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INTRODUCTION: LAW VS. ORDER, OR HABEAS VS. HOBBES

*Wythe Holt**

We are now enduring a milestone in human affairs, a millennium. This is an entirely human-made, arbitrary event, but what part of human life is not arbitrary or accidental, at least insofar as we mortals can ascertain? Thomas Hobbes advocated royal dictatorship within an aristocratic culture as the appropriate style of civic ordering for himself and his fellow humans, because the arbitrariness of life was otherwise, he estimated, solitary, poor, nasty, brutish, and (blissfully) short.[1] We may put the millennium to good use by pausing to ponder the extent to which Hobbes is correct. Which is more nasty and brutish, tyranny or the disorderly, passion-filled mundanity of democratic freedom? Since more and more folks in supposedly advanced societies are opting for the first under the mistaken notion that they have the second, it is well to consider the slim benefits that thousands of years of supposedly civilized life have brought us.

I personally conclude Hobbes to be wrong. I think that one of those few benefits of civilized life is embodied in the Great Writ, the writ of habeas corpus.[2] The Great Writ—developed in

* University Research Professor of Law, University of Alabama School of Law.

1. THOMAS HOBBES, LEVIATHAN ch. 13 (Liberal Arts Press 1958) (1651).

2. *See* U.S. CONST. art I, § 9, cl. 2 (constitutional guarantee of habeas); 28 U.S.C. § 2241 (1994); *see also* Fay & Nola, 372 U.S. 391, 399 (1963) (Habeas corpus

the Anglo-American legal system over centuries of bitter struggle—is a landmark of democratic freedom. It says that the government is subordinate to the people. It says that the liberty of a single individual is more important than the order of a controlling government. It says that I, and each of my fellow humans, can question my (our) detention by government, can force government to provide rational legal justification for its restriction of my (our) liberty, can require government to bring me (us) out of detention into the light of judicial scrutiny where government must confront *both* me (us), in person, *and* my (our) arguments about the illegality of its restraints upon me (us). It says that government must free me (us) if my (our) arguments are better than its. It says that democratic freedom can have a bit of orderliness and rationality too.

Moving from the ideological abstract (where the modern liberal theorists of freedom, such as Ronald Coase[3] and Akhil Reed Amar,[4] love to dwell) to the reality of political life, I must note that, in this process of questioning the legality of governmental detention, the government (in the form of judges) is still in what appears to be, and often is, control. Governments cannot stand not to be in control, and the minions of government—judges—still do the decisionmaking. Thus I am subject to the passions and weaknesses of those who may be lackeys to tyranny or fearful of their own lives or possessions or status, even when, especially when (as today) tyranny is masked as participatory liberal capitalism. I would prefer to make my arguments to that other, even more democratic legal institution used for centuries by the Anglo-American legal system, a jury of my peers. Habeas procedure is jury-less.

In the disorderly world of politics, however, I (we) always have a chance. Political resistance and struggle can take the form of legal debate. In the courtroom, I (we) have the rights to a public forum for my (our) grievances, and to a considered, rational response to my (our) arguments. I (we) have the opportunity to publicize my (our) situation, and any poor response the

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is "the Great Writ, . . . 'the most celebrated writ in the English law.'").

3. Ronald Coase (Clifton R. Musser Professor Emeritus of Economics, University of Chicago Law School), *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

4. Akhil Reed Amar (Southmayd Professor of Law, Yale Law School), THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

government, or the judges, may make to my (our) arguments. This publicity can occur outside the courtroom; struggle either in or outside the courtroom may remove or dilute what control the government and the judges have. Further, judges are trained in an ideology of popular rights, which emphasizes the importance of liberty (it could be *their* bodies in detention), the dueness of process, and the centrality of judges in guarding citizen freedom. Judges are members of a legal profession which has a similar ideology of protection for the rights of the people. All of us live in what is billed to be a popular democracy, and I (we) always can claim our fundamental rights. Judges may courageously oppose the government of which they are a part, may even be outraged by what government has done. Federal judges upon occasion have been courageous and even outraged in this fashion. We are also somewhat aided by the multiplicity of governments in our federal system, so that a national judge might not identify with an offending state government. Thus, habeas (in the United States) is one of those few evidences that democracy in civilization has benefitted the average human being—that Hobbes is wrong.

Accordingly, we are fortunate that Professor Eric M. Freedman, whose name symbolizes what habeas can do, has chosen to publish in *The Alabama Law Review* his three-part study of the history of four crucial United States Supreme Court cases interpreting habeas corpus and its availability.[5] Professor Freedman is perhaps the best and most important of today's several historians of the legal history of habeas corpus in the United States, in no small part because of his meticulous research and his crystal-clear prose. Exhaustively looking for and depending upon that *sine qua non* of the historian (as opposed to the theorizer), the actual evidence embedded in the partial record that time leaves us, Professor Freedman has undertaken a fresh, insight-

5. Eric M. Freedman, *Milestones in Habeas Corpus: Part One, Just Because John Marshall Said It Doesn't Make It So:* Ex parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000); Eric M. Freedman, *Milestones in Habeas Corpus: Part Two, Leo Frank: Untangling the Historical Roots of Federal Habeas Corpus Review of State Constitutions*, 51 ALA. L. REV. (forthcoming 2000); Eric M. Freedman, *Milestones in Habeas Corpus: Part Three,* Brown v. Allen: *The Habeas Corpus Revolution That Wasn't*, 51 ALA. L. REV. (forthcoming 2000).

ful, and thorough (if long-term) look at our experience with habeas corpus in the federal system which will eventually become a book. The three parts of that study he has presented to us, one in this and the others in future issues, will be at the heart of his book and of his liberatory message about the history of habeas in the United States.

In these three articles, Professor Freedman undertakes to reread four of the United States Supreme Court's most important habeas corpus cases. Two of those cases, the most recent two, *Moore v. Dempsey*[6] and *Brown v. Allen*,[7] are usually taken to have expansive holdings while the other two, *Ex parte Bollman*[8] (in dictum) and *Frank v. Mangum*,[9] are usually understood as limiting the reach of the Great Writ, the former because it agreed with a federal statute supposedly limiting the federal writ to federal prisoners.[10] I do not wish to delve into the specifics of Professor Freedman's findings and stories, thereby perhaps spoiling the fun of reading them yourself, but I think it fair to say that Professor Freedman's controversial (if historically well-grounded) conclusion is that the cases are consistent with his (and my) view both of the Constitution and of legislative and judicial history, that Congress cannot constitutionally restrict and *has not restricted* (until very recently, in 1996),[11] and the Court *has consistently granted,* the expansive, liberatory *avenue* for relief from illegal detention for all persons within the United States that a writ of habeas corpus can provide. [I must add that, in published work, I have taken an opposite view of Congress's meaning in section 14 of the Judiciary Act of 1789;[12] Professor Freedman's research and arguments in his article in this issue have convinced me of my error.]

The Constitution recites in part 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

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6. 261 U.S. 86 (1923).
7. 345 U.S. 946 (1953).
8. 8 U.S. 75 (1807).
9. 237 U.S. 309 (1915).
10. *Ex parte Bollman*, 8 U.S. at 77-78.
11. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No: 104-132, 110 Stat. 1214.
12. Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1496-97 (1989).

it."[13] I read this (known as "the Suspension Clause") to state *unequivocally* that federal judges *must* be available, *at all times*, to hear habeas corpus writs containing complaints of illegal detention *filed by any person* in the United States whose liberty has been restricted *by any government, and by any branch of a government such as a court,* in the United States (unless Congress has deliberately withheld the "privilege" during a rebellion or an invasion). Professor Freedman has a similar understanding, I think. The cases almost uniformly affirm the existence of federal court jurisdiction, that is, power to hear petitioners' complaints about the legality of their detentions, usually overruling restrictive and sometimes pedantic objections founded upon the competency, sovereign status, and/or *bona fides* of the authority (especially a court) which ordered the detention in the first place, and have done so since the undeservedly obscure *United States v. Hamilton* in 1795.[14] Professor Freedman's excellent telling of the tales of power and of the exercise of the writ in these four cases confirms that exciting and liberatory reading.

The broad power to hear a habeas petitioner does not mean that the court will grant freedom as a result. All too often, as in *United States v. Hamilton*,[15] *Ex parte McCardle*,[16] and *Ex parte Royall*[17]—and in *Ex parte Bollman*[18] and *Frank v. Mangum*[19]—the Court has followed an expansive, Constitutionally-sound, often ringing declaration of the broad power of federal courts to hear and issue writs of habeas corpus with a restrictive, pinched view of the equities presented by, or the law pertinent to, the petitioner(s) before it, usually thereby denying actual freedom. One might argue cynically that there is no freedom in propaganda, that lip service to the democratic import of the Great Writ without actually using it to give petitioners their freedom is consistent with a form of government which proclaims itself a democracy but allows citizens little in the way of

13. U.S. CONST. art. I, § 9, cl. 2.
14. 3 U.S. 17 (1795).
15. *Id.*
16. 74 U.S. 506 (1868); 73 U.S. 318 (1867).
17. 117 U.S. 241 (1886).
18. *Ex parte Bollman*, 8 U.S. at 75.
19. *Frank*, 237 U.S. at 309.

actual power.

Be that as it may, the Great Writ is in desperate straits today. Congress attempted greatly to impair the power of petitioners to bring habeas corpus writs by certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996.[20] While I think the act clearly unconstitutional in these restrictions on habeas, the present United States Supreme Court is not likely to agree with me. Perhaps efforts such as these by Professor Freedman will help the Court to understand the liberatory intent of the Framers and thus the strong mandate of the Suspension Clause, the uniform history of broad and remedial construction of their jurisdiction in habeas cases by prior Courts, and the central and crucial place of the Great Writ in the history of the struggle by people against the tyrannical and overwhelming exercise of power by governments to deprive them of liberty, so that the Act will be overturned. Then we will have habeas, not Hobbes; law, not Big Brother's order.

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20. 110 Stat. 1214.