Habeas Corpus — Coram Nobis — Remedies Available to Validly Sentenced Prisoners Who Are Mistreated by State Penal Authorities

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Habeas Corpus—Coram Nobis—Remedies Available to Validly Sentenced Prisoners Who Are Mistreated by State Penal Authorities

Where a person is deprived of certain rights by penal authorities after he has been imprisoned pursuant to a valid trial and sentencing, what remedies are available to him to obtain judicial relief? An increasing number of recent cases have suggested a variety of answers, depending partly upon (1) whether the prisoner shows infringement of constitutional or merely non-constitutional rights, and (2) the type of remedy sought. The decisions may further be classified according to the different grounds for relief raised by prisoners in these situations.

1. Discriminatory denial of access to the courts.
2. Infliction of "cruel and unusual" punishment. Included with these cases should be those where a prisoners shows general un-
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authorized mistreatment, not serious enough to merit the charge of
being “cruel and unusual.”

3. Refusal to release a prisoner who has completed serving a valid
sentence.

4. Improper transfer of the prisoner from one penal institution to
another.

5. Unwarranted revocation of parole, made without notice and
hearing.

6. Refusal to release one committed to an institution for the insane
who has regained his sanity.

I. Habeas Corpus

The writ of habeas corpus is the most common device used by
prisoners seeking relief from after-trial deprivation of rights. How-
ever, the use of this ancient writ is immediately hindered by historic
rules governing its issuance which have grown old as the writ itself.
Habeas corpus was historically regarded as a method by which one
“illegally” or “unlawfully” restrained might be released. When de-
fining these terms, the courts concluded that an “illegal” or “unlawful”
restraint was one imposed pursuant to a void judgment; that is, render-
ed by a court without jurisdiction; and only when such facts as these
were shown would the writ issue. Deprivation of constitutional rights
at the time of the trial, such as the right to counsel, were classified as
jurisdictional defects for the purposes of this rule. Thus the prisoner
whose only claim is deprivation of rights subsequent to a valid trial
is subject to the objection that events occurring after a trial cannot
affect the trial court’s original jurisdiction, and the writ is not the
proper remedy.

Some, unfortunately not most, forward-looking jurists have cast
off the chains of this old rule. Witness the words of Judge Learned
Hand of the Second Circuit:

We can find no more definite rule than that the writ is available, not
only to determine points of jurisdiction, stricti juris, and constitutional
questions; but whenever else resort to it is necessary to prevent a com-
plete miscarriage of justice.

A second rule, again the offspring of antiquity, declares that the
only relief a person may seek in habeas corpus proceedings is absolute

2 Although in use as early as the fifteenth century, the writ began to be used
as it is today in the seventeenth century. 1 Holdsworth, History of English Law
227 (3d ed. 1922).
2 Hurd, Habeas Corpus 143–144 (1858).
4 See, for example, Kauble v. Haynes, 64 F. Supp. 153 (N.D. Cal. 1946).
Contra: Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944).
5 United States v. Kennedy, 157 F.2d 811, 813 (2d Cir. 1946).
release, and the courts are powerless to grant any other. It is quite natural for the bench to balk at releasing from confinement one who has been validly convicted of a crime for no other reason than that prison authorities have not properly conducted themselves in regard to his rights. Accordingly, courts often refuse to allow the prisoner by this writ to raise such questions as the validity of a transfer from one institution to another, improper medical treatment and the like. However, the Supreme Court has discarded this limitation on the writ, contrary to earlier dicta, and now grants relief to fit the wrong, seemingly because of the inadequacy or nonexistence of other possible remedies.

A. Constitutional Grounds

The harshness of results under the historical view is most apparent where the facts alleged by the petitioner would constitute a denial of constitutional rights, and where habeas corpus is the only available device to present these facts to the court. We turn first to these cases.

Often a prisoner will allege that he has been denied an opportunity to appeal his conviction. While due process does not require a state to provide appeal procedure, where such a procedure does exist the equal protection clause requires that it be offered indiscriminately. Accordingly, where prison officials prohibited a prisoner from sending out appeal papers, the Supreme Court held that he had been denied equal protection. It was reasoned that the state statutes allowed persons outside of prison to have access to the courts to appeal trial court decisions, and that the state ought not to be allowed to delimit the operation of these setatutes to a particular class at the whim of prison

8 McNally v. Hill, 293 U.S. 131 (1934). Also see Snow v. Roche, 143 F.2d 718 (9th Cir.), cert. denied, 323 U.S. 788 (1944).
7 United States v. Ragen, 152 F.2d 268 (7th Cir. 1945).
9 Snow v. Roche, 143 F.2d 713 (9th Cir.), cert. denied, 323 U.S. 788 (1944).
9 Dowd v. Cook, 340 U.S. 206 (1951). Also see Mahler v. Ehy, 264 U.S. 32 (1924), which cites numerous other cases before the date of the McNally decision where the Court, in habeas corpus proceedings, granted relief other than immediate release.
13 Dowd v. Cook, 340 U.S. 206 (1951); Cochran v. Kansas, 316 U.S. 255 (1942). Also see United States v. Ragen, 143 F.2d 774, 777 (7th Cir. 1944); Briggs v. White, 32 F.2d 108 (8th Cir. 1929); Bernard v. Warden of Md. House of Correction, 187 Md. 273, 49 A.2d 737 (1946); Ex parte Rider, 50 Cal. App. 797, 195 Pac. 965 (1920). In Stidham v. Swope, 82 F. Supp. 931 (D. Cal. 1949), the prosecuting attorney kept appeal papers sent to him by a prisoner until after the time limit for appeals ran out. The court held that such act by a state official amounted to a denial of appeal reviewable in habeas corpus proceedings.
officials. Some courts, while not permitting a denial of appeal to be raised in habeas corpus proceedings, have pointed out that the prisoner has an opportunity to perfect a delayed appeal, thus removing the necessary factor of discrimination.\textsuperscript{14}

Following the theory that an appeal procedure is not a necessary element of due process, the majority holds that denial of counsel for purposes of appeal is likewise not violative of due process and thus affords no ground for habeas corpus.\textsuperscript{15} Where the denial of counsel occurs during trial (clearly depriving the accused of the "fair" trial guaranteed by due process), the by-product of which is the denial of an appeal, the courts have sometimes talked about the denial of appeal as well as denial of counsel when issuing the writ.\textsuperscript{16} However, none of these decisions granted habeas corpus solely on the grounds of the denial of appeal.

The courts in these denial-of-appeal cases have not strait-jacketed themselves with the rule requiring an unconditional order of release, but have taken a more common sense approach to the cases. Where a prisoner had been prohibited by prison officials from sending out appeal papers, the Supreme Court ordered release of the prisoner only on the condition that the state should fail to provide him with an opportunity for a delayed appeal.\textsuperscript{17} Other courts have used the hearing provided by the habeas corpus proceeding to allow the prisoner to air his objections to the original trial, and have ruled upon the validity of the trial court's holding—in short, substituting the habeas corpus hearing for the appeal.\textsuperscript{18}

Even though a person stands validly convicted and committed, at times he has been granted a writ because he has been forced to endure cruel and unusual punishment at the hands of prison officials.\textsuperscript{19} Since


\textsuperscript{15} Brown v. Johnston, 126 F.2d 727 (9th Cir.), cert. denied, 317 U.S. 27 (1942); De Maurez v. Swope, 104 F.2d 758 (9th Cir. 1939); Bernard v. Warden of Md. House of Correction, 187 Md. 273, 49 A.2d 737 (1948). Contra: Reid v. Sanford, 42 F. Supp. 300 (D.C. Ga. 1941) (The rationale of this case was that although the trial court had jurisdiction in the first instance, it lost it by the refusal to appoint counsel, upon request, after it had granted the appeal.).

\textsuperscript{16} Johnson v. Zerbst, 304 U.S. 458 (1938) (containing language to the effect that denial of counsel for purposes of an appeal would be violative of due process); Counsel v. Clemmer, 165 F.2d 249 (D.C. Cir. 1947); Ex parte Cook, 84 Okla. Crim. 404, 183 P.2d 595 (1947).

\textsuperscript{17} Dowd v. Cook, 340 U.S. 206 (1951).


most state constitutions contain provisions prohibiting cruel and unusual punishment, a state court could protect the prisoner from such punishment if it so desired. In addition to this protection is that offered by the Eighth Amendment prohibition which, when the punishment is so cruel and unusual as to "shock the conscience," will be read into the Fourteenth Amendment guarantee of due process.

Where habeas corpus proceedings involving the ground of cruel and unusual punishment have been before the Supreme Court, it has by inference sanctioned this as a ground for issuance of the writ. In these cases the writ has ultimately been denied either on the ground that the punishment was not in fact cruel and unusual, or on the technical argument that the petitioner had not first exhausted his state remedies before going into the federal courts. However, the inference is possible because the Court, while refusing the writ because of non-exhaustion, failed to advise the petitioner that even if he had exhausted his state remedies he would have no cause of action. The federal courts have assumed that the Supreme Court did not mean to deny that the infliction of cruel and unusual punishment was grounds for issuance of a writ of habeas corpus.

Many difficulties face a petitioner who attempts habeas corpus on this ground, however. Since it is difficult to prove that any punishment meets the cruel and unusual test, many prisoners trip and fall at this first hurdle. The law here is further clouded because most habeas corpus petitions are drawn by the unskilled prisoner without the aid of an attorney, and in his anxiety to present just cause for the writ he is apt to color the facts, even to the extent of putting into his petition completely groundless claims. One gets the impression from reading the cases in which prisoners have made a completely un-

22 Sweeney v. Woodall, 344 U.S. 86 (1952). The Court held that the petitioner had to exhaust his state remedies in the state in which he was imprisoned. The holding settled the dispute over the extradition cases.
23 See, for example, Davis v. O'Connell, 185 F.2d 513 (8th Cir. 1950). This was the near universal opinion after the controversy raised by the reversal without written opinion of Johnson v. Dye, 175 F.2d 250, rev'd, 338 U.S. 864 (1949). The Court reversed, merely citing Ex parte Hawk, 321 U.S. 114 (1944). Also see Smith v. O'Grady, 311 U.S. 633 (1940).
24 State v. Smith, 114 Neb. 653, 209 N.W. 630 (1926) (bread and water diet); Ex parte Pickens, 101 F. Supp. 289 (D. Ala. 1951) (jail in which petitioner was held was a serious fire hazard); In re Pinaire, 46 F. Supp. 113 (N.D. Tex. 1942) (cold pack treatment for insanity); Ex parte Berry, 113 Cal. App. 2d 613, 248 P.2d 420 (1932) (medical test for syphilis); Ex parte Thompson, 32 Tex. Rep. 274, 22 S.W. 876 (1893) (refusal to allow prisoner to work off debt for which he was imprisoned).
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supported claim of cruel and unusual punishment, usually merely tacking it on to the real grounds for which they seek the writ, that the court summarily denies that such punishment is grounds for the writ without giving it the consideration possibly available if the petitioner had supported his claim with proofs.\(^{25}\)

A sizeable number of cases deal with allegations of general unauthorized acts by prison officials, wherein there is no claim, or at least none mentioned, that the treatment amounts to constitutionally prohibited cruel and unusual punishment.\(^{26}\) The leading case granting the writ for “mere” unauthorized acts as distinguished from infringements of constitutional rights is *Coffin v. Reichard*,\(^{27}\) in which the court said:

> Any unlawful restraint of personal liberty may be inquired into on habeas corpus. . . . This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions.

However, this is the minority view.\(^{28}\) The majority of courts refuse to issue the writ on one of three grounds: either of the two ancient rules mentioned earlier—habeas corpus looks only to jurisdiction of the trial court,\(^{29}\) and habeas corpus may only be used when the facts justify complete release of the prisoner\(^{30}\)—or the favorite, that the court won’t superintend “administrative functions,” such as matters of discipline in the prison.\(^{31}\) Courts in some jurisdictions, while denying a writ of habeas corpus, have pointed out an administrative remedy available to the prisoner.\(^{32}\) In the absence of such appeal to an administrative body, however, a prisoner in the majority of states would probably have no chance to have these grievances heard.

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\(^{25}\) See Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); Thorp v. Clarke, 67 F. Supp. 703 (E.D.N.Y. 1946), where allegations of cruel and unusual punishment, unsupported by any proof, were held to be insufficient grounds for issuance of the writ.


\(^{27}\) 143 F.2d 443, 445 (6th Cir. 1944)

\(^{28}\) See Comment, 2 J. of Pub. Law 181 (1953).

\(^{29}\) Snow v. Roche, 143 F.2d 718 (9th Cir.), cert. denied, 323 U.S. 788 (1944).


\(^{31}\) Sarshick v. Sanford, 142 F.2d 676 (5th Cir. 1944); United States v. Skeen, 107 F. Supp. 879 (N.D. W. Va. 1952); State v. Wright, 188 Md. 192, 51 A.2d 668 (1947).

The only cases arising in Nebraska involving alleged mistreatment by prison officials subsequent to a valid trial concern the claim of unwarranted detention in solitary confinement. The Nebraska Supreme Court has consistently held that such allegations do not state grounds for issuance of the writ.\(^3\) It is apparent from these opinions that the Court based its holdings on all three of the suggested reasons.

It stands as a tribute to Nebraska penal authorities that a case has never arisen in this state considering after-trial deprivation of constitutional rights; that is, denial of the opportunity to appeal or official infliction of cruel and unusual punishment. The fact of correct penal administration which may thus be inferred is a fortunate thing, for even without cases directly in point, certain factors indicate that the judicial arm of this state's government would deny a prisoner even the chance to have such objections heard in habeas corpus proceedings. In the first place, the Nebraska Supreme Court has repeatedly held that a writ of habeas corpus is not the proper method to get a hearing upon an alleged deprivation of federal constitutional rights up to the time of sentencing.\(^4\) The Court's position was crystallized in the famous Hawk cases where it said that habeas corpus was not the proper method for raising objections to an unconstitutional deprivation of counsel at time of trial.\(^5\) Although the Court neglected to say in definite terms which remedy should be used, an extremely important point because of the exhaustion principle,\(^6\) it appears that a motion for new trial\(^7\) and subsequent writ of error\(^8\) is the proper method.\(^9\)

\(^3\) In re Application of Dunn, 150 Neb. 669, 35 N.W.2d 673 (1949); Swanson v. Jones, 151 Neb. 767, 39 N.W.2d 557 (1949); In re Application of Bortles, 150 Neb. 679, 35 N.W.2d 679 (1949).
\(^6\) It can hardly be denied that a prisoner should know with certainty what his proper remedy is, where the court has a principle which forces him to choose the proper remedy before he can get a hearing on the merits.
\(^7\) The application for new trial must be made within ten days after the verdict is rendered or within three years of the judgment, when on grounds of newly discovered evidence; Neb. Rev. Stat. § 29-2103 (Reissue 1948).
\(^8\) The time limit for commencing proceedings for writ of error is three months after the rendition of the judgment; Neb. Rev. Stat. §§ 25-1931, 29-2301, 29-2306 (Reissue 1940), as construed by Goodman v. State, 131 Neb. 662, 269 N.W. 383 (1938).
\(^9\) Hawk v. Olsen, 146 Neb. 875, 881, 22 N.W.2d 136, 140 (1946) ("The question which petitioner now seeks to present could have been presented and determined by the trial court, in the first instance, on a motion for a new trial and if not determined there to his liking then by this court on a writ of error." The court failed to continue and say that this was the general rule to be applied in all of these cases.).
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The probable reasons for the Nebraska position are (1) habeas corpus may not be used as a substitute for writ of error, the feeling being that events happening at the time of the trial may be appealed, and (2) failure by the accused seasonably to demand counsel (or supposedly any other constitutional right), whether or not such failure was due to ignorance, may be taken as implied waiver of the right. It is evident therefore that these cases do not stand for the proposition that after-trial infringement of constitutional rights is not a proper ground for issuance of a writ of habeas corpus. By definition they happen after the trial and would thus not be a basis for appealing the trial court's decision. However, these cases show that the Nebraska Court appears unperturbed by the fact that a prisoner may never have a hearing "on the merits" concerning his claimed loss of constitutional rights. This, plus the fact that the court has tenaciously adhered to the rule that habeas corpus may only be used to release a prisoner where his sentence is absolutely void for want of jurisdiction, are indications that the Court would be unimpressed by such after-trial objections.

A final factor tending to bar the granting of a habeas corpus hearing upon allegations of after-trial deprivation of constitutional rights is the Nebraska statute providing when a writ of habeas corpus shall issue. This statute provides that all persons are entitled to the writ who are "confined in any jail" or "unlawfully deprived" of their liberty, "... except persons convicted of some crime or offense for which they stand committed. ..." Under the plain meaning of this section it would seem that the writ is not available to any one convicted and imprisoned for a crime in Nebraska. However, by judicial interpretation in In re Application of Dunn the Nebraska Court failed to adopt this literal interpretation, so that the exception in effect reads "... except persons validly convicted of some crime or offense for which they stand validly committed. ..." Thus the Nebraska position that habeas corpus is only available to attack a void judgment is further strengthened. However, the effect of this particular decision

40 This view seems inconsistent with Supreme Court cases which have held that no waiver is possible unless the accused knows his constitutional rights. See Johnson v. Zerbst, 304 U.S. 458 (1938).
42 Under this interpretation, it would seem that the statute suspends the writ of habeas corpus in violation of the Nebraska and federal constitutions. See Neb. Const. Art. 1, § 8; U.S. Const. Art. 1, § 9. It is interesting to note that to date Shepard's Nebraska Citator lists only six Nebraska cases which have ever cited the statute.
44 150 Neb. 669, 35 N.W.2d 673 (1949).
is in doubt since the court in the Dunn case, after interpreting the statute so that it could not hear the case, went ahead and discussed the merits of the petitioner's claim of after-trial unauthorized conduct.

B. Non-Constitutional Grounds

The courts have allowed habeas corpus in a variety of other situations where the acts or circumstances complained of arise subsequent to a valid trial. Again, petitioners in all these classes of cases have in some jurisdictions felt the still youthful bite of the twice-mentioned "ancient" rules. Many courts again have in some instances refused to interfere with prison officials and have thus denied an application for the writ, labeling the complained-of conduct as an "administrative function."

The holdings are fairly unanimous that where a prisoner can show that he has served the amount of time for which he was sentenced, but has not been released, he may be released through habeas corpus. These cases extend this view to the allowance of statutory good time deductions. There are no cases in Nebraska squarely in point, but by dictum and inference the cases indicate that the Nebraska Supreme Court would follow the majority and allow habeas corpus here. These holdings are in harmony with the ancient rule that habeas corpus is available only when the trial court is without jurisdiction, since the authority of the court over the prisoner would end when his legal sentence ended.

The courts are even more unanimous in their refusal to issue the writ where the prisoner claims that he has been unlawfully transferred from one penal institution to another. This seems to be another of the administrative functions with which the courts will not interfere. Under Nebraska statutes, when an inmate of the men's reformatory is classified as an "incorrigible" by the institution's

46 Carroll v. Squier, 136 F.2d 571, 573 (9th Cir.), cert. denied, 320 U.S. 793 (1943) ("When the good time allowance, the granting of which, in the first instance, is in the nature of a privilege bestowed by the legislature, is earned, it becomes a matter of right, enforceable by habeas corpus proceedings.").
47 In re Fanton, 55 Neb. 703, 76 N.W. 447 (1898).
49 State v. Howard, 224 Ind. 515, 69 N.E.2d 172 (1946); United States v. Ragen, 152 F.2d 268 (7th Cir. 1945); People v. Murphy, 257 App. Div. 1020, 12 N.Y.S.2d 870 (3d Dep't 1939).
51 Neb. Rev. Stat. § 83-459 (Reissue 1950). The statute does not expressly provide for a hearing, but an interview with Board of Control officials indicated that a hearing is given the prisoners before any transfer is made.
officials, he may, after a hearing before the Board of Control, be transferred to the state penitentiary. Such transfer automatically revokes previously earned good time. Since this involves a deprivation of substantial rights of the prisoners, New York, with a similar statute, has held that where the transfer was made without a hearing there was a lack of due process and the prisoner could, through habeas corpus proceedings, get a court order re-transferring him. A federal prisoner has the same right to a hearing under federal statutes. Although there are no Nebraska cases on the subject, the rule in other jurisdictions seems to be that even after a hearing has been given, habeas corpus is still available to challenge the validity of the transfer. The petitioner must in such a case assume the difficult burden of showing that the prison authorities acted "arbitrarily, capriciously or fraudulently." The lack of cases makes it uncertain whether habeas corpus is available in Nebraska where no hearing is given, or when there is one, to challenge the findings. However, if it be true that the writ may not be used to rectify post-trial infringement of constitutional rights, the same reasons would apply even more strongly to bar issuance of the writ in these transfer cases.

There is a division of opinion among the jurisdictions on the issue of whether an unwarranted revocation of parole, made without a hearing, is sufficient cause for the issuance of a writ of habeas corpus. Many of the cases turn on the wording of state statutes especially concerning the amount of discretion given the officer who revokes the parole. Those cases arising in jurisdictions with no statute on point appear fairly evenly split on the fundamental issue of whether or not a right to notice and hearing before revocation of parole is guaranteed by the constitutional right to due process. However, the majority of the decisions from jurisdictions with a statute such as Nebraska's, where the Pardon Board has the power "... to retake and remand any inmate ... upon parole at any time, with or without cause ...," hold that the statute may be followed with impunity.

People v. Martin, 289 N.Y. 471, 46 N.E.2d 890 (1943). The New York statute, like Nebraska's, does not expressly provide for the hearing. Due process provides this requirement.

Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Griffin v. Zerbst, 83 F.2d 805 (10th Cir. 1936); Lessner v. Humphrey, 89 F. Supp. 474 (M.D. Pa. 1950). See, for example, the cases cited supra note 53.


See Note, 29 A.L.R.2d 1074 (1953), at page 1116 for a listing of the states which have statutes expressly providing for notice and hearing; and page 1125 for the states with a statute similar to Nebraska's, dispensing with notice and hearing.


against constitutional objections raised by the inmate. Here the
Nebraska prisoner has neither judicial nor administrative means of
forcing a hearing on his claim that his liberty on parole was un-
justifiably revoked.

A petition for writ of habeas corpus has traditionally been recog-
nized as the proper method for one who has been committed by court
order to an institution for the insane, who is refused release and claims
to have regained his sanity. Nebraska statutes specifically provide
for the use of habeas corpus by one claiming regained sanity. Although
the statutes seem never to have been used by one committed
as insane in a criminal prosecution, the statute would presumably
apply as well here as in a civil committment.

II. Coram Nobis

One of the better definitions of the writ of error coram nobis was
given in New England Furniture & Carpet Co. v. Willicutts:

In modern practice, the writ of error coram nobis may be defined as
a common law writ issuing out of a court of record to review and correct
a judgment of its own relating to some error in fact as opposed to
error in law not appearing on the face of the record, unknown at the time
without fault to the court and to the parties seeking relief, but for which
judgment would not have been entered.

It is seen from this that the courts have in the past considered coram
nobis to be a device which operates only to attack a judgment. It has
been thought to be axiomatic that the writ would not lie where there
was a valid judgment entered.

The kind of treatment incurred by a prisoner after sentencing has
been accepted as grounds for coram nobis where that treatment was
authorized by the judgment and at the same time contrary to law.
In the days of slavery it was held to lie to release a slave imprisoned
in the state penitentiary, slaves not being subject to such imprison-

Owen v. Smith, 89 Neb. 596, 131 N.W. 914 (1911) (under earlier statute
from which it was inferred that no hearing was needed); Ex parte Paquette,
112 Vt. 441, 27 A.2d 129 (1942); In re Patterson, 94 Kan. 439, 246 Pac. 1009
(1915).

In Owen v. Smith, 89 Neb. 596, 598, 131 N.W. 914, 915 (1911), the court
said: "Any other construction of the law would not be a kindness to the in-
mates of the penitentiary; for, if the governor is given to understand that
every time he grants a parole he thereby restores the convict to full citizenship
to such an extent that he cannot revoke such parole except upon notice and a
full hearing, he would be very loath to exercise the humane prerogative which
the code now confers upon him."

Ex parte Rosier, 133 F.2d 316 (D.C. Cir. 1942); Senager v. Gillham, 278 Ill.
295, 116 N.W. 71 (1917); Northfoss v. Welch, 116 Minn. 62, 133 N.W. 82 (1911).
Also see Comment, 38 Va. L. Rev. 91 (1952).


555 F.2d 983, 987 (D.C. Minn. 1971).
It has also been allowed to release a person under eighteen years of age from the penitentiary for the same reason. But the usual case of post-trial deprivation of rights seems clearly outside the ambit of operation of the writ. The treatment which is complained of is not authorized by the judgment, which is therefore not under attack. One case exists in which the writ was sought on the grounds that the petitioner had not been able to prosecute his appeal within the statutory period. The court refused to grant the writ, stating, "The unvarying test of the writ coram nobis is mistake or lack of knowledge in facts inhering in the judgment itself. It has never been granted to relieve from consequences arising subsequent to the judgment." On the other hand, it has been suggested by way of dictum that the writ might lie for a person who has become insane during his sentence in prison.

Nebraska has the writ of coram nobis as part of its criminal procedure, and the few cases dealing with its scope have been treated elsewhere. The definition of the writ is substantially the same as that set out above. While no case has been found in which the writ was sought for anything which happened subsequent to the trial, and while it seems unlikely that the writ would ever be granted in such a case, it might be necessary for a mistreated prisoner to go through the formality of seeking the writ if the state courts would allow him no relief, and it was necessary to seek the protection of the federal courts. It is well established that a state prisoner must exhaust all his state remedies before the federal courts will interfere. By this is meant that any procedure remotely possible of succeeding must be tried. And since no square holding exists in which the writ was denied, it seems probable that the federal courts would remain inactive until it was tried.

65 Ex parte Toney, 11 Mo. 661 (1848).
66 Ex parte Gray, 77 Mo. 160 (1882).
70 "The object of the writ is to bring into the record, before the court that rendered the judgment, facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment." Hawk v. Olson, 145 Neb. 306, 310, 16 N.W.2d 181, 183 (1944).
71 Ex parte Hawk, 321 U.S. 114 (1944).
72 See, for example, Woods v. Nierstheimer, 328 U.S. 211 (1946), in which the fact that the statute of limitations had plainly run was held insufficient to excuse petitioner from trying a statutory substitute for coram nobis so as to have completely exhausted his state remedies.
III. Miscellaneous Remedies

A. Injunction and Mandamus

Other remedies less archaic in application suggest themselves. Why not allow the prisoner to obtain an injunction restraining penal officials from continuing the objectionable practice? There seem to be two reasons why this is not done. First, general rules of equity prohibit the courts from issuing an injunction in these cases. Equity does not generally interfere in the execution of criminal sentences; and it is quite uniform that equity will not restrain threatened injury to personal rights. Second, courts have a natural distaste for interfering with the administration of a penal institution. And so the remedy is unavailable.

It has been suggested by way of dicta that a writ of mandamus might lie where the administrative officials refuse to correct an abuse of a prisoner's right when it has been called to their attention. In addition, a California state court issued mandamus where the cooperation of state penal officials was necessary for a prisoner to perfect an appeal of his conviction. The weight of authority is otherwise, and the infrequency of its use is indicative of the non-availability of this remedy.

B. Suit for Damages

A tort action for damages is probably the prisoner's principal form of redress. But one who attempts to invoke this type of relief is beset with many difficulties. Civil death statutes may prohibit the suit from being brought until the prospective plaintiff has been released from prison or may prevent the prisoner from appearing in person to present his case. Such delay is of great importance in that testimony and evidence become stale, and the deterrent effect of such suits is largely lost. The prisoner may also be forced to sue a lesser...

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73 McClintock, Equity 428 (1936).
74 McClintock, Equity 426 (1936).
75 See, for example, Thorp v. Clarke, 67 F. Supp. 703, 704 (D.C.N.H. 1946): "It is not the function of this court to superintend the treatment of prisoners in the State Prison...."
76 Cf. Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914).
77 United States v. Ragen, 152 F.2d 268 (7th Cir. 1945): "Even though petitioner were transferred wrongfully he is not entitled to a discharge... the most he could accomplish would be a return to... Joliet."
78 Ex parte Robinson, 112 Cal.2d 626, 246 P.2d 982 (1952).
79 Illustrative cases are Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953); State v. Warden of Md. Penitentiary, 72 A.2d 700 (1950); Platek v. Aderhold, 73 F.2d 173 (5th Cir. 1934).
80 See Note, 59 Yale L.J. 800 (1950), dealing with physical mistreatment only.
81 See Note, 26 So. Calif. L. Rev. 425 (1953).
official, which may be financially unsatisfactory, because the ranking officials have been granted an immunity. Practical difficulties also exist. The prisoner's only witnesses are probably other convicts, who a jury is likely to disbelieve, and who may fear that they will have to answer for their testimony when returned to prison.

Where the prisoner claims an infringement of his Federal Constitutional rights, it is theoretically possible for him to bring suit under the Civil Rights Act. Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . ., subjects . . . any . . . person . . . to the deprivation of any rights secured by the Constitution . . . shall be liable to the party injured. . . ." But theory differs from practice, and no case has been found in which a prisoner was successful in an action pursuant to this statute.

C. Contempt

It may be possible for a prisoner to invoke the contempt powers of the court in order to protect his rights. Two cases, one in a federal district court and one in a state supreme court, have held that a person in charge of prisoners who violates their rights is guilty of contempt of court. It is reasoned that the jailor is ex officio an officer of the court in that he carries out its criminal judgments; that he has been ordered to "receive and safely keep" the prisoner; and that when he does not do this the court may punish him by using its inherent powers.

This theory has sometimes been adhered to where excessive leniency by the jailor is alleged instead of mistreatment. It has been held that a jailor may be held in contempt if he prematurely releases the prisoner or if he accords him special privileges. Logic would seem to dictate in these jurisdictions that irregular conduct by the jailor is punishable as contempt no matter whether it works for the prisoner's benefit or against it, but apparent difficulty exists in trying to convince a court that implicit in the commitment's order to "receive and safely keep" is a mandate not to abuse the prisoner.

D. Nebraska Law

Few of these remedies have been resorted to in Nebraska. There is no reported case of a prisoner ever having sought an injunction or

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85 Howard v. State, 28 Ariz. 433, 237 Pac. 203 (1925). A Colorado case is contra, People v. District Court, 89 Colo. 78, 299 Pac. 1 (1931), and the case may not even be good law in Arizona anymore. See Ridgway v. Superior Court of Yavapai County, 74 Ariz. 117, 245 P.2d 268 (1952).
86 State v. Superior Court, 30 Ariz. 332, 246 Pac. 1033 (1926).
87 United States v. Hoffman, 13 F.2d 269 (N.D. Ill. 1925).
writ of mandamus. Suit for damages has been brought against a sheriff based on his negligence in allowing a jail to burn, but no litigation has been found where intentional abuse of a prisoner was alleged as a cause of action. The Nebraska courts have mentioned the contempt power as a possible sanction, but have neither approved nor disapproved of it. And so, especially in view of the holdings in other jurisdictions, there seems to be no remedy available to the Nebraska prisoner which is certain to afford him some relief.

**CONCLUSION**

There is apparently no satisfactory judicial procedure by which a prisoner who has been validly tried and convicted can get redress for wrongs done him while in prison. Several remedies have been suggested, habeas corpus being the most prominent. The use of this writ, however, has been severely curtailed by judicial inertia which refuses to yield to pressing problems and instead clings to archaic limitations to its application.

Of the other remedies to which resort has been made, none are adequate. Coram nobis by definition is inapplicable, and mandamus or an injunction will not issue. Numerous obstacles render a suit for damages by the prisoner a hopeless procedure, and to attempt to invoke the contempt powers of the courts is a hap-hazard procedure at best.

With reference to habeas corpus, Nebraska law is subject to the same deficiencies that exist in other jurisdictions. In the area of general unauthorized treatment which falls short of violation of a constitutional right, the Nebraska Supreme Court has spoken in the solitary confinement cases, holding that such disciplinary matters are not reviewable by the courts. This stand seems justified. If the gateway to the judiciary is opened to claims of unwarranted discipline, the courts would be flooded with habeas corpus petitions based upon fancied discriminatory treatment. This same theory—non-harrassment of prison officials—justifies the refusal to hear cases of unauthorized transfer, with the possible exception of transfers from the reformatory to the penitentiary which revoke good time. It appears that Nebraska would follow the majority in ruling that release is possible through habeas corpus proceedings on grounds of completion of lawful criminal sentence or regained sanity. In the non-constitutional cases therefore, only in the latter-mentioned transfer cases and the unwarranted revocation of parole cases does it appear that the man imprisoned in Nebraska may be imprisoned wrongfully, without a chance to have a judicial hearing concerning these wrongs.


In re Application of Dunn, 150 Neb. 669, 675, 35 N.W.2d 673, 677 (1949).
Without doubt, if full protection of the prisoners' rights is the goal the two inadequacies in Nebraska Law just mentioned should, in some way, be remedied. However, this inadequacy appears slight when compared to the plight of the prisoner who is being deprived of constitutional rights after his trial. His only hope in Nebraska is through federal habeas corpus. Where a state imprisons a person in violation of rights guaranteed him by the federal constitution, and the state courts refuse to remedy the wrong done by the state, he may petition the federal courts for a writ of habeas corpus. The catch is the phrase in italics; in language more familiar to one who has sought federal habeas corpus for state wrongs, all state remedies must be exhausted. The religiousness with which this rule is applied is illustrated by this statement from a Supreme Court opinion:

Nor do the denials of petitioner's applications for habeas present a federal question merely because the five-year statute of limitations on the statutory substitute for the writ of error coram nobis has expired. Petitioner claims that this leaves him without any remedy in the state courts. But we do not know whether the state courts will construe the statute so as to deprive petitioner of his right to challenge a judgment rendered in violation of Constitutional guarantees where his action is brought more than five years after rendition of the judgment.

Thus even though the availability of a remedy in the state court is extremely remote, the petitioner must first try it before the writ will issue from the federal courts. Relief at the end of so circuitous a route hardly seems any relief at all. If the Hawk case is a measuring stick, it takes 17 years to exhaust state remedies in Nebraska. Has justice triumphed when a man spends 17 years in prison under an invalid sentence?

The exhaustion problem is further enhanced by the confused state of the law on habeas corpus in this state. The Supreme Court has charged that "... the opinions of the Nebraska Courts do not mark clearly the exact boundaries within which Nebraska confines the historic remedy of habeas corpus. . . ." Being confused, the federal courts must ask the Nebraska court for a determination of the issues presented by each slight change in the facts presented by a petitioner before they can grant a writ. The federal courts can never say, "It is clear that Nebraska would not issue a writ of habeas corpus for

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92 Smith v. O'Grady, 312 U.S. 329, 332 (1941).
93 See Smith v. O'Grady, 312 U.S. 329 (1941), involving deprivation of the right to counsel in a Nebraska trial court. The petitioner argued that he should not have to try habeas corpus in the Nebraska courts before getting federal habeas corpus. However, the court held, after making the statement cited in note 91 supra, that since the writ might possibly be available in Nebraska, he would have to try there for it.
after-trial deprivation of constitutional rights." The cases also indicate that the law on coram nobis is so confused that perhaps the petitioner will also have to try it.

Because of the delay thus occasioned, it is submitted that federal habeas corpus, though theoretically possible, is practically inadequate as a remedy for post-trial violations of constitutional rights. If the government of this state is really concerned with protecting the rights of persons imprisoned in state institutions, the enactment of an independent statutory remedy would seem to be necessary. Illinois recently passed a Post-Conviction Hearing Act providing for a hearing upon allegations by a prisoner that he was deprived of constitutional rights at the time of his trial. Mr. Albert Jenner, chairman of the committee which fostered this statutory revision, pointed out that this act was passed as a substitute for other post-conviction remedies. The new remedy resulted in part from the United States Supreme Court's denunciation of the confused state of Illinois decisions as to what remedies were available in varying circumstances resulting is a lack of due process. This confusion went to the basic issue of which of the three possible remedies, i.e., habeas corpus, coram nobis, or writ of error, should be used in cases where a man was deprived of constitutional rights at his trial. The similarity to the present unhealthy conditions in Nebraska, even to the exact remedies which are in a state of confusion, is apparent. Thus, in a recent comment on the late Henry Hawk's dilemma, it was suggested that Nebraska enact such a statutory remedy for pre-commitment deprivation of constitutional rights. To prevent a recurrance of the Hawk case, this would seem wise, but insufficient for the protection of the prisoner who can show only post-trial deprivation of constitutional rights. The obvious answer is to extend the new statutory remedy to include these post-trial acts by prison officials. Only by the passage of such a statute may the constitutional rights of Nebraska prisoners effectively be preserved. Such an enactment is strongly urged.

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It is clear that where there is an absence of an appropriate state remedy, or where such remedy is ineffective, the federal courts may sustain an application for the writ even though the petitioner does not first seek it in the state courts. 28 U.S.C. § 2254 (Supp. 1952).


Marnio v. Ragen, 332 U.S. 561, 570 (1947) (concurring opinion by the late Mr. Justice Rutledge).