H

HABEAS CORPUS

(Latin: "You shall have the body.") Habeas corpus is the most celebrated of Anglo-American judicial procedures. It has been called the "Great Writ of Liberty" and hailed as a crucial bulwark of a free society. Compared to many encomia, Justice FELIX FRANKFURTER's praise in BROWN V. ALLEN (1953) is measured:

> The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of *habeas corpus* as the basic safeguard of freedom in the Anglo-American world. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." Mr. Chief Justice [SALMON P.] CHASE, writing for the Court, in *Ex parte Yerger*, 8 Wall. 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.

Though even this rhetoric may be a bit overdone, it nonetheless reflects the importance that has come to be attached to habeas corpus. It is a symbol of freedom, as well as an instrument. What is significant in the rhetoric is not the degree of exaggeration but rather the extent of truth.

Habeas corpus is accorded a special place in the Constitution. Article I, section 9, of the basic document, included even before the BILL OF RIGHTS was appended, contains the following provision: "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."

This text of course presumes an understanding of what habeas corpus is. Technically, it is simply a writ, or court order, commanding a person who holds another in custody to demonstrate to the court legal justification for that restraint of personal liberty. The name "habeas corpus" derives from the opening words of the ancient COMMON LAW writ that commanded the recipient to "have the body" of the prisoner present at the court, there to be subject to such disposition as the court should order. A writ of habeas corpus, even one directed to an official custodian, can be obtained routinely by the prisoner or by someone on his behalf. As at common law, the writ that starts proceedings also defines the nature of those proceedings (and lends its name to them and, sometimes, to the final order granting relief). Thus, habeas corpus not only requires the custodian promptly to produce the prisoner in court but also precipitates an inquiry into the justification for the restraint and may result in an order commanding release.

The writ itself is no more than a procedural device that sets in motion a judicial inquiry. Yet the importance attached to habeas corpus necessarily posits that a court will not accept a simple showing of official authority as sufficient justification for imprisonment. Otherwise, the constitutional provision would indeed be much ado about nothing. "The privilege of the Writ" would hardly be worth guaranteeing if it did not invoke substantial criteria for what are sufficient legal grounds for depriving a person of liberty.

The principle that even an order of the king was not itself sufficient basis had been established in England before the time of our Constitution. In *Darnel's Case* (1627), during the struggle for parliamentary supremacy, a custodian's return to a writ of habeas corpus asserted that the prisoner was held by "special command" of the king, and the court accepted this as sufficient justification. This case precipitated three House of Commons resolutions and a PETITION OF RIGHT, assented to by the king, declaring habeas corpus available to examine the underlying cause of a detention and, if no legitimate cause be shown, to order the prisoner released. But even these actions did not resolve the matter. Finally, two HABEAS CORPUS ACTS, of 1641 and 1679, together established habeas corpus as an effective remedy looking beyond formal authority to examine the sufficiency of the actual cause for holding a prisoner.

Although the Habeas Corpus Acts did not extend to the American colonies, the principle that the sovereign had to show just cause for imprisoning an individual was carried over to the colonies. After the Revolution, the underlying principle was implicitly incorporated in the constitutional provision guaranteeing the regular availability of habeas corpus against suspension by the new central national government.

The broad assumptions underlying the Great Writ have been well articulated by HENRY HART. Speaking in the particular context of PROCEDURAL DUE PROCESS for ALIENS, but with general implications, he wrote of:

> the great and generating principle . . . that the Constitution always applies when a court is sitting with JURISDICTION in habeas corpus. For then the Court has always to inquire, not only whether the statutes have observed, but whether the petitioner before it has been "deprived of life, liberty, or property, without due process of law," or injured in any other way in violation of the FUNDAMENTAL LAW. . . .
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> That principle forbids a CONSTITUTIONAL COURT with JURISDICTION in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by act of Congress. The inquiry remains, if MARBURY V. MADISON still stands, whether the act of Congress is consistent with the fundamental law. Only upon such a principle could the Court reject, as it surely would, a return to the writ which informed it that the applicant for admission [to the United States] lay stretched upon a rack with pins driven in behind his fingernails pursuant to authority duly conferred by statute in order to secure the information necessary to determine his admissibility. The same principle which would justify rejection of this return imposes responsibility to inquire into the adequacy of other returns [Hart, 1953: 1393–1394].

It hardly requires demonstration that an executive directive can provide no more justification than an act of Congress. In fact the Supreme Court very early held in *Ex parte Bollman and Swartwout* (1807) that a President's order was not itself a sufficient basis for a return to a writ of habeas corpus.

The purpose of the habeas corpus clause of Article I, section 9, is to assure availability of the writ, but the provision clearly allows its suspension when necessary in the event of rebellion or invasion. The power to suspend the writ has been rarely invoked. Suspensions were proclaimed during the CIVIL WAR; in 1871, to combat the Ku Klux Klan in North Carolina; in 1905, in the Philippines; and in Hawaii during WORLD WAR II. Furthermore, two of these suspensions were limited by the Supreme Court. In the first case, EX PARTE MILLIGAN (1866), the Supreme Court held that the writ was not suspended in states (e.g., Indiana) where the public safety was not threatened by the Civil War. In the last case, DUNCAN V. KAHANAMOKU (1946), the Supreme Court held that the writ was not suspended in Hawaii eight months after the attack on Pearl Harbor because the public safety was no longer threatened by invasion.

The point is not the rarity with which the power to suspend the writ of habeas corpus has been invoked in this country's history. That can be seen as a function of the relative stability and insulation that the nation has enjoyed. Rather, the significant point is the basic acceptance of the proposition that the courts remain open in habeas corpus proceedings to consider the validity of an attempted suspension of the writ and, if they find it invalid, to examine the validity of the detention. This position has not always been respected by the immediately affected executive or military authorities, and such holdings by the Supreme Court have been handed down after immediate hostilities have ended. Nevertheless, the ultimate verdict of history has upheld the courts' position. The existence of those Supreme Court precedents, and their acceptance and perceived vindication by history, help bolster the likelihood of similar judicial action in response to future emergencies.

The habeas corpus writ described by Article I is not necessarily one issued by a federal court. The Constitution posits the existence of state courts as the basic courts of the nation; it does not require the creation of lower federal courts at all. Thus, the suspension clause was designed to protect habeas corpus in state courts from impairment by the new national government.

The clause may nonetheless have reflected a wider sense of moral duty. The first Congress, in establishing a system of lower federal courts, gave federal judges the power to issue the writ on behalf of prisoners held "under or by colour of the authority of the United States." The federal courts have always retained that habeas corpus jurisdiction, and it has since been much expanded.

Perhaps the most dramatic example of the use of ha-

beas corpus occurred in *Ex parte Milligan.* Milligan, a civilian living in Indiana, was sentenced to death by a court-martial during the Civil War though the local GRAND JURY had refused to indict him. The Supreme Court held that courts-martial do not have jurisdiction to try civilians so long as the civilian courts are open. The Court further held that the writ of habeas corpus was not suspended, despite the general language of a statute purporting to suspend the writ during the Civil War, because the public safety was not threatened in Indiana.

Habeas corpus also provided an effective remedy for challenging an extraordinary extension of military power during World War II. The government relocated Japanese Americans away from their homes on the West Coast to detention camps inland. Although the Supreme Court in *Korematsu v. United States* (1944) held the relocation to be constitutional, the Court on the same day held in a habeas corpus case, *Ex parte Endo* (1944), that the government was not authorized to confine Japanese Americans in the camps against their will. (See JAPANESE AMERICAN CASES, 1943–1944.)

Nor is the availability of habeas corpus to challenge extraordinary military actions limited to American citizens or residents. Even German saboteurs, landed in this country by submarine, were permitted during wartime to challenge the power of a special military commission over them. Though the Court rejected that challenge in EX PARTE QUIRIN (1942), the exercise of military power was drawn into question and examined; the Court denied relief on the merits, holding that the asserted jurisdiction was constitutional.

Habeas corpus is not restricted to testing major or extraordinary extensions of power. Particularly in the last few decades, the writ has provided a means by which federal courts have regularly controlled the reach and exercise of fairly commonplace court-martial jurisdiction. For example, in United States ex rel. *Toth v. Quarles* (1955), military police arrested an ex-serviceman in Pennsylvania and flew him to Korea to stand trial in a court-martial on charges related to his time in service. (See MILITARY JUSTICE AND THE CONSTITUTION.) A writ of habeas corpus issued, Toth was returned to the United States, and the civilian court that had issued the writ ordered him released on the ground that he was a civilian not subject to military jurisdiction. More generally and more routinely, habeas proceedings have provided the means to define and enforce constitutional boundaries determining which persons and events may be tried without civilian courts and their procedures. Habeas corpus is a residual font of authority to ensure that the Constitution is not violated whenever individuals are imprisoned.

Indeed, habeas corpus proceedings are not limited to the enforcement of constitutional rights; they also open for scrutiny other issues of basic legal authority. For example, the writ has been used as a means to invoke JUDICIAL REVIEW of individual administrative orders for military CONSCRIPTION or alien DEPORTATION. The issues raised have included questions of statutory authority and the existence of a basis in fact for the official order. Most significant, the federal courts were unwilling to take general language precluding judicial review as barring habeas corpus; habeas corpus proceedings were held to be available even though the applicable statutes expressly provided that the administrative action should be final. Here again that position, insisting on the primacy of habeas corpus, was subsequently vindicated, and indeed, ratified by Congress in statutory revisions. Whether the Constitution entitles an individual to judicial review of military draft or IMMIGRATION orders still has not been authoritatively resolved. One of the strengths of habeas corpus, however, is that it permitted that issue to be finessed. The availability of *habeas corpus* facilitated avoidance of an ultimate confrontation—which might well have resulted in a rejection of the constitutional claim—while securing reaffirmation of the principle that government is subject to the RULE OF LAW as applied in the ordinary courts.

Our focus to this point has been on the writ from a federal court directed to a federal officer or custodian. The matter becomes more complex when the issues involve the relationships between federal and state governments. Seizure of one government's agents by the other, and their release from resulting custody, can be crucial factors in a struggle for political power. It is no accident, then, that the writ has been involved—and had evolved—in jurisdictional battles within or among governments. This involvement was evident, as mentioned earlier, in the battle for parliamentary supremacy over the crown in Britain. The writ has also played an important role in the changing relationships of federal and state governments in this country, and has in turn been shaped by these evolving relationships.

When the first Congress gave the lower federal courts power to issue the writ, it limited the power to federal prisoners and, even as to them, did not provide for exclusive jurisdiction. The state courts, then, had CONCURRENT JURISDICTION to issue habeas corpus for federal prisoners and exclusive *habeas* jurisdiction for state prisoners. The succeeding centuries have witnessed a huge expansion of federal power, including a shift of much power from the states to the central government. As the power of the federal government grew, the federal courts gradually gained the power to issue writs of habeas corpus for state prisoners. At the same time, the power of state courts to issue habeas corpus for federal prisoners has narrowed and today is practically extinguished.

As with many American legal institutions the conflict

over slavery figured prominently in the development. The Fugitive Slave Act of 1850, which was enacted as part of the COMPROMISE OF 1850, increased federal power at the expense of the states. Enforcement of the act, which required return of escaped slaves to their owners, met strong resistance in Northern states. State courts would order the arrest of federal officers who attempted to enforce the act and would issue writs of habeas corpus to release individuals charged with violating the act. The federal officers were not helpless, however. Although the federal courts did not have general power to issue writs of habeas corpus for state prisoners, they had been empowered to release state prisoners imprisoned for actions taken pursuant to federal law. Congress had granted this power in 1833 in response to South Carolina's threat to arrest anyone who attempted to collect the federal tariff. The federal courts exercised the power in the 1850s and 1860s to release federal agents arrested for enforcing the Fugitive Slave Act. (See FUGITIVE SLAVERY.)

A more intractable problem was posed by state court writs of habeas corpus releasing individuals convicted in federal court of violating the Fugitive Slave Act. The Supreme Court resolved this problem in ABLEMAN V. BOOTH (1859), holding that state courts did not have the power to release prisoners held pursuant to proceedings in federal court. Otherwise, the laws of the United States could be rendered unenforceable in states whose courts were in opposition. After the Civil War, the Supreme Court went further and held in *Tarble's Case* (1872) that state courts could not issue habeas corpus to release someone held under authority, or color of authority, of the federal government. A state court may only require the federal officer to inform it of the authority for a prisoner's detention; all further questions as to actions under color of federal authority are to be resolved in the federal courts. Habeas corpus cannot be entirely barred, but so long as the writ is available from the federal courts, state courts are effectively precluded from issuing habeas corpus on behalf of persons held in custody by the federal government.

The power of federal courts to issue habeas corpus for state prisoners followed the opposite course. The JUDICIARY ACT OF 1789 did not give the federal courts any such power and, until after the Civil War, these courts were granted it only in a limited number of circumstances. An example was the release of those seized for enforcing federal law, mentioned earlier. The HABEAS CORPUS ACT OF 1867, however, was general, giving federal courts power to issue the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States. . . ." Jurisdiction in essentially these terms continues to the present day.

The precise objectives of the 1867 act were never defined. The act aimed generally at extending the effectiveness of federal authority, particularly against resistance in the former slave states. Its terms extended to prisoners in state custody as to all other persons. Until well into the twentieth century, its thrust was principally against restraints without (or before) trial. Among other reasons, the federal Constitution had not yet been construed to impose any significant requirements for state criminal proceedings. In more recent times, federal habeas corpus has become a forum for challenging state criminal convictions on constitutional grounds. In terms of volume, this is the federal writ's principal use today.

This pattern evolved only sporadically, and only after a number of limiting concepts had been loosened. The first of these was a principle of long standing that habeas corpus was available to persons imprisoned under authority of a court, particularly following criminal trial and conviction, only on the grounds that the court had no jurisdiction to try him. If that court had jurisdiction, all challenges, including constitutional ones, were to be raised there. Trial court decisions were to be reviewable, if at all, by higher courts, not by COLLATERAL ATTACK in other courts of the same level. It was often stated that habeas corpus was not to serve as a substitute for appeal.

The formal doctrine that the habeas corpus court would not look beyond whether the holding or convicting court had jurisdiction prevailed until near the middle of the twentieth century. Nevertheless, the scope of federal habeas corpus grew substantially even before that time. The concept of "lack of jurisdiction" is not inelastic, and the Supreme Court gradually expanded the meaning of that term to include constitutional violations that might be said to preclude a fair trial.

The first step in this expansion of the meaning of the issue of jurisdiction was to allow habeas corpus relief for a prisoner convicted of violating an unconstitutional law. Unconstitutional laws were null and void, it could be rationalized; thus the state court was without jurisdiction because *no* law authorized the conviction. The next step was to issue habeas corpus to remedy constitutional violations so gross as effectively to deprive the prisoner of a real trial. Such violations were held to be so fundamental that a court, proceeding in those circumstances, lost jurisdiction. Examples included mob-dominated trials and denial to defendants of opportunity to be heard. Reliance on the concept of lack of jurisdiction became more and more attenuated until, in *Waley v. Johnston* (1942), the Supreme Court explicitly abandoned that formal concept as linch-pin. From that time forward, the Court focused on more realistic considerations: whether the constitutional claims being asserted could not have been presented effectively in the original court that tried the case or on direct review of the conviction.

The concerns over the proper "deference" to be accorded by the habeas corpus court to the court that originally tried and convicted a prisoner arose even where both courts were federal. When federal habeas corpus was being sought by a state-convicted prisoner, these concerns were reinforced by further considerations of mutual respect and comity between state and federal systems. In response to these considerations, there developed early two substantial limits on the availability of federal habeas corpus for state prisoners: if the state courts had fully and fairly litigated the prisoner's claim, or if the prisoner failed to exhaust all state remedies, federal habeas corpus would not lie.

The requirement that state remedies be exhausted was established in *Ex parte Royall* (1886). To meet it, the prisoner must first press his claims to be free based on federal law, through the state courts. Thus, the prisoner must appeal his conviction or must seek state habeas corpus or other available postconviction remedy. (See EXHAUSTION OF REMEDIES.) Under the Constitution's SUPREMACY CLAUSE, state courts are required to follow and apply federal constitutional law. Principles of comity—essentially respect for the state courts' responsibility and ability to reach a correct decision—were seen to require that state courts be allowed an opportunity to correct their own errors before federal habeas corpus could be issued. The general exhaustion requirement is now codified in the statute governing habeas corpus.

In view of the exhaustion requirement, it may seem ironic that for many years presentation of the federal claim in state proceedings might mean that it could not thereafter be considered in federal habeas corpus. Federal collateral attack was barred if the state courts had sufficiently considered and passed upon the prisoner's constitutional claim. This is not so perverse as might first appear. Habeas corpus, as a collateral remedy, was to deal with serious constitutional problems involving circumstances outside the record or cognizance of the state courts. It would also serve where appellate consideration was unavailable or ineffective. If the state courts had adjudicated the federal constitutional contention adversely to the prisoner, on full and fair consideration and with effective appellate review, the remedy for error was to seek review in the United States Supreme Court. This was another aspect of the principle that habeas corpus was not to do service as an appeal.

The soundness of this reasoning depends, of course, upon Supreme Court reviews being available and effective. But whatever may once have been true, by the middle of the twentieth century that premise had clearly become unreliable. The Court's docket had grown to the point that it could pass on the merits of no more than a sixth of the cases in which its review was sought. The percentage has become even smaller in recent years. Moreover, even when available, appellate review in particular cases may be innately limited in significant respects because it must be conducted on the basis of a "cold" written record. Tones, attitudes, inflections of voice, and other subtle factors may exert powerful influences on outcomes and yet not be evident on the record. Beyond that, in many criminal proceedings an adequate written record may not even be produced. The significance of these factors in limiting the utility of Supreme Court review is greatly heightened when the applicable federal law is developing rapidly, and particularly if state judges are hostile to or less than entirely sympathetic with the direction of that development. Both of these conditions existed in the 1930s and 1940s and both intensified in the period following World War II, when the Supreme Court greatly expanded the procedural requirements imposed by federal constitutional law in state criminal prosecutions. Many requirements that previously governed only federal CRIMINAL PROCEDURE were "incorporated" into the FOURTEENTH AMENDMENT and made applicable in state trials. (See INCORPORATION DOCTRINE.) Moreover, and surely of no less import, the Supreme Court was also expansively construing the EQUAL PROTECTION CLAUSE of the Fourteenth Amendment to heighten prohibitions against RACIAL DISCRIMINATION. That attitude enhanced federal scrutiny of jury selection and other elements of state criminal proceedings. Particularly in the early stages of the development of these growing constitutional demands, there was reason to believe that many state judges might be less than fully sympathetic, if not directly hostile, to these new federal principles and DOCTRINES.

Under these conditions, direct appellate review by the Supreme Court could not alone provide reliable and effective enforcement of federal constitutional guarantees in the state courts. Indeed, any tendency toward heel-dragging or resistance might well be encouraged by the knowledge that the statistical probability of federal appellate review was very low. Moreover, by diverting Supreme Court energy to enforcement of earlier holdings, resistance might effectively retard further development of the new doctrines.

Habeas corpus from federal courts probing the validity of state convictions could offer an alternative mode for securing effective enforcement of the new constitutional rights. Federal judges generally could be relied upon to be more in tune with Supreme Court developments than their state counterparts. Because the entire federal judiciary would be involved, case-load capacity would be much more equal to the task. Moreover, because trial-type hearings were possible, habeas corpus had the further advantage that the federal courts need not be dependent upon the state court record. These gains could, of course, be

achieved only by abandoning the rule that barred consideration on federal habeas corpus of contentions that had been adjudicated previously in the state courts. The Supreme Court took that step in 1953 in *Brown v. Allen.*

Brown v. Allen represented a major extension of the functions of habeas corpus. Its holding, allowing federal reconsideration of issues previously considered fully by state courts, also effectively opened wide the range of constitutional contentions that could serve as sufficient grounds for seeking federal habeas corpus. From that point forward, it was clear that at the very least any constitutional claim that could be said to raise any significant issue of trial fairness would be open to consideration. That expansion of the scope of habeas corpus serves important ends, but it has significant costs.

One of these costs is the adverse reaction of many state judges. The result of *Brown v. Allen* is that federal courts on habeas corpus may reexamine a state prisoner's constitutional challenges to his conviction after a state court has considered and rejected those same challenges. Because the prisoner must exhaust his state remedies before federal habeas corpus, normally the federal constitutional claims have been pressed not only at the state trial but throughout the state court system, including the state supreme court. The upshot of the new role of federal habeas corpus, then, is that a single federal district judge routinely may review the determination of the highest court of a state and, if he disagrees with it, overturn the conviction that the collegial, multimember court had upheld.

People and state officials in general, and state supreme court justices in particular, long since have become accustomed to review by the Supreme Court of the United States. Whatever may have been thought in their time of the challenges raised and rejected in MARTIN V. HUNTER'S LESSEE (1816) and COHENS V. VIRGINIA (1821), the higher authority of the Supreme Court in matters of federal law has been fully accepted. There has not been a corresponding acceptance of the habeas corpus authority of lower federal court judges. That federal judges may be more in accord with developing Supreme Court doctrines, though offered as justification, does not palliate the felt insult. On the contrary, if state judges are hostile to those developments, that fact exacerbates it. If the state court justices see themselves as entirely in accord with the Supreme Court's developing doctrines, the routine reexamination by a single district judge may still be offensive, to some perhaps even more so. On occasion, state courts have even openly refused to pass upon a constitutional claim on the grounds that a federal judge would pass on it anyway. On balance, the expansion of federal habeas corpus jurisdiction has almost certainly enhanced even state court enforcement of federal constitutional rights, but the felt slight to status and the consequent resentment are real.

At least as important as the resentment of state judges is the concern that the wide availability of federal habeas corpus may dilute the deterrent effect of the criminal law. Part of this concern grows out of the belief that deterrence is enhanced by certainty of punishment and that the expansion of federal habeas corpus increases the possibility that a conviction may be overturned. Certainly, the availability of federal habeas corpus, after the full range of state court remedies, does mean that the finality of a conviction is greatly delayed, even when the conviction is ultimately upheld. Moreover, the knowledge that the ultimate decision can always be greatly delayed itself diminishes any general sense in the community that punishment may be swift or certain.

When the conviction is overturned years after the trial and even longer after the alleged crime, these effects are exacerbated. Although the usual habeas corpus remedy is to order release only if the prisoner is not retried and convicted within a reasonable time, retrial after considerable delay may be practically impossible: witnesses may have died or disappeared; memories inevitably fade; other evidence may be lost. In those instances a reversal on procedural grounds amounts to a full release.

In fact, the proportion of habeas corpus proceedings that result in any victory for the prisoner is exceedingly small. But the effect of those few cases may be far greater than their number, particularly if a case was notorious in the community. Each such incident attracts attention and presumably lessens the deterrent effect of the criminal law. It may also be important that each raises questions for the citizenry at large who are already fearful about the capacity of the system to cope with crime.

Finally, the rehabilitative functions of the penal system may be affected. It has been suggested that demonstration of society's deep concern for fair procedure is useful, and even that channeling prisoners' efforts into litigation may be helpful. But it is more likely that the indefinite stringing-out of a conclusion is counterproductive. As Justice LEWIS F. POWELL, concurring in SCHNECKLOTH V. BUSTAMONTE (1973), wrote: "No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen."

The concerns expressed are real and significant, but they can be accommodated only by restricting the scope of federal habeas corpus. That in turn involves a judgment as to the necessity of having federal judges routinely avail-

able to consider particular claims of constitutional violations. Every constitutional claim is important. But the issue here is not whether a constitutional right shall be declared, or whether rights so declared shall be binding on state courts and subject to review and enforcement by the federal Supreme Court. The issue is whether there should be an additional, collateral channel for routine reexamination of every state court rejection of every constitutional claim asserted in a criminal proceeding.

While perhaps in theory all constitutional rights are equal, there are differences among them. For one thing, there may be substantial differences in the justifications for, and consequences of, seeking thoroughgoing enforcement of particular rights in every case where they may be colorably claimed. The Supreme Court has recognized as much in holding that some newly established constitutional rights should be given full retroactive effect (applying to all habeas corpus cases regardless of when the original conviction was obtained) and others should not. In at least one sense it is fair to characterize these decisions as holding some constitutional rights to be more fundamental than others.

Furthermore, constitutional rights serve different sets of purposes. Most procedural requirements in criminal prosecutions are designed to minimize the likelihood of an erroneous conviction, for example, the RIGHT TO COUNSEL or the right to confront prosecution witnesses. (See CONFRONTATION.) Others are designed to protect personal privacy or dignity at trial or in the society; among these are the rules against UNREASONABLE SEARCHES or seizures, and the RIGHT AGAINST SELF-INCRIMINATION. Finally, there may be relevant distinctions between rights and remedies. Thus, the rule excluding evidence obtained by prohibited police actions may be viewed as a means to deter official misconduct rather than an independent right.

These distinctions may be highly relevant in determining the appropriate scope of federal habeas corpus in reexamining state court convictions. Consider, for example, the EXCLUSIONARY RULE that evidence obtained by an unconstitutional search may not be used in a criminal prosecution. State convictions obtained after such evidence has been introduced are invalid and subject to reversal on direct Supreme Court review. (See MAPP V. OHIO, 1961). But if in a particular case the state courts should decide that the search was legal, how important is it that the decision be reviewable on federal habeas corpus—even assuming that the state decision might be wrong and yet not important enough to warrant Supreme Court attention? Illegally seized evidence does not mean actually unreliable evidence; in fact, such evidence is generally highly probative (for example, the drugs themselves in a prosecution for possession or sale of narcotics). The ban on unreasonable searches and the exclusionary rule do not protect against convicting the wrong person; they aim to protect individual privacy and control police conduct. Thus the sole purpose of extending habeas corpus to encompass the exclusionary rule would be to enhance the rule's deterrent effect. But that enhancement would be only marginal, *i.e.*, only to the extent of whatever additional disincentive might be generated by the extra possibility of a conviction, upheld by the state courts, being overturned years later on federal habeas corpus. At the same time, any such gain could be only obtained at the cost of the side effects of habeas corpus already described, including particularly the problems involved in releasing individuals who have been proven to have violated the law.

The Supreme Court has vacillated on precisely this issue. After many years in which federal habeas corpus was held to encompass claims under the exclusionary rule, the Court in STONE V. POWELL (1976) decided that it would not be available to review decisions of SEARCH AND SEIZURE issues reached after full consideration.

That decision stirred much debate. Perhaps as a result of the prominent role of lawyers and judicial review in interpreting the Constitution, there is a tendency to focus attention on the borderlines of case law development. That perspective can be misleading. What is more important than the decision to exclude search and seizure issues is the scope of federal habeas corpus for state prisoners that remains available. Constitutional claims need not be related to ultimate accuracy of conviction in order to be included. Moreover, despite strong suggestions from respected sources that the prisoner's factual innocence ought to be a major element in the availability of habeas corpus relief, the Court has not adopted that position. By any measure, the range of constitutional claims that may be raised and relitigated in federal habeas corpus is far greater than those few precluded—and then only after full and fair state consideration.

Similarly, much of the legal writing concerning habeas corpus today deals with its use to challenge criminal convictions. It is sometimes even suggested that Congress could not constitutionally restrict the scope of that kind of habeas corpus. Related to this, but more generally, it is argued that the provision of Article I, section 9, against the suspension of the privilege of habeas corpus should now be interpreted as prohibiting Congress from suspending or limiting federal habeas corpus—including habeas corpus for state convicted prisoners. The argument generally acknowledges that this was not the original intention of the suspension clause. It contends, rather, that in view of subsequent developments and present conditions, the original purpose now calls for extending it to cover habeas corpus from federal courts.

While these arguments, and the general issue of federal habeas corpus for persons held under state court convic-

tions, are important, too exclusive a focus on them risks distorted perspective. Far more significant than the existence of these arguments, or their validity, is their currently academic nature. Despite strenuous objections to the jurisdiction, Congress has not significantly restricted the scope of federal habeas corpus for state prisoners. Moreover, it does not derogate from the importance of this use of habeas corpus to point out that at base the availability of the Great Writ to challenge executive or military actions or other imprisonments without semblance of judicial process is far more vital to the maintenance of liberty. Even the most ardent advocates of collateral attack on judicial convictions are not likely to disagree.

It is surely a measure of the state of liberty in the United States that so much can be taken for granted. Habeas corpus for extraordinary assertions of executive, military, or other nonjudicial authority comes to the fore only rarely—and that is a measure of freedom's health in the nation. Yet it is that general freedom from that kind of arbitrary authority that is most crucial. Habeas corpus has helped to secure that freedom in the past, and its continuing availability helps secure it continually. It is true that liberty is most prevalent when habeas corpus is needed least. It is also true that the effectiveness of the remedy of habeas corpus is dependent upon the substantive criteria that come into play. Yet the existence of the Great Writ, indeed precisely in its taken-for-granted quality, plays a major role in supporting and reinforcing the conditions of freedom.

PAUL J. MISHKIN
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HABEAS CORPUS
(Update 1)

A federal court is empowered to grant a writ of habeas corpus to any individual who is held in custody by federal or state government in violation of the Constitution of the United States. Although state courts also can provide habeas corpus relief to those in state custody, the most important contemporary use of habeas corpus is as a vehicle for federal court review of state court criminal convictions. After almost 200 years of habeas corpus litigation in the United States, including more than a century under the RECONSTRUCTION statutes that made federal court relief available to state prisoners, the scope of habeas corpus remains controversial.

Conservatives view habeas corpus as a means for guilty people to escape punishment. They seek to limit the availability of the writ, arguing that habeas corpus undermines the finality of criminal convictions and creates friction between federal and state courts. Liberals, in contrast, see federal habeas corpus review as an essential protection to assure that no person whose constitutional rights have been violated—whether factually innocent or guilty—is imprisoned.

The debate over the scope of habeas corpus review implicates major underlying disputes in constitutional law. For example, federal district court review of state court criminal convictions raises questions of FEDERALISM, along with the question of whether state judiciaries can be trusted to protect federal constitutional rights. Moreover, disagreements about the availability of habeas corpus reflect different views about the value of the constitutional rules governing CRIMINAL PROCEDURE.Those who oppose Supreme Court protections for criminal defendants (such as the EXCLUSIONARY RULE and MIRANDA RULE warnings) seek to limit their enforcement by narrowing the scope of habeas corpus review.

Not surprisingly, the Supreme Court frequently splits along ideological lines in ruling on habeas corpus issues. The WARREN COURT's expansion of habeas corpus relief was halted by the BURGER COURT, which adopted substantial new restrictions on federal court habeas review. Most recently, the REHNQUIST COURT has announced important additional limits on the matters that can be raised in federal habeas corpus proceedings. Three restrictions are particularly significant.

First, a petitioner is allowed to present in federal habeas corpus only those matters that were argued in the proceedings that led to his or her conviction, unless the