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Habeas Personam

Introduction

The purpose of this paper is to posit Personhood Theory, as defined first by Georg Wilhelm Hegel and modernized by Margaret Jane Radin, as a descriptive account of the evolution of liberty. Personhood Theory argues for the guarantee of privacy as elemental to the free exercise of an individual. It argues that freedom is impossible without privacy, because privacy prevents the occlusion of autonomy.[1] If it is indeed the case that Personhood Theory is such an accurate account of liberty as it has developed and is developing throughout the world, it would seem far more likely that the prescriptive elements, those pressing for a concretization of privacy rights, are philosophically sound and viable methods by which the goals of liberty might be furthered.

[1] See Radin, Margaret Jane, Reinterpreting Property, University of Chicago Press, Chicago, 1993; Inness, Julie C., Privacy, Intimacy and Isolation, Oxford University Press, 1992.

This paper will examine the protections afforded in the common law by the right to seek the Writ of Habeas Corpus to challenge detention, as well as looking at the parallel history of Poland's principle of Neminem Captivabimus, which affords similar rights and originated over two centuries prior to the Habeas Corpus Act of 1689. Additional parallels will be drawn to other traditions. The texts of the constitutions of various modern nations as well as international agreements will be employed to show the pervasiveness of the right to challenge detention.

After outlining the history of the protections of Habeas Corpus and similar provisions and giving a brief overview of Personhood Theory, the extent will be examined to which the history mirrors the ideas espoused by the proponents of Personhood. The similarities will be shown to be so extensive that Personhood Theory emerges as an enormously powerful descriptor of the evolution of liberty as it is, and as a prescriptor of liberty as it should emerge.

History

You Should Have the Body: Habeas Corpus in the Common Law

Origins

The reign of Henry II of England (ruled 1154-89) saw the foundation of the English royal courts, as well as the first legal textbook and thus the basis for the whole of the Common Law.[2] In brief, the political reasons for Henry's legal reforms had in large part to do with struggles with the barons, who had been steadily rising in power through the reign of Henry's predecessor on the throne, King Stephen. Traditionally, legal matters had been settled by the immediate liege-lord of the person being tried or seeking relief. As such, the Crown had little direct control over matters occurring inside the baronies. In order to remedy this, Henry's legal reforms included the system of writs, the bureaucratic tools by which subjects might bring their complaints to Henry's new courts. Putatively, subjects needed only to word their cases in such a way that they fit the requirements of one of the established writs in order to escape the decisions of the nobility and bring the case to one of the courts of the Crown, courts which were central to Henry's plan to centralize power in himself and thus maintain greater control over his barons.

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[2] See W.L. Warren, *Henry II* , London, 1973.

Although, according to Blackstone, the term "habeas corpus" was not recorded until 1305,[3] it may have been in common usage much earlier. Nevertheless, it is all but certain that writs having similar effect were extant in the time of Henry.[4] Between the fourteenth and seventeenth centuries, many types of writs were born, and several of those relating to criminal justice began with the words "habeas corpus", meaning "you should have the body". The reason for this is that the barons would likely have only nominally subjected to the authority of the Crown, allowing for the case to be tried in the king's courts while disposing of the person as they wished. The "habeas corpus" writs and their predecessors, if authorized by the magistrates of the royal courts, forced the nobility to surrender the person himself to the authority of the Crown for trial. The difference is crucial in that the writs effectively revolutionized the feudal system itself. Instead of the subjects holding direct fealty only to their liege-lords, who in turn were vassals of the king, every English person was truly a subject of the king and could seek redress with the king's courts. Under the new system, a subject could even seek legal remedy against even his own lord, a most unlikely situation when one could petition that very lord for relief. Thenceforth, only the Crown, the State itself, had authority over the body of its subjects. English people, at least in theory, could no longer be oppressed by the

[3] 3 Blackstone 129.
[4] See Warren.

whims of their local lords. Their bodies belonged only to themselves and to the state.

The writ of habeas corpus **ad subjiciendum [translated: you should have the body in order to subject it to examination]**, is the writ that today is usually rendered simply as "habeas corpus". In part, this is because of the preeminence of the "Great Writ", as it is sometimes called,[5] and in part because ad subjiciendum takes logical precedence over the other habeas corpus writs. The less famous writs, concerning such issues as exoneration, answering accusations, bearing witness, and prosecution, are functionally or temporally predicated upon examination. As mentioned above, the historical purpose of the habeas-type writ was to allow a person to challenge his detention by a local lord in the royal courts, or sometimes to challenge such a lord holding the deceased body of a person who had been put to death.

The Habeas Corpus Act of 1679

By the seventeenth century, the writ of habeas corpus had evolved to symbolize the liberty of the individual, particularly the commoner, from the state itself. In the latter half of that century, the House of Commons was bristling against what its member perceived as an abuse of power by the very courts that

[5] Eric M. Freedman *Habeas Corpus: Rethinking the Great Writ of Liberty*, NYU Press, 2001, *passim*.

had been set up centuries earlier to keep an unruly nobility in check.[6] The Star Chamber, a court whose name had become synonymous with secrecy and abuse of power, had only been abolished only eight years before the Interregnum, in 1641. From the end of the Interregnum in 1660, part of the Crown's reconsolidation of power and efforts to restrain the might of the recently ascendant commoners (and Commons) was for the royal courts to wield its monopoly on the granting of habeas corpus petitions in such a way as to prevent those arrested from receiving a fair trial. In the politically charged period immediately following the Restoration, the courts were seen by many as instruments of the Crown in stifling dissent.[7] When habeas petitions were withheld, anyone who irritated the powerful could be held indefinitely pending a trial that would never occur on suspicion of charges that need not even have been stated.

Although the push to ensure the right to petition for habeas corpus, and to ensure that such petitions would be properly heard, is often attributed to the staunch Whig Lord Shaftesbury, the Tories, particularly those in the House of Commons, felt the abuses of the Privy Council as well. Parliament's stand against the mistreatment perpetrated by the courts was mostly a bipartisan affair.[8] Nevertheless, the debates in Parliament over just how much reform was

[6] Id., Chapter 2 *passim*.
[7] Id. at 523.
[8] Id. at 542.

to be implemented raged for over a decade. Originally, habeas corpus petitions had to be filed three times before any redress could actually be sought. In response to this, some Whigs fought vociferously to have the petitions granted automatically, arguing like Edward Vaughan, that "whosoever is a prisoner ought to be so by law -- those committed by the King and Council are not prisoners of State and they must have 'Habeas Corpus.'"[9]

This libertarian language of the Enlightenment was a marked change from the past. There were staunch royalists who argued in reactionary language against the reforms, however, such as Roger L'Estrange, a royalist and opponent of Shaftesbury who wrote in An Account of the Growth of Knavery that strengthening habeas corpus would "provoke the people by suggesting that their souls and their liberties are at stake and to make use of that power."[10] But even such strident language as this implied that the people *had* souls, that the existence of those souls was inextricably bound to liberty, and that with that liberty came power. By relying on the importance of the presence of the body, the soul was recognized. By recognizing the presence of a soul in all bodies, noble and common, liberty was recognized. Even the words of liberalism's enemies were pregnant with nascent modernity and its libertarian ideals.

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[9] Edward Vaughan, from Grey, *Debates II*, 243-247.
[10] Roger L'Estrange, *An Account of the Growth of Knavery*, 2d ed., London, 1681, 8-9.

As of 1679, enough of a consensus had been reached. The Habeas Corpus Act of 1679 was passed by the great majority of Parliament. The king could no longer overturn a writ of habeas corpus. People could no longer be held indefinitely, or until their untimely demises, while the courts refused to deliberate on the writ petition, nor could the authorities use "transportation" to sidestep a habeas petition by sending a distasteful prisoner to Jamaica. The Act was a bellwether of the age, for it, like much of the rest of the late seventeenth century legislation, served to ensure the "lives, liberties and properties of Englishmen".[11] As of the Revolution of 1688, the Habeas Corpus Act of 1679 had the reputation as the "foundation of liberty" 527.[12]

Into Modernity

Over the succeeding centuries, the British Empire spread, and with it the Common Law. Every nation that adopted the Common Law system took with it the idea that the right to question one's incarceration is fundamental to liberty and the rule of law. As such, nations as culturally and geographically distant as Nigeria[13], Tonga[14], and Malaysia[15] have enshrined the precepts of personal

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[11] Williamson Papers, ed. William D Christie, Camden Society, ser. II, vols. VIII–IX, London, 1874, II 142.
[12] Freeman *supra* at 527.
[13] Chief Gani Fawchinmi, *The Nigerian Law of Habeas Corpus*, Nigerian Law Publications, 1986, *passim*.
[14] Constitution of Tonga, Cl. 9.
[15] The Constitution of Malaysia does ensure in Article 5(2) equivalent protections, although the words "habeas corpus" are not used. But See Nicole Fritz and Martin

liberty inherent in habeas corpus protections. For, as Albert Dicey wrote in 1885, while the habeas corpus provisions "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[16]

Although they were very conscious of the fact that they were founding a new nation with new ideals and so found little occasion to make mention of the British Common Law system upon which their legal system would nevertheless be based, the authors of the United States Constitution found the Great Writ so vital that they specifically referenced it: "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."[17] Indeed, the only arguments over habeas corpus in the Constitutional Convention concerned whether it should ever have been allowed to be suspended and if so, what circumstances might be extreme enough to warrant such a suspension.[18] Over time, the right to petition for a writ of habeas corpus was expanded to include every court in the United States.[19] It

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Flaherty, *Special Report: Unjust Order: Malaysia's Internal Security Act*, 26 Fordham Int'l L.J. 1345 (2002-2003) (highlighting the rarity of habeas protection after the passing of the Internal Security Act of 1960).

[16] Albert Venn Dicey, *Introduction To The Study Of The Law Of The Constitution*, 8th Ed., London, 1885.; taken from http://www.constitution.org/cmt/avd/law_con.htm.

[17] U.S. Const. Art. 1 § 9.

[18] Francis Paschal, *The Constitution and Habeas Corpus*, 1970 Duke L.J. 609-10.

[19] See *Ex parte Bollman*, 8 U.S. 75 (1807); 28 U.S.C. 2241; 28 U.S.C. 2254; 28 U.S.C. 2255.

bears mentioning that countries, like The Philippines, that modeled their legal systems on the United States, also have strong habeas corpus protections.[20]

We Shall Not Imprison: Neminem Captivabimus

Alternate Genesis

The history of the protection of the individual of the tyranny of arbitrary imprisonment is arguably as storied in a land that, because of its recent history, is not often spoken of as a bastion of freedom: Poland.[21] The Polish lands had an early start on the tenets of liberty. The Sejm, the Polish parliament, in a move stronger than the British nobility's seizure of power from King John in the Magna Carta, made the Polish king secondary as early as 1374. Indeed, by 1572, the kings of Poland were no longer hereditary. The Sejm had taken the right to elect the king.

In 1430, the Sejm forced King Wladyslaw Jagiello to sign the Privilege of Jedlna. That document, and the 1433 Privilege of Krakow, guaranteed much the same protections as those inherent in the right to petition for habeas corpus. The exact language, "Nullum terrigenum possessionatum capiemus, nisi judicio

[20] Constitution of The Philippines, III § 15.
[21] Daniel H. Cole, *International Law: From Renaissance Poland To Poland's Renaissance*, 97 Mich. L. Rev. 2062 (1999), at 2065.

rationabiliter fuerit convictus" [translated: We will neither seize the property of nor imprison anyone not convicted of a crime.], usually shortened to "neminem captivabimus" [We shall imprison no one.], is remarkable not only for the early date of such strong libertarian language. Just as in the American, South African, and other constitutions, person and property are protected together.[22] Like in habeas corpus protections in the common law, neminem captivabimus does not speak at all to the guilt or innocence of the accused. Rather, it affords the due process of law to people who have been accused of a crime by the state.

Poland's reforms, though revolutionary, were still tenuously mired in the prejudices of their times. As such, the Privileges of Jedlna and Krakow originally afforded protections only to the members of the Sejm, the greater and lesser nobility and gentlefolk of the country. However, as early as 1493, Poland's parliament became bicameral, with the lower house representative of localities. In 1505, a written constitution of sorts was passed, in which it was declared "nothing new about us without us".[23] This state of affairs held sway even through the so-called "First Republic" of 1569 to 1791. There were kings, but they were only elected for life tenures. In 1791, Poland adopted a constitution mostly in the model of the United States and France. This constitution extended the rights of neminem captivabimus to the bourgeoisie

[22] Constitution of the Republic of Poland, II § 42-46. .
[23] Id.

classes. Unfortunately, this new liberalism lasted for only a few years, as Poland the country ceased to exist in 1794, having been taken and partitioned by its mightier neighbors. When Poland again became independent in 1921, it once again enshrined the neminem captivabimus principle in its constitution. When Poland once again adopted a republican constitution in 1992, it translated the Latin into Polish but otherwise retained the same language in its guarantee of the right of an individual not to be held without due process of law.[24]

Security of Person: Freedom Made General

With the development of international institutions in the twentieth century, it was necessary to adopt legal norms, jurisprudential principles that spanned beyond national boundaries. As the nations that represented the Western liberal tradition, the victors of the Second World War, were the primary driving force behind the early development of international law, it was to be expected that it would the principles held most dear by those nations that would be enshrined as international principles. The ideas inherent in the right to habeas corpus, that the state may not take possession of the body of an individual without due process of law, were no longer limited to the countries espousing the common

[24] Id., II § 41-45.

law tradition, or to Poland. By the twentieth century, most civil law countries had adopted protections similar to habeas corpus.[25] Thus, when the documents of international law were drafted, they included provisions identical to habeas corpus protections.

When the UN General Assembly adopted the Universal Declaration of Human Rights in 1948,[26] that body put forth the general principles by which international law would ideally be governed thenceforth. Article 2 of that document reads "Everyone has the right to life, liberty and security of person."[27] In order to clarify what this means in the criminal sphere, Article 9 holds that "No one shall be subject to arbitrary arrest, detention, or exile."[28] These articles, taken together with Article 29(2), which reads "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society," [29]

[25] See, E.g. Constitution of France V § 34.2.
[26] General Assembly resolution 217 A (III), 10 December 1948.
[27] UDHR, Article 3.
[28] Id., Article 9.
[29] Id., Article 29 § 2.

have the same effect as the habeas corpus protections afforded in common law jurisdictions. A person's body is secure. It belongs to him or her and not to the state. The state may not arbitrarily take possession of the body, or direct its course. This right is only derogable upon due process of law, which itself must be applied with justice. Although the Universal Declaration of Human Rights was not a binding document, it hinted at an *opinio juris* followed at least by the democracies of Europe and North America, all of which already followed these precepts in state practice. As such, the ideals present in habeas corpus protections, became customary international legal norms viewed as fundamental tenets of freedom. Dicey's understanding that in the habeas corpus provisions lie nascent guarantees of personal liberty had been borne out.[30]

While the principles set forth in the Declaration were, by the nature of the document itself, somewhat vague, it international community affirmed them in the International Covenant on Civil and Political Rights. That document, which was adopted in 1966 and came into force in 1976, as a treaty has binding force. It has at current sixty-seven signatories, and 160 nations are party to it.[31] All of the general principles mentioned in the Universal Declaration are reiterated in the ICCPR.[32] Moreover, the ICCPR goes further, specifically giving every individual speedy access to the courts, both to be tried speedily and to challenge

[30] Dicey, *supra*.
[31] See http://www.ohchr.org/english/countries/ratification/4.htm.
[32] ICCPR, Article 9 § 1.

his or her detainment.[33] If these rights are not met, the individual is further given the right to redress.[34]

The court that, at least nominally, has the broadest jurisdiction of any criminal court and so might be taken as the summation of the principles of international jurisprudence, is the International Criminal Court. The Court's founding document, which came into force in 2002, is the Rome Statute.[35] As part of the Rome Statute, all international legal rights are to be guaranteed by the International Criminal Court.[36] Therefore, the specific rights to self outlined in the ICCPR are to remain in force in all ICC proceedings. Furthermore, the drafter of the Statute placed such import on protections similar to habeas corpus and neminem captivibamus that they specifically repeated in Article 59 (3) that "the person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender." Article 60 (2) states further that "A person subject to a warrant of arrest may apply for interim release pending trial."

It is often argued that the rights deriving from habeas corpus are values entirely rooted in those Western societies in which they reached maturity, and

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[33] Id., Article 9 §§ 3-4.
[34] Id., Article 9 § 5.
[35] For information on and the text of the Rome Statute, See http://www.un.org/law/icc/statute/romefra.htm.
[36] Rome Statute of the International Criminal Court, Article 21 § 3.

that these rights cannot be held universal. This argument is too complex to include a full and fair discussion here, involving as it does colonialism, the so-called clash of civilizations, and differing anthropological theories. However, putting aside the numerous Asian and African nations that both have adopted provisions protecting the individual in their municipal laws and have ratified the international treaties protecting such rights, whether the individual has a meaning separate from the state in non-Western cultures does bear mention. Even in a culture as supposedly foreign to Western values as China, the individual is not entirely subject to the will of the state. The Confucian ideal is a *balance* of the public and private.[37] All relationships in the Confucian model are based in based in reciprocity: the more is taken, the more must be given. The child owes the parent filial piety, but the parent owes the child protection, sustenance and shelter. The relationship between the individual and the state is much the same, for the higher the position in society – and the state is admittedly paramount – the more is owed to those lower in status.[38] The will individual, indeed even his or her pursuit of happiness, has a place in the Confucian tradition. As Confucius himself reputedly wrote, "at 70, without transgressing morality, I followed my heart's desire."[39] Just as in the West, if one does not do wrong, one can continue to live as one wishes.

[37] Wm. Theodore de Bary, Asian Values and Human Rights: A Confucian Communitarian Perspective, Harvard University Press, Cambridge, 1998, 28-29 and *passim*.
[38] Id., 18-21.
[39] Confucius, *Analects*, 2(4), from de Bary at 23.

As such, the right to prevent a court from exercising possession of an individual's person without just cause is a common thread running through the history international and municipal jurisprudence. From humble beginnings in the power struggles between the nobility and royalty in England and Poland, the right of an individual to maintain his or her liberty in the face of governmental and judiciary power has spread, first to the various nations of Europe and North America and to many of the former colonies of those nations, and then to the international arena to be adopted by the vast majority of nations. The right to do as one wishes so long as one does not transgress the mores of one's society is implicit even in cultures where the will of the individual is purportedly absent and unvalued. Perhaps, then, it is a descriptive truth, not merely a prescriptive hope, that people belong to themselves, and only cede that possession in extreme circumstances or if they have transgressed society's norms, and that is only the definitions the state has placed on "extreme circumstances" and "transgress" that differs across times and cultures.

Personhood Defined

Legal Personhood Theory has primarily been developed by Margaret Jane Radin, although her ideas are in turn largely influenced by the works of Kant,

Locke, and Hegel.[40] John Locke's primary contribution to personhood has been his conception that what a person thinks, does and makes are all extensions of the self. Thus are freedom of action and freedom of being intertwined.[41] In Kant's view, the self, as a rational actor, is *a priori* free. The simple fact that a person has reason, and in that reason can choose, means that person is free.[42] For Kant, reasoning, and so choice, is an end unto itself, and any restriction of that choice is immoral. This is of course only true insofar as one person's acting upon his or her freedom to choose does not restrict another. Freedom, then, is absolute metaphysically, but bounded in the world of apparent reality where freedoms intersect. This can most simply be described by the old maxim that one has the right to swing his arms freely, but loses that right at the moment before his arms strike the nose of another. The other person's right to continue as a rational free decision-maker would be restricted, in that he or she would no longer be able to choose to walk around with an intact nose.

Hegel's theory of personhood draws heavily upon the ethics of Kant. However, where Kant stresses the unethical nature of interference with the actions of others, Hegel sees that while restriction of the actions of others may

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[40] Justin Stec, Why The Homeless Are Denied Personhood Under The Law: Toward Contextualizing The Reasonableness Standard In Search And Seizure Jurisprudence, 3 Rutgers Journal of Law and Policy 321 (2006).
[41] John Locke, Second Treatise of Government, Dover Publications, Mineola, NY, 2002 (1690), Ch. 5.
[42] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, Mary Gregor, ed., tr., Cambridge University Press, 1997 (1785), 7.

be minimized, it cannot be avoided.[43] In his master-slave dialectic, Hegel describes a ladder of personhood rising from less manifest personhood to more manifest personhood. At the bottom of the ladder are the purely dominant and submissive, the slave owner and the slave. The slave owner uses his will only to restrict the will of another, while the slave's will is restricted utterly. Creating a synthetic person from these two antitheses, Hegel moves up the ladder through the ethical person, who acts as Kant would have him act, to the political person, to the final rung, the person made whole, who has complete mastery of self and so needs not dominate the other. Intrinsic to this theory is the idea that the boundaries of the person do not cease at the edges of the physical being, but at the limits of the sphere of the person's influence over the physical realm. As such, property, and one's control over it, is part of the person. In Hegel, a person is only whole when she is secure in her body *as well as* her home and personal effects. A restriction of a person's freedom to act or exercise will over property is not only a restriction of rights, but a restriction of self.

These ideas, that a person is only a person insofar as he is a free actor both in terms of his body and his property, is the foundation of Margaret Radin's

[43] This and the following are major themes in Georg Wilhelm Friedrich Hegel's *Phenomenology of Mind* and *Philosophy of Right*.

theory of legal personhood.[44] As she puts it, "the individual's ability to project a continuing life plan into the future is as important to personhood as continuing consciousness."[45] In order to project this life plan, a person must have freedom, not only to act, but to interact with the world, and it is the body and property through which the individual interacts with the world. In personhood theory, an individual cannot fully be a person without the ability to restrict physical and informational access and agency to the self.[46] The right to self-preservation is foundational to being. From this derives action, for the right to be and control the continuity of being implies the right to control the vector of the continuity of selfhood. This can only occur if body, agency, and property lie under the sole control of the individual.[47] A person cannot seek perfection without action, and cannot act without the freedom to act. Fundamental rights comprise any right that is a sine qua non of perfecting the self.[48] Inherent in the worldview of the adherents of personhood theory is the dual assumption, common in modern liberal jurisprudence, that a) citizens are the arbiters of what is good for themselves, and the government for the public good; and b) that the state, when

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[44] Margaret Jane Radin, *Reinterpreting Property*, University of Chicago Press, Chicago, 1993.
[45] Id. at 39.
[46] See Julie Inness's critique of personhood theory in Julie C. Inness, Privacy, Intimacy and Isolation, Oxford Univesity Press, New York, 1992, 16-20.
[47] Id. at 41 and 71.
[48] See Aaron J. Rappaport's summary and critique of personhood theory in Aaron J. Rappaport, Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy, 2001 Utah L.R. 441 (2001) at 450-51.

balancing the interests of the public and the private person (like forbidding wanton arm-waving and nose-punching) should exercise its power no more than is necessary to preserve autonomy for as many people as possible.[49] As Hegel would have it, just as the lowest rung on the personhood ladder is the duality of the master/slave, so low is the state that acts as master and not simply arbiter of increased personhood.

Personhood, then, is the theory that the self only exists insofar as it is autonomous in self and in action. The sphere of the self, which includes the body, the thoughts, and the property and product of the body and its thoughts, is an autocracy whose sovereignty to project into the future can only be bounded by the parity of other sovereign actors. The state exists to enforce this system of sovereign equality. The state then has the negative responsibility not to preclude persons from acting. Also, the state has the affirmative responsibility to assure that its persons may act, and thus be full persons, by preventing other persons from exercising their bodies and property in such a way as to restrict the freedom of another to freely choose a vector for her self. As such, personhood is both a libertarian theory and a theory of social justice. People must remain free to act, but the state may create regulations to ensure that the free action of one does not infringe upon the free action of another.

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[49] Id.

It bears mentioning here that the state is not an actor, but merely a regulatory body whose purpose is to maintain the autonomy of as many individuals as possible. The state ensures that its citizens can be persons. From Kant, each person by virtue of her reason is free, and it is unethical to restrict that freedom. From Locke, the property of each person is inextricably tied to her autonomy. From Hegel, a person climbs the ladder of personhood, becomes more of a person, as she gains greater control over herself without needing to restrict the autonomy of others to do so. From Radin, the person and property of a person are only fungible by that person, and the state may only restrict this fundamental right so as to prevent the free action of one from infringing upon the free action of another.

Personhood Applied

Personhood Theory is not merely an amorphous prescription for how a state should act in reference to its citizens in some ideal future utopia, a philosophy forever confined to the realm of ideas. Rather, it describes the evolution of the principles of personal liberty that have evolved to varying degrees not only in the democracies of Europe and North America, but around

the world. Just as Hegel's individual, as he climbs the ladder of personhood, disrupts the actions of other actors to an ever-lessening degree, so does the modern state. The idea that an individual is only a person qua person when she is free to act is perhaps nowhere better evinced than in the history of habeas corpus-type jurisprudence. One need only return to Dicey's statement that though the habeas corpus provisions "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[50] The provisions do not need to declare rights or principles, simply because they embody a principle from which liberty follows: the person is the sole arbiter of the body, not another person and not the state.

Although it may seem counterintuitive, even the early reforms of King Henry were steps towards manifesting liberty in the individual. It is true that Henry's reforms had as their goal the removal of power over the people of England from the nobility and to himself, from one person to another. However, this shift was vital. In Medieval England, the king was the state, not simply its head. The courts of King Henry operated in the name of the crown, but were truly the courts of the English state, just as today's British (and Commonwealth) courts still sit in the name of the Queen. While it is true that King Henry, in the twelfth century, had more power of his courts than Queen Elizabeth II does

[50] Dicey, *supra*.

today, he nevertheless was removing power over individuals from the realm of other people, the barons, to himself, who was not so much a person as the state made manifest.[51] The master/slave dichotomy of baron/serf had begun to be transcended. Furthermore, when Henry instituted his reforms, he placed in them the right for detention, restriction of free action, to be challenged. When it was declared to one of Henry's courts "you should have the body," it was being implicitly stated to the court that it did not have the right to wantonly take from someone the freedom to act without evidence that that person had abused that freedom, had contravened the tenets of society.

Over the centuries, as the principle of king as state dissipated and the divine right of kings eroded, so did the right of the state itself to exert preeminent control over the individual. Indeed, by the time of the British Interregnum, the free will of the individual rested in himself and in God. The state began to be seen as merely the moderator of public order.[52] Indeed, as mentioned above, it was the worry of the intractable Tory L'Estrange that the commoners would realize that their "souls and their liberties were at stake"[53] and that they would take advantage of that right. By the passage of the Habeas

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[51] For discussions of the king as state, See, E.g., Anson D. Morse, *The Place of Party in the Political System*, 2 Annals of the American Academy of Political and Social Science 12, 1891.
[52] For a discussion of this subject, See, E.g., Winston Churchill, *A History of the English Speaking Peoples*, Cassell, 1956, 2-70.
[53] L'Estrange, *supra*.

Corpus Act, the souls and the liberties of people had been conflated. The soul, the core of being, was bound up with free will, both in a theological sense and a legal sense. Even then, a century before Kant wrote, guaranteeing the right to seek habeas corpus relief was seen as an affirmation of the right of the individual to be free to act without undue influence of the state. Implicit in the very passage of the Act of Habeas Corpus was the idea that the soul, and the free will it implies, belongs to individual, not the state. In the eyes of the Parliament of seventeenth century England, a person was not a person without his soul. The soul implied free will and freedom to act. Therefore a person was not a person without freedom of action. A person had a right to his personhood. Therefore, the state could not remove the right of freedom of action without due process of law, i.e. without showing that the person had exercised his freedom in such a way bounded by the rules the state had set to protect the free action of other individuals.

Clearly, this reasoning was not explicit, nor could it have been a century before Kant and three centuries before Radin. However, the laws of any state do exist at least nominally to protect the interests of its citizens. Take the following example. If Jack batters Jill, surely he is precluding Jill from freely going about her day in the manner in which she would surely prefer. Even using the theological language prevalent in Restoration England (even more explicitly

under Cromwell) and in the comments of L'Estrange, Jill had been granted a soul and its requisite free will, by God. God's authority overreached that of even the state and its king. In this case, the state is vested with the right, God-given at that time, to deprive Jack of his freedom of action, but *only if it shows that it was because Jack took Jill's right*. In the standard state of affairs, Jack owned Jack's body and the vector of its action. In order for the state to take possession of that body and its freedom, the state must present the body to a court and justify its restriction of Jack's freedom. Indeed, as argued by Vaughan, a prisoner is the prisoner of neither the king nor the court, but of the law itself.[54] The person is not a prisoner by virtue of the power of the state, but only of the system whereby the right of others is protected.

The same argument, of course, applies to the Polish reforms of the Privilege of Jedlna and the Privilege of Krakow. As these documents stated, "We will neither detain a person nor seize the property of a person without his first being convicted by law."[55] This indeed is an early expression, two centuries before Locke, of the idea put forth by the proponents of Personhood Theory: that property is tied to a person, that it is an expression of a person's free action. Here, and time and time again, where the body of a person is protected from seizure by the state, so is property. In the United States

[54] Waughan, *supra*.
[55] Cole, *supra*.

Constitution, the Fifth Amendment guarantees that nobody may be "deprived of life, liberty, or property."[56] These three ideas are protected together. Again, in the modern Constitution of Poland, the various guarantees of the inviolability of the person are only a few lines away from the guarantee of the inviolability of property.[57] Indeed, that document specifically provides that if a person is unduly deprived of her liberty, she will given monetary property, thus further conflating property and liberty.[58] Again, in the Constitution of the Republic of South Africa, where privacy is specifically guaranteed (only a clause away from that condemning slavery and two clauses away from the provision guaranteeing the right to challenge detention), that privacy includes one's self and one's property and effects.[59] The same rights are guaranteed in the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, and countless constitutions and legal systems.[60] Often, the right to security to self and property are guaranteed in a single breath, like in the United States Constitution. Even where that is not the case, the language, that of inviolability and security is the same for protections of personal liberty and control of property.

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[56] U.S. Const., Am. V.
[57] Constitution of Poland, Art. 42-46.
[58] Id. at Art. 42 (4).
[59] Constitution of the Republic of South Africa, II, 12-14.
[60] UDHR, ICCPR, *supra*.

Habeas Corpus implies that it is the individual, not the state, that owns the person. It is thus that the state must present the body, the core of personhood, in order to challenge the right of the person to continue to exercise freedom as it wishes. The ideas described by Personhood Theory, those calling for a guarantee of personal liberty and extending that liberty from the physical body to property, have been implicit since the right to seek habeas corpus-type protections were first guaranteed in England and in Poland centuries ago. In expressing liberty, the reformers of unjust legal systems have tied the freedom of the soul to freedom of the body, and made the body that which must be brought to challenge the freedom of the person. They have tied property to the body in defining liberty. The arc of the history to habeas corpus and similar principles from around the world reflects the very relationship of the self to society, with its freedom of body and of property at its core, that is presented by Personhood Theory.

Conclusion

The history and the prevalence of the right to challenge detention is at the center of the move from governments of tyranny to free societies. Indeed, the extent to which a society allows such challenges may even be seen as a

barometer to measure the level to which a society is free. King Henry, in instituting his reforms, made every resident of Britain, in principle at least, a subject only of the state, no longer subject to the whims of the landowning barons. The Habeas Corpus Act of 1689 happened soon after Britain's experiment with a true republic. Its purpose was to guarantee the freedom and inviolability of the individual and curb the tyranny of the crown and its Privy Chamber. In Poland, *neminem captivibamus* was first the expression of the right of the Polish parliament to have freedom from the king. It later became the centerpiece of the free Polish republic, at the time one of the freest nations in Europe, where Jews and others flocked to escape persecution. In the latter twentieth century, when nations around the world had seen the horrors that could be brought about by a curb of political freedoms, the United Nations enshrined the right to challenge detention in the UDHR and later the ICCPR and Rome Treaty. As the age of colonization ended, many new nations specifically outlined this right as a cornerstone of the freedoms guaranteed by their new constitutions. It has come to be universally understood that a state that can hold citizens without justification is, by definition, not a free state. Conversely, a state that assures that such detentions do not occur has laid the groundwork for liberty.

Furthermore, there is a perceived interrelationship between the inviolability of the physical body, the thoughts inside that body, and the property belonging to that body. For these reasons, the principles of Personhood Theory are not merely a *lex ferenda* description of the ideas around which a free society should be designed. Rather, Personhood Theory is an apt description of the development of liberty. Its applicability is not restricted by national or even cultural boundaries. The proposed right not to have one's autonomy restricted is not a proposed liberty, but one of the cornerstones of liberty itself. As the ideals of liberty have developed, as manifest by the right to challenge detention, so have the tenets of Personhood Theory been made more manifest. It is thus not unreasonable to state that the expectation of privacy, so necessary to the freedom to exercise one's autonomy into the future as one wills, is also an inherent element to a free society.