Michigan Law Review

Volume 64 | Issue 3

1966

Legal History in the High Court--Habeas Corpus

Dallin H. Oaks
The University of Chicago

LEGAL HISTORY IN THE HIGH COURT—HABEAS CORPUS

*Dallin H. Oaks**

EVER since Chief Justice Marshall declared that courts could resort to the common law to determine what Congress meant by the term "habeas corpus" in a federal statute,[1] the history of this venerable remedy has played an important role in the Supreme Court. Over the years, however, courts have moved away from using the writ of habeas corpus for its historic functions of eliciting the cause of commitment and compelling adherence to prescribed procedures in advance of trial[2] until today it has become primarily a means by which one court of general jurisdiction exercises post-conviction review over the judgment of another court of like authority.[3] Despite this significant change in function, the United States Supreme Court has continued to support its decisions on questions of post-conviction review by calling upon the history of habeas corpus during that period when it was predominantly a pretrial remedy. Whatever view one may adopt as to the wisdom of these decisions, the results of the Court's "magisterial historiography" have not been happy for history.[4] Three decisions of the October Term, 1962, provide prime examples.

---

* Professor of Law, The University of Chicago.—Ed.

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

2. See generally CHURCH, THE WRIT OF HABEAS CORPUS 2-30 (1884); 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 104 (1926); WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ*, 18 CAN. B. REV. 10, 172 (1940); Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 341-61 (1952); Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 244-45 (1965).

3. See, *e.g.*, 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); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); *Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in United States Courts*, 33 F.R.D. 363 (1964).

4. The quotation is from MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT 313 n.1 (1959).

Several recent articles have criticized the Supreme Court's use of legal history. The most comprehensive of these is Kelly, *CLIO and the Court: An Illicit Love Affair*, 1964 SUP. CT. REV. 119, 131, which concludes that in the reapportionment, school segregation, church and state, sit-in, and birth control cases the Supreme Court was supporting its "libertarian interventionism in the social order" by a "historical technique of adjudication" that "may well be the successor to the sociologically oriented opinion of substantive due process days." The Supreme Court's historical representations in Fay v. Noia, 372 U.S. 391 (1963), concerning the legislative history of the Habeas Corpus Act of 1867 are ably criticized in Mayers, *The Habeas Corpus Act of 1867—The Supreme*

I. Habeas Corpus To Include De Novo Determination of Facts

In *Townsend v. Sain*[5] a state prisoner sought a writ of habeas corpus to obtain a federal hearing on a constitutional question that had already been heard by a state court. Prior decisions had established that federal district courts had the power, on a habeas corpus petition, to hear testimony on a subject already considered by a state court.[6] Therefore, the principal issue in *Townsend* was not the court's power, but rather the court's obligation: Could the district court dispose of the petition by simply reviewing the written record from the state court, or did the federal Habeas Corpus Act[7] (first enacted in 1867) require an evidentiary hearing to "try issues of fact anew"?[8]

The historical development of habeas corpus was relevant to this inquiry because when the 1867 Congress provided that persons restrained of their liberty in violation of the Constitution could obtain a writ of habeas corpus from a federal court, it undoubtedly intended—except to the extent the legislation provided otherwise—to incorporate the common-law uses and functions of this remedy.

After the usual bow to history, the Supreme Court clarified the extent of the federal courts' authority to hold habeas corpus hearings by declaring that the district courts have power "to take testimony and determine the facts *de novo* in the largest terms"[9] and that "the power of inquiry on federal habeas corpus is plenary."[10] On the subject of the courts' obligation, the Supreme Court listed various circumstances in which it held that a federal court "must grant an evidentiary hearing to a habeas corpus applicant"[11] detained under the judgment of a state court.

A. *Common-Law Rules Against De Novo Hearing*

Responsible students of the problem presented in *Townsend* differ over the wisdom, in a federal system, of requiring—or even

Court as Legal Historian, 33 U. Chi. L. Rev. 31 (1965). Another example of Supreme Court historiography is discussed in Tefft, *United States v. Barnett: "'Twas a Famous Victory,"* 1964 Sup. Ct. Rev. 123, 132-33.

5. 372 U.S. 293 (1963).

6. See, *e.g.*, Rogers v. Richmond, 357 U.S. 220 (1958); Brown v. Allen, 344 U.S. 443 (1953); Cranor v. Gonzales, 226 F.2d 83 (9th Cir. 1955). See generally Bailey, *Federal Habeas Corpus*, 45 B.U.L. Rev. 161, 167, 169-71, 176-77 (1965).

7. 62 Stat. 964 (1948), as amended, 28 U.S.C. § 2241 (1964). As far as state prisoners are concerned, this provision traces its history to Act of Feb. 5, 1867, ch. 27, 14 Stat. 385.

8. 372 U.S. at 309.

9. *Id.* at 311.

10. *Id.* at 312.

11. *Id.* at 313. The Court listed six situations in which an evidentiary hearing is required. *Ibid.*

permitting—a federal court to hold a trial de novo on factual issues already resolved in the state courts.[12] Whatever the merit of the Court's holding, however, it clearly was not supported by the supposed "common-law understanding"[13] that the Court relied on to support its conclusion. Authorities on the history and use of habeas corpus[14] mention no "common-law understanding" that a court hearing a habeas corpus petition could "determine the facts de novo in the largest terms."[15] Moreover, the Court's holding plainly contradicts a well-known, although out-dated, rule governing the procedure in habeas corpus. At common law a petitioner was not permitted to introduce evidence to controvert the truth of a return filed in response to a writ of habeas corpus.[16] Thus, if the return stated a valid explanation for the confinement—such as the judgment and sentence of a court—the petitioner would remain in custody. A court hearing a habeas corpus petition obviously would have no occasion to "determine the facts de novo" so long as the rule against controverting the jailer's return precluded the prisoner from challenging the findings or judgment of the committing court.

The *Townsend* opinion contains no historical discussion to support its assertion about de novo hearings.[17] For this purpose, the Court relied exclusively on the extensive discussion in *Fay v. Noia*,[18] which was decided the same day as the *Townsend* case. In a footnote to the *Fay* opinion, the Court stated:

> In making provision for the trial of fact on habeas (something that had been left unmentioned in the previous statutes governing federal habeas corpus), the Act of 1867 seems to have restored rather than extended the common-law powers of the habeas judge. For it appears that the common-law doctrine of the incontrovertibility of the truth of the return was subject to numerous exceptions.[19]

---

12. *Compare* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963), *with* Reitz, *supra* note 3. See generally Note, 76 HARV. L. REV. 1253 (1963); 53 NW. U.L. REV. 765 (1959); 68 YALE L.J. 98 (1958).

13. 372 U.S. at 311.

14. See, *e.g.*, CHURCH, *op. cit. supra* note 2, §§ 221-55, 362-85; Chafee, *The Most Important Human Right in the Constitution*, 32 B.U.L. REV. 143 (1952); 1 HOLDSWORTH, *op. cit. supra* note 2, at 227; Fox, *Process of Imprisonment at Common Law*, 39 L.Q. REV. 46 (1923); Jenks, *The Story of the Habeas Corpus*, 18 L.Q. REV. 64 (1902), reprinted in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 531 (1908).

15. 372 U.S. at 311.

16. Commonwealth v. Chandler, 11 Mass. 83 (1814); People *ex rel.* Ordronaux v. Chegaray, 18 Wend. 637 (N.Y. 1836); CHURCH, *op. cit. supra* note 2, §§ 166-67; HURD, HABEAS CORPUS 263-77 (1858). See authorities quoted in note 20 *infra*.

17. 372 U.S. at 311.

18. 372 U.S. 391 (1963). The decision is discussed more fully in Part II *infra*.

19. *Id.* at 416 n.27.

Only two authorities were cited to support the assertion that there were numerous exceptions to the doctrine of incontrovertibility, and both make it clear that the exceptions related almost exclusively to non-criminal commitments.[20] With respect to commitments of persons accused of crime, both authorities are flatly opposed to Mr. Justice Brennan's suggestion that a court hearing a habeas corpus case has a common-law power to re-try factual questions already settled in courts of proper jurisdiction. Similarly, the important 1816 English statute[21]—soon duplicated in most American states[22]—which modified the harsh rule against controverting a return, was expressly inapplicable to persons "confined or restrained for some criminal or supposed criminal matter. . . ."[23]

There is also ample authority to demonstrate that as late as the mid-nineteenth century an English prisoner was still forbidden to controvert the truth of a return given in response to his petition for habeas corpus. For example, in 1855 a prisoner convicted of a misdemeanor petitioned the Court of Common Pleas for habeas corpus relief, on the ground that the alleged offense was committed outside the territorial jurisdiction of the inferior court that had convicted

---

20. Discussing commitments for criminal or supposed criminal matters, HURD, THE WRIT OF HABEAS CORPUS 270-71 (2d ed. 1876), states that the return "could not either at common law or under the habeas corpus act, 31 Car. II., be controverted with a view to the absolute discharge of the prisoner." There were "occasional exceptions," Hurd states (while listing only the subject of bail), "but they rest upon no well defined principle" and are "impossible to specify." *Ibid.* With respect to imprisonments other than for criminal matters, however, the exceptions to the rule against controverting the return were "governed by a principle sufficiently comprehensive to include most . . . cases" so that it was "impossible to specify those [non-criminal cases] in which it could not [be controverted]." *Id.* at 271. The other authority, 4 BACON, ABRIDGMENT OF THE LAW 587 (Bouvier ed. 1844), states that "no one can in any case controvert the truth of the return to a *habeas corpus*." The only exceptions cited by Bacon relate to proceedings to determine whether a prisoner who had been indicted should be admitted to bail, and to a case where a petitioner was allowed to put in an issue of privilege in opposition to the return by way of confession and avoidance. *Id.* at 587-88. INGERSOLL, THE WRIT OF HABEAS CORPUS 15-19 (1849), also cited by the Supreme Court but for a different proposition, lists one other exception: persons allegedly being illegally pressed into overseas military service.

21. 56 Geo. 3, c. 100 (1816).

22. See, *e.g.*, Md. Laws 1813, pp. 624-25; N.Y. Laws 1818, p. 298. For a thorough discussion of the American legislation, see HURD, *op. cit. supra* note 20, at 277-88.

This remedial legislation was probably meant to provide a means of contradicting the return of one who held a prisoner without legal process and had a personal interest in the question of his custody. Where the confinement was based on official process, these statutes gave "no greater right to inquire into the merits on which the process of commitment is founded, than was allowed by the common law." Bennac v. People, 4 Barb. 31, 34 (N.Y. Sup. Ct. 1848).

23. 56 Geo. 3, c. 100, § I (1816). See *Ex parte* Beechings, 4 B. & C. 136, 107 Eng. Rep. 1010 (K.B. 1825).

him. He offered affidavits in support of his assertions.[24] Although the Courts of Westminster clearly had authority to release prisoners wrongfully detained by inferior courts,[25] this petition was unanimously rejected with the observation that the petitioner's argument was "as groundless as it is unprecedented."[26] The opinion of Chief Justice Jervis observed:

> [T]he finding of the jury is, that the prisoner committed the offense within the jurisdiction of the court, as alleged. He now seeks to impeach that finding, on the ground that the place where the offense was actually committed is more than one thousand yards distant from the boundary of the parish in which the record alleges it to have been committed. That is not to be governed by the inquiry whether the fact be indisputable or otherwise. If we could entertain the application because the boundary is clearly ascertained, we should be equally bound to entertain disputes of the most refined and minute character. The inconvenience of this is manifest. The truth is that the remedy is not by an application of this sort.[27]

Just a few years earlier, the Justices of Queen's Bench had refused relief on a similar ground in two noteworthy cases. In the first, *Carus Wilson's Case*,[28] the jailer's return stated that the petitioner was held under a legally valid sentence of the Royal Court at Jersey. For this reason, the court held that the petitioner could not introduce affidavits to show that the lower court had acted inconsistently with Jersey law.[29] Two years later this same ground was employed to

24. In the Matter of Newton, 16 C.B. 97, 139 Eng. Rep. 692 (C.P. 1855).

25. See authorities cited in Collings, *supra* note 2, at 338 n.14.

26. 16 C.B. at 102, 139 Eng. Rep. at 694.

27. *Id.* at 101-02, 139 Eng. Rep. at 694. A similar view was expressed in the opinion of Justice Williams: "If an application of this sort could be entertained, it would be open to a party, after a lengthened inquiry at the assizes as to whether or not the alleged offence was committed within the county, to cause himself to be brought up by habeas corpus, and have the whole matter tried over again upon affidavits. So monstrous a state of things never could be." *Id.* at 103, 139 Eng. Rep. at 694.

28. 7 Q.B. 984, 115 Eng. Rep. 759 (1845).

29. "[W]e may decide the question before us by considering the principle of the exception that runs through the whole law of habeas corpus, whether under common law or statute, namely, that our form of writ does not apply where a party is in execution under the judgment of a competent Court. If, indeed, it were proposed to shew that the prisoner had never been before such Court at all, or that no such sentence had been in fact given, there might be a difficulty in saying that a traverse to that effect could not be allowed. But, when it appears that the party has been before a Court of competent jurisdiction, which Court has committed him for a contempt or any other cause, I think it is no longer open to this Court to enter at all into the subject matter. If we were to do so, we should constitute ourselves a Court of Error from such other Court; and should be constantly examining whether the

deny habeas corpus relief to a petitioner who sought to have the court review by affidavit whether the Royal Court of Jersey, which had convicted him of burglary, had authority to sentence him to be transported.[30]

In view of the foregoing authority, it is not surprising that neither *Townsend* nor *Fay* refers to any case illustrating the so-called "common-law understanding" by which a court presented with the record of a hearing in another court of general jurisdiction was supposed to have held an evidentiary hearing to develop the facts de novo.

B. *Limited Use of De Novo Hearings*

There are two early lines of authority on subjects somewhat related to the issues considered in *Townsend* and *Fay* that the Supreme Court might have used to support its assertion of a "common-law understanding," but both are of limited applicability and concern a usage of habeas corpus now practically outmoded. A recent English article refers to several nineteenth century cases in which courts accepted extrinsic evidence to controvert a return to a writ of habeas corpus, but those cases involved commitments by courts of inferior jurisdiction, over whom the scope of review by habeas

---

circumstances, the existence of which was proved, warranted the opinion which such Court had formed." *Id.* at 1008, 115 Eng. Rep. at 769; *accord*, Case of the Sheriff of Middlesex, 11 Ad. & E. 273, 292, 113 Eng. Rep. 419, 426 (Q.B. 1840). Of course, habeas corpus would lie if the order of commitment were illegal on its face. See, *e.g.*, The King v. James, 5 B. & Ald. 894, 106 Eng. Rep. 1418 (K.B. 1822); Rex v. Collyer, Say. 44, 96 Eng. Rep. 797 (K.B. 1752). See also Queen v. Batcheldor, 1 Per. & Dav. 516, 537 (1839), where Chief Justice Denman suggested, by way of dictum, that a petitioner for habeas corpus might be afforded an opportunity to introduce evidence to controvert the return "if the falsehood of the returns were made in any degree probable before us . . . ." However, just three years later this same court, with Chief Justice Denman presiding, held that where a return to a writ of habeas corpus included a copy of an order which stated that the petitioner had been brought to the bar of the Court of Chancery and committed for contempt, the petitioner would not be permitted to controvert this return by affidavits to show that he had never been brought to the bar of the court at all. *Ex parte* Clarke, 2 Q.B. 619, 114 Eng. Rep. 243 (1842).

30. Brenan's Case, 10 Q.B. 492, 116 Eng. Rep. 188 (1847). "No objection was made to the return on the ground that it did not shew jurisdiction in the Court to try and punish for the crime of burglary: but it was said to be bad for not shewing that the Court had power to punish by transportation.

"We think, however, that, the Court having competent jurisdiction to try and punish the offence, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the Court to pass the sentence to be set out by the gaoler upon the return. We are bound to assume, prima facie, that the unreversed sentence of a Court of competent jurisdiction is correct; otherwise we should, in effect, be constituting ourselves a Court of appeal without power to reverse the judgment." *Id.* at 502, 116 Eng. Rep. at 192.

corpus has always been wider than in the case of superior courts.[31] Similarly, when a prisoner applied for habeas corpus before indictment or trial, some courts examined the written depositions on which he had been arrested or committed,[32] and others even heard oral testimony[33] to determine whether the evidence was sufficient to justify holding him for trial. This procedure amounted to a trial de novo on the limited issue of probable cause to detain the petitioner for trial. As noted in an extremely instructive opinion by a Virginia trial judge, however, the reason a habeas corpus court can look behind the warrant of a committing magistrate and consider or hear the evidence on which it is founded is that the magistrate is not a court of record whose decisions are subject to review by appeal or writ of error.[34] Consequently, neither of the foregoing types of cases is authority for a trial de novo upon habeas corpus review of the final judgments of courts of general jurisdiction.

The purpose of the foregoing discussion is not to argue that the Supreme Court reached the wrong decision in *Townsend*. Its conclusion that a federal district court, when disposing of a habeas corpus application, has the power and sometimes the duty to hold a trial de novo on factual questions already determined in a state court may be a sound decision for our time. The limited point urged here is that when the Court asserted that the 1867 act restored rather than extended the common-law powers of the habeas judge,[35] its assertion was plainly at variance with the facts of history.

When the writ of habeas corpus performed its ancient function of eliciting the cause of imprisonment, or of enforcing the right to

31. Rubinstein, *Habeas Corpus as a Means of Review*, 27 MOD. L. REV. 322, 326-32 (1964). That this same distinction was observed in American courts is apparent from CHURCH, *op. cit. supra* note 2, §§ 235, 238.

32. See, *e.g.*, The King v. Marks, 3 East 157, 102 Eng. Rep. 557 (K.B. 1802) (petitioners remanded because corpus delicti appeared in depositions though not in warrant of commitment); Lord Mohun's Case, 1 Salk. 104, 91 Eng. Rep. 96 (1697) (court bails prisoner on basis of depositions given at coroner's inquest); Rex v. Dalton, 2 Str. 911, 93 Eng. Rep. 936 (K.B. 1731). *But cf.* Rex v. Acton, 2 Str. 851, 93 Eng. Rep. 893 (K.B. 1729); Rex v. Greenwood, 2 Str. 1138, 93 Eng. Rep. 1086 (K.B. 1739) (court refuses to consider written evidence other than depositions in determining whether to admit petitioners to bail).

In the leading American habeas corpus decision, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807), the Supreme Court considered the evidence in the written depositions, concluded that no crime had been committed, and entered an order discharging the petitioners. See also *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806). For a discussion of state-court opinions illustrating this use of the writ, see Oaks, *supra* note 2, at 258-59.

33. See United States v. Johns, 4 Dall. 412, 413 (U.S. Cir. Ct. 1806).

34. *Ex parte* Pryor, 3 Quart. Law J. 371, 387-88 (Richmond, Va. Cir. Ct. 1858).

35. Fay v. Noia, 372 U.S. 391, 416 n.27 (1963), relied on by the Court in Townsend v. Sain, 372 U.S. 293, 311 (1963).

bail or to release from confinement under void process prior to trial, there was seldom, if ever, any circumstance where a court of record had previously determined any factual issues that were relevant in the habeas corpus proceeding. The problem of de novo factual hearing by habeas corpus is primarily incident to the use of habeas corpus as a post-conviction remedy—a relatively recent phenomenon. Consequently, the Court would have been more forthright if it had recognized that ancient habeas corpus history was of little or no assistance in reaching a decision on an issue involving a relatively recent function of the writ, rather than claiming support from a supposed showing that its conclusion really was dictated by—or at least that it restored—the durable content of the ancient law.

II. Habeas Corpus To Review All "Intolerable Restraints"

The second case from the 1962 Term, *Fay v. Noia*,[36] also involved a state prisoner whose right to a writ of habeas corpus from a federal court turned on the construction of language in the Habeas Corpus Act. The issue was whether the provision requiring the exhaustion of state remedies[37] barred relief to a petitioner whose coerced-confession claim, tendered and denied during the state-court trial,[38] could not be reasserted in the state courts because he had failed to seek a direct appeal within the statutory time limit. This is another question on which capable lawyers will differ. Its resolution should turn on a matter of legislative interpretation and—to the extent that the words of the act permit judicial innovation—on a consideration of the appropriate relationship between state and federal courts in our federal system. However, almost half of the Court's opinion is devoted to a far-ranging "preliminary inquiry into the historical development of the writ of habeas corpus,"[39] which concludes with a well settled proposition that was not in issue and not mentioned in either brief:[40] that habeas corpus is an appropriate remedy to challenge a conviction procured by a coerced confession.

Although unnecessary and immaterial, the Court's historical exegesis was not meaningless, since the Court used it to construct a conclusion or rule of great potential significance in future habeas

36. 372 U.S. 391 (1963).
37. 28 U.S.C. § 2254 (1964).
38. For an account of the testimony heard by the jury in the trial of Noia and his co-defendants, see United States v. Murphy, 127 F. Supp. 689 (N.D.N.Y. 1955).
39. 372 U.S. at 399.
40. See Brief for Petitioner and Brief for Respondent, Fay v. Noia, 372 U.S. 391 (1963).

corpus litigation.[41] According to Mr. Justice Brennan, "history refutes the notion that until recently the writ was available only in a very narrow class of lawless imprisonments."[42] The true function of the writ, he declared, "has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. . . . Vindication of due process is precisely its historic office."[43] Elsewhere he referred to "the common-law principle that restraints contrary to fundamental law, by whatever authority imposed, could be redressed by writ of habeas corpus"[44] and to "the historic office of the Great Writ to redress detentions in violation of fundamental law."[45] Habeas corpus, it would seem, has always been a judicial thunderbolt for enforcing the dictates of natural law.

A. *Historical Development of the Writ*

Legal historians[46]—even those cited in the opinion[47]—hold a view that is at odds with the historical analysis in the *Fay* case. They emphasize that the writ originated as a mesne process by which courts compelled the attendance of parties whose presence would facilitate their proceedings. Even in the early part of the fifteenth century, habeas corpus was still being used as an ancillary writ in conjunction with writs of certiorari, privilege, and audita querela. The first recorded instance of habeas corpus being used as an independent remedy is toward the beginning of the sixteenth century. That century and the succeeding one saw a fierce struggle in which the courts of King's Bench and Common Pleas sought to establish their jurisdictional supremacy over the courts of Chancery and the Exchequer, as well as special courts like the Privy Council, Admiralty, Requests, and High Commission. The writ of habeas corpus *cum causa* proved to be an extremely effective weapon in this struggle. According to Holdsworth, the common-law courts could use this writ

41. A portion of the Court's historical discussion was material—that bearing on the meaning of the 1867 act, which authorized habeas corpus for federal prisoners. For a persuasive argument that the Court's conclusion—that Congress meant to authorize broad federal habeas corpus review of all state criminal convictions—is "inherently implausible" and "without historical foundation," see Mayers, *supra* note 4.

42. 372 U.S. at 402-03.

43. *Id.* at 401-02.

44. *Id.* at 408.

45. *Id.* at 412.

46. See authorities cited *supra* notes 2 & 14.

47. The summary to follow above is taken principally from HOLDSWORTH, *op. cit. supra* note 2, WALKER, *op. cit. supra* note 2, INGERSOLL, *op. cit. supra* note 20, and Cohen, *supra* note 2. Each of these except Cohen was cited by Mr. Justice Brennan, who seems to have been notably unselective in his citation of authorities. *E.g.*, 372 U.S. at 408 n.16, 423 n.33.

to "bring before themselves and release persons who had been imprisoned by one of these rival courts, if, in their opinion, the court had acted in excess of its jurisdiction."[48]

The writ of habeas corpus *ad subjiciendum*, which was used independently to inquire into the cause of detention in both criminal and civil cases, was perfected during the seventeenth century. That its growth was gradual is apparent from a number of cases in the early 1600's in which persons imprisoned by the Crown or by the Privy Council were unable to secure release by habeas corpus even though the return to the writ stated no reason for their confinement.[49] The availability of the writ as an effective remedy for executive detention not based on common-law process was not resolved, even in theory, until 1641. In that year an act of Parliament abolished the Star Chamber, eliminated or curtailed the jurisdiction of various councils, and authorized issuance of the writ of habeas corpus by King's Bench or Common Pleas for persons imprisoned by the command of the King, the Privy Council, the Council Board, or any successor to the jurisdiction of the Star Chamber.[50]

The effect of certain exceptions in the 1641 act, considerable doubts about which courts or judicial officers had jurisdiction to issue the writ of habeas corpus, and various devices employed to avoid the effect of the writ, all united to permit continued infringements on the personal liberty of the subject[51] and to necessitate the important reforms in the famous Habeas Corpus Act of 1679.[52] But that act, for all its renown, was essentially a reform of habeas corpus procedures and jurisdictions. It merely clarified which courts or judicial officers could issue the writ, empowered judicial officers to issue it when courts were not in session, and established rules to govern the practice incident to the writ and to prevent its evasion.[53] The act contained no enlargement of the types of confinements for which the writ could issue. In fact, it clearly exempted from the

48. 1 HOLDSWORTH, *op. cit. supra* note 2, at 227.

49. See generally 6 HOLDSWORTH, *op. cit. supra* note 2, at 31-40 (1924); WALKER, *op. cit. supra* note 2, at 57-74; Cohen, *supra* note 2, at 33-34, 38.

50. 16 Car. 1, c. 10, § 8 (1641). Discussions of this act may be found in WALKER, *op. cit. supra* note 2, at 75-76; Cohen, *supra* note 2, at 172-74.

51. See 9 HOLDSWORTH, *op. cit. supra* note 2, at 115; WALKER, *op. cit. supra* note 2, at 76-82.

52. 31 Car. 2, c. 2 (1679). A discussion of this act appears in Cohen, *supra* note 2, at 183-96; Oaks, *supra* note 2, at 252-53.

53. *Ibid.* See also DICEY, LAW OF THE CONSTITUTION 216-19 (9th ed. 1939). "Still this statute, although recognizing no new principle, put into more practical shape the remedy already well known, and marks an important period in the extending usefulness of the writ." INGERSOLL, *op. cit. supra* note 20, at 7.

benefits of the writ persons committed for "felony or treason plainly expressed in the warrant of commitment" and "persons convict or in execution by legal process."[54]

The Habeas Corpus Act of 1679 apparently satisfied the need of that time, for the law in this area remained relatively static for the next century and a half. The general rule, as stated by Lord Campbell in an 1860 opinion denying habeas corpus relief to a person convicted of a criminal offense, was that

> a writ of habeas corpus, to the expediency of granting which we have also directed our attention, is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of common law.[55]

B. *Misinterpretation of Bushell's Case*

Mr. Justice Brennan did not discuss this gradual development in the uses of the writ of habeas corpus. In fact, he asserted that over the years "the nature and purpose of habeas corpus have remained remarkably constant,"[56] a fitting and necessary foundation for his assertion that the "historic office" of this writ was to vindicate "due process" or "fundamental law" or to "provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[57] To support this assertion, the Court offered three authorities: an ambiguous dictum in a famous 1670 contempt case in Common Pleas,[58] an obscure and unsupported statement in *Bacon's Abridgment*,[59] and a bill introduced in the House of Commons in 1593 but never passed.[60]

This triumvirate gives but fragile support for the Court's far-reaching conclusion. The combination of authority is primarily noteworthy for the fact that this was apparently the best the Court

---

54. 31 Car. 2, c. 2, § 3 (1679).

55. *Ex parte* Lees, El., Bl. & El. 828, 836, 120 Eng. Rep. 718, 721 (Q.B. 1860). See also cases discussed in text accompanying notes 24-30 *supra*. For a summary of the habeas corpus law of this period, see Collings, *supra* note 2, at 337-38.

56. 372 U.S. at 402.

57. *Id.* at 401-02.

58. Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670). See 372 U.S. at 403-05.

59. 4 BACON, *op. cit. supra* note 20, at 585-86. See 372 U.S. at 405. The Supreme Court once said of this same passage of Bacon's that "when applied to imprisonment under conviction and sentence, [it] is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void." *Ex parte* Siebold, 100 U.S. 371, 376 (1879).

60. Bill introduced in 1593 and quoted in WALKER, *op. cit. supra* note 2, at 44-45. See 372 U.S. at 402.

could assemble for an opinion whose text and voluminous footnotes bespeak prodigious research.

The weight to be given to the short passage in *Bacon's Abridgment* and to the abortive legislation is apparent without discussion. But the true significance of the Court's use of the landmark decision in *Bushell's Case*,[61] which it offered as an example of the use of habeas corpus to relieve from an "intolerable" judicial restraint,[62] requires some discussion.

Bushell's Case involved a writ of habeas corpus issued by Common Pleas for a juror imprisoned by the Court of Sessions for contempt after he and his eleven colleagues voted to acquit certain defendants, allegedly ignoring the manifest weight of the evidence.[63] In its discussion of this case, the Supreme Court stated:

> Nor is it true that at common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court. *Bushell's Case* is again in point. Chief Justice Vaughan did not base his decision on the theory that the Court of Oyer and Terminer had no jurisdiction to commit persons for contempt, but on the plain denial of due process, violative of Magna Charta, of a court's imprisoning the jury because it disagreed with the verdict.[64]

The Court then quoted extensively from *Bushell's Case*[65] and *Bacon's Abridgment*,[66] and concluded that at the time when the Constitution was adopted and the Judiciary Act[67] first conferred habeas corpus jurisdiction upon federal courts, "there was respectable common-

61. Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670).

62. See 372 U.S. at 403.

63. For an engaging account of the background of this famous case, see Deutsch, *Hugh Latimer's Candle and the Trial of William Penn*, 51 A.B.A.J. 624 (1965).

64. 372 U.S. at 404.

65. "[W]hen a man is brought by Habeas Corpus to the Court, and upon return of it, it appears to the Court, That he was against Law imprison'd and detain'd, . . . he shall never be by the Act of the Court remanded to his unlawful imprisonment, for then the Court should do an act of Injustice in imprisoning him, de novo, against Law, whereas the great Charter is Quod nullus libet homo imprisonetur nisi per legem terrae . . . . This is the present case, and this was the case upon all the Presidents [precedents] produc'd and many more that might be produc'd, where upon Habeas Corpus, many have been discharg'd . . . .

"This appears plainly by many old Books, if the Reason of them be rightly taken, For insufficient causes are as no causes return'd; and to send a man back to Prison for no cause return'd, seems unworthy of a Court." *Id.* at 404-05.

66. "[I]f the commitment be against law, as being made by one who had no jurisdiction of the cause, *or for a matter for which by law no man ought to be punished*, the court are to discharge him . . . ; and the commitment is liable to the same objection where the cause is so loosely set forth, that the court cannot adjudge *whether it were a reasonable ground of imprisonment or not.*" *Id.* at 405. (Emphasis added by the Supreme Court.)

67. 1 Stat. 73, 81-82 (1789).

law authority for the proposition that habeas was available to remedy any kind of governmental restraint contrary to fundamental law."[68]

There are several interesting aspects to this conclusion. First, it is striking that the single case the Court offered to demonstrate the use of habeas corpus to release a person *convicted of a crime* in violation of "fundamental law" or "due process" was a case where the prisoner had been *committed for contempt.* This signifies more than the probable absence of directly applicable authority. A contempt case is not even properly analogous on this point for, as clearly indicated in the *Bushell* opinion itself, English courts could exercise a far broader scope of review when examining a commitment for contempt than when considering commitments for treason or felony.[69]

Second, it is questionable whether the portion of the *Bushell* report quoted by the Supreme Court is even a part of Chief Justice Vaughan's opinion. The quoted passages are from the second of two collections of briefs of cases appearing at the end of the report and are preceded by the title: "Presidents [precedents]. That the Court of Common Pleas, upon Habeas Corpus, hath Discharg'd Persons Imprison'd by other Courts, upon the Insufficiency of the Retorn only, and not for Privilege."[70]

Third, as indicated in the above title and in portions of the original passage edited out in the version quoted by the Supreme Court, the true subject of the quoted passage is whether Common Pleas could issue its writ of habeas corpus for a person imprisoned by another court when there was no issue of privilege. The absence of some issue of privilege is significant because *Bushell's Case* arose at a time when the Common Pleas judges and other authorities were actively debating whether that court could issue the writ of habeas corpus in a circumstance other than the jurisdiction expressly granted in the Star Chamber Act, or the familiar situation where habeas corpus was an ancillary remedy to enforce some litigant's "privilege" to have his case heard exclusively in Common Pleas.[71]

68. 372 U.S. at 404-06. *Cf. Ex parte* Siebold, 100 U.S. 371, 376 (1879), wherein the Court stated that the *Bushell* court "discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose."

69. See text accompanying note 82 *infra.*

70. Vaughan at 154, 124 Eng. Rep. at 1015.

71. See Jones's Case, 2 Mod. 198, 86 Eng. Rep. 1023 (C.P. 1676); 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 202-03 (1931). The controversy was ended by the Habeas Corpus Act, 31 Car. 2, c. 2 (1679), which clearly gave Common Pleas independent jurisdiction to issue habeas corpus in a criminal case.

In this context, it appears highly unlikely that the author of the quoted passage assumed the heavy and unnecessary burden of demonstrating that the writ of habeas corpus could be used to "remedy any kind of governmental restraint contrary to fundamental law." All the author had to do—and all the title and language of the passage indicate that he purported to do—was to answer the disputed question whether Common Pleas could issue a writ of habeas corpus *ad subjiciendum* in a case not involving privilege where the respondent's return to the writ did not set out sufficient cause for the petitioner's detention.

Fourth, the language quoted from the *Bushell* report to the effect that the writ of habeas corpus was used to discharge persons "against Law imprison'd and detain'd, . . . whereas the Great Charter is Quod nullus libet homo imprisonetur nisi per legem terrae"[72] was not understood by sixteenth and seventeenth century authorities to grant a general license to remedy restraints intolerable under some vague standard of justice or natural or "fundamental" law. A passage from Sir Edward Coke's *Institutes* discussing Magna Charta in relation to personal liberty as enforced by the writ of habeas corpus provides insight into the contemporary significance of such phrases as "due process of law" and "against Law imprison'd and detain'd."[73] Coke's stated requirements all concern the formal regularity of the process of commitment and the authority of the official who signed it. There is nothing in his

72. See note 65 *supra.*

73. 1 COKE, 2D INSTITUTES 52-52† (1797 ed.): "Now seeing that no man can be taken, arrested, attached, or imprisoned but by due processe of law, and according to the law of the land, these conclusions hereupon doe follow.

"First, that a commitment by lawfull warrant, either in deed or in law, is accounted in law due processe or proceeding of law, and by the law of the land, as well as by processe by force of the kings writ.

"2. That he or they, which doe commit them, have lawfull authority.

"3. That his warrant, or *mittimus* be lawfull, and that must be in writing under his hand and seale.

"4. The cause must be contained in the warrant, as for treason, felony, &c. or for suspition of treason or felony, &c. . . . .

"5. The warrant or mittimus containing a lawfull cause, ought to have a lawfull conclusion, viz. and him safely to keep, untill he be delivered by law, &c. and not untill the party comitting doth further order. And this doth evidently appeare by the writs of *habeas corpus*, both in the kings bench, and common pleas, eschequer and chancery. . . .

"By these writs it manifestly appeareth, that no man ought to be imprisoned, but for some certain cause: and these words, *ad subjiciend. et recipiend. &c.* prove that cause must be shewed: for otherwise how can the court take order therein according to law?"

Coke's preëminence as the most authoritative seventeenth century commentator on the meaning of Magna Carta is discussed in Kurland, *Magna Carta and Constitutionalism in the United States*, in THE GREAT CHARTER 48, 50-51 (1965).

discussion regarding whether the content of substantive offenses or even procedures employed at the trial squared with "fundamental law" or gave rise to an "intolerable restraint."[74] Similarly, Holdsworth suggests that although there was "no historical connection between Magna Charta and this writ," nevertheless when habeas corpus came to be used as an independent remedy in the case of persons committed to prison by the Privy Council, "men naturally connected it with those clauses of Magna Charta which prohibited imprisonment without due process of law."[75] Holdsworth also stated:

> Due process of law was interpreted by the House of Commons to mean due process of common law; and Magna Charta and these later statutes were supposed to prove that arrests by order of the king or Council were illegal. But we have seen that this interpretation was never acquiesced in by the crown; and that the mediaeval protests and mediaeval legislation never succeeded in limiting the large and vague power of the king or his council to make arrests.[76]

The king was obviously desirous of restricting the scope of the writ. In contrast, the parliamentary opposition, which was supported by the common lawyers, wished to utilize the writ as a protective device to preclude imprisonment without common-law process. Finally, in the seventeenth century the uncertain status of the executive detention power was resolved in favor of the demands of Parliament, which effected its object by enacting legislation. "[I]t is this legislation, which extends from the Petition of Right to 1816, that has given to the writ its great place in our modern constitutional law."[77]

If a seventeenth century lawyer ever urged that the function or office of habeas corpus was the "vindication of due process,"[78] he would undoubtedly have had in mind the use of habeas corpus to

74. The full passage from Coke also seems to explain the meaning of another passage on which the Supreme Court relied, 372 U.S. at 405 n.14—Hale's terse and ambiguous phrases "cause for which a man ought not to be imprisond" and imprisonment "without lawful or just cause." See 1 COKE, *op. cit. supra* note 73, at 52-52†. Similarly, INGERSOLL, *op. cit. supra* note 20, at 44, states that "the only inquiry upon the return under magna charta, from which the writ derived its efficacy, was, whether the commitment was *per legem terrae*, that is, by an officer authorized by the law of the land, for an offence against the law, and for a purpose, and in a form recognized by the law." See also Dunham, *Magna Carta and British Constitutionalism*, in THE GREAT CHARTER 20, 28, 34-36 (1965).

75. 9 HOLDSWORTH, *op. cit. supra* note 71, at 111, 112 (1926).

76. *Id.* at 112.

77. *Id.* at 114.

78. This theory was urged by the Supreme Court in *Fay*. See 372 U.S. at 402.

review executive detentions and to release persons wrongfully imprisoned by the crown. The idea that this phrase from Magna Charta implies some supervisory review of the acts of judges of superior courts, or a broad license to "remedy any kind of governmental restraint contrary to fundamental law"[79] originates in the United States Reports, not the annals of English history.

Fifth, Chief Justice Vaughan's stated reason for issuing the writ of habeas corpus in *Bushell's Case* was merely the insufficiency of the respondent's return to the writ. The *Bushell* court gave three grounds of insufficiency. First, the return did not set out the particulars of the alleged contempt—the evidence against whose manifest weight the jurors were charged with acting.[80] This observation of course suggests a very broad scope of review for courts issuing writs of habeas corpus. When this aspect of *Bushell's Case* is compared with the felony prosecution in *Fay v. Noia,* however, it is significant that Chief Justice Vaughan emphasized that this broad reviewing power applied only to persons committed for contempt. Indeed, if a respondent's return to a writ of habeas corpus stated nothing more than the fact that the petitioner had been committed for treason or felony, "this is a sufficient retorn to remand him, though in truth this is a general retorn."[81] Chief Justice Vaughan explained the distinction between cases involving felony and those involving contempt:

> The cases are not alike; for upon a general commitment for treason or felony, the prisoner (the cause appearing) may press for his tryal, . . . and upon his indictment and tryal, the particular cause of his imprisonment must appear, which proving no treason or felony, the prisoner shall have the benefit of it. But in this case [involving contempt], though the evidence given were no full nor manifest evidence against the persons indicted, but such as the jury upon it ought to have acquitted those indicted, the prisoner shall never have any benefit of it, but

79. *Id.* at 405.

80. "But here the evidence given to the jury is not exposed at all to this Court, but the judgment of the Court of Sessions upon that evidence is only expos'd to us; who tell us it was full and manifest. But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs." Vaughan at 137, 124 Eng. Rep. at 1007.

"Hence it is apparent, that the commitment and retorn pursuing it, being in it self too general and uncertain, we ought not implicitly to think the commitment was re vera, for cause particular and sufficient enough, because it was the act of the Court of Sessions." Vaughan at 140, 124 Eng. Rep. at 1008.

81. Vaughan at 142, 124 Eng. Rep. at 1009. See also text following note 16 *supra.*

> must continue in prison, when remanded, until he hath paid that fine unjustly impos'd on him, which was the whole end of his imprisonment.[82]

The return in *Bushell's Case* was also held to be faulty for not stating that the jurors gave their verdict corruptly, knowing that the evidence against the persons indicted was full and manifest. Since reasonable men can differ on their evaluation of the same testimony, the court held that conclusions contrary to those reached by the court were not contemptuous absent some element of corruption.[83] Finally, the return was insufficient because the common law did not permit courts to fine a jury for going against judicial directions or the evidence in a particular case. The nature of the functions of judge and jury made it impossible for a judge to give an enforceable direction in this matter or to determine whether such a direction had been disregarded.[84]

Thus, one searches the *Bushell* opinion in vain for support of the proposition for which Mr. Justice Brennan used this famous case. The ground for issuance of the writ was not some abstract violation of "fundamental law" or "whatever society deems to be an intolerable restraint," but simply the fact that the return failed to set out a sufficient basis for the commitment. "For," as the very passage relied on by the Court observes, "insufficient causes are as no causes retorn'd; and to send a man back to Prison for no cause retorn'd, seems unworthy of a Court."[85]

---

82. Vaughan at 143, 124 Eng. Rep. at 1010.

83. "I conclude therefore, that this retorn, charging the prisoners to have acquitted Penn and Mead, against full and manifest evidence first and next, without saying that they did know and believe that evidence to be full and manifest against the indicted persons, is no cause of fine or imprisonment." Vaughan at 142, 124 Eng. Rep. at 1009.

84. "Without a fact agreed, it is as impossible for a Judge, or any other, to know the law relating to that fact, or direct concerning it, as to know an accident that hath no subject.

"Hence it follows, that the Judge can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

"But the Judge, qua Judge, cannot know the fact possible, but from the evidence which the jury have, but (as will appear) he can never know what evidence the jury will have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is. . . .

"Being return'd of the vicinage, wence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in Court, but to this evidence the Judge is a stranger." Vaughan at 147, 124 Eng. Rep. at 1012.

85. Vaughan at 156, 124 Eng. Rep. at 1016. Quoted by the Supreme Court in Fay v. Noia, 372 U.S. at 404-05.

C. *Misapplication of Bushell's Case*

The seventeenth and eighteenth century law of habeas corpus posed three insurmountable obstacles to any attempt to use the writ of habeas corpus for the "vindication of due process,"[86] if that phrase denotes the sort of "fundamental law" or "intolerable restraint" considerations invoked to free the petitioner in *Fay v. Noia.* First, as previously discussed, a general return that the petitioner had been committed for treason or felony was a sufficient return to a writ of habeas corpus. Second, petitioners were forbidden to challenge the truth of particulars set out in the respondent's return to the writ. Third, once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other than to verify the formal jurisdiction of the committing court.[87] In view of these three limitations, it may be said that practically every kind of "intolerable restraint" or violation of "fundamental law" that the twentieth century lawyer might imagine—except an imprisonment without *stated* legal justification, such as the imprisonment involved in *Bushell*—could be shielded from inquiry by a general return, a valid judgment, or the rule against controverting facts set out in the return, and a court would be virtually powerless to supply a remedy by habeas corpus.[88] Concededly, there should be a remedy for every violation of law involving a person's liberty, and perhaps in our day the remedy should be through the writ of habeas corpus. But it is misleading to claim support for this proposition in the holding or language of *Bushell's Case.*

III. Habeas Corpus To Omit Traditional Requirement of Immediate and Confining Restraint

Where the history of habeas corpus is concerned, the Supreme Court has also had its sins of omission. In *Jones v. Cunningham,*[89] the question was whether a state prisoner who had been released on

86. 372 U.S. at 402.

87. See notes 29 and 55 *supra.* American cases on this subject are discussed in Oaks, *Habeas Corpus in the States—1776-1865,* 32 U. Chi. L. Rev. 243, 261-64 (1965).

88. See generally Rubinstein, *supra* note 31, at 325-26. "Superior courts do not have to enumerate or specify the grounds upon which the imprisonment is founded; nor does this have to be done in the return to the writ. Consequently, the opportunities to find fault with the 'cause shown' are almost nil. . . . Superior and other common law courts enjoy, therefore, an almost complete immunity from review on habeas corpus." The scope of review was of course wider where the prisoner had been committed by an inferior court. *Ibid.*

89. 371 U.S. 236 (1963).

parole was "in custody in violation of the Constitution,"[90] so that he could attack the validity of his conviction by a federal writ of habeas corpus directed to the parole board.

If there was any single feature that characterized the writ of habeas corpus in both its early statutory and common-law forms, it was the requirement that adult petitioners be subject to an immediate and confining restraint on their liberty.[91] Early state court decisions in this country were in agreement that the Habeas Corpus Act "evidently alluded to persons who were within the four walls of a prison" and that it "did not relate to persons who were not actually in custody or imprisoned, or who were out on bail."[92] The Supreme Court relied on these state court opinions in its 1920 decision that a prisoner who had been released on bail, "being no longer under actual restraint, . . . was not entitled to the writ of *habeas corpus*."[93] Lower federal courts appear to have followed this rule almost unanimously in bail cases up to the present day.[94] Similarly, once the practice of releasing prisoners on parole became current toward the end of the nineteenth century, the courts appear to have been almost unanimous in holding that a writ of habeas corpus could not be maintained to test the validity of a conviction after a petitioner had been so released.[95]

---

90. 28 U.S.C. § 2241(c)(3) (1964).

91. See, *e.g.*, Palmer v. Forsyth, 4 B. & C. 401, 402, 107 Eng. Rep. 1108, 1109 (K.B. 1825) where a writ of habeas corpus was quashed because the custodian "had no power at all over the body of the defendants." See 4 BACON, *op. cit. supra* note 20, at 471. In situations where the writ sought was the *cum causa*, which was used to obtain review of a case before a higher court, the courts seem to have been less exacting in the custody requirement. See Mitchell v. Mitchinham, 2 Dowl. & R. 722 (K.B. 1823).

92. State v. Buyck, 2 Bay 563, 564 (S.C. 1804). See Dodge's Case, 6 Mart. 569 (La. 1819); Respublica v. Arnold, 3 Yeates 263 (Pa. 1801); Logan v. State, 3 Brev. 415 (S. C. 1814). *Cf.* State *ex rel.* Ellerbe, *in re* Daniel, 39 Ala. 546 (1865); *Ex parte* Lee, 39 Ala. 457 (1864) (no habeas corpus review of regularity of duty assignments of military personnel); Cox v. Gee, 60 N.C. 516 (1864). *But cf. Ex parte* Badgley, 7 Cow. 472 (N.Y. 1827), where it was held that a petitioner can be "discharged" by habeas corpus from one cause of imprisonment even though the respondent can validly detain him for another.

93. Stallings v. Splain, 253 U.S. 339, 343 (1920).

94. See Allen v. United States, 349 F.2d 362 (1st Cir. 1965) (motion for relief under 28 U.S.C. § 2255); Matysek v. United States, 339 F.2d 389 (9th Cir. 1964) (same); cases cited in 17 RUTGERS L. REV. 808 (1963) and 15 N.Y.U. INTRA. L. REV. 153 (1960). *Contra*, United States *ex rel.* Shott v. Tehan, 337 F.2d 990 (6th Cir. 1964), *cert. granted sub nom.* Tehan v. Shott, 381 U.S. 923 (1965). Bailey, *Federal Habeas Corpus*, 45 B.U.L. REV. 161, 186 n.105 (1965), states that the petitioner in *Tehan* was free on bail, although the opinion makes no mention of this fact.

In *Allen v. United States, supra*, the court distinguished *Jones v. Cunningham* on the ground that the parolee involved there was subject to far more restrictions on his freedom than a person who is at large on bail.

95. See Shelton v. United States, 242 F.2d 101 (5th Cir. 1957) (motion for relief under 28 U.S.C. § 2255); cases cited in Jones v. Cunningham, 294 F.2d 608 (4th Cir.

The classic illustration of the principle involved in the bail and parole cases is the Supreme Court's own 1885 decision in *Wales v. Whitney*.[96] That case involved a habeas corpus petition by a naval officer who sought relief from the following order by the Secretary of the Navy: "You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington."[97] In holding that this restraint was not the type of "restraint or imprisonment suffered by a party applying for a writ of *habeas corpus*, which is necessary to sustain the writ,"[98] the Court relied on some early bail cases and stated:

> Something more than moral restraint is necessary to make a case for *habeas corpus*. There must be actual confinement or the present means of enforcing it. . . .
>
> It is said in argument that such is the power exercised over the appellant under the order of the Secretary of the Navy. But this is, we think, a mistake. If Dr. Wales had chosen to disobey this order, he had nothing to do but take the next or any subsequent train from the city and leave it. There was no one at hand to hinder him. . . . The fear of . . . [being arrested and returned to the District], which may or may not keep Dr. Wales within the limits of the city, is a moral restraint which concerns his own convenience, and in regard to which he exercises his own will.[99]

Relying on the foregoing authorities, the Court of Appeals for the Fourth Circuit held that the writ of habeas corpus was not available to the parolee in *Jones v. Cunningham*.[100] The Supreme Court reversed. Although Mr. Justice Black "looked to common-law usages and the history of habeas corpus both in England and in this country,"[101] he chose his precedents from among recent decision involving aliens seeking entrance to this country, and common-law decisions under which the writ was issued to liberate wives or minor children "not under imprisonment, restraint or duress of any kind."[102] The Court held that the principles allowing habeas corpus release in these cases were applicable to the "significant restraints"

1961), *rev'd*, 371 U.S. 236 (1963). *Contra*, *Ex parte* Snodgrass, 43 Tex. Crim. Rep. 359, 65 S.W. 1061 (1901); cases cited note 106 *infra* (decided after *Jones v. Cunningham*).

96. 114 U.S. 564 (1885).

97. *Id.* at 566.

98. *Id.* at 571.

99. *Id.* at 571-72.

100. Jones v. Cunningham, 294 F.2d 608 (4th Cir. 1961), *rev'd*, 371 U.S. 236 (1963). The petitioner was seeking relief under 28 U.S.C. § 2241.

101. 371 U.S. at 238.

102. *Id.* at 239. The history of habeas corpus as a remedy in child custody disputes is discussed in Oaks, *supra* note 87, at 270-74.

imposed on the petitioner by his parole board.[103] Then, without so much as mentioning the bail and parole cases, or even its own decision in *Wales v. Whitney*,[104] which involved a remarkably similar restraint, the Court concluded: "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in the 'custody' of the members of the Virginia Parole Board within the meaning of the habeas corpus statute."[105]

As in the cases of *Townsend* and *Fay*, the result reached in *Jones v. Cunningham* may be a sound decision for our time and circumstances.[106] Recent state-court decisions show a trend toward modifying the traditional custody requirement.[107] But whatever the wisdom of such modification, the Supreme Court's statement that its decision in *Jones v. Cunningham* was supported by the "history of habeas corpus both in England and in this country" falls considerably short of complete accuracy.[108]

It may be that we know too much of legal history already. In

---

103. Petitioner had been directed to live with his aunt and uncle in a certain community. He could not change his residence, leave the community, or own or operate a motor vehicle, without the permission of a parole officer to whom he was required to report regularly. 371 U.S. at 242.

104. *Cf.* Kurland, *Foreword to The Supreme Court—1963 Term*, 78 HARV. L. REV. 143, 170 (1964). Inexplicably, even the state's brief in this case failed to cite *Wales v. Whitney*. Brief for Respondent, Jones v. Cunningham, 371 U.S. 236 (1963). The Petitioner's brief distinguished *Wales* on the basis of what was at best an alternative ground of decision: being subject to military orders, petitioner could have been confined to Washington by a lawful directive pertaining to his military duties, so that the order in question placed no added restraint on his liberty. Brief for Petitioner, 28-29, Jones v. Cunningham, *supra*. Despite the presence of this alternative ground, a consideration of the *Wales* opinion as a whole shows that the Court's holding was not limited to petitioners in the military.

105. 371 U.S. at 243.

106. *E.g.*, Commonwealth *ex rel.* Stevens v. Myers, 213 A.2d 613 (Pa. 1965), a well reasoned and erudite opinion expressly modifying the law to permit a prisoner to use the writ of habeas corpus to attack the validity of a final judgment of conviction even though he has not yet begun to serve the sentence imposed. *Accord*, Martin v. Commonwealth, 349 F.2d 781 (4th Cir. 1965). Recent decisions permitting a person to use habeas corpus to test the validity of a sentence from which he has been paroled include People *ex rel.* Zangrillo v. Doherty, 40 Misc. 2d 505, 243 N.Y.S.2d 694 (Sup. Ct. 1963); Garnick v. Miller, 403 P.2d 850 (Nev. 1965); Commonwealth *ex rel.* Alexander v. Rundle, 213 A.2d 644 (Pa. 1965). For a discussion of some modern reasons for modifying the traditional requirement of custody as a prerequisite for habeas corpus, particularly in cases like *Jones v. Cunningham* where the petitioner was in custody when he initiated his petition for the writ, see 59 MICH. L. REV. 312 (1960).

107. 371 U.S. at 238.

108. In discussing *Jones v. Cunningham*, a note in 51 CALIF. L. REV. 228, 230 (1963), suggests that "it was somewhat misleading to resort to historical usages to define the meaning of 'custody' for purposes of postconviction review" because, "historically, the Great Writ was primarily a pretrial device to prevent the arbitrary imprisonment of an individual without bringing him to trial."

certain corners of the law, "ignorance is the best of law reformers."[109] If we are to use history in legal opinions, however—and it is difficult to make any use of precedent without involving history to some extent—we must avoid getting facts twisted by wishful thinking or "innocently motivated after-mindedness."[110] As one perceptive scholar has observed, "the historian, unlike the brief-writer, can never proceed on the assumption that history unfolds backward in neat legal categories; his task, whatever his opinions on the merits of contemporary policies, is to analyze the past on its own terms."[111] This ideal was not realized in the "historical" discussions in the three important habeas corpus decisions of the 1962 Term, which established a new scope of factual inquiry ("de novo"), a vague new extension of the legal grounds for issuance of the writ ("detentions in violation of fundamental law"); and a new and practically all-encompassing definition of the custody that will suffice to qualify for issuance of the writ ("conditions which significantly confine and restrain freedom").

Few students of the law object to a court's reshaping old remedies to fit new and growing social problems, so long as the court moves within the interstitial area governed by what Karl Llewellyn called the "law of leeways."[112] But the legal rules fashioned to cover such growth should be cloaked in reason, not garbed in a regal patchwork of history that, on close examination, proves as embarrassingly illusory as the Emperor's new clothes.

109. HOLMES, THE COMMON LAW 78 (1881), quoted in WEINER, USES AND ABUSES OF LEGAL HISTORY: A PRACTITIONER'S VIEW 4 (1962).

110. See WEINER, *op. cit. supra* note 109, at 9.

111. Roche, *The Expatriation Cases: "Breathes There the Man With Soul So Dead,"* 1963 SUP. CT. REV. 325, 326. In Kelly, *CLIO and the Court: An Illicit Love Affair*, 1964 SUP. CT. REV. 119, 155, the author discusses numerous important areas of recent Supreme Court adjudication to support his thesis that the Court "has confused the writing of briefs with the writing of history."

112. LLEWELLYN, THE COMMON LAW TRADITION 219-20 (1951); LLEWELLYN, BRAMBLE BUSH 156-57 (1951).