THE PREMATURITY DOCTRINE IN HABEAS CORPUS—A CRITIQUE

While the constitutional rights of persons charged with criminal offenses have been strengthened and expanded by recent Supreme Court decisions,[1] in some situations federal post-conviction remedies have not kept pace with this trend. This incongruity is most pronounced when a state or federal prisoner challenges a sentence which he has not commenced to serve, basing his challenge on an alleged violation of these rights.[2] If federal habeas corpus is the remedy utilized, and if the prisoner is currently serving a valid sentence, relief is denied because the request is "premature."[3] In this situation, where the challenged sentence commences *in futuro*, other federal post-conviction remedies have been equally unsuccessful.[4] While this note will deal primarily with the prematurity doctrine of federal habeas corpus, a review of these other remedies is necessary to demonstrate their inadequacy and the subsequent need for an abolition of the prematurity doctrine established by *McNally v. Hill*.[5]

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1. See, *e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

2. The discussion in this note is based on the assumption that the time for direct appeal has expired and that any attack on the judgment in question must be collateral.

3. McNally v. Hill, 293 U.S. 131 (1934). The prematurity doctrine has also been labelled "mootness" and "timeliness." See SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS § 6 (1965); Note, 46 B.U.L. REV. 269 (1966); Note, 11 VILL. L. REV. 589 (1966).

To avoid confusion, prematurity should be distinguished from mootness. Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 5 n.7, 213 A.2d 613, 616 n.7 (1965). A question is "moot" for habeas corpus when the petitioner was, but is not presently, in custody or restrained of his liberty by the conviction being attacked. *E.g.*, Parker v. Ellis, 362 U.S. 574 (1960); Morrison v. Hunter, 161 F.2d 723 (10th Cir. 1947). *But see* Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964) (per curiam). In *Parker*, the petitioner was in state custody when certiorari was granted but was released having served his sentence at the time the Supreme Court decided the case. The petitioner in *Morrison* was sentenced to two concurrent sentences of ten and fifteen years but had already served the ten-year sentence being attacked. By contrast, a question is "premature" when the petitioner is presently serving an unchallenged sentence and therefore is not eligible for immediate release. Confusion arises because habeas corpus is denied in both moot and prematurity situations on the same ground—that the federal courts' habeas corpus jurisdiction requires that the petitioner be in "custody" under the conviction or sentence attacked.

4. The available remedies are federal habeas corpus, a motion under § 2255, Rule 35 of the Federal Rules of Criminal Procedure, coram nobis, mandamus, and declaratory judgment.

5. 293 U.S. 131 (1934).

I. Available Remedies

A. *The Federal Writ of Habeas Corpus*

In the leading prematurity case of *McNally v. Hill*,[6] the Supreme Court held that federal habeas corpus was not available to attack an allegedly invalid conviction or sentence if the petitioner was presently serving an admittedly valid sentence not being attacked. McNally petitioned for a writ of habeas corpus attacking the third count of a three-count indictment on the ground that it failed to charge him with an offense under the relevant statute.[7] He was, at the time, incarcerated pursuant to the second count, which was not under attack, and had not begun to serve his consecutive sentence under the third count. He claimed the continued existence of this consecutive sentence preluded his parole eligibility until some future date. On writ of certiorari, the Supreme Court affirmed the dismissal of his petition.

Since the federal habeas corpus statute did not define the meaning of the writ, the Court in *McNally* looked to the pre-1789 uses of habeas corpus in England as "authoritative guides in defining the principles which control the use of the writ in the federal courts. . . ."[8] Two basic principles evolved from the Court's investigation. First, the purpose of the writ was to inquire into the legality of the detention or custody of the petitioner; in the absence of an unlawful restraint of liberty, the writ could not be utilized. Second,

> the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention were found unlawful . . . . [A] diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not result in his immediate release.[9]

Applying these principles to the habeas corpus statute, which stated that the writ shall inquire "into the cause of restraint of liberty," the Court held that "a sentence which the prisoner has not begun to serve cannot be the cause of restraint which the statute makes the subject of inquiry,"[10] and even if the Court declared the petitioner's future sentence to be invalid, he

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6. *Ibid.*

7. All three counts were based on violations of the National Motor Vehicle Theft Act, 18 U.S.C. §§ 2311-12 (1964).

8. McNally v. Hill, 293 U.S. 131, 136 (1934).

9. *Id.* at 136-38.

10. *Id.* at 138.

would not be entitled to immediate release. In short, habeas corpus cannot be utilized to establish one's parole eligibility.[11]

It is common today for a person to be convicted pursuant to a multi-count indictment, or a series of separate indictments, and to have concurrent or consecutive sentences imposed. Since the *McNally* decision, which the Court has subsequently reaffirmed,[12] most lower federal courts have followed the prematurity doctrine not only in cases of consecutive sentences[13] but also in cases of concurrent sentences.[14] Moreover, the *McNally* rationale has been extended to several analogous situations.[15] As a result of strict adherence to *McNally* by both federal and state courts,[16] prisoners have been compelled to seek other avenues of relief.

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11. The Court suggested, however, that the petitioner might use mandamus to compel the parole board to consider his petition for parole. *Id.* at 140.

12. Fay v. Noia, 372 U.S. 391 (1963); Holiday v. Johnston, 313 U.S. 342 (1940); *Ex parte* Hull, 312 U.S. 546 (1940) (per curiam).

13. *E.g.*, Miller v. Gladden, 341 F.2d 972 (9th Cir. 1965); Welch v. Markley, 338 F.2d 561 (7th Cir. 1964); Holland v. Gladden, 338 F.2d 52 (9th Cir. 1964), *cert. denied,* 382 U.S. 868 (1965) (per curiam); Gailes v. Yeager, 324 F.2d 630 (3d Cir. 1963) (per curiam); United States *ex rel.* Rinaldi v. New Jersey, 321 F.2d 885 (3d Cir. 1963); Hart v. Ohio Bureau of Probation & Parole, 290 F.2d 550 (6th Cir. 1961). *Contra,* Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965).

14. *E.g.*, Lowther v. Maxwell, 347 F.2d 941 (6th Cir.) (per curiam), *cert. denied,* 382 U.S. 881 (1965); Wilson v. Gray, 345 F.2d 282 (9th Cir.), *cert. denied,* 382 U.S. 919 (1965); Browning v. Crouse, 327 F.2d 529 (10th Cir. 1964), *cert. denied,* 384 U.S. 973 (1966); McGann v. Taylor, 289 F.2d 820 (10th Cir. 1961) (per curiam), *cert. denied,* 371 U.S. 866 (1962); United States *ex rel.* Mascio v. Ragen, 179 F.2d 930 (7th Cir. 1950); United States *ex rel.* Kling v. LaVallee, 306 F.2d 199, 203 (2d Cir. 1962) (concurring opinion).

15. When a petitioner is presently serving a sentence which he claims is void, but has a subsequent sentence to serve which is not being attacked or which is found valid, some courts will not grant any relief unless the petitioner has served the valid portion of his sentence, less good time. McNealy v. Johnson, 100 F.2d 280 (9th Cir. 1938). The rationale behind this is that the valid subsequent sentence commenced at the date he was incarcerated under the void sentence and conviction. Therefore, since the only relief available by habeas corpus is immediate release, the court can grant relief only if the petitioner had already served his valid sentence. United States v. Carpenter, 151 Fed. 214 (9th Cir. 1907). *But see* Palumbo v. State, 334 F.2d 524 (3d Cir. 1964). The *Palumbo* court held that a federal district court had the power to consider the merits of a habeas corpus petition attacking convictions and sentences presently being served even though the petitioner had future sentences to serve. The court's rationale was that the petitioner was attacking present "custody" as required by 28 U.S.C. § 2241(c)(3) (1964). The petitioner had not served a sufficient time corresponding to his future sentence to have entitled him to release from prison, but the court made no mention of the immediate release requirement. Similarly, some state courts have granted relief under habeas corpus by reversing the conviction and sentence presently being served even though the prisoner may remain in custody to serve the remainder of his valid future sentence. *Compare* Jablonski v. State, 29 N.J. Super. 90, 102 A.2d 56 (App. Div. 1953), *and* State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 87, 133 N.W.2d 753 (1965), *with*

B. *Motion Under Section 2255*

Following the enactment of the 1867 amendment[17] to section 14 of the First Judiciary Act of 1789,[18] federal habeas corpus jurisdiction extended to

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Page v. Green, 174 Ohio St. 178, 187 N.E.2d 592 (1963), *and* Smyth v. Midgett, 199 Va. 727, 101 S.E.2d 575 (1958).

If the petitioner attacks all his concurrent or consecutive sentences, habeas corpus would seem to be available since he would be entitled to immediate release. See Igenito v. New Jersey, 238 F.2d 935 (3d Cir. 1956); United States *ex rel.* Jackson v. Maroney, 246 F. Supp. 299 (W.D. Pa. 1965). *But see* Palumbo v. State, *supra.*

A prisoner sentenced as an habitual criminal or multiple offender under a valid conviction for a substantive offense cannot use habeas corpus to attack his past convictions which were the basis of his recidivist sentence while serving that portion of his sentence which could have been imposed for the substantive offense. Clark v. Turner, 350 F.2d 294 (10th Cir. 1965) (per curiam); Browning v. Crouse, 327 F.2d 529 (10th Cir. 1964). If the petitioner had served the valid substantive sentence and was then serving only the recidivist portion, habeas corpus would inquire into the validity of this detention. Carroll v. Boles, 347 F.2d 96 (4th Cir. 1965) (per curiam). Moreover, the Second Circuit has held that if, absent the prior invalid conviction, a state prisoner upon resentencing *might* be sentenced to no more than the period he had already served, habeas corpus would be granted. United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303 (2d Cir. 1964); United States *ex rel.* Cutrone v. Fay, 289 F.2d 470 (2d Cir. 1961); United States *ex rel.* Smith v. Martin, 242 F.2d 701 (2d Cir. 1957); United States *ex rel.* Smith v. Jackson, 234 F.2d 742 (2d Cir. 1956). Under this rule, if there is a *possibility* that petitioner could obtain immediate release upon resentencing were the federal court to act favorably on his petition, the Second Circuit would determine the merits of his allegedly invalid conviction and remand him to the state court for resentencing.

When an increased sentence has resulted from a prior federal conviction, state and federal prisoners sentenced as multiple offenders can obtain immediate relief through coram nobis in the federal courts without encountering the "custody" and "right to release" problems associated with habeas corpus. See United States v. Morgan, 346 U.S. 502 (1954).

16. Most states follow *McNally* in applying their own habeas corpus procedures. *E.g.,* Goodman v. State, 96 Ariz 139, 393 P.2d 148 (1964); Wright v. Bennett, 131 N.W.2d 455 (Iowa 1964); State *ex rel.* Nelson v. Tahash, 265 Minn. 330, 121 N.W.2d 584 (1963). For a fuller listing of authorities see Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 8 n.10, 213 A.2d 613, 618 n.10 (1965). A number of states have rejected the prematurity doctrine. *In re* Chapman, 43 Cal. 2d 385, 273 P.2d 817 (1954); Simon v. Director of Patuxent Institution, 235 Md. 626, 201 A.2d 371 (1964); Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 213 A.2d 613 (1965); Palmer v. Cranor, 45 Wash. 2d 278, 273 P.2d 985 (1954); State *ex rel.* White v. Boles, 140 S.E.2d 591 (W. Va. 1965); see State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 87, 133 N.W.2d 753 (1965). While the Oregon Post Conviction Hearing Act, ORE. REV. STAT. § § 138.510-.680 (1963), deleted the term "custody," the courts still may be able to invoke the prematurity rule under § 138.540(2). *But see* Application of Landreth, 213 Ore. 205, 324 P.2d 475 (1958).

17. 14 Stat. 385 (1867).

18. 1 Stat. 81-82 (1789).

both state and federal prisoners. In 1948, however, section 2255[19] was enacted as a statutory remedy for federal prisoners "simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined."[20] This motion, which has been appropriately labeled a "procedural substitute for habeas corpus,"[21] is available only "to a prisoner in custody under sentence of a court established by Act of Congress,"[22] and utilization of federal habeas corpus is precluded unless the remedy under section 2255 is "inadequate or ineffective to test the legality

19. 28 U.S.C. § 2255 (1964):

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

20. United States v. Hill, 368 U.S. 424, 427 (1962). The purpose of § 2255 and its history are fully discussed in Hayman v. United States, 342 U.S. 205 (1952). The fact that habeas corpus had to be brought in the district where the prisoner was confined caused several problems: the records of the sentencing court were not readily available; witnesses did not live near the district court where the petitioner was confined; and the district courts whose jurisdictions were located near federal penal institutions had a disproportionate number of habeas corpus petitions. To avoid these problems, § 2255 provided for a motion to the original sentencing court.

21. Duggins v. United States, 240 F.2d 479, 484 (6th Cir. 1957).

22. 28 U.S.C. § 2255 (1964). This statute has been interpreted as precluding a prisoner presently serving a state sentence from questioning the validity of a federal conviction or sentence which commences at the expiration of service of his state sentence. Young v. United States, 337 F.2d 753 (5th Cir. 1964); Ellison v. United States, 263 F.2d 395 (10th Cir. 1959).

of his detention."[23] Thus, it is now rare for federal habeas corpus to be used by a federal prisoner. A prisoner bringing a motion under section 2255 to vacate, set aside, or correct a sentence imposed by a federal court is still faced with the *McNally* rule,[24] since relief is "available only to persons who were entitled to relief by habeas corpus."[25]

The federal courts of appeals almost uniformly had held that section 2255 was available only to attack the sentence under which a person was in custody,[26] and only by a prisoner who satisfied the statutory requirement of "claiming the right to release."[27] The courts had applied these rules not only to the concurrent,[28] the excessive,[29] and the *McNally* type consecutive sentence cases,[30] but also to the moot situation in which the prisoner attempts to attack a federal sentence previously served.[31]

In 1959, the Supreme Court in *Heflin v. United States*[32] considered the jurisdictional question of whether relief by motion under section 2255 to correct the prisoner's sentence was premature. The petitioner had been convicted under a three-count indictment for violation of a federal statute. The sentences pursuant to his conviction were ten years on the first count, three years on the third count, and one year and a day on the second count; all were to run consecutively in that order. While serving his sentence under the first count, petitioner brought a motion pursuant to section 2255 to cor-

23. 28 U.S.C. § 2255 (1964).

24. Heflin v. United States, 358 U.S. 415 (1959).

25. Duggins v. United States, 240 F.2d 479, 483 (6th Cir. 1957).

26. For example, in United States v. Bradford, 194 F.2d 197 (2d Cir. 1952), the court said that the term "custody" under § 2255 has the same meaning as in habeas corpus, and that the jurisdiction of the federal courts under the two remedies is identical. *Accord,* Duggins v. United States, 240 F.2d 479 (6th Cir. 1957); Crow v. United States, 186 F.2d 704 (9th Cir. 1950).

27. See Heflin v. United States, 358 U.S. 415, 418 n.5 (1959). *Contra,* Holloway v. United States, 191 F.2d 504, 507 (D.C. Cir. 1951).

28. United States v. McGann, 245 F.2d 670 (2d Cir. 1957); Oughton v. United States, 215 F.2d 578 (9th Cir. 1954); Winhoven v. United States, 209 F.2d 417 (9th Cir. 1953).

29. McDonald v. Johnston, 149 F.2d 768 (9th Cir. 1945).

30. *E.g.,* Crow v. United States, 186 F.2d 704 (9th Cir. 1950). However, in Hoffman v. United States, 244 F.2d 378 (9th Cir. 1957), the court indicated it would give § 2255 relief when a prisoner was serving an allegedly invalid sentence, although he had a valid consecutive sentence yet to serve. For purposes of the right-to-be-released requirement of § 2255, the prisoner was deemed to have been confined on the subsequent valid sentence as of the date of the inception of the challenged prior sentence. If he had already served the time required under the subsequent valid sentence, he would be entitled to immediate release. This same rule is applied in habeas corpus. See note 15 *supra.*

31. Lopez v. United States, 186 F.2d 707 (9th Cir. 1950). *But see* Russell v. United States, 306 F.2d 402 (9th Cir. 1962).

32. 358 U.S. 415 (1959).

rect his sentence under the second count alleging that the Federal Bank Robbery Act[33] could not be construed so as to subject him to penalties for both taking and receiving stolen property. Expressing the view of five members of the Court in his concurring opinion,[34] Mr. Justice Stewart ruled that the motion under section 2255 could not be entertained. There were three bases for this conclusion. First, the language of section 2255 states that a prisoner must be in custody under a sentence imposed by a federal court and must be "claiming the right to be released." Second, although section 2255 provides that "a motion for such relief may be made at any time," this language means only that "as in habeas corpus, there is no statute of limitations, no *res judicata,* and that the doctrine of laches is inapplicable."[35] Third, *United States v. Hayman,*[36] a controlling precedent, made it clear that the purpose of section 2255 was to alleviate some of the problems associated with federal habeas corpus by affording the *same rights* as habeas corpus, in a more convenient forum. Therefore, Justice Stewart concluded that the basic principles of *McNally* were applicable to section 2255. By contrast, the four remaining Justices expressed the view

> that when § 2255 says "A motion for such relief may be made at any time," it means what it says. . . . [T]he correction of sentence, if made, will *affect* "the right to be released," protected by § 2255, even though that right will not be immediately realized.[37]

Even though *Heflin* was decided by a closely divided Court, the federal circuits have, of course, followed Justice Stewart's interpretation of section 2255.[38]

C. *Rule 35*

The concurring majority in *Heflin* found an alternative procedural ground for relief. Rule 35 of the Federal Rules of Criminal Procedure pro-

33. 18 U.S.C. § 2113 (1964).

34. Mr. Justice Douglas wrote the opinion of the Court, in which all nine Justices agreed on the interpretation of the Federal Bank Robbery Act. In his concurring opinion, Mr. Justice Stewart stated the position of a majority of the Court, while Mr. Justice Douglas presented the minority view on the issue of jurisdiction.

35. Heflin v. United States, 358 U.S. 415, 420 (1959).

36. 342 U.S. 205 (1952).

37. Heflin v. United States, 358 U.S. 415, 418 (1959). (Emphasis added.) Thus, at least four members of the Court disapproved of the application of the prematurity concept to § 2255. For a different interpretation of the right-to-be-released requirement of § 2255 reaching the same conclusion as the *Heflin* majority see Crow v. United States, 186 F.2d 704 (9th Cir. 1950).

38. *E.g.,* Johnson v. United States, 344 F.2d 401 (5th Cir. 1965) (consecutive sentences); Scarponi v. United States, 313 F.2d 950 (10th Cir. 1963) (consecutive sentences); Bayless v. United States, 288 F.2d 794 (9th Cir. 1962) (concurrent sentences); Williams v. United States, 236 F.2d 894 (9th Cir. 1956) (concurrent sentences).

vides that "the court may correct an illegal sentence at any time." Despite the similarity of the "at any time" language,[39] Rule 35 has a legislative history entirely different from that of section 2255.[40] Established two years earlier than section 2255, Rule 35 was enacted to allow a federal district court to correct an illegal sentence after the expiration of the term in which it was imposed. Unlike section 2255, Rule 35 was not intended "to meet the problems involved in habeas corpus proceedings or a collateral attack upon a judgment."[41] Neither, of course, was designed with prematurity in mind. The invocation of the Rule may be restricted, however, to cases in which the sentence to be corrected was illegal on its face, to the exclusion of matters *dehors* the record.[42]

As a result of *Heflin,* some prisoners appear to be entitled to some relief under Rule 35 even though they are not presently serving the sentence to be corrected.[43] In *United States v. Hill,*[44] another 5-4 decision, the Court defined an "illegal sentence" under Rule 35 as one which exceeds statutory or constitutional limits or imposes multiple terms for the same offense. Four Justices, interpreting the Rule literally, contended that an illegal sentence was any sentence imposed in a "prohibited manner."[45]

The scope of Rule 35 is further restricted in that it is applicable only to the correction of illegal *sentences* and, therefore, cannot be used collaterally to attack the validity of *convictions.*[46]

D. *Coram Nobis*

If a prisoner is faced with the prematurity rule and cannot avail himself of the narrow scope of relief afforded under Rule 35, coram nobis may be available. In *United States v. Morgan,*[47] the Supreme Court held that,

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39. *Compare* Rule 35: "A court may correct an illegal sentence at any time," *with* § 2255: "motion for such relief may be made at any time." In Holloway v. United States, 191 F.2d 504 (D.C. Cir. 1951), the court indicated it would give relief under either clause.

40. Heflin v. United States, 358 U.S. 415, 422 (1959).

41. Duggins v. United States, 240 F.2d 479, 483 (6th Cir. 1957).

42. See Heflin v. United States, 358 U.S. 415, 418, 422 (1959).

43. Prior decisions had also utilized Rule 35 and reached the same conclusion. Hoffman v. United States, 244 F.2d 378 (9th Cir. 1957); Duggins v. United States, 240 F.2d 479 (6th Cir. 1957); United States v. Bradford, 194 F.2d 197 (6th Cir. 1952); Holloway v. United States, 191 F.2d 504 (D.C. Cir. 1951).

44. 368 U.S. 424 (1962).

45. *Id.* at 430 (dissenting opinion).

46. United States v. Hill, *supra* note 44; Johnson v. United States, 344 F.2d 401 (5th Cir. 1965); Hoffman v. United States, 244 F.2d 378 (9th Cir. 1957); Duggins v. United States, 240 F.2d 479 (6th Cir. 1957).

47. 346 U.S. 502 (1954).

pursuant to an application in the nature of error coram nobis under the All Writs Act,[48] a federal district court has the power to vacate its judgment of conviction and sentence *after* the sentence has been served.[49] Here the respondent's previously served federal sentence, alleged to have been imposed in violation of his constitutional rights,[50] resulted in his being sentenced as a second offender in a later state conviction. The Court, invoking the All Writs Act, held that neither Rule 60(b) of the Federal Rules of Civil Procedure[51] nor section 2255 precluded the use of this motion. Since the *Morgan* case, the federal courts have generally extended their jurisdiction through coram nobis to cases in which prisoners have attacked the validity of convictions and sentences to be served in the future.[52] These courts have treated motions for section 2255 relief as motions for coram nobis relief, seemingly cognizant of language in *Morgan:* "otherwise a wrong may stand uncorrected which the available remedy would right,"[53] and "in behalf of the

48. 28 U.S.C. § 1651(a) (1964).

49. Had this been a habeas corpus petition or a motion under § 2255, the district court would have lacked jurisdiction since the petition or motion would have been moot.

50. The respondent, who was nineteen at the time of his trial, had pleaded guilty to a federal offense. He claimed he was without counsel, did not competently waive counsel, was ignorant of the law, and was not advised of his rights.

51. The court held that Rule 60(b) abolished the writ of coram nobis only in civil cases. United States v. Morgan, 346 U.S. 502, 505 n.4 (1954).

52. Johnson v. United States, 344 F.2d 401 (5th Cir. 1965); Thomas v. United States, 271 F.2d 500 (D.C. Cir. 1959); Williams v. United States, 267 F.2d 559 (10th Cir., *cert. denied,* 361 U.S. 867 (1959); Application of Dinerstein, 258 F.2d 609 (9th Cir. 1958); Tucker v. United States, 235 F.2d 238 (9th Cir. 1956); Mitchell v. United States, 228 F.2d 747 (10th Cir. 1955), *cert. denied,* 350 U.S. 1014 (1956); Hartman v. United States, 228 F. Supp. 402 (W.D. Va. 1964); *cf.* Owensby v. United States, 353 F.2d 412 (10th Cir. 1965), *cert. denied,* 383 U.S. 962 (1966); Young v. United States, 337 F.2d 753 (5th Cir. 1964); Moon v. United States, 272 F.2d 530 (D.C. Cir. 1959). *Contra,* United States v. Baker, 158 F. Supp. 842 (E.D. Ark. 1958).

Timeliness is not an issue in coram nobis. Relief is given when the question is moot, as in *Morgan,* and when the federal sentence being attacked is to be served in the future. Mitchell v. United States, 228 F.2d 747 (10th Cir. 1955); Hartman v. United States, 228 F. Supp. 402 (W.D. Va. 1964). *But see* United States v. Baker, 158 F. Supp. 842 (E.D. Ark. 1958). The courts have granted coram nobis relief even where no issue of denial of parole eligibility was present. See Migdol v. United States, 298 F.2d 513 (9th Cir. 1961); Thomas v. United States, 271 F.2d 500 (D.C. Cir. 1959); Williams v. United States, 267 F.2d 559 (10th Cir.), *cert. denied,* 361 U.S. 867 (1959); Tucker v. United States, 235 F.2d 238 (9th Cir. 1956). But the prisoner may have to show some present restraint:

> [Coram nobis] relief appears to have been afforded under the writ only where a present restraint or imposition has resulted from a sentence already served, or to be served. Mathis v. United States, 246 F. Supp. 116, 122 (E.D.N.C. 1965).

53. United States v. Morgan, 346 U. S. 502, 512 (1954).

unfortunates, federal courts should act in doing justice if the record makes plain a right to relief."[54]

Since the federal writ of coram nobis avoids the custody and right-to-release problems associated with habeas corpus and motions under section 2255, it would seem custom-made for a prisoner faced with the prematurity dilemma of *McNally* or *Heflin*.[55] On the contrary, coram nobis has not been an adequate remedy to deal with all prematurity problems. Federal coram nobis has several limitations. Its availability extends only to correcting federal, not state, convictions.[56] Further, the scope of relief is limited to the correction of errors of fact, not errors of law.[57] At common law, the facts to be corrected by coram nobis had to be facts not disclosed by the record.[58] Thus, coram nobis will not be granted "to correct errors committed in the course of the trial, even though such errors relate to constitutional rights."[59] Finally, a petition for coram nobis must present "circumstances compelling such action to achieve justice."[60] While a detailed examination of the circumstances in which coram nobis relief is given would be beyond the scope of this note, commentators[61] regard this remedy as less potent in correcting substantive constitutional errors than habeas corpus. The latter is issued to state and, where applicable, federal[62] prisoners "in custody in violation of the Constitution or laws or treaties of the United States."[63]

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54. *Id.* at 505.

55. See Note, 66 COLUM. L. REV. 1164, 1178 (1966).

56. Jurisdiction to entertain the federal writ of coram nobis is conferred by the All Writs Act, 28 U.S.C. § 1651(a) (1964). The theory behind the writ is that the sentencing court should correct its own errors. See United States v. Morgan, 346 U.S. 502 (1954); Thomas v. Cunningham, 335 F.2d 67 (4th Cir. 1964); Madigan v. Wells, 224 F.2d 577, 578 n.2 (9th Cir. 1955).

For a list of the states providing some type of relief under the name "coram nobis" see Note, 61 COLUM. L. REV. 681, 692 n.63 (1961). See generally FRANK, CORAM NOBIS (1953); Briggs, *"Coram Nobis"—Is it Either an Available or the Most Satisfactory Post-Conviction Remedy to Test Constitutionality in Criminal Proceedings?*, 17 MONT. L. REV. 160 (1956); Note, 46 B.U.L. REV. 269, 273-74 (1966); Note, 57 NW. U.L. REV. 467 (1962); Note, 33 ST. JOHN'S L. REV. 98 (1958).

57. See FRANK, CORAM NOBIS ¶ 1.02 (1953).

58. This limitation may have been eliminated to some extent. See United States v. Morgan, 346 U.S. 502, 511-12 (1954).

59. Moon v. United States, 272 F.2d 530, 532 (D.C. Cir. 1959).

60. United States v. Morgan, 346 U.S. 502, 511 (1954).

61. See Comment, 11 VILL. L. REV. 589, 596 n.39 (1966); Note, 46 B.U.L. REV. 269, 274 (1966). However, another writer feels that federal "courts have the power under the All-Writs Act to include constitutional objections within the scope of coram nobis." Note, 66 COLUM. L. REV. 1164, 1179 (1966).

62. 28 U.S.C. § 2255 (1964).

63. 28 U.S.C. § 2241(c)(3) (1964).

E. *Mandamus*

The *McNally* opinion suggested that a petitioner might establish his parole eligibility by proving, in a mandamus proceeding against the United States Board of Parole, that the yet-to-be-served federal sentence was void.[64] When *McNally* was decided, an adult federal prisoner's parole eligibility was determined by the fractional method. Under this system, a prisoner is eligible for parole consideration after serving one-third of the total sentence imposed.[65] However, in a 1958 amendment to the federal parole law, two additional methods were established. One method allows the judge to impose an indeterminate sentence and to designate a minimum term to be served which cannot exceed one-third of the maximum sentence imposed.[66] Upon serving the minimum term the prisoner becomes eligible for parole. The second provision permits the judge to leave parole eligibility entirely to the determination of the Parole Board.[67]

Since its adoption, this latter provision has been used with increased frequency.[68] Under the fractional and indeterminate sentence methods, parole consideration is precluded for a stated period, while under this discretionary parole eligibility provision, the Board could theoretically hold a prisoner eligible for parole at any time. However, as a practical matter, the continued existence of an allegedly void consecutive or concurrent sentence will prob-

64. McNally v. Hill, 293 U.S. 131, 140 (1934).

65. 18 U.S.C. § 4202 (1964). When two or more consecutive sentences are to be served, the aggregation of these sentences determines the parole eligibility date. Walker v. Taylor, 338 F.2d 945 (10th Cir. 1964); Brown v. United States, 256 F.2d 151 (5th Cir. 1958); Rothstein v. Hiatt, 68 F. Supp. 738 (M.D. Pa. 1946). For example, if a prisoner is sentenced to a three-year term and a consecutive nine-year sentence, he would be eligible for parole after serving four years. If he had been sentenced to only the three-year term, or if his nine-year consecutive sentence had been vacated by habeas corpus while he was serving his three-year sentence, he would be eligible for parole after serving one-third of three years or one year. Thus, under the prematurity rule there is a three-year period during which the prisoner is denied the opportunity for parole consideration.

If the prisoner is serving concurrent sentences, the parole eligibility date under this statute is determined by the longest of the concurrent sentences. Clark v. United States, 267 F.2d 99 (4th Cir. 1959). Therefore, when concurrent sentences are of unequal length, prematurity problems arise when the prisoner seeks to attack the longest concurrent sentence.

66. 18 U.S.C. § 4208(a)(1) (1964).

67. 18 U.S.C. § 4208(a)(2) (1964): "[T]he court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine." Similar discretion is sometimes given to parole boards by state legislation. See CAL. PEN. CODE §§ 3020, 5077; WASH. REV. CODE § 9.95.040 (Supp. 1965).

68. In 1960, the federal courts imposed 75 indeterminate sentences; in 1964, 43 were imposed. The Board established the parole eligibility dates in 624 cases in 1960 as compared to 1,535 cases in 1964. UNITED STATES BD. OF PAROLE, ANNUAL REPORT, July 1, 1963 to June 30, 1964. See 1964 ATT'Y GEN. ANN. REP. 461-63.

ably result in a Board decision to postpone parole eligibility.[69] A search of the cases involving the fractional and indeterminate sentence methods has uncovered dicta in only a few decisions supporting the *McNally* suggestion that mandamus may be used to establish parole eligibility.[70] No cases involving prematurity were found in which mandamus was, in fact, brought to establish a prisoner's parole eligibility.

A further question that has not specifically been answered is whether a court in a mandamus proceeding could determine the validity of the challenged consecutive or concurrent sentence. The Board acts within its jurisdiction and does not arbitrarily deny parole eligibility, when, as calculated by applying the parole statute to the sentence on its face, the combination of

69. See Hibdon v. United States, 204 F.2d 834, 839 (6th Cir. 1953) (dictum). Under 18 U.S.C. § 4203 (1964), parole is granted to federal prisoners in the "discretion" of the Board of Parole if "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society. . . . " Some of the factors considered by the Board in implementing this broad statutory guideline include the prisoner's personal history, education, employment, family, personal habits, *and* the nature of the offenses committed, including the sentences imposed. UNITED STATES BD. OF PAROLE, FUNCTIONS OF THE UNITED STATES BOARD OF PAROLE 2-3 (1964). As part of the Board's voting procedure, the members of the Board do not give their reasons for granting or denying parole. *Id.* at 4-5. Therefore, while it is impossible to determine exactly what effect a second or subsequent conviction and sentence has in the parole decision, parole may be postponed where more than one conviction and sentence exists. See Hibdon v. United States, *supra.*

An analogous situation is presented under the 1958 parole eligibility amendments. It seems probable that the same factors used by the Board in granting parole will be utilized in the Board's discretionary determination of the parole eligibility date. See 28 U.S.C. § 4208(c) (1964).

70. Brown v. United States, 256 F.2d 151 (5th Cir. 1958); Walton v. Hiatt, 50 F. Supp. 690 (M.D. Pa. 1943). *But see* Losieau v. Hunter, 193 F.2d 41 (D.C. Cir. 1951). Under none of the three methods can parole eligibility be established by resort to habeas corpus. See McNally v. Hill, 293 U.S. 131 (1934) (fractional method); Walker v. Taylor, 338 F.2d 945 (10th Cir. 1964) (discretionary with board).

By comparison, since the granting of parole is "discretionary," 18 U.S.C. § 4203 (1964), habeas corpus will not secure relief from the Board's decision denying parole once a prisoner has become eligible. See, *e.g.,* Hauck v. Hiatt, 141 F.2d 812 (3d Cir. 1944) (per curiam); Goldsmith v. Aderholt, 44 F.2d 166 (5th Cir. 1930), *cert. denied,* 282 U.S. 901 (1931); Bass v. Hiatt, 50 F. Supp. 420 (M.D. Pa. 1943).

It has been held that there is no review of the Parole Board's decision to grant or deny parole under the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964), since this Act precludes judicial review when the agency action "is by law committed to agency discretion." Bozell v. United States, 199 F.2d 449 (4th Cir. 1952), *cert. denied,* 345 U.S. 977 (1953); *cf.* Robbins v. Reed, 269 F.2d 242 (D.C. Cir. 1959); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949). No cases were found dealing with review of the Federal Parole Board's decision to deny parole, but state law generally prevents judicial review of state boards. *E.g.,* Tyler v. State Dep't of Pub. Welfare, 19 Wis. 2d 166, 119 N.W.2d 460 (1963). Even in federal parole revocation cases, most federal courts grant limited judicial review. See Note, 1964 WASH. U.L.Q. 335, 348-51.

the two or more minimum or fractional terms exceeds the period already served. Moreover, it is questionable whether the court could go beyond this determination, since the prisoner's prejudice has not resulted in the first instance from the Board's action but from the events at the trial.[71]

No cases have been found in which mandamus has been brought to compel the Board to consider a prisoner for parole under the 1958 discretionary provision. But it would seem that mandamus is not a viable remedy under this provision either, for although mandamus can be used to compel the performance of a duty calling for an exercise of discretion, it cannot be employed to direct an exercise of discretion in a particular way.[72] However, it could be argued that within this rule a court may be able to direct the Board, when establishing a prisoner's parole eligibility, to disregard his void sentence. It is submitted that even if a court grants mandamus, it would be able to compel the Board only to convene for the purpose of determining when it will consider his parole application. This, in fact, would accomplish little, since the Board in its discretion could decide not to consider the prisoner for parole consideration at the present time and remain silent as to a future time when it would again consider his eligibility.

F. *Declaratory Judgment*

Another possible remedy would be the utilization of the Federal Declaratory Judgment Act[73] to establish a prisoner's parole eligibility through a declaration of the invalidity of a concurrent or consecutive sentence. No cases have been uncovered in which a prisoner in a prematurity situation has successfully resorted to this remedy.[74] Two reasons have been asserted for denying a prisoner relief under this Act:

71. In Clark v. Memolo, 174 F.2d 978 (D.C. Cir. 1949), a federal prisoner, contending his sentences were concurrent, alleged he was denied parole eligibility since the Attorney General, through his subordinate, the Director of the Bureau of Prisons, had failed to disregard the allegedly illegal court order declaring that his sentences ran consecutively. The court, in discussing the unavailability of mandamus, said that such relief would result in the Attorney General's being compelled to disregard his statutory duty to base parole computation on the court record and being given the power to declare a judgment void. Therefore, to grant mandamus relief "would amount to a collateral attack on such judgment by the Attorney General." *Id.* at 981.

72. *E.g.*, Wilbur v. United States, 281 U.S. 206, 218 (1930); Anderson v. McKay, 211 F.2d 798 (D.C. Cir.), *cert. denied*, 348 U.S. 836 (1954). Even though FED. R. CIV. P. 81(b) has abolished the writ of mandamus, the same relief as previously afforded under the old writ is now available pursuant to the All Writs Act, 28 U.S.C. § 1651 (1964), in a petition in the nature of mandamus. Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813 (D. Mass. 1960); M.P. & St. L. Express, Inc. v. United States, 165 F. Supp. 677 (W.D. Ky. 1958).

73. 28 U.S.C. § 2201 (1964).

74. The prisoner in Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965), sought relief in the federal district court under the Federal Declaratory Judgment Act, but the court

> It was the primary purpose of the act to have a declaration of rights not theretofore determined, and not to determine whether rights theretofore adjudicated have been properly adjudicated. . . . [Moreover,] the action for declaratory judgment is not . . . a substitute for a motion to vacate or to correct the sentence in the court where it was imposed, or . . . a substitute for habeas corpus in the district where the unlawful detention occurs, or . . . a substitute for a new trial or appeal.[75]

It can be argued that the latter reason is insufficient to deny declaratory relief since neither a motion under section 2255 nor habeas corpus is available to a prisoner in a prematurity situation; therefore, an action for a declaratory judgment would not be a substitute for other available remedies. One writer, analogizing to the successful use of declaratory relief in non-prematurity cases, argued that a declaratory judgment should be available in a prematurity situation, since a justiciable issue is presented by the immediate legal impact of a denial of parole eligibility and the resulting continued physical confinment.[76] At the present time, however, the courts have not adopted this argument.

II. A Critique of McNally and The Prematurity Rule

Any remedy which results in "service of any part of an illegal sentence is a gross inadequacy."[77] Nonetheless, as demonstrated in the above discussion of the available post-conviction remedies, the scope of collateral attack in the federal courts is restricted to such an extent that incarceration is often prolonged unnecessarily. While the other five remedies offer only piecemeal relief, habeas corpus, if not barred by the prematurity restriction, offers a superior remedy against unconstitutional restraints on liberty. Therefore, the question becomes one of abandoning the prematurity rule. The determination of this question depends on a resolution of the following issues: (1) Should the Supreme Court have used a historical approach in defining the meaning and uses of the writ of habeas corpus and was it accurate in doing so? (2) Did the pre-*McNally* uses of the writ in this country justify the Court's adoption of the prematurity doctrine and do they justify the continuance of the doctrine today? (3) Does the denial of parole eligibility fulfill the statutory habeas corpus requirement that the prisoner demonstrate present unlawful custody? (4) Is immediate release the only relief available under habeas corpus?

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denied relief on the ground that this Act was not a substitute for habeas corpus or other collateral attack. On appeal, the Fourth Circuit treated his motion as a writ of habeas corpus and stated that it need not consider whether the Declaratory Judgment Act could be used because it was granting habeas corpus relief.

75. Clark v. Memolo, 174 F.2d 978, 981 (D.C. Cir. 1949).

76. Note, 1966 Duke L.J. 588, 597 n.40.

77. Young v. United States, 337 F.2d 753, 757 (5th Cir. 1964).

A. *The Historic Function of the Writ*

The Great Writ of habeas corpus *ad subjiciendum* at common law was the principal legal protection against deprivation of personal liberty.[78] It was the common law writ used by persons committed or detained on a criminal charge.[79] Holdsworth points out that it was originally utilized by the royal courts to protect or enlarge their jurisdiction at a time of great rivalry among the English courts, but subsequently became the remedy to protect the liberty of the individual.[80] Parliament[81] eventually "made it the most efficient protector of that liberty that any legal system has ever devised."[82] In the *McNally* case, the Court looked to the historic uses of the writ both under common law and after the passage of the English Habeas Corpus Act of 1679. It reasoned that while section 14 of the First Judiciary Act of 1789 and subsequent statutes established the habeas corpus jurisdiction of the federal courts, they were silent as to the meaning of the term. As a result the Court purported to follow the docrine of *Ex parte Bollman*:[83]

> [F]or the *meaning* of the term *habeas corpus,* resort may unquestionably be had to the common law, but the power to award the writ by any of the courts of the United States, must be given by written law.[84]

The *McNally* Court, rather than looking to the current habeas corpus statute, relied on historical principles as "authoritative guides" not only for the "meaning" of habeas corpus but also for its "use." Thus, the Court looked to common law interpretations of the principles of unlawful custody and immediate release in reaching its decision.[85]

While there is no doubt that historically the writ functioned to remedy unlawful detention or custody resulting in the deprivation of liberty, the Court failed to take into account the distinction between the original use of the writ in England and its attempted use more than a century and a half later in cases like *McNally.* Historically, the writ was used as a pre-trial remedy, not as a post-conviction collateral attack.[86] In addition, parole problems are of recent origin and are too complex to be resolved merely by

78. 4 BACON, ABRIDGMENT OF THE LAW 571 (1856); HURD, WRIT OF HABEAS CORPUS 232-233 (1858).

79. 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 111 (1926).

80. *Id.* at 104-125.

81. Habeas Corpus Act, 1679, 31 Car. 2, c. 2.

82. Holdsworth, *op. cit. supra* note 79, at 105.

83. 8 U.S. (4 Cranch) 75 (1807).

84. *Id.* at 94. (Emphasis added.)

85. See notes 8-10 *supra* and accompanying text.

86. Oaks, *Legal History in the High Court—Habeas Corpus,* 64 MICH. L. REV. 451 (1966); 51 CALIF. L. REV. 228, 230 (1963).

deciding the issue of whether the petitioner is eligible for immediate physical release. The Court in *McNally* did not cite any English cases analogous to a situation in which the writ was sought to attack a sentence running consecutively to the valid sentence being served. The Court could not have found such historical precedents[87] since the power of the English courts to impose consecutive sentences was first litigated in misdemeanor cases in 1768,[88] and the power to establish consecutive sentences in felony cases was not conferred until 1827.[89] Since most of these developments were subsequent to the First Judiciary Act, the Supreme Court in *McNally* did not have an "authoritative guide" from the English common law. Therefore, the Court's interpretation of the federal habeas corpus statute should have been limited primarily to American precedent and to the language of the statute itself.

Had *McNally* adhered to the *Bollman* doctrine,[90] the result of the case would have been different. The habeas corpus statute in 1934 authorized the issuance of the writ "for the purpose of inquiry into the cause of restraint of liberty . . . where he . . . is in custody in violation of the Constitution or of a law or treaty of the United States. . . ."[91] In contrast to *McNally*'s erroneous application of *Bollman,* this doctrine if appropriately applied can afford the flexibility necessary to deal with changing forms of "restraint of

87. See Bross Crosby's Case, 3 Wils. K.B. 188, 95 Eng. Rep. 1005 (1771); Rex v. Clarkson, 1 Str. 445, 93 Eng. Rep. 625 (K.B. 1721). In *Clarkson, supra,* a man claimed a girl was his wife and attempted to release her from the custody of her guardians. In *Bross, supra,* the Mayor of London was imprisoned for contempt pursuant to an order of the House of Commons. Neither of these situations approach the complexity of parole eligibility.

88. In Wilkes v. Rex, Wilm. 332, 97 Eng. Rep. 123 (K.B. 1768), it was held that when a man was already imprisoned for a crime and was subsequently convicted of a misdemeanor, a sentence could be imposed to commence after the expiration of the sentence he was serving. Rex v. Rhenwick Williams, 1 Leach 529, 536, 168 Eng. Rep. 366, 370 (Crown. 1790), established that a court has power to impose three consecutive sentences pursuant to a conviction of three separate offenses of assault. The case of Rex v. Castro, 5 Q.B.D. 490 *aff'd,* 6 A.C. 229 (1880), upheld an imposition of consecutive sentences when defendant was convicted under a two-count indictment for separate perjury offenses.

89. Criminal Law Act, 1827, 7 & 8 Geo. 4, c. 28. See Rex v. Greenberg, [1943] 1 K.B. 381; ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES §§ 635-38 (34th ed. 1959). These misdemeanor and felony cases imply that previous to the 1768 case of Wilkes v. Rex, *supra* note 88, a court could imprison a man who was already serving a previous sentence, but the latter sentence would have begun at the time of sentencing and not at the expiration of the first sentence.

90. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). *McNally* cited this doctrine but failed to follow it. See notes 84-85 *supra* and accompanying text. Instead of looking to the written law (the habeas corpus statute), the Court turned to English common law. Thus, the Court confused "meaning" with jurisdiction (application).

91. See McNally v. Hill, 293 U.S. 131, 135-36 (1934).

liberty" or "custody,"[92] such as the denial of parole eligibility.[93] Consequently, the current habeas corpus statute[94] should be given great weight in assessing the validity of the prematurity doctrine.

B. *Pre-McNally in the United States*

The *McNally* decision was based in part on the substantive law developed in this country prior to 1934. In the earliest cases in which a situation similar to prematurity arose, the Supreme Court consistently held that if a sentence is excessive, and if the legal portion of the sentence is clearly separable from the excessive portion, there is no relief by habeas corpus until the prisoner has served the legal portion of his sentence.[95] The Court reasoned that since the trial court had competent jurisdiction over the person and the general subject matter, and authority to impose at least the legal and separable part of the sentence, the prisoner was not entitled to immediate release until he had served that portion which the court might lawfully impose.[96] This rule was further extended to cases where a court imposed only an excessive term of imprisonment; the writ was denied because the petitioner was still serving the valid portion of the sentence.[97] Excessive sentence cases are analogous to the consecutive and concurrent sentence cases; therefore, the Court in *McNally* was somewhat justified in relying on these cases in viewing McNally's petition as premature.

In consecutive sentence cases prior to *McNally,* most courts upheld the rule that a prisoner could not attack by habeas corpus a sentence that was not being served.[98] The courts concluded that immediate release was the

92. This assumes no drastic changes will be made in the habeas corpus statute. 28 U.S.C.A. § 2241 (1959) (revisor's notes).

93. Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965). This point is explored in detail in the section entitled "Is the Denial of Parole Eligibility 'Custody'?" pp. 367-71 *infra*..

94. 28 U.S.C. § § 2241-2254 (1964).

95. Harlan v. McGourin, 218 U.S. 442 (1910); United States v. Pridgeon, 153 U.S. 48 (1894) (sentenced to valid term of imprisonment and invalid sentence of hard labor); *In re* Swan, 150 U.S. 637 (1893). Both *Pridgeon* and *Harlan* are analogous to concurrent sentence cases, and the Court denied relief because the prisoners were not entitled to immediate release. *Accord,* McKinsey v. Finletter, 205 F.2d 761 (10th Cir. 1953). For an excellent summary of the treatment of excessive sentence cases in the states see Application of Landreth, 213 Ore. 215, 324 P.2d 475 (1958).

96. The Court, in these cases, did not consider parole problems because the federal parole statute was not enacted until 1910.

97. DeBara v. United States, 99 Fed. 942 (6th Cir. 1900). See also Dodd v. Peak, 47 F.2d 430 (D.C. Cir. 1931); Mabry v. Beaumont, 290 Fed. 205 (9th Cir. 1923).

98. *E.g.,* Eori v. Adenhold, 53 F.2d 840 (5th Cir. 1931); Woodward v. Bridges, 144 Fed. 156 (D. Mass. 1906); see United States v. Carpenter, 151 Fed. 214 (9th Cir. 1907).

only relief available under habeas corpus.[99] Even after the Parole Act was passed in 1910[100] allowing parole, within the parole board's discretion, after a prisoner's service of one-third of his total terms, the courts continued to adhere to the prematurity rule.[101] One circuit, however, established a short-lived rule aimed primarily at affording a prisoner relief in habeas corpus to entitle him to parole eligibility but not immediate release.[102] In this case, the petitioner was sentenced to consecutive sentences after conviction under a two-count indictment, and was serving a valid sentence pursuant to the first count at the time he sought habeas corpus relief. Holding that the second count was void, the court reasoned that the prisoner was entitled to be discharged on habeas corpus from the subsequent invalid sentence because of the effect which this illegal sentence had on his parole eligibility. The prisoner was then remanded to custody to serve his sentence under the first count.

The extension of the prematurity rationale in excessive sentence cases to consecutive sentence cases, although justifiable prior to the time of the *McNally* decision, seems unwarranted today. In both types of cases, the allegedly invalid sentences did not present the prisoner with immediate legal disabilities or illegal punishment since the illegal or excessive sentence was not to commence until some future time. Parole problems were not in issue because even in 1934, parole was in its infancy. Today, parole laws have been adopted in all states,[103] but their full utilization in the rehabilitation of criminals has been frustrated by the courts' adherence to the prematurity rule. This rule not only delays parole consideration and therefore parole itself, but also the existence of a yet-to-be-served sentence could prevent a prisoner from obtaining parole and, therefore, delay his release from prison until the full service of his valid sentences.[104] In addition, most of the

99. See Eori v. Adenhold, *supra* note 98.

100. 36 Stat. 819 (1910).

101. Eori v. Adenhold, 53 F.2d 840 (5th Cir. 1931). *But see* Colson v. Adenhold, 5 F. Supp. 111 (N.D. Ga. 1933). In *Colson,* through habeas corpus, the court invalidated future sentences and remanded the prisoner to custody to serve his valid sentences. The court, however, did not expressly rely on the effect a contrary ruling would have had on the prisoner's parole eligibility.

102. O'Brien v. McClaughry, 209 Fed. 816 (8th Cir. 1913). *O'Brien* was overruled in Hostetter v. United States, 16 F.2d 921, 923 (8th Cir. 1926). The Eighth Circuit thought that the Supreme Court had indirectly overruled *O'Brien* in Morgan v. Devine, 237 U.S. 632, 640 (1915).

103. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 546 (1963).

104. Parole may be delayed so long that the prisoner may be released without the opportunity of making an orderly transition back to society. Such denial of parole undermines its very purpose, since "release under some form of official supervision and control is more likely to achieve success than outright release without such supervision and con-

early prematurity cases, like the excessive sentence cases, involved questions of law, not questions concerning evidentiary facts which might be lost by delay in adjudication. However, since *McNally,* a great number of convictions have been successfully attacked on evidentiary questions which depend on the continued existence of witnesses, court records, and other evidentiary materials relating to, *inter alia,* the competency of counsel, coerced confessions and guilty pleas, and illegal searches and seizures. Postponement of collateral attack involving facts related to these issues may indeed preclude a future reversal of a conviction, because witnesses may die and evidence may be lost.

C. *McNally's use of "Custody" and the Relief Available under Habeas Corpus: A Comparison with Recent Precedent*

1. *The Custody Requirement*

The historic function of the writ has been to inquire into the illegality of one's detention and give relief against unlawful restraints of liberty. This purpose has followed the writ throughout its legislative history in the United States. Under the First Judiciary Act, the Supreme Court and district courts had the power to grant the writ "for the purpose of inquiry into the cause of commitment—*Provided,* That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States. . . . "[105] Under the Act of 1867, the federal courts had the power to grant the writ "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."[106] Under the 1875 revision[107] the word "custody" replaced the phrase "restrained of his or her liberty," but this alteration in terminology did not affect the writ's use,[108] since these phrases can be considered merely descriptive of the writ.[109] The present

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trol." UNITED STATES BD. OF PAROLE, *op. cit. supra* note 69, at 11. As another author stated:

> It is desirable, whenever possible and whenever not inimical to the public welfare, that parole supervision be provided for as many offenders as possible. It is much better for supervision to follow an institutional sentence, than for an inmate to be released to the community without any guidance or direction. Sharp, *Modern Sentencing in Federal Courts: The Effect on Probation and Parole,* 12 AM. U.L. REV. 167, 176 (1963).

105. 1 Stat. 81-82 (1789).

106. 14 Stat. 385 (1867).

107. REV. STAT. § 753 (1875).

108. See Wales v. Whitney, 114 U.S. 564 (1885).

109. See 28 U.S.C.A. § 2241 (1959) (revisor's notes).

statute, as amended in 1948, retains the "custody" language.[110] Moreover, other sections of the present habeas corpus act contain the terms "restraint,"[111] "inquire into the legality of detention,"[112] and "certifying the true cause of the detention."[113] In cases since 1948, the Supreme Court has continued to use these terms, "custody" and "restraint of liberty," interchangeably.[114]

Some courts properly recognize that the prisoner is entitled to immediate release from *custody* or *restraint of liberty*,[115] while other courts speak only in terms of immediate *discharge*.[116] A contributing factor to this semantic confusion is the fact that many criminal cases involve the imposition of a single sentence; in these cases it is quite logical to speak of immediate release from prison as the only available relief.[117] Even the Supreme Court, which seemed to be aware of this distinction in *McNally*,[118] fell into this verbal trap in its subsequent analysis of *McNally* in *Fay v. Noia*.[119]

As a prerequisite for habeas corpus jurisdiction and relief, the determination of whether a person is in unlawful "custody" is crucial. The necessary

110. 28 U.S.C. § 2241(c) (1964):

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

111. 28 U.S.C. § 2241(a) (1964).

112. 28 U.S.C. § 2245 (1964).

113. 28 U.S.C. § 2243 (1964).

114. See note 148 *infra*.

115. See, *e.g.*, Fay v. Noia, 372 U.S. 391, 427 n.38 (1963); McNally v. Hill, 293 U.S. 131, 139 (1934); Hart v. Ohio Bureau of Probation & Parole, 290 F.2d 550 (6th Cir. 1961).

116. See, *e.g.*, Postelwait v. Markley, 342 F.2d 677 (7th Cir. 1965).

117. See Miller v. Gladden, 341 F.2d 972 (9th Cir. 1965); Click v. Ohio, 319 F.2d 855 (6th Cir. 1963).

118. See McNally v. Hill, 293 U.S. 131, 139 (1934).

119. 372 U.S. 391 (1963).

> [T]he settled principle [is] that if a prisoner is detained lawfully under one count of the indictment, he cannot challenge the lawfulness of a second count on federal habeas corpus. McNally v. Hill . . . . For the federal court to order the release of such a prisoner would be to nullify a proceeding—that under the first count—wholly outside the orbit of federal interest. *Id.* at 432.

The Court here was saying that if the prisoner in a prematurity situation was freed from imprisonment under his valid state sentence, then comity between the federal and state governments would be disrupted.

degree of restraint lies between moral restraint, which is not custody,[120] and actual physical confinement. For example, the writ's use in deportation and child custody cases involves a finding of custody short of actual prison confinement.[121] Moreover, some recent cases have abandoned the earlier view that the degree of restraint imposed on one released on bail[122] or parole[123] did not constitute custody.[124] In granting habeas corpus relief when a prisoner[125] or mental patient[126] is incarcerated in the wrong institution or when one's confinement has resulted from an illegal revocation of parole,[127] the courts do not remove the lawful restraints or discharge the prisoner from all custody. It is only the unlawful restraints that are acted upon. If, in prematurity cases, the denial of parole eligibility is an unlawful restraint,[128] the illegal sentence should be expunged, thereby removing only the unlawful restraint.

A comparison of two significant custody cases will show the Court's change to a more realistic approach. In *Wales v. Whitney*,[129] the Secretary of the Navy issued an order placing appellant under arrest pending a court-martial proceeding and ordered him to remain within the city limits of Washington. Holding that the petitioner was not in custody of the Secretary of the Navy, the Court said:

> [S]omething more than moral restraint is necessary to make a case for habeas corpus. There must be actual confinement or the present means of enforcing it.[130]

The Court reasoned that the petitioner was under only moral restraint, for he could leave the city at will and only later be arrested and imprisoned for violating the order. The subsequent order for his arrest and imprison-

120. Wales v. Whitney, 114 U.S. 564 (1885).

121. See generally SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS § 5.3 (1965); Note, 1966 DUKE L.J. 588; Note, 26 MD. L. REV. 79 (1966).

122. Bates v. Bates, 141 F.2d 723 (D.C. Cir. 1944). *Contra, e.g.*, Stallings v. Splain, 253 U.S. 399 (1920); *In re* Rowland, 85 F. Supp. 550 (W.D. Ark. 1949); *see* Allen v. United States, 349 F.2d 362 (1st Cir. 1965) (§ 2255). See also Note, 26 MD. L. REV. 79 (1966).

123. See text accompanying notes 132-39 *infra*. One on probation, however, is not in custody for habeas corpus purposes. Engle v. United States, 332 F.2d 88 (6th Cir.), *cert. denied*, 379 U.S. 903 (1964); Benson v. California, 328 F.2d 159 (9th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965).

124. For a discussion of the custody problems of pardon, probation, and parole under § 2255 see Note, 27 OHIO ST. L.J. 302, 318 (1966).

125. *In re* Bonner, 151 U.S. 242 (1893); *accord*, Johnson v. Avery, 252 F.2d 783 (M.D. Tenn. 1966).

126. Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953).

127. *Ex parte* Hull, 312 U.S. 546 (1940).

128. See text accompanying notes 143-62 *infra*.

129. 114 U.S. 564 (1885).

130. *Id.* at 571-72.

ment would be the first restraint on his liberty. Since he obeyed the first order only because of his fear of future arrest, and had freedom of movement within the city, he was not unlawfully restrained of his liberty.[131]

By comparison, a more liberal approach was taken in *Jones v. Cunningham,*[132] when, without citing *Wales v. Whitney,*[133] the Court held that a state prisoner on parole is in custody within the meaning of 28 U.S.C. § 2241. Therefore, the federal court had jurisdiction to entertain the parolee's petition for the writ. Some of the conditions of the petitioner's parole included the designation of a certain house and community in which to live, the prohibition against driving a car, the requirement of particular employment, and the requirement that he had to associate with "good company." Moreover, for any violations of these stringent restraints on his liberty he could be rearrested and required to serve the allegedly invalid sentence he was attacking in his petition for the writ.[134] Reversing the Court of Appeals, which had followed precedent[135] by holding his petition moot, the Court, in *Jones,* stated:

> It is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do. Such restraints are enough to invoke the help of the Great Writ. Of course, that writ always could and still can reach behind prison walls and iron bars. But it can do more. *It is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.*[136]

Therefore, even though a parolee is released from actual physical imprisonment, parole "imposes conditions which significantly confine and restrain his freedom. . . ."[137] Thus, the Supreme Court seems to have established a test for determining custody; *i.e.,* whether the restrictions or conditions "sig-

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131. In another interpretation of the *Wales* case, Sokol argues:

> [T]he point of the case is that the order which placed the officer under arrest subjected him to no more restraint than he was previously under. Absent the arrest order, the restrictions on him were exactly the same. And these restrictions were concededly lawful. SOKOL, *op. cit. supra* note 121, at 27.

132. 371 U.S. 236 (1963).

133. 114 U.S. 564 (1885).

134. The restraints in the *Jones* and *Wales* cases were similar in that if the parolee in *Jones* had violated the conditions of his parole, his parole would have been revoked. It can be assumed that he complied with the conditions of his parole to prevent parole revocation and subsequent confinement in prison.

135. See cases cited in Jones v. Cunningham, 294 F.2d 608, 611 n.10 (4th Cir. 1961).

136. Jones v. Cunningham, 371 U.S. 236, 242-43 (1963). (Emphasis added.)

137. *Id.* at 243.

nificantly restrain petitioner's liberty to do those things which in this country free men are entitled to do,"[138] or are "restraints not shared by the public generally."[139]

A situation analogous to prematurity is presented in the mistreatment-of-prisoner cases. Here, the prisoner is attacking an allegedly unlawful restraint while in lawful custody under a conviction and sentence not being challenged. In these cases, a long line of authority has denied the prisoner habeas corpus relief, holding that he was in lawful custody pursuant to a valid conviction, and that any manner of punishment pursuant to lawful imprisonment was beyond the scope of the writ.[140] The leading case expressing the minority view is *Coffin v. Reichard*,[141] where the court, in granting relief against excessive mistreatment, held:

> [A]ny unlawful restraint of personal liberty may be inquired into on habeas corpus . . . this rule applies although a person is in lawful custody . . . . While the law does take [a prisoner's] liberty and imposes a duty of servitude and observance of discipline . . . it does not deny his right to personal security against unlawful invasion.
>
> When a man possesses a substantial right, the courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights.[142]

Cases like *Jones* and *Coffin* demonstrate a judicial awareness that "custody" is not a stagnant concept. Hopefully, this expansion of the relief available under habeas corpus will continue and eventually dissolve the prematurity restraint on parole eligibility.

2. *Is The Denial of Parole Eligibility "Custody"?*

Generally, one cannot establish his parole eligibility through habeas corpus.[143] The only federal decision specifically rejecting this rule is the

138. *Ibid.*

139. *Id.* at 240.

140. *E.g.*, Williams v. Steele, 194 F.2d 32 (8th Cir.), *aff'd on rehearing*, 194 F.2d 917 (8th Cir.), *cert. denied*, 344 U.S. 838 (1952); Taylor v. United States, 179 F.2d 640 (9th Cir.), *cert. denied*, 339 U.S. 988 (1950); Snow v. Roche, 143 F.2d 718 (9th Cir.) *cert. denied*, 323 U.S. 788 (1944).

141. 143 F.2d 443 (6th Cir. 1944) (per curiam), *cert. denied*, 325 U.S. 887 (1945).

142. *Id.* at 445.

143. Holiday v. Johnston, 313 U.S. 342 (1940); McNally v. Hill, 293 U.S. 131 (1934); Pope v. Huff, 141 F.2d 727 (D.C. Cir. 1944); United States *ex rel.* Chilcote v. Maroney, 246 F. Supp. 607, *aff'd on rehearing*, 246 F. Supp. 608 (W.D. Pa. 1965); United States *ex rel.* Brown v. Warden, 231 F. Supp. 179 (S.D.N.Y. 1964); Hollman v. Wilkinson, 124 F. Supp 849 (M.D. Pa. 1954); Rothstein v. Hiatt, 68 F. Supp. 738 (M.D. Pa. 1946).

Influenced by cases rejecting the prematurity rule, one federal district court reluctantly upheld *McNally*. United States *ex rel.* Jackson v. Banmiller, 187 F. Supp.

recent case of *Martin v. Virginia.*[144] The petitioner in *Martin,* while serving a fifteen-year sentence under a valid conviction for second degree murder, escaped from prison. He was subsequently convicted of escape and of grand larceny perpetrated during the escape, and was sentenced to a term of imprisonment to commence at the expiration of his murder sentence. This state prisoner petitioned for a writ of habeas corpus,[145] claiming that his subsequent convictions resulted from a deprivation of his constitutional rights to counsel of his own choosing and to effective assistance of appointed counsel at trial. Here, as in *McNally,* the prisoner, while serving a valid sentence, petitioned for the writ to obtain an immediate declaration of the invalidity of his escape and grand larceny convictions. Absent these subsequent convictions he would have been eligible for parole consideration on his unchallenged murder sentence. The court rejected the *McNally* rule and held that a sentence which a prisoner had not begun to serve satisfied the "custody" requirement of the habeas corpus statute since the challenged sentences deprived him of his parole eligibility.

The basis of the *Martin* decision was that the court was keeping within the spirit of the Supreme Court's recent development of the meaning of "custody." It was the court's opinion that *McNally* had been significantly qualified by *Jones v. Cunningham*[146] and *Fay v. Noia.*[147]. The court in *Martin* interpreted *Fay* as equating, in broad terms, "custody" with "restraint of liberty."[148] Relying on the broad *Jones* language that habeas corpus has never been a static, narrow, or formalistic remedy, the court said:

> In light of these progressively developing notions as to the scope of the writ of habeas corpus, there is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well

513 (E.D. Pa. 1960). By contrast, state cases abrogating prematurity specifically point out that the challenged future sentence denies the prisoner parole eligibility. *Ex parte* Chapman, 43 Cal. 2d 385, 273 P.2d 817 (1954); see State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). See generally Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 213 A.2d 613 (1965).

144. 349 F.2d 781 (4th Cir. 1965). For a discussion of the *Martin* case see 46 B.U.L. REV. 269 (1966); Note, 1966 DUKE L.J. 588.

145. Martin had originally filed a motion for a declaratory judgment, and the district court dismissed on the ground that such a motion was not a substitute for habeas corpus. On appeal, the circuit court treated the motion for a declaratory judgment as a petition for habeas corpus.

146. See text accompanying notes 132-39 *supra.*

147. 372 U.S. 391 (1963).

148. Martin v. Virginia, 349 F.2d 781, 783 (4th Cir. 1965). In *Fay,* the Court said "Of course custody in the sense of restraint of liberty is a prerequisite to habeas corpus . . . ." Fay v. Noia, 372 U.S. 391, 427 n.38 (1963).

> reconsider McNally and hold that a denial of eligibility for parole is a "restraint of liberty" no less substantially then the technical restraint of parole.[149]

Therefore, *Martin* concluded that invalid "subsequent convictions which cause the vast difference between continued confinement without eligibility for consideration for parole and conditional release are in the truest sense a present restraint upon Martin's liberty."[150] The court also attempted to preclude a future demise of its holding by unequivocally asserting that its ruling was not limited to prisoners showing as strong a case for parole as did Martin, whose record without the subsequent convictions would have all but assured him of parole once given parole consideration.

The rationale of the *Martin* case has come under attack from both courts and commentators. For example, *United States ex rel. Chilcote v. Maroney*[151] linked *Jones* with *McNally* to reach a result opposite to that reached through the use of *Jones* in *Martin*. The petitioner in *Chilcote* was challenging what were in effect sentences running concurrently with admittedly valid sentences.[152] The court relied on *McNally's* requirement of immediate release and construed *Jones'* holding that a parolee meets the test of "custody" because he is subjected "to significant restraints not imposed on the public generally" to demonstrate that even if the petitioner's parole eligibility were established and his parole granted, he could not obtain "immediate release," since he would still be subject to the restraints associated with parole. In addition, *Chilcote* pointed out that even if the petitioner became "eligible" for parole, he might not achieve immediate release because parole is entirely within the discretion of the parole board. The logic of the *Chilcote* court, of course, rests on the assumption that "immediate release"—with its tacit implication of nothing less than complete freedom from *all* physical restraints—is the *only* relief available under habeas corpus. This logic ignores the spirit of the *Jones* decision, which denies that habeas corpus was intended to be a "narrow, formalistic remedy."[153] Further, both parole and parole eligibility problems come within the *Jones* test since they are not imposed on the public generally, and therefore, both should constitute custody.

One writer has criticized *Martin's* equating the deferral of parole eligibility with the restraints of parole, which constituted the "custody" in *Jones*.

149. Martin v. Virginia, *supra* note 148, at 783-84.

150. *Id.* at 784.

151. 246 F. Supp. 607, *aff'd on rehearing*, 246 F. Supp. 608 (W.D. Pa. 1965). See also United States *ex rel.* Bowers v. Rundle, 240 F. Supp. 323 (E.D. Pa. 1965).

152. Chilcote had been released on parole from the allegedly void sentences and had begun serving his valid sentence at the time he sought habeas corpus relief.

153. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

He felt that the concept of custody is eroded when defined in terms of legal disabilities as opposed to the traditional criteria based on the degree of physical restraint.[154] It is submitted, however, that the consequences of a loss of such rights as voting and holding political office can be distinguished from the loss of parole eligibility: the latter results in continued physical confinement. Although *Jones* recognized that a parolee is in "custody" because he is subject to restraints not imposed on a completely free man, this does not preclude a holding that a prisoner is in "custody" because he is subject to restraints not imposed on a parolee.[155] Parole is the half-way house between actual confinement and complete freedom. Therefore, as in *Martin,* denial of parole eligibility is physical restraint.

Furthermore, the Supreme Court in *United States v. Morgan* partially relied on the legal disabilities attendant to an invalid conviction as one of the bases for granting coram nobis relief: "Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, *civil rights may be affected.*"[156]

Though the petition for relief in *Morgan* was clearly moot (in habeas corpus terms), coram nobis relief was given. The Court, after *Morgan,* rejected a legal disability argument in a habeas corpus case dismissed on the ground of mootness,[157] but at least one Court of Appeals decision seems to have employed the *Morgan* rationale to establish a finding of custody in what would otherwise have been a moot habeas corpus case.[158]

Although parole has been held to be a matter of legislative grace and not a matter of right,[159] and though the courts generally refuse to interfere

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154. Note, 1966 DUKE L.J. 588, 593-94.

155. *Compare Ex parte* Hull, 312 U.S. 546 (1940) (prison to parole), *with* Jones v. Cunningham, 371 U.S. 236 (1963) (parole to absolute release).

156. United States v. Morgan, 346 U.S. 502, 512-13 (1954). (Emphasis added.)

157. Parker v. Ellis, 362 U.S. 574 (1960). The legal disabilities argument advanced by Chief Justice Warren and Mr. Justice Douglas was not adopted by the Court's majority. In *Parker* the prisoner had served his sentence and had been released from prison when the Court decided the case. Therefore, parole problems were not in issue.

158. See Thomas v. Cunningham, 335 F.2d 67, 69 (4th Cir. 1964).

159. Parole under state and federal law is considered a privilege, and its denial is not viewed as a violation of a prisoner's constitutional rights. See, *e.g.,* Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964); Carson v. Executive Director, 292 F.2d 468 (10th Cir. 1961); State *ex rel.* McQueen v. Horton, 31 Ala. App. 71, 14 So. 2d 557 (1943); People *ex rel.* Richardson v. Ragen, 400 Ill. 191, 79 N.E.2d 479 (1948); People *ex rel.* Cecere v. Jennings, 250 N.Y. 239, 165 N.E. 277 (1929); State *ex rel.* Alldis v. Board of Prison Terms & Paroles, 56 Wash. 2d 412, 353 P.2d 412 (1960); Latham v. United States, 259 F.2d 393 (5th Cir. 1958) (dictum). But *see* Sneed v. Cox, 74 N.M. 659, 397 P.2d 308 (1964). See also Comment, 28 So. CAL. L. REV. 158 (1955).

with parole revocations,[160] the Supreme Court has avoided the harsh consequences of a *McNally* rule by allowing a prisoner to attack, through habeas corpus, a subsequent conviction which results in parole revocation. In *Ex parte Hull,*[161] the Court held that parolees will be protected from unreasonable revocations resulting from invalid subsequent convictions. While on parole pursuant to a valid sentence and conviction, Hull was convicted and sentenced for another crime. After a parole hearing, the parole board regarded this second offense and conviction as a parole violation and ordered the petitioner to serve his maximum sentence under the first conviction. Hull petitioned for a writ of habeas corpus alleging that the second conviction resulted from a denial of due process at the trial. On the question of prematurity, the Court stated:

> The petition is not premature. Compare McNally . . . . Despite the fact that petitioner is now in prison under the sentence for the first offense, he was at liberty on parole at the time he was arrested and charged with the second offense. True, parole regulations obligated him to stay within Jackson County but that is not the imprisonment present in the McNally Case. Moreover, petitioner's parole was revoked and he was ordered to serve out his first sentence only because of the second conviction.[162]

It seems odd that parole will be protected but eligibility for parole will not. If an unlawful revocation of parole is a restraint of liberty, it seems arguable that the denial of the opportunity for parole is likewise a restraint of liberty sufficient to satisfy the custody requirement.

3. *The Flexibility of Habeas Corpus Relief*

In keeping with the spirit of the *Jones* and *Martin* cases and their broad interpretations of custody, the narrow interpretation of the immediate release requirement in *McNally* has been similarly expanded. The immediate release problem in prematurity cases centers around the erroneous impression given by *McNally* that immediate release and admission to bail of a prisoner are the only types of relief available under the writ.[163] Neither the habeas corpus statute nor the case law compels a court to give only

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160. See 1964 WASH. U.L.Q. 335.

161. 312 U.S. 546 (1940).

162. *Id.* at 549-50. To invoke habeas corpus relief under this rule, the courts have insisted that the invalid conviction be the sole basis for the parole revocation. See United States *ex rel.* Gaito v. Maroney, 324 F.2d 673 (3d Cir. 1963); United States *ex rel.* Parker v. Ragen, 167 F.2d 792 (7th Cir. 1948).

163. McNally v. Hill, 293 U.S. 131 (1934).

immediate release from custody. At common law[164] and under the Habeas Corpus Act of 1679,[165] the English courts could only remand the prisoner to custody, discharge him from custody, or admit him to bail. However, the present habeas corpus statute, 28 U.S.C. § 2243, does not expressly command that the petitioner be given his immediate release, but provides in broad language that, "The court shall . . . dispose of the matter *as law and justice require.*"[166] The Court, in *McNally,* ignoring this broad statutory language, relied on the pre-1789 English law and limited the relief authorized by the writ.[167] However, under 28 U.S.C. § 2243, the writ

> is not a rigid and inflexible proceeding in which the court must either order release of the prisoner outright or direct his return to custody .... Thus the court is given ample discretion to render an order which, though neither releasing the prisoner immediately nor returning him irrevocably to custody, serves "law and justice."[168]

Recently, the Supreme Court, in one portion of *Fay v. Noia,* stated that the only limitation on the relief available in habeas corpus is that it must be *"some form* of discharge from custody."[169] The judicial connotation of the term "law" further compels a liberal and flexible interpretation of section 2243.[170] The Supreme Court, in discussing a predecessor to the sec-

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164. See 4 BACON, ABRIDGMENT OF THE LAW 567-68 (1856).

165. *Id.* at 589-90.

166. 28 U.S.C. § 2243 (1964). (Emphasis added.) This language is identical to its predecessor, § 761 of the Revised Statutes of 1875, except that the term "matter" has replaced the term "party." This did not affect the function of the writ. United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320 (2d Cir.), *cert. denied,* 366 U.S. 963 (1961).

167. Diligent search of the English authorities and the digest before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his *immediate release.*

Such use of the writ in the federal courts is without the support of history *or of any language in the statutes* which would indicate a purpose to enlarge its traditional function. McNally v. Hill, 293 U.S. 131, 137-38 (1934). (Emphasis added.)

168. United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320, 322 (2d Cir.), *cert. denied,* 366 U.S. 963 (1961).

169. 372 U.S. at 427 n.38 (1963). (Emphasis added.)

170. The Supreme Court, in Price v. Johnston, 334 U.S. 266 (1948), gave a liberal interpretation to the term "law" in granting the writ of habeas corpus under the All Writs Act, presently codified in 28 U.S.C. § 1651(a) (1964). Since the term "law" in the All Writs Act is also found in § 2243 of the habeas corpus statute, the Court's interpretation in *Price v. Johnston* is relevant:

Section 262 says that the writ must be agreeable to the usages and principles of "law," a term which is unlimited by the common law or the English law. And since "law" is not a static concept, but expands and develops as new problems arise, we do not believe that the forms of the *habeas corpus* writ authorized by § 262 are only those recognized in this country in 1789, when the original Judiciary Act containing the substance of this section came into existence. In short we do not read

tion, said, "[T]he Court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus."[171]

Under section 2243 the courts have fashioned habeas corpus "to suit the needs of the case. . . ."[172] In actual practice, the courts have served the ends of justice by refusing to restrict the writ's use to any rigid formula or to circumscribe it with technical limitations. The federal courts may give a conditional release order, delaying the release of a state prisoner to afford the state a reasonable time for retrial.[173] Similarly, in extradition cases, the courts have the power to order a remand to the Commissioner for further inquiry into the sufficiency of existing evidence, and for the presentation of additional evidence.[174] Before the enactment of Rule 35,[175] if a federal sentence was void, the proper procedure under habeas corpus was not to release the prisoner from prison but to remit him to the sentencing court for correction of the sentence.[176] Moreover, when a prisoner or mental patient is incarcerated in the wrong institution, or when parole has been illegally revoked, the writ of habeas corpus has been utilized to correct only the unlawful restraints. In the former situation, rather than receiving a total release, the prisoner is merely transferred from one institution to another.[177] In the latter case, if the revocation is found illegal, the prisoner is released on parole,[178] which, as discussed above, is not at all equivalent

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§ 262 as an ossification of the practice and procedure of more than a century and a half ago. Rather it a legislatively approved source of procedural instruments designed to achieve "the rational ends of law." Price v. Johnston, 334 U.S. 266, 282 (1948).

Moreover, in Fay v. Noia, 372 U.S. 391, 438 (1963), the Court said, in reference to the exhaustion of state remedies doctrine, that § 2243 commands flexibility and discretion in the courts' use of habeas corpus. But the Court, in other portions of the opinion, casts doubt on this liberal interpretation. See *id.* at 430-31.

171. *In re* Bonner, 151 U.S. 242, 261 (1893).

172. LaFaver v. Turner, 345 F.2d 519, 520 (10th Cir. 1965).

173. Irvin v. Dowd, 366 U.S. 717 (1961); Chessman v. Teets, 354 U.S. 156 (1957); Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Tod v. Waldman, 266 U.S. 113 (1924); Mahler v. Eby, 264 U.S. 32 (1924); *Ex parte* Medley, 134 U.S. 160 (1890); LaFaver v. Turner, 345 F.2d 519 (10th Cir. 1965); Patterson v. Medberry, 290 F.2d 275 (10th Cir.), *cert. denied,* 368 U.S. 839 (1961); United States *ex rel.* Westbrook v. Randolph, 259 F.2d 215 (7th Cir. 1958).

174. United States *ex rel.* D'Amico v. Bishopp, 286 F.2d 320 (2d Cir.), *cert denied,* 366 U.S. 936 (1961).

175. FED. R. CRIM. P. 35.

176. *In re* Bonner, 151 U.S. 242 (1893); Wilson v. Bell, 137 F.2d 716 (6th Cir. 1943); Bryant v. United States, 214 Fed. 51 (8th Cir. 1914); Goulette v. Hunter, 73 F. Supp. 717 (D. Kan. 1947); Price v. Zerbst, 268 Fed. 72 (N.D. Ga. 1920).

177. See *In re* Bonner, 151 U.S. 242 (1893); Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953); Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966).

178. *Ex parte* Hull, 312 U.S. 546 (1940).

to complete release.[179] Finally, prisoners who, while serving valid sentences, had received cruel and unusual punishment or abusive treatment resulting from religious discrimination,[180] were uniformly denied habeas relief on the ground that they were not entitled to immediate discharge.[181] However, a growing number of courts have rejected this view. As the court in *Coffin v. Reichard*[182] stated:

> 28 U.S.C.A. § 461 [presently § 2243] authorizes the court in habeas corpus proceedings to dispose of the party "as law and justice require." The judge is not limited to a simple remand or discharge of the prisoner, but he may be remanded with directions that the prisoner's retained civil rights be respected, or the court may order the prisoner placed in the custody of the Attorney General of the United States for transfer to some other institution.[183]

The immediate release concept should not be a bar to the abrogation of the prematurity rule. The fact that courts have deviated from strict adherence to this rule and have used habeas corpus to correct only present unlawful restraints, subjecting the petitioner to further lawful restraints, presents persuasive precedent for adapting the writ to fit prematurity situations. This has been the philosophy and basic premise of the Supreme Court in coram nobis cases.[184]

The desired solution in prematurity cases should follow the rationale of the conditional release cases:[185] while the prisoner remains in custody to serve the unchallenged sentences, the challenged sentence is vacated,[186] and

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179. See text accompanying notes 125-27 *supra.*

180. See generally Comment, *Black Muslim in Prison: Of Muslim Rites and Constitutional Rights,* 62 COLUM. L. REV. 1488 (1962); Comment, *Black Muslim Prisoners and Religious Discrimination: The Developing Criteria For Judicial Review,* 32 GEO. WASH. L. REV. 1124 (1964); Note, *Habeas Corpus—Coram Nobis—Remedies Available to Validly Sentenced Prisoners Who Are Mistreated by State Penal Authorities,* 33 NEB. L. REV. 434 (1954); Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985 (1962); Note, *Beyond The Ken of the Courts: A Critique Of Judicial Refusal To Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963); 59 YALE L.J. 800 (1950).

181. See, *e.g.,* Williams v. Steele, 194 F.2d 32 (8th Cir.), *aff'd on rehearing,* 194 F.2d 917 (8th Cir.), *cert. denied,* 344 U.S. 838 (1952); Snow v. Roche, 143 F.2d 718 (9th Cir.), *cert denied,* 323 U.S. 788 (1944).

182. 143 F.2d 443 (6th Cir. 1944) (per curiam), *cert. denied,* 325 U.S. 887 (1945).

183. *Id.* at 445; *accord,* Application of Brux, 216 F. Supp. 956 (D. Hawaii 1963); Threatt v. North Carolina, 221 F. Supp. 858 (W.D.N.C. 1963) (dicta); Thompson v. Cavell, 158 F. Supp. 19 (W.D. Pa.) (dicta), *cert. denied,* 355 U.S. 843 (1957).

184. See notes 53-54 *supra* and accompanying text.

185. See note 173 *supra* and accompanying text.

186. See State *ex rel.* White v. Boles, 140 S.E.2d 591 (W. Va. 1965).

the prosecuting authorities are given a reasonable time within which to retry the prisoner.[187] This procedure, in effect, affords the prisoner immediate release from the unlawful restraints on his liberty.

III. The Constitutional Validity of the Prematurity Doctrine

A. *Denial of Due Process*

Traditionally, federal habeas corpus was used to attack a sentence and conviction that were void for want of the trial court's jurisdiction over the person or the general subject matter.[188] However, this traditional jurisdictional concept has been broadened to enable the courts to inquire into convictions which are constitutionally defective.[189] With the writ's expansion,[190] a few courts have recognized new problems concerning the application of the *McNally* rule. While most of the states follow *McNally*,[191] two state cases rejecting it have dealt with the problems of procedural due process resulting from the delay in adjudicating constitutional questions. In *Palmer v. Cranor*,[192] the Supreme Court of Washington rejected the prematurity rule, saying in part:

187. United States *ex rel.* Westbrook v. Randolph, 259 F.2d 215 (7th Cir. 1958); see Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 14 n.18, 213 A.2d 613, 621 n.18 (1965). This vindicates the interests of both the state and the prisoner. Neither has to bear the burden of lost testimony or evidentiary materials. See text accompanying notes 192-200 *infra*. The state interest is not invaded by the federal system. Compare note 119 *supra* and accompanying text. The prisoner may become eligible for parole earlier.

188. *Ex parte* Medley, 134 U.S. 160 (1890); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

189. See Johnson v. Zerbst, 304 U.S. 458 (1938). See generally Hart & Wechsler, The Federal Courts and the Federal System 1248-68 (1953); Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L. Rev. 441 (1963); Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U.L. Rev. 78, 79-80 (1964).

190. *E.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); Brown v. Allen, 344 U.S. 443 (1953). In *Townsend*, the Court rejected the "exceptional circumstances" rule which had previously been the standard governing the issuance of the federal writ in attacking constitutionally defective convictions. The Court replaced this general rule with a set of detailed and comprehensive criteria to preserve uniformity in the writ's post-conviction function. The Court in *Brown v. Allen* held that it is within the federal courts' habeas corpus jurisdiction to redetermine the merits of federal constitutional questions even though they were fully litigated in a state criminal proceeding.

191. See, *e.g.*, Phillips v. State, 40 Ala. App. 698, 122 So. 2d 551 (1960); Wright v. Bennett, 131 N.W.2d 455 (Iowa 1964) (case of first impression); McQueen v. Crouse, 192 Kan. 821, 391 P.2d 68 (1964). See generally Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 8 n.10, 213 A.2d 613, 618 n.10 (1965).

192. 45 Wash. 2d 278, 273 P.2d 985 (1954); *accord*, Nahl v. Delmore, 49 Wash. 2d 318, 301 P.2d 161 (1956). See generally 32 Wash. L. Rev. 90 (1957); 30 Wash. L. Rev. 123 (1955).

> Those portions of the petition for a writ of *habeas corpus* which we can consider, [*i.e.*, constitutional defects in the conviction], and the supporting documents, raise a question of fact—was petitioner's plea of guilty the result of coercion? To hold that a court of competent jurisdiction cannot examine this question until the expiration of his first sentence, would not only vitiate the statutes, but would deny petitioner procedural due process to require him to wait until the expiration of the first sentence. Witnesses move away; evidence disappears; memories grow dim.[193]

The court held that habeas corpus is available to a prisoner, while serving a valid sentence, to attack a sentence not yet served. Since no question of law was involved, the court said it need not decide whether to reject the prematurity doctrine in such cases.[194] The court implied, however, that no prejudice to the petitioner would result in postponing the adjudication of questions of law until the petitioner had finished serving the valid portion of the sentence.[195]

In the recent case of *Commonwealth ex rel. Stevens v. Meyers*,[196] which rejected a long line of precedent upholding the *McNally* rule in Pennsylvania, the state supreme court recognized a double-edged effect resulting from the prematurity doctrine. First, as noted in *Palmer*, since the petitioner in the habeas corpus proceeding has to sustain the burden of proof, delay in vindicating constitutional rights may result in substantial prejudice to the effective adjudication of the merits of his petition; further, if the case is retried, he may be unable to defend himself due to a loss of evidentiary materials.[197] Second, the court indicated that in light of such recent Supreme Court decisions as *Gideon v. Wainwright*,[198] the number of cases to be retried is being substantially increased; in these retrials, the state must again attempt to prove beyond a reasonable doubt the guilt of the accused. Therefore, the effect of continued adherence to the prematurity doctrine may often result in a greater burden on the state. As the court stated:

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193. Palmer v. Cranor, 45 Wash. 2d 278, 285, 273 P.2d 985, 989-90 (1954); *accord*, Jablonowski v. State, 29 N.J. Super. 109, 102 A.2d 56 (App. Div. 1953).

194. Compare pp. 362-63 *supra*.

195. Washington has reaffirmed this distinction between issues of fact and issues of law in its application of prematurity. Ashley v. Delmore, 49 Wash. 2d 1, 297 P.2d 958 (1956), *cert. denied*, 353 U.S. 986 (1957). In this case, the court noted that, although it was premature in terms of immediate release, the petition was not premature in requesting a correction of the sentence, because the illegal portion could have an adverse effect on the parole board.

196. 419 Pa. 1, 213 A.2d 613 (1965). See generally 27 U. PITT. L. REV. 719 (1966).

197. Commonwealth *ex rel.* Stevens v. Meyers, *supra* note 196, at 15-16, 213 A.2d at 621-22.

198. 372 U.S. 335 (1963). *Gideon* was applied retroactively in Pickelsimer v. Wainwright, 375 U.S. 2 (1963) (memorandum decision).

> [S]uch delay naturally places a serious and sometimes fatal strain on the Commonwealth's ability to present its case on retrial. Witnesses may have become scattered or disappeared entirely, memories may have faded and other evidence may no longer be accessible.[199]

The rationale of these two cases seems to support the conclusion that the prematurity rule results in a denial of due process to the prisoner.[200]

B. *Suspension of the Writ*

Under the federal writ, the petitioner must sustain the burden of proof of unlawful restraint[201]—for example, establishing by a preponderance of the evidence[202] that his conviction was in violation of his constitutional rights. While no prematurity cases have considered the issue, it is submitted that the loss of court records and court reporters' notes, the death or unavailability of witnesses, and the fading of memories result in an effective "suspension" of the writ in violation of Article I of the Constitution.[203] While the prisoner may later petition for the writ when serving the challenged sentence,[204] the writ may no longer be available, as a practical matter, to secure relief from the unlawful imprisonment.[205] In addition to this possible

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199. Commonwealth *ex rel.* Stevens v. Meyers, 419 Pa. 1, 15, 213 A.2d 613, 621 (1965); *accord,* State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 244, 252, 133 N.W.2d 753, 757 (1965). This same rationale has been used as a basis for granting coram nobis relief. See Johnson v. United States, 344 F.2d 401, 411 (5th Cir. 1965); Thomas v. United States, 271 F.2d 500, 502 n.4 (D.C. Cir. 1959).

200. See United States *ex rel.* Westbrook v. Randolph, 259 F.2d 215 (7th Cir. 1958); *cf.* Patterson v. Medberry, 290 F.2d 275 (10th Cir. 1961). *But see* Macomber v. Gladden, 304 F.2d 487 (9th Cir. 1962). See also Carroll v. Boles, 347 F.2d 96 (4th Cir. 1965) (per curiam).

201. *E.g.,* Oyler v. Taylor, 338 F.2d 260 (10th Cir. 1964), *cert. denied,* 382 U.S. 847 (1965); United States *ex rel.* Wilson v. Pate, 332 F.2d 886 (7th Cir. 1964).

202. *E.g.,* Palumbo v. State, 334 F.2d 524 (3d Cir. 1964) (denied right to counsel); Beeler v. Crouse, 332 F.2d 783 (10th Cir. 1964) (per curiam) (coerced plea of guilty).

203. "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." U.S. CONST. art. I, § 9. Historically, there seems to be no need for a distinction as to which branch of government can suspend the writ of habeas corpus; thus, by procedural restrictions, the judical branch can violate the suspension clause with the same effect as a legislative or executive fiat. See Fay v. Noia, 372 U.S. 391, 405, 406 n.15 (1963). See generally Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?,* 40 CALIF. L. REV. 335 (1952).

204. See SOKOL, A HANDBOOK OF FEDERAL HABEAS CORPUS § 25 (1965).

205. The federal courts do not invoke laches when a prisoner fails to seek habeas corpus relief within a reasonable time after conviction. Heflin v. United States, 358 U.S. 415, 420 (1959); Chessman v. Teets, 354 U.S. 156, 164 (1957); Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 123 (1955); Palmer v. Ashe, 342 U.S. 134, 138 (1951).

total suspension when evidentiary materials are lost, there seems to be a temporary suspension that occurs in all prematurity cases between the time that the prisoner first seeks relief and the time that his request is no longer held premature. Because the prematurity doctrine is without a rational basis in light of modern parole eligibility problems, it arguably results in an unconstitutional suspension of the writ. However, care must be taken that the temporary suspension theory not be expanded into a broad proposition that no limitations should be put on the availability of habeas corpus. Some limitations, which do have a rational basis, are necessary to avoid abuse of the writ.

Two of these limitations are the non-substitution rule and the exhaustion doctrine. The writ cannot be used as a substitute for an appeal or writ of error. That is, habeas corpus cannot be used to correct mere irregularities committed in a trial that do not raise constitutional issues or reflect defects in a court's jurisdiction.[206] Also, a state prisoner must exhaust all available state remedies before his petition for the federal writ can be entertained.[207] This latter rule has a rational basis in promoting comity between the states and the federal government. Even here the Supreme Court has recently made significant inroads in determining what constitutes exhaustion of one's available state remedies when an unreasonably strict application of the exhaustion doctrine would have effectively denied a prisoner a remedy to vindicate his constitutional rights.[208]

The Supreme Court's decision in *Fay v. Noia* means that in spite of the sound rational basis for the exhaustion doctrine, the Court will not permit unreasonable applications of the doctrine to abrogate the writ's utilization in protecting a prisoner's constitutional rights. Certainly, if this rationale is applicable to the exhaustion doctrine, it has at least equal applicability to the prematurity doctrine of *McNally*. The rejection of prematurity would merely result in the federal courts' entertaining the writ at an earlier date. The number of petitions, over all, would not increase except during a short

206. Sunal v. Large, 332 U.S. 174 (1946); Johnson v. Zerbst, 304 U.S. 458 (1938); Knewel v. Egan, 268 U.S. 442 (1925); *Ex parte* Watkins, 23 U.S. (3 Pet.) 193 (1830).

207. 28 U.S.C. § 2254 (1964); see Darr v. Burford, 339 U.S. 200 (1950); *Ex parte* Royall, 117 U.S. 241 (1886). See generally SOKOL, *op. cit. supra* note 204, § 22.

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (1964).

208. Fay v. Noia, 372 U.S. 391 (1963).

period after the rule's abrogation. Furthermore, there would be no problem of comity between the state and federal courts. State prisoners seeking the federal writ could be granted conditional or delayed releases from their unlawful custody in order to allow the state a reasonable period to hold a new trial.[209]

CONCLUSION

There seems to be ample justification today for a re-examination and abandonment of the prematurity rule. 1) Both substantive and procedural changes in the writ have recently expanded its scope. 2) Other state and federal remedies inadequately cope with prematurity problems. 3) The historical basis of the prematurity rule is at least questionable. 4) The wrongful denial of parole eligibility constitutes unlawful custody. 5) Habeas corpus relief is flexible enough to afford an immediate removal of the unlawful restraints of liberty present in prematurity situations. 6) The prematurity rule can be viewed as a denial of due process and a suspension of the writ.

To abolish the prematurity doctrine, either the Supreme Court must reinterpret the habeas corpus statute to expand the concept of custody and clarify the relief available, or Congress must amend the statute. In addition, section 2255 must be similarly modified to establish a remedy for federal prisoners consistent with that provided by habeas corpus—allowing challenges to unconstitutional restraints at any time.[210]

The Supreme Court has shown a growing awareness that the Great Writ must be preserved and developed into an efficient remedy to preserve our preciously guarded constitutional rights. There is sound reason to believe that the Court should and will abandon *McNally*'s unreasonable procedural limitations, which have unduly confined the utilization of the federal writ for the preservation of personal liberty:

> Only two Terms ago this Court had occasion to reaffirm the high place of the writ in our jurisprudence: "We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' . . . and unsuspended, save only in the cases specified in our Constitution." . . .

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209. See cases cited notes 173, 186-87 *supra*.

210. Although § 2255 states that the writ of habeas corpus is not available to a federal prisoner "unless it also appears that the remedy by motion [under § 2255] is inadequate or ineffective," this clause has been of no effect, because the prematurity rule has been applied to both habeas corpus and motions under § 2255. If the prematurity doctrine is eliminated from habeas corpus, it is necessary to do so with regard to § 2255, to prevent the same difficulties which brought about the enactment of § 2255 from again arising. See note 20 *supra*.

These are not extravagant expressions. Behind them may be discerned the unceasing contest between personal liberty and government oppression.[211]

211. Fay v. Noia, 372 U.S. 391, 400-01 (1963).