

Public Ethics Radio

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Transcript of Episode 4, Larry May on Habeas Corpus

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MATT PETERSON: You're listening to Public Ethics Radio. I'm Matt Peterson. This podcast features conversations between our host, Christian Barry, and scholars and thinkers who engage with ethical issues that arise in public life. The show is a production of the Centre for Applied Philosophy and Public Ethics, an Australian Research Council Special Research Centre, in association with the Carnegie Ethics Studio at the Carnegie Council for Ethics in International Affairs. You can find us on the web at www.publicethicsradio.org.

MATT PETERSON: "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." This is what's known as the Suspension Clause of the U.S. Constitution.

This clause encapsulates a tension that has become especially pronounced in American public life in recent years. The U.S. government, like all governments, is charged with protecting both the liberties and security of its people. It must allow the people to file habeas corpus petitions in court, except when doing so would prove too dangerous.

Now, we all know that the Bush Administration has claimed in certain cases, especially for the prisoners held at Guantanamo Bay, that it would indeed be too dangerous to allow habeas corpus petitions to be filed. But in order to assess this claim, we need to know not only how serious the threats posed by these detainees, but just what it is that we're withholding from them when we deny the right to petition for habeas corpus. What exactly is habeas corpus? How important is it as a right? And what is lost in denying this right to prisoners?

To try to answer this question, we bring you a conversation with the distinguished philosopher and lawyer Larry May.

Larry May is Professor of Philosophy at Washington University in St. Louis and Research Professor of Social Justice at the Centre for Applied Philosophy and Public Ethics, as well as a practicing lawyer. He sat down with Christian Barry in Canberra.

CHRISTIAN BARRY: Larry May, thanks for joining us on Public Ethics Radio.

LARRY MAY: Glad to be here, Christian.

CHRISTIAN BARRY: So I just wanted to start by asking a relatively simple question, which is, what is habeas corpus?

LARRY MAY: Habeas corpus literally means produce the body. And in my research, I tend to distinguish between a minimalist and a maximalist sense. In its earliest use, habeas corpus just meant that a prisoner had the right to demand of the jailer that he be produced into the public domain and that the jailer declare what the charges were that were keeping the prisoner incarcerated. As it has developed, from slightly before the time of Magna Carta, habeas corpus has taken on a much richer meaning, including today in the United States habeas corpus includes basically any kind of constitutional challenge that a prisoner could bring to any aspect of his incarceration.

CHRISTIAN BARRY: So what kind of a right is habeas corpus?

LARRY MAY: So habeas corpus is a procedural right. That is, it sets up a very rudimentary procedure that has to be followed. If a prisoner petitions, then certain things have to be followed. And the first thing is that, and this has been true for 800 years, that the body be brought forward, be brought out of the prison, into the light of day, where somehow the prisoner can be seen. And secondly that the charges be read against him. Now that doesn't yet tell you anything about what will happen next. It doesn't tell you that somehow this person should be released from incarceration, that it isn't a sort of get out of jail free card or anything of the sort. It's much more rudimentary than that. If it had more status than that then it could be seen as a substantive right to liberty. After all there is a right to liberty that is at stake here, it's the liberty to be free from incarceration. So there's obviously a connection between the two. But the stripped-down version of habeas that I'm most interested in doesn't actually get you any substantive liberty.

CHRISTIAN BARRY: And the habeas rights that people have say in the United States, is that representative of habeas rights across other national jurisdictions, or is that unique in some sense.

LARRY MAY: In the United States, I think habeas comes to mean much more than it does anywhere else. Although the right developed in England, as I said, at the time of Magna Carta or slightly before, the right in the English speaking world has remained reasonably strong, but I don't think it's nearly as strong as it is in the United States. In Australia, for instance, the right at the turn of the last century was quite important. But due to various acts of Parliament, it has been reduced in importance so that it's hardly ever used in Australia any more. Whereas in the United States all of the important decisions that have been made concerning prisoners have been done under that label. So in Guantanamo, all of the appeals that have been made so far were based on habeas corpus. Also, concerning my own legal research and practice, actually, virtually all of the petitions that are made, in behalf of those who are on death row in the United States are also made as habeas petitions.

CHRISTIAN BARRY: OK, so similar types of mechanisms exist even in other jurisdictions

which don't officially have any constitutionally protected or even common law protection of habeas?

LARRY MAY: Well, they'll be called something else in other jurisdictions.

CHRISTIAN BARRY: Yeah.

LARRY MAY: Habeas corpus is unique to the Anglo-American-Australian, as it were, legal system. It's called other things in other societies. But typically it's the right not to be arbitrarily incarcerated. And there will be statutes or something equivalent to custom in other societies to prohibit this, but not in all. In the United States and in the Anglo-American system, this is a right that has a historical special significance as a way of confronting tyrants in particular. And one of the questions that I'm interested in is to try to figure out why this innocuous sounding right at least in its minimalist sense been so important as a constitutional check against tyranny in the English-speaking world.

CHRISTIAN BARRY: So maybe we could ask you just to go into that a little bit. Two things. One is, on this minimalist understanding, why, what seems to be as you put it an innocuous procedural right just to be brought out of the dungeon or brought into the air, um, which doesn't necessarily seem to be sufficient to protect any other sorts of rights, why that was thought to be important. And then also just to talk a little bit about the claims that have been made about the broader understanding of habeas rights. In a recent broadcast, Keith Olbermann of MSNBC, not a program which normally is focusing on ancient legal doctrines, said the reality is that without habeas corpus, a lot of other rights lose their meaning. Why would anyone make such strong claims on behalf of habeas, even in this more maximalist understanding?

LARRY MAY: Well, the more maximalist understanding makes more sense, I guess, because it really is a way for someone to challenge any abrogation of rights that one suffers as a prisoner. I guess the more interesting question is why, historically, the right which was not so, didn't involve so much stuff, was considered so important. So that at the time when it was first written about in the 13th century, Bracton says that it's the most important of England's rights. And, Blackstone in the 18th century says simply that it is the most fundamental right that there is. So there's a really interesting, I think, historical and conceptual problem in trying to figure out why that would be. At least in part, I guess the simple answer to the question is that if you can be thrown into jail, and basically have the key lost so that you can't in a sense get out of jail again, it doesn't really matter what other rights you might have. All of those other ones have been effectively denied to you as a result of being thrown into jail in this way.

I guess the challenging question is, why is the minimalist right, that only involves having the prisoner's body produced, and the charges against the prisoner read out, where the prisoner could then be returned, as soon as the charges have been read, why is that so significant. And so that's what I'm interested in. And I think what the, what Olbermann is talking about, and what lots of other folks are today talking about, in the more maximalist sense, you can see that what habeas corpus does, is to stand in as a kind of rudimentary judicial review which basically calls for any kind of due process consideration to be put on the table. In some ways it's an easier issue to deal with. The harder issue to is to figure out why the right that started out as just this simple business

about bringing you out of the dungeon or out of the prison would be so significant.

So think about Guantanamo in that respect. You had folks who were captured largely in Afghanistan in early 2002. And many of them were transported to this legally black, legal black hole that was created. And initially and for many years, the Bush Administration simply refused to grant them any rights at all. But most significantly, they would not bring them out of the prison so that folks could see if they were dead or alive, or whether their loved ones could figure whether they were still there. And they refused to name them, and most significantly they refused to say what the charges were against them. So actually, in some ways, it was the most rudimentary, the minimalist sense of habeas, that was the first thing that you would think about in the Guantanamo case. And indeed, that's the way that the U.S. Supreme Court addressed the issue when it, in a series of cases starting in 2004.

CHRISTIAN BARRY: I see, so even when people are talking about Guantanamo, or what's been denied, the protections that have been denied to prisoners there, it's not just this maximalist reading, but it is indeed the minimalist reading. So what kinds of reasons, I mean you mentioned a couple of things that you know, nobody may know if your rights are violated, or there are some signs that we can at least read off a prisoner by seeing him which would lead us to make some relatively well informed views about um beliefs about how they've been treated, but of course many rulers could just produce these people and then put them back in and continue mistreating them. So maybe talk a little bit more about what kinds of ...

LARRY MAY: Sure

CHRISTIAN BARRY: ... what kinds of um explanations there might be to attribute such significance. Why would it seem to be such a threat to rulers?

LARRY MAY: Yeah, that's the central question, of course. Why is it that presidents, kings, and even tyrants, have been deterred, or have felt that they can't do what they want to do because a worry about habeas corpus. And, so, I think it's actually a complex set of factors that are involved. It can't just be, especially if we're thinking about tyrants, that the tyrant is just is somehow worried about being shamed. I think it's rather that there's a worry about the destabilizing effect that this would have on the legitimacy of the ruler. And the two things that are most important that are often mentioned as well, is that there is a concern about what's often referred to as being disappeared that you'll find in especially through Latin America.

There is a book that Jacobo Timmerman wrote called *A Prisoner without a Name, a Cell without a Number* that I think well illustrates what the problem is. So if you are denied a habeas right or something like it, what it means is that you can be put in prison and effectively lost. And along with you being lost, most of your rights are lost as well. So that's part of it. And then, Christian, as you're also right to point out, there's a sense that, you can find this in the writings about habeas, going back hundreds of years, there's also a sense that if you were to have to produce the body of the prisoner there would signs on the prisoner's body that would indicate possible abuse. If the prisoner has been tortured, typically there will be quite evident signs when of it the prisoner is produced. If a prisoner has been killed, it will be obvious after a while. It's only so long that someone can, that the jailer can say, well we've lost the person or we don't know where

the person is. At a certain point it becomes crystal clear to all that the prisoner has been killed. The other thing that's really crucial is the issue of the rule of law, that if a person can be incarcerated in this way, and effectively to lose one's rights, what you have is a imposition of an individual's will, within a political structure, that somehow takes form, that stands in stead of procedures that should be, that would be followed that would constitute a rule by law instead of a rule by man as it were.

CHRISTIAN BARRY: Well, I wanted to push you just a little bit on this idea of a denial of rights, because of course we can understand why dictators and people who are shameless might worry about having their misdeeds exposed. But there are some arguments that are actually legally produced by people who I don't think are necessarily shameless or are dictators, and they certainly don't conceive of themselves that way, and that is that they very much think of at least curtailing habeas as a way not of denying people of rights, but as a way of offering security for the rights that we actually have.

LARRY MAY: Right.

CHRISTIAN BARRY: So if you think of rights as having two dimensions, one as how extensive they are and also how secure they are, and the argument always is, and certainly this has been present in the discourse about Guantanamo, that yes, it's certainly true that the scope of certain rights may need to be narrowed both the content and who it is extended to, that this is essential, that this is important for securing the rights that we have.

LARRY MAY: Right, and so, the question is, whether what you gain by denying habeas corpus actually gives you a kind of net benefit. And you can certainly understand security in a certain way so that it involves rights. And that's absolutely right. So the Bush Administration for instance concerning Guantanamo has claimed that if they had had to treat these people as having especially the right of habeas corpus, that this would have had a negative impact on the War on Terror. And that would have jeopardized a whole range of rights for citizens in the United States. The United States Supreme Court has considered those claims in several important cases in the last few years and has rejected each one of them. And I think that's especially important.

If you just think about U.S. law for a minute, habeas corpus is not in the Bill of Rights. Habeas corpus is the only right that is in the Constitution itself. And this is something that has been brought up in several of the most recent Supreme Court decisions as being a reason why the government cannot, even if they think there is a threat that denying this right would help them to counteract, that they can't do it, that they can't deny that right. At least not for very long. Remember that the Guantanamo case is especially egregious because it's been going on for seven and a half years by now, and this is the thing that the Supreme Court has keyed on. But the interesting thing is that the habeas right, because of its position within the Constitution, looks like it is actually thought of as a foundation, as part of the foundation. The Bill of Rights, to a certain extent have that character as well. But they were, they're amendments to the Constitution, they have a different kind of legal status. And then the issue is whether there's a different kind of moral status that we can attribute to this. So, the question I guess would be what exactly is the security threat by bringing someone forward out of the dungeon as it were and declaring what the charges were against that person.

CHRISTIAN BARRY: We're going to take a quick break and return with more from Larry May on habeas corpus.

MATT PETERSON: You're listening to Public Ethics Radio with myself, Matt Peterson, and your host, Christian Barry. We're talking to Larry May about habeas corpus.

CHRISTIAN BARRY: In your view, do the prisoners at Guantanamo pose a sufficient threat that might merit the suspension of habeas rights?

LARRY MAY: It's just not clear. And the Bush administration, concerning the Guantanamo cases, has not been able to make it clear what exactly they think the threat to security is by producing these people. Now, of course, if you had to have a full scale trial afterwards, you would, and there would be all sorts of questions can be brought in, there may be that certain disclosures would be ones that have some kind of threat to national security. But the stripped down right of habeas corpus, the one that prisoners are claiming, it's hard to see why that would have any effect on the rights of others, adverse effect on the rights of others. In fact, as I say, for the last 800 years, the claim has gone the other way, Keith Olbermann being the only you know the most recent to make this claim. That somehow if you don't protect this right, then all the other rights in a society are going to be jeopardized, not that somehow they will be made more secure.

So you move from, in some ways I think it's a fascinating story, you move from an incredibly simple, innocuous right, to something that ends up challenging the government in a certain way if it's actually recognized. And that's the sort of, that's been the history of habeas over the years. Indeed, a friend of mine in England wrote to me recently to say that he was talking to someone in the Ministry of Justice, sorry the Ministry of Defense, to say that the spam filters were set in such a way so that she could not receive any emails with the words "habeas corpus" in them. So in the U.K. at the moment, which has also been greatly trying to diminish habeas rights, they're so worried about this still that they actually have adopted this policy. Um, similarly I guess in the recent presidential debates about this, there's been quite a bit of controversy about how habeas should be regarded, with some of the candidates suggesting that uh, habeas should be much more restricted in the United States than it is at the moment.

CHRISTIAN BARRY: OK, Larry you mentioned this point about habeas becoming an issue in the U.S. election, and certainly people like Senator McCain and also Justice Roberts, who wrote the dissent in the recent Supreme Court decision striking down as unconstitutional the Military Commissions Act. Now, the claim that McCain makes, and we can listen to the audio in a moment, is that um, yes, habeas is important, yes we're against torture, yes we recognize all the supports of these rights, but it's simply a category mistake, it's a fundamental mistake to think that habeas should be extended to prisoners in Guantanamo because they simply have a different status.

JOHN MCCAIN: The United States Supreme Court yesterday rendered a decision which I think is one of the worst decisions in the history of this country. Senator Graham and Senator Lieberman and I had worked very hard to make sure that we didn't torture any prisoners, that we

didn't mistreat them, that we abided by the Geneva Conventions, which applies to all prisoners. But we also made it perfectly clear, and I won't go through all the legislation we passed, and the prohibition against torture, but we made it very clear that these are enemy combatants, these are people who are not citizens, they do not and never have been given the rights that citizens of this country have. And my friends there are some bad people down there. There are some bad people. So now what are we going to do. We are now going to have the courts flooded with so-called, quote, habeas corpus suits against the government, whether it be about the diet, whether it be about the reading material. And we are going to be bollixed up in a way that is terribly unfortunate, because we need to go ahead and adjudicate these cases.

CHRISTIAN BARRY: And as Justice Roberts put it, slightly more prosaically, “the dangerous mission assigned to our forces abroad is to fight terrorists not serve subpoenas.”

LARRY MAY: So, I disagree with McCain and Roberts quite strongly about this. I think that the issue is rather clear-cut. The Bush administration tried to create a legal black hole, indeed one of the Bush administration officials described it as the legal equivalent of outer space. And this is what they tried to create in Guantanamo, where there was going to be a situation where they could stash people for long periods of time without any kind of recognition of rights. Now this is something that the United States government created. So the issue of whether these detainees are citizens or not is irrelevant. Indeed, the Geneva Conventions say that there cannot be situations where there are gaps. That the Geneva Conventions protect prisoners in all situations, and that something like what happened in Guantanamo is simply not allowed. So for McCain to say that the Military Commissions Act that was set up by Congress was consistent with the Geneva Conventions was simply wrong.

CHRISTIAN BARRY: But of course McCain and others allege that the people that are in Guantanamo are often very bad people indeed. And isn't this the heart of the matter?

LARRY MAY: I don't think that it's relevant whether these folks are bad people or not. First of all, I would point out that there has been no determination of whether they are bad or not, and that's the whole point. The whole point is that these folks have been incarcerated without having charges declared against them, and hence no opportunity for them to even begin to mount a defense against the claims that have been made. So we don't actually know whether there are bad people down there.

CHRISTIAN BARRY: You know one of the claims that is made is that we're not denying the human rights of these people. We're simply denying the applicability of a certain legal order. So habeas corpus is not typically extended to enemy combatants during war. Is that incorrect? And if so, what kinds of protections are typically offered to prisoners, and is this adequate?

LARRY MAY: Right, so typically habeas is something that is, that is a right or petition that is launched in peacetime. That's true. And typically there are different rules that apply during wartime. There are, of course, corresponding rules that say that after a certain period of time, a reasonable period of time, after the hostilities have ended, the people who are still keeping the prisoners in incarceration have to determine whether they are legitimately detainable. So what the Bush administration has tried to do in Guantanamo Bay is to create a situation where neither

the laws of the United States apply in peacetime, the most important right being the right of habeas corpus as I've indicated, and where the standard rights that occur in the battlefield, that are epitomized in the Geneva Convention, that those rights don't apply either because these folks were enemy combatants, that they were, as the Administration first argued, illegal combatants, which means that they simply didn't fit the category of prisoners of war. They were able to say that these folks simply didn't fall into either one of those categories. So if you were looking at this as a matter of peacetime situation no rules applied. And if you were looking at it as a situation of war, similarly, no rules applied. So that McCain is only looking at half the story. I mean when he's says they're not citizens of the United States, that's fine, if they were regarded as fully as prisoners of war, then there's a whole battery of rights, procedural and substantive, that would have to have been afforded them, those weren't afforded them either.

CHRISTIAN BARRY: Are these enemy combatants, or how should we really think about these people? And think about... It seems obvious that some kind of legal order should apply to them. The President, and McCain, and Roberts will argue of course that we already do have a legal system through this Military Commissions Act which is adequate, but even putting that to one side, we still do have to have some understanding of what their status is and what kind of legal order we should be trying to apply to them.

LARRY MAY: The prisoner of war status makes most sense, and Roberts's position on this makes the most sense, when someone is captured on the battlefield and is sent back behind enemy lines, and resources are, have to be expended then in order to then secure this prisoner from escape. And often what happens is that those resources are taken away from the battlefield situation. And so you have, there's a kind of a conflict between how much should be required of a of the folks who have um captured these prisoners and I guess you could say that the underlying position of the Geneva Convention was you don't have to treat these people with full rights, as if they were in a country during peace time.

But Roberts is simply wrong to think that those kinds of arguments make sense concerning Guantanamo. We wouldn't be drawing resources away from the battlefield in Iraq and Afghanistan if we were to give these folks minimal legal rights at Guantanamo. So that part of it I think is mistaken. And similarly, so then if you, if you shift and then say well what rights should we give them outside of the protection of the normal rules of war, I think McCain is wrong to think that it would somehow be a great burden on the U.S. courts if we were to allow a few hundred people to be bringing complaints against how they were treated, and the legitimacy of their incarceration at Guantanamo. The courts have been dealing with petitions of a similar sort from those on death row, and those folks vastly outnumber the people the number of people who are held at Guantanamo. My worry is that they not be given any kind of legitimate status at all. And if they're not given um a status that affords them some rights then we're in a very bad situation. And this is what McCain I think has failed to recognize.

CHRISTIAN BARRY: In a recent rejoinder, Obama made the following claim about habeas and why we have it and what it's importance is. And I wondered if you might respond, just saying whether or not you think the risks that are being pointed to here are real risks.

BARACK OBAMA: What I have also said is this: that when you suspend habeas corpus—

which has been a principle, dating before even our country, it's the foundation of Anglo-American law—which says, very simply, if the government grabs you, then you have the right to at least ask, why was I grabbed and say, maybe you've got the wrong person.

The reason you have that safeguard is because we don't always have the right person. We don't always catch the right person. We may think this is Mohammed the terrorist, it might be Mohammed the cab driver. You may think it's Barack the bomb thrower, but it might be Barack the guy running for president.

CHRISTIAN BARRY: Yes and it's not just Obama who's making claims like this of course. Bruce Ackerman from Yale Law School, a recent book, effectively argued that the Military Commissions Act “authorized the President to seize American citizens as enemy combatants, even if they have never left the United States, and once thrown into military prisoner, they cannot expect a trial by their peers or any of the other normal protections in the Bill of Rights.”

LARRY MAY: Right, well, I, from what I've said before, I guess it should be pretty clear that I'm much more sympathetic to Obama's claim, and that's what I said a minute ago, when I said that there's a sense in which you don't know whether the person in Guantanamo is a bad person or evil person as McCain and other's have said, until there's been at least some kind of preliminary hearing. Now the stripped down version of habeas doesn't even ask for that much. It says that you've got to bring the person forward and declare what the charges were, but the problem is that the Bush Administration is worried that even by declaring the charges it may disclose some kind of wrongdoing on the part of the government. And that's the other issue that's so crucial here. What habeas corpus and other procedural rights do is they act as a way to stop governments from engaging in wrongdoing by the risk of public disclosure and by the corresponding accountability that comes from that.

I would say that much for sure. The other side of it though is that I think that there is an issue whether the U.S. courts should extend habeas corpus rights outside of the U.S. I think that's a reasonable issue. Now there is a question about whether Guantanamo is strictly speaking Guantanamo Bay Naval Station is outside the jurisdiction of the United States. But leave that go for a minute. I agree that it's not clear that the United States courts should be involved in habeas petitions from outside the United States. And that's one of the reasons why I'm arguing that something like the right of habeas corpus should be an internationally recognized fundamental right that has the status of jus cogens, that is, the highest of international rights from which there is no derogation possible. Then the question would be how should they be best protected. And I think rather than having U.S. Courts doing so, and even rather than having regional courts doing so, regional human rights commissions and courts doing this, that this should be something that has play at a truly international court level, something like the International Criminal Court.

CHRISTIAN BARRY: How are these rights protected at present?

LARRY MAY: Right, so at present habeas is not recognized by any truly international court. International law at the moment is primarily a matter of multilateral treaty. And so the International Criminal Court was begun as a convention that was held under the auspices of the United Nations, and after 60 nations signed on, ratified it, then it went into effect. So now I think

we've got somewhere around 110 states that have signed on, out of approximately 200, so you've got more than half the states that are involved. But you also have, and this is the important thing, I guess, is there is a fair amount of gap filling that occurs as well. Recently the United States said that they thought that um, the leader of the Sudan, political leader of the Sudan, Bashir, should indeed be indicted by the ICC in the Hague and that they would support such an indictment and arrest warrant. Now it turns out that Sudan is not a party to the International Criminal Court treaty, nor is the United States, so what's happening here? So the United States is trying to use that particular international forum to get something that it wants in a different part of the world, seemingly ignoring the point that these are multilateral treaties, and that the U.S. isn't a member, nor is the Sudan. So there is a kind of what international lawyers would call a growing customary international law that is emerging that somehow tries to knit together all of these treaties that are in play. And I think somewhat by a slight of hand, then to capture all the nations of the world under that umbrella that has been created. My contention is that if you had something like an international Magna Carta, that that would be the way to address this. But initially I think the reason why Magna Carta could get off the ground is because it didn't address substantive issues, it only addressed procedural issues, whereas I was trying to argue before, they're somehow seen as more innocuous, less controversial, and as a result, easier somehow to get through.

CHRISTIAN BARRY: Until we get to specific cases.

LARRY MAY: Until we get to specific cases. But I do think that a an international treaty on procedural rights would have quite a lot of support right now.

CHRISTIAN BARRY: Larry May, thanks so much for joining us on Public Ethics Radio.

LARRY MAY: Christian, thanks so much, I really enjoyed it.

MATT PETERSON: Thanks for listening to Public Ethics Radio. And thanks especially to Barbara Toterdell, who helped immensely in the production of this episode. We'll be back soon with another conversation about public ethics. In the meantime, you can find out more about us and our guests on the web at www.publicethicsradio.org.