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Warren E. Burger

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CRIMINAL LAW

POST CONVICTION REMEDIES: ELIMINATING FEDERAL-STATE FRICTION

WARREN E. BURGER*

It is hardly news to the fifty lawyers who hold the high office of Attorney General in each of the States to be told that in recent years the federal courts have been literally flooded with habeas corpus cases from state prisoners. Many of you have been drawn into this process. You know it well. You do not like it. I do not like it. I know of no federal judge who likes it. But it is the common lot of federal and state judges to be required to perform duties which as a matter of private choice, or sound judicial administration, they would avoid.

The fact that most of these petitions have no merit and that they constitute an undue burden on the federal court system as well as on the states which were required to respond in the federal proceeding is irrelevant. The burden is a fact.

This development has been sand, if not gravel, in federal-state relationships, and the state courts were not without basis in protesting that nothing in the Constitution gave federal trial judges a power of appellate review over state supreme courts. Indeed, I think it is safe to say that the vast majority of federal trial judges share this view. As we look back we can see that the cumbersome procedural nightmare which developed was never intended even though it was inevitable. But it happened, and it is not something theoretical but a hard, stubborn fact. As practitioners you know that the important thing now is what we will do to get this procedural nightmare under control.

Having tried to state this problem as it looks from your side of the table, let me now put it from the federal side. It can be simply stated. This tension is inherent in the nature of the federal system as it now exists. It is our collective responsibility to acknowledge these tensions and deal with them.

There is another factor and it is the human

aspect: prisoners like many other human beings find it easy to believe they are victims of injustice. This is all the more true when a person is denied both his freedom and the amenities of life in a prison which affords him little or nothing at all of constructive activity or opportunity to improve himself. Most of the two hundred thousand inmates of American prisons have no adequate programs for education or self-improvement. For them filing petitions is often a form of therapy as some people on the outside write letters-to-the-editor.

For nearly all of the past one hundred and eighty years responsibility for the administration of criminal justice has been regarded as the primary responsibility of the states, jealously guarded as a local matter no less, if not more, than any other. We are now faced, and we could accurately say you are confronted, with the fact that federally-imposed standards of procedure have become limitations on the states in the administration of criminal justice. It serves no useful or practical purpose to wish or even to agree that the improvement of standards of fairness at every level of criminal justice probably could have been accomplished as swiftly and uniformly, and without friction and tension, in some other way than the process of case by case rule-making on the federal side without notice to and participation in that process by those affected—features which are generally regarded as part of “due process” in rule-making. The history of this tension and friction ought to teach us some important lessons for the future, but now we must deal with the situation as it is.

Beginning in 1963 the American Bar Association embarked upon what has become perhaps the most ambitious single undertaking in the history of that great organization. The Criminal Justice Project of the ABA sought to identify and restate appropriate standards for the administration of criminal justice.

* Chief Justice, United States Supreme Court.
This article is an adaptation of a speech made by the Chief Justice to the National Association of Attorneys General on February 6, 1970.

I wish to talk about just one facet of the many subjects dealt with in the American Bar Association standards. That facet is the means of dealing with post-conviction remedies and it will point the way to eliminating tensions and frictions between the state and federal courts.

I said earlier that this particular problem of federally-imposed standards for post-conviction remedies fell upon all of us in the period when state legislatures, like the Congress, were harassed with new and enlarged demands for more money and enlarged programs. To have reached through all of this to gain the attention of the lawmakers would have required a powerful legislative program, and we know that neither prisoners behind walls nor judges in their courts have lobbyists to press their legitimate claims on lawmakers.

It was in 1963 that the United States Supreme Court in *Townsend v. Sain*¹ laid down the main requirements of an adequate fact-finding process for post-conviction claims based on a federal constitutional right. A claim addressed to a federal court asserting denial of a federal constitutional right in the state courts required the United States District Judge to hold a full evidentiary hearing into the prisoner's claim if the state had not provided such a hearing. The Supreme Court did not mechanically establish federal district courts as the reviewers of state courts; that is a last resort. A state which provides an adequate post-conviction hearing under *Townsend* standards will likely find that federal judges deal summarily with prisoner petitions. However, if 1963 was not when the friction began, this is when it was intensified. Eight years earlier in 1955 the National Conference of Commissioners on Uniform State Laws had developed a Uniform Post-Conviction Procedure Act which would have very likely satisfied the standards later fixed by the Supreme Court in the *Townsend* case. Unfortunately, by 1963 only a handful of states had responded to this thoughtful, authoritative and, what is important, non-federal program of the Uniform Act. It was this lack of an effective program to press this legislation on the states which brought on our problem.

The Criminal Justice Project recommendation for post-conviction remedy standards begins by acknowledging that the vast majority of these applications for petitions are prepared by prisoners without the assistance of counsel. It also recog-

nizes the reality that most of these applications have no merit. But it also points out the folly of prosecutors challenging and judges deciding these petitions on formal or technical grounds for failure to comply with procedural rules. In the seven years since the *Townsend* case, it has become clear that to reject an application on such grounds simply means an appeal or a new petition on another day with all the attendant waste of time and manpower. The standard therefore urges some very practical things: that the states provide paper, pens, typewriters, and reasonable access to law books and open avenues of communication between prisoners and the courts.

Then the ABA standards take another step which twenty years ago would have seemed absurd to many reasonable people. This step is the recognition of the value of providing trained counselling to all prisoners on a systematic basis and the use of lawyers and law students whenever possible through the cooperation of bar associations, law schools, and legal aid offices. The ideal program recommended for the future is even more; it is to establish a small but continuing staff available to all prisoners to advise them and to prepare applications in appropriate cases. This many seem unwise, even now, to many reasonable people unless they think through the problem, consult our own prior experience, and consult the experience of other civilized countries. If they do this I think they would be persuaded.

Experimental programs in some states, notably Oregon, and in some federal prisons gave guidance and inspiration to the Project committee, but my own observations were reinforced from other sources. On the Court of Appeals in Washington where I sat, we had far less contact with this problem than most other federal courts. But such exposure as I had made it very clear to me at an early date the prisoners with grievances and with little or nothing constructive to do would never give up once they knew the doors had been opened to them. In common with many other judges I concluded that the sooner the courts explored the merits of the habeas corpus claims and disposed of the case with a full hearing, the better it would be for all concerned.

In this same period I visited a good many prisons in this country and in various parts of Europe. I will leave to another day the melancholy contrast between the intelligent corrections systems of some European countries and the generality of our own

¹ 372 U.S. 293 (1963).

systems in this country. While it may make a dent in our nationalist pride in American institutions, it should not surprise us that other countries do some things better than we do. After all, countries like Sweden, Norway, Denmark, and Holland have been running prisons for more than a thousand years. We have been at it as a nation for only one hundred eighty years. It is perhaps difficult for an American or an English lawyer, bred on the notion that the Great Writ of habeas corpus is indispensable to a civilized and free people, to understand how any system could be fair without it. One can very quickly find out, however, that with respect to prisoners in these enlightened northern European countries there is a very intelligent workable alternative to habeas corpus. I will use Holland to illustrate this substitute process: there a team of trained people from the Ministry of Justice, usually three, with backgrounds in law, psychology and counselling, make regular visits to all institutions of confinement. Their responsibility is to inquire as to the basis of the confinement, hear the grievances of prisoners, and make reports to the Minister of Justice as to cases which appear to call for some remedy. In a sense these trained teams are like bank examiners, or health inspectors. Their method provides a regular avenue of communication designed to flush out the rare case of miscarriage of justice and the larger number of cases in which the prisoner has some valid complaint or deserves re-examination of his sentence. The mere existence of such an avenue of communication exercises a very beneficial influence which is in many respects far superior to our habeas corpus process.

With us, the prisoner hopes that some distant proceeding before a remote judge will enable him to have his cries heard; with them, the prisoner meets face to face with trained counselors who give him a sympathetic hearing, ask questions, make a record of his complaints, and bring his valid grievances to the attention of higher authority. In their greater experience with prisons and prisoners they have become patient and tolerant of human frailty. They know that people confined want freedom and that they will complain and press for freedom whether they deserve it or not. In their wisdom they also know—and we must learn—that prisoners who do not complain are often the truly lost souls who have surrendered and cannot be restored.

I must be sure to avoid the risk of having it thought that I have suggested, or even hinted, that we should abandon the Great Writ or mod-

ify it in any way. Perhaps in our understandable pride in our own institutions we may have over-rated our own system here and there. But we need not and should not abandon or even modify habeas corpus. What we need is to strengthen and supplement it with flexible, sensible working mechanisms adapted to the modern condition of overcrowded and understaffed prisons. If we read the history of the Great Writ going back to Magna Carta, we will readily see that it was never designed for the needs of a country with more than two hundred thousand prisoners scattered over fifty states. It is good but it is not good enough, and for a great volume of cases it is not efficient. One thing more: the actual experience in prisons where these services have been made available to prisoners is that they file fewer, not more, petitions with the courts.

Why should I discuss this problem with fifty men whose individual primary responsibility as an Attorney General is largely in the area of civil matters and only to a limited extent (or not at all) in the criminal area? There are several reasons:

1. As Attorney General, each of you holds the highest legal office in your state, and you have an influence and a standing equaled only by that of the Governor and the Chief Justice of your state.
2. You have a special standing with the legal profession, with the courts, and with the public.
3. In the state systems you are, whether you like it or not, the nearest thing we have to a Minister of Justice.
4. You have an overview of all that goes on within your state in the administration of justice.

From this vantage point I suggest to you—indeed I urge—that you use the power and the prestige of your office, your standing with your legislature, your leadership among lawyers, to lead your state in all matters relating to an improved system of justice. I would urge you to begin by taking one step in this crucial area I have been discussing, that is, to develop by rules of court, by legislation, by the rule-making process, or by whatever means is available, a simple and workable procedure by which every person in confinement who has, or who thinks he has, a grievance or complaint can be heard promptly, fairly and fully in the state courts. If this is done properly, one hearing will very likely dispose of the matter.

I predict that if you will undertake this task,

whether it is within or without your official duties, you will reduce the flood of federal-state cases to a small stream, you will help those who must operate the prisons and you will relieve one of the most unhappy tensions between the states and the federal courts and restore state supreme courts to their rightful place as the primary arbiters of the state cases.

If this sounds like a call to reform, so be it. As lawyers we would perhaps prefer a term like re-

shape, or revise, but by whatever name, you as lawyers should help lead the way and few are in a better position than you. If changes and improvements are to be left only to judicial power, that power must be—of necessity—adapted to the means available, crude, awkward and inefficient instrument as that may be. If truly efficient means are to be found, the task must not be placed on busy judges but on the deliberate process of large and representative segments of the profession.