Exhaustion of State Remedies before Bringing Federal Habeas Corpus: A Reappraisal of U.S. Code Section

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EXHAUSTION OF STATE REMEDIES BEFORE BRINGING FEDERAL HABEAS CORPUS:
A REAPPRAISAL OF U.S. CODE SECTION 2254

I. INTRODUCTION

There are many instances in which a state's prisoner, after being denied his liberty for years, has subsequently, upon issuance of federal writ of habeas corpus, either been proven innocent or adjudged entitled to a new trial upon grounds that he was denied some constitutional right during the process of his state court trial. In some of these cases it has been clear from the very beginning that if the allegations of the writ were proven, the detention was unconstitutional. Yet the prisoner is still forced to endure years of confinement while exhausting state remedies before federal habeas corpus is available to him.

The purpose here is to review the history of the federal writ of habeas corpus as presently embodied in 28 U.S.C. § 2241, and to discuss the proper application to be given to 28 U.S.C. § 2254, which in certain instances, requires exhaustion of state remedies before habeas corpus may be brought in the federal courts.

II. HISTORICAL BACKGROUND

The writ of habeas corpus historically has had as its basic purpose the vindication of a prisoner's right to immediate liberty.

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3 [Hereinafter referred to as Section 2241] It is important to note that § 2241 is the basis of our present substantive habeas corpus law. In the absence of some restriction imposed by 28 U.S.C. § 2254 (1958), habeas corpus may be granted in all cases enumerated in this section.

4 [Hereinafter referred to as Section 2254]
whenever wrongfully detained. Unlike the states' appellate procedure, to which the federal courts give deference as to a matter of right and law, the writ of habeas corpus has always been regarded as a summary remedy, individual and distinct in its own right. The forbearance which the federal courts exercise in granting habeas corpus can be based on nothing higher than comity, and even then comity based solely on accord with the results achieved by the state courts in protecting federal rights.

There is nothing in the language of the Federal Habeas Corpus Statute, which has remained substantially unchanged since 1867, to suggest that federal habeas corpus is in any way connected with, or part of, the appeal procedure provided by the state courts. Indeed, the fact that the privilege of habeas corpus was extended to prisoners in custody under state authority for the first time in 1867, one year before the adoption of the Fourteenth Amendment, should indicate that Congress intended to provide a summary process against state officials to more effectively preserve federal rights than the state courts' process had done in the past. That federal habeas corpus is an exceptional remedy, distinct and separate from the appeal procedures provided by the state is further evidenced by the fact that res judicata does not apply to habeas corpus.

In view of the basic differences in the nature of the two remedies, it is unjustifiable to impose upon habeas corpus the

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6 Covell v. Heyman, 111 U.S. 176, 182 (1884) (points out the distinction between the appeal process of the states and habeas corpus).
10 The purpose of the exhaustion of state remedies requirement as applied to the states' appeal process is to assure that the federal courts do not interfere with the normal process of state law, and that all constitutional questions raised in the state courts shall be properly matured therein before they reach the federal courts on appeal. See Staub v. City of Baxley, 355 U.S. 313 (1958). In addition, as a matter of law in ordinary cases involving the constitutionality of state law, the state has not legally acted until its procedures are exhausted.

None of the above justifications for the exhaustion requirement, however, apply to the remedy of federal habeas corpus. It is summary from its very nature, for if the prisoner meets the requirements of the
same exhaustion of state remedies requirements that serve an effective purpose when applied to state appeal procedures.

However, it is unquestioned that the writ of habeas corpus, as applied in some instances, has not effectively vindicated violations of federal rights. In certain cases the broad application given federal habeas corpus by the substantive requirements of Section 2241 has been limited, for all practical purposes, only to use as an alternative to Supreme Court review, serving merely as a collateral attack procedure to set aside a final judgment of the state courts. It is clear, however, that the enactment of Section 2254, the federal statute dealing with exhaustion of state remedies before bringing federal habeas corpus should not, in itself, be the basis for subverting the purpose of the writ.

Section 2254 states:

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

The revisor's notes state that this section was meant only to be declaratory of existing decisions as affirmed by the Supreme

habeas corpus statute, he has an immediate right to be free from restraint by state officials.

Irvin v. Dowd, 359 U.S. 394 (1959). The petitioner in this case was denied federal habeas corpus after a failure to perfect an appeal. Petitioner had escaped from custody and, because of this, the lawyer's motion for a new trial was denied and the appeal thereby lost.

In Brown v. Allen, 344 U.S. 443 (1953), defendant's counsel filed the papers for appeal one day late because, upon a failure to locate anyone in the state office by telephone, he chose to deliver them in person the next day instead of mailing them that same day. It was unquestioned that the attorney did not deliberately flout the state procedure. Because of this slight technical default, however, the prisoner, who had received the death penalty, was denied habeas corpus by the federal courts. The inadvertent loss of the state forum, even when it was clear that a constitutional right had been violated, resulted in the denial of federal habeas corpus.

Certainly such results are inconsistent with the concept of habeas corpus as a remedy to vindicate constitutional rights whenever violated.


Hart, supra note 12, at 112-14.

Court, specifically citing Ex parte Hawk, a 1944 case, as the statute's source. The cases up to and including Hawk thus shed much light upon what was intended by the statute. It is unquestioned that the cases beginning with Ex parte Royall, the decision first cited for the general proposition that state judicial remedies must be exhausted before the writ of habeas corpus will be granted, and subsequent cases extending through and from Hawk, all describe only what should ordinarily be proper procedure in the state courts before bringing habeas corpus in the federal courts. These cases recognize that much cannot be foreseen in laying down a general rule, and that special circumstances justify departure from a rule designed to regulate the usual case. In fact, within a few years after the announcement of the exhaustion requirement in Royall, cases were decided which held there was no duty to exhaust state remedies before seeking habeas corpus. Such cases continued to be decided after Hawk and after the passage of Section 2254. These cases and the words of the habeas corpus statute plainly show federal courts are free to grant habeas corpus immediately, without state remedies being exhausted where: (1) a person is held in state custody before a state judgment has been rendered; (2) there is an absence of available state court corrective process; or (3) there are circumstances rendering such process ineffective to protect the rights of the prisoner.


16 321 U.S. 114 (1944).

17 117 U.S. 241 (1886).

18 321 U.S. 114 (1944).

19 321 U.S. 114 (1944).


22 Boske v. Comingore, 177 U.S. 459 (1900); In re Neagle, 135 U.S. 1 (1890); Wildenhus's Case, 120 U.S. 1 (1887).


24 United States ex rel. DeVita v. McCorkle, 216 F.2d 743 (3d Cir. 1954);
Section 2254 does not apply to cases falling within the first category listed above. In such cases the general rule of Section 2241 allows habeas corpus to be brought immediately. Cases fitting under the second and third categories are provided for in the exceptions contained within Section 2254 itself. In spite of these statutory provisions, however, many cases still arise where exhaustion of state remedies is required in spite of seemingly plain statutory language to the contrary.

III. HABEAS CORPUS CASES TO WHICH SECTION 2254 IS WHOLLY INAPPLICABLE

The exhaustion of remedies requirement of Section 2254 does not limit the general rule of Section 2241 in all cases. By its very terms it applies only to "a person in custody pursuant to the judgment of a state court." Thus, persons who meet the substantive requirements for bringing habeas corpus, and who are in custody, but have not yet had a state judgment rendered against them, have no statutory duty to exhaust state remedies before applying for federal habeas corpus. The revisor's notes to Section 2254 clearly point this out. The reason is that if Section 2254 were applied to applications for habeas corpus by persons detained solely under authority of a state officer it would unduly hamper federal courts in the protection of federal officers detained for acts committed in the course of official duty. It is clear, however, that private

Brown v. Frisbie, 178 F.2d 271 (6th Cir. 1949); Boyd v. O'Grady, 121 F.2d 146 (8th Cir. 1941); Downer v. Dunaway, 53 F.2d 586 (5th Cir. 1931); United States ex rel. Bongiorno v. Ragen, 54 F. Supp. 973 (N.D. Ill. 1944).

Because of the usual attitude that § 2254 is "the rule" this may be difficult to conceptualize. The general habeas corpus rule is primarily covered by 28 U.S.C. § 2241 (1958). By itself it would clearly provide that habeas corpus is available to vindicate the listed federal rights whenever violated. The application of this general rule is, however, restricted by the exhaustion of remedies requirements codified in § 2254. The restrictions placed upon the general rule by § 2254 are themselves limited, however, by the two exceptions within § 2254 itself.

28 U.S.C. § 2241 (1958). Note particularly the broad terms of subsection (c), which state that habeas corpus is available to a prisoner who "(1) is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) . . . is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) . . . is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

28 Ibid.
citizens as well as federal officials need not exhaust state remedies when they are detained prior to a state judgment.\(^{29}\)

Section 2254 was undoubtedly made inapplicable to persons in custody, but not pursuant to a judgment, in order to preserve the immediate right to bring habeas corpus in situations such as that presented in the landmark case of *In re Neagle*.\(^{30}\) In *Neagle*, a United States Marshal was removed from state custody before judgment. The court recognized that the federal government had an important interest in the performance of its governmental functions, and that its officials who were acting pursuant to federal law could not constitutionally be held by state authorities.\(^{31}\) It was pointed out that so long as the federal official was acting pursuant to federal law,\(^{32}\) the supremacy clause of the Constitution would compel his immediate release by habeas corpus.\(^{33}\)

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\(^{29}\) The basis for making a distinction in habeas corpus petitions brought before a judgment and those after a judgment is that there may possibly be a justifiable presumption that custody pursuant to a court's judgment is constitutional. There can be no such presumption before a judgment has been rendered, however.

\(^{30}\) See 135 U.S. 1 (1890).

\(^{31}\) Id. at 75. The Court reasoned: "If the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State of California. When these things are shown it is established that he is innocent of any crime against the laws of the State, or of any other authority, whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal. . . . It is the exercise of a power common under all systems of criminal jurisprudence."


\(^{33}\) 135 U.S. 1, 63 (1890).
Cases preceding the passage of Section 2254 had also extended the doctrine of *Neagle* to private citizens acting pursuant to federal law. These decisions indicate that it mattered not whether the person detained was employed as a federal official, but rather the important consideration was whether or not the detention of the individual substantially interfered with an important right of the federal government. Wildenhus's *Case,*[^34] is an early example of the federal interest which was deemed important enough to be protected by allowing immediate habeas corpus. In that case state authorities arrested a foreign ship's crew contrary to a treaty between the United States and the government of the ship's crew. It was pointed out that the operation of the federal government and its relationship with other governments was involved. It was this federal interest, rather than the individual interests of the ship and crew, which was determinative in allowing immediate habeas corpus before judgment.[^36] Similarly, many cases have arisen where a state, by statute, has denied a private citizen his constitutional right to carry on interstate commerce unencumbered by state interference. *In re Beine*[^37] and *Ex parte Jervey,*[^38] two typical examples, discuss the clear constitutional right being denied the individual; but in each instance the federal right to have interstate commerce carried on without having a tax placed upon it by a state seems to be emphasized over the purely individual right.

The individual's federal rights are, however, protected by habeas corpus, and even without a showing that a wrongful detention of a private person substantially interferes with the operation of the federal government. Under Section 2241 an individual is entitled to immediate habeas corpus in the federal courts when he is unconstitutionally held in state custody prior to a state judgment.


[^35]: 120 U.S. 1 (1887).

[^36]: Id. at 12, 18.

[^37]: 42 Fed. 545 (D. Kan. 1890).

IV. HABEAS CORPUS CASES TO WHICH SECTION 2254 APPLIES, BUT WHICH FALL WITHIN THE EXCEPTIONS LISTED IN THE SECTION

A. EXCEPTION ONE—AN ABSENCE OF AVAILABLE STATE CORRECTIVE PROCESS

Even where a judgment has been rendered by a state court, Section 2254 contains two exceptions to the exhaustion of remedies requirement. The first provides for situations where there is an absence of available state corrective process. It is now conceded that a prisoner in custody pursuant to a state judgment, who for some good reason did not, or was not able to avail himself of the state's appellate procedure, may obtain a hearing upon application for federal habeas corpus. Available state remedies are now recognized as being only those which are presently available to the specific prisoner seeking relief. Some courts which refused to grant habeas corpus after a prisoner failed to take advantage of the appellate procedure provided by the state, reasoned that the prisoner, by his failure to appeal, had automatically waived his right to resort to his federal writ of habeas corpus. This was held to be the case even though the prisoner exerted every effort possible in view of his limited education, finances, or intelligence. Some courts still reason that one who fails to avail himself of the appeal procedure of the state should not be allowed to use habeas corpus as a writ of error. Such reasoning results in placing the availability of federal habeas corpus, a remedy entirely separate from appeal, at the mercy of the state courts' procedure. It is one thing to insist that a prisoner must follow state procedure to the letter if he chooses to vindicate his constitutional rights by appeal from the state courts, but it is another thing to say that when a prisoner has made every reasonable effort to appeal and has failed, he should be denied federal habeas corpus because of such failure. If

41 Cases cited note 23 supra.
42 Ex parte Hawk, 321 U.S. 114 (1944).
43 Frank v. Mangum, 237 U.S. 309 (1915); Urquhart v. Brown, 205 U.S. 179 (1907); Markuson v. Boucher, 175 U.S. 184 (1899); Baker v. Grice, 169 U.S. 284 (1898); Whitten v. Tomlinson, 160 U.S. 231 (1895); In re Frederich, 149 U.S. 70 (1893); Ex parte Royall, 117 U.S. 241 (1886); Ex parte Siebold, 100 U.S. 371 (1879); Ex parte Parks, 93 U.S. 18 (1876).
44 Note, supra note 8.
the denial of constitutional rights remains unremedied, habeas corpus should still be available.

In *Johnson v. Zerbst*, however, the court took a different approach in deciding whether a prisoner had automatically waived his right to habeas corpus by failing to appeal. The court held that habeas corpus was available to a prisoner who had not waived his constitutional right to counsel, and who, because of lack of counsel, had failed to perfect an appeal. The waiver theory, which probably should have no application to habeas corpus cases whatsoever, was, at least in *Zerbst*, confined to cases in which the prisoner consciously and willingly refused to take advantage of the appeal procedure which, *as a practical matter*, was available to him. *Zerbst* recognized the obvious truth that one without counsel and ignorant of legal procedure could not be expected to perfect an appeal.

*Potter v. Dowd* and *Rhea v. Edwards* allowed habeas corpus after appeal time had run. In *Potter*, the prisoner was too poor to employ an attorney. In *Rhea*, counsel had abandoned the case while Rhea was in prison and had no knowledge that he was without a lawyer. In *United States ex rel. Noia v. Fay*, the Court of Appeals for the Second Circuit of New York took a big step toward restricting the application of the waiver doctrine to habeas corpus. The prisoner in *Fay* failed to appeal for fear that upon appeal he might again lose and be sentenced to death rather than life imprisonment which he was serving. Two other prisoners convicted on the same charge, however, did appeal and their convictions were reversed on the grounds that evidence was unconstitutionally admitted against them. In deciding the issue of whether the prisoner had waived his right to habeas corpus by failing to appeal, the court gave heavy consideration to the obviously violated constitutional right and the great probability that the prisoner would be freed entirely upon retrial, if any were even held. The court stated,

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46 Parker v. Illinois, 333 U.S. 571 (1948); Central Union Tel. Co. v. City of Edwardsville, 269 U.S. 190 (1925). Note in each of these cases that the waiver spoken of is a waiver of the right to continued use of the state forum for the process of appeal. See Reitz, *supra* note 5, at 1332-38 for a discussion of the inapplicability of this waiver doctrine to habeas corpus.


48 146 F.2d 244 (7th Cir. 1944).


"We cannot believe that Noia [the prisoner] would consciously and willingly have surrendered his constitutional right had he known then what he knows now . . . ."\footnote{51}

The Supreme Court, in the recent landmark case of \textit{Fay v. Noia},\footnote{52} affirmed the circuit court decision in \textit{United States ex rel. Noia v. Fay} on the waiver issue. The Supreme Court made it clear that slight procedural defaults in the state courts, if not made willfully, would not preclude the prisoner from habeas corpus. \textit{Fay} established that the federal courts had the power to grant habeas corpus \textit{whenever} the prisoner had no remedy for his constitutional rights presently available to him in the state courts.\footnote{53}

This case should herald an entirely different approach to federal habeas corpus than the state courts have presently been taking. In reciting a complete history of the federal writ,\footnote{54} the Court made it clear that the extraordinary remedy of habeas corpus will not be subdued in the future by the unrelated technicalities of state appellate procedure.

Unless the seemingly clear language of \textit{Fay} is substantially emasculated in subsequent case development, it would appear that constitutional rights are at last being put in their proper perspective and assured immediate protection by habeas corpus.

\textbf{B. Exception Two—An Existence of Circumstances Rendering Such Process Ineffective To Protect The Rights Of The Prisoner}

This exception has been held to relieve a prisoner from the burden of exhausting state remedies even when the process of the state is presently available, if such process is not a practical remedy to protect his rights.

In \textit{United States ex rel. DeVita v. McCorkle},\footnote{55} a state prisoner had been sentenced to death and was in the process of exhausting his state remedies by submitting a petition for certiorari to the Supreme Court.\footnote{56} At the time he applied for the writ, a definite

\footnotesize{\textsuperscript{51} 300 F.2d 345, 351 (2d Cir. 1962).}  
\footnotesize{\textsuperscript{52} Fay v. Noia, 372 U.S. 391 (1963).}  
\footnotesize{\textsuperscript{53} Ibid.}  
\footnotesize{\textsuperscript{54} Ibid.}  
\footnotesize{\textsuperscript{55} 216 F.2d 743 (3d Cir. 1954).}  
\footnotesize{\textsuperscript{56} See Darr v. Burford, 339 U.S. 200 (1950). In overruling \textit{Wade v. Mayo}, 334 U.S. 672 (1948), the Court held that an application for certiorari to the United States Supreme Court was a link in the exhaustion of state remedies. In the absence of exceptional circumstances it is a prerequisite to bringing habeas corpus in a federal district court.}
date had not yet been established for his execution, but his counsel reasonably expected that it would be the next day, before the petition for certiorari could be perfected. The court granted the writ of habeas corpus, stating that the petition for certiorari was “process ineffective to protect the rights of the prisoner as is stated in the alternative clause of the governing statute.”

Such results show that the federal courts are taking a realistic look at the situation rather than merely looking to the record to see if the prisoner has a paper remedy available. Clearly the prisoner in McCorkle did have a paper remedy—his petition for certiorari. It is equally clear that notwithstanding this remedy his death would have deprived him permanently of whatever constitutional rights he had.

In Boyd v. O'Grady, a prisoner applied for a state writ of habeas corpus after conviction, but did not appeal to the state supreme court. The court of appeals discussed two considerations which made this case exceptional so as to allow immediate release on habeas corpus if the constitutional claim could be proven. First, the court relied on the fact that in the past the state court had consistently wrongly rejected similar claims. Second, and perhaps even more important in everyday application, the court pointed out that the prisoner could not possibly preserve his rights even if he ultimately would have been able to win on his claim in the state courts, because by the time he obtained his relief his sentence would have been served. This is frank judicial recognition that one has no legal remedy if it takes as long to attain the remedy as it does

57 216 F.2d 743, 744 (3d Cir. 1954).
58 121 F.2d 146 (8th Cir. 1941).
59 Id. at 148. Note the realistic approach the court took in deciding whether or not the petitioner had an adequate state remedy. The court considered the past results of the state court in similar cases in deciding whether the petitioner should have been required to pursue a state remedy. The court stated: “We think it must be inferred from the decisions of the Supreme Court of Nebraska... [citing cases], and from the state court’s summary denial of the petition for habeas corpus in this case, that at least up to the time of the decision in Smith v. O’Grady in February of this year, the Nebraska courts when considering petitions for habeas corpus did not give to the Nebraska statute requiring assignment of counsel to one accused of a penitentiary offense the same effect as the federal courts are required to give to the assistance of counsel clause of the Sixth Amendment in habeas corpus cases before them. It is at best doubtful whether the Nebraska courts would... have granted habeas corpus...”
60 Id. at 148, 149.
to serve the sentence. Via the delay and intervening imprisonment, his constitutional rights have been permanently lost, just as the prisoner's life in *United States ex rel. DeVita v. McCorkle* would have been permanently lost had he been limited to his state remedy.

Under the rationale of *O'Grady*, if the time element makes an "available" remedy ineffective to protect the prisoner's rights, he cannot be compelled to pursue it.

There are, of course, cases which allow a federal official immediate habeas corpus even when the official has not applied for it until after he is in custody pursuant to judgment. In such cases, the urgency of vindicating the federal right combined with the delay which would result if the official were restricted to use of state process may operate to fit such case within exception two of Section 2254 as constituting the existence of circumstances rendering the state process ineffective to protect the rights of the prisoner.

It would seem that this urgent right to vindication of federal rights should produce many more exceptional cases than are now appearing. It would be inconsistent for the courts to hold that it is a case of particular urgency when the protection of a Supreme Court Justice is involved, and not likewise hold the case to be exceptional when the very law which the Justices are appointed to uphold is flouted. Certainly every individual has a right and a duty to obey federal law, and in that sense is, when detained while merely acting pursuant to a valid law, answering for an act which he was authorized to do by the law of the United States, within the clear meaning of *In re Neagle*. We are not without instances where states, by wrongful detention of private citizens, have delayed the enforcement of federal laws, Supreme Court decisions, and Interstate Commerce Commission orders. Cases in which Negroes are detained by state authorities for frequenting public places under right of federal statute or Supreme Court decisions, as well as cases in which states have detained persons for riding interstate carriers under similar right, are examples which should be exceptional. In such cases a prisoner should be allowed to bring habeas corpus immediately after judgment by the state court because of the urgency of protecting the federal right involved.

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61 E.g., Ohio v. Thomas, 173 U.S. 276 (1899); *In re Leaken*, 137 Fed. 680 (S.D. Ga. 1905); *In re Waite*, 81 Fed. 359 (N.D. Iowa 1897).

62 See note 29 *supra*.


Any realistic approach to the problem of preserving constitutional rights must consider the time factor. One author who made an analysis of thirty-five successful petitions for habeas corpus noted that all the successful petitioners were convicted of very serious offenses, most either receiving the death sentence or life imprisonment. It was pointed out that the obvious reason for this was that those who received lesser sentences had no practical chance to avail themselves of habeas corpus. It evidently takes so long under the present requirements of Section 2254 to mature a case for federal habeas corpus that the "lighter" sentences of only a few years are completed and the cases thereby become moot before they can even receive a hearing. The time lapse between conviction and obtaining relief by habeas corpus in one case studied was twenty-six years. There were thirteen cases in which the time span was ten years or more, and twenty-four in which it was five years or more. Without the need of going into histrionics as to the purpose of "The Great Writ," it certainly seems obvious that it was never intended to protect only those sentenced to life imprisonment or other long terms.

In fact, such delays as occur should present serious constitutional problems. Article I, section 9, clause two, in limiting the powers of Congress, provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." A federal statute, which as a practical matter denies a state's prisoner the right to even apply for habeas corpus until after a delay of years would seem to suspend the privilege of the writ and fall within

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65 Reitz, supra note 1, at 484.
67 United States ex. rel. Montgomery v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949). There is no indication that the prisoner sought relief prior to 1947 or 1948, however.
68 U.S. CONST., art. I, § 9, cl. 2.
69 1 WATSON, THE CONSTITUTION OF THE UNITED STATES 723 (1910). "Every one who is deprived of his liberty is entitled to attempt to regain it by applying for a writ of habeas corpus. This is what is meant by the privilege of the writ. It is the privilege one has to ask that a writ be issued and the cause of his detention inquired into. This privilege existed at common law, and was in the nature of a natural right. To suspend the privilege of the writ is to prevent the writ from being put into operation; in other words, to deprive persons of the benefit [emphasis added] of the writ."
the prohibition of this constitutional provision. It was always assumed by the delegates to the Constitutional Convention that the privilege of the writ was to be enjoyed "in the most expeditious and ample manner." That a delay of years before being granted such privilege does not accord with the intent of the founders of the Constitution, should be obvious.

In addition to the time factor, practices in state prisons often prevent prisoners from even applying for the writ of habeas corpus. Such practices have been held to create circumstances rendering the state process ineffective to protect the rights of the prisoner within the meaning of Section 2254. United States ex rel. Montgomery v. Ragen presented such a situation. The prisoner, serving a sentence of 199 years, had neither successfully appealed nor completed an application for a state writ of habeas corpus. Upon the eventual receipt of a writ, however, it was established that the warden of the Joliet, Illinois, prison had not permitted prisoners to send petitions for writs to any court for a period of at least two years. Although the court held against the petitioner on the merits of his constitutional claim, it stated that the case presented the special circumstances spoken of in Section 2254 that would excuse a failure to resort to the appeal procedure or other state remedies.

71 2 Farrand, The Records of the Federal Convention of 1787, pp. 341, 576 (1911). Farrand traces the progress of the various sections of the Constitution from introduction to final adoption, taking much of his history from Madison's Journal. When Article I, section 9, clause two was submitted to the convention by Pinckney it read: "The privileges and benefit of the Writ of Habeas corpus shall be enjoyed in this Government in the most expeditious and ample manner; and shall not be suspended by the Legislature except upon the most urgent and pressing occasions, and for a limited time not exceeding _____ months." As reported in 1 Meigs, The Constitution and the Courts 182 (1924), "The Committee on Style made merely a verbal change, and then reported as follows:—The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." See generally, The Constitution of the United States 275-81 (amended to Jan. 1, 1938), officially issued as S. Doc. 232, 74th Cong., 2d Sess. (1938); Prescott, Drafting the Federal Constitution 737, 738 (1941).
72 54 F. Supp. 973 (N.D. Ill. 1944).
73 Id. at 976.
In Robbins v. Green, a case in which the prisoner was financially unable to perfect an appeal, the court could have relied upon "the absence of available state corrective process" in granting habeas corpus. It chose, however, to rely on exception two, which was equally applicable.

V. WHEN IS A CASE "EXCEPTIONAL" WITHIN THE MEANING OF THE EXCEPTIONS OF SECTION 2254?

Upon an examination of the cases which have been held to be "exceptional" under either exception one or two of Section 2254, certain common characteristics are noticeable. Two or more of the following factors are usually present: (1) There is a clear violation of the prisoner's constitutional rights; (2) The prisoner's burden of vindicating his rights through use of state process is great because of the time, energy, and expense involved; and (3) There is a good probability that upon granting of the writ the prisoner will be discharged entirely.

If at least the first two of the above considerations are present, and as a practical matter considering all factors the prisoner has not deliberately flouted the appeal procedure of the state and has no remedy presently available to him or as a practical matter there is an existence of circumstances rendering such process ineffective to protect his rights, he should be allowed an immediate hearing upon application for habeas corpus.

Some argue, however, that the federal courts are already overburdened with hearings and applications for habeas corpus and should not be further crowded. It is true that many habeas corpus petitions are being submitted to the federal courts. Between 1950 and 1960, 6,000 petitions were filed in the federal district

74 218 F.2d 192 (1st Cir. 1954) (held that a financial barrier to perfecting an appeal constituted circumstances rendering such process [i.e., a theoretical right to review by the Supreme Judicial Court] ineffective to protect the rights of the prisoner within the meaning of 28 U.S.C. § 2254 (1958)).

75 The exceptions within § 2254 itself are perhaps overlapping or inter-changeable to some extent. As pointed out in the revisor's notes to § 2254, S. Rep. No. 1559, 80th Cong., 2d Sess. 9 (1948), the purpose of exceptions one and two was to further elucidate what was meant by an "adequate state remedy." This concept should be kept in mind to avoid the error of making overly technical distinctions based on the exact phrasing of each section.

This would indicate that even under the law as presently applied, prisoners who are physically able to do so are not reluctant to assert their judicial contentions even though they may be without merit. The fact that is often overlooked, however, is that from the 6,000 petitions submitted, a yearly average of only thirty-one applications are given a hearing. The rest, being patently frivolous, are dismissed upon first reading. There is no reason to believe the burden would be greatly increased in the future unless the states become completely heedless of their duties. The prisoner who is able to bring immediate habeas corpus, even under a broad application of Section 2254 would probably, in the great majority of cases, still have had at least one trial at the state level, and perhaps more. Generally, at least, a finding of fact will be needed before it can be sufficiently clear that a constitutional right has been violated. Yet, if somewhere during the course of exhausting his state remedies the prisoner is able to show that his case falls within one of the exceptions to Section 2254, what justification can there be for denying him vindication of his constitutional right as soon as possible? Certainly the fact that the federal courts may become crowded is not a valid reason. Such a problem as this is better solved by appointing more federal judges than by denying constitutional rights.

It is also argued that if federal influence is expanded into the area the states have long felt to be a hallowed ground, it will destroy the integrity of the state court system. If, however, by preserving state integrity, a prisoner is deprived of his constitutional rights, such "integrity" hardly seems worth preserving. The integrity of the states' procedure must be judged by whether or not it dispenses justice as fairly and efficiently as possible. In some states, because of the present inadequacies of due process protection and collateral attack procedures, a prisoner is either completely denied justice, or justice is substantially delayed. In addition, many states limit their habeas corpus or other post-conviction remedies to situations where the trial court had no jurisdiction over the defendant, or over the crime charged, or where its sentence was beyond the statutory limits of punishment. Any resulting embar-

78 Ibid.
80 See Scott, One Year Review of Criminal Law and Procedure, 33 Dicta 65, 82-83 (1961).
rallassment from a federal court upset of a state conviction in such a
case is largely the state's own making.

VI. CONCLUSION

The historical purpose of the writ of habeas corpus is to vindicate federal rights whenever violated. Even where a state prisoner has chosen initially to rely on the state procedure, Section 2254 should not be applied in such a manner as to subvert the immediate use of the writ. The only possible justification for the federal courts' deference to a state's appellate procedure before allowing use of the separate remedy of habeas corpus is the presumption that the constitutional rights of the prisoner will be effectively preserved through utilization of the state process.

Such a presumption is usually justified when the prisoner is in custody pursuant to a state judgment. But if the prisoner has applied for federal habeas corpus before a state judgment has been rendered, no such presumption exists and he is entitled to apply for habeas corpus immediately.

If the prisoner is in custody pursuant to a judgment the state courts should still, in most cases, continue to be the source of justice for the state prisoner. But if an examination of all the evidence indicates that the state process has failed or will fail to protect the prisoner's constitutional rights the writ of habeas corpus in the federal courts should always be available. When the exceptional case arises in which, either at the very outset or during the process of exhausting state remedies, it is obvious that on the substantive merits, as distinguished from the procedural lapse, the prisoner should not be imprisoned, and those merits are of constitutional magnitude, any explanation advanced to deny the prisoner his vindication by habeas corpus when the state cannot provide relief is very unconvincing. Procedure exists, or ought to exist, for the purpose of effectuating rights, not denying them. To refuse to deal with practical realities when basic rights such as liberty and life itself are at stake is totally unjustified and unreasonable. If a state remedy is adequate to protect a prisoner's rights within the meaning of adequacy as spelled out under Section 2254, then clearly no federal intervention through habeas corpus is needed or is desirable. But where, as a practical matter, the state remedies are not adequate, their exhaustion is not necessary. Section 2254 clearly provides for situations where no exhaustion of state remedies is necessary, and the courts should no longer ignore its plain meaning.

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