Review of *Habeas Corpus: From England to Empire*

*John McLaren**

Paul D. Halliday, Habeas Corpus: From England to Empire. (Cambridge, Mass: Belknap Press, 2010), 512 pp.

From time to time a work of history appears that by dint of prodigious, even heroic, research, careful and lucid reading of data and contexts, and engaging exposition, turns conventional wisdom on its head. Paul Halliday's magisterial study of the rise and fall of the "Great Writ" fits firmly into that category, and justifies the encomiums from leading scholars of the history of English Law that fill the back cover of this work. As two of the reviewers, Christopher Brookes and James Oldham, both assert, this book is destined to be the lasting authoritative work on the history of this remarkable judicial tool for testing the legitimacy of the imprisonment (or less formal detention) of the subject. It is a book that will be of interest not only to legal historians, but also to those who investigate political, social and intellectual history and, not least, to constitutional scholars.

This is an in-depth study of the use of the writ by the royal courts, especially the King's or Queen's Bench, over three centuries from 1500 to 1800, and it is organized around a quadrennial examination of the records of individual cases in which *habeas corpus* was sought over that time span. The author Paul D. Halliday also pays special attention to periods when the writ was used more expansively for one reason or another—such as periods of greater judicial activism, political crises, or wartime conditions. Halliday's starting point is that the conventional historiography of the writ has been marred by too little systematic research, excessive reliance on a smattering of cases, and generalized political or philosophical claims about its role in the struggle for fundamental freedoms, or liberty writ large. For the constitutional scholar wedded to the idea of an evolution, albeit spotty, of liberty as a hazily perceived natural right secured early on by the deployment of the Common Law—the view immortalized by Sir Edward Coke—and by Lockean principles of free-

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dom, Halliday's findings will prove something of a shock. What he reveals is that the deployment of the writ, which began to build up steam in the final decades of the reign of Elizabeth I, was a pragmatic exercise of an authority that the royal judges understood flowed from the monarch as an essential feature of the prerogative delegated to them by the King or Queen. True, the act of challenging those who would detain others on illegal, dictatorial or flimsy grounds lay with the architects and interpreters of the Common Law. The offense or wrong, however, was not an interference with individual's liberty by anything inherent in that body of law, but was an interference with the authority, person and dignity of the ruler. Ironically, although not surprisingly given the provenance of *habeas corpus*, the record of judicial enthusiasm for issuing the writ does not fit neatly into any preordained ideological spectrum. It was not Coke who was particularly adventurous in using it during the early years of the seventeenth century, but his predecessors, Chief Justices John Popham and Thomas Fleming. Although Chief Justice Sir Matthew Hale in the reign of Charles II stands out as a reformist judge who was ready to use the writ where he believed that justice demanded it, the same was also true of political conservatives such as Sir John Holt at the turn of the seventeenth century, and of William Murray, Lord Mansfield, in the mid to late eighteenth century.

Halliday demonstrates that the judges did not rationalize their decisions in terms of a transcendent theory of rights and freedoms, which is the claim made by more radical advocates such as John Lilburne during the Commonwealth and Granville Sharp, the anti-slavery campaigner in the late eighteenth century. Instead, the judges' decisions involved an examination of the claims to specific "liberties" made by both the detaining authority and the detainee. In the early modern English polity, liberties were emanations of royal authority and discretion, and thus legal constructs. They attached to particular institutional, political and social roles and functions. Following Chief Justice Matthew Hale's rationalizing of the use of the writ in Charles II's reign as a process of weighing competing franchises that embraced certain, defined liberties, the author concludes that the issue in *habeas corpus* hearings was typically an assessment and balancing of the reasonableness of both the jailor's or the detainer's claim of authority and necessity, and the detainee's claim that his or her liberties as an individual or member of a status group had been unlawfully infringed upon in the circumstances. Although today we are much more used to a system of rights and analysis that places a heavy emphasis on individual liberty, a reflection of a broader political philosophy of freedom that gradually began to infuse legal argument during the modern period, the process that Halliday portrays has clear resonances in the balanc-

ing that contemporary Canadian courts are challenged to undertake in their application of section 1 of the *Charter of Rights and Freedoms*.[1] The parallel would be particularly apt in modern cases in which the claim by a litigant to infringement of her rights was closely related to membership of a definable social group, for example, a distinctive religious tradition or sect. The fact that our courts use the analytical tools of the Oakes test to balance the competing rights under section 1 demonstrates that the tradition of pragmatism that Halliday describes in assessing the historical uses of the writ lives on in Anglo-Canadian constitutionalism, and is a thread that links the two eras.[2]

If the Great Writ was circumscribed in its use in individual cases by the care and caution among the judiciary about the nature of the interpretative exercise, then in the hands of the more creative judges it had a remarkable capacity for expanding, both functionally in terms of the types of contexts and detainees embraced, and jurisdictionally in the range of territories and spaces in which it ran. One of the advantages of the methodology used by the Halliday in charting the growth of the use of *habeas corpus* is that it demonstrates very clearly its tensile quality in investigating different as well as new forms of detention over time. In the late Elizabethan era and the early Stuart period, the writ was primarily an instrument for expanding the control the royal courts exercised over subordinate jurisdictions and the regulatory powers of governance and judgment that were increasingly granted to them by the state through statute and royal delegation. Later, its scope expanded to embrace those on the receiving end of orthodox political and religious strictures during the struggles between the monarch and Parliament during the mid to late seventeenth century. Later still, it was used during the times of political instability and fear of French designs that characterized the two decades or so after the Glorious Revolution of 1688. During the seventeenth century, there was a distinctive expansion of the writ's use in cases in which the complaint was less about formal imprisonment than about private detention, typically by husbands of their wives and children—cases in which the courts were challenged to relate and balance the relative rights and obligations of family members. In the latter half of the eighteenth century, the writ was used vigorously by judges to open up to scrutiny the practice of both naval and military impressment, and with far less confidence, of slavery.

1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *R v Oakes*, [1986] 1 SCR 103 (SCC) [*Oakes*].

Halliday shows that *habeas corpus* was deployed to bring a more expansive range of British subjects under its embrace. It was also used to enlarge understandings of subjecthood, in the process affording solace to some aliens in Britain who found themselves imprisoned. Moreover, judges extended its reach to subjects of British territories, whatever their constitutional status and wherever those possessions existed on the globe, and even on the high seas. The notion that protection should be afforded to aliens on English and then British soil, allied with concepts of allegiance, was used to dispel arguments that foreigners were not entitled to vindication of their liberties. Following older jurisdictional claims of English monarchs over conquered territories such as Ireland and Wales, and ostensibly autonomous jurisdictions, such as the Bishop's Palatinate of Durham and the independent city of Berwick on Tweed, the royal judges issued the writ to protect those detained further afield, for example, in the Channel Islands and West Indian possessions. In the minds of the more creative judicial exponents of its use, *habeas corpus* had the character of an imperial writ that ran wherever British control of governance and law was established, or, as on board ship, the British flag flew.

Important to Halliday's analysis and commentary, and a point that could have been underlined more clearly in the narrative, is the overlapping of governmental, administrative and judicial functions within England, Great Britain and its Empire. At the core of this book is the reality that the Common Law judges were not only the craftsmen and interpreters of the Common Law, but also immensely powerful agents of the Crown in this aspect of the prerogative's reach—so powerful, indeed, that it could be turned on the King and his Council. Despite the actions and more especially the rhetoric of Sir Edward Coke, the Common Law and the prerogative were not inevitably in opposition. Moreover, judges, some of whom sat on the Privy Council, would have understood these diverse roles as natural and complementary, as important elements in royal justice in which both the Common Law and the prerogative had important roles as sources of law. For most, the issue was not an inherent conflict between the two sources (they were in fact capable of mutually supporting each other, as the application of the writ demonstrates), but the unwarranted use made of powers granted under or subversive of the prerogative and the growth of the view in royal circles that the prerogative was exclusively the King's business and its use not subject to review by anyone else.

More dramatic, because it engendered the ultimate countervail to the judicial commitment to the writ as a potent instrument in curbing carceral authority in the English and later British system of governance, was the tension between Parliament and the judiciary over the claim of the legislature to

be a court vested with powers of imprisoning those it saw as a threat to the state and public order, or who had offended its privileges. Especially during the period of the Commonwealth, Parliament put up a stiff resistance to judicial attempts to force it to render up those it had ordered incarcerated. But in the longer run it was not Parliament's claim to be a court that proved most subversive of the courts' use of *habeas corpus*, but the reality of Parliamentary sovereignty. Halliday demonstrates how Parliament's interest in the writ and its equitable and moral basis in ensuring that imprisonments and detentions were just was a two-edged sword. On the one hand, it provided the statutory means whereby the writ could be strengthened, the claim made about the *Habeas Corpus Act, 1679*[3] (although largely a codification of judge-made law). On the other, Parliament had the power to suspend it or limit its protections legislatively during periods of real or imagined threats to the security of the realm. This was particularly true of the period running from the start of reign of William and Mary in 1689 to the end of the eighteenth century, when episodic wars with France and later revolutionary activities in the thirteen American colonies gave rise to overblown anxieties about perils from both outside and within the domestic community. These fears induced Parliament to apply a legislative scalpel and suspend or severely limit the writ's reach. Halliday sees this clearly as a growing and problematic tension between "the persistent logic of detention" and judicial supremacy in the cause of liberty.

The tension described was increasingly resolved in wartime conditions or periods of fear about internal dissension in ways that tipped the balance in favour of "public safety". Fortunately, given the growing interest in imperial and comparative colonial legal history, not least the longstanding deployment of constitutional and rule of law discourse in British colonies, Halliday uses his detailed and persuasive analysis of the story in England, Britain and their geographically close possessions such as Ireland and the Channel Islands, as a segue into the experience and fortunes of the "Great Writ" across the Empire. If its evolution in Britain itself was to be marked increasingly by compromising its effectiveness in response to fear about the safety of the state, these pressures were greater in its colonial possessions. There were two potential sources of challenge to judicial initiative. The first lay in the significant plenary powers of governance and law that the Crown, through the prerogative, gave to colonial executives. These men were often more inclined to see the spectres of internal insurrection or external threat than their imperial master, a product perhaps of the lack of full *de facto* sovereignty over the territories claimed by the British

3 31 Charles II, c 2.

government that Lauren Benton has recently identified.[4] The second was the enthusiasm of colonial and later Dominion legislatures to embody *habeas corpus* protections in statutory form, and then, following British precedents, to suspend or limit the writ's operation as seemed appropriate to the political elite or majority in those territories. Drawing on records and literature from a sample of colonial possessions, India, Québec, Ceylon, New South Wales, Van Diemen's Land (Tasmania) and New Zealand, Halliday notes that there were some courageous judges who followed the lead of activist English jurists in using the writ. However, even some of these individuals felt constrained by the colonial context, and both executives and legislatures were often only too ready to trump judicial activism during periods of "unrest". There is in fact a sobering string of examples of the compromising of individual and collective freedom by the suspension of *habeas corpus* and the invocation of "special measures" until the sun effectively settled on Empire, a phenomenon only too evident in the states that emerged from the colonial experience.[5]

In the case of written constitutions, Halliday points out that the archetype, the United States Constitution, contained a suspension clause "in cases of rebellion or invasion," an expedient invoked by President Lincoln during the American Civil War. In the *Charter*, although section 10 proclaims that "everyone has a right on arrest or detention . . . to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful," this is a provision subject to the legislative override countenanced in section 33.[6] As those incarcerated—often for long periods as suspected terrorists or their aiders or abettors—under special powers and without access to the evidence against them will no doubt attest, the protections of the "Great Writ" are a cruel joke. That those in Canada with authority in security matters have little or no sense of history, or if they have, conveniently forget it, is evident in the obvious parallels between modern outrages such as the rendition of Maher Arar to Syria, and Oliver Cromwell's attempts to remove his prisoners, most notably John Lilburne, outside the reach of his judges to the Channel Islands or the Isles of Scilly. *Plus ça change*!

Although the English and imperial judiciary's development of *habeas corpus* is an inspiring history in Halliday's hands, there is in the background

4 Lauren Benton, *A Search For Sovereignty: Law and Geography in European Empires, 1400–1900* (New York: Cambridge University Press, 2010).

5 See e.g. the late Brian Simpson's numerous examples in *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001) at 54–90.

6 *Charter, supra* note 1, s 10.

the sense that the curtailment of the power of the writ, if not preordained, has elements of inevitability about it, given the patterns of constitutional development in Britain. Halliday's analysis of the English judges' handling of the writ indicates that they were not all equally enthusiastic about its potential. For every Sir Matthew Hale and even Sir John Holt and Lord Mansfield, there was a Chief Justice John Keylinge who found himself before a committee of Parliament for referring to the Great Charter as "Magna Farta" while hearing a case before him early in the reign of Charles II. During the seventeenth century, while some judges showed remarkable and courageous independence, others, especially in the reigns of the last two Stuarts, demonstrated a spineless obsession with listening only to their "master's voice". Halliday himself notes the dramatic change in judicial attitude to the writ when Lord Kenyon replaced Lord Mansfield as Chief Justice of King's Bench towards the end of the eighteenth century—coinciding with a period of high anxiety in government circles about conflict with the French, and associated internal threats from within the polity, when a range of freedoms were curtailed statutorily by Pitt the Younger's government. From the government's point of view, Kenyon must have suited the tenor of the times.

If the English judge felt or imagined pressures to conform to the will of the state in security matters, the pressures were even greater in the colonies. Before the grant of responsible government in the "white Empire" and for long after elsewhere, colonial judges were appointed "at pleasure" and thus outside the grant of formal independence set out in section 3 of the *Act of Settlement, 1701*.[7] London's clear expectation was that these individuals would hew to a Baconian ideal of judicial service and, above all, to serve loyally the Crown and the colonial governments in the territories where they were appointed. It was a brave, pig-headed or eccentric judge who would stand up against the will of a colonial governor, a legislature in cahoots with the executive, or even a reformist Assembly. Some did, as Halliday notes. Moreover, there was no reason in principle why colonial judges should have been any less equipped to recognize the value of *habeas corpus* as a product of the prerogative and the judicial role in protecting that aspect of it (indeed, theoretically living in a prerogatively ordained order, they might be expected to be particularly sensitive to it). The reality is that there are enough examples of colonial judicial careers foundering as a result of independent thought to conclude that the climate for judicial activism in using the "Great Writ", let alone a liberal

7 12 & 13 William III, c 2, s 3.

rendering of the rule of law, was unsupportive, if not outright hostile.[8] In those imperial territories that secured responsible government and thus judicial independence, often a combination of judicial political connections and professional self-denial under a changing conception of a separation of powers in a Diceyan world meant a decline in judicial courage, although there were invariably noble exceptions.

This is then a book to be thoroughly recommended as fine example of what the work of a talented historian can bring to our understandings of constitutional and legal developments in the British world. I, for one, hope that Paul Halliday will not down his pen or retire his keyboard on this topic, but pick up on his overview of the fortunes of *habeas corpus* in the Empire with a much more extensive study of the "writ imperial". One suspects that, as in Britain, there are fascinating and instructive histories to be told.

8 See John McLaren, *Dewigged, Bothered and Bewildered: British Colonial Judges on Trial* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2011).