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# HABEAS CORPUS: ITS HISTORY AND ITS FUTURE

*Charles Alan Wright\**

A CONSTITUTIONAL HISTORY OF HABEAS CORPUS. By *William F. Duker*. Westport, Conn.: Greenwood Press. 1980. Pp. 349. \$29.95.

Habeas corpus is in disarray. To many the "Great Writ," as it has been called by justices from John Marshall<sup>1</sup> to Sandra Day O'Connor,<sup>2</sup> has lost its halo.<sup>3</sup> There is uncertainty about what the function of habeas corpus ought to be, the Supreme Court vacillates between contracting and expanding the substantive grounds on which the writ will lie, while at the same time the procedural rules for seeking the writ are consistently being made more difficult to satisfy. As I have written elsewhere:

The most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a single federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations.<sup>4</sup>

At such a troubled time, the appearance of what is said to be the first book published on the history of habeas corpus (p. 7) seemed a welcome event. Perhaps a fuller understanding of what has occurred in the past would give valuable insight into what the writ ought to be in the future. That hope was not fulfilled. Indeed Mr. Duker virtually says that it is a hope that cannot be fulfilled. He is critical of those who "have viewed history as an event rather than as a process and therefore have failed to take note of the most striking characteristic of the writ of habeas corpus: like liberty itself, the writ is the product of continuous creation" (p. 7). To him "[h]istory is studied to give perspective not legitimacy" (p. 267).

The first three chapters, tracing the history of the writ from its English origins down to the Civil War, are fascinating reading for those who have

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1. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

2. *Engle v. Isaac*, 102 S. Ct. 1558 (1982).

3. "There has been a halo about the 'Great Writ' that no one would wish to dim. Yet one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality." *Schneekloth v. Bustamonte*, 412 U.S. 218, 275 (1973) (Powell, J., concurring).

4. 17 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 558 (1978) (footnote omitted) [hereinafter cited as WRIGHT, MILLER & COOPER].

not already learned much of this from articles in legal periodicals. The final three chapters, which in substance carry the story from the Act of February 5, 1867,<sup>5</sup> down through the most recent decisions at the time the book was written, are considerably less satisfying. Unfortunately it is the 1867 statute, giving the federal courts power to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States"<sup>6</sup> that made federal habeas corpus available to state prisoners. This is the aspect of habeas corpus that is at the heart of the present controversy and uncertainty.

We think of habeas corpus as an important safeguard of liberty. To Chief Justice Chase it was "the best and only sufficient defence of personal freedom."<sup>7</sup> To Chief Justice Warren it was "both the symbol and guardian of individual liberty."<sup>8</sup> That is certainly not how it began. In a well-known article at the beginning of this century, Professor Jenks announced a "most embarrassing discovery, . . . [T]he writ *Habeas Corpus* was originally intended not to get people out of prison, *but to put them in it*."<sup>9</sup> In common with other more recent historians, Mr. Duker argues convincingly that Professor Jenks confused habeas corpus with *capias*, and that while the two shared a certain resemblance and at certain periods interacted, they were distinct forms of process. Unlike *capias*, seizure pursuant to a writ of habeas corpus was not an arrest in a technical sense (pp. 19-23).

The excellent chapter on the English origins, however, which had earlier appeared in a law review,<sup>10</sup> shows that habeas corpus was a prerogative writ to compel the appearance of persons. The Normans used it to centralize the judicial system by bringing disputes away from the local and manorial courts into the royal courts. From the fifteenth to the seventeenth centuries the common-law courts used habeas corpus in their battles over jurisdiction with the Court of Chancery, and, to a lesser extent, the Court of High Commission, the Court of Admiralty, and the Court of Requests. As England moved toward Civil War, Parliament attempted to use habeas corpus in its struggle for power against the King.

This history is fascinating, but if I may borrow a sentence Judge Friendly wrote about another study of English legal history thought to have relevance to contemporary American problems, "[a]lthough this history is absorbing, I do not find it a *vade mecum*."<sup>11</sup> Mr. Duker says, for example, that "[t]he underlying reason for the rule that *res judicata* had no application to habeas proceedings was that since no appeal against a refusal to issue the writ or to discharge the prisoner was available, it would have been intolerable for a person to have the legality of his custody determined con-

5. Ch. 28, 14 Stat. 385 (1867).

6. *Id.* This is codified with only verbal changes in 28 U.S.C. § 2241(c)(3) (1976).

7. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868).

8. *Peyton v. Rowe*, 391 U.S. 54, 58 (1968).

9. Jenks, *The Story of the Habeas Corpus*, 18 L.Q. REV. 64, 65 (1902) (emphasis in original).

10. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978).

11. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 678 (1968).

clusively by the first judicial body to hear the matter" (pp. 5-6). The Supreme Court has recognized that the rule about *res judicata* derives from this fact at common law, but has thought that not a complete explanation. "[I]ts roots would seem to go deeper. Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."<sup>12</sup> One need not necessarily agree that conventional notions of *res judicata* should have "no place" in habeas corpus.<sup>13</sup> Still, in light of the drastic change in the function and purpose of the writ, the fact that, unlike the situation in English common law, appeal is now ordinarily available from a refusal to issue the writ<sup>14</sup> hardly seems decisive on what weight, if any, should be given to prior determinations.

Mr. Duker continues by recounting the extension of habeas corpus to the British colonies in North America and the inclusion of the suspension clause in the Constitution.<sup>15</sup> He concludes, as do many scholars, that the constitutional language was not intended to guarantee a federal writ of habeas corpus but only to limit the circumstances in which Congress could interfere with the issuance of state writs of habeas corpus. The argument is plausible, but this has not been the Supreme Court's understanding. Although Chief Justice Marshall said that the power to award the writ by any of the courts of the United States must be given by written law, he considered that the Constitution imposed on Congress "the obligation of providing efficient means by which this great constitutional privilege should receive life and activity. . . ."<sup>16</sup> The argument is advanced today that the suspension clause does not require Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction, but this is on the view that the Constitution protects only the scope of the writ as it was known at the time the Constitution was drafted, rather than on any theory that the Constitution is speaking only to habeas corpus from a state court and not to federal habeas corpus.<sup>17</sup>

As a part of this argument against Marshall's reading of the Constitution as imposing an obligation on Congress, Mr. Duker points out that by the time the Constitutional Convention came to consider habeas corpus, it had already firmly fixed upon the idea that it was to be optional with Congress whether to create any lower federal courts (p. 127). This demonstrates, he says, "that the 'obligation theory' espoused by Marshall . . . is questionable, since Congress was without power to impose jurisdiction on the state courts" (p. 157 n.13). For that proposition he cites a gratuitous dictum from Justice Washington.<sup>18</sup> It is true that through the first part of

12. *Sanders v. United States*, 373 U.S. 1, 8 (1963).

13. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 149-50 (1970).

14. A certificate of probable cause is required. See 28 U.S.C. § 1253 (1976).

15. U.S. CONST. art. I, § 9, cl. 2: "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."

16. *Ex parte Bollman*, 8 U.S. (4 Cranch) at 95. See also *Jones v. Cunningham*, 371 U.S. 236, 238 (1963).

17. See *Swain v. Pressley*, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring); *Bounds v. Smith*, 430 U.S. 817, 835 (1977) (Burger, C.J., dissenting).

18. "For I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the

the nineteenth century until the 1860s there were instances in which the Supreme Court "and state courts broadly questioned the power and duty of state courts to . . . enforce United States civil and penal statutes or the power of the Federal Government to require them to do so."<sup>19</sup> That question has long since been resolved, and it is now clear, as history shows the Framers must have contemplated, that Congress has always had power to require state courts to entertain claims created by federal statute.<sup>20</sup>

At several points in this portion of the book Mr. Duker takes issue with the quite different interpretation of the historical evidence in a well-known article by Francis Paschal, *The Constitution and Habeas Corpus*.<sup>21</sup> Unfortunately both in the text (p. 136) and at twelve places in the footnotes and Bibliography, Duker refers to "Pascal" and the title of the article is given as "Habeas Corpus and the Constitution." Ordinarily I would think it infra dig for a reviewer even to take note of insignificant errors of this kind, but in this instance I think it needs to be mentioned. Much of the historical material in the first half of this book is derived from original research by Mr. Duker into the primary materials, the ancient records themselves. I am not trained as a historian and am obliged to rely on secondary sources such as his book. But when I find that he consistently makes an obvious error in citing a modern, easily checked source, what confidence can I have that he has not made similar mistakes in reporting his findings from the materials I cannot check?<sup>22</sup>

In the final three chapters of the book Mr. Duker is, for the most part, writing about current events, not history. I agree with another reviewer who has observed that "[t]he treatment here is at times disappointing, at least to lawyers who demand the thorough research and analytical precision that the historian seeking overview tends to neglect."<sup>23</sup> The literature abounds with articles that have analyzed these recent developments more thoroughly and more thoughtfully, nor is Mr. Duker's presentation strengthened by his partisanship for one particular point of view.<sup>24</sup>

Whatever the historical origins of habeas corpus may have been, in the

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State Courts may exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the federal Courts." *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27-28 (1820). Justice Washington later notes that the members of the Court who agree with the result announced in his opinion "do not concur in all respects in the reasons which influence my opinion." 18 U.S. (5 Wheat.) at 32. See also the discussion of the *Houston* case in Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1831-1835*, 49 U. CHI. L. REV. 646, 702-05 (1982).

19. *Testa v. Katt*, 330 U.S. 386, 390 (1947) (footnote omitted).

20. C. WRIGHT, *FEDERAL COURTS* § 45 (4th ed. 1983).

21. 1970 DUKE L.J. 605.

22. There are other instances of obvious sloppiness in the book. Justice Black is quoted (p. 7) as speaking of "the protection of the individual against erosion of their right. . . ." Of course he said "individuals." *Jones v. Cunningham*, 371 U.S. 236, 246 (1963). When Mr. Duker uses the famous quotation from Professor Jenks that I have quoted in the text accompanying note 9 *supra*, he inserts an "of" in it that does not appear in the original (p. 13).

23. Yackle, Book Review, 17 CRIM. L. BULL. 479, 487 (1981) (footnote omitted).

24. A Canadian law professor, reviewing Mr. Duker's book for a British audience, says: "The author's uncritical enthusiasm for judicial activism and his almost mystical belief in the power of habeas corpus may seem odd to non-American readers." Sharpe, Book Review, *PUB. L.*, Spring 1982, at 154, 156.

United States today the function of the writ is thought to be "the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty,"<sup>25</sup> or, more guardedly, as "a bulwark against convictions that violate 'fundamental fairness.'"<sup>26</sup> Yet it still retains something of its ancient character as a weapon for jurisdictional disputes between branches or levels of government. As the author aptly says: "Throughout this century in the United States, habeas corpus has been the medium of the dialogue of federalism between the federal and state courts" (p. 156). The expansion of the writ in the 1950s and 1960s has strengthened the federal courts at the expense of their state counterparts and has been a means for imposing federal constitutional standards on state criminal proceedings.

As noted at the outset of this review, these developments have stirred much controversy. There has been a countermovement, particularly since 1976, but it is unclear how far it will go and there is no agreement on where it should go. On the one hand, for example, Judge Friendly's suggestion that for the most part convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence<sup>27</sup> has found sympathetic listeners in high places.<sup>28</sup> Yet in an important recent book, my colleague, Philip Bobbitt, has made quite a contrary suggestion. He thinks that the view that moral arguments should generally be excluded from the constitutional discourse

justifies, for example, the phenomenon of federal habeas corpus, for which it is otherwise difficult to give good grounds. Habeas corpus severs the constitutional decision from the moral question of guilt or innocence, so that the former can be dispassionately weighed as one suspects it seldom can be in the context of a trial. At the same time federal habeas corpus gives the matter to a group of deciders whose customary business is, by comparison to state courts, largely amoral. It is the state courts that must confront questions of moral blame, broken promises, negligent or intentional harm, marital collapse, and virtually all crime. The federal courts, on the other hand, except for their diversity jurisdiction, are largely given over to matters of government regulation, intergovernmental conflict, and national commerce. Federal habeas corpus enables the constitutional questions to be given the priority they can seldom achieve when held in the balance with a moral conviction widely enough shared to have found its way into a state's criminal code.<sup>29</sup>

Professor Bobbitt's point is a thoughtful one, and merits careful consideration.

The changes in habeas corpus in the past seven years have not all been in one direction. In terms of the substantive grounds for which the writ will lie, the best known case is *Stone v. Powell*,<sup>30</sup> holding that fourth amend-

25. *Jones v. Cunningham*, 371 U.S. at 243 (1963).

26. *Engle v. Isaac*, 102 S. Ct. at 1570 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977)).

27. Friendly, *supra* note 13, at 142.

28. See *Schneckloth v. Bustamonte*, 412 U.S. at 265-66 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring).

29. P. BOBBITT, *CONSTITUTIONAL FATE* 140 (1982).

30. 428 U.S. 465 (1976).

ment claims may not be heard on habeas corpus if the state has provided an opportunity for full and fair litigation of the claim. To Mr. Duker: "*Stone v. Powell* represented the triumph of those who had been working to block the expansion of federal habeas jurisdiction which the Warren Court had accelerated to insure the transmission of its concept of criminal justice to the state court" (p. 264). Yet it seemed when *Stone* came down that it was bottomed on dislike for the exclusionary rule, rather than of habeas corpus, and the Court has refused to extend the full and fair opportunity rule to other constitutional violations, explaining that in *Stone* it had "made it clear that it was confining its ruling to cases involving the judicially created exclusionary rule. . . ." <sup>31</sup> The Court has also refused to make clear what it means by "full and fair opportunity" despite the varied views on this point in the circuits. <sup>32</sup>

In *Rose v. Mitchell* <sup>33</sup> and *Jackson v. Virginia* <sup>34</sup> the Court has held that habeas corpus will lie in circumstances where previously it had not been thought to be available. The decision in *Rose*, that the writ will run if there is racial discrimination in the selection of a grand jury foreman even though there was no constitutional impropriety in the selection of the petit jury and guilt was established beyond a reasonable doubt at a trial free from constitutional error, can be explained in terms of the abhorrence with which we view racial discrimination of any kind, and especially discrimination that infects the judicial system. The ruling in *Jackson*, however, that a prisoner is entitled to the federal writ if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt, seems a triumph of logic over practicality. The *Jackson* Court recognized that "most meritorious challenges to constitutional sufficiency of the evidence undoubtedly will be recognized in the state courts . . ." <sup>35</sup> That is clearly true. But since this new ground is one that can plausibly be asserted by very many state prisoners and it is one that a federal court cannot ordinarily reject without first reading the entire record of the state trial, the effect is to burden the courts without any significant benefit to anyone. My purpose here, however, is not to argue the merits of these cases, but only to show that the Court has not moved monolithically in a single direction with regard to the substantive grounds for habeas in the recent cases.

- On the procedural side, however, the recent decisions have all gone one way, and have created an increasingly difficult set of barriers that a state prisoner must overcome before a federal court will be allowed to decide whether his constitutional claim has any merit. The statute itself requires that the prisoner exhaust his state remedies before seeking habeas corpus. <sup>36</sup> The exhaustion requirement cannot be ignored no matter how clear the

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31. *Rose v. Mitchell*, 433 U.S. 545, 560 (1979).

32. See Justice White's dissent from denial of certiorari in *Shoemaker v. Riley*, 103 S. Ct. 266 (1982).

33. 443 U.S. 545 (1979).

34. 443 U.S. 307 (1979).

35. *Jackson v. Virginia*, 443 U.S. at 322.

36. 28 U.S.C. § 2254(b), (c) (1976). See 17 WRIGHT, MILLER & COOPER, *supra* note 4, at § 4264.

violation of the prisoner's constitutional rights.<sup>37</sup> Nor is the requirement satisfied unless the prisoner has fairly presented the same claim to the state court that he makes to the federal court.<sup>38</sup> But it was only "the substance" of the claim that must first be presented to the state courts and it was not necessary that the prisoner have cited "book and verse on the federal constitution."<sup>39</sup> Today that rule is applied with great severity, and a petition must be dismissed if there is any significant difference between the phrasing of the claim in federal court and in state court, no matter how unlikely it may be that the state court would have reached another result if the claim to it had been in the words later used in federal court.<sup>40</sup>

Most of the circuits had thought that if a prisoner presented a "mixed petition," in which state remedies had been exhausted on some claims but not on others, they could reach the merits of the exhausted claims while dismissing the unexhausted claims.<sup>41</sup> That view has now been rejected. Total exhaustion is required. The prisoner has the choice of postponing his attempt to get federal relief until he has gone back to state court and exhausted the remaining claims or of resubmitting to the federal court a petition presenting only the exhausted claims.<sup>42</sup> There are great hazards in the latter course for the prisoner, because four members of the Court have said that if he resubmits his exhausted claims and is unsuccessful, and thereafter he exhausts his state remedies on the other claims and presents them to the federal court in a later habeas corpus petition, he may have that later petition dismissed under Habeas Corpus Rule 9(b) on the ground that his failure to present the claims in his earlier petition was an abuse of the writ.<sup>43</sup>

Even the prisoner who masters the intricacies of exhaustion is not out of the woods. If the prisoner has been successful when he presented his constitutional contention to the state court, he will have been released, or retried, and has no need to resort to federal court. Applications for habeas corpus come, then, only where the state court has rejected the constitutional contention or for some reason or another has failed to pass on it.

If the state court has rejected the constitutional contention, its findings of fact are presumed to be correct, and the prisoner has the burden of establishing by clear and convincing evidence that the determination is erroneous, unless one of eight circumstances specified by statute exist.<sup>44</sup> In a case that has twice gone back and forth between the Ninth Circuit and the Supreme Court, new teeth have been put in that statute. It has been held

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37. *Duckworth v. Serrano*, 454 U.S. 1 (1981).

38. *Picard v. Connor*, 404 U.S. 270 (1971).

39. 404 U.S. at 278 (quoting *Daugherty v. Gladden*, 257 F.2d 750, 758 (9th Cir. 1958)).

40. *Anderson v. Harless*, 103 S. Ct. 276 (1982).

41. 17 WRIGHT, MILLER & COOPER, *supra* note 4, at 640-43.

42. *Rose v. Lundy*, 102 S. Ct. 1198 (1982). See also *Bergman v. Burton*, 102 S. Ct. 2026 (1982).

43. *Rose v. Lundy*, 102 S. Ct. at 1204-05. See 17 WRIGHT, MILLER & COOPER, *supra* note 4, at § 4267.

44. 28 U.S.C. § 2254(d) (1976). See 17 WRIGHT, MILLER & COOPER, *supra* note 4, at § 4265.

applicable even to findings by a state appellate court<sup>45</sup> and while it remains the rule that the statute does not apply to a state court determination of a mixed question of law and fact, the Court has taken a strict view on whether the federal court was disagreeing with the state court on the ultimate mixed question, to which the statute does not apply, or to the questions of fact that underlie that ultimate question, where the statute is applicable.<sup>46</sup>

If the state court has not decided the federal claim, it will be because the prisoner has not asserted it properly in state court or because there is some adequate state ground that supports the conviction. This is the "abortive state proceeding" about which the permissive view taken in *Fay v. Noia*<sup>47</sup> has been virtually supplanted by the holding in *Wainwright v. Sykes*<sup>48</sup> that federal relief can be had only if there is a showing of "cause" for the prisoner's failure to raise the issue properly at his trial and also a showing of actual prejudice. Although *Wainwright* did not define what was meant by "cause" and "prejudice," more recent cases have given meanings to those terms, and the meanings are not comforting to prisoners. The futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial, nor is it sufficient cause that defendant's lawyer was unaware of the basis for an objection if other defense lawyers have perceived and litigated the claim.<sup>49</sup> A claim of prejudice must be evaluated in the total context of the events at trial and a defendant must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."<sup>50</sup>

Much can be said for each of these decisions, viewed individually. Taken as a group they seem questionable. Most habeas corpus petitions are filed by untutored laymen, not versed in the niceties of these elaborate procedural doctrines. Years ago Justice Rutledge described the Illinois system of post-conviction remedies as a "procedural labyrinth . . . made up entirely of blind alleys."<sup>51</sup> For many state prisoners federal habeas corpus will now seem to merit a similar description. It is not obvious that it is a wise use of precious federal judicial time, or a service to the states and the notion of federalism, to have many or most habeas corpus petitions disposed of on procedural grounds. If the federal courts are free to reach the merits, they will find in the overwhelming bulk of the cases that the petition should be denied because the state courts have faithfully applied the commands of the Federal Constitution. A rebuff to the prisoner on procedural grounds leaves a cloud, however frivolous, over the state conviction and is

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45. *Sumner v. Mata*, 449 U.S. 539 (1981), *on remand*, 649 F.2d 713 (9th Cir. 1981), *vacated and remanded per curiam*, 102 S. Ct. 1303 (1982).

46. *Sumner v. Mata*, 102 S. Ct. 1303 (1982), *vacating and remanding per curiam* 649 F.2d 713 (9th Cir. 1981). The statute was also given a strict construction in *Marshall v. Lonberger*, 51 U.S.L.W. 4113 (1983).

47. 372 U.S. 391 (1963).

48. 433 U.S. 72 (1977).

49. *Engle v. Isaac*, 102 S. Ct. 1558 (1982).

50. *United States v. Frady*, 102 S. Ct. 1584, 1596 (1982) (emphasis in original).

51. *Marino v. Ragen*, 332 U.S. 561, 567 (1947) (Rutledge, J., concurring).

simply an invitation to the prisoner to try and try again in the hope that sometime, somehow, he can push the right combination of buttons and obtain a decision on the merits.

In my view the proper resolution of the continuing controversy about habeas corpus will come only when there is substantial consensus on what its proper function is in a federal system in the late twentieth century. What happened when the Normans conquered England, though very interesting in its own right, does not seem to be of much help in achieving that consensus. If there can be substantial agreement on the function of the writ, the substantive grounds on which it is to be available should fall readily in place. Finally a set of procedural rules are needed that will be clear, that will be understandable to prisoners, and that will give a fair opportunity to resolve constitutional contentions on their merits.

Such a solution is far more likely to be achieved by legislation than it is by episodic decisionmaking. The Department of Justice and the Senate have been working in this direction.<sup>52</sup> There is so much emotion about habeas corpus that the legislative proposals now pending are certain to arouse vigorous opposition from those who tend to rhapsodize about the Great Writ and to lament any attempt to confine it in any way. My hope is not that the present proposals will be adopted intact, but that they will stimulate a dialogue in which open-minded and responsible people will be able to agree on what habeas corpus should be in the future. Mr. Duker's history has shown that the single most striking fact about habeas corpus over the years has been its ability to change. Presumably it retains that ability, and must do so if it is to meet the needs of today and tomorrow.

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52. S. 2838, 97th Cong., 2d Sess. (1982). See 128 CONG. REC. S11851-59 (daily ed. Sept. 21, 1982).