HABEAS CORPUS IN THE STATES—1776-1865

DALLIN H. OAKS†

JUSTLY hailed as the "highest safeguard of liberty."[1] the writ of *habeas corpus* has a revered place among our institutions. It has a notable history,[2] but its origins were humble and held little promise of distinction. Early forms of the writ were used to transfer custody of persons held on civil process from one court to another to aid the administration of justice.[3] In this role habeas corpus was merely a weapon in legal controversies between private individuals and in jurisdictional disputes among various courts. Eventually one of the ancillary forms, the writ of habeas corpus *cum causa*, by which a person being sued in an inferior court had his body and the cause removed into a higher court, evolved into what we know and hail as "the Great Writ."

> But the great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum;* directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,*

† Professor of Law, The University of Chicago. The research assistance of Thomas E. Cahill and David L. Paulsen, third-year students at the Law School, is gratefully acknowledged.

1 *E.g.*, Smith v. Bennett, 365 U.S. 708, 712 (1961).

2 Noteworthy discussions include CHURCH, HABEAS CORPUS 2-30 (1884); Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ*, 18 CAN. B. REV. 10, 172 (1940); FOX, *Process of Imprisonment at Common Law*, 39 L.Q. REV. 46 (1923); 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 104 (4th ed. 1927); Jencks, *The Story of Habeas Corpus*, 18 L.Q. REV. 64 (1902), reprinted in 2 SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 531 (1908); WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); *Remarks on the Writ of Habeas Corpus Ad Subjiciendum, and the Practice Connected Therewith*, 54 LAW MAG. 278 (Nov. 1855), also printed in 3 AM. L. REG. 193 (1856). For an excellent judicial discussion of the history see Williamson v. Lewis, 39 Pa. 9 (1861). A good summary of habeas corpus procedure appears in 1 CHITTY, CRIMINAL LAW 118-32 (4th Am. ed. 1841). Typical forms are set out in CHURCH, HABEAS CORPUS 631 *et seq.* (1884).

3 *Ad respondendum* (to remove a prisoner confined by process of an inferior court to charge him with an action in the court above); *ad satisfaciendum* (to remove a prisoner to charge him with execution in the court above); *ad faciendum* et *recipiendum*, sometimes called *cum causa* (to remove a cause and a prisoner from an inferior court to the courts in Westminster); *ad prosequendum, testificandum,* or *deliberandum* (to remove a prisoner in order to prosecute or testify in an action or to be tried in the proper jurisdiction) 3 BLACKSTONE, COMMENTARIES *129-31 (Am. ed. 1832); 3 COMYNS, DIGEST 453-62 (1785).

> to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.[4]

In this highest use the writ of habeas corpus was a "writ of right": it issued immediately upon showing (usually by affidavit) of a prima facie case for its issuance.[5] When employed against the crown and its officers in its fully developed form to elicit the cause for an individual's imprisonment and to ensure that he was released, admitted to bail, or promptly tried, the writ of *habeas corpus ad subjiciendum* won its place as the most important safeguard of personal liberty.

Today the writ of habeas corpus is still in the mainstream of the law. Its momentum is unchecked, but its direction has changed. Except in respect to controversies over child custody[6] and commitment to mental institutions,[7] habeas corpus has ceased to be a significant remedy in civil litigation. Its most important contemporary function is still that of challenging the legality of official restraints on liberty, but even in this familiar area the writ has departed from its history. At common law

4 BLACKSTONE, COMMENTARIES *131 (Am. ed. 1832). One early statute referring to this writ calls it "the writ of liberty." Act of Feb. 10, 1807, ALA. DIGEST OF LAWS 660 (Toulmin 1823). A noteworthy definition of the writ is contained in article 791 of the Louisiana Code of Practice in Civil Cases 134 (1839): "The habeas corpus is an order in writing, issued in the name of the State by a judge of competent jurisdiction, and directed to a person who has another in his custody or detains him in confinement, commanding him to bring before the judge the person thus detained, at the time and place appointed, and to state the reasons for which he thus keeps him imprisoned and deprived of liberty."

5 1 CHITTY, CRIMINAL LAW 123-24 (4th Am. ed. 1841); DICEY, LAW OF THE CONSTITUTION 211 (6th ed. 1902); Goddard, *The Prerogative Writs*, 32 N.Z.L.J. 199, 214 (1956); Sim's Case, 61 Mass. 285, 291-93 (1851) (Shaw, C.J.); Passimore Williamson's Case, 26 Pa. 9, 15-17 (1855). Habeas corpus was not a writ "of course," which a court was bound to grant without any showing. *Ibid.*

The legal issues were argued on the "return" to the writ, a written explanation of the causes for the prisoner's detention. Where the writ had been issued under the provisions of the Habeas Corpus Act the prisoner was usually brought before the court on the return, unless he was in a class clearly not entitled to the writ. 1 CHITTY, *id.* at 126. Legal questions connected with the return are discussed in CHURCH, HABEAS CORPUS ch. XI (1884). Prior to statutory changes early in the Nineteenth Century, there were rarely any factual issues at the hearing on the return, since the petitioner was not allowed to contradict the respondent's return to the writ. CHURCH, HABEAS CORPUS § 166 (1884); HURD, HABEAS CORPUS 263-77 (1858).

Early in the Nineteenth Century English and American courts began to resolve habeas corpus cases by issuing a rule to show cause (rule nisi) why the writ should not issue or by hearing the legal issues on a motion for the writ. This was done as an administrative convenience to obviate the necessity for producing the prisoner where this was difficult or unnecessary. Cox v. Hakes, [1890] 15 App. Cas. 506, 509; Goddard, *supra*, at 214; Oaks, *The "Original" Writ of Habeas Corpus in the United States Supreme Court*, 1962 SUP. CT. REV. 153, 189 (Kurland ed.)

6 JACOBS & GOEBEL, CASES ON DOMESTIC RELATIONS 882 (4th ed. 1961).

7 AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 129, 137-41 (Lindman & McIntyre eds. 1961).

and under the famous Habeas Corpus Act of 1679[8] the use of the Great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus. In contrast, the modern writ of habeas corpus frequently issues from federal courts to review the decisions of state courts in matters relating to the conduct of completed criminal trials. The question in these federal habeas corpus proceedings is not whether the prisoner is held by a formally valid process, but whether the state court that entered the judgment of conviction committed egregious error in reaching its judgment. In short, the writ of habeas corpus is still serving as a weapon in jurisdictional disputes between competing legal systems, but the original role of merely bringing the prisoner before the court for the purposes of furthering its business has been supplanted by a new function—reviewing the proceedings of the committing court with a view to possible invalidation of its judgment.

The sequence of events that lead to this modern use of the writ is set forth in the abundant literature on the federal writ of habeas corpus.[9] Although the federal constitution and statutes contain detailed provisions on habeas corpus, the leading federal decisions have relied heavily on history and on the common law. Chief Justice Marshall set the precedent in an important early case by declaring that "for the meaning of the term *habeas corpus*, resort may unquestionably be had to the

[8] 31 Car. 2, c.2 (1679).

[9] *E.g., Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess. 92-113 (1955) (statements by Conference of Chief Justices); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Hart, *Forward—The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 101-25 (1959); Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960); Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); Note, 55 COLUM. L. REV. 196 (1955); Note, 35 COLUM. L. REV. 404 (1935); Note, 61 HARV. L. REV. 657 (1948); Note, 68 YALE L.J. 98 (1958); *Symposium on Habeas Corpus and Post Conviction Review*, 33 F.R.D. 363 (1964).

For earlier discussions consult CHURCH, HABEAS CORPUS ch. VII (1884); Dobie, *Habeas Corpus in the Federal Courts*, 13 VA. L. REV. 433 (1927); Thompson, *Abuses of the Writ of Habeas Corpus*, 6 A.B.A. REPS. 243 (1883), reprinted in 18 AM. L. REV. 1 (1884); *Report of the Committee on Jurisprudence and Law Reform on Abuses of the Writ of Habeas Corpus*, 7 A.B.A. REPS. 12-44 (1884).

For a discussion of one area of federal habeas corpus jurisdiction frequently invoked by laymen but almost totally unfamiliar to lawyers, see Oaks, *supra* note 5.

common law. . . ."[10] A hundred and fifty-six years later history was still of such significance that the majority opinion in a leading habeas corpus case declared that the Court could not answer the question posed "without a preliminary inquiry into the historical development of the writ of habeas corpus."[11]

Judicial opinions that claim guidance from habeas corpus history have normally relied on developments in England in the Seventeenth and Eighteenth Centuries.[12] While the importance of these developments is ample justification for close scrutiny, the Supreme Court's frequent reexamination of this period is perhaps also attributable to the work of several distinguished scholars who have illuminated the subject and made its principal events comparatively accessible.

In contrast, the United States Supreme Court has rarely considered the more recent history of the writ of habeas corpus in our own state courts and legislatures. Although comparatively little has been written about this subject it is not lacking in importance. Prior to the Civil War federal habeas corpus jurisdiction was so limited that almost all of the habeas corpus litigation in this country was in the state courts. In drawing precedents or lessons from the history or common law of habeas corpus modern courts should not overlook the constitutional, statutory and case-law developments in the various states in this period.

To supply one introduction to such an examination this article will discuss the uses and history of the writ of habeas corpus ad subjiciendum[13] in the several states during the period from the Revolution through the 1860's,[14] considering the constitutional, statutory, and judicial antecedents of the law.[15]

10 *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807).

11 Fay v. Noia, 372 U.S. 391, 399 (1963).

12 *E.g.*, McNally v. Hill, 293 U.S. 131 (1934); *Ex parte* Siebold, 100 U.S. 371 (1879).

13 This study is limited to the *ad subjiciendum* form of the writ although other, ancillary, forms were also in common use during this period. The most familiar of these was the writ of habeas corpus *cum causa*. *E.g.*, Taylor v. Llewellin, 1 Harris & McHenry 19 (Md. 1692); Morris Canal & Banking Co. v. Vannatta, 17 N.J.L. 159 (1839); Austin v. Nelson, 6 N.J.L. 381 (1797); Snowden v. Roberts, 4 Cow. 69 (N.Y. 1825); Bell v. Hall, 12 Johns. R. 152 (N.Y. 1815); Vosburgh v. Rogers, 8 Johns. R. 91 (N.Y. 1811); Benner v. Oberlander, 1 Bin. 366 (Pa. 1808); Fleming v. Bradley, 5 Call 203 (Va. 1797); Judicial Org. Act § 3, Judicial Reg. Act § 39, 3 OHIO STATS. 1671-1678, (1830); An act for Establishing a General Court, § 53, 9 VA. STATS. 414 (Hening 1775). The statutes also mention the *ad testificandum*. *E.g.*, 2 N.Y. REV. STAT. 559 (1828); ALA. DIG. 410 (Clay 1843).

14 The Civil War was chosen as the cut-off point because it marked the end of what had been almost exclusive state habeas corpus jurisdiction over persons imprisoned by state authority. The modern era of habeas corpus was initiated by the statutes, constitutional amendments, and judicial decisions of the Reconstruction, which gave the federal courts their first broad authority to issue the writ for state prisoners, enlarged their scope of review, and promulgated the constitutional doctrines necessary

I. CONSTITUTIONAL PROVISIONS

Unlike other treasured rights like trial by jury or the right of confrontation, which were expressly guaranteed in each of the original state constitutions,[16] the privilege of the writ of habeas corpus was transmitted into American law principally through tradition and the common law. Only three of the twelve original states that had written constitutions in the first decade of our national existence included any mention of the writ. These constitutions guaranteed the privilege affirmatively: North Carolina by a declaration that every freeman is entitled to a remedy to inquire into and remove unlawful restraints of his liberty (habeas corpus not mentioned),[17] Georgia by a declaration that the principles of the habeas corpus act should be part of its constitution,[18] and Massachusetts by the following provision:

> The privilege and benefit of the writ of *habeas corpus* shall be enjoyed in this commonwealth, in the most free, easy, cheap, 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 twelve months.[19]

In 1784 New Hampshire adopted a new constitution embodying the Massachusetts provision (but with a three-month limitation).[20] Thus, when the constitutional convention met in Philadelphia in 1787 there were four states with habeas corpus guarantees in their constitutions, eight with none, and one state (Rhode Island) without a written constitution.

---

for the broad control over criminal processes that federal habeas corpus courts have come to exert in our own day. 14 Stat. 385 (1867); U.S. CONST. amend. XIV. *E.g.*, *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873); *Ex parte* Siebold, 100 U.S. 371 (1879).

15 An effort has been made to locate and examine all of the state constitutional provisions, all of the significant state legislation, and all of the important state decisions concerning the writ of habeas corpus *ad subjiciendum* during the pre-Civil War period. However, the relative infrequency with which these early courts cited prior decisions in reaching their judgments, the scarcity of legal periodicals, and the dearth of early citations in the normal reference materials of legal research all suggest that significant sources have escaped notice.

16 POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 85 (1957). *Cf.* Comment, 73 YALE L.J. 1000, 1030, 1055-57 (1964) (appendix of early state provisions on constitutional right to counsel).

17 N.C. CONST. art. XIII (1776). All of the state constitutional provisions cited herein may be found in 1 or 2 POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS (2d ed. 1878).

18 GA. CONST. art. LX (1777).

19 MASS. CONST. c.6, art. VII (1780).

20 N.H. CONST. (unnumbered provision) (1784).

Zechariah Chafee, Jr., who called the writ of habeas corpus "the most important human rights provision in the Constitution,"[21] contended that the writ was omitted from most early state constitutions not because it was thought unimportant, but because "it had been so long and solidly established in every colony that assertion was probably considered unnecessary."[22] The fact that considerably less than half of the original state constitutions specifically guaranteed other important rights such as the right to counsel[23] and the privileges against self-incrimination and unreasonable search and seizure supports Chafee's inference that omitted matters were not necessarily thought unimportant. Other history —notably that involving suspension of the writ, cited hereafter—casts doubt upon the conclusion that the right to habeas corpus was so solidly established that constitutional guarantees were considered unnecessary.

The draft federal constitution first reported by the Committee of Detail contained no habeas corpus provision.[24] Among various proposals thereafter submitted to the committee by Mr. Charles Pinckney of South Carolina was a habeas corpus provision in substantially the same form as that in the Massachusetts constitution.[25] After some debate Gouverneur Morris of Pennsylvania moved that:

> 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.[26]

This version, which remains unchanged today as article I, section 9, clause 2 of our federal constitution, was approved unanimously up to the word "unless," but three colonies voted against the remaining language (the vote was 7-3) because of their contention that the privilege should never be suspended.[27] The record discloses no concern that the federal constitution made no express grant of the habeas corpus privilege whose suspension it forbade. It seems to have been assumed

21 Chafee, *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143, 144 (1952).

22 *Ibid.*

23 POUND, *op. cit. supra* note 16, at 86-87, 89.

24 5 ELLIOT'S DEBATES 376-81 (2d ed. 1845); HURD, HABEAS CORPUS 123 (1858); Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 341 *et seq.* (1952).

25 5 ELLIOT'S DEBATES 445, 484 (2d ed. 1845).

26 *Id.* at 484. This provision was generally similar to the following provision suggested in a draft submitted to the convention by Mr. Charles Pinckney on May 29, 1787, some months before the report of the Committee of Detail: "nor shall the privilege of the writ of habeas corpus ever be suspended, except in case of rebellion or invasion." *Id.* at 131; *id.* at 185.

27 *Id.* at 484. The dissenting states were Georgia, North Carolina and South Carolina.

either that the right to the writ was conferred by implication in the anti-suspension provision or that it existed under the common law in force in the several states.[28]

The habeas corpus provision in the federal constitution was soon copied by the constitution-makers in the thirteen original states and in the new states admitted to the union thereafter. By 1844 five of the eight states that had been without habeas corpus provisions originally, plus Rhode Island (which finally adopted a constitution in 1842) and Georgia (which relinquished its clause conferring the right affirmatively) had adopted provisions patterned after the federal one.[29] Massachusetts, New Hampshire and North Carolina retained their original provisions conferring the right and (except for North Carolina) prohibiting its suspension. Virginia had no provision concerning the writ until its new constitution of 1830, which provided that "The privilege of the writ of *habeas corpus* shall not in any case be suspended."[30] The remaining two states, Maryland and South Carolina, added habeas corpus provisions to their constitutions after the Civil War.[31]

All twenty-one of the new states admitted after 1787 and prior to 1860, with the sole exception of Vermont, wrote into their constitutions a habeas corpus provision practically (and in most cases exactly) identical to the federal provision.[32] None made any affirmative guarantee of the writ, an unusual circumstance in view of a succession of federal enactments declaring that the inhabitants of these new areas were to have the benefits of the writ.[33] It was apparently assumed by the new states

28 RAWLE, A VIEW OF THE CONSTITUTION 118 (2d ed. 1829). See generally Collings, *supra* note 24, at 341-45; Oaks, *supra* note 5, at 155-56. The Supreme Court recently cited article I, § 9 in support of this statement: "The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available." Jones v. Cunningham, 371 U.S. 236 (1963)(dictum).

29 CONN. CONST. art. I, § 14 (1818); DEL. CONST. art. I, § 13 (1792); GA. CONST. art. IV, § 9 (1798); N.J. CONST. art. I, § 11 (1844); N.Y. CONST. art. VII, § 6 (1821); PA. CONST. art. IX, § 14 (1790); R.I. CONST. art. I, § 9 (1842).

30 VA. CONST. art. III, § 11 (1830).

31 MD. CONST. art. III, § 55 (1867); S.C. CONST. art. I, § 17 (1868).

32 ALA. CONST. art. I, § 17 (1819); ARK. CONST. art. II, § 18 (1836); CAL. CONST. art. I, § 5 (1849); FLA. CONST. art. I, § 11 (1838); ILL. CONST. art. VIII, § 13 (1818); IND. CONST. art. I, § 14 (1816); IOWA CONST. art. I, § 13 (1846); KAN. CONST. art. I, § 8 (1855); KY. CONST. art. XII (1792); LA. CONST. art. 6, § 19 (1812); ME. CONST. art. I, § 10 (1820); MICH. CONST. art. I, § 12 (1835); MINN. CONST. art. I, § 7 (1857); MISS. CONST. art. I, § 17 (1817); MO. CONST. art. XIII, § 11 (1820); OHIO CONST. art. VIII, § 12 (1802); ORE. CONST. art. I, § 24 (1857); TENN. CONST. art. XI, § 15 (1796); TEX. CONST. art. I, § 10 (1845); WIS. CONST. art. I, § 8 (1848).

The federal provision was also embodied in the Constitution of the Confederate States of America, art. I, § IX, cl. 3. GA. CODE p. 982 (1861).

33 The Northwest Ordinance of 1787 provided in art. II that "The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas*

that the federal-style provision forbidding suspension of the writ sufficed to guarantee its availability, and Congress seems to have acquiesced in that assumption.

Vermont, the single deviation from the general pattern, had no habeas corpus provision until its constitutional amendment in 1836,[34] which followed in substance the 1830 Virginia formulation that the writ of habeas corpus should never be suspended. No other states adopted this absolute prohibition against suspension in pre-Civil War times, but it became quite popular thereafter. Doubtless as a result of the experiences of that troubled time, particularly the furor over President Lincoln's suspension of habeas corpus,[35] seven states adopting constitutions during the period between 1865 and 1876 included provisions absolutely prohibiting suspension of the writ.[36] In addition, one other state adopted for the first time the federal formula forbidding suspension except in certain circumstances.[37]

Like the federal constitution, most state constitutions were silent on who could suspend the writ in the prescribed circumstances. The Massachusetts-New Hampshire formulation expressly conferred this power on the legislature, as did variations of the federal provision adopted in Connecticut and Rhode Island in 1818 and 1842, respectively.[38] Florida's 1868 constitution and an 1858 South Carolina statute were unique in granting the suspension power to the Governor.[39] The silence on this subject in the remaining state constitutions, including those adopted in the two decades following 1860, was probably the result of a general consensus that the suspension power resided in the legislature. Such was the effect of Chief Justice Taney's famous opinion in *Ex Parte Merryman*[40] on President Lincoln's celebrated suspension of the writ. In addi-

---

corpus . . . ." Section 3 of the 1811 Enabling Act for Louisiana provided that its constitution "shall secure to the citizen . . . the privilege of the writ of habeas corpus, conformable to the provisions of the Constitution of the United States . . . ." Section 14 of the 1812 Act creating the Territorial Government of Missouri provided in section 14 that "The people of the said Territory shall always be entitled to . . . the benefit of the writ of *habeas corpus*." I POORE, *op. cit. supra* note 17, at 431, 699; 2 POORE, *id.* at 1100.

34 VT. CONST. art. XII (1836).

35 See Collings, *supra* note 24, at 341 n.33.

36 ALA. CONST. art. I, § 18 (1875); LA. CONST. art. I, § 7 (1868); MD. CONST. art. III, § 55 (1867); MO. CONST. art. II, § 26 (1875); N.C. CONST. art. I, § 21 (1868); TEX. CONST. art. I, § 12 (1876); W. VA. CONST. art. III, § 4 (1872).

37 S. C. CONST. art. I, § 17 (1868).

38 CONN. CONST. art. I, § 14 (1818); R.I. CONST. art. I, § 9 (1842).

39 FLA. CONST. art. VI, § 21 (1868); S.C. REV. STAT. ch. 132, § 18 (1872).

40 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861). The question of suspension is discussed in CHURCH, HABEAS CORPUS §§ 50-57 (1884).

tion, in each of at least six recorded instances where the writ was suspended during or before the War for Independence, this power was exercised by the legislature and not by the executive.[41]

II. Statutory Provisions

Virtually all American habeas corpus legislation had its genesis in the English Habeas Corpus Act of 1679, but more than a century elapsed before the provisions of that act became generally applicable on this side of the Atlantic. Originally the Crown took the position that the 1679 act did not apply to the colonies, and in the two decades before 1700 the Privy Council annulled attempts by the colonies of Massachusetts, New York and Pennsylvania to legislate its terms into effect.[42] After 1710 the policy changed and the royal governors in Virginia and North and South Carolina issued Proclamations extending the colonial subjects' right to petition for the writ of habeas corpus.[43] Nevertheless, only one state, South Carolina, seems to have had a habeas corpus act at the time of the Declaration of Independence.[44]

It is surprising that lawmakers in the colonies and later in the original thirteen states apparently had no sense of urgency about enacting habeas corpus legislation. Only Georgia, Massachusetts, New York, Pennsylvania and Virginia had passed habeas corpus acts by 1787.[45] Delaware and New Jersey joined this group in the 1790's,[46] but it was not until many years later that acts were passed in Connecticut (1821), Maryland

41 Massachusetts during Shay's Rebellion, 1786-87, Hurd, Habeas Corpus 136 (1858); New York and Pennsylvania with respect to certain individuals in 1770 and 1758, respectively, Levy, The Legacy of Suppression 55, 85 (1960); New Jersey, South Carolina, and Virginia, at certain times during the War for Independence, Index to New Jersey Laws 391 (Hood 1877); 4 S.C. Stat. 458 (1838); 10 Laws of Va. 413-14 (Hening 1822).

See Oaks, *supra* note 5, at 160 for a discussion of the Jefferson Administration's attempt (successful in the Senate) to have the writ suspended in 1807 in connection with the alleged Burr conspiracy.

42 Walker, The American Reception of the Writ of Liberty 10-13 (1961); Carpenter, *Habeas Corpus in the Colonies*, 8 Am. His. Rev. 18 (1902); Hurd, Habeas Corpus 109-20 (1858). See generally Brown, British Statutes in American Law, 1776-1836, ch. 1 (1964).

43 *Ibid.*

44 Act of Dec. 12, 1712, 2 S.C. Stat. 399 (Cooper 1837). Chafee, *supra* note 21, at 146 says that all the colonial charters were silent about habeas corpus.

45 Ga. Const. art. LX (1777) (incorporates Habeas Corpus Act); 1 Mass. Gen. Laws ch. 71 (1784); Act of Feb. 21, 1787, N.Y. Laws 1785-88, 424 (Official Reprint 1886); Act of Feb. 18, 1785, Pa. Gen. Laws 142 (Dunlop, 2d ed. 1849); Act of 1784, 11 Laws of Va. 408 (Hening 1823).

46 Act of Feb. 2, 1793, Del. Laws 294 (Rev. ed. 1829); Act of Mar. 11, 1795, N.J. Rev. Laws 193 (1820).

(1809), New Hampshire (1815), North Carolina (1836), and Rhode Island (1822).[47]

The close conformity of most state legislation to the English Habeas Corpus Act of 1679 requires a brief summary of that act.[48] The writ of *habeas corpus ad subjiciendum,* the Great Writ, evolved out of the common law, and was used long before the legislation of 1679. That statute was merely supplementary and remedial. Its substantive provisions only applied to persons who were committed or detained for criminal or supposed criminal matters, and even as to those its primary benefits were not available to persons committed for "felony or treason plainly expressed in the warrant of commitment," or to "persons convict or in execution by legal process . . ." (§ 3).

The act's inapplicability to civil imprisonments was assured by a provision that its terms did not extend "to discharge out of prison any person charged in debt, or other action, or with process in any civil cause . . . " (§ 8). Finally, the remedy authorized by the act was simply to "discharge the said prisoner from his imprisonment, taking his or their recognizance, with one or more surety or sureties . . . for his or their appearance in the Court of King's bench the term following . . ." (§ 3). The act conferred no power to discharge the prisoner absolutely, except where he was indicted and not tried within the prescribed time.[49] Plainly, the benefits of this famous English act were intended primarily for individuals detained for a crime but held without a warrant of commitment, or for individuals held without bail upon a warrant charging a minor offense.

The principal new substantive right created by the 1679 act was the power it gave selected judicial officers to issue the writ of habeas corpus "in the vacation time, and out of term" (§ 3), when the common-law writ of habeas corpus (which could only be issued by a court in session) had previously been unavailable.[50] The act also effected numerous reforms in the procedure governing habeas corpus generally. It required that

47 An Act to Provide for Issuing the Writ of Habeas Corpus, CONN. COMP. LAWS 265 (1821); Act of 1809, 1 MD. LAWS 568 (Dorsey 1840); Act of June 26, 1815, 2 N.H. LAWS 11 (1815-21); An act for the better security of personal liberty, 1 N.C. REV. STAT. 314 (1836-37); Act of 1822, R.I. Laws, 1822, p. 180.

48 31 Car. 2, c.2 (1679), discussed in WALKER, *op. cit. supra* note 2, at 79-85; Cohen, *supra* note 2, at 172, 185-96; 1 CHITTY, CRIMINAL LAW 121-22 (4th Am. ed. 1841).

49 HURD, HABEAS CORPUS 417 (1858).

50 COKE, INSTITUTES, Pt. II, p. 53 and Pt. IV, p. 81; 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 115-16 (1926). After an earlier decision to the contrary, it was finally held that Chancery could issue the common-law writ during vacation. Crowley's Case [1818] 2 Swan. 1. The English Act also removed certain existing doubts about the jurisdiction and powers of certain courts to issue the writ of habeas corpus by a broad grant of such jurisdiction to the High Court of Chancery, the Court of Exchequer, and the Courts of King's Bench and Common Pleas (§ 10).

jailers make return to such writs within three days (if the commitment was within twenty miles of the place of return), and that the respondent certify the true causes of imprisonment (§ 2). It imposed a civil penalty in favor of the aggrieved prisoner: (a) on officers who neglected or refused to make the proper return or who refused the prisoner's request to furnish him with a copy of his warrant of commitment (£ 100), (b) on any person who should move a prisoner from the prison and custody to which he was originally committed except by habeas corpus or some other legal writ or cause (£100), (c) on any judicial officer who in vacation refused any writ that the act required be granted (£ 500), and (d) on any person who should knowingly reimprison for the same offense any person previously set at large by habeas corpus (£ 500) (§§ 5, 6, 9, 10). The act also prohibited sending persons to foreign prisons (§ 12). Finally, the right to a speedy trial was enforced by the requirement that persons committed for felony or treason (to whom the habeas corpus provisions did not apply) who were not indicted during the term following their commitment should be bailed, and if not indicted and tried in the second term should be discharged (§ 7).

Each of the foregoing procedural reforms unquestionably identifies various means that had previously been used to prevent suitors from obtaining the benefits of the common law writ of habeas corpus,[51] and they were held to apply to the common law as well as to the statutory forms of the writ.[52] By describing and stigmatizing these abuses of the common-law writ and by providing a comparable statutory remedy during vacation, the Habeas Corpus Act of 1679 won its place as a landmark of liberty.

With the sole exception of Connecticut, which passed its own unique habeas corpus statute in 1821, all of the habeas corpus acts passed in the thirteen original colonies or states were patterned after the English act. Although this legislation invariably duplicated the procedural reforms in the English act, the degree to which the exact terms were copied varied from the modernized provisions of Massachusetts to the verbatim copies in Georgia and South Carolina, which followed the English version so slavishly that the only officers authorized to issue the writ in vacation were the "lord chancellor or lord keeper, or any one of his majesty's justices, either of the one bench or of the other, or the barons of the exchequer of the degree of the coif . . . ."[53] These two

51 1 CHITTY, *op. cit. supra* note 48, at 119-21; WALKER, *op. cit. supra* note 2, at 79-85; Cohen, *supra* note 2, at 183-84; Chafee, *supra* note 21, at 148-49.

52 HURD, HABEAS CORPUS 208 (1858).

53 The quoted language is from section 3 of the English Act, adopted verbatim in these two jurisdictions. GA. CONST. art. LX (1777); Act of Oct. 16, 1692, 2 S.C. STAT. 74 (Cooper 1837).

states apparently had to enact supplementary legislation to empower their own judicial officers to exercise the powers created by the act.[54]

Although patterned after the English act, the scope of the state statutes differed in three important respects: (1) the type of commitments for which the writ would issue, (2) whether issuance of the writ was authorized generally or only during vacation, and (3) what courts or judicial officers were authorized to exercise the powers created.[55]

The legislation in the twelve original states that followed the English act was uniform in providing that the benefits of the act should not extend to persons properly charged with felony or treason or to "persons convict" or in execution under civil or criminal process. However, the statutes were not uniform on whether they authorized issuance of the writ for those illegally held without process. Like the English act, the legislation in Georgia, New Jersey, New York (prior to 1818),[56] South Carolina and Virginia (prior to 1815)[57] was only applicable to persons committed on criminal process. The remaining states, doubtless influenced by the liberal provisions of the legislation enacted in Massachusetts and Pennsylvania at a very early date, and by similar provisions in an 1816 English act,[58] phrased their habeas corpus legislation to apply to all persons restrained of their liberty for any cause or upon any pretense whatever.

Another substantive difference lay in whether the state legislation merely authorized issuance of the writ by judges during vacation, like the English act, or whether it also empowered certain courts or judges to award the writ during term.[59] The legislative authority in Georgia, Maryland, New Jersey, New York (prior to 1818), North Carolina, South Carolina, and Virginia (prior to 1815) was limited to confinement while

54 Act of Feb. 16, 1799, GA. DIGEST 206 (Prince 1822); Act of Dec. 12, 1712, 2 S.C. STAT. 399 (Cooper 1837).

55 Unless otherwise noted, the two paragraphs next following in the text refer to the original state habeas corpus acts cited in notes 45-47 *supra*.

56 N.Y. LAWS 298 (1818).

57 Act of Jan. 10, 1815, VA. ACTS 1814, ch. XXVI (1815).

58 56 Geo. III ch. 100 (1816).

59 There were no constitutional provisions specifying which courts or judges could issue the writ of habeas corpus in any of the original thirteen states except Delaware, whose second constitution had a provision authorizing the chancellor and certain judges to issue the writ during vacation. DEL. CONST. art. VI, § 5 (1792). In contrast, this subject was included in the constitutions of most of the states admitted and new constitutions adopted after about 1820. *E.g.*, ARK. CONST. art. VI, § 2 (1836); MO. CONST. art. V, § 3 (1820); OHIO CONST. art. IV, § 2 (1851). The subject was doubtless given constitutional dignity to assure that the privilege of the writ would not be frustrated if the legislature failed to enact legislation designating which court or judicial officer should be empowered to issue the writ. For a discussion of comparable ambiguities in the federal constitution in this respect, see Oaks, *supra* note 5, at 155-56.

the court was not in session. These states apparently relied on the common-law authority of their courts to redress restraints suffered during term time.

Statutes in the remaining states, which authorized issuance of the writ during term by courts, fit into three groups. The first group, led by Massachusetts and including New Hampshire and Rhode Island, authorized issuance of the writ only by the state's highest tribunal. Pennsylvania and Delaware empowered both trial level courts and their highest court to issue the writ. Alone in the last category was Connecticut, whose legislation authorized issuance of the writ in term or vacation by the judges of trial-level courts of general jurisdiction.

In some jurisdictions, particularly those whose statutes were narrowly tailored to the English pattern, the statutory habeas corpus jurisdiction was generously supplemented by powers derived from the common law. A court exercising common law powers could give an absolute discharge (instead of merely admitting the petitioner to bail), and may not have been inhibited in the exercise of this power by statutory exceptions such as those relating to "persons convict or in execution by legal process."[60] Courts employing such powers in habeas corpus cases included trial-level courts in Georgia, New York (prior to the codification of its habeas corpus law in an 1818 act), Pennsylvania, and South Carolina.[61] Individual judges, justices or chancellors of course had no common law powers.[62]

III. Court Decisions

The state constitutions and statutes (supplemented where appropriate by the common law) define the theoretical availability of the writ of habeas corpus, but they do not reveal the actual uses to which the writ was put. The best evidence of usage are the reports of court decisions. Even this evidence must be used with caution, however. The number of reported habeas corpus decisions is not a direct or even a relative indication of the number of such cases decided. The volume of reports

60 Hurd, Habeas Corpus 417-18 (1858). Available authorities are too scarce to conclude with certainty whether there were comparable limitations on the exercise of common law powers. If not, those states that supplanted the common law by remedial habeas corpus legislation drafted to apply to all forms of restraints actually narrowed the range of protection under the writ of habeas corpus to the extent that the availability of the new statutory writ was subject to statutory exceptions. *E.g.*, see text accompanying note 85, *infra*.

61 In the Matter of Mitchell, Charlton's Rep. 489 (Ga. 1836); Bank of United States v. Jenkins, 18 Johns. R. 305 (N.Y. 1820); In the Matter of Carlton, 7 Cow. 471 (N.Y. 1827); Commonwealth v. Robinson, 1 S. & R. 353 (Pa. 1815); State v. Fasket, 5 Rich. 255 (S.C. 1851).

62 *E.g.*, Peltier v. Pennington, 14 N.J. 312 (C.J. in Chambers 1834); In the Matter of Goodhue, N.Y. City-H. Rec. Reports 153 (Chancery 1816).

depends most immediately on whether any provision was made for reporting the decisions of the courts or judges who had the statutory or common-law habeas corpus power. For example, where the highest state court had the statutory jurisdiction one would expect to find numerous reports of decisions on habeas corpus matters. This is true of Massachusetts and Pennsylvania, and also of New York, where the exercise of common-law (and later statutory) powers by the Supreme Court was carefully reported, although this was not then the highest state court.[63] Similarly, one would expect few reported court decisions in states like Connecticut, Georgia, Maryland, and North and South Carolina, where the statutory powers were vested in judges whose decisions were not usually reported and where the constitutional provisions limiting the highest state court to "appellate jurisdiction" prevented that court from exercising any common law habeas corpus powers.[64] Occasional reports of the habeas corpus opinions of some Maryland judges, and a number of sporadic reports of the habeas corpus decisions of lower courts exercising common-law jurisdiction in Connecticut and Georgia did give a smattering of case authority in those states.

The number and content of appellate opinions is an equally unreliable indication of the actual extent of habeas corpus litigation and the types of restraints for which the writ was issued. The extensive statutory jurisdiction conferred on individual judges normally was not subject to appellate review because their orders were not the final judgments of courts.[65] In addition, the laws governing review of the action of courts in habeas corpus matters were laden with complications that undoubtedly inhibited appellate review.[66]

63 Inexplicably, there are few or no reported court decisions in Delaware, New Hampshire, and Rhode Island, where the statutory habeas corpus power was also vested in whole or part in a court whose decisions were normally reported.

64 Norwood v. Martin, 3 H. & J. 199 (Md. 1810). The comparable limitation on the habeas corpus jurisdiction of the United States Supreme Court is discussed in Oaks, *supra* note 5.

65 *In re* Perkins, 2 Cal. 424, 430 (1852); Weddington v. Sloan, 54 Ky. (15 B. Mon.) 147 (1854); In the Matter of Metzger, 46 U.S. (5 How.) 176 (1847). *Cf.* Steele v. Shirley, 17 Miss. (9 S. & M.) 382 (1848) (writ of error under statute, but no appeal).

66 The statutory remedy of appeal was available in some states to review the exercise of common-law or statutory jurisdiction by lower courts. *E.g.*, Clark v. Gautier, 8 Fla. 360 (1859); Shaw v. Smith, 8 Ind. 485 (1857); Foster v. Alston, 6 How. 406 (Miss. 1842); State v. Fasket, 5 Rich. 255 (S.C. 1851); Renney v. Mayfield, 4 Hay. 165 (Tenn. 1817). However, many states either had no such legislation or construed it to be inapplicable to review of habeas corpus matters. Bell v. Miller, 4 Gill. 301 (Md. 1846); Howe v. State, 9 Mo. 690 (1846); cases cited in Note, 45 Am. Dec. 130, 133 (1886).

Precedents on the availability of the common-law writ of error to review habeas corpus decisions were also highly contradictory. In the two most notable cases the various judges on the courts were so badly divided that neither had great value as

These observations raise serious questions about the advisability of using the reported opinions of judges or courts as the basis for quantitative or qualitative generalizations about the extent and type of use of the writ of habeas corpus in the several states prior to the Civil War. These opinions are the best evidence of the content of the law in that period, however, and each one is also irrefutable evidence of at least one employment of the writ. In those two respects they can serve as the basis for cautious generalization, particularly in view of the scarcity of other relevant and available historical sources.

The reported habeas corpus cases may be classified in four groups: (1) those where a prisoner is seeking relief from a criminal arrest or commitment; (2) those where a prisoner is seeking relief from a civil arrest or commitment; (3) those where an individual is seeking relief from some restraint on his liberty that does not arise from a civil or criminal arrest or commitment; and (4) those where some third party is seeking to have a prisoner released from the respondent's custody so that the third party can take custody of the prisoner himself.

---

precedent. *Ex parte* Yates, 6 Johns. R. 337 (N.Y. 1810); Holmes v. Jamison, 39 U.S. (14 Pet.) 273 (1840). Frequently a writ of error was used without discussion of its propriety. *E.g.*, Lindsey v. Lindsey, 14 Ga. 657 (1854); Hovey v. Morris, 7 Ind. 559 1845); Sam v. Fore, 20 Miss. (12 S. & M.) 413 (1849). Most opinions that discussed the question held the writ of error inapplicable because the petitioner's right to make successive applications for the writ deprived habeas corpus orders of the status of final judgments. Wade v. Judge, 5 Ala. 130 (1843); Hammond v. People, 32 Ill. 446 (1863); cases cited in *Appeals and Writs of Error in Habeas Corpus Cases*, 1 AM. LAW REG. 513 (1853). On the problem of successive applications, consult Gordon, *The Unruly Writ of Habeas Corpus*, 26 MOD. L. REV. 520 (1963). Of course this rationale had little or no force where the lower court had discharged the prisoner (since most habeas corpus legislation forbade his reimprisonment). Therefore, it is not surprising that some cases that denied appellate review to refusals of relief suggested the propriety of review if the prisoner had been released by the writ. In fact, most reported instances where appellate jurisdiction was declined involve cases where relief was refused below, whereas most exercises of appellate jurisdiction involved cases where the prisoner had been discharged. Hammond v. People, 33 Ill. 446, 457-58, 462 (1863) (separate opinion); *Appeals and Writs of Error, supra* at 516. *Compare Ex parte* Mitchell, 1 La. Ann. Rep. 413 (1846) (no appeal where prisoner remanded), *with* Dodge's Case, 6 Mart. 569 (La. 1819) (dictum) (appeal allowed where prisoner discharged); and Jones v. Timberlake, 6 Rand. 678 (Va. 1828) (no writ of error where prisoner remanded), *with* Ruddle's Ex'r v. Ben, 37 Va. (10 Leigh) 487 (1839) (writ of error allowed where prisoner discharged).

A few states permitted review of certain habeas corpus judgments by mandamus or certiorari, the former most prevalent where relief had been denied and the latter where it had been granted. Mandamus: *Ex parte* Mahone, 30 Ala. 49 (1847); Wright v. Johnson, 5 Ark. 687 (1844); Hyde v. Jenkins, 6 La. 427 (1834). Certiorari: Field v. Walker, 17 Ala. 80 (1849); Platt v. Harrison, 6 Iowa 79 (1858).

By the time of the Civil War the foregoing distinctions began to be erased by legislation granting generous appellate review of habeas corpus decisions, *e.g.*, *Ex parte* James Collier, 6 Ohio St. 55 (1867); HURD, HABEAS CORPUS 568 (1858), and today the matter is only of historical interest.

A. *Criminal Arrest or Commitment*

Habeas corpus cases initiated by persons charged with crimes divide into two groups—petitions brought before and petitions brought after judgment of conviction. This division highlights the contrast between modern habeas corpus litigation and that common more than a century ago. Today habeas corpus has become a remedy most frequently employed after conviction. In the Nineteenth Century, however, most petitions involving criminal commitments preceded conviction. In fact, many were submitted immediately upon the defendant's being arrested and before he was even brought before a judicial officer for formal commitment.

At the pre-indictment stage there were two principal uses of the writ. First, it was employed to obtain the defendant's release on bail prior to indictment or trial.[67] This was the function that had been codified in the Habeas Corpus Act of 1679 and its legislative progeny in this country. In determining whether to admit the petitioner to bail the habeas corpus court would examine and be guided by the depositions upon which the commitment was founded.[68]

Second, the writ was sought to effect an absolute release from the pending charge. Such a release, available at common law or under remedial legislation, would result from a showing that the warrant or writ under which the defendant was held was void. For example, in an 1854 case the writ of habeas corpus issued on the court's conclusion that the warrant was invalid because the law whose violation was charged was unconstitutional.[69] A more common, if less successful, attack was based on the claim that the arrest warrant had been issued on insufficient proof of the commission of the named offense or of the probable guilt of the petitioner. Following is a typical statement of the reasoning upon which most courts rejected such grounds for issuance of the writ:

> [U]pon the writ of habeas corpus we cannot look beyond the colorable authority of the judge to issue the warrants. We cannot inquire into the technicalities, or the strict regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law. In these cases we can merely look into the sheriff's return, which contains the several warrants by virtue of which he detains the relators; and

67 *In re* McIntyre, 10 Ill. 422 (1849); Belgard v. Morse, 68 Mass. (2 Gray) 406 (1854); State v. Best, 7 Ind. 612 (1845); *Ex parte* Croom & May, 19 Ala. 561 (1851).

68 CHURCH, HABEAS CORPUS §§ 390, 400 (1884); 1 CHITTY, *op. cit. supra* note 48, at 128-29.

69 *In re* Booth, 3 Wis. 1, 49 (1854), *rev'd sub nom.* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859). This proposition later became well settled. See Note, 3 AM. & ANN. CASES 581 (1905).

> also into the affidavits contained in the traverse and upon which the judge issued the warrants, *so far as to see that the judge had colorable jurisdiction of the process, and assumed to take proof upon the issuing of the same,* and which the proof he adjudged to be sufficient, we will not, upon the writ of habeas corpus, review his adjudication upon that question; nor undertake to say whether he erred in adjudging the proof to be sufficient.[70]

Other authorities, particularly in extradition cases, held that the habeas corpus court could re-examine the affidavits or depositions upon which the warrant had been issued and discharge the prisoner if they did not furnish a proper basis for his detention.[71] An appellate court could justify this wider scope of review by reference to the common law practice of securing review of the decisions of inferior courts by means of the companion writs of certiorari and habeas corpus *cum causa.*[72] One court explained this practice as follows:

> This [*cum causa*] form of the writ is seldom used by us now, because it is seldom needed. It is a form of enforcing an undoubted authority over subordinate courts. But some of its principles have passed into, or naturally belong to, the administration of the common law *habeas corpus ad subjiciendum;* because superior courts, in reviewing the commitments of inferior magistrates on this latter writ, do sometimes go back of the commitment, and inquire into the grounds of it and their sufficiency. The power to do this comes from the fact of their

70 *In re* Prime, 1 Barb. 340, 349 (N.Y. 1847) (Emphasis added). Accord: *In re* Clark, 9 Wend. 212 (N.Y. 1832); *In re* Greenough, 31 Vt. 279 (1858); State v. Asselin, Charlton Rep. 184 (Ga. 1808); *see* CHURCH, HABEAS CORPUS § 234 (1884).

71 *E.g.*, State v. Buzine, 4 Del. 472 (1846) (facts in deposition did not constitute larceny); *In re* Greenough, 31 Vt. 279, 288-89 (1858) (dictum); see CHURCH, HABEAS CORPUS § 235 (1884). A notable federal example of this use of the writ is *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807).

An even more searching inquiry was permitted in *Ex parte* Mahone, 30 Ala. 49 (1857), discussed in CHURCH, HABEAS CORPUS § 237 (1884). In that case the court held that a prisoner committed after a preliminary examination had an absolute right to have the court on habeas corpus "hear and pass on all legal evidence which he offers, touching the question of his guilt. If, on such examination, 'it appear that no offense has been committed, or that there is no probable cause for charging the defendant therewith,' the prisoner must be discharged." 30 Ala. at 50. The language quoted in this unusual opinion apparently came from the section of the statute governing the discharge of defendants on preliminary hearing. ALA. CODE § 4010 (1867). *Cf.* State v. Best, 7 Ind. 611 (1845).

72 1 CHITTY, *op. cit. supra* note 48, at 127. As a means of review, habeas corpus and certiorari were complementary. The former brought up the prisoner but not record; the latter brought up the record but not the prisoner. 2 HALE, PLEAS OF THE CROWN 210 (Am. ed. 1847); Bacon, *Habeas Corpus,* 4 ABRIDGMENT OF THE LAW 563, 587 B11 (Bouvier ed. 1852).

> superiority, and therefore from common law, and not from the Habeas Corpus Act.
>
> * * *
>
> When a court has authority to send a *habeas corpus* or a *certiorari* to remove a cause and the record of it from an inferior court, to be tried before them, or when they act as superior committing magistrates, they may go back into the evidence on which the commitment is founded, and review that, because of their jurisdiction over the inferior courts and their acts, and because of their general superiority. Where they have no such superiority, they cannot do it.[73]

This passage probably explains what was meant when a Nineteenth Century court asserted that habeas corpus and certiorari could be used together to perform the functions of a writ of error[74]—a startling contradiction of the usual statement that habeas corpus cannot substitute for an appeal or writ of error.[75]

After indictment prisoners were clearly less able to employ the writ of habeas corpus to obtain bail or absolute discharge because the underlying factual basis for the indictment was not available, and any consideration of extrinsic evidence would merely be a preview of the trial on the merits.[76] So far as bail was concerned, it will be remembered that the bail provisions in the Habeas Corpus Act of 1679 did not apply to persons who had been committed for "felony or treason plainly expressed in the warrant of commitment."[77] There seems to have been a sharp division of authority over whether this or similar language in state legislation forbade the exercise of common law as well as statutory habeas corpus powers to enforce bail for prisoners under indictment. The later cases seem to have ruled in favor of the power to make this use of the writ,[78] but there is no evidence that the power was frequently employed.

73 Williamson v. Lewis, 39 Pa. 9, 27-28 (1861).

74 *E.g.*, Wales v. Whitney, 114 U.S. 564, 571 (1885).

75 *E.g.*, CHURCH, HABEAS CORPUS § 363 (1884).

76 People v. McLeod, 25 Wend. 483, 568-72 (N.Y. Sup. Ct. 1841); *In re* Greenough, 31 Vt. 279, 288-89 (1858); CHURCH, HABEAS CORPUS § 244 (1884). It was also suggested that the indictment cut off whatever right the defendant might have had to have habeas corpus review of the sufficiency of the depositions or proofs upon which he was originally arrested or committed.

77 31 Car. 2, c.2, § 3 (1679).

78 *Ex parte* Campbell, 20 Ala. 89 (1852); Lumm v. State, 3 Ind. 293 (1852). *Contra:* People v. McLeod, 25 Wend. 483, 568-69 (N.Y. Sup. Ct. 1841) (dictum). The *McLeod* dictum on this question provoked a celebrated reply by another New York judge, 26 Wend. 663, 692-99 (N.Y. 1841), a rejoinder by the author of the McLeod opinion, 3 Hill 635, 643-47, 668-71 (N.Y. 1842), and a surrejoinder by the original critic, 1 AM. LAW MAG. 348, 355-59 (1843).

The 1679 provisions respecting persons committed for "felony or treason not only affected bail applicants, but also had indirect impact on habeas corpus petitioners seeking absolute discharge. Successor legislation, which expressly forbade discharge by habeas corpus of persons imprisoned on an indictment or by virtue of any process or commitment issued to enforce an indictment, significantly reduced the range of habeas corpus relief.[79] Even where there was no express statutory prohibition, the fact that a court had unquestionably assumed jurisdiction over a prisoner by an indictment or formal judicial commitment after hearing persuaded other courts of coordinate jurisdiction to refuse to entertain applications for habeas corpus, at least so long as the committing court was in session.[80] Similarly, appellate courts refused to make inquiry by habeas corpus where the alleged defects could later be brought before them by writ of error.[81]

The existence of an indictment did give the defendant an opportunity for discharge by habeas corpus if he was not brought to trial within the prescribed statutory period.[82] The indicted defendant could also seek release on the ground that the indictment did not charge an offense punishable by law, but courts divided on whether such a defect was a proper basis for release by habeas corpus.[83]

Habeas corpus petitions brought after conviction[84] fell under the shadow of state legislation patterned after the original provision that withheld the benefits of the Habeas Corpus Act from "persons convict or in execution by legal process."[85] Thus, several early state-court cases denied habeas corpus relief to convicts on the ground that the statute specifically excluded them from the benefit of the writ.[86] These opinions

79 *E.g.*, Wright v. State, 5 Ind. 290 (1854); *Ex parte* Ruthven, 17 Mo. 541 (1853).

80 *Ex parte* Bushnell, 8 Ohio 599 (1858); *Ex parte* Booth, 3 Wis. 145 (1854); Jack v. The Sheriff, 7 Watts & Serg. 108, 109 (Pa. 1844) ("during the sitting of the court there is no occasion whatever for the *habeas corpus*, for the court itself to whom the prisoner is answerable may bring the party before it by a simple order, and bail, discharge or remand him as they may see fit").

81 Norton v. Deacon, 8 Serg. & Rawl. 72 (Pa. 1822).

82 State v. Fasket, 5 Rich. 255 (S.C. 1851).

83 Matter of Corryell, 22 Cal. 178, 181 (1863) ("The Court derives its jurisdiction from the law, and its jurisdiction extends to such matters as the law declares to be criminal, and none other, and when it undertakes to imprison for an offense to which no criminality is attached, it acts beyond its jurisdiction."). *Contra*: Emanuel & Giles v. State, 36 Miss. 627 (1859).

84 Judging from reported decisions, there were few habeas corpus applications prior to 1850 by persons who had been convicted of a criminal offense, but a comparatively large number thereafter. There seems to be no explanation for the marked increase at this time.

85 31 Car. 2, c.2 § 3 (1679).

86 Riley's case, 19 Mass. 171 (1824); Matter of Goodhue, New York City-H. Rec. 153 (1816); *Ex parte* Shaw, 7 Ohio St. 81 (1857).

of course presuppose (expressly or by implication) that the judgment by which the petitioner became a "convict" was rendered by a court possessing general jurisdiction in criminal cases.

It has been urged that the statutory provision about "persons convict" had no bearing on convicts who were applying for the common law writ of habeas corpus,[87] but the force of this argument suffers from the absence of evidence that the scope of review of final criminal judgments was any more comprehensive by means of the common law writ than it was under the Habeas Corpus Act of 1679, or other similar legislation. There is little or no evidence in this country, perhaps because the common law habeas corpus powers were abrogated in some states, were ill defined in others, and in any event could not be exercised during vacation or by individual judicial officers.

The familiar principle that barred convicts from habeas corpus relief —a principle rarely if ever expressly limited to the statutory writ—was enunciated by one court as follows:

> [I]t will be obvious that this court nor no other court nor officer can investigate the legality of a judgment of a court of competent jurisdiction by a writ of *habeas corpus*. If the court has jurisdiction of the subject matter and of the person, although its proceedings may be irregular or erroneous, yet, they cannot be set aside in this proceeding. The party must resort to his writ of error or other direct remedy to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive.[88]

Included among those irregular or erroneous proceedings whose judgment could not be avoided by habeas corpus were those based upon insufficient evidence or mistaken facts,[89] a misdemeanor trial held without the defendant being present,[90] or a proceeding terminating with a judgment or sentence defective in some formality such as omission to state the precise type of misdemeanor of which the defendant was convicted[91] or the correct party to whom a fine should be paid.[92]

87 Brief of Paul A. Freund for Respondent, pp. 30-32, United States v. Hayman, 342 U.S. 205 (1952).

88 *Ex parte* Toney, 11 Mo. 661-62 (1848). The leading case in this country is probably *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1829). The point is discussed at length in The Writ of Habeas Corpus—Its Uses and Abuses, 5 PACIFIC C.L.J. 549 (1880); Note, 26 Am. Dec. 40 (1886).

89 *Ex parte* Toney, 11 Mo. 661, 662 (1848); Stoner v. State, 4 Mo. 614 (1837); Adams v. Vose, 67 Mass. 51, 54-55 (1854).

90 *Ex parte* Tracy, 25 Vt. 93 (1853).

91 *In re* O'Connor, 6 Wis. 288 (1857); State v. Shattuck, 45 N.H. 205 (1864). *Contra:* Matter of Cavanagh, 10 How. Pr. 27 (N.Y. Sup. Ct. 1854).

92 Phinney, Petitioner, 32 Me. 440 (1851).

In order to use habeas corpus to attack an imprisonment under a final criminal judgment the irregularity in the proceedings had to be of such quality as to render the judgment void. A judgment was void under this rule if the court had no jurisdiction over the subject matter.[93] Similarly, it was held that a prisoner would be discharged by habeas corpus if the law he was convicted of violating was unconstitutional,[94] or if the punishment was greater than the court was authorized to impose.[95] A prisoner was also entitled to discharge on habeas corpus if subsequent events such as a pardon or expiration of the term of imprisonment had deprived the judgment of conviction of validity as a basis for the confinement.[96]

A large proportion of the "convicts" who presented habeas corpus applications in state courts had been committed for contempt. Since contempt adjudications were not reviewable by writ of error, certiorari or appeal (in the absence of special statutory authorizations)[97] there were special pressures for habeas corpus review in such cases. This may explain why some decisions permitted habeas corpus review of mere errors or irregularities in contempt commitments.[98] However, most courts seem to have held fast to the usual common law rule that habeas corpus could only upset commitments "pronounced by a court having no jurisdiction or authority in the subject-matter."[99] Despite vigorous attempts to have the habeas corpus tribunal find jurisdictional significance in the circumstances leading to the contempt, courts normally held that jurisdiction in

93 Miller v. Snyder, 6 Ind. 1 (1854).

94 Herrick v. Smith, 67 Mass. 1, 49 (1854); *Ex parte* Booth, 3 Wis. 157 (1854), *rev'd on other grounds*, 62 U.S. (21 How.) 506 (1859). *But cf.* Platt v. Harrison, 6 Iowa 79, (1858) (involving city ordinance).

95 Feenley's case, 66 Mass. 598 (1853); In the Matter of Sweatman, 1 Cow. 147 (N.Y. 1823); *see* Note, 56 U. PA. L. REV. 255 (1908). *But cf. Ex parte* Shaw, 7 Ohio St. 81 (1854) (habeas corpus will not lie when sentence less than minimum authorized).

96 In the Matter of Goodhue, New York City-H. Rec., 153 (1816); *In re* Edymoin, 8 How. Pr. 478 (N.Y. 1853) (county judge in chambers).

97 RAPALJE, CONTEMPT § 141 (1884).

98 *Ex parte* Rowe, 7 Cal. 181 (1857); *Ex parte* Hickey, 12 Miss. 751 (1844). A broader scope of habeas corpus review of contempt commitments was advocated by the Court of Common Pleas in Bushell's Case, Vaughn 135, 142, 124 Eng. Rep. 1006, 1009 (1670).

99 Williamson's Case, 26 Pa. 9, 18 (1855); CHURCH, HABEAS CORPUS § 317 (1884). The leading American decision is *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822), where the Supreme Court, in denying habeas corpus relief to a petitioner committed for contempt by a federal court, held that it should apply the same standard for habeas corpus review of contempt commitments as for review of any judgment after indictment: whether the committing court acted beyond its jurisdiction.

One respected court held that it had no power to inquire into the legality of a contempt commitment made by a court of coordinate authority, but this judgment was reversed. People v. Yates, 4 Johns. R. 317, 361 (N.Y. Sup. Ct. 1809), *rev'd*, 6 Johns. R. 337 (N.Y. 1810).

respect to a contempt commitment simply meant the power to punish for contempt, without regard to how it was exercised in this particular situation.[100] In one leading case the court declared:

> Does anybody doubt the jurisdiction of the District Court to punish contempt? Certainly not. All courts have this power, and must necessarily have it; otherwise they could not protect themselves from insult, or enforce obedience to their process. Without it, they would be utterly powerless. The authority to deal with an offender of this class belongs exclusively to the court in which the offence is committed; and no other court, not even the highest, can interfere with its exercise, either by writ of error, *mandamus*, or *habeas corpus*.[101]

Habeas corpus was an effective remedy when a contempt commitment had been entered by a committing magistrate having no jurisdiction or authority to commit for contempt,[102] when the prisoner was held without a formal adjudication of contempt,[103] and when the committing authority had lost jurisdiction because the case out of which the civil commitment had arisen was no longer before the court.[104] These same principles were also applied to commitments for contempt of legislative bodies.[105]

B. *Civil Arrest or Commitment*

The availability of the statutory writ of habeas corpus for relief from civil arrests or commitments was severely restricted by section 8 of the Habeas Corpus Act of 1679, which provided that "nothing in this act shall extend to discharge out of prison any person charged in debt, or other action, or with process in any civil cause . . . ."[106] Identical or substantially identical provisions were included in almost all of the early American habeas corpus acts, which were patterned after the

100 Williamson's Case, 26 Pa. 9 (1855); *Ex parte* Cohen and Jones, 5 Cal. 494 (1855); *Ex parte* Adams, 25 Miss. 883 (1853); State v. Towle, 42 N.H. 540 (1861); People v. Cassels, 5 Hill. 164 (N.Y. 1843) (permitting the petitioner to introduce extrinsic evidence to contradict the recitals of jurisdiction); Jordan v. State, 14 Tex. 436 (1855).

101 Williamson's Case, 26 Pa. 9, 18 (1855).

102 *In re* Remington, 7 Wis. 643 (1859); Clarke's Case, 66 Mass. 320 (1853).

103 *Ex parte* Adams, 25 Miss. 883 (1853).

104 *Ex parte* Maulsby, 13 Md. 625 (1859) (single judge); *Ex parte* Rowe, 7 Cal. 175 (1857).

105 Falvey & Kolrourn v. Massing, 7 Wis. 630 (1859); Burnham v. Morrissey, 80 Mass. 226 (1859).

106 31 Car. 2, c.2 § 8 (1679). In addition, the sec. 3 authority to grant the writ of habeas corpus during vacation specifically refers to persons "other than persons convict or in execution by legal process."

English legislation.[107] These provisions were generally construed to render the habeas corpus legislation inapplicable to parties held by civil process.[108] Of course the common law habeas corpus powers usually were theoretically available, but there were few, if any, reported instances where they were used in this area. Consequently, unless the traditional form of legislation was altered,[109] the writ of habeas corpus was not a workable remedy for relief from civil commitment in most states.[110]

The principal civil arrests or commitments affected by the habeas corpus law were the *capias ad respondendum*, a mesne process by which the sheriff was commanded to take the named party into custody in order to have him before the court to answer the plaintiff in an action at law, and the *capias ad satisfaciendum*, a writ of execution by which the sheriff was commanded to take a defendant into custody in order to have him before the court to satisfy the damages or debt named in the court's judgment.[111]

Each of these means of confinement was the subject of special legislation relating to the availability of habeas corpus. A few states gave their courts or judicial officers the power to use the writ of habeas corpus to discharge persons held upon mesne process who had given reasonable bail.[112] Far more significant statutory changes related to the *capias ad satisfaciendum*, the process by which persons were imprisoned for debt. Commencing about 1830 most states enacted legislation that permitted insolvent debtors to obtain relief from imprisonment for obligations founded on contract.[113] The writ of habeas corpus was made available to enforce the release of debtors who had won their right to release by complying with the provisions of this legislation, and there are numerous reported cases where it was so used.[114] In other cases, where civil com-

107 *E.g.*, MASS. GEN. LAWS 1784, ch. 72, § 1; N.Y. LAWS 1787, ch. 39, § 8; PA. GEN. LAWS 1700-1849, ch. 81, § V.

108 Peltier v. Pennington, 14 N.J. 312 (1834) (Chief Justice in chambers); *Ex parte* Wilson, 10 U.S. (6 Cranch) 52 (1810); Cable v. Cooper, 15 Johns. R. 152, 155 (N.Y. Sup. Ct. 1818); *Contra*: Hecker v. Jarret, 3 Binn. 404, 410-11 (Pa. 1811). *Cf.* State v. Ward, 8 N.J. 120 (1825) (Justice in chambers).

109 Some habeas corpus acts of states entering the union after 1800 either omitted the exception for persons held under civil commitment or were expressly applicable to confinement under civil process. ILL. REV. CODE 1827 p. 237-38, §§ 1, 2; 2 OHIO STATS. 1788-1833 p. 754-55, § 1; see Hathaway v. Holmes, 1 Vt. 405, 415-16 (1828).

110 Bank of United States v. Jenkins, 18 Johns. R. 237, 240 (N.Y. Sup. Ct. 1820) (dictum); Geyer v. Stoy, 1 Dall. 135 (Pa. Sup. Ct. 1785) (*semble*).

111 BLACK, LAW DICTIONARY 262 (4th ed. 1951).

112 MASS. GEN. LAWS 1784 ch. 72, §§ 1, 5; 2 N.H. LAWS 1815, ch. 45, §§ 1, 5. One court used this authority to discharge a person held by a *capias ad respondendum*.

113 *E.g.*, Act of April 26, 1831, § 46, N.Y. STAT., p. 415 (Blatchford 1851). See generally HURD, HABEAS CORPUS ch. 3 (1858).

114 *Ex parte* Beatty, 12 Wend. 229 (N.Y. Sup. Ct. 1834); Burroughs v. Willett, 15

mitments continued to be used but where special legislation made the writ available to those confined, the usual rules governing the issuance of habeas corpus prevailed. The writ could not be employed where the judgment upon which the execution was issued was only erroneous or contained merely formal defects,[115] but it would effect the release of those held by court orders issued without jurisdiction[116] or, in the case of mesne process, without the necessary supporting affidavits in proper form.[117]

C. *Restraints other than Civil or Criminal Arrest or Commitment*

A prisoner could also use the writ of habeas corpus to obtain freedom from restraints other than civil or criminal arrest or commitment. The reported cases in this category fall into three areas: confinement by military authorities, commitment of the insane and slavery.

There are at least two recorded instances in which state courts issued the writ of habeas corpus to release a private citizen from confinement by federal military authorities.[118] This circumstance, which was repeated several decades later in the celebrated federal habeas corpus cases of *Ex parte Milligan*[119] and *Ex parte Merryman*,[120] reveals the writ of liberty performing what is perhaps its most essential task: freeing persons from illegal official restraints of liberty not founded in judicial action. A less essential use of the writ is revealed in the numerous cases where members of the armed forces successfully employed it to obtain a ruling on the validity of the restraints imposed upon them by contracts of enlistment.[121]

How. Pr. 210 (N.Y. Sup. Ct. 1857); State v. Sheriff, 15 N.J. 68 (1835); *Ex parte* Davis, 18 Vt. 401 (1846).

115 Bell v. Miller, 4 Gill 301 (Md. 1846); Wiles v. Brown, 3 Barb. 37 (N.Y. Sup. Ct. 1848); *Ex parte* Kellogg, 6 Vt. 509 (1834); CHURCH, HABEAS CORPUS § 383 (1884). Another barrier to relief in these cases was the insistence of some courts that the petitioner's correct remedy was not habeas corpus but a motion to the court that had issued the *capias ad satisfaciendum*. Davis v. Lecky, 1 Watts 66 (Pa. 1832); Bank of United States v. Jenkins, 18 Johns. R. 305 (N.Y. Sup. Ct. 1820).

116 Commonwealth v. Hambright, 4 S. & R. 147 (Pa. 1818); *In re* Blair, 4 Wis. 522, 534 (1854).

117 Soule v. Hayward, 1 Cal. 345 (1850); Dwire v. Saunders, 15 Ind. 306 (1860) (dictum).

118 Matter of Stacy, 10 Johns. R. 328 (N.Y. Sup. Ct. 1813); State v. Wederstrandt, Charlton's Rep. 213 (Ga. 1808). The jurisdictional question raised when a state court is petitioned to issue its writ to a federal officer is discussed in text following note 164 *infra*.

119 71 U.S. (4 Wall.) 2 (1866).

120 17 Fed. Cas. 144 (C.C.D. Md. 1861) (Taney, C.J.).

121 *Ex parte* Cain, 39 Ala. 440 (1846); *Ex parte* Mitchell, 39 Ala. 442 (1864); Mims v. Burdett, 33 Ga. 587 (1863); Commonwealth v. Cushing, 11 Mass. 67 (1814); Walker

Another restraint that was challenged by the writ of habeas corpus was that imposed upon inmates of hospitals for the insane. Judging from the scarcity of reported cases, such challenges were rare. The only noteworthy opinion in this period was that of Chief Justice Shaw of the Supreme Judicial Court of Massachusetts, which denied habeas corpus relief to a lunatic by the name of Oakes.[122] The following portions of the court's opinion are instructive of the law applied in such cases.

> It has been argued, that the constitution makes it imperative upon the court to discharge any person detained against his will; and that by the common law, no person can be restrained of his liberty, except by the judgment of his peers, or the law of the land. But we think there is no provision, either of the common law or of the constitution, which makes it the duty of the court to discharge every person, whether sane or insane, who is kept in confinement against his will.
>
> * * *
>
> The right to restrain an insane person of his liberty, is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others. In the delirium of a fever, or in the case of a person seized with a fit, unless this were the law, no one could be restrained against his will. And the necessity which creates the law, creates the limitation of the law.
>
> * * *
>
> The question must then arise, in each particular case, whether a person's own safety or that of others requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation.[123]

The court concluded from the evidence presented in a two-day hearing that the petitioner should continue to be restrained, and remanded him to the asylum.

The availability of the writ of habeas corpus in cases involving the institution of slavery seems to have been dictated more by geography than by doctrine. In northern states there were cases in which the writ

---

v. Morris, 3 AM. JURIST 281 (Mass. 1830); State v. Dimick, 12 N.H. 194 (1841); Matter of Carleton, 7 Cow. 471 (N.Y. Sup. Ct. 1827); United States v. Wyangall, 5 Hill. 16 (N.Y. Sup. Ct. 1843); Commonwealth v. Gamble, 11 S. & R. 93 (Pa. 1824); *Ex parte* Coupland, 26 Tex. 386 (1862); Mann v. Parke, 57 Va. 443 (1864).

122 Matter of Oakes, 8 Monthly Law Reporter 122 (Sup. Jud. Ct. Mass. 1845) (not officially reported).

123 *Id.* at 124-25.

of habeas corpus was issued in behalf of a person who was claimed as a slave, and on the return of the writ the court held a hearing on the issue of his freedom and either discharged him as a free man or remanded him to his custodian on the ground that he was not.[124]

In the South the "writ of liberty" generally would not lie when the petitioner was a colored person and when the individual making the return claimed that he held the petitioner in servitude. The principal rationale for this rule was the master's right to a jury trial on the issue of his property in the slave.[125] The following opinion is representative of the courts' reasoning on this question:

> In our opinion the constitution of this state, which declares that the right of trial by jury shall remain inviolate, guaranties to the master in such case the right to have a jury pass upon his claim, and we apprehend the legislature could no more divest him of his right to his slave by the fiat of a single individual, than of his freehold. If he can be deprived of the right of trial by jury in respect of the legal claim to his slave, the same principle might deprive the citizen of jury trial in respect to all property.[126]

Another court asserted that the writ of habeas corpus was not an appropriate remedy anyway, since a decision to discharge the petitioner would not be res judicata on his right to freedom and would not prevent the respondent from immediately taking him into custody again.[127] The

124 Arabas v. Ivers, 1 Conn. 92 (1784); State v. Raborg, 5 N.J.L. 642 (1819) (*semble*); Commonwealth v. Holloway, 6 Binn. 213 (Pa. 1814). See also MD. CONST. art. I, § 12 (1864). *Cf.* Wright v. Deacon, 5 S. & R. 61 (Pa. 1819); Sim's Case, 61 Mass. 285 (1851) (fugitive slave act confinements).

An early New Jersey statute assumes the availability of this writ to remove "any negro, mulatto, mestee, or Indian" out of the possession of anyone claiming his service, but it provided a means by which the custodian could have a jury trial of the issues joined therein. N.J. REV. LAWS 1820 p. 376, § 29.

125 Renney v. Mayfield, 4 Hay. 165 (Tenn. 1817); Thornton v. Demoss, 13 Miss. 609 (1846); case cited in note 126 *infra*. Whatever the merit of this reasoning in a system of law that recognized slavery, it would have no force in one that did not. Thus, in a famous case where a writ of habeas corpus was used to free a negro slave about to be sent to Jamaica by his American owner, Lord Mansfield refused to be influenced by the argument that a judgment holding that the slave became entitled to his freedom by being brought into England would also have the effect of setting at liberty at least 14,000 others held in that country. Slavery, he said, "is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." The Negro Case, 20 How. St. Tr. 1, 72, 82 (1773).

126 Field v. Walker, 17 Ala. 80, 82 (1849). The issues posed by the return to a writ of habeas corpus were of course normally tried by the court. See note 209 *infra*.

127 Weddington v. Sloan, 54 Ky. 147, 154 (1854). *Accord*, State v. Brearly, 5 N.J.L. 653, 660 (1819) (prior order discharging petitioner because enlistment void not res judicata in subsequent petition).

Although an order entered in a habeas corpus proceeding generally had no res

prevalence of statutes patterned after the English provision penalizing the respondent for recapturing a petitioner discharged by habeas corpus[128] makes the later proposition questionable, at least in states whose penalty provision was not limited to recaption of persons released from criminal commitment.

States that had created a statutory remedy at law by which alleged slaves could litigate the issue of their freedom denied such persons access to habeas corpus on the ground that the statutory remedy was exclusive.[129] States that lacked such a statutory remedy sometimes withheld the benefits of the writ because (it was said) the slave could litigate his right to freedom by an action at law against his master for trespass or false return (to the writ of habeas corpus).[130] In applying these rules southern courts also relied upon or at least referred to a new rule that color was prima facie evidence of liability to servitude,[131] and to an old principle that the petitioner could not introduce evidence contradicting the facts set out in the return.[132]

Although southern courts were apparently unanimous in denying the writ of habeas corpus *ad subjiciendum* to slaves,[133] these same courts usually declared that the writ was available to persons of color who had been granted their freedom.[134] The crucial distinction was between

---

judicata effect, the ruling was binding on the parties in subsequent litigation where the real object of the first proceeding was "to obtain a decision upon some claim of right" by either party. 1 FREEMAN, JUDGMENTS § 324 (4th ed. 1892). Thus, an order on a petition for habeas corpus in a child custody dispute was conclusive on the parties so long as the facts remained the same. *E.g.*, Mercein v. People, 25 Wend. 64 (N.Y. Ct. ERR. 1840); cases cited in Note, 35 AM. DEC. 668, 669 (1886). That same principal was later applied to habeas corpus cases involving the validity of a contract of enlistment, FREEMAN *op. cit. supra*, and undoubtedly should also have been applied to cases involving a slave's right to freedom. *Cf.* Alexander v. Stokeley, 7 S. & R. 299 (Pa. 1821) (*homine replegiando* in slavery case). See also authorities cited note 66 *supra*.

128 31 Car. 2, c.2, § 6 (1670) (only applied to persons afterward "imprisoned or committed for the same offense"); Act of Dec. 17, 1796, § 6, 1 KY. DIGEST OF STAT. LAW 775 (1834) (same); 1 MASS. GEN. LAWS, ch. 72, § 12 (1823) (applies to recaption of any person "discharged by habeas corpus"); 2 N.Y. REV. STATS. 1828, p. 571, § 59 (same).

129 Field v. Walker, 17 Ala. 80 (1849); Thornton v. Demoss, 13 Miss. 609 (1846); ILL. REV. CODE 1827, p. 241, § 8; see DeLacy v. Antoine, 34 Va. 438, 443 (1836).

130 Renney v. Mayfield, 4 Hay. 165 (Tenn. 1817); see Clark v. Gautier, 8 Fla. 360, 363 (1859).

131 Field v. Walker, 17 Ala. 80 (1849); Clark v. Gautier, 8 Fla. 360 (1859); Thornton v. Demoss, 13 Miss. 609 (1846). *But cf.* State v. Philpot, Dudley's Rep. 46, 52 (Ga. 1831).

132 Renney v. Mayfield, 4 Hay. 165 (Tenn. 1817); authorities cited note 5 *supra*. *But cf.* DeLacy v. Antoine, 34 Va. 438, 443, 448 (1836).

133 Other varieties of habeas corpus were of course available to bring a slave before the court for purposes ancilliary to other litigation. *E.g.*, see Sam v. Fore, 20 Miss. 413 (1849).

134 Field v. Walker, 17 Ala. 80, 82 (1849); Clark v. Gautier, 8 Fla. 360, 363-67 (1859); cases cited notes 136 and 137 *infra*. *Contra*, Thornton v. Demoss, 13 Miss. 609 (1846).

those cases in which an issue as to the petitioner's status was "really involved" or where there was a "real contest and fair subject of controversy"—where the writ was denied[135]—and those cases where there was "no real litigation as to the right to freedom"—where the writ might be granted.[136] Thus, in Virginia and Georgia cases where the petitioners attached documentary evidence of their freedom and where the respondent claimed they were slaves but did not aver in the return that they were his slaves, the petitioners were discharged by means of the writ of habeas corpus.[137]

D. *Third-Party Uses of the Writ to Obtain Custody of the Prisoner*

In the habeas corpus cases considered thus far the petitioner was the prisoner himself, or (if he was unable to initiate the petition) another person asserting the prisoner's right to freedom by a petition brought in his behalf.[138] In contrast, there is a fourth group of habeas corpus cases in which the third party sought the petition at least partially in his own behalf, not striving to win the prisoner's freedom but seeking rather to win the right to the prisoner's custody for himself. These cases ranged all the way from instances of masters seeking possession of slaves to cases of parents using the writ to adjudicate the right to custody of a child. In these cases the writ was used almost as if the prisoner were property whose rightful ownership or possession was at issue. The analogy to the writ of replevin is obvious, and, indeed, in some states an ancient variation of that writ, the writ *de homine replegiando*, was resurrected and used as an alternate to the writ of habeas corpus.

1. *Child Custody.* Early state habeas corpus controversies over the custody of minors involved exclusively the common-law writ of habeas corpus, since the English Habeas Corpus Act and similar American legislation only applied to persons committed for criminal matters. Even the remedial legislation authorizing the writ of habeas corpus to inquire into any case of illegal restraint of liberty probably did not apply in the usual child custody case where the respondent was a parent or guardian, since the restraint imposed by such persons could rarely be termed "illegal."[139] On the other hand, the common law could not

135 Field v. Walker, 17 Ala. 80, 82 (1849); Clark v. Gautier, 8 Fla. 360, 367 (1859).

136 DeLacy v. Antoine, 34 Va. 438, 444 (1836).

137 *Ibid.;* State v. Philpot, Dudley's Rep. 46 (Ga. 1831). *Cf.* Ruddle v. Ben, 37 Va. 437 (1839).

138 CHURCH, HABEAS CORPUS § 91 (1884); Note, *Right of Stranger to Writ of Habeas Corpus,* 9 L.R.A. (n.s.) 1173 (1907).

139 *E.g.,* State v. Smith, 6 Me. 462, 466-67 (1830); Foster v. Alston, 7 Miss. 406, 456-57 (1842); People v. Wilcox, 22 Barb. 178, 187-89 (N.Y. Sup. Ct. 1854); Gishwiler v. Dodez, 4 Ohio St. 615, 621 (1855).

be too technical about the nature of the restraint in such cases or the habeas corpus remedy would fail altogether.[140]

The first problem posed for one seeking to invoke the common law writ of habeas corpus to obtain custody of a minor and an adjudication of guardianship was the fact that this writ was traditionally used simply to relieve a person from a restraint on his liberty. Could one realistically speak of a restraint on the liberty of a child too young to exercise any choice as to his surroundings? Moreover, could the court give any more relief by means of the writ of habeas corpus than merely to free the child so that he might go where he chose?

Where a child had attained the age of discretion (which seems to have been about fourteen years,[141] although the courts were never very precise about it), the common law courts adhered to the traditional habeas corpus approach and simply ordered that the restraints on the child's liberty be removed so that he could go where he chose.[142] Sometimes the court ordered its officers to protect such a minor for a time to prevent his recaption by the original custodian, but the court would not deliver him into the custody of the relator.[143]

Where a child was under the age of discretion, however, nothing was to be accomplished simply by ordering the restraints removed. In this circumstance a habeas corpus court had to choose between either declining to entertain the writ or departing from the traditional scope of habeas corpus by granting the writ, determining who should have custody, and ordering the child delivered to the proper custodian. For a time the common law courts seemed to be embracing both alternatives.

In 1724 Lord Raymond, after first doubting whether he could go farther than seeing that the child was under no illegal restraint, ordered a nine-year-old delivered to her guardian, the petitioner.[144] Ten years later that case was overruled in a petition brought by a father for his

140 In the Matter of Mitchell, Charlton's Rep. 489, 492 (Ga. 1836): "To confine the writ of *habeas corpus* at common law exclusively to cases of illegal *confinement*, would be destructive of the ends of justice. It would enable a kidnapper to maintain possession of a child of tender years (taken by him by fraud or force from the bosom of its family), merely because its want of legal discretion would preclude the idea of its being confined against its will. I apprehend that it is not going too far to say, that the interests and welfare of society require, that under peculiar circumstances, the fact that the child of tender years is *detained* improperly from the custody of the person entitled to its possession is sufficient to ground and maintain the writ of *habeas corpus*." *Accord*, Trainer v. Cooper, 8 How. Pr. 288 (N.Y. Sup. Ct. 1853).

141 Queen v. Clarke, 7 El. & Bl. 186, 196-97, 119 Eng. Rep. 1217, 1221 (Ex. 1856). *Habeas Corpus, Custody of Infant*, 15 CENT. L.J. 281, 283 (1882).

142 Authorities cited notes 143, 145, and 157 *infra*.

143 *E.g.*, Rex v. Clarkson, 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1721).

144 Rex v. Johnson, 1 Str. 579, 93 Eng. Rep. 711 (K.B. 1724).

thirteen-year-old.[145] The judges resolved "that upon this writ they could only deliver him out of the custody of the aunt, and inform him he was at liberty to go where he pleased."[146] When the boy chose to to remain with his aunt the judges took no further action because "the right of guardianship could not be determined by them in this summary way . . . ."[147] Three decades later the pronouncement in the case was itself rejected by Lord Mansfield in his important dictum in *Rex v. Delaval*,[148] probably the best known and most influential habeas corpus authority imported into this country with the common law. In that case, which involved an order discharging from all restraint an eighteen-year-old girl who was alleged to have been detained by a third party for immoral purposes, Lord Mansfield asserted a power (which he did not exercise) to resolve custody matters on habeas corpus, coupled with broad discretion on whether it should be exercised in any given case:

> In cases of writs of habeas corpus directed to private persons "to bring up *infants*," the court is bound, *ex debite justiciae*, to set the infant *free from an improper restraint*: but they are *not bound* to *deliver them over* to any body nor to give them any *privilege*. This must be left to their *discretion*, according to the circumstances that shall appear before them.[149]
>
> * * *
>
> The true rule is, "that the court are to judge upon the circumstances of the particular case; and to give their directions accordingly."[150]

The proposition relating to discretion was imperative to the proper administration of Mansfield's rule on the power to resolve custody questions. If habeas corpus courts were to have power to determine the right of guardianship, they had to have discretion in whether to exercise that power, especially in the usual case where a child was in the custody of the mother. Otherwise, the common law rule giving the father the legal right of custody[151] would give him an absolute power—exercisable by habeas corpus—to have a court order the mother to

145 Rex v. Smith, 2 Str. 983, 93 Eng. Rep. 983 (K.B. 1734).

146 *Ibid.*

147 *Ibid.*

148 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763).

149 *Id.* at 1436, Eng. Rep. at 914.

150 *Id.* at 1437, Eng. Rep. at 914.

151 *E.g.*, King v. DeManneville, 5 East 221, 223, 102 Eng. Rep. 1054, 1055 (K.B. 1804). In his argument in Paine v. Paine, 23 Tenn. 523, 526 (1843), counsel said of this rule: "It is a universal principle in civilized nations. It is the natural law—the Christian law. It is founded on the physical, moral and intellectual superiority of the male sex. It results from the duty devolved by law on the father, to maintain, educate and protect his children. To discharge the duty, requires the power and involves the right."

surrender custody of the child to him, whatever the circumstances.[152] This is exactly what began to happen in England when habeas corpus courts assumed Mansfield's power to resolve custody controversies, but neglected to exercise the discretion he asserted.[153] The consequence of their opinion that they "must" make an order for proper legal custody in all cases tendered by habeas corpus[154] were orders tearing children away from their mothers and delivering them to fathers in circumstances so offensive that the law eventually had to be changed by Parliament.[155]

The American decisions seem to have been in agreement that where the child had attained the age of discretion, the habeas corpus court could only order him set at liberty, and could not adjudicate who should be his custodian and order him delivered to that person.[156] One opinion on this question states the court's want of power in this circumstance so broadly as to preclude custody and delivery orders even where the children were under the age of discretion,[157] but when that circumstance arose for litigation this same court found adequate common law power to make the appropriate order.[158]

In other states, especially where courts had asserted their inability to resolve any custody questions by habeas corpus,[159] legislatures enacted measures that authorized use of the writ of habeas corpus in custody battles between husband and wife and specifically empowered the court to award custody according to the welfare of the child.[160] Such legislation was narrowly drawn and the reported cases show that

152 If the father already had custody, his paramount legal right would preclude habeas corpus relief for the mother. *Ex parte* Skinner, 9 Moore C.P. 278, 281 (Ch. 1824); State v. Stigall, 22 N.J. L. 286, 288-89 (1849).

153 Cases cited notes 151 and 152 *supra* and 154 *infra*.

154 King v. Greenhill, 4 Adol. & El. 624, 111 Eng. Rep. 922 (K.B. 1836).

155 2 & 3 Vict. c. 54 (1839). See discussion in Mercein v. People, 25 Wend. 64, 104-05 (N.Y. Ct. Err. 1840).

156 People v. Chegaray, 18 Wend. 637, 642-43 (N.Y. Ct. Err. 1836) (dictum); In the Matter of Kottman, 2 Hill 363 (S.C. 1833), case cited note 157 *infra*.

157 State v. Cheeseman, 5 N.J. L. 522, 525 (1819): "It is for the relief of the prisoner, and the prisoner only. It is to inquire why the liberty of the citizen is restrained. This, then, is its legitimate and only object—to relieve from restraint and imprisonment. . . . If one of two parties unlawfully restrain and imprison the person about whom the contest arises, the writ steps in and relieves from restraint, but leaves the contest, as to possession, to be decided in another mode."

158 Mayne v. Baldwin, 5 N.J. Eq. 454 (Ch. 1846); State v. Stigall, 22 N.J. L. 286 (1849).

159 See, *e.g.*, People v. Chegaray, 18 Wend. 637, 643 (N.Y. Ct. Err. 1836). Several decades later the New York courts were able to find a common law power of delivery by habeas corpus, although the common law continued to impose its strong advantages in favor of the father. Trainor v. Cooper, 8 How. Pr. 288 (N.Y. Sup. Ct. 1853).

160 *E.g.*, 2 N.Y. REV. STATS. 1828, pp. 148-49; IND. REV. STATS. 1843, ch. 35, §§ 73-77, p. 606.

the moving party was frequently left to his common law remedy where the custodian was the grandparent or guardian instead of the parent.[161]

Thanks to the devotion paid to Lord Mansfield and his dictum in *Delaval*, most American states were able, through the natural development of the common law, to reject the rigid English approach and to use the writ of habeas corpus as a viable and relatively fair means of resolving custody disputes in a manner best adapted to serve the welfare of the child.[162] There are numerous cases where courts asserted and exercised their powers to resolve issues on the guardianship of young children by habeas corpus. In some instances courts exercised their discretion to refuse habeas corpus relief to one who was probably the rightful legal custodian, when to do so would interfere with a custody (normally the mother's) that they thought best for the child.[163] In many other cases courts exercised the anomalous common law authority asserted by Mansfield, and ordered that the subject children, brought into court by means of the writ of habeas corpus, be delivered into the custody of the petitioner.[164]

2. *Enlistees in Armed Forces; Master-Apprentice.* When a claim to the custody of a minor stemmed from the relation of master-apprentice or from a contract of enlistment in the armed forces the principles evolved in child-custody controversies were generally controlling, but each of these cases involved additional problems.

Habeas corpus cases involving minor members of the armed forces

161 Trainor v. Cooper, 8 How. Pr. 28 (N.Y. Sup. Ct. 1853); People v. Wilcox, 22 Barb. 178 (N.Y. Sup. Ct. 1854); Mercein v. People, 25 Wend. 64, 83, 95 (N.Y. Ct. Err. 1840); Young v. State, 15 Ind. 480 (1861). The identity of the respondent could have a determining effect on the court's power to give relief if the court applied the rigid commonlaw rules in favor of the father's legal right in commonlaw cases and the liberal discretionary authorizations in cases covered by the statutes. *Cf.* Trainor v. Cooper, *supra.* One wonders if this difference does not explain why counsel for fathers so often brought commonlaw habeas corpus proceedings and named as custodian-respondent not the wife, but rather the maternal grandfather with whom she resided. *E.g.*, Mercein v. People, *supra;* Barry v. Mercein, 3 Hill 399 (N.Y. Sup. Ct. 1842).

162 See generally, HURD, HABEAS CORPUS 465-536 (1858); CHURCH, HABEAS CORPUS §§ 438-52 (1884); *Habeas Corpus—Custody of Infant*, 15 CENT. L.J. (1882); *Habeas Corpus Proceedings for the Release of Infants*, 36 CENT. L.J. 385 (1903).

163 Nickols v. Giles, 2 Conn. 461 (1796); In the Matter of Mitchell, Charlton's Rep. 489 (Ga. 1836); Whitney v. Whitney, 1 Chi. Leg. News 37 (Cook Co. Ct., Ill. 1868); State v. Smith, 6 Me. 462 (1830); Foster v. Alston, 7 Miss. 406 (1842); State v. Stigall, 22 N.J. L. 286 (1849); Mercein v. Barry, 25 Wend. 64 (N.Y. Ct. Err. 1840); Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813); Paine v. Paine, 23 Tenn. 523 (1843).

164 Wright v. Johnson, 5 Ark. 687 (1844); *Ex parte* Ralston, Charlton's Rep. 119 (Ga. 1824); In the Matter of Mitchell, Charlton's Rep. 489 (Ga. 1836); Bounell v. Berryhill, 2 Ind. 613 (1851); cases cited note 158 *supra;* Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203 (1834); People v. Nickerson, 19 Wend. 16 (N.Y. Sup. Ct. 1837); Ward v. Roper, 26 Tenn. 111 (1846).

posed the question whether a state court had jurisdiction to issue the writ for a person held in the custody of a federal officer. With the exception of doubts expressed by Chancellor Kent in one early New York case,[165] state court opinions and judgments seem to have been unanimous in favor of the jurisdiction.[166] When Kent joined a court freeing a prisoner from the custody of United States Army officers[167] and then wrote approvingly of these cases in his influential *Commentaries on American Law*,[168] the issue was conclusively settled in favor of the jurisdiction.[169] In 1859 the United States Supreme Court upset these state decisions in *Ableman v. Booth*.[170] As would be expected, however, southern courts persistently sustained state court jurisdiction,[171] and state writs of habeas corpus for members of the armed forces vexed the Confederacy during the War Between the States.[172]

Some courts were unwilling to make the writ of habeas corpus available to a master seeking to obtain the release of his minor apprentice because the master had a right to an action at law against the person alleged to have seduced the apprentice from his service.[173] However,

165 In the Matter of Ferguson, 9 Johns. R. 239 (N.Y. Sup. Ct. 1812).

166 Sims Case, 61 Mass. 285, 309 (1851) (dictum that issuance of habeas corpus "is constantly done, in cases of soldiers and sailors, held by military and naval officers, under enlistments complained of as illegal and void."); cases cited in notes 118 and 121 *supra;* Commonwealth v. Harrison, 11 Mass. 63 (1814); State v. Dimick, 12 N.H. 194 (1841); State v. Brearly, 5 N.J.L. 555 (1819); In the Matter of Carlton, 7 Cow. 471 (N.Y. Sup. Ct. 1827); numerous cases involving members of the armed forces are discussed and quoted in HURD, HABEAS CORPUS 164-202 (1858).

167 In the Matter of Stacy, 10 Johns. R. 327 (N.Y. Sup. Ct. 1813).

168 1 KENT, COMMENTARIES ON AMERICAN LAW 400 (4th ed. 1840).

169 At least one state made its habeas corpus act unavailable to persons held by the authority of federal courts or military officers. ILL. REV. CODE 1827, § 8, p. 240.

170 62 U.S. (21 How.) 506 (1859).

171 *E.g.*, Mims v. Wimberly, 33 Ga. 587 (1863).

172 *Ibid.; Ex parte* Lockhart, 39 Ala. 450 (1864); *Ex parte* Barton, 39 Ala. 452 (1864); *Ex parte* Graham, 39 Ala. 454 (1864); *Ex parte* Lee, 39 Ala. 457 (1864); *Ex parte* Graham, 39 Ala. 459 (1864); *Ex parte* Starke, 39 Ala. 475 (1864); State *ex rel.* Ellerbe v. Daniel, 39 Ala. 546 (1865); cases cited note 121 *supra* from Alabama, Georgia, Virginia and Texas; cases cited in ROBARDS, DECISIONS OF THE SUPREME COURT OF TEXAS RENDERED UPON APPLICATIONS FOR WRITS OF HABEAS CORPUS DURING THE TERMS IN 1862, 1863, 1864 AND 1865 (1865).

173 Lea v. White, 36 Tenn. 73, 74 (1856) ("The object of the writ of habeas corpus was not to enable persons to assert a right to property, or to the services of another, but to protect the liberty of the subject. An action on the case for seducing the apprentice from the master's service, instead of a habeas corpus, would have been a proper remedy.").

The availability of the legal remedy was also given as a reason for denying the writ on discretionary grounds. In the Matter of Ferguson, 9 Johns. R. 239 (N.Y. Sup. Ct. 1812); Commonwealth v. Robinson, 1 S. & R. 352 (Pa. 1815) (as an alternative ground the court held there was no restraint reachable by habeas corpus since the minor wished to remain in the Army).

most courts seem to have been willing to use the writ to adjudicate the validity of the restraints under which the apprentice was held.

Since the minors involved in enlistment and apprenticeship relationships were normally old enough to exercise some choice as to their custodian, the type of remedy given by the habeas corpus court typically corresponded to that involved in those child-custody cases where the minor had attained the age of discretion. Where it was shown that a master had no legal right to the continued custody of a minor apprentice,[174] or where it was demonstrated that a contract of enlistment gave no basis for restraining the liberty of the enlistee,[175] the court normally adjudicated the invalidity of the restraint and ordered the minor discharged, giving him liberty to go where he pleased. In some cases the court even assured the minor the temporary presence of officers of the court to protect him in his choice.[176] As in the comparable child-custody cases, some of these opinions implied that courts had no power to order custody transferred from the respondent to the petitioner.[177] On the other hand, two respected courts suggested by implication or by dictum that they enjoyed such power at common law,[178] and in one notable case the Supreme Judicial Court of Massachusetts expressly ordered that a minor "be discharged from the custody of the respondent [U.S. Navy], and restored to that of the guardian."[179]

3. *Slaves.* The rules governing an alleged slave's access to the writ of habeas corpus to litigate his right to freedom were discussed in an earlier section. The geographical differences noted there are also

174 Commonwealth v. Hamilton, 6 Mass. 273 (1810); In the Matter of M'Dowle, 8 Johns. R. 328 (N.Y. Sup. Ct. 1811). *Cf.* Newman's Case, Ohio Dec. Reprints 22 (Ct. Com. Pleas 1843) (writ denied on the merits).

175 Commonwealth v. Harrison, 11 Mass. 63 (1814); Commonwealth v. Fox, 7 Pa. 336 (1847); *cf.* State v. Brearly, 5 N.J.L. 653 (Sup. Ct. 1819); Commonwealth v. Murray, 4 Binn. 487 (Pa. 1812) (writ denied on the merits).

176 Cases cited note 174 *supra.*

177 *E.g.*, In the Matter of M'Dowle, 8 Johns. R. 328, 332 (N.Y. Sup. Ct. 1811); *cf.* case cited note 173 *supra.* The commentators argued that an order for the delivery of an apprentice effectively denied him a jury trial on issues respecting the validity of his indenture of apprenticeship, and granted his master specific performance on a contract for personal services. HURD, HABEAS CORPUS 545-48 (1858); CHURCH, HABEAS CORPUS § 445 (1884).

178 Commonwealth v. Harrison, 11 Mass. 63, 66 (1814); Commonwealth v. Robinson, 1 S. & R. 353, 356 (Pa. 1815) ("But a habeas corpus may be issued at common law, under which courts have gone so far, as to deliver the body of an infant to his parent, and sometimes an apprentice to his master. It is discretionary, however, whether to proceed to that length or not.").

179 Commonwealth v. Downes, 41 Mass. (24 Pick.) 227, 232 (1836). An Indiana statute impliedly enacts the same rule by providing: "Writs of *habeas corpus* shall be granted in favor of parents, guardians, masters and husbands . . . ." 2 IND. REV. STATS. 1852, p. 320, § 737.

apparent in cases where the petitioner was a third person seeking to obtain custody of the alleged slave.

In the South, where the master's right to a jury trial before being deprived of his property prevented slaves from litigating their right to freedom by habeas corpus, somewhat the same considerations seem to have prevented slave owners from using the writ to recover possession of slaves. An 1845 Virginia decision, where a slaveowner sought the writ to effect the release from the penitentiary of a Negro felon who was alleged to be his slave, expresses the traditional doctrine:

> It may be that the owner of a slave, in ignorance that he is prosecuted, might be the subject of wrong. But this Court cannot therefore now undertake to unsettle the law, and legislate for his redress. This writ never seems to have been given in contemplation of its executing the office it is now called upon to perform. It is a high prerogative writ, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It was framed for the security of liberty. It is now asked by persons claiming to be masters, for the restoration of their slave to their possession. It is not prayed for by *William Mayo,* but by his masters; and it seems to the Court that it cannot be granted on their application, when on the same facts it would be denied on his own. By the statute, the writ is to be awarded on the application of the person in custody, or by some other person *on his behalf.* Whenever applied for it is the application of the prisoner. Whosoever may file the petition, it can only be issued at the instance of the party in custody; or at least with his consent: as no man can be brought up a prisoner without his consent. *King v. Reynolds,* 6 T.R. 497; *King v. Edwards,* 7 T.R. 745. Upon these principles, the writ would be discharged if even it were prayed for by the convict, as he could not be now admitted to question the jurisdiction to which by his own act he had submitted; if even that Court had not, as it certainly had, jurisdiction as to him, whether a slave or a free man of colour.
>
> But the Court goes farther, and is of opinion, that the purposes of the writ cannot be perverted to such uses as this. That it cannot, under colour of an application on behalf of the slave, be used by the master to enable him to take possession of the subject of the writ, as property.[180]

In short, the court flatly refused to let the "freedom writ" be used by a third party as a process of recaption. The appropriate process in such

180 *Ex parte* Ball, 43 Va. (2 Gratt.) 588, 592-93 (1845); *cf.* Williamson's Case 26 Pa. 9, 25 (1855) (concurring opinion).

a case was the writ *de homine replegiando*,[181] which will be discussed later.

Mississippi is the only southern state where the writ of habeas corpus seems to have been used to recover slaves, and there the remedy was prescribed by statute wherever slaves were "taken or seduced out of the possession of the master, owner or overseer . . . by force, strategem or fraud, and unlawfully detained . . . ."[182] The doctrinal inconsistency between this remedy, where a judge tried the issues and exercised the power to remove the slaves from their existing custodian and restore them to their rightful owner, and the right-to-jury rationale for refusing a similar habeas corpus remedy to slaves for testing their right to freedom,[183] does not seem to have influenced the lawmakers.

In northern courts, where habeas corpus was available to petitioning slaves, the writ was also available to slave owners seeking to recover runaway slaves and to abolitionists seeking to prevent their removal to the South.

Northern lawmakers drew an analogy to the child-custody cases in providing that the writ of habeas corpus could be used by a slave-owner to regain custody of his slave.[184] The abolitionist feelings that began to run high in the North about 1830[185] brought serious qualifications to this remedy, however. By 1840 four northern states had provided by statute that when a writ of habeas corpus was sought to bring up the body of an alleged fugitive from labor or service the issues should be determined by a jury.[186] Other statutes of this character, collectively

181 "The common law of England, as it was when Pennsylvania was settled, could not have allowed a habeas corpus for the purpose of enforcing slavery; for it did not recognize such an institution. The common law remedy, for trying the title to a feudal villein, was the writ de homine replegiando, and that was the writ used by us in slave cases." Williamson's Case, 26 Pa. 9, 25-26 (1855) (concurring opinion).

182 MISS. COMP. STATS. § 11, 1802-39. There are numerous cases under this statute. In some the slaves were ordered restored to the petitioner. Scudder v. Seals, 1 Miss. (Walker) 154 (1824); Steele v. Shirley, 17 Miss. (9 S. & M.) 382 (1848). In others relief was denied because the facts set forth in the petition did not bring the case within the narrow limits of the habeas corpus provision and thus the enabling legislation did not apply. Hardy v. Smith, 3 S. & M. 316 (Miss. 1844); Nations v. Alvis, 13 Miss. (5 S. & M.) 338 (1845); Steele v. Shirley, 21 Miss. (13 S. & M.) 197 (1849); Buckingham v. Levi, 23 Miss. 590 (1852).

183 See discussion in text at note 125 *supra*.

184 CONN. COMP. LAWS 1838, p. 571, § 1; N.Y. REV. STATS. 1828, p. 560-61, §§ 6-12; *Ex parte* Williamson, 3 Am. Law Reg. 741, 744 (1855) (dictum of Chief Justice in chambers); Wheeler v. Williamson, 3 Am. Law Reg. 729 (U.S.D.C. E.D. Pa. 1855).

185 The intense public excitement over the enforcement of the Fugitive Slave Laws, in which the writ of habeas corpus played an important part, is described in McDOUGALL, FUGITIVE SLAVES, ch. 3 (1891); 1 NEVINS, ORDEAL OF THE UNION 380-90 (1947); 2 *id.* 150-54.

186 Act of June 1, 1838, § 1, CONN. COMP. LAWS 1838, p. 572; Act of Jan. 22, 1824, § 3, IND. REV. STATS. 1838, p. 322; Act of May 6, 1840, § 1, N.Y. LAWS 1840, p. 174; Act of Oct. 29, 1840, § 1, VT. LAWS 1840, p. 13.

known as "personal liberty laws," required the state's prosecuting attorney to render his advice and professional services to the fugitive at the county's expense,[187] and required a slaveowner who sought to obtain custody of a fugitive by habeas corpus to post a bond of $1,000 from which would be deducted the costs and expenses of the proceeding and a payment to the fugitive of $100 plus damages if the jury's verdict was against the slaveowner's claim.[188]

In 1842 a Pennsylvania statute, which made it a felony for anyone to carry away a Negro from any part of the state with the intent of causing him to be detained in slavery[189]—an obvious conflict with the federal Fugitive Slave Law of 1793[190]—was held unconstitutional by the United States Supreme Court in *Prigg v. Pennsylvania*.[191] Northern states reacted with additional legislation designed along lines suggested in the *Prigg* opinion[192] to withdraw all state assistance from federal enforcement without posing the direct federal-state conflict condemned there.[193]

In the meantime, the writ of habeas corpus continued to be an important weapon in the hands of abolitionists. Several cases illustrate its use to prevent the removal to the South of Negro slaves already in the hands of their masters.[194] In addition, the statute books contain enactments apparently designed to ensure the availability of habeas corpus for this purpose where the content of the common law was unsure.[195]

4. *Principal and Bail.* Other cases where the writ of habeas corpus was used to deliver the body of a prisoner from one custody to another

187 Act of May 6, 1840, § 9, N.Y. LAWS 1840, p. 175; Act of Oct. 29, 1840, § 6, VT. LAWS 1840, p. 14.

188 Act of May 6, 1840, § 12, N.Y. LAWS 1840, p. 176-77; Act of Oct. 29, 1840, § 8, VT. LAWS 1840, p. 14.

189 9 PA. LAWS 1825-27, p. 95, § 1.

190 1 Stat. 302 (1793).

191 41 U.S. (16 Pet.) 539 (1842).

192 *Id.* at 614-16.

193 The most common provision forbade state officers from exercising any jurisdiction or issuing any certificates or warrants of removal under the 1793 federal act. Other common provisions forbade the use of state jails to detain persons claimed as fugitives from labor, and punished the use of force or violence to carry away persons claimed as fugitives or to interfere with them after they had been released by hearings on state habeas corpus. Act to Prevent Slavery, 1844, § 5, CONN. REV. STATS. p. 797, 798 (1854); Act of Mar. 24, 1843, MASS. ACTS 1843, p. 33; Act of Mar. 3, 1847, ch. 804, PA. GEN. LAWS 1700-1849 p. 1092; VT. COMP. STATS. 1850, ch. 101. For a summary of other personal liberty laws, principally those passed in the 1850's, consult MCDOUGALL, FUGITIVE SLAVES, ch. 5 (1891).

194 Commonwealth v. Taylor, 44 Mass. (3 Met.) 72 (1841); Commonwealth v. Aves, 35 Mass. (18 Pick.) 193 (1836); *In re* Francisco, 9 Am. Jurist 490 (Mass. 1832) (before Shaw, C.J.); see MCDOUGALL, FUGITIVE SLAVES 39 (1891); *cf. Ex parte* Lawrence, 5 Binn. 304 (Pa. 1812).

195 *E.g.*, VT. COMP. STATS. ch. 101, § 9 (1843).

involved the relation of principal and bail.[196] This relation was created when a prisoner (the "principal") procured his release from imprisonment by presenting a bailbond or recognizance of a surety (the "bail"). The law gave the bail generous rights commensurate with his responsibilities. It considered the principal "as a prisoner, whose gaol liberties are enlarged or circumscribed, at the will of his bail."[197] In the form of another popular metaphor, "the bail has the principal on a string, and may pull it when he pleases . . . ."[198] The bail manifested his control by a bail-piece, a document by virtue of which the bail could secure the aid of courts or state officers or act himself to arrest the principal "at all times and in all places . . . ."[199]

Principals made conventional use of the writ of habeas corpus to test the legality of the custody imposed upon them by their bails.[200] A more novel use of habeas corpus arose when the bail petitioned for the writ to recover custody of his principal.[201] In one leading case, where a sheriff had arrested the principal on civil process, the court ordered that he be "relieved from the custody of the sheriff, that his bail may proceed with him."[202] The opinion explained:

> The writ of *habeas corpus* may issue at the instance of the party restrained of his liberty, *or at the instance of any other person who has a right to the custody of such person;* and the English books abound with cases of habeas corpus at the instance of special bail; and this, in civil cases, is a matter of course. When confined on a criminal charge, it must be on motion; but in either case it is not matter of favour, but *ex debito justitiae.*[203]

In an earlier case, involving a principal confined on a criminal charge, a

196 See HURD, HABEAS CORPUS 60-72 (1858). The best judicial discussion of this relation is in Nicolls v. Ingersoll, 7 Johns. R. 144 (N.Y. Sup. Ct. 1810) (civil damage action).

197 Nicolls v. Ingersoll, 7 Johns R. 144, 155 (N.Y. Sup. Ct. 1810).

198 Holsey v. Trevillo, 6 Watts 402, 404 (Pa. 1837).

199 Nicolls v. Ingersoll, 7 Johns. R. 144, 155 (N.Y. Sup. Ct. 1810).

200 Commonwealth v. Brickett, 25 Mass. (8 Pick.) 137 (1839); *Ex parte* Lafonta, 2 Rob. 495 (La. 1842). *But see* Respublica v. Arnold, 3 Yeates 263 (Pa. 1801). A question frequently litigated in these cases was whether the bail could exert his confining authority in a state other than that in which the bail-piece had been issued. It was uniformly held that he could. *Ibid.*

201 Hyde v. Jenkins, 6 La. 427, 429 (1834); cases cited notes 202 and 204 *infra. Cf.* Respublica v. Gaoler, 2 Yeates 263 (Pa. 1798) (writ denied on merits; no suggestion that court lacked power to transfer custody of prisoner by means of writ). Compare the courts' use of the writ of habeas corpus *cum causa,* where the order transfers the custody of the prisoner from a lower court to the officers of the higher court to facilitate review of the case there.

202 Holsey v. Trevillo, 6 Watts 402, 404 (Pa. 1837).

203 *Id.* at 403. (Emphasis added.)

court remanded the principal to prison, but ordered that after his sentence had been served "he should be delivered over to the bail."[204]

In conclusion, there are frequent instances where a third party has sought habeas corpus for purposes other than to assure the freedom of the nominal petitioner. In some of these cases the court emphatically denied that this was a proper function for the "freedom writ." In other cases—some in each of the subject areas discussed—courts either expressed approval of such a practice or actually issued their writ of habeas corpus to assist one person in obtaining custody of another.

IV. The Writ *De Homine Replegiando*

No discussion of the role of the writ of habeas corpus in state courts would be complete without reference to the companion remedy available through the writ *de homine replegiando,* later called the writ of personal replevin. Blackstone described this writ as follows:

> The writ *de homine replegiando* lies to replevy a man out of prison, or out of the custody of any private person, (in the same manner that chattels taken in distress may be replevied, of which in the next chapter) upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him.[205]

Available accounts of the common law practice are somewhat obscure.[206] Upon service of the writ the sheriff apparently replevied (set at liberty) the plaintiff immediately unless it appeared from the defendant's return that the plaintiff was held upon one of the causes for which a man could not have this writ or that he was held for some cause for which he was not "replevisable." Since these two exceptions were very comprehensive (including, for example, persons held for death of a man, persons taken by command of the King, and persons held as wards or as villeins), immediate release was doubtless rare. Where the plaintiff was not eligible for immediate replevin, he or those proceeding in his behalf had to furnish security (by recognizance in open court) that the plaintiff would successfully prosecute his action or return to custody if that should be

204 United States v. Bishop, 3 Yeates 37 (Pa. 1800). *Cf.* Reddill's Case, 1 Whart. 445 (Pa. 1836) (habeas corpus used to transfer prisoner from one prison to another).

205 3 Blackstone, Commentaries *129 (1771). For a discussion of the procedure in replevin see *id.* at 146-48.

206 The description in the text is a synthesis of the procedures described in 3 Blackstone, Commentaries *129 (1771); Moor v. Watts, 1 Ld. Raym. 613, 615, 88 Eng. Rep. 1426, 1428 (K.B. 1700); Fitz-Herbert, Natura Brevium 152-55 (1775); 1 Lilly, Modern Entries 293-94 (5th ed. 1791); Skinner v. Fleet, 14 Johns. R. 263, 264-65, 268-69 (N.Y. Sup. Ct. 1817).

adjudged.[207] Thereupon a second writ would issue commanding the sheriff to bring the plaintiff into court notwithstanding the defendant's return. When the plaintiff was produced he went into the custody of the marshall of the court unless further security was posted, in which case the plaintiff was bound to appear in court from day to day until his case was determined. If the defendant had carried the plaintiff out of the sheriff's jurisdiction before the second writ could be served, the sheriff would return that the plaintiff had been eloigned. Thereupon the court issued a process called a *capias in withernam,* upon which the defendant was immediately imprisoned without bail or mainprize until he had produced the plaintiff.

The major significance of the common law writ *de homine replegiando* was that the trial of issues joined was by a jury[208] instead of by a court as with the writ of habeas corpus.[209] The advantage of a jury trial to persons who were at a significant disadvantage under the prevailing law but who could count on the sympathy and support of a predominant portion of the community was obvious.

Owing to the "lengthy and cumbersome nature of the proceedings"[210] on the writ *de homine replegiando,* it was rarely an effective remedy at common law, and when Blackstone wrote the first edition of his *Commentaries* in 1771 he termed it "almost entirely antiquated . . . ."[211] Thanks to certain statutory simplifications, however, the writ was soon resurrected on this side of the Atlantic, and performed an important function for a time in at least eight states.

The principal statutory reforms of the writ *de homine replegiando* date from a 1786 Massachusetts statute,[212] which bypassed the multiplicity of alias and pluries writs necessary to enforce the common law remedy and made it a "writ of right" for certain classes of plaintiffs: persons held upon criminal process for a bailable offense, persons held upon most mesne civil process, and persons held without process.[213] Where a person

207 Actions on this bond were relatively common. The leading case in this country is probably Covenhoven v. Seaman, 1 Johns. Cas. 23 (N.Y. Sup. Ct. 1799), which contains a summary of the undertakings in the bond.

208 2 KENT, COMMENTARIES ON AMERICAN LAW 31 (4th ed. 1840).

209 CHURCH, HABEAS CORPUS §§ 172-73 (1884).

210 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 121 (1922).

211 3 BLACKSTONE, COMMENTARIES *129 (1771).

212 1 MASS. GEN. LAWS ch. 58 (1786).

213 The statute excepted persons committed by the executive while the writ of habeas corpus was suspended by the legislature, and persons committed for treason, murder, counterfeiting, arson, burglary, robbery or other offense punishable by death or banishment or persons "held in execution upon judgment of debt, forfeiture, withernam, or by distress for taxes, or under sentence, after conviction, for fine, costs or in punishment." 1 MASS. GEN. LAWS ch. 58, § 1 (1786). In Nason v. Staples, 48 Me.

in one of these classes applied for the writ and furnished the sheriff with appropriate bond to ensure his appearance (if held on criminal process) or gave bond to the defendant (if held upon civil process or without process) he was delivered immediately upon the sheriff's service of the writ.[214] In contrast, a respondent who was served with a writ of habeas corpus had three days to bring the prisoner into court to make his return (ten days if the place of imprisonment was between 20 and 100 miles from the court, and twenty days if it was more than 100 miles).[215] The advantage of immediate release, especially to slaves or others in danger of being eloigned, is apparent. The statutory remedy of course also retained the crucial feature of the jury trial.

The use of the writ *de homine replegiando* seems to have been relatively widespread. The Massachusetts enactment was copied into the Maine statutes when that state was carved out of Massachusetts in 1821.[216] Although no other states codified their law on this writ, it appears from court decisions[217] or from statutes that regulated or abolished its use[218] that the common law writ *de homine replegiando* was employed at some time in at least six other states: Maryland, Mississippi, New York, Pennsylvania, South Carolina, and Virginia.

In Massachusetts, New York, Pennsylvania and especially in Maine, the writ was apparently very familiar to lawyers. It seems to have been used

---

123, 128 (1861), the court said the *homine replegiando* remedy was needless except for persons held without any process because habeas corpus was so much speedier and so much less onerous, in consequence of which "there is not a single case reported, in this State or in Massachusetts, where a person held upon legal process, either civil or criminal, ever applied for the writ." The cases cited in note 219 *infra* contradict this broad statement.

214 1 MASS. GEN. LAWS ch. 58, § 2 (1786); Nason v. Staples, 48 Me. 123, 127-28 (1861).

215 *E.g.*, An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonments Beyond the Seas, 31 Car. 2, c.2 § 2 (1679); 1 MASS. GEN. LAWS ch. 72, § 3 (1784). Although the language of the statutory writ of habeas corpus followed the common law form, under which the writ was, in theory, "returnable immediate," 31 Car. 2, c.2, § 3 (1679), it was held both in England and in the United States that a return would not be compelled by attachment until after the minimum statutory periods mentioned above. CHURCH, HABEAS CORPUS § 124 (1884); HURD, HABEAS CORPUS 240 (1858). The pre-statutory practice on this question is set forth in Cohen, *supra* note 2, at 189; 4 BACON, ABRIDGEMENT, *Habeas Corpus*, B13 (question 6th) (Bouvier ed. 1852), summarized in PRINCE'S GA. DIGEST 1820, p. 569.

216 1 MAINE LAWS ch. 66 (1821).

217 See cases cited in notes 219, 222, 224, 231, 235 and 238, *infra*.

218 1 DORSEY'S MD. LAWS 1692-1839, ch. 63, p. 599 (1810) (transfer of actions by *homine replegiando*); 2 N.Y. REV. STATS. 1852, p. 792, §§ 13, 15 (person claiming fugitive slave after *homine replegiando* may be held to bail; penalizes removal of fugitive after writ granted); New York statute cited note 225 *infra*; Virginia and Mississippi statutes cited in note 234 *infra*.

for virtually every purpose for which habeas corpus was employed.[219] In the remaining states, as well as in these leading jurisdictions, however, the major impact of the writ was on the institution of slavery. As with habeas corpus, the doctrine governing this use of the writ varied from north to south.

In the North the writ seems to have been available to slaves and slaveowners on the same basis. Since *homine replegiando* was the common law remedy for determining whether a person was held in the servitude of villeinage,[220] and since there was common law authority for its use in respect to slaves,[221] it is not surprising that there are cases demonstrating its use in northern courts by slaveowners to recover their slaves.[222] As northern opinion was aroused on the slavery question, however, the slaveowner's position was stronger with judges than with juries, so efforts at recovering runaway slaves typically began (where the owner needed legal assistance to exert his right to seize the slave) with a petition for a writ of habeas corpus.[223]

The more common northern usage of the writ *de homine replegiando* is suggested by a line of Pennsylvania cases, which demonstrate that this writ was the conventional means by which an alleged slave in that state established his right to freedom.[224] Another usage is defined in an 1828 New York act, which provided that an alleged fugitive from labor who was in custody in that state could bring a writ of *homine replegiando* and be released from custody immediately without giving any security and that all prior proceedings relating to his caption or removal would

219 Nason v. Staples, 48 Me. 123 (1861) (criminal commitment); Garland v. Williams, 49 Me. 16 (1860) (civil arrest); Gurney v. Tufts, 37 Me. 130 (1853) (criminal commitment); Hutchings v. Van Bokkelen, 34 Me. 126 (1852) (soldier-officer); Richardson v. Richardson, 32 Me. 560, 565 (1851) (child-custody) ("Upon habeas corpus the court may exercise a discretion in relation to the disposition of a child, which it is unable to do in this action"); Bridges v. Bridges, 13 Me. 408 (1836) (parent-child); Johnson v. Medtart, 4 Md. 24 (1815) (soldier-officer); Aldrich v. Aldrich, 29 Mass. (12 Pick.) 102 (1833) (civil arrest); Wood v. Ross, 11 Mass. 271 (1814) (soldier-officer); Williams v. Blunt, 2 Mass. 207 (1806) (master-apprentice); cases cited in notes 222 and 231 *infra*.

220 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 497-98 (3d ed. 1923); case quoted note 181 *supra*. On villeinage see generally, 1 COKE, COMMENTARY UPON LITTLETON §§ 172-212 (Butler ed. 1823); HOLDSWORTH, *op. cit. supra*, at 491-510.

221 4 COMYNS, DIGEST, *Imprisonment* (L4) (5th ed. 1822).

222 See Skinner v. Fleet, 14 Johns. R. 263 (N.Y. Sup. Ct. 1817); Cowperthwaite v. Jones, 2 Dall. 55 (Pa. C.P. 1790).

223 On the return to the writ the state court held a hearing and issued the certificate authorized by the Fugitive Slave Law to permit the owner to transport the slave to the South. Later, exercise of this jurisdiction was prevented by some state laws. See generally, note 193 *supra*.

224 Alexander v. Stokeley, 7 S. & R. 299 (Pa. 1821); Wilson v. Belinda, 3 S. & R. 396 (Pa. 1817); See *Ex parte* Lawrence, 5 Binn. 304 (Pa. 1812).

be suspended until final judgment was given on the *homine replegiando*.[225]

In Massachusetts, where a *homine replegiando* statute had been in effect for fifty years, the writ assumed the unmistakable character of an anti-slavery remedy through events commencing in 1835. In that year the legislature abolished the writ *de homine replegiando* during a statutory revision,[226] apparently because the writ of habeas corpus was thought sufficient to answer the purposes of justice.[227] The following year various petitions praying "the passage of such laws as will secure to those, claimed as slaves in this Commonwealth, a trial by jury"[228] were referred to a legislative committee, which was directed to inquire into the expediency of restoring the writ *de homine replegiando*. After a thorough survey of state power to enact such legislation the committee proposed and the Massachusetts legislature enacted a bill "to restore the trial by jury, on questions of personal freedom," which substantially reenacted the old *de homine replegiando* statute under the new name "personal replevin."[229]

If *homine replegiando* was available in the circumstance specified in the New York and Massachusetts statutes and implied in the Pennsylvania litigation, then it could upset the whole course of proceedings under the Fugitive Slave Act, not only because of the delay involved, but also because slaveowners or slavecatchers, considering that their prospects of prevailing in a contest before a northern jury were bleak, would be inclined to discontinue any efforts at recovery once the *replegiando* was granted. The obvious conflict between this state remedy and the objectives of the federal act concerned the Massachusetts lawmakers, but they concluded that the overriding interest in personal liberty justified exercise of the jurisdiction.[230] The predominant view in the courts, however, was that state laws could not validly conflict with federal legislation in this manner. A succession of cases in Pennsylvania and New York held that *homine replegiando* was not available for a person who had been arrested under the provisions of the federal act.[231] After the Supreme

225 Act of Dec. 10, 1828, §§ 15-17, 2 N.Y. REV. STATS. 1828, p. 558, 561.

226 MASS. REV. STATS. 1836, ch. 111, § 38.

227 See *Trial by Jury in Questions of Personal Freedom*, 17 AM. JURIST 94 (1837).

228 *Id.* at 94-95.

229 *Ibid.* Act of Apr. 19, 1837, MASS. GEN. LAWS 1836-53 Supp., ch. 221, p. 44.

230 *Trial by Jury in Questions of Personal Freedom*, 17 AM. JURIST 94, 97, 112-13 (1837).

231 Jack v. Martin, 12 Wend. 311 (N.Y. Sup. Ct. 1834), *aff'd on other grounds*, 14 Wend. 507 (N.Y. Ct. Err. 1835); Wright v. Deacon, 5 S. & R. 62 (Pa. 1819); In re Martin, 16 Fed. Cas. 881 (C.C.S.D.N.Y. between 1827 and 1840); see MCDOUGALL, FUGITIVE SLAVES § 44 (1891) (Mass. 1840) (Latimer case, also referred to in Commonwealth v. Tracy, 46 Mass. (5 Met.) 536, 544 (1843)); see generally, 2 KENT, COMMENTARIES 31-33 (4th ed. 1840).

Court invalidated the Pennsylvania kidnapping penalty on analogous principles in 1842[232] there appear to be no further reports of *homine replegiando* being involved in fugitive slave cases.

In the South the writ *de homine replegiando* was distinctly unwelcome, doubtless because of its potential for disrupting the system of slavery. After initially being used by slaves asserting a right to freedom,[233] the writ was abolished by statute in Virginia and Mississippi.[234] In Maryland its use was inhibited by narrow adherence to the common law rule under which this writ could only be issued by the court of chancery (although it was returnable in a court of law).[235] An 1823 decision by a federal circuit court (Circuit Justice William Johnson) in South Carolina, involving Jamaican sailors imprisoned under a state statute requiring the seizure and imprisonment of persons of color venturing ashore while their vessels were in port, threatened to make the writ *de homine replegiando* available to slaves.[236] But counsel's vehement protest in that case against the use of this "obsolete" writ, "raked up from the ashes of the common law to be now first used against the state of South Carolina"[237] bore fruit some years later when the state supreme court extinguished this remedy in an action brought by a group of Negroes who sought to use it to establish their right to freedom from one who claimed them as slaves.[238] As it had done in opinions denying similar use of the writ of habeas corpus, the court rested on the availability of an alternate legal remedy. Of greater importance, however, was the inappropriateness of *de homine replegiando* to actions involving the master-servant relationship, since the enforcement machinery "may almost reverse the position, for a time, of master and slave,"[239] and in any event would deprive the master of the service of his slave during the period of litigation. The court gave this explanation:

> That the old common law proceeding is calculated to be extremely mischievous to one who turns out to be really the master, is scarcely denied at the bar, and will be strongly conceived by him who will consult the particulars of the case of *More v. Watts*, in the several books where it appears: for it will be seen if the claimant fail to give surety, he is to go into the custody

232 Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

233 DeLacy v. Antoine, 34 Va. (7 Leigh) 438, 443 (1836).

234 MISS. COMP. STATS. 1802-30, p. 664, § 8; VA. ACTS 1814, p. 68, § 13.

235 Johnson v. Medtart, 4 Md. 24 (1815); 3 COMYNS, DIGEST, *Imprisonment* (L4) (5th ed. 1822).

236 Elkison v. Deliesseline, 8 Fed. Cas. 491 (C.C.D.S.C. 1823).

237 *Id.* at 497.

238 Huger v. Barnwell, 5 Rich. 273 (S.C. 1852).

239 *Id.* at 277.

> of the prison keeper. Surely this is not an agreeable result to the master. So likewise the master is liable to be captured by a *capias in withernam*, bailable, to be sure, provided he pleads "*non cepit*," but this would be impracticable for one, really master, who had exercised the right of capturing his slave, and thus, it is possible, that, under the proceeding chosen in the present case, an absolute slave might be at large, on bail, and his master in custody.[240]

Only by understanding such quirks in the substantive law can one explain the apparently anomalous fact that the writ of personal replevin, which treated the petitioner almost as if he were property, was embraced in the North but rejected in the slaveholding states.

V. Conclusion

In a notable address on the study of law Holmes warned against the "pitfall of antiquarianism" and declared that "for our purposes our only interest in the past is for the light it throws upon the present."[241] A survey of the numerous areas in which the writ of habeas corpus was employed in the state courts and of the multitude of constitutional, statutory and decisional laws governing its use throws some light upon the present, but the subject areas are so numerous and diverse that the illumination is kaleidoscopic and faint. Such a survey defies conclusion, but several features are worthy of final mention.

Few state constitution-makers seem to have been concerned with the subject of habeas corpus until after article I, section 9 of the federal constitution was adopted and became a model for subsequent state provisions. The states were also tardy in enacting habeas corpus legislation. Although most state statutes were patterned after the English Habeas Corpus Act of 1679, their coverage was so diverse that the availability of the writ for many types of restraints—differing from state to state—remained under the authority of the common law. One of the most interesting aspects of the state history is the light that it throws on the contrast between the common law and the statutory writs of habeas corpus and the substantive law and practice that governed the use of each.

The history of habeas corpus in criminal cases is of special interest because of the contemporary importance of this use of the writ. Subjects of particular revelance include the extent to which the habeas corpus court's reviewing authority was limited by common law rules or by comparable statutory limitations confining it to defects of "jurisdictional"

240 *Ibid.*

241 Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 474 (1897).

significance, the possibility that the scope of review varied according to whether the writ was being issued under statutory authority or pursuant to the common law, and the asserted inapplicability of the "jurisdiction" limitation when the issuing court was in effect using a habeas corpus *cum causa* to exercise supervisory authority over the committing court.[242]

Perhaps more interesting, though less important as a source of illumination for present usages, was the employment of habeas corpus and its jury-trial counterpart, *de homine replegiando,* as weapons in the hands of slaveowners and abolitionists struggling over the custody of alleged fugitives from labor. The diversity of substantive law that governed use of these remedies in northern and southern courts provides an example of the way the law affects and is affected by conditions and needs in the society it serves.

History contains other examples where habeas corpus was not used to promote freedom. Although some courts voiced doctrinal objections or specifically rejected such attempts, there were cases permitting a person in a variety of circumstances to use the writ to obtain custody of the nominal petitioner, almost as if he were property whose rightful possession was at issue. In these cases the "writ of liberty" revealed its potential as an instrument of confinement and oppression.

The final point that rates special mention seems ironic in a period of protest against federal habeas corpus to relieve state prisoners from the alleged wrongful conduct of state officers. In the five decades preceding 1865 there are numerous instances where state courts issued their writ of habeas corpus to release persons from the restraints imposed on their liberty by the alleged wrongful conduct of federal officers. When that usage of the writ by state courts was prevented in *Ableman v. Booth,* and when Congress enlarged the power of the federal courts to issue habeas corpus for state prisoners, the relative prominence of state law on the usages of habeas corpus began its decline.

242 If the rule limiting habeas corpus review to so-called jurisdictional defects did not apply to writs issued by a court with supervisory authority over the committing court, the exception could easily engulf the rule in the important area of federal review of state commitments. On issues of federal law federal courts have "supervisory authority" over state courts, which they can appropriately exercise by means of their statutory authority to issue the writ of habeas corpus for state prisoners.