The Writ of Prohibition in New York—Attempt to Circumscribe an Elusive Concept

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NOTES AND COMMENTS

THE WRIT OF PROHIBITION IN NEW YORK—ATTEMPT TO CIRCUMSCRIBE AN ELUSIVE CONCEPT

Steeped in its common law ancestry, the “ancient and just” writ of prohibition has always been said to lie to prevent a lower court from acting either totally without jurisdiction or in excess of the jurisdiction it did possess. Thus, to determine whether this extraordinary remedy should be granted, courts must carefully examine different factual settings in order to make the fine distinction between those situations in which jurisdiction was absent or had been abused and those in which the lower court had merely acted erroneously.

Although the concept of jurisdiction which lies at the heart of any argument for or against the issuance of prohibition is not inherently difficult, the formulation of a workable framework within which this concept could be applied has proved troublesome. Recently, in LaRocca v. Lane, the New York Court of Appeals attempted to present such a framework.

Acknowledging the difficulty typically encountered in applying traditional criteria for determining the appropriateness of issuance of the writ, the LaRocca court nevertheless noted that “the absence of bright lines of demarcation in the law is not unusual.” Refusing, therefore, to draw hard and fast guidelines to determine when a court acts in excess of its jurisdiction, the court voiced confidence in the ability of courts in general to determine the writ’s applicability. An examination of both the writ’s historic background and the


2 3 W. Blackstone, Commentaries *112.

A prohibition is a writ issuing properly only out of the court of king’s bench, being the king’s prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas, or exchequer; directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.

Id. (footnotes omitted).


5 Id. at 580, 338 N.E.2d at 611, 376 N.Y.S.2d at 99.
court of appeals' interpretation in LaRocca indicates that the writ of prohibition has retained the essential characteristics of its English and New York heritage.

HISTORICAL BACKGROUND

The Writ's Common Law Birth

The origin of prohibition can be traced to the "prerogative writs" which first became effective remedies during England's Tudor period. The development of these prerogative writs was spawned by the four centuries of conflict over jurisdiction following the separation by William the Conqueror of the ecclesiastical and temporal courts of England. This separation of judicial authority prompted the official court of the Crown, the King's Bench, to develop the prerogative writs as a means of extending and consolidating its own jurisdiction.

The writs were utilized to control both the ecclesiastical and inferior temporal courts. At first, only the King's Bench issued writs of prohibition, but in later years other courts, such as the courts of Chancery, Common Pleas, and the Exchequer, also began to issue the writ when justice would be served thereby.

The existence of two autonomous judicial systems in Tudor England produced great conflict. Since neither the common law court system nor the ecclesiastical court system was considered superior to the other, the common law courts lacked the authority to reverse the judgments of the ecclesiastical courts. The writ of prohibition thus became a very important vehicle for circumscrib-

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6 See G. Radcliffe & G. Cross, The English Legal System 59-60 (3d ed. 1954). The King's Bench had at its command a number of special writs — the so called "prerogative writs" — by the issue of which it could control the activities of inferior authorities throughout the realm. Id. at 59 (footnotes omitted). These special writs included the writs of habeas corpus, prohibition, quo warranto, mandamus, and certiorari. See id. at 59-60.

7 T. Plucknett, A Concise History of the Common Law 165 (4th ed. 1948). The writs apparently began as administrative orders of superior officials directing subordinates to do a particular act. Id.

8 See 3 W. Blackstone, Commentaries *112.

9 See id. at 665.

10 See 2 F. Pollock & F. Maitland, The History of English Law 665 (2d ed. 1959) [hereinafter cited as Pollock & Maitland]. Although the law courts did not consider the ecclesiastical courts inferior, they nonetheless jealously guarded their own jurisdiction. If a suit was instituted in the Bishop's court concerning some matter which the King's justices believed did not lie within the jurisdiction of that court, they, on petition of the defendant, would issue prohibition to prevent further proceedings. 1 id. at 479.

11 See id. at 665.
ing the power of the ecclesiastical courts\textsuperscript{12} and preventing them from exercising jurisdiction over temporal matters.\textsuperscript{13} Accordingly, a writ would issue to an ecclesiastical court which acted in some manner considered “contrary to the general law of the land, or manifestly out of the jurisdiction of the Court.”\textsuperscript{14} Thus, if an ecclesiastical court chose to meddle with a purely temporal civil or criminal matter for which there was a remedy at common law, as opposed to ecclesiastical law, it was said to have exceeded its jurisdiction and a writ of prohibition would lie.\textsuperscript{15} An ecclesiastical judge who proceeded despite the issuance of such a writ was subject to being “haled before the [King’s] justices and punished.”\textsuperscript{16}

The use of the writ as a means of control over inferior temporal courts was somewhat more restricted in that the writ would issue only in those cases where the court acted without or in excess of its jurisdiction.\textsuperscript{17} The writ would not issue to correct “mere irregularities” or questions of law decided erroneously.\textsuperscript{18}

\textsuperscript{12} “In their jealousy of the Church courts the common lawyers often applied for prohibitions even where the Church courts did have jurisdiction.” A. Kiralfy, The English Legal System 187 (2d ed. 1956).

\textsuperscript{13} See T. Plucknett, A Concise History of the Common Law 463 (4th ed. 1948). The courts often came to bitter confrontation over what constituted a temporal matter outside the jurisdiction of the ecclesiastical courts. For example, at early common law, the church courts exercised jurisdiction over defamation actions. The law courts soon became jealous of this power and began to issue writs of prohibition to prevent the church courts from entertaining these actions. A compromise of sorts was reached when the King’s Court agreed to prohibit church courts from entertaining defamation actions only when the defamation contained the imputation of a crime which was cognizable in the common law courts. In later years, however, the law courts gradually chipped away at the jurisdiction of the ecclesiastical courts, ultimately leaving them with no authority at all to hear defamation actions. Id.

A great dispute also arose as to which courts had jurisdiction to entertain actions involving contract law. The ecclesiastical courts claimed authority to enforce all promises whether made by pledge of faith or by oath. Henry II, nevertheless, asserted that the royal courts had jurisdiction over the law of contract, while Becket, the Archbishop of Canterbury, claimed at least concurrent jurisdiction for the church courts. Henry II ultimately prevailed, with the law courts standing everready to prohibit the church courts from entertaining a breach of faith cause of action unless the subject matter of the promise was not cognizable by the temporal courts. 1 Pollock & Maitland, supra note 10, at 128-29.

\textsuperscript{14} 2 W. Odgers & W. Odgers, The Common Law of England 510 (R. Burrows ed. 1927) (citation omitted). See also A. Kiralfy, The English Legal System 187 (2d ed. 1956). The writ of prohibition was originally obtained as a matter of privilege, rather than of right. It was an elastic writ, adaptable to many factual situations. Normally, the writ recited that the church courts were interfering in some matter within the temporal sphere. Id.


\textsuperscript{16} 2 Pollock & Maitland, supra note 10, at 665.

At common law, an appeal could be taken from the issuance of a writ of prohibition. Known as the “writ of Consultation,” such an appeal was heard by two chief justices of the common law courts. If the chief justices decided that the writ of prohibition did not lie, then the church court was authorized to continue the proceedings. Id.

\textsuperscript{17} Theoretically, a writ of prohibition would also issue if one of the judges was an “interested party.” 2 W. Odgers & W. Odgers, The Common Law of England 511 (R. Burrows ed. 1927).

\textsuperscript{18} Id.
In general, the writ operated more as an instrument for controlling ambitious courts attempting to transcend their jurisdictional confines than as a corrective device. Indeed, it was this very power struggle, particularly between the law and ecclesiastical courts, which fostered the development of the writ of prohibition and began to shape its nature and applicability.

The Common Law Writ in New York

Culled from its English heritage, the writ of prohibition, although no longer an instrument employed in a judicial power struggle, found its place in New York law. The first decision of major importance concerning the writ was rendered by the court of appeals in 1860. In Quimbo Appo v. People, prohibition was sought to prevent the trial court from ordering a new trial subsequent to the defendant’s felony conviction. Concluding that the lower court had no jurisdiction to order the second trial, the court of appeals upheld issuance of the writ.

In support of its decision, the court reasoned that the writ should lie, not only in the situation where an inferior court lacked jurisdiction, but also where a tribunal having jurisdiction exceeded its “legitimate powers.” Based upon the premise that preventing “the exercise of an unauthorized power” is preferable to correcting such an exercise upon its occurrence, Quimbo Appo recommended a liberal use of the writ.

In 1875, Thomson v. Tracy offered a similar explanation for when the writ of prohibition would lie. There, however, the court of appeals, concerned with potential abuse of the writ, cautioned

19 See 1 W. Holdsworth, A History of English Law 228-29 (7th ed. 1956); The Ancient and Just Writ, supra note 1, at 334.

20 The law courts were so anxious to maintain their jurisdiction that they would ignore a litigant’s express promise to submit to the jurisdiction of a church court and renounce his right to seek the writ of prohibition. It was the King’s right to prohibit the church courts from proceeding, not the individual’s. Thus, if the litigant later changed his mind and sought prohibition, it still might be granted and his prior renunciation deemed ineffective. Although the litigant was liable for breach of promise and could be imprisoned, the law courts retained authority to issue the writ. 1 Pollock & Maitland, supra note 10, at 129.

21 20 N.Y. 531 (1860).

22 In England, the writ would issue only from a superior to an inferior temporal court. See 3 W. Blackstone, Commentaries *112-13. True at common law, this principle continues to enjoy vitality today. Colin v. Appellate Division, 3 App. Div. 2d 682, 159 N.Y.S.2d 99, 100 (2d Dep’t), motion for leave to appeal denied mem., 3 App. Div. 2d 721, 160 N.Y.S.2d 812 (2d Dep’t 1957) (second department refused to grant prohibition to prevent the first department’s enforcement of a rule specially promulgated by first department).

23 20 N.Y. at 541.

24 Id. at 542. See also The Ancient and Just Writ, supra note 1, at 338.

25 60 N.Y. 31 (1875). The Thomson court denied a motion seeking to invoke the writ as a bar to an appeal of a judgment.
that prohibition should not "be made a drag net by means of which all controverted and litigated questions between individual suitors may be brought into court and tried and determined."\textsuperscript{26} Thomson and subsequent cases continued to propound the basic principle that the writ would not lie to correct errors or mistakes in practice; it would only lie where "the inquiry relates to jurisdiction."\textsuperscript{27} At the same time, lingering in the background, and asserted by the court of appeals in \textit{People ex rel. Mayor v. Nichols},\textsuperscript{28} was the common law doctrine, applicable to the ecclesiastical courts,\textsuperscript{29} that the writ would lie to prevent the transgression of some "fundamental principle of justice."\textsuperscript{30} Had this principle been fully accepted, the scope and utility of the writ probably would have been greatly expanded.

With the advent of the twentieth century, however, the judicial attitude concerning the writ of prohibition underwent a marked change. Rather than adopting the liberal \textit{Quimbo Appo} approach toward granting the writ, the court of appeals, in \textit{People ex rel. Livingston v. Wyatt},\textsuperscript{31} strictly defined the occasions for which the writ would lie. In \textit{Livingston}, a subpoena commanding the defendant's presence at an investigation was void on its face and therefore "called for obedience to its commands on the part of no one."\textsuperscript{32} Nevertheless, the court held that the writ of prohibition was not the proper remedy to correct this improper use of criminal process since prohibition issues only where the error cannot be remedied "by ordinary proceedings at law, or in equity, or by appeal."\textsuperscript{33} The court was satisfied that another remedy, regardless of its inconvenience, existed, \textit{viz}, the relator could disobey the

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\textsuperscript{26} Id. at 37. The court stressed that the writ has a proper but a restricted and limited office, and it cannot be enlarged so as to bring within its scope and operation questions merely collateral or incidental to its direct purpose . . . .

\textit{Id.}

\textsuperscript{27} \textit{People ex rel. Mayor v. Nichols}, 79 N.Y. 582, 591 (1880).

In addition to the requirement that the error sought to be remedied by prohibition pertain to jurisdiction, courts have consistently held that issuance of the writ, regardless of the circumstances, "is not demandable as matter of right," \textit{People ex rel. Adams v. Westbrook}, 89 N.Y. 152, 155 (1882), but rests in the sole discretion of the court. \textit{E.g.}, \textit{id.}; \textit{In re Quill}, 3 App. Div. 2d 717, 159 N.Y.S.2d 312 (2d Dep't) (mem.), \textit{motion for leave to appeal denied mem.}, 3 App. Div. 2d 764, 161 N.Y.S.2d 577 (2d Dep't 1957); \textit{Potsdam Cent. School Dist. No. 2 v. Frank}, 56 Misc. 2d 605, 289 N.Y.S.2d 603 (Sup. Ct. St. Lawrence County 1968).

\textsuperscript{28} 79 N.Y. 582 (1880).

\textsuperscript{29} See note 14 and accompanying text \textit{supra}.

\textsuperscript{30} 79 N.Y. at 592.

\textsuperscript{31} 186 N.Y. 383, 79 N.E. 330 (1906), \textit{discussed in The Ancient and Just Writ, supra} note 1, at 342.

\textsuperscript{32} 186 N.Y. at 393, 79 N.E. at 334.

\textsuperscript{33} \textit{Id.} at 394, 79 N.E. at 334, \textit{quoting People ex rel. Adams v. Westbrook}, 89 N.Y. 152, 155 (1882).}
subpoena and, if subsequently cited for contempt and imprisoned, have an absolute right to seek a writ of habeas corpus.34

The writ of prohibition underwent no further change during the next 30 years. Then, in 1935, the court of appeals, in Culver Contracting Corp. v. Humphrey,35 added a new twist to the rules governing issuance of the writ. In discussing the propriety of the award of damages in a condemnation proceeding, the court concluded that the trial court had no jurisdiction to award certain consequential damages.36 Notwithstanding the reviewability of this error on appeal, the court granted prohibition, stating that the writ would lie where it “furnishes a more effective remedy”37 than the remedy available by appeal. With the exception of a few cases,38 however, the “more effective remedy” doctrine enunciated in Culver has rarely been invoked to support issuance of the writ.39

34 186 N.Y. at 394-95, 79 N.E. at 334. In the same year that Livingston was decided, the court of appeals handed down People ex rel. Hummel v. Trial Term, 184 N.Y. 30, 76 N.E. 732 (1906), which once again reinforced the principle that the writ of prohibition would lie only where no other remedy existed. In Hummel, a writ was sought to prevent a trial judge from refusing to quash an indictment allegedly obtained on the basis of the petitioner’s forced testimony against himself before the grand jury. Since the denial of the motion to quash the indictment was reviewable on the appeal, the court refused to grant prohibition. Id. at 33, 76 N.E. at 733. Accordingly, in People ex rel. Jerome v. Court of General Sessions, 185 N.Y. 504, 78 N.E. 149 (1906), the court of appeals issued a writ of prohibition to prevent a trial court from granting a new trial to a defendant who had been convicted for selling falsely labeled merchandise, giving two reasons for its decision: First, the trial court had no authority to order a new trial; and second, the prosecution would have been unable to appeal any such order. Id. at 506-07, 78 N.E. at 150. In line with this reasoning, in People ex rel. Cooley v. Wilder, 234 App. Div. 256, 225 N.Y.S. 218 (4th Dep’t 1932), and in Mecca v. Woltz, 142 Misc. 535, 255 N.Y.S. 224 (Sup. Ct. Erie County 1932), prohibition was withheld since denial of a jury trial was remediable on appeal.


36 Id. at 33-34, 196 N.E. at 629. The consequential damages involved were damages to adjoining property which resulted from the construction of a subway under the condemned property.

37 Id. at 39, 196 N.E. at 631. The court considered the writ of prohibition a more effective remedy because the trial court’s improper consideration of the consequential damages suffered by an adjoining property owner would necessitate the admission of extraneous testimony resulting in a prolonged trial at an added expense. Id. at 40, 196 N.E. at 632.

38 In Murtagh v. Liebowitz, 303 N.Y. 311, 101 N.E.2d 753 (1951), the court of appeals directed special term to grant the writ to petitioner who was being prosecuted in a court which patently lacked jurisdiction even though appeal or habeas corpus could have been sought. Similarly, in Melish v. Baker, 6 App. Div. 2d 819, 176 N.Y.S.2d 362 (2d Dep’t 1958) (per curiam), prohibition was granted to restrain enforcement of a judgment of dispossessing the availability of other remedies including reopening the proceedings and vacating or modifying the order. And, in Elcock v. Boccia, 12 Misc. 2d 955, 173 N.Y.S.2d 311 (Sup. Ct. N.Y. County 1958), a writ of prohibition was granted to direct a justice of the municipal court to vacate a stay of a warrant of eviction despite the availability of a review on appeal of the order granting the stay. See also The Ancient and Just Writ, supra note 1, at 351-53.

39 Because of the lack of consideration given Culver by the court of appeals in recent decisions, it appeared that the “more effective remedy” doctrine had lost its vitality. In
Codification of the Writ in New York

In 1937, the New York Legislature adopted article 78 of the Civil Practice Act which abolished the common law classifications distinguishing writs of prohibition, mandamus, and certiorari. In place of these classifications, a single remedy, “Proceeding Against a Body or Officer,” was made available. This was intended to avoid penalizing the litigant who possessed a valid grievance but mistakenly sought the wrong writ to remedy a particular error. Notwithstanding the uniformity of the procedure for obtaining the three great writs, the substantive common law applicable to each of the writs continued to govern their issuance. No remedy that had been available through these writs prior to the adoption of article 78 was lost as a result of the procedural unification.

When New York’s procedural law was recodified in 1963, with the adoption of the Civil Practice Law and Rules, the substantive

LaRocca v. Lane, 37 N.Y.2d 575, 338 N.E.2d 606, 376 N.Y.S.2d 93 (1975), however, the court, although denying prohibition, spoke favorably of Culver. See note 199 and accompanying text infra.


The primary purpose of the new article was to wipe out technical distinctions which had been a snare for suitors approaching the court for relief and which, at times, hampered the court in granting relief for proven grievances.

Id. at 174, 33 N.E.2d at 80.


Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. . . . Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

(1) which is not final or can be adequately reviewed by appeal to a court or to some other body or officer . . . .

(2) which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

The above-enumerated restrictions on the use of what is still known as an article 78 proceeding have been held inapplicable to a petition for a writ of prohibition. The phrase, in § 7801, “to challenge a determination” has been interpreted to mean the same as the phrase “to review a determination” which was found in § 1285 of the Civil Practice Act, see note 40 and accompanying text supra. The definition of “to review a determination,” as set forth in § 1284 of that Act, “clearly excluded proceedings in the nature of prohibition from the limitations in § 1285.” 8 W. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE § 7801.06, at 78-23 (1974). Since § 7801 of the Civil Practice Law and Rules was not intended to change the substantive law, these limitations have similarly been held inapplicable to the writ of prohibition. Id., citing Civil Serv. Employees Ass’n v. Helby, 31 App. Div. 2d 525, 297 N.Y.S.2d 813 (3d Dep’t), aff’d per curiam, 24 N.Y.2d 993, 250 N.E.2d 230, 302 N.Y.S.2d 822 (1969). But see Pichel v. Wells, 38 App. Div. 2d 632, 326 N.Y.S.2d 887 (3d Dep’t 1971).
distinctions between the writs remained as significant as they had been under the Civil Practice Act. Neither legislative codification, therefore, had any effect upon the courts' attitude as to when the writ of prohibition would lie.

In general, when confronted with a petition for a writ of prohibition, the courts, in both criminal and civil cases, continued to follow the broad guiding principles established long before the 1937 codification. In the strong tradition begun by Livingston, virtually ignoring Culver, the courts adhered to the principle that prohibition would issue only where an adequate remedy did not exist at law, in equity, or by appeal. For example, in Consolidated Edison Company v. Murtagh, the petitioner sought a writ of prohibition to prevent the Magistrate's Court of the City of New York from considering an alleged violation of the Smoke Control Law. The Supreme Court, Bronx County, finding in this particular instance that the court had jurisdiction to adjudicate the alleged violation, went further to comment that "[t]he argument of petitioner, that months would elapse before appellate tribunals could pass upon the jurisdictional question presented, does not warrant the granting of this extraordinary remedy."
One other basic principle often resorted to by the courts, both before and after the enactment of the Civil Practice Act, is the maxim that the writ lies only to restrain judicial or quasi-judicial functions; it does not lie to correct an error in an administrative proceeding.\(^{53}\)

**The Postcodification Writ**

*The Writ’s Applicability in Civil Law*

Subsequent to the 1937 codification, most civil cases in which the writ has been petitioned for have been quasi-judicial or administrative proceedings. Thus, as noted above, since prohibition is available only to remedy an error in a judicial proceeding or in an administrative proceeding deemed quasi-judicial, the writ has been granted sparingly. Nevertheless, there have been many occasions on which petitioners have sought to restrain some form of action by an administrative official. Inevitably, even where the challenged action is considered quasi-judicial, the courts find that judicial in-

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\(^{53}\) In Kaney v. New York State Civil Serv. Comm’n, 190 Misc. 944, 77 N.Y.S.2d 8 (Sup. Ct. Erie County), aff’d mem., 273 App. Div. 1054, 81 N.Y.S.2d 168 (4th Dep’t), aff’d mem., 298 N.Y. 707, 83 N.E.2d 11 (1948), an individual civil service appointee sought to restrain the State Civil Service Commissioner from investigating examinations given by the municipal civil service commission. The court labeled this proceeding administrative and, therefore, outside the sphere of cases in which the writ of prohibition is available to remedy an alleged error. *Id.* at 951, 77 N.Y.S.2d at 16. In DeLia v. McMorrin, 56 Misc. 2d 205, 288 N.Y.S.2d 147 (Sup. Ct. Oneida County 1968), the court emphasized that the writ of prohibition is an extraordinary remedy: “[i]t lies only to restrain judicial and quasi-judicial action by an inferior court or tribunal, and ordinarily this writ does not lie to restrain administrative acts . . . .” *Id.* at 208, 288 N.Y.S.2d at 151 (citations omitted). *See also* White v. Shelley, 44 Misc. 2d 777, 255 N.Y.S.2d 111 (Sup. Ct. Richmond County 1964) (writ denied where sought to prevent a probation officer from operating a drug rehabilitation center); Rivkin v. Garbros, Inc., 183 Misc. 389, 48 N.Y.S.2d 25 (Sup. Ct. Richmond County 1944) (petition for prohibition denied where sought to prevent a New York City marshall from executing a warrant of dispossess alleged to be ineffective against petitioner because he was not made a party to the proceeding); *In re* Lubin, 182 Misc. 835, 51 N.Y.S.2d 728 (Sup. Ct. Queens County 1943) (writ of prohibition denied where sought to restrain clerk from issuing warrant of dispossess against petitioner since all that remained to be done was the ministerial task of the clerk’s issuance of the warrant.

In O’Donnell v. Morrissey, 151 Misc. 315, 272 N.Y.S. 451 (Sup. Ct. Albany County 1934), however, the court held prohibition would lie to prevent a ministerial act if there was no other remedy available and the court acted without or in excess of its jurisdiction. Similarly, in Sesselberg v. Schoeneck, 151 Misc. 267, 272 N.Y.S. 588 (Sup. Ct. Albany County 1933), the court issued a writ restraining the Alcoholic Beverage Control Board from acting in derogation of the statutory requirement that notice of its issuance of licenses be published in the newspapers, an apparently ministerial or administrative function.
tervention prior to the petitioner’s complete exhaustion of his administrative remedies is premature and improper.\textsuperscript{54}

In addition to quasi-judicial or administrative proceedings, judicial disputes involving domestic relations are also a common area of civil litigation in which the writ of prohibition has been frequently sought. The most common claim of error in family court proceedings is that the court does not have jurisdiction over the controversy at hand. In \textit{Dempsey v. O’Brien},\textsuperscript{55} for example, the petitioner alleged that the family court had no jurisdiction to modify petitioner’s support payment to his wife since she was not in danger of becoming a public charge. It being clear that the court had jurisdiction to entertain such a support modification proceeding, the writ was quickly denied.\textsuperscript{56} A cross-motion to dismiss a petition for prohibition was denied, however, in \textit{Wilson v. Family Court}.\textsuperscript{57} There, petitioner challenged the family court’s jurisdiction over him regarding charges which included inducing truancy, harboring truants, and interfering with a truant officer. Finding that the family court was without jurisdiction to adjudicate charges of that nature, the court ruled that it was required to entertain jurisdiction of the petitioner’s application for prohibition.\textsuperscript{58}

\textsuperscript{54} For example, in \textit{St. James Associates v. Gabel}, 36 Misc. 2d 1023, 233 N.Y.S.2d 733 (Sup. Ct. N.Y. County 1962), the petitioner attempted to obtain a writ of prohibition to restrain the administrator of the City Rent and Rehabilitation Administration from modifying or revoking orders granting rent increases to the petitioning landlord. The supreme court denied the writ and held that it would be improper to interfere until all the administrative remedies provided for had been exhausted. \textit{Id.} at 1024, 233 N.Y.S.2d at 734. The same result had been reached in \textit{In re Spina}, 127 N.Y.S.2d 253 (Sup. Ct. Kings County 1953), wherein the petitioning landlords sought to restrain the State Rent Administrator from proceeding to establish a maximum chargeable rent. Holding that the petitioners had failed to exhaust their full administrative remedies, the court denied the writ. \textit{Id.} at 255. \textit{Accord}, Protnicki v. New York State Dep’t of Civil Serv., 18 App. Div. 2d 859, 236 N.Y.S.2d 423 (3d Dep’t 1963) (writ of prohibition would not lie to prevent proceedings by Department of Civil Service to rescind list of those eligible for civil service appointments); Village of Camillus v. Diamond, 76 Misc. 2d 319, 350 N.Y.S.2d 546 (Sup. Ct. Onondaga County 1979), \textit{aff’d mem.}, 45 App. Div. 2d 982, 359 N.Y.S.2d 878 (4th Dep’t 1974) (prohibition was denied to prevent the Commissioner of Environmental Conservation from holding a hearing on the modification of a pollution abatement order).

\textsuperscript{55} 60 N.Y.S.2d 574 (Sup. Ct. Queens County 1946).

\textsuperscript{56} \textit{Id.} at 576. Similarly, in \textit{In re Horowitz}, 287 N.Y.S.2d 276 (Sup. Ct. Kings County 1962), the court denied a writ of prohibition sought to prevent a family court from compelling an attorney to reveal the last known address of his former client. The court was persuaded that the family court had jurisdiction to determine whether the compelled disclosure would be violative of the attorney-client privilege. \textit{Id.} at 277.

\textsuperscript{57} 46 Misc. 2d 478, 259 N.Y.S.2d 602 (Sup. Ct. N.Y. County 1965).

\textsuperscript{58} \textit{Id.} at 479, 259 N.Y.S.2d at 604. Earlier, in Angarita v. Court of Special Sessions, 203 Misc. 12, 113 N.Y.S.2d 196 (Sup. Ct. N.Y. County 1952), a paternity action in which the mother was a resident of Venezuela, the supreme court granted prohibition because the family court lacked jurisdiction. The court explained that ordinarily it should not be anticipated that a lower court will exceed its jurisdiction, but where it is apparent that, based on no question of fact, a lower court has incorrectly determined that it does have jurisdiction the writ of prohibition will lie. \textit{Id.} at 14, 113 N.Y.S.2d at 198.
One final civil area in which applications for writs of prohibition are common is that involving real property actions. In Yaras v. Schenck,59 the petitioner sought a writ of prohibition to halt an allegedly improper condemnation proceeding, claiming that it was excessive and not for a public use. The court held that the initial determination of these issues was within the province of the trial court adjudicating the proceeding and therefore denied the writ.60

The Writ's Applicability in Criminal Law

The writ of prohibition has enjoyed greater success in preventing jurisdictional errors in criminal cases than in civil cases. Perhaps the potential for the imprisonment of a defendant as a consequence of a court's erroneous assumption of jurisdiction has resulted in the more flexible attitude concerning the issuance of prohibition in criminal proceedings.

In criminal law, the writ is most frequently granted in those instances in which it appears that a defendant may "be subject for the same offence to be twice put in jeopardy of life or limb."61 Although the court theoretically does have jurisdiction in such a case, it is commonly stated that by exposing a defendant to double jeopardy, the court goes beyond its legitimate powers.62 Due to its prominence in federal and state constitutions, double jeopardy has become more than just a defense to raise during the prosecution.63 Indeed, the writ of prohibition has emerged as the "traditional remedy"64 to prevent this type of infringement upon a defendant's constitutional rights.65 Furthermore, the fact that an erroneous

60 Id. at 1209, 140 N.Y.S.2d at 626. Thereafter, in Emray Realty Corp. v. Stoute, 6 Misc. 2d 365, 157 N.Y.S.2d 457 (Sup. Ct. N.Y. County 1956), the supreme court granted a cross-motion to dismiss a petition for a writ of prohibition sought to prevent the municipal court from issuing a show cause order in a summary rent proceeding. It was the court's opinion that the petition did not allege facts sufficient to support issuance of the writ. Even if the municipal court lacked jurisdiction to issue the order, no harm was alleged that could not be remedied on appeal. Id. at 368, 157 N.Y.S.2d at 461.
61 U.S. Const. amend. V. Accord, N.Y. Const. art. 1, § 6. In general, prohibition is seldom granted. Double jeopardy is the only clear category of cases in which the probability of obtaining the writ is great; once double jeopardy is shown to exist, the courts are extremely liberal in issuing this remedy.
63 Id. at 476, 199 N.Y.S.2d at 245.
65 See Allen v. City Court, 33 Misc. 2d 356, 224 N.Y.S.2d 1018 (Sup. Ct. Tompkins County 1962). In speaking of double jeopardy and the writ of prohibition, the court stated:
conviction can be remedied on appeal has not had the same impact on issuance of the writ\textsuperscript{66} that the availability of a remedy on appeal has had in civil\textsuperscript{67} and most other criminal cases.

The great majority of cases in which a claim of double jeopardy is alleged result from a court's erroneous declaration of a mistrial\textsuperscript{68} and a subsequent attempt to retry the defendant.\textsuperscript{69} For example, in \textit{People} ex rel. \textit{Luetje} v. \textit{Ketcham},\textsuperscript{70} the district attorney attempted to prosecute the defendant a second time after the trial court had declared a mistrial due to the deadlocked deliberations of the jury. In granting the writ of prohibition, the court held that the jury had been arbitrarily discharged since certain jury members felt more deliberations might have enabled them to arrive at a verdict. The subsequent attempt to prosecute the defendant for the same offense, the court concluded, resulted in impermissible exposure to double jeopardy for the prevention of which the writ of prohibition was an appropriate remedy.\textsuperscript{71}

Similar to the contention that a court has no jurisdiction to try a case due to the defendant's exposure to double jeopardy is the claim that a court loses jurisdiction as a result of some act or omission on its part. Whereas prohibition is frequently granted in

\begin{footnotesize}
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\textit{Id.} at 359, 224 N.Y.S.2d at 1020.
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\textsuperscript{67} See note 54 and accompanying text \textit{supra}.

\textsuperscript{68} In \textit{Snee} v. County Court, 31 App. Div. 2d 303, 297 N.Y.S.2d 414 (4th Dep't 1969), the court pointed out that a mistrial can only be granted in limited circumstances. Unless a trial is terminated by disagreement of the jury, by the discharge of a jury pursuant to law, with the consent of the defendant, or for "extreme or absolute necessity," any subsequent prosecution of the defendant for the same offense constitutes double jeopardy. \textit{Id.} at 307, 297 N.Y.S.2d at 419.

\textsuperscript{69} See, \textit{e.g.}, \textit{Girard} v. \textit{Rossi}, 40 App. Div. 2d 13, 337 N.Y.S.2d 34 (4th Dep't 1972) (per curiam) (mistrial declared due to stenographer's sudden illness); \textit{Art} v. \textit{City Court}, 35 App. Div. 2d 1062, 316 N.Y.S.2d 492 (4th Dep't 1970) (mem.) (original joint trial of two defendants declared a mistrial due to alleged error in trying both actions together); \textit{Kim} v. \textit{Criminal Court}, 77 Misc. 2d 740, 354 N.Y.S.2d 833 (Sup. Ct. N.Y. County 1974) (judge declared mistrial because he was being assigned to another court part).

\textsuperscript{70} 45 Misc. 2d 802, 257 N.Y.S.2d 681 (Sup. Ct. Nassau County 1965).

In \textit{Toliver} v. \textit{Judges of Family Court}, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (Sup. Ct. Bronx County 1969), the family court had declared a mistrial due to unavailability of witnesses. Prohibition was subsequently granted to prevent a second trial since the unsuccessful hearing was deemed tantamount to a trial. And in \textit{Flahavan} v. \textit{Allen}, 51 Misc. 2d 1063, 274 N.Y.S.2d 703 (Sup. Ct. Cortland County 1966), prohibition was granted to prevent the trial of petitioner's speeding violation after the violation had previously been dismissed for want of prosecution.

\textsuperscript{71} 45 Misc. 2d at 803, 257 N.Y.S.2d at 683.
the former case, an allegation that a court has divested itself of jurisdiction is rarely held to warrant the issuance of prohibition.

In Zupancic v. Hoagland, the petitioner sought a writ of prohibition to restrain a justice of the peace from proceeding with a prosecution for driving while intoxicated. Petitioner contended that the court lost jurisdiction when it granted an unauthorized adjournment. The court held that the drastic remedy of prohibition was not necessary to correct this alleged error and therefore denied the writ. Unlike the situation in which double jeopardy obtains, the court believed that in this instance even though the petitioner might be forced to suffer through a trial and conviction by a court lacking jurisdiction, the appeal process provided adequate vindication of his rights.

Attempts to employ the writ of prohibition in criminal proceedings have not been limited to double jeopardy situations or to cases in which it was alleged that courts, through their own act or omission, divested themselves of jurisdiction they correctly possessed in the first instance. Many petitioners, uniformly unsuccessful have also sought prohibition to prevent continuance of a prosecution based on the contention that a particular court had no jurisdiction at all to adjudicate the proceeding because the information or indictment under which the defendant was being prosecuted was legally insufficient or defective.

Id. at 169, 275 N.Y.S.2d at 421.

In Woolever v. Beckley, 25 App. Div. 2d 921, 270 N.Y.S.2d 88 (3d Dep't 1966) (per curiam), the petitioner alleged that the delay in his traffic violation prosecution, the result of a lengthy adjournment, constituted a denial of the right to a speedy trial. The court held that "however unreasonable" the action be considered, the lower court had jurisdiction of the defendant. The appellate division therefore reversed the order granting prohibition. Id. at 921, 271 N.Y.S.2d at 89. In Abbott v. Rose, 40 Misc. 2d 64, 242 N.Y.S.2d 773 (Sup. Ct. Monroe County 1963), however, a writ of prohibition was granted to prevent continuance of a speeding violation trial after the court lost jurisdiction as a result of the failure of the justice of the peace to be present on the return date for the prosecution.


See Brayer v. Supreme Court, 7 App. Div. 2d 887, 181 N.Y.S.2d 215 (4th Dep't 1959) (per curiam) (district attorney, without the power from the court to do so, ordered the convening of a grand jury); Powell v. Criminal Court, 44 Misc. 2d 898, 255 N.Y.S.2d 1 (Sup.
There, the court was unsolicitous of "[t]he fact that the petitioner [might] be required to stand trial before an appeal from any judgment of conviction" could be had and concluded that this was not "[a] sufficient [reason] to invoke the drastic relief of prohibition."

Additionally, attempts have been made to utilize the writ of prohibition as a vehicle for preventing courts from exceeding their jurisdiction or "legitimate authority." Thus, prohibition has been sought to remedy such acts as the improper denial of a waiver of a jury trial and the unauthorized temporary removal of a pending criminal prosecution from the calendar in order to permit a second indictment of the defendant to be tried first. In both instances, the writ has been granted to prevent what was considered to be an unauthorized use of power by the respective courts.

Ct. N.Y. County 1964) (court failed to examine any witnesses prior to issuance of warrant of arrest); Di Silvestro v. Court of Special Sessions, 16 Misc. 2d 544, 181 N.Y.S.2d 893 (Sup. Ct. Queens County 1958) (magistrate in felony court failed to attach stenographic minutes of hearing to return made to district attorney).

Another instance in which prohibition has been sought to prevent a court from allegedly acting without jurisdiction is exemplified by Ricapito v. People, 20 App. Div. 2d 567, 245 N.Y.S.2d 846 (2d Dep't 1963) (mem.), wherein the petitioner sought a writ of prohibition to prevent the prosecution of an assault indictment which the petitioner alleged should have been transferred from the county court to the family court. In denying the writ, the court stated: "Where, as here, there are no unusual circumstances, it does not matter that the jurisdictional question may not be reviewed until after a conviction . . . ." Id. at 567, 245 N.Y.S.2d at 848 (emphasis added) (citations omitted).

121 N.Y.S.2d 136 (Sup. Ct. Orange County 1955). The petitioner in Clouse contended that the court had no jurisdiction to prosecute since the information failed to allege a specific date, time, or place for the alleged crime.

77 Scott v. McCaffrey, 12 Misc. 2d 671, 172 N.Y.S.2d 954 (Sup. Ct. Bronx County 1958). Stating that once a judge is certain the petitioner is aware of his waiver the judge has no authority to mandate a jury trial, the court concluded that the defendant was entitled to a writ of prohibition. Reaching a contrary conclusion, the courts, in People v. Fitzpatrick, 34 App. Div. 2d 730, 311 N.Y.S.2d 577 (4th Dep't) (mem.), wherein the petitioner sought a writ of prohibition to prevent the prosecution of an assault indictment which the petitioner alleged should have been transferred from the county court to the family court. In denying the writ, the court stated: "Where, as here, there are no unusual circumstances, it does not matter that the jurisdictional question may not be reviewed until after a conviction . . . ." Id. at 567, 245 N.Y.S.2d at 848 (emphasis added) (citations omitted).

78 Id. at 137.

79 Scott v. McCaffrey, 12 Misc. 2d 671, 172 N.Y.S.2d 954 (Sup. Ct. Bronx County 1958). Stating that once a judge is certain the petitioner is aware of his waiver the judge has no authority to mandate a jury trial, the court concluded that the defendant was entitled to a writ of prohibition. Reaching a contrary conclusion, the courts, in People v. Fitzpatrick, 34 App. Div. 2d 730, 311 N.Y.S.2d 577 (4th Dep't) (mem.), appeal dismissed mem. sub nom., Fitzpatrick v. Oneida County Court, 27 N.Y.2d 742, 263 N.E.2d 390, 314 N.Y.S.2d 992, appeal on constitutional grounds dismissed, 27 N.Y.2d 816, 315 N.Y.S.2d 1033 (1970), and Duchin v. Peterson, 12 App. Div. 2d 622, 208 N.Y.S.2d 458 (2d Dep't 1960) (mem.), motion for leave to appeal denied mem., 9 N.Y.2d 609, 210 N.Y.S.2d 1025 (1961), held the writ of prohibition to be an extraordinary remedy which should not be granted in a case where an error resulting in a conviction can be reviewed on appeal.


An unauthorized use of power also provided occasion for issuance of the writ in Anonymous v. People, 20 App. Div. 2d 395, 247 N.Y.S.2d 323 (1st Dep't), aff'd mem. sub nom. Fish v. Horn, 14 N.Y.2d 905, 200 N.E.2d 857, 252 N.Y.S.2d 313 (1964), wherein prohibition was granted to prevent a family court judge from punishing for contempt the superintendent of a women's reformatory who refused to accept a 17-year-old girl in the reformatory. Prohibition was held to lie because the family court did not have jurisdiction to place the girl there. 20 App. Div. 2d at 402, 247 N.Y.S.2d at 330. See also In re Kraemer, 7 App. Div. 2d 644, 180 N.Y.S.2d 408 (2d Dep't 1958) (mem.), aff'd, 6 N.Y.2d 363, 160 N.E.2d 633, 189
In other cases wherein petitioners alleged that the trial court had gone beyond its legitimate powers, however, the writ has been denied. In Glass v. Markewich, the writ was withheld, it having been sought to prevent a judge from continuing with the petitioner's criminal trial due to petitioner's ill health. So too, in Rodriguez v. City Magistrates' Court the petition for prohibition to prevent the trial court from attaching the petitioner's prior criminal record to the record on appeal was denied, notwithstanding petitioner's allegation that this was highly prejudicial to his chances for success.

This ground for issuance of the writ of prohibition, that a court has acted in excess of jurisdiction or beyond "legitimate authority," rather than totally without jurisdiction, has generated much of the confusion surrounding the writ of prohibition today.

LaRocca v. Lane: An Inquiry Into Methodology

In LaRocca v. Lane, the New York Court of Appeals was presented with its latest opportunity to clarify the rules governing the applicability of the writ of prohibition in those nebulous situations in which it is alleged that a court has acted in excess of its jurisdiction. The court utilized LaRocca as a vehicle for a historical review of the writ and an attempt to identify the critical factors to be considered in any decision concerning the availability of prohibition. Cognizant of the difficulty in drawing hard and fast lines, the LaRocca court nevertheless attempted to sketch the outer boundaries within which prohibition will lie to prevent a court from exceeding its jurisdiction.

The petitioner in LaRocca, a Roman Catholic priest, instituted a proceeding under article 78 to prohibit a criminal court judge

N.Y.S.2d 878 (1959) (prohibition granted to prevent prosecution's appeal from decision of village police justice finding petitioners not guilty of trespass); Feig v. Bromberger, 19 Misc. 2d 703, 74 N.Y.S.2d 307 (Sup. Ct. N.Y. County 1947) (prohibition issued to prevent traffic court from proceeding after petitioner pleaded guilty to parking ticket and clerk refused to accept his plea).

See, e.g., Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943); Madole v. Davidson, 21 App. Div. 2d 671, 249 N.Y.S.2d 890 (1st Dep't 1964) (per curiam); In re Hodes, 19 App. Div. 2d 608, 240 N.Y.S.2d 665 (1st Dep't 1963) (per curiam).


Based on the record, the appellate court was unable to say that the trial court was acting or was about to act without or in excess of its jurisdiction. Id. at 794, 175 N.Y.S.2d at 334.


See text accompanying notes 93-95 infra.


37 N.Y.2d at 578-80, 338 N.E.2d at 609-11, 376 N.Y.S.2d at 96-99.
from compelling him to remove his clerical garb before participating as defense counsel in a jury trial. While special term granted the petition and prohibited the trial judge from enforcing his order, the appellate division reversed and dismissed the proceeding on the merits. The court of appeals affirmed this dismissal.

The court began its inquiry into the petition for prohibition noting the existence of two issues: First, whether prohibition under article 78 was an appropriate remedy; and second, if prohibition did lie, whether the trial judge’s order violated the petitioner’s first amendment right to freely exercise his religion. If the petitioner failed to demonstrate prohibition was an appropriate remedy for his alleged injury, the court would have dismissed the petition without further inquiry into the merits of petitioner’s claim.

In determining whether prohibition was an appropriate remedy, the court verbalized a threshold test requiring the petitioner to present a “substantial claim” that the trial judge had exceeded his powers. Determination of whether such a substantial claim existed necessarily required the court to differentiate between an error of substantive or procedural law and an excess of jurisdiction. As the court noted, these two concepts are difficult at times to distinguish since an excess of jurisdiction necessarily involves an error of law. Admitting its frustration with the difficulty inherent in the formulation of this distinction, the court nevertheless noted that

the absence of bright lines of demarcation in the law is not unusual; man’s language and capacity to conceptualize is not perfect. The fact is that in extreme enough cases the distinction is easily apparent. At one extreme, a trivial error in excess of jurisdiction may be just that, trivial, and hardly worthy of treatment as an excess of power. On the other hand, at the other extreme, a gross abuse of power on its face and in effect may be in reality so serious an excess of power incontrovertibly justifying and requiring summary correction.

Abuse or Perversion of Entire Proceeding: Prohibition Granted

As an example of a gross abuse of power requiring summary correction, the court pointed to its earlier decision in Proskin v.
In response to the prosecution's allegation that the trial court erred in granting the defendant's motion to inspect the grand jury minutes upon which the indictment was based, the Proskin court considered whether the trial court had exceeded its jurisdiction or authority. The Criminal Procedure Law provides that before a motion to inspect grand jury minutes can be granted, the movant must show reasonable doubt as to the sufficiency of the evidence before the grand jury. Furthermore, the discovery allowed the defendant must be guardedly limited to that testimony relevant to the movant's indictment. The court of appeals agreed with the prosecution's contention that the movant had failed to produce sufficient evidence to cast doubt upon the grand jury's indictment and held that an inspection granted despite the lack of such evidence was improper and beyond the trial court's statutory authority. According to the court of appeals, rather than requiring the proper grounds for the inspection motion, the trial court apparently granted the discovery, not because of insufficiency of evidence before the grand jury, but to aid the defendant in the preparation of his defense.

In addition to the alleged nonexistent doubt concerning the sufficiency of the evidence before the grand jury, the prosecution claimed that it was error for the trial court to permit the defendant to inspect the entire record of the grand jury. These minutes included not only testimony relevant to the defendant's indictment, but also testimony concerning 7 other defendants and 15 other indictments. The court of appeals held this unlimited discovery to be improper, stating:

The cloak of secrecy accorded Grand Jury proceedings for the protection of the public, witnesses, potential defendants, and others may not be lifted for purposes of general unilateral discovery before a criminal trial...

Analyzing both alleged errors, the Proskin court concluded that the trial court exceeded its jurisdiction since

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97 Id. at 18, 280 N.E.2d at 875, 330 N.Y.S.2d at 45.
99 30 N.Y.2d at 19, 280 N.E.2d at 876, 330 N.Y.S.2d at 46.
100 Id.
101 Id.
102 Id.
103 Id. (citations omitted).
lacks grounds to permit inspection: . . . Even the pretext of authority is absent where the right of inspection is extended to unrelated testimony, as was done here.\textsuperscript{104}

As interpreted by later cases, it would appear that the critical factor in Proskin warranting issuance of the writ was that the inspection allowed by the court resulted in an abuse or perversion of the entire proceeding.

\textit{Error of Law However Egregious: Prohibition Denied}

A better understanding of what the court meant in \textit{LaRocca} when it used Proskin as an example of "a gross abuse of power . . . so serious [as to require] summary correction"\textsuperscript{105} can be achieved by an analysis of two other recent court of appeals' decisions, \textit{State v. King}\textsuperscript{106} and \textit{Nigrone v. Murtagh}.

In King, the first major court of appeals decision dealing with the writ after Proskin, the court put to rest any possible contention that Proskin stood for the proposition that prohibition would lie to prevent an error of law of such magnitude that it amounted to an excess of jurisdiction.\textsuperscript{108} In King, 106 Id. (citations omitted).


108 36 N.Y.2d 59, 324 N.E.2d 351, 364 N.Y.S.2d 879 (1975). Prior to King, it appeared arguable that the Proskin decision was based in part on the fact that the trial court had acted beyond its statutory authority. In Proskin, the Criminal Procedure Law provided the exclusive basis upon which a motion to inspect grand jury minutes could be granted. See text accompanying note 98 \textit{supra}. Once the trial court granted inspection on grounds other than those provided by statute, its actions could be deemed in excess of its jurisdiction and, consequently, remediable by prohibition.

This argument, that a court which acts without or contrary to express statutory authority thereby acts in excess of its authority within the meaning of traditional prohibition analysis, has been given credence by some lower courts. For example, in Vergari v. Kendall, 76 Misc. 2d 848, 352 N.Y.S.2d 989 (Sup. Ct. Westchester County), \textit{modified mem.}, 46 App. Div. 2d 679, 360 N.Y.S.2d 1003 (2d Dep't 1974), prohibition was granted to restrain a judge from directing that defendants be allowed discovery of police reports including statements of the police and witnesses against the defendants. Since N.Y. Crim. Pro. Law § 240.10, 20(3) (McKinney 1971) provides that police reports and statements of prospective witnesses in criminal actions are exempt from any discovery by the defendant, the court held that the discovery was unauthorized, and, therefore, prohibition would lie to prevent it. King's emphasis on the perversion of the entire proceeding caused by the complete exposure of the grand jury minutes in Proskin, however, considerably weakens any argument of this nature.

On the other hand, Judge Scileppi, dissenting in Proskin, regarded the statutory requirements in question as having been met. He argued that adequate facts had been presented in Proskin to render questionable the sufficiency of the evidence before the grand jury and, hence, that the court had acted "within its sound discretion" when it granted the motion to inspect. 30 N.Y.2d at 26, 280 N.E.2d at 880, 330 N.Y.S.2d at 52 (Scileppi, J. dissenting). It was Judge Scileppi's opinion that the court had jurisdiction of the parties and of the subject matter of the motion. The court, he concluded, was therefore authorized to rule upon the sufficiency of the moving papers, and any subsequent "objection relate[d] to the merits of the application, rather than to jurisdiction, and [could not] serve as the
a criminal prosecution resulting from the Attica insurrection, the trial court granted the defendant 10 peremptory venire challenges above the statutory limit, but, at the same time, denied the prosecution's motion for an equivalent number. The prosecution thereupon petitioned the Appellate Division, Fourth Department, for a writ of prohibition to prevent the trial court from granting the defendant the additional challenges. The appellate division, by a divided court, granted the writ. In an opinion authored by Chief Judge Breitel, the court of appeals took a narrow view of the writ's applicability and reversed, stating that prohibition is an extraordinary remedy which should issue only where "a clear legal right" to it exists. The court emphatically declared that courts may not entertain a collateral proceeding to review an error of law in a pending criminal action, however egregious and however unreviewable, by way of immediate appeal or by appeal after the final judgment of conviction or acquittal, whichever may eventuate.

Although Proskin and King both involved a court acting beyond permissible boundaries as determined by statute, the King court distinguished Proskin by analogizing it to the situation in which constitutionally forbidden double jeopardy obtains. In such a case, according to King, prohibition is an appropriate remedy because there has occurred "an unlawful use or abuse of the entire action or proceeding as distinguished from an unlawful procedure or error in the action or proceeding itself . . . ." It can be inferred from the King opinion that it was primarily the abuse of the grand jury secrecy in Proskin — rather than the failure of the trial court to comply with statutory procedure — which resulted in a tainting or perversion of the entire proceeding, thus making prohibition an appropriate remedy.
Error Occurring Prior to Court's Assumption of Jurisdiction: Prohibition Denied

Less than four months after King, the court of appeals was again confronted with a petition for prohibition which could have been interpreted as alleging a perversion of an entire proceeding. In Nigrone v. Murtagh, a perjury prosecution, the defendant sought a writ of prohibition to prevent the continuance of prosecution after the trial court had denied his motion to dismiss the indictment on the basis of alleged prosecutorial misconduct. The special prosecutor had arranged a fictitious robbery which resulted in an undercover policeman's indictment by a grand jury having no knowledge of the scheme. Subsequent to the indictment, a judge, his son, who was an attorney, and Nigrone, the son's law partner, were called before an Extraordinary Special Grand Jury investigating judicial corruption to determine whether they had conspired to fix the outcome of the robbery prosecution.

On the basis of contradictions between "surreptitiously" obtained recordings of Nigrone's conversations with other parties alleged to be participants in the conspiracy and his testimony before the Extraordinary Special Grand Jury, Nigrone was indicted for perjury. At this point, he moved to dismiss the indictment on the ground that the special prosecutor had been guilty of gross misconduct. When the motion was denied, Nigrone instituted an article 78 proceeding to obtain a writ of prohibition.

The court of appeals affirmed the appellate division's denial of the writ, holding that the case was not one in which the court lacked jurisdiction or acted in excess of its jurisdiction. The special prosecutor was guilty of improper conduct, but the trial

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116 The special prosecutor had arranged for a probationary officer from the Police Academy to play the part of a man named "Vitale," a man purported to have committed an armed robbery. A false complaint against "Vitale" was filed, and a false criminal record created. 46 App. Div. 2d at 343-44, 362 N.Y.S.2d at 514-15.
117 Nigrone was indicted on one count of perjury for his allegedly false testimony that he never asked his law partner "if the 'hook was in' in the Vitale case." Id. at 346, 362 N.Y.S.2d at 516.
118 The alleged prosecutorial misconduct included criminal activities such as "suborning perjury before the first Kings County Grand Jury [which indicted Vitale], offering a false instrument for filing, and obstructing governmental administration." Id.
119 36 N.Y.2d at 424-25, 330 N.E.2d at 46, 369 N.Y.S.2d at 77-78.
120 In fact, the appellate division, in speaking of the alleged misconduct, stated: Such a perversion of the criminal justice system by an overzealous prosecutor is illegal, outrageous and intolerable and we condemn it. If the justice system is to have any usefulness, it must be respected and believed. The necessary confidence cannot be preserved when grand juries and Judges are duped in charades composed of lies and deceptions fabricated by the law officers of the State.
46 App. Div. 2d at 347, 362 N.Y.S.2d at 517.
court had nothing to do with what had transpired previously. The Extraordinary Special Grand Jury was aware of the fictitious robbery and indictment by the unsuspecting grand jury. "Consequently, nothing in a procedural or jurisdictional sense affect[ed] the pending criminal action." It was the court's opinion that the proper remedy for Nigrone was to raise the issue, as one would with respect to claims of illegal search and seizure or illegal wiretapping, by motion as a bar to prosecution.

Although Nigrone might be considered a case involving the tainting of an entire proceeding similar in some respects to Proskin, the essential difference appears to lie in the fact that, in Nigrone, the court had nothing to do with the alleged wrongdoing. The history of the writ supports this distinction insofar as courts have always placed greater emphasis on what occurs before the bench than on what transpired prior to that point. So, for example, the writ has been denied where it was sought to halt a prosecution based on evidence obtained by illegal search and seizure.

The writ also would not issue to prevent the prosecution of a petitioner who had been illegally arrested. Claims of a statute's unconstitutionality or the absolute invalidity of a court's show cause order have met a similar fate.

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1. 121 36 N.Y.2d at 425, 330 N.E.2d at 46, 369 N.Y.S.2d at 78.
2. 122 Id. at 425, 330 N.E.2d at 46, 369 N.Y.S.2d at 78.
6. 126 See Cawley v. Brust, 42 App. Div. 2d 951, 348 N.Y.S.2d 345 (1st Dep't. 1973) (mem.), wherein a show cause order served on Sunday was held to be "absolutely void for any and every purpose . . . ." Id., 348 N.Y.S.2d at 346.

Recently, there have been a number of unsuccessful petitions for prohibition to halt proceedings in which it was alleged that the grand jury which indicted the petitioner was improperly impaneled. See Paciona v. Marshall, 35 N.Y.2d 289, 319 N.E.2d 199, 360 N.Y.S.2d 882 (1974) (per curiam) (exclusion of students and women); Wrobleski v. Ricotta, 45 App. Div. 2d 461, 359 N.Y.S.2d 130 (4th Dep't) (per curiam), aff'd per curiam, 35 N.Y.2d 745, 320 N.E.2d 647, 361 N.Y.S.2d 913 (1974) (exclusion of students and women); Seidenberg v. County Court, 34 N.Y.2d 499, 315 N.E.2d 475, 358 N.Y.S.2d 416 (1974) (jury impaneled for excessive period). These results appear to be in accord with the general
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Nigrone appears to fit neatly into the aforementioned category of cases in which, although misconduct occurred prior to trial, the trial court had jurisdiction and did nothing itself to exceed that jurisdiction. The only recognized exception to this principle—obviously not at issue in Nigrone—is the situation in which double jeopardy is involved. In such a case, the writ of prohibition traditionally has been held the applicable remedy to prevent that particular constitutional infringement.

Propriety of Issuance or Denial: A Suggested Framework

A reading of LaRocca in light of the decisions in Proskin, King, and Nigrone suggests the recognition by the New York Court of Appeals of at least three guiding principles: First, prohibition will not lie to correct an error of law no matter how egregious; second, an action by a court which perverts the entire proceeding is remediable by prohibition; and third, implicit within the second principle, is the corollary that the improper action must occur within the confines of the proceeding itself. Indeed, a fourth principle can be culled from LaRocca: where a petitioner "presents an arguable, substantial, and novel claim that a court [had] exceeded its powers because of a collision of unquestioned constitutional principles, he may, in the first instance, seek redress by prohibition." In LaRocca, the court believed petitioner had met this burden and thus passed the threshold test since he presented a "substantial" argument that the trial court exceeded its powers by ordering petitioner to remove his clerical garb, in violation of his first amendment rights. The court admitted that "upon reaching the merits, the Court may decide the issue adversely to petitioner. But this would not foreclose the remedy." Having decided that the petitioner presented a "substantial claim" that a court exceeded its jurisdiction and, therefore, that prohibition was an appropriate remedy, the court invoked the familiar maxim: "Prohibition is not mandatory, but may issue in the sound discretion of the court." In other words, even if a

principle that prohibition will not issue to remedy an error allegedly committed prior to a court's assumption of jurisdiction.

See notes 61-71 and accompanying text supra.

See text accompanying notes 108-12 supra.

See text accompanying notes 113-14 supra.

See notes 119-26 and accompanying text supra.

37 N.Y.2d at 581, 338 N.E.2d at 611, 376 N.Y.S.2d at 99.

Id.

Id. at 579, 338 N.E.2d at 610, 376 N.Y.S.2d at 97.
petitioner meets the "substantial claim" test, he may still be denied prohibition. As the LaRocca court pointed out, there are a number of "ancillary" factors which courts should take into consideration in the exercise of their discretion in this area. These factors can be capsulized as follows: First, the gravity of the harm caused by the excessive power; second, the availability or unavailability of an adequate remedy on appeal, at law, or in equity; and third, the remedial effectiveness of prohibition if such an adequate remedy does not exist. A close examination of the recent cases in which prohibition has been granted sheds some light on the applicability of these principles.

In LaRocca, for example, petitioner alleged a serious harm, viz, a violation of his right to freely exercise his religion. If he chose to exercise his religion despite the court order, he risked being held in contempt of court. As for the availability of an adequate remedy, the court noted that an appeal from a criminal conviction would not necessarily result in vindication of the petitioner's rights. The conviction might be reversed on other grounds, or the defendant might even decide not to take an appeal at all. Indeed, the defendant might be acquitted in the first instance, leaving petitioner no occasion within the criminal proceeding to obtain a review of the order in question. Because of the uncertainty of petitioner's opportunity to vindicate his rights, the court found that an adequate remedy did not exist on appeal, at law, or in equity. Closely related to this consideration was the LaRocca court's concern with the status of the petitioner. In applying the "substantial claim" test, the court stated: "When a petitioner, whether party or not, but especially where one is not a party, presents an arguable, substantial, and novel claim . . . he may, in the first instance, seek redress by prohibition." Although the court never fully explained the reason for its concern with the petitioner's status, it can be inferred that the court is more favorably disposed to permit a collateral proceeding by a nonparty than by a party because of the possibility that a nonparty may lack an available remedy within the primary litigation itself.

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134 For a discussion of the "ancillary" factors to be considered in determining the applicability of prohibition, see 36 ALBANY L. REV. 804, 807-08 (1972).
135 37 N.Y.2d at 579-80, 338 N.E.2d at 611, 376 N.Y.S.2d at 97-98.
136 Id. at 581-82, 338 N.E.2d at 611-12, 376 N.Y.S.2d at 99-100.
137 Id. at 581, 338 N.E.2d at 611, 376 N.Y.S.2d at 99 (emphasis added).
138 In addition, permitting LaRocca, a nonparty, to seek review of the order in question through the vehicle of prohibition does not run counter to the growing judicial concern over the adverse effect which a permissive attitude toward issuance of the writ to parties can have
The court, having determined the existence of serious harm and the unavailability of an adequate remedy, then considered the effectiveness of prohibition. Once again, the court found the answer conducive to issuance of the writ. If prohibition had been denied, the petitioner would have been forced to either submit to the order of the court or face the possibility of imprisonment for contempt. It was the opinion of the court that prohibition was a more effective remedy than resort to a subsequent habeas corpus proceeding and thus issuable in its discretion.\footnote{LaRocca v. Lane, 37 N.Y.2d 575, 581, 338 N.E.2d 606, 611, 376 N.Y.S.2d 93, 100 (1975).}

The court's consideration of these factors can also be seen in cases prior to LaRocca, such as Proskin\footnote{Proskin v. County Court, 30 N.Y.2d 432, 437, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 709 (1971).} and Lee v. County Court,\footnote{Lee v. County Court, 27 N.Y.2d 432, 437, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 709 (1971).} in which prohibition was granted. In Proskin, the harm attributable to the trial court's exposure of the entire record of the grand jury minutes was obvious: it revealed secret information pertaining to seven defendants in addition to the movant.\footnote{Proskin v. County Court, 30 N.Y.2d 15, 18, 280 N.E.2d 875, 876, 330 N.Y.S.2d 44, 45 (1972); Lee v. County Court, 27 N.Y.2d 432, 437, 267 N.E.2d 452, 454, 318 N.Y.S.2d 705, 709 (1971).} In Lee, a defendant who pleaded the defense of insanity to a murder indictment refused to submit to questioning by the prosecution's psychiatrists. As a result, the trial court ordered the defendant's insanity plea stricken. The harm alleged by defendant was the violation of his constitutional right against self-incrimination.\footnote{Proskin is discussed in notes 96-104 and accompanying text supra.} In both of these cases the court determination complained of was unappealable, \textit{i.e.} the defendant in each case would have been required to wait until conviction and then voice his claim of error on an appeal therefrom.\footnote{Proskin is discussed in notes 96-104 and accompanying text supra.} It is clear, in both Proskin and Lee, that the remedy provided was inadequate; consequently, prohibition was "a more complete and efficacious remedy."\footnote{Proskin v. County Court, 30 N.Y.2d at 581, 338 N.E.2d at 611, 376 N.Y.S.2d at 100. The court cited Culver Contracting Corp. v. Humphrey, 268 N.Y. 26, 40, 196 N.E. 627, 631-32 (1935), discussed in notes 35-39 and accompanying text supra, for the proposition that prohibition was applicable where it provided a "more effective remedy." Although the LaRocca court noted that a contrary conclusion had been reached in People ex rel. Livingston v. Wyatt, 186 N.Y. 383, 394-95, 79 N.E. 330, 334 (1906), discussed in notes 31-34 and accompanying text supra, it nevertheless deemed prohibition applicable to the situation before it.} In Lee, if prohibition had been denied, the defendant would have been forced to endure an entire trial stripped of his insanity defense notwithstanding his constitu-
tional privilege against self-incrimination. In Proskin, the remedy provided on ultimate appeal would not undo the harm caused by the improper exposure of the entire record of the grand jury minutes. It is clear in both these cases that, a "substantial claim" having been presented, the "ancillary" discretionary factors considered in the courts' review of these petitions for prohibition were positive inducements for issuance of the writ. 146

Having determined that the petitioner had presented a "substantial claim" that a court exceeded its jurisdiction 147 and having found the ancillary discretionary factors conducive to issuance of prohibition, the LaRocca court turned to the merits of the proceeding. The essential difficulty presented by this petition was the clash between fundamental principles of liberty. On the one hand, petitioner urged his first amendment right to freely exercise his religion, while, on the other hand, the trial judge stressed the right of both the defendant and the people to a fair and impartial trial.

As noted by the United States Supreme Court in NAACP v. Button, 148 "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." 149 Applying this test in LaRocca, Chief Judge Breitel, in his majority opinion, stressed the state's "paramount duty" to provide litigants with a fair and impartial trial. Balancing this "compelling state interest" with the incidental burden it produced on petitioner's first amendment right to

146 In King and Nigrone, the court never reached the application of these discretionary factors since, "in the first instance," the petitioner had failed to state a "substantial claim" that a court had exceeded its jurisdiction. Had a substantial claim been presented, it is suggested that the application of these discretionary factors would have revealed that King presented facts more suitable for issuance of prohibition than did Nigrone.

In King, the harm caused by the trial court's action was the forcing of the prosecution to proceed with the trial after the defendant had been granted 10 additional peremptory venire challenges. In Nigrone, no serious harm was caused by the court's actions at all, the defendant's rights not being impaired at trial. As for the adequacy of a remedy on appeal, at law, or in equity, the petitioner in King was without an adequate remedy since the court's action was not reviewable on appeal. State v. King, 36 N.Y.2d 59, 61-62, 324 N.E.2d 351, 353, 364 N.Y.S.2d 879, 881 (1975). Clearly, the writ of prohibition provided a "more effective" remedy in King than no remedy at all. In contrast to King, the alleged error in Nigrone, although not separately reviewable, would have been reviewable on appeal from a judgment of conviction. See Nigrone v. Murtagh, 36 N.Y.2d 421, 426, 330 N.E.2d 45, 47-48, 369 N.Y.S.2d 75, 79 (1975); N.Y. CRIM. PRO. LAW § 450.10 (McKinney 1971). Since an adequate remedy did exist, and since there was no serious harm to the petitioner, it could not be said that prohibition provided a "more effective remedy."

147 See text accompanying note 131 supra. It should be noted, as the LaRocca court pointed out, that there do exist constitutional violations, such as the right to a speedy trial, which cannot be considered excesses of jurisdiction, 37 N.Y.2d at 580, 338 N.E.2d at 610, 376 N.Y.S.2d at 98; accord, Blake v. Hogan, 25 N.Y.2d 747, 748, 250 N.E.2d 568-69, 303 N.Y.S.2d 505, 506 (1969) (dictum), cited in Lee v. County Court, 27 N.Y.2d 432, 437, 267 N.E.2d 452, 455, 318 N.Y.S.2d 705, 709.


149 Id. at 438.
freely exercise his religion, Chief Judge Breitel concluded that "the performance of the State's paramount duty to insure a fair trial may not be substantially jeopardized because of petitioner's right, however significant, to free exercise of his religion." The petition for prohibition was therefore denied.

**CONCLUSION**

Throughout its long and tortuous history, the great prerogative writ of prohibition has consistently escaped the confining bounds of a strict definition. Despite the passage of centuries since its birth, prohibition has retained its extraordinary remedial characteristics. Today, as in Blackstone's day, prohibition will lie only to prevent a lower court from acting either totally without jurisdiction or in excess of the jurisdiction it does possess.

In *LaRocca v. Lane*, the New York Court of Appeals interpreted the writ's historic definition to require that a petitioner present a "substantial claim" that a court has exceeded its jurisdiction before prohibition will issue. The court pointed to two instances in which prohibition would lie to remedy an alleged excess of jurisdiction because a substantial claim existed: where the act complained of resulted in either a perversion of the entire proceeding, as in *Proskin*, or "a collision of unquestioned constitutional principles," as in *LaRocca*.

Although *LaRocca*’s guidelines will not always be clearly visible, they are, perhaps, as sharply defined as the writ of prohibition will allow. The remedy is an extraordinary one; one which issues not as a matter of right, but in the well-considered discretion of the court. Such discretion requires flexibility. Accordingly, the court of appeals, in *LaRocca*, rather than submitting to the strong temptation to formulate a stringent standard for issuance of the writ, preserved prohibition's extraordinary discretionary nature. Thus, the writ of prohibition has, once again, avoided strict judicial definition and will continue to enjoy the vitality necessary to assure its potent remedial power.

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150 37 N.Y.2d at 577, 338 N.E.2d at 608, 376 N.Y.S.2d at 95-96. The possibility certainly existed, as the court acknowledged, that jurors might place more trust in the words of a priest than in the words of his opposing counsel. Sensitive, however, to the existence of religious prejudice, the court was quick to point out the alternative possibility of an adverse jury reaction to a priest acting as counsel. It was the court's opinion, therefore, that the petitioner's clerical garb would interfere with the state's duty to provide a fair and impartial trial. *Id.* at 584, 338 N.E.2d at 613, 376 N.Y.S.2d at 102.

151 *Id.* at 581, 338 N.E.2d at 611, 376 N.Y.S.2d at 99.