

A HANDBOOK OF FEDERAL HABEAS CORPUS. By Ronald P. Sokol. Charlottesville, Virginia: The Michie Company. 1965. Pp. 289. \$10.00.

That the writ of habeas corpus has an honorable history in defense of liberty is not to be doubted. That its current popularity, after the United States Supreme Court decisions in *Fay v. Noia*¹ and *Townsend v. Sain*,² creates problems in the administration of criminal justice, has been extensively documented.³ What is amazing is that since 1886 nobody has written a book on how to obtain federal habeas corpus.⁴ Until, that is, Mr. Sokol set his capable mind and agile pen to the task of producing *A Handbook of Federal Habeas Corpus*.

Habeas corpus in Anglo-American law traces at least to Edward I, when several varieties of the writ were used to compel defendants and jurymen to appear at trial.⁵ It is, however, of *habeas corpus ad subjiciendum*—the Great Writ—that Sokol writes and which principally concerns courts today.⁶ A close relative of this form of the writ was used in the struggle between the common law courts and Chancery, to release those whom Chancery had committed for contempt. It developed originally to test the jurisdiction of inferior tribunals; courts at Westminster were fond of using habeas corpus to find the power of an inferior court wanting.⁷ The writ came, however, to have broader use than against judicially-ordered confinement. In the political turmoil of the seventeenth century, it served to free those whom the King had committed for "reasons of State." Of this use, Selden said that habeas was "the highest remedy in law for any man that is imprisoned."⁸ And so, with the expansion and strengthening provided by the Petition of Right,⁹ the Habeas Corpus Act of 1679,¹⁰ and later English statutes,¹¹ the writ came to be available to test any confinement, by government official or private person, of anyone who could

¹ 372 U.S. 391 (1963).

² 372 U.S. 293 (1963).

³ See, e.g., Symposium, *Applications for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts*, 33 F.R.D. 363 (1963) (with many articles and some suggested statutory changes); Brennan, *Some Aspects of Federalism*, 39 N.Y.U.L. REV. 945 (1964); United States *ex rel. Walker v. LaVallee*, 224 F. Supp. 661 (N.D.N.Y. 1963) (district judge remarks on problems in his district).

⁴ This fact is noted by SOKOL, *Preface to FEDERAL HABEAS CORPUS* at v (1965) [hereinafter the book is cited as SOKOL]. The 1886 work was HURD, *THE WRIT OF HABEAS CORPUS*.

⁵ PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 57 (4th ed. 1948). Plucknett draws heavily on the more extended treatment of habeas corpus in 9 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 108-25 (1926).

Forerunners of the writ date at least to Roman law. See Comment, 53 CALIF. L. REV. 224, 227 n.14 (1965), and material there cited.

⁶ 9 HOLDSWORTH, *op. cit. supra* note 5 at 108-12; see *Fay v. Noia*, 372 U.S. 391, 399 n.5 (1963); *Carbo v. United States*, 364 U.S. 611 (1961) (*habeas corpus ad prosequendum*).

⁷ PLUCKNETT, *op. cit. supra* note 5, at 57.

⁸ Quoted *ibid.*; see 9 HOLDSWORTH, *op. cit. supra* note 5, at 114.

⁹ See 6 *id.* at 34-37 (1927); 9 *id.* at 115 (1926); PLUCKNETT, *op. cit. supra* note 5, at 53.

¹⁰ An Act for better securing the liberty of the subject, 31 Car. 2, c. 2 (1679).

¹¹ E.g., An Act for more effectually securing the liberty of the subject, 56 Geo. 3, c. 100 (1816); see 6 HOLDSWORTH, *op. cit. supra* note 5, at 118-19.

hie himself or his next friend to court to file a petition.¹² In this form, habeas corpus is guaranteed in the body of the United States Constitution.¹³

Today, federal habeas is available to those illegally in federal custody,¹⁴ illegally in custody for an act done under federal authority,¹⁵ in custody for commission of an act permitted by the law of nations,¹⁶ and in custody in violation of the federal constitution or federal statute.¹⁷ Also, the related "motion to vacate sentence" is available for those convicted of federal crimes.¹⁸

By far the most important of federal habeas provisions concerns the state prisoner held "in custody in violation of the Constitution or laws or treaties of the United States."¹⁹ When, in March 1963, the Supreme Court reaffirmed the Great Writ as indispensable to the guarantee of liberty from unconstitutional state action, it gave substance to its pronouncements by striking down two hurdles which had stood in the way of state prisoners obtaining habeas review of federal claims. In *Fay v. Noia*,²⁰ speaking of the exhaustion of state remedies requirement of 28 United States Code, section 2254,²¹ the court adverted to "the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review,"²² and went on to discard a century's worth of court-made constrictions of federal habeas. In *Townsend v. Sain*,²³ the Court reaffirmed the power and duty of a federal district judge to hold a full evidentiary hearing upon the petition in enumerated cases in which "the facts are in dispute."²⁴

It was perhaps a foreboding of *Fay* and *Townsend* that led a law professor to argue in January 1963 for restriction of federal habeas for state prisoners;²⁵ it was experience with the doctrine of those cases that led a federal district judge with thousands of state prisoners in his district devoutly and publicly to wish that states would begin of their own accord to review convictions obtained by allegedly illegal means.²⁶

In all of the pother, with district courts freely exercising their power to

¹² PLUCKNETT, *op. cit. supra* note 5, at 57-58; SOKOL § 1-5.1; United States *ex rel. Bryant v. Houston*, 273 Fed. 915, 916 (2d Cir. 1921).

¹³ U.S. CONST. art. 1, § 9: "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 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

¹⁴ 28 U.S.C. § 2241(c)(1) (1964).

¹⁵ 28 U.S.C. § 2241(c)(2) (1964).

¹⁶ 28 U.S.C. § 2241(c)(4) (1964).

¹⁷ 28 U.S.C. § 2241(c)(3) (1964).

¹⁸ 28 U.S.C. § 2255 (1964).

¹⁹ 28 U.S.C. § 2241(c)(3) (1964).

²⁰ 372 U.S. 391 (1963).

²¹ 28 U.S.C. § 2254 (1964).

²² 372 U.S. at 424.

²³ 372 U.S. 293 (1963).

²⁴ *Id.* at 312-13; see Sokol § 13, at 67.

²⁵ Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). The publication of this article preceded the decisions in *Fay* and *Townsend* by just two months.

²⁶ United States *ex rel. Walker v. LaVallee*, 224 F. Supp. 661 (N.D.N.Y. 1963). And see material cited at note 3 *supra*.

assign inexperienced counsel to represent indigent petitioners before judges who themselves have acquired little technical knowledge of federal habeas, Mr. Sokol has come to the rescue with his excellent manual. It is, he says, "designed for lawyers and judges who are handling or deciding habeas corpus cases. If some errant law student, or anyone else for that matter, desires greatly to look at it, he has only my reluctant permission."²⁷

Sokol sets out to define each relevant statutory term, to discuss who may apply for the writ, who is a proper respondent, which court has jurisdiction, and similar initial considerations. The organization of his book follows the case through the order to show cause, hearing on the petition, and judicial review. Sokol discusses limitations on the availability of the writ, including an excellent section on exhaustion of state remedies, the inapplicability of ordinary *res judicata* principles to habeas, and the provisions for dismissal of frivolous petitions. His final section deals with problems peculiar to petitions of indigent prisoners with a summary of statutory and case-law authorizations and mandates for easing their trip through the courts. Finally, Sokol sets out all relevant federal statutes and rules, and an excellent set of forms drawn from the practicing bar and from district court files.²⁸ His emphasis is, therefore, practical and workmanlike. The book is nonetheless couched in readable style, with great attention to the ethical and tactical decisions which face an attorney, particularly one assigned to represent an indigent petitioner, in federal habeas litigation.

One should especially note Sokol's attention to the requirement of a hearing. He sets forth and analyzes in detail the *Townsend v. Sain*²⁹ criteria for holding a full evidentiary hearing.³⁰ He suggests to the attorneys for petitioner and respondent, and to the district judge, ways in which court time can be saved and justice subserved with intelligent use of documentary evidence in the form of affidavits and trial transcripts.³¹ Since habeas corpus is an original civil proceeding, Sokol wonders aloud to what extent the provisions of the Federal Rules of Civil Procedure on depositions and discovery may apply; there is no informative case law, and he ably outlines the competing contentions and arguments.³²

²⁷ SOKOL, *Preface* at vii.

²⁸ SOKOL, app. C, at 189-220. *Id.* at 192-99, Sokol sets out a form used in the Northern District of Illinois and elsewhere for prisoners' habeas petitions; the form asks all questions pertinent to a determination of the merits of the petition. By the use of such forms, district courts do material service to indigent prisoners. It may be suggested that if courts will not adopt such forms of their own accord, attorneys can press them to do so by appealing denials of habeas based upon alleged formal deficiencies. Once the court of appeals of a given circuit has accepted a form petition as adequate to present facts stating a cause of action for habeas corpus, district courts all over the circuit can perhaps be brought to see the light.

We do have a minor quibble about the organization of the book. The discussion of motions to vacate sentence should have been placed toward the beginning, along with the general treatment of habeas, not left to the section on "Limitations on the Availability of the Writ." The book has a good index, table of contents, and cross-reference system, so this is not much of a problem.

²⁹ 372 U.S. 293 (1963).

³⁰ SOKOL § 13, at 67.

³¹ SOKOL §§ 13, 14.2, 14.3, 32.

³² SOKOL § 18.

One thing which the book lacks, however, is a discussion of the social policy which ought to govern federal habeas for state (and federal) prisoners when the Supreme Court reinterprets old rights and cognizes new ones. The retroactivity of *Gideon v. Wainwright*³³ had been put squarely in issue before the book was published, by Justice Harlan's dissent in *Picklesimer v. Wainwright*.³⁴ Now with the post-publication decision of the Court in *Linkletter v. Walker*,³⁵ that the *Mapp v. Ohio*³⁶ exclusionary rule may not be invoked to secure federal habeas by a state prisoner whose conviction became final before *Mapp*, the question of retroactivity becomes central to great numbers of habeas cases. The Court grounded its decision in *Linkletter* on broad criteria of state "reliance" upon the previous rule as enunciated in *Wolf v. Colorado*,³⁷ the rationale of the decision in *Mapp* that state courts must exclude illegally seized evidence, and the effect of retroactivity on the administration of justice. It decided that states had relied on the *Wolf* doctrine; that the prime purpose of the exclusionary rule was to deter *future* police conduct, not bar from admission probative, albeit illegally-seized, matter as evidence of guilt; and, that great numbers of federal habeas petitions would be engendered if *Mapp* were retroactive. These considerations led the Court to hold that *Mapp* should be given prospective operation only.

Perhaps Sokol can be excused for not venturing extensively into this territory, though he had adequate warning that the questions were ripe; his admirable procedural handbook could become overblown beyond its pretensions and perhaps beyond its usefulness. But he should not be excused for failing to mention the matter at all. The core provision of the federal habeas statute relating to retroactivity is "in custody in violation of the Constitution or laws or treaties of the United States."³⁸ The court in *Linkletter* made no attempt to interpret this statutory language. The words "in violation of" require, we believe, a determination of the relation between the infringement of the prisoner's rights and his confinement. In making this determination, we suggest that concepts of causation not unrelated to those used in the law of torts may be relevant to a decision.³⁹ The easiest illustration would come of asking the question, "but for the violation, would the prisoner be in custody?" If the answer is no, then arguably habeas should be granted; such an analysis would have led to an opposite result to that reached in *Linkletter*. A more sophisticated analysis would ask, "what concepts of personal liberty sought to be guaranteed by the constitutional provision violated are offended by the continued incarceration of the petitioner?" The answer to this question would turn on concepts of competitive fairness looking to the adjustment of state and private interests. How much of a price ought the state to pay in disruption of its system of criminal justice for the unlawful actions of its servants with respect to the petitioner? How much does the argument "he would have been found guilty anyway" violate our notions that "guilt" is not only a finding of coercive,

³³ 372 U.S. 335 (1963).

³⁴ 375 U.S. 2, 3 (1963) (dissenting opinion).

³⁵ 85 Sup. Ct. 1731 (1965).

³⁶ 367 U.S. 643 (1961).

³⁷ 338 U.S. 25 (1949).

³⁸ 28 U.S.C. § 2241(c)(3) (1964).

³⁹ See generally Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law* (pts. 1, 2), 52 CALIF. L. REV. 459, 764 (1964).

objective fact, but also a conclusion to be reached only after certain required procedures designed to safeguard and affirm respect for the dignity and personal freedom of actual and potential prisoners? In short, the federal statutory scheme seems to require a detailed examination of the foundation in law for the imprisonment of a particular person, as well as evaluation of collective and impersonal considerations such as "reliance," "federalism," and "administration of justice." It is to be regretted that Sokol did not pursue this question at all, if only to cite and evaluate some of the ponderous body of literature in the field.⁴⁰

A further problem arises in connection with Sokol's discussion of mootness. He cites a 1957 Second Circuit case, *United States ex rel. Smith v. Martin*,⁴¹ for the proposition that habeas "is not available merely because the petitioner can show that he might, if resentenced get a shorter sentence."⁴² *Martin* contains strong dicta which affirm the opposite proposition, and these dicta were transmuted into holding in the 1964 Second Circuit case of *United States ex rel. Durocher v. LaVallee*.⁴³ In the latter case, a New York state prisoner sought federal habeas because he was denied counsel in criminal proceedings later used by New York to give him "second offender" status. This status carried the possibility of a higher sentence for the New York crime for which he was incarcerated at the time of filing his petition. The court of appeals, reversing the district court, held that federal habeas was available, though the petitioner's New York sentence was less than the permissible maximum for first offenders. The "possibility" of a shorter sentence, held the court, "is sufficient to warrant the issuance of a federal writ of habeas corpus."⁴⁴

In fact, Sokol's entire discussion of the use of habeas for purposes other than outright release from physical custody could have used closer attention. It has been held, for example, that habeas is a proper remedy for a prisoner who is deprived of certain privileges, or subject to unconstitutional discrimination in the prison;⁴⁵ this is so even though granting the relief requested will leave the prisoner still lawfully in jail. That is, habeas may be used in some cases to test the nature and quality of a confinement, as well as the fact of confinement.⁴⁶

⁴⁰ *E.g.*, *Picklesimer v. Wainwright*, 375 U.S. 2, 3 (1963) (dissenting opinion); *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303, 314 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964). See generally material cited in *Linkletter v. Walker*, 85 S. Ct. 1731 (1965).

⁴¹ 242 F.2d 701 (2d Cir. 1957).

⁴² Sokol § 6, at 32.

⁴³ 330 F.2d 303 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964).

⁴⁴ 330 F.2d at 305 n.2. *Compare* *Pollard v. United States*, 352 U.S. 354 (1957), *with* *Parker v. Ellis*, 362 U.S. 574 (1960).

⁴⁵ *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944).

⁴⁶ This is, however, a disputed use of the writ, *Annot.*, 155 A.L.R. 145 (1944); *Sarshik v. Sanford*, 142 F.2d 676 (5th Cir. 1944). *Cf. Ex parte Hull*, 312 U.S. 546 (1941), in which the Court invalidated a state prison regulation restricting the right of prisoners to file habeas petitions. The Court's opinion is unclear as to the federal jurisdictional basis for nullifying the regulation. In some states, it is clearly established that habeas lies to remove unlawful conditions in an otherwise lawful confinement. See, *e.g.*, cases cited in *Annot.*, 152 A.L.R. 143 (1944); *In re Ferguson*, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961). The better federal remedy for unlawful conditions of confinement is probably a civil suit for injunctive relief, alleging denial of civil rights under color of state law. See

Sokol rightly points out that the Supreme Court decided in *McNally v. Hill*⁴⁷ that habeas will not lie to attack an invalid judgment and commitment where the petitioner is also held in custody under a lawful judgment and commitment. He fails, however, to note an exception to that rule clearly enunciated by the Court in *Ex parte Hull*:⁴⁸ Where probation or parole has been revoked because of a subsequent conviction, the prisoner may be discharged on a writ of habeas corpus challenging the second conviction without attacking the first conviction. This is so because the invalid second conviction was the predicate of the revocation of parole, and the granting of relief may effect the petitioner's complete discharge from custody.

Questions of custody and mootness are much litigated today, and it is to be regretted that Sokol did not spend more time analyzing the growing body of legal literature on the subject.⁴⁹

All considered, however, Sokol has done a necessary and admirable job. Too much emphasis is perhaps given in the press and legal journals to the impact upon federal habeas law of new Supreme Court decisions dealing with criminal procedure. Certainly Sokol's book will be important to prisoners whose convictions were obtained, the Court now finds, unconstitutionally. But among the work's more important uses, one has reason to hope, will be in helping lawyers of conscience obtain freedom for those whose race, nationality, or financial condition precluded a fair trial on their initial conviction, and a meaningful review on direct appeal. The struggle for Negro freedom—for jobs, equal schooling, and equal accommodation—and the highblown rhetoric of the War on Poverty have perhaps obscured the fact that thousands languish in jail on "bum raps." Granted, habeas does not lie to determine the truth or falsity of an adjudication of guilt. Nevertheless, now that federal habeas has been stripped of the requirement that a prisoner exhaust himself and his futile state remedies, it will ensure inquiry into the procedural iniquities characteristic of trials of the poor and discriminated. Sokol serves this cause not only by outlining the law of habeas, but by suggesting ways for courts, petitioners' counsel, and attorneys-general to facilitate the receipt, hearing, and fair disposition of habeas petitions.

In sum, with wit, style, accuracy, and thoroughness, Sokol has done bench

Cooper v. Pate, 378 U.S. 546 (1964). But see *United States v. Muniz*, 374 U.S. 150, 164 n.25 (1963), citing with approval cases allowing tests of conditions on confinement by both habeas and denial of civil rights suits.

Mr. Justice Frankfurter has aptly remarked, "I think it is fair to say that the scope of *habeas corpus* in the federal courts is an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal v. Large*, 332 U.S. 174, 184 (1947) (dissenting opinion). He went on to list eight categories in which the Court did not draw sharp jurisdictional lines in granting federal habeas. *Id.* at 185-87. And see *In re Bonner*, 151 U.S. 242 (1894), in which Mr. Justice Field held federal habeas available to test the quality of a federal prisoner's confinement. *Bonner* was cited with approval in *Ex parte Hull*, 312 U.S. 546, 549 (1941). See notes 47-48 *infra* and accompanying text.

⁴⁷ 293 U.S. 131 (1934).

⁴⁸ 312 U.S. 546 (1941).

⁴⁹ *E.g.*, *Wilson v. Gray*, 345 F.2d 282 (1965), *reversing* 230 F. Supp. 860 (N.D. Calif. 1964); *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964).

and bar a great service. We hope that he will not mind a law student, and a law professor, to whom he gives only "reluctant permission" to study his book,⁵⁰ saying so.

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⁵⁰ SOKOL, *Preface* at vii.

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