 204 (1950): "As it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation, the federal courts sought a means to avoid such collisions. Solution was found in the doctrine of comity . . . ."

19 The Washington Supreme Court has never promulgated a definition of what constitutes an advisory opinion. Those few instances in which the court has spoken to the problem in no way support its conclusion here. Cooper v. Department of Institutions, 63 Wash. 2d 722, 388 P.2d 925 (1964) (to answer questions which have become moot would be an advisory opinion); Hutchinson v. Port of Benton, 62 Wash. 2d 451, 383 P.2d 500 (1963) (in declaratory judgment action, decision on legality of transaction not actually pending would be advisory); Grill v. Maydenbauer Bay Yacht Club, 57 Wash. 2d 800, 359 P.2d 1040 (1961) (where appeal was not from final judgment, opinion on substantive issues would be advisory).
One of the crucial characteristics of any nonadvisory opinion is that it have finality.²⁰ A Washington state court decision treating the merits of an application for collateral relief would have finality to the extent that any such decision has finality in light of the possibility of federal habeas review.²¹

Stripped of its verbal formulations, the position of a majority of the Washington court—that jurisdiction would not be exercised even if it existed—raises major policy questions concerning a state court's role in administering habeas corpus applications containing claims of federal constitutional violations. The common basis of the opinion of the court and the two concurring opinions is, quite simply, that the present scope of federal habeas corpus substantially decreases the necessity of state court determination of federal issues on collateral attack. Extensive quotation by the court from both Townsend v. Sain²² and Fay v. Noia,²³ two recent Supreme Court decisions expanding the scope of federal habeas corpus for state prisoners, as well as the court's reference to the "futility" of making any determination on the merits,²⁴ supports this view. The Washington court emphasized the plenary powers of the district court to find anew the facts and the federal law applicable to White's petition,²⁵ concluding that the federal district court alone had "final authority."²⁶

Exactly what impact the White decision will have on state habeas corpus petitions in Washington cannot as yet be known.²⁷ The concurring

²⁰ 40 Texas L. Rev. 1041, 1044 (1962). All other characteristics of a nonadvisory opinion were present in White: (1) a concrete, contested issue; (2) a definite assertion of a legal right; (3) positive denial of such right; (4) a controversy of such a nature as to be consonant with the exercise of the judicial function; (5) an issue which was not academic, theoretical or based upon a contingency; (6) a controversy within the jurisdiction of the court. Id. at 1044 n.29. See generally Stevens, Advisory Opinions—Present Status and an Evaluation, 34 Wash. L. Rev. 1 (1959); 69 Harv. L. Rev. 1302 (1956).

²¹ See note 15 supra. A few state courts, in abstention cases, have felt that a decision rendered when ultimate power of review remained in a federal court was advisory. Wright, Federal Courts § 52, at 171 (1963). Where a federal court invokes the abstention doctrine, thus permitting the parties to return to state court to litigate both state and federal issues, and reserves the power to redetermine the federal issues, it has been argued that the state court has not been presented with a justiciable controversy, for it cannot determine all issues with finality. United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Texas 1965); 40 Texas L. Rev. 1041, 1043-44 (1962). It is, however, a "familiar principle that res judicata is inapplicable in habeas proceedings . . . ." Fay v. Noia, 372 U.S. 391, 423 (1963). Furthermore, the state court objection in the habeas situation is solely technical. The district court could as easily have dismissed for failure to exhaust state remedies, precluding any jurisdictional objection.


²⁴ 399 P.2d at 528.

²⁵ Id. at 524-25, 527, 530. In an extensive footnote the court detailed the exhaustive litigation following People v. Chessman, 35 Cal. 2d 455, 218 P.2d 769 (1950), 399 P.2d at 529 n.3, noting that the proceedings in White were similar to the early stages of that litigation. Id. at 530. The court's concern with finality is understandable. In any litigation involving a state prisoner under sentence of death, the prisoner, at least arguably, will prolong litigation with the hope of gaining either executive clemency or a few more years of life. See quotation in text accompanying note 101 infra.

²⁶ 399 P.2d at 530.

²⁷ Since White, the Washington Supreme Court has not passed upon a state prisoner's petition.
opinion of Judge Hale intimates that once a state prisoner has appealed his conviction and presented a single habeas corpus petition, the state court will afford no further relief.\footnote{Id. at 535. Though res judicata is not applicable in habeas proceedings, Fay v. Noia, 372 U.S. 391, 423 (1963), a court does have power to prevent abusive use of the writ. See, e.g., Sanders v. United States, 373 U.S. 1 (1963). It is possible that the Washington court is taking the position that, in light of availability of federal review, more than one habeas application constitutes abuse. It is also possible that the decision represents a retreat to the void on the face doctrine, i.e., review is confined to the face of the record to determine if the convicting court had jurisdiction over the defendant and the subject matter of the action. Under this doctrine, most of the usual due process claims such as coerced confession, denial of counsel and the like are not cognizable. See generally \textit{State Post-Conviction Remedies} 158-59.}

28 In any event it is clear that in light of prior decisions, of a state statute placing a duty upon the court to determine if there has been a constitutional violation and of the usual Washington procedure for habeas petitions,\footnote{The friction created by federal review of state convictions\footnote{The evolution of the scope of habeas corpus in Washington has been similar to that in other states. The state originally followed the void on the face doctrine. Mason v. Cranor, 42 Wash. 2d 610, 257 P.2d 211, cert. denied, 346 U.S. 901 (1953); see note 28 supra. An exception to the doctrine had been recognized for cases in which denial of counsel was alleged. See Thorne v. Callahan, 39 Wash. 2d 43, 234 P.2d 517 (1951). Statutory reform followed. Wash. Rev. Code Ann. §7.36.140 (1961) provides in part: "In the consideration of any petition for a writ of habeas corpus by the supreme court . . . if any federal question shall be presented . . . it shall be the duty of the supreme court to determine in its opinion whether or not petitioner has been denied a right guaranteed by the Constitution of the United States." Unlike the experience in other states, see \textit{State Post-Conviction Remedies} 167-68, this statute was not judicially emasculated. In response to the statute, the void on its face doctrine was repudiated—a judgment could be attacked if there was any constitutional infirmity. Nahle v. Delmore, 49 Wash. 2d 318, 301 P.2d 517 (1951). Statutory reform followed. Wash. Rev. Code Ann. §7.36.140 (1961) provides in part: "In the consideration of any petition for a writ of habeas corpus by the supreme court . . . if any federal question shall be presented . . . it shall be the duty of the supreme court to determine in its opinion whether or not petitioner has been denied a right guaranteed by the Constitution of the United States." Unlike the experience in other states, see \textit{State Post-Conviction Remedies} 167-68, this statute was not judicially emasculated. In response to the statute, the void on its face doctrine was repudiated—a judgment could be attacked if there was any constitutional infirmity. Nahle v. Delmore, 49 Wash. 2d 318, 301 P.2d 517 (1951); Palmer v. Cranor, 45 Wash. 2d 278, 273 P.2d 985 (1954). Washington courts have usually granted extended hearings on the alleged constitutional violations. E.g., McNear v. Rhay, 398 P.2d 732 (Wash. 1965); Thorne v. Callahan, 39 Wash. 2d 43, 234 P.2d 517 (1951) (four day hearing held, with record on appeal comprising 431 pages of testimony). The supreme court has construed the statute to require a determination of the merits of the allegations. McNear v. Rhay, supra; Pitts v. Rhay, 64 Wash. 2d 481, 392 P.2d 234 (1964).}

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32 Former Ohio Chief Justice Weygandt, testifying before a congressional committee, stated: "Our penitentiary has as many curbstone lawyers as any other State Penitentiary, but we have at least a consistent record in Ohio that we have never allowed one of these writs of habeas corpus." \textit{Hearings on H.R. 5649 Before Sub-committee No. 3 of the House Committee on the Judiciary, 84th Cong., 1st Sess., ser. 6, at 13 (1955)}; see Bailey, \textit{Federal Habeas Corpus—Old Writ, New Rule: An Overhaul for State Criminal Justice}, 45 B.U.L. Rev. 161, 174 (1965).

33 Professor Reitz believes that the basic source of antagonism may not be federal review but rather hostility toward the constitutional norms enforced by federal courts. \textit{Federal Habeas Corpus} 561.
court appears to be finality, as well as a desire to do all that is possible to promote that goal. As viewed by the White court, finality can best be achieved by sufficiently narrowing the scope of state habeas corpus, so that a prisoner may obtain final adjudication of all claims in a federal court.

**Constitutional Considerations**

Initially, there is some doubt whether a state court can constitutionally restrict its habeas corpus jurisdiction to exclude certain types of claims or can refuse to consider habeas corpus petitions. A few Supreme Court cases seem to intimate that state courts have an obligation to provide some post-conviction process by which constitutional violations can be tested, but later decisions indicate that these statements implied only that when a state court does not provide any appropriate forum for relief, a federal court may entertain applications for release by state prisoners without requiring prior application to the state court.

The constitutional requirement that the "privilege of the Writ of Habeas Corpus shall not be suspended . . .", though phrased in absolute terms, is a limitation upon the national government, not upon the states. If a state court is constitutionally compelled to provide adequate

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33 The narrowing could be accomplished by any of at least three methods depending on the state's situation: (1) A return to the void on the face doctrine; (2) a limitation on the number of petitions the court will entertain; (3) a highly restrictive doctrine of waiver so that any claims not presented in the first petition would be deemed waived. See note 28 supra.

34 If the Washington courts follow a consistent policy of refusal to hear certain types of federal claims, there would be no doubt that the habeas applicant could dispense with a state petition. See Whippler v. Balkom, 342 F.2d 388, 390 (5th Cir. 1965); note 18 supra.

35 Habeas corpus is used in this sense to denote collateral relief in criminal cases generally. In Washington, habeas corpus appears to be the only form of collateral relief. See Wash. Rev. Code Ann. § 7.36.140 (1961). In states employing other forms of collateral attack such as coram nobis or delayed appeals in addition to habeas corpus, the same question would be present if all collateral remedies were judicially restricted.

36 Young v. Ragen, 337 U.S. 235 (1949); Mooney v. Holohan, 294 U.S. 103, 112-13 (1935). Clearly, by the terms of the supremacy clause of the Constitution, state courts are bound to enforce constitutional rights at the prisoner's trial. The inquiry here is whether state courts may so structure the state collateral remedy as to preclude relief at that stage.


The older cases intimating that there are situations in which a state is obligated to provide a post-conviction remedy arose upon consideration of state prisoner applications for federal habeas corpus. In this context, statements concerning a state court's obligation indicate that nonfulfillment of the obligation means that state remedies have been exhausted, not that a post-conviction remedy is constitutionally compelled. See Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Supreme Court Rev. 187, 210.


39 Gasquet v. Lapeyre, 242 U.S. 367 (1917); Geach v. Olsen, 211 F.2d 682 (7th Cir. 1954). This conclusion is based upon the organizational pattern of the Consti-
collateral relief, it is by force of the due process clause of the fourteenth amendment. The Supreme Court, in *Case v. Nebraska*, granted certiorari to decide whether there was such a constitutional compulsion. After certiorari was granted, the state legislature enacted a statute providing a post-conviction procedure; the Court remanded the cause to the state court for reconsideration in light of the supervening statute, thus avoiding a determination of the issue.

Petitioner's counsel in *Case* based his argument on the premise that the due process clause encompasses not only certain substantive guarantees of the Bill of Rights, but also the right to be heard in a collateral proceeding if denial of these guarantees is alleged. On the facts of *Case*, due process may require a state post-conviction hearing. Petitioner had been convicted on a guilty plea made without assistance of counsel and was thus deprived of any opportunity to raise constitutional claims. "This is total deprivation of hearing, total deprivation of process." But that is not to
say that a post-conviction hearing is required where there has been some process—where the applicant has raised his claims in the original proceedings; where, assisted by counsel, he has had full opportunity to raise his claims but has failed to do so; or even where petitioner has entered a guilty plea with the aid of counsel.

Even if due process encompasses the right to be heard in all of the above situations, it does not follow that in the collateral relief context the state must afford a hearing. Federal habeas corpus jurisdiction creates an "utterly unique relationship" between state and federal courts, for state court denial of collateral relief leads, at the prisoner's option, to full reconsideration by a federal trial court. "[E]lsewhere in the federal system the state courts' decisions are accepted as final, subject only to possible review in the Supreme Court . . . ." So long as federal trial courts are free to entertain habeas corpus applications, the right to be heard is given full protection, and state court denial of the post-conviction application does not result in abridgment of the right. One federal circuit court has recognized

a refund was denied by the state court on the theory that it had no jurisdiction to entertain a suit against the state or state officials. Ward involved a similar factual situation. In both cases the Supreme Court was primarily concerned with whether the state court's view of its jurisdiction was an adequate state ground sufficient to prevent the Supreme Court from reaching the merits of the tax. Though there are statements in both cases that refusal to reach the merits of the allegedly unconstitutional tax was a denial of due process, the opinions are somewhat ambiguous, for there are also statements that retention of the tax moneys themselves under an unconstitutional statute would be a due process denial. At best, these two cases stand for the proposition that a state may not act unconstitutionally and then deny any opportunity for a hearing on the merits of its action.

After Gideon v. Wainwright, 372 U.S. 335 (1963), it is clear that the state must furnish counsel to an indigent defendant accused of a felony. In a factual situation such as that found in Moore v. Dempsey, 261 U.S. 86 (1923)—where mob pressure and domination so interfere with the course of justice that the accused cannot receive a fair trial—even though counsel is present, there may be a total deprivation of process.

It is often said that there is no constitutional right to appeal from a criminal conviction. E.g., Mooneyham v. Kansas, 339 F.2d 209 (10th Cir. 1964); Horton v. Bomar, 335 F.2d 583 (6th Cir. 1964) (dictum). In great measure appeal itself is a post-conviction remedy, for, where allegations have been raised at trial, it gives the prisoner a second opportunity to present these constitutional allegations. In such a situation if appeal is not constitutionally compelled it would seem, a fortiori that neither are other post-conviction procedures. Furthermore, "a consistent line of decisions establishes that a state court's determination that a state court claimant has chosen an inappropriate remedy under state procedure—in this situation post-conviction relief rather than assertion at trial—is adequate to sustain a judgment of dismissal." Sandalow, supra note 37, at 211.

According to Professors Hart and Wechsler, "what process is due always depends upon the circumstances, and the due process clause is always flexible enough to take the circumstances into account." Hart, The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1393 (1953), reprinted in Hart & Wechsler, The Federal Courts and the Federal System 333 (1953). Both federal and state courts may hear claims arising under the Constitution. It would appear that Congress could deprive all federal courts of jurisdiction to entertain post-conviction applications filed by state prisoners without causing a due process deprivation, so long as the state courts were still available to hear these claims. Id. at 1401-02; cf. Tarble's Case, 80 U.S. (13 Wall.) 397 (1872). (Tarble might have been decided differently had federal courts been unable to enter-
that an applicant has a right to post-conviction process which is protected by federal jurisdiction:

It was specially important that this [federal court hearing] be . . . [held] because there had been no taking of testimony on the relevant circumstances of the trial before any . . . state court in which the conduct of relator's trial had been challenged as essentially unfair. We emphasize this because we believe it is a virtue of our system of justice, as implemented by the due process clause of the Fourteenth Amendment, that it does not send a convicted person to his death without according him one full opportunity to prove charges of unfair trial which are not patently frivolous. The important thing here is that relator has now had that chance.50

With the federal interest in the vindication of constitutional rights adequately protected by the availability of federal habeas corpus, the basic interest served by a Supreme Court insistence that states provide corrective process would be supervision of state criminal procedures.61 It would be improper for the Court to compel a state to protect a state interest that the state court no longer wishes to protect.

Practical considerations may enter into the formulation of constitutional doctrines62 and in this case counsel against the promulgation of a
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doctrine requiring adequate state collateral relief. Cognizant of the already great federal-state antagonism which federal habeas corpus jurisdiction has produced, the Supreme Court should decide that availability of federal habeas corpus renders unnecessary insistence that a state court expand the scope of its collateral relief. By dismissing without prejudice to filing a federal petition, rather than remanding to the state court with a demand that the application be considered upon its merits, the Supreme Court would avoid a stark conflict. If, after remand, the state court did not grant a hearing on the application, the Court would probably be faced with two choices: release the applicant though his contentions had not yet been found meritorious or direct the petitioner to apply to the proper federal district court. Clearly, the Court would choose the latter alternative. The additional litigation created by the original remand to the state court could be avoided by simply dismissing without prejudice to a federal petition.

Numerous courses are open to a state court wishing to restrict the scope of state collateral relief, each having its own consequences. The method chosen by a state court will most likely be more the product of history than of logic since the scope of choices available to any given court will be limited by the peculiar doctrinal development of that state's collateral relief. At least two of these courses—a restriction of jurisdiction or a strict definition of waiver—appear, however, to be constitutionally permissible.


64 Occasionally remand to the state court will be ordered, usually when the Court recognizes that there is some possibility that the state court might grant relief. See, e.g., Jennings v. Illinois, 342 U.S. 104 (1951).

65 The Court might attempt to dispose of the petition on the merits, but this would involve a determination based on an inadequate factual record. Occasionally the Supreme Court has ordered that a state either afford the applicant a hearing or release him. See Jackson v. Denno, 378 U.S. 368 (1964); Rogers v. Richmond, 365 U.S. 534 (1961). In each of these instances appeal was from denial of the writ by a federal circuit court and not from a state court denial. Furthermore, the dispositive issue in each case was legal rather than factual—Jackson settled the proper procedure and Rogers the proper test for determining the voluntariness of a confession. Thus, the necessity for an adequate record as to the issues of fact was not present.

The possibility that a state court would ignore the Court's directions upon remand is not imaginary. In Hawk v. Olson, 326 U.S. 271 (1945), the Court remanded to the state court to hold a hearing on the alleged denial of counsel. The state court on remand reiterated that habeas corpus was not available and refused to hold a hearing. Hawk v. Olson, 146 Neb. 875, 22 N.W.2d 136 (1946).

It also appears that some states are not willing voluntarily to broaden their collateral remedies. In Krauter v. Maxwell, 3 Ohio St. 2d 142, 209 N.E.2d 571 (1965), a habeas corpus petition based upon illegality of arrest and denial of counsel was denied, the court finding that such a claim was not cognizable in habeas corpus. The dissent contended that Case indicated that states would be “well advised” to provide adequate post-conviction remedies. Id. at 153, 209 N.E.2d at 578.

66 See State Post-Conviction Remedies 157-63 for a comprehensive discussion of the various techniques state courts have employed to deny a hearing on due process allegations. For example, if petitioner alleged that his confession admitted at trial was coerced, the court might refuse to hear this claim on the grounds that: (1) this specific claim is not cognizable collaterally; (2) evidentiary claims generally are not raisable in collateral proceedings; (3) claims dependent upon facts outside the record
The state court could insist that its habeas remedy reaches only errors vitiating the jurisdiction of the trial court, thus effectively precluding most due process claims.57 Support for such insistence can be found both in decisions declaring that state jurisdictional requirements do not raise constitutional questions58 and the experience of state attempts to refuse enforcement of federal statutes.59 State courts must enforce federal claims unless they have an otherwise "valid excuse." 60 In Testa v. Katt,61 the Supreme Court held that if a state court has "jurisdiction adequate and appropriate under established local law" to adjudicate the controversy, it must do so. The implication of Testa appears to be that a state does not have to enforce federal rights if it does not enforce analogous forum-created rights.62 Simply stated, lack of state court jurisdiction over state claims is a "valid excuse" for refusal to entertain similar federal claims.

are not subject to collateral attack; (4) claims raisable at trial are not raisable collaterally; or (5) only "jurisdictional" claims are cognizable under collateral attack. Of course, this list is not exhaustive.

57 This was the position taken by the state in Case v. State, 177 Neb. 404, 129 N.W.2d 107 (1964). See generally State Post-Conviction Remedies 157-61.


61 130 U.S. 388, 394 (1917). Testa did not face the question whether Congress could constitutionally force state courts to create jurisdiction to hear federal claims.

62 Most commentators have found this to be the most probable reading of Testa. See Cullison, supra note 59, at 239; Note, State Enforcement of Federally Created Rights, 73 HARV. L. REV. 1551, 1554-55 (1960); Note, Utilization of State Courts To Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism, 60 HARV. L. REV. 966, 971 (1947). Professor Hart has stated:

But whether the states are under a constitutional obligation to provide courts of competent jurisdiction for the enforcement of federal rights of action, if no such courts otherwise exist, and, if so, how the obligation can be effective, remains uncertain. The uncertainty illustrates again the great fact of political science that ultimate questions often do not have to be faced in successful collaborative living.


The problem has usually been approached in terms of congressional power under the necessary and proper clause to compel state courts to hear the federal claim. See WRIGHT, FEDERAL COURTS § 45, at 149 (1963). Most of the litigation arose under the Federal Employer's Liability Act which requires state courts to exercise concurrent jurisdiction. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1964). Thus, the contention could be made that Congress may compel state courts to hear federal claims, but that the Supreme Court, absent a clear direction from Congress, should not.
The state could also adopt the position that any constitutional claims which could have been but were not raised in the original proceedings shall be deemed conclusively waived. It does not appear that the federal standard of waiver applicable to federal habeas corpus is a constitutional requirement for the states. The Supreme Court, for example, recently remanded a case to the state supreme court to determine if federal waiver standards would be adopted by the state. The Court insisted: "[W]e neither hold nor even remotely imply that the State must forgo insistence on its procedural requirements if it finds no waiver."

The state court would have to structure with care the technique it employs to restrict the scope of state collateral relief. The doctrine is well established that if a state court usually entertains actions of a certain type under state jurisdiction, the court may not decline to entertain a similar federal claim on grounds which amount to discrimination against rights created by federal law. So long as the state court consistently holds that certain types of claims, whether created by state or federal law, do not fall within the jurisdictional scope of the state collateral remedy, an even-handed application of any restriction would be constitutional.

As a practical matter, a state court should have little problem in avoiding any discriminatory application of the method it adopts for restricting state collateral remedies. Such discrimination would occur only if the state court insisted upon enforcing certain types of state rights but refused to enforce similar federal guarantees. Four situations are possible: (1) the state constitutional or statutory provision is interpreted less favorably to the prisoner than the federal constitutional provision; (2) the state provision is interpreted identically to the federal right; (3) the state provision is interpreted more favorably to the petitioner than its federal counterpart; and (4) the state provision has no federal parallel. In situations

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63 See State Post-Conviction Remedies 164-65.

64 See note 6 supra. Waiver is here used not in the usual sense of whether the right itself was waived, a standard which is part of the right itself and thus a constitutional necessity, but rather whether the opportunity to litigate an asserted denial of the right was waived by failure to do so in a prior proceeding.

65 Henry v. Mississippi, 379 U.S. 443, 452 (1965). The Court then added that such a finding would merely result in a federal district court determining waiver by federal standards. Ibid. Had the Court deemed federal waiver standards constitutional, it is doubtful that the remand would have been phrased in permissive terms. Furthermore, in Fay v. Noia, 372 U.S. 391, 428 (1963), the Court recognized that: "A defendant by committing a procedural default may be debarred from challenging his conviction in the state courts even on federal constitutional grounds." Defendant could not be so debarred if the federal waiver standard were a constitutional requirement.


67 Several states have due process clauses worded similarly to the fourteenth amendment. In the area of economic due process a few of these states have retained greater control over state legislation than the federal due process clause requires.
(1) and (2) discrimination would have little utility for the state court, as it grants to the petitioner no more than he can achieve by his federal application. A state judge would realize that restriction of the state remedy will not promote finality, for the applicant can obtain release in a federal court. In situation (3) the state court would have no reason to discriminate, for the state guarantee, fully and fairly applied, would subsume any protection offered by the federal Constitution. Only in situation (4) would the state court be compelled to abandon a state guarantee, for the restrictions would preclude its consideration and the prisoner would be unable to obtain federal relief on the nonparallel provision.6

Certainly, the Washington court's reaction would not be constitutionally interdicted. Petitioner had counsel and two prior opportunities—the original proceedings and one post-conviction application—to raise constitutional claims. This is all the process which petitioner is due.

Practical Considerations

The Supreme Court has recognized that the expanded scope accorded federal habeas corpus would be a source of irritation between federal and state courts, but it apparently believes that, if prodded sufficiently, state courts or legislatures would reform both the substance and the procedure of their collateral remedies so that all constitutional claims would receive an adequate, albeit reluctant, reception.6 Most commentators have echoed the Supreme Court's hope,7 yet the Washington court has refused to accept the gauntlet; rather than reform, it has chosen retreat.

It might at first seem that the Washington court has thus unwarrentedly renounced any responsibility to adjudicate federal claims, unnecessarily placed a burden upon federal courts and violated the cooperative spirit of the federal system. Much of this feeling would seem to stem from the assumption that the duality of review occasioned by federal habeas corpus jurisdiction implies state consideration of constitutional allegations.

See Barrett, Bruton & Honnold, Constitutional Law 962-63 (2d ed. 1963). For example, the Supreme Court in Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), upheld a statute allowing an employee to leave his employment without loss of pay on election day for the purpose of voting. In Heingaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955), however, a state supreme court refused to follow Day-Brite and invalidated a similar law under the due process clause of the state constitution.68 Those states desiring to restrict collateral relief would probably feel little loss in foregoing the enforcement of the state provision.69

Some state courts appear to be responding favorably. See State Post-Conviction Remedies 193-96.

Pragmatically, however, there is much to commend the Washington position.

The exhaustion doctrine, which in the collateral relief context is simply a reflection of the desire that state courts should consider habeas applications before federal review is to be permitted, is often justified on the theory that it promotes state concern for constitutional rights. Even if a state court narrows the scope of its habeas relief so that in most cases resort to the state court would be unavailing, the necessary conclusion is not that state disrespect for constitutional norms will be fostered. The state would still retain a substantial interest in prevention of constitutional violations during the criminal trial proceeding for, if violations are not prevented, the state conviction will be subject to federal collateral review, the state will be put to the expense and risks of retrial and finality of the judgment will be delayed. Professor Meador has suggested that states should accept the opportunity offered by the Supreme Court to revise their collateral remedies so that they may maintain control over their criminal processes and administration. Recent Supreme Court habeas corpus opinions imply that if the state is to avoid collateral review by a federal court, its post-conviction remedy must be coextensive with federal habeas corpus. Furthermore, however untenable the position may be, much of the state hostility toward federal habeas corpus is directed at the substantive doctrines of due process. Faced with a forced submission to federally conceived procedures for litigating judicially unpopular federal rights, a state court may well feel that standards imposed from above do not, in essence, allow for any real retention of control. Finally, state court withdrawal might lead to a reduction of federal-state friction. Professor Amsterdam has noted that the diversity and federal question jurisdiction of the federal district courts, though an intrusion upon state courts, do not prompt state animosity. He attributes this phenomenon to the fact that these cases are "clearly, cleanly, and completely excluded from the state courts' ken . . . ." Federal habeas corpus, on the other hand, presents a constant source of irritation by violating provinces state courts have traditionally regarded as exclusive. Though state court withdrawal smacks of an ostrich-like philosophy, it would mean that a state judge was not being reversed—simply because he never ruled upon the question. The result—federal court issuance of the writ—would be identical in either case, but state judges would not feel the sting of reversal of their denials

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72 Meador, supra note 70, at 929; accord, State Post-Conviction Remedies 195-96.
74 See note 32 supra.
77 Federal Removal 835.
of the writ, especially if the federal court had based its determination upon allegations which had not been presented to the state court in the original state proceeding.\textsuperscript{78}

Professor Amsterdam suggests that economical deployment of the state's judicial resources may impel a state court decision to deny collateral attack. Where petitioner has already raised and received full consideration of his allegations during trial and appeal, entertaining a post-conviction application presenting similar questions results in wasteful duplication of judicial time and effort, entails expense if the convict must be brought before the court for a hearing, increases the possibility that prisoners will file applications to gain a trip to court and disturbs the finality of the conviction with accompanying ill effects upon rehabilitation.\textsuperscript{79} If petitioner has received an unobstructed opportunity to raise constitutional claims yet has not done so, these considerations must be balanced against state court desire to insure integrity of its criminal processes by requiring that all claims be heard at least once at the state level.\textsuperscript{80} Again, the state court could properly insist that the importance of finality dictates that the petition be denied.\textsuperscript{81}

State court withdrawal would not necessarily have a detrimental impact upon federal court administration of federal habeas corpus jurisdiction. Assertions that expanded scope of state habeas corpus would create a significant decrease in the number of federal petitions misconceive the nature of the typical applicant's motives and misinterpret the experience of recent years. Prisoners, spurred on by a sense of grievance,\textsuperscript{82} by the expanding contours of due process\textsuperscript{83} and by an inability to evaluate the merits of their petitions, are filing habeas corpus applications after state court denials almost as a matter of course.\textsuperscript{84} The resultant markedly increasing rate of federal habeas corpus applications from state prisoners\textsuperscript{85}

\textsuperscript{78} A possible countervailing consideration should be mentioned. State police and prosecutors might more liberally administer constitutional guarantees if they had been decreed by their own courts; a state court rebuke might have more impact than that of a federal court. However, both police and prosecutors are primarily interested in convictions and it is likely that they would soon conclude that disregard of an accused's rights would result in reversal of the conviction by a federal court. This should provide sufficient stimulus to insure compliance with the Constitution.

\textsuperscript{79} Amsterdam Address 19-21; see text accompanying note 101 infra.

\textsuperscript{80} Amsterdam Address 20, 23-24.

\textsuperscript{81} Id. at 24.

\textsuperscript{82} United States ex rel. Walker v. LaVallee, 224 F. Supp. 661, 662 (N.D.N.Y. 1963).

\textsuperscript{83} Pope, Suggestions for Lessening the Burden of Frivolous Applications, 33 F.R.D. 409, 413-14 (1962).


\textsuperscript{85} Table 1:

<table>
<thead>
<tr>
<th>Year</th>
<th>No. of Petitions Filed</th>
<th>No. of Successful Petitions</th>
<th>% Successful</th>
</tr>
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<tbody>
<tr>
<td>1960</td>
<td>4</td>
<td>871</td>
<td>0.46</td>
</tr>
<tr>
<td>1961</td>
<td>9</td>
<td>984</td>
<td>0.91</td>
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<tr>
<td>1962</td>
<td>17</td>
<td>1,249</td>
<td>1.36</td>
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<tr>
<td>1963</td>
<td>34</td>
<td>1,904</td>
<td>1.78</td>
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<tr>
<td>1964</td>
<td>46</td>
<td>3,531</td>
<td>1.30</td>
</tr>
</tbody>
</table>

The data for the number of successful petitions was obtained by the author through examination of all reported opinions for those years. The number of unreported
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has been further aggravated by a relaxation of prison rules allowing expanded access to legal materials. Thus in 1960, 871 petitions were filed by state prisoners and four, or 0.46 per cent, were reported as successful while in 1964, 3,531 were filed and forty-six, or 1.30 per cent, were reported as successful. This data tends to show that even if state courts, utilizing an expanded habeas remedy, had granted all meritorious claims, the number of federal petitions would not have significantly decreased; furthermore, since prisoners do not seem to be discouraged by the great probability that their petitions will be denied, it is not likely a state court denial on the merits would convince the habeas applicant that his allegations would receive equally unfavorable federal treatment.

Perhaps, as envisioned by Townsend, a full and fair state court hearing on each petition would render unnecessary a federal court hearing. Yet the Supreme Court's language in Townsend itself vitiates this expectation. Not only did the Court detail six circumstances making a hearing by a federal court mandatory, it left to district court discretion the power to hold a full evidential hearing in any case. The Court noted that "it is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." placed considerable emphasis upon demeanor evidence and insisted that a hearing must be held if all the relevant facts were not "reliably" found. The stress laid upon proper release cases cannot be determined. Even assuming that the number of unreported release cases is double or even triple the number of those reported, a significant change in the percentage of petitions successful would not result. The data for the number of petitions filed was found in DIRECTOR OF ADMINISTRATIVE OFFICE OF U.S. COURTS ANN. REP., 1960—table C3, at 235; 1961—table C2, at 239; 1962—table C2, at 197; 1963—table C2, at 199; 1964—table C2, at 219. The Administrative Office compiles its data on the basis of a fiscal year ending in June; the number of successful petitions was calculated on a calendar year. Thus, though the data is not technically comparable, it does show the relevant trend. In fiscal 1965, 4,666 habeas corpus petitions were filed. Letter from James A. McCafferty, Chief, Research and Evaluation Branch, Administrative Office of the United States Courts, to the University of Pennsylvania Law Review, Jan. 21, 1966, on file in the Biddle Law Library, University of Pennsylvania. The number of writs granted in 1965, as of reported opinions published by Jan. 15, 1966, was 43, or 0.92% of the petitions filed.

See note 85 supra.


87 See note 85 supra.

89 Townsend v. Sain, 372 U.S. 293, 318 (1963). The Supreme Court made a district court hearing mandatory under the following circumstances:

If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

90 See note 88 supra.

91 372 U.S. at 318.

92 Id. at 312.

93 Id. at 322.

94 Id. at 313.
factual development by a state court combined with the known predilections of local judges and juries to distort constitutional norms has led one commentator to conclude: "I am more than a little skeptical concerning the number of state prosecutions for arguably fourteenth-amendment protected activity in which an appropriately solicitous federal district judge could conclude with some assurance that the state trial was 'full and fair.'" 94 Despite the discretion given in Townsend to district judges to refuse to grant an evidentiary hearing when state court procedures are acceptable, an evidentiary hearing should be "required on every well-pleaded federal contention raising a factual dispute." 95

Both district and circuit judges have concluded that, in practice, the effect of Townsend will be to compel a district judge to hold a hearing in most cases. Faced with frequent statements by the Supreme Court that it will make an independent examination of the facts to insure that constitutional criteria have been properly applied,96 the chances of reversal of a district court denial are heightened if a district court accepts state court findings.97 This factor, combined with the broad discretion granted by Townsend, prompted one circuit judge to admonish: "If you have any doubt on the disposition of a post conviction application for relief, grant a hearing." 98 A prisoner who alleges a deprivation of his constitutional rights will ultimately be granted a hearing somewhere unless he has deliberately by-passed state procedures or by deliberate personal choice has waived the right.99 Since there is little probability that an adequate state hearing will meaningfully decrease either the number of hearings a federal judge will be required to hold or the number of federal petitions filed, in terms of economy of the total system of federal-state habeas corpus state court withdrawal at least dispenses with state hearing and consideration of the merits of each application, a task which most federal judges will have to duplicate.

Though a state judge's concept of finality has usually dictated that he advocate repeal of federal collateral review,100 the inevitability of federal

94 Federal Removal 834. Though directed toward civil rights prosecutions, Professor Amsterdam's observation seems applicable to other criminal prosecutions, especially those involving defendants who are members of minority or disfavored socio-economic groups.

95 Id. at 841 n.193.


98 Breitenstein, Remarks on Recent Post Conviction Decisions, 33 F.R.D. 434, 445 (1963). Senior Circuit Judge Pope notes: "[T]he more often the federal judge digs into facts for himself, without merely accepting the state court's findings, the more frequently we shall find . . . [any constitutional violation], the more apt we are to learn the truth in the rare meritorious case." Pope, Suggestions for Lessening the Burden of Frivolous Applications, 33 F.R.D. 409, 419 (1962). For a similar reaction by a district judge, see Caffrey, The Impact of the Townsend and Noia Cases on Federal District Judges, 33 F.R.D. 446, 449-51 (1963).


100 See Desmond, supra note 75, at 20.
review may prompt the conclusion that finality can best be served, within the bounds of the existing system, by withdrawal. Professor Bator, admittedly thinking in terms of the intrusions occasioned by federal habeas corpus jurisdiction, offers a powerful plea that our judicial system be structured to satisfy this need:

The first step in achieving that aim [rehabilitation] may be a realization by the convict that he is justly subject to sanction . . . ; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.102

This interest can be equally well served if the state court, by conclusively demonstrating that an applicant's remedies are exhausted, removes the necessity for application to the state court and thus permits direct recourse to the federal system.

The wisdom of the decision reached by the Supreme Court in *Townsend* is not here in question. Its conclusion that a federal district court, when disposing of a habeas corpus application, has the power and often the duty to hold a hearing on factual questions already determined in a state court may be sound. *Townsend*, however, is the pivot of the total federal-state collateral relief system; as the frequency of federal hearings increases, the incentive for state court reform correspondingly decreases. The tenor of *Townsend*—from the viewpoint of a state judge—is negative. The six mandatory situations coupled with the district judge's discretion to hold a hearing in any event leaves the state judge with a feeling of futility;102 a belief that even his best efforts will not necessarily forestall a federal hearing.103 The Supreme Court should not expect to achieve the best of both worlds—a system in which state courts hold extensive hearings yet then accept the probability of repetition of this process by a federal court.

Ideally, state court determination of the merits of each habeas application under procedures giving full scope to all constitutional allegations might obviate the need for federal review in most, if not all, cases. But

101 Bator, *supra* note 70, at 452.
102 See note 24 *supra* and accompanying text.
103 This problem has been implicitly recognized by the Judicial Conference of the United States. In a bill drafted by the habeas corpus committee, an amendment to § 2254 was proposed to remove the negative impact of *Townsend*. The amendment provides that factual findings of a state judge, if contained in a written opinion "or other reliable and adequate written indicia, shall be presumed to be correct . . . ." Report of the Committee on Habeas Corpus, Judicial Conference of the United States 16 (Sept., 1965), on file in the Biddle Law Library, University of Pennsylvania. This proposal is apparently designed to increase the incentive to hold state hearings by creating a presumption in favor of their validity.
when confronted with the necessities of day to day administration of federal habeas corpus jurisdiction, the inability of the system to discourage prisoner applications or the hearings these applications inevitably require and the state court's overriding interest in finality, state court withdrawal seems to combine practical efficiency with maximum protection of constitutional rights. Withdrawal, certainly, is a more sensible course than continued state recalcitrance—it serves both the interests of finality and efficient judicial administration with, hopefully, a concomitant decrease in federal-state antagonism.