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Two Theories of Habeas Corpus

Determining the appropriate role of habeas corpus in American law has taken on new import because of political pressures to detain terrorism suspects without charge. These detainees, like those of prior generations, have sought due process through habeas corpus, predictably meeting with mixed success.[1] Although the writ has often been described as the ultimate protector of liberty,[2] judges have applied it inconsistently, to say the least. Through the twentieth century, the federal courts have held that violating a detainee's constitutional rights *both* does[3] and does not[4] justify granting the writ. And the current standard rests uncomfortably in

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[1] *Compare* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (holding American citizen held as enemy combatant may challenge factual basis for detention on habeas), *and* Rasul v. Bush, 542 U.S. 466, 488 (2004) (holding federal courts have habeas jurisdiction to review confinement of non-Americans outside U.S. territory), *with* Rumsfeld v. Padilla, 542 U.S. 426, 450-51 (2004) (rejecting habeas challenge on jurisdictional grounds).

[2] Townsend v. Sain, 372 U.S. 293, 311 (1963) ("[T]he historic conception of the writ, anchored in the ancient common law and in our Constitution as an efficacious and imperative remedy for detentions of fundamental illegality, has remained constant to the present day."); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868) ("The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defense of personal freedom."); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (describing the object of the writ as the "liberation of those who may be imprisoned without sufficient cause"); 1 CHESTER JAMES ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS § 1.00 (1987) ("It is everywhere accepted that both the Habeas Corpus Act of 1679 and its modern counterparts are to be construed broadly and generously to protect the liberty of the people."); Milton Cantor, *The Writ of Habeas Corpus: Early American Origins and Development*, *in* FREEDOM AND REFORM 57 (Harold M. Hyman & Leonard W. Levy eds., 1967) (quoting Blackstone describing habeas corpus as "the great and efficacious writ in all manner of illegal confinement"); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 9 (1980); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1087 (1995); Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1344, 1349-51 (1961); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 25 (1956).

[3] Wainwright v. Sykes, 433 U.S. 72, 87 (1977) ("[S]ince *Brown v. Allen* it has been the rule that the federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas court make its own independent determination of his federal claim, without being bound by the determination on the merits of that claim reached in the state proceedings.") (internal citation omitted).

[4] Knewel v. Egan, 268 U.S. 442, 447 (1925) ("[T]he judgment of state courts in criminal cases will not be reviewed on *habeas corpus* merely because some right under the Constitution of the United States is alleged to have been denied to the person convicted.").

between.[5] Most commentators would agree with Joseph Hoffman's and William Stuntz's conclusion that "habeas doctrine has achieved a Rube Goldberg quality that frustrates all efforts to give it logical coherence."[6]

This state of affairs is unacceptable. Without a thorough understanding of the writ's history, the courts are ill-equipped to chart its future. This article presents two theories of habeas corpus that help explain the doctrine's changing course. The first – the *judicial-power* theory – interprets the writ as a device that superior courts use to enforce their authority to proclaim the law when inferior judges defy or trivialize that power.[7] According to this theory, habeas

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[5] The current position was in large part codified by the Antiterrorism and Effective Death Penalty Act of 1996. With respect to the standard of review, the statute reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2) (2000). The Supreme Court has interpreted this standard to require what it calls "objectively reasonable decisions," a category of decisions with incoherent criteria. *See* Steven Semeraro, *A Reasoning-Process-Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 923-27 (2004) ("The many divided decisions in recent habeas cases . . . confirm that whenever an issue is truly debatable, one cannot predict how the Court will decide."). For example, in a recent case, the Court split five to four granting the writ in an ineffective assistance of counsel case. Rompilla v. Beard, 125 S. Ct. 2456 (2005). The majority found that the state courts had been objectively unreasonable, *id.* at 2467, yet the dissent believed that the state was not only reasonable but correct, declaring that "it is this Court, not the state court, which is unreasonable." *Id*. at 2471 (Kennedy, J., dissenting).

[6] Joseph L. Hoffman & William J. Stuntz, *Habeas Afer the Revolution*, 1993 SUP. CT. REV. 65, 109 (1994) (explaining that the Court has developed ever-evolving, complicated and arguably convoluted threshold requirements that petitioners must satisfy, which have nothing to do with the constitutionality of the conviction, before a federal habeas court can address the merits of a constitutional claim).

[7] The Court has held that it has the ultimate power to articulate federal constitutional and statutory law. *See* Tarble's Case, 80 U.S. (13 Wall.) 397, 407 (1871); Ableman v. Booth, 62 U.S. (21 How.) 506, 525 (1858).

Prior commentators have alluded to an inter-governmental regulatory role for habeas corpus that is in line with the theory put forth here. *See* DUKER, *supra* note 2, at 8, 33-48 (recognizing that habeas served as a device that allowed common law courts to protect their jurisdiction); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 6 (2001) ("[F]ederal habeas corpus . . . implements the theme of checks and balances that pervades our Constitutional structure"); DANIEL J. MEADOR, HABEAS CORPUS AND MAGNA CARTA 12-13 (1966) (analogizing modern role of habeas in the United States to its former role in resolving rivalries among competing English courts); RONALD P. SOKOL, FEDERAL HABEAS CORPUS 5, 22 (1969) ("The argument is that the writ is today being used in America to pull judicial business,

doctrine expands when necessary to combat the inferior courts' systemic failure to track superior court changes in the scope of liberty-enhancing rights. When the system stabilizes, the writ contracts and comes to be employed in an ad hoc fashion to root out clear examples of lower court defiance or trivialization of superior law.[8]

The second habeas theory focuses on the ideology associated with the writ. Histories of habeas corpus, like most historical legal theory, generally interpret doctrinal change as a response to independent social and political factors external to the legal system. This need-response hypothesis of doctrinal development is true at some level, but incomplete. To fully understand the development of habeas doctrine, one must also take account of the extent to which that doctrine, and the ideology surrounding it, helped create changes in society, politics, and the law itself.

This *conflicting-ideologies* theory explores these broader effects of habeas doctrine, contending that the writ in the United States has long embodied two competing ideologies. First, a powerful liberty-supporting ideology has enabled reformers to conceive of, and opponents to accept, new possibilities for expanding liberty-enhancing rights. Second, a counter-habeas ideology sees the writ as a dangerous get-out-of-jail-free card that enables criminals to avoid just punishments. Ironically, this ideology too has advanced liberty interests by focusing opponents of broad criminal procedure

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formerly within the exclusive province of the state courts, into the federal, much as it was pulled eight centuries ago into the royal courts."); Seymour D. Thompson, *Abuses of the Writ of Habeas Corpus*, 18 AM. L. REV. 1, 2 (1884) (explaining that habeas was "[d]esigned as a means of subjecting to the superintendence of the superior courts and judges, arrests and imprisonments made by ministerial officers and by inferior magistrates . . . ."); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2338 (1993) [hereinafter Yackle, *Hagioscope*] (explaining that "the writ provided the means by which the federal courts came to have ultimate authority to vindicate federal claims arising in state criminal cases"); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 997 (1985) [hereinafter Yackle, *Explaining*] ("Properly conceived, the writ is not a procedural vehicle for the protection of physical liberty . . . but an instrument of governmental administration employed to distribute authority and responsibility between courts of concurrent jurisdiction."). Yet none of these commentators have pursued this theory as a primary rationale for changes in habeas doctrine.

[8] One example of this expansion-contraction cycle occurred in the 1960s and 1970s. In the early 1960s, the United States Supreme Court applied a number of federal criminal procedure rights to the states. Anticipating state court confusion or resistance, the Court simultaneously expanded the scope of habeas. *See infra* Parts II.C.4-5. Once federal rights became an accepted part of state criminal proceedings, the scope of the writ – but not the rights of detained persons – contracted. *See infra* Part II.C.6.

protections on challenging the scope of the writ itself, rather than the substance of liberty-enhancing rights.

Part I of this article briefly describes the development of habeas corpus doctrine and surveys the existing developmental theories. Although the stories are quite varied, each rests on the notion that habeas has a true form against which particular judicial decisions can be measured. The differing accounts all agree that the Court has sometimes interpreted habeas incorrectly, though they cannot agree about which decisions were mistakes.

Part II presents the judicial-power theory. According to this interpretation, when the judges of a superior court system are confident that inferior courts are attempting to apply the law in good faith, the merits of the incarceration of a particular individual may receive little, if any, scrutiny.[9] By contrast, when the superior court senses that its legal proclamations are being ignored or trivialized, it is likely to intervene through habeas review regardless of the strength of the liberty interest at stake.[10] After briefly summarizing the consistency between this interpretation of the writ and its common law and nineteenth century American uses, this Part explores each of the significant developments in habeas doctrine throughout the twentieth century and explains how each is consistent with the judicial-power understanding of the writ.

Part III presents the conflicting-ideologies theory of habeas corpus in which doctrinal change is explained by the oscillating dominance of a liberty-centered ideology and a crime-control ideology. At each step, this theory explains, habeas doctrine did not simply respond to changing attitudes about criminal procedure; it helped enable those attitudes to change. This part gathers historical anecdotes in political and legal commentary that exemplify the conflicting ideological roles that habeas has played over time. It concludes, perhaps surprisingly, that changes in habeas corpus have advanced the

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[9] *See, e.g.*, O'Dell v. Netherland, 521 U.S. 151, 156, 167-68 (1997) (refusing to review constitutionality of failing to instruct jury that the alternative to a death sentence was life without possibility of parole because case became final before federal constitutional compulsion to make such information available to the jury was announced); Smith v. Murray, 477 U.S. 527, 534-35 (1986) (refusing to review constitutional claim virtually indistinguishable from claim previously granted because petitioner did not raise issue on state appeal, though an amicus had raised it).

[10] *See, e.g.*, Vasquez v. Hillery, 474 U.S. 254, 260-64 (1986) (extending writ to grand jury error bearing no relation to the liberty interest of the defendant); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 99-101 (1988) (explaining that grand jury claim is unrelated to propriety of conviction).

interests of liberty irrespective of which ideological pole has dominated.

I. EXISTING THEORIES OF HABEAS CORPUS'S DOCTRINAL EVOLUTION

This section briefly explains habeas corpus doctrine under the common law and federal and state constitutions, statutes, and court decisions. It then summarizes the existing academic theories of doctrinal change.

A. Origins and Early Codification

At common law, and later by statute in England, the writ of habeas corpus was used to challenge arbitrary imprisonment without charge,[11] and at least occasionally improper confinement as well.[12] The colonists brought the writ to the New World,[13] and the founding fathers explicitly recognized it in the Suspension Clause of Article I of the Federal Constitution.[14] Section 14 of The Judiciary Act of 1789 created authority in the federal courts to grant the writ to prisoners held in federal custody "for the purpose of an inquiry into the cause of commitment."[15] Neither the constitutional provision, which simply prohibits the suspension of the writ, nor the awkward language of the first habeas statute did much to project the course of habeas doctrine.[16]

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[11] Dallin H. Oaks, *Habeas Corpus in the States 1776-1865*, 32 U. CHI. L. REV. 243, 244-45 (1965) ("At common law and under the famous Habeas Corpus Act of 1679 the use of the great Writ against official restraints was simply to ensure that a person was not held without formal charges and that once charged he was either bailed or brought to trial within a specified time."). *See generally* ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960); 9 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 111 (4th ed. 1926).

[12] The most famous example is Bushell's Case, (1670) 124 Eng. Rep. 1006-07 (C.P.), in which a court granted the writ in favor of jurors confined for failing to convict.

[13] DUKER, *supra* note 2, at 95-116.

[14] U.S. CONST. art. I, § 9, cl. 2 reads: "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."

[15] Judiciary Act of 1789, ch. 20, sec. 14, 1 Stat. 73, 81-82 (1789).

[16] Interpretations of the clause range from merely limiting the ability of the federal government to suspend the writ in the state courts, DUKER, *supra* note 2, at 135 ("In sum, the debates in the federal and state conventions, the location of the habeas clause, and the contemporary commentary support the thesis that the habeas clause was designed to restrict Congressional power to suspend state habeas for federal prisoners."), to creating a federal constitutional right to federal court review of state court convictions. FREEDMAN, *supra* note 7, at 46 ("Since the Constitution came into force, the federal courts have had the authority to free state prisoners on habeas

In 1867, Congress adopted the language that remains in force today: "[T]he several courts of the United States . . . shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[17] Despite the apparent clarity and broad scope of the 1867 language,[18] commentators have vigorously debated Congress's intent. Some have narrowly interpreted the 1867 Act to have extended only then-existing habeas power to freed slaves who had been effectively bound to continued servitude.[19] Others have argued that the Act created a federal forum to review all questions of federal law that arise in state criminal cases.[20]

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corpus, and the Suspension Clause applies as a matter of original intent to any attempt by Congress to limit that authority."). Other theories have also been advanced. *See, e.g.*, ZECHARIAH CHAFEE JR., HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 51-74 (1952).

[17] Law of Feb. 5, 1867, ch. 28, 14 Stat. 385 (1867).

[18] A sponsor of the Act declared that it created habeas jurisdiction in the federal courts "coextensive with all the powers that can be conferred upon them." CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (statement of Rep. Lawrence).

[19] *See* DUKER, *supra* note 2, at 242 ("[T]here was no hint that the measure was intended to apply to those convicted by a state court of competent jurisdiction"); Forsythe, *supra* note 2, at 1116 ("[T]here is a strong and consistent record that can be read to understand the 1867 Act as referring to the Thirteenth Amendment and the Reconstruction laws designed to enforce it. Indeed, the purpose of protecting the freedmen seems to dominate the entire course of the bill . . . . [A]side from the class of persons protected, there is nothing in the legislative history that alters the conclusion from the text that the Act did not change the English limitations except in the mode of factual inquiry."); Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 55-56 (1965) ("[T]here is no foundation for the Court's assertions that the 1867 act was intended to afford a new remedy for state prisoners, that it was enacted in contemplation of anticipated southern resistance to Reconstruction, and that it was aimed at implementing the fourteenth amendment."); Neil McFeeley, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 535 (1976) ("Historical research indicates that the [1867 Act was] instituted to protect the newly-freed slaves against the vagrant and apprentice laws formulated by the southern states.").

[20] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1868) ("This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of deprivation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 619-20 (1982) (concluding that the 1867 Act indicated that Congress believed state courts would not "vindicate federal law" and it thus conferred full authority to federal courts to adjudicate federal claims anew); Mark Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on* Schneckloth v. Bustamonte, 1975 WIS. L. REV. 484, 487-92 (arguing that legislative history of the 1867 Act supports broad view).

Subsequent legislation[21] did little to settle that dispute until the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[22] in which Congress explicitly imposed a standard of review on federal habeas courts reviewing state criminal proceedings. In place of the existing judicially created *de novo* review standard,[23] the amendment required a federal habeas court to defer to the state court unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[24]

In interpreting these statutes, the Court has tended to chart its own course. While generally assuming that the 1867 Act granted the broadest possible jurisdiction, the Court has often refrained from exercising that jurisdiction for prudential reasons.[25] Even under the relatively clear language in AEDPA, the Justices have continued to engage in definitional debate[26]

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[21] A 1948 amendment codified the judge-made exhaustion of state remedies requirement. Act of June 25, 1948, § 2254, 62 Stat. 967. The 1966 amendments limited the federal habeas courts' discretion to hold evidentiary hearings where state courts had made fact findings. 28 U.S.C. § 2244(a)-(c) (2000). *See* S.REP. NO. 89-1797, at 2 (1966), *as reprinted in* U.S.C.C.A.N. 3663, 3663-64; *see also* H.R. REP. NO. 89-1892, at 5-7 (1966).

[22] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. Lanham No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 28, 40, 42, 49, and 50 U.S.C.).

[23] *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

[24] 28 U.S.C. § 2254(d)(1)-(2) (2000).

[25] In 1886, the Court recognized federal jurisdiction to remove state criminal cases to federal court, but required prisoners ordinarily to exhaust state court remedies first. *Ex parte* Royall, 117 U.S. 241, 253 (1886). The Court subsequently took the same approach with respect to procedural defaults of federal claims, *Wainwright*, 433 U.S. at 87 (1977) (recognizing federal jurisdiction despite state law procedural bar to review, but requiring federal courts to refrain from exercising jurisdiction unless petitioner demonstrates cause for the default and actual prejudice resulting from the lack of federal review); Fay v. Noia, 372 U.S. 391, 425-27, 433 (1963) (recognizing federal jurisdiction despite state law procedural bar to review, but permitting federal courts to refrain from exercising jurisdiction where petitioner deliberately bypassed state proceeding in order to secure federal court review); non-constitutional claims, United States v. Timmreck, 441 U.S. 780, 783-85 (1979) (reserving judgment on jurisdiction and refusing to address non-constitutional violation of a federal rule of criminal procedure); and Fourth Amendment claims, Stone v. Powell, 428 U.S. 465, 494-95 (1976) (recognizing federal jurisdiction but refusing to hear Fourth Amendment claim on habeas unless petitioner was not granted a full and fair opportunity to litigate the claim in state court).

[26] In Williams v. Taylor, 529 U.S. 362 (2000), the Court split five to four on what this language meant. The majority held the new amendment limited the federal courts' authority to grant the writ to cases in which state courts "unreasonably appl[y]" federal law in an objective sense to be determined by the federal courts according "to the facts of the prisoner's case." *Id*. at 413. The four Justices in the minority concluded that the 1996 Amendment required federal courts to "give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court

and the writ continues to be applied quite flexibly.[27] These decisions are entirely untethered to the common law, constitutional, or statutory bases for the writ.[28] In short, the Court's approach has been to do what it thinks is right.[29]

The result has been an accordion-like habeas doctrine that appears to expand and contract with the mood of the Justices.[30] Throughout the first half of the twentieth century, the Court insisted that habeas claims would lie only where either (1) the trial court lacked jurisdiction, or (2) the statute under which a conviction or sentence rested was

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addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails.'" *Id*. at 387 (Stevens, J., dissenting) (quoting Lindh v. Murphy, 96 F.3d 856, 861 (7th Cir. 1996)).

[27] In each of the following ten cases addressing habeas challenges after full briefing, a sharply divided Court granted the writ five times and denied it five times. *Compare* Rompilla v. Beard, 125 S.Ct. 2456, 2469 (2005) (granting the writ); Miller-El v. Dretke, 125 S.Ct. 2317, 2340 (2005) (same), Wiggins v. Smith, 539 U.S. 510, 529 (2003) (same), Penry v. Johnson, 532 U.S. 782, 803-04 (2001) (same), *and* Williams v. Taylor, 529 U.S. 420, 442-44 (2000) (same), *with* Yarborough v. Alvarado, 541 U.S. 652, 655 (2004) (denying the writ), Lockyer v. Andrade, 538 U.S. 63, 75-77 (2002) (same), Bell v. Cone, 535 U.S. 685, 688-89 (2002) (same), Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (same), *and* Weeks v. Angelone, 528 U.S. 225, 227 (2000) (same). The Court has also indicated that despite the more restrictive language of the 1996 Act, it may retain prudential restraints on federal court jurisdiction even if the statute's requirements are satisfied. *See* Horn v. Banks, 536 U.S. 266, 272 (2002) (suggesting the Court will continue to apply its retroactivity doctrine even to cases in which AEDPA standard would permit a federal court to grant the writ, stating "none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard . . . .").

[28] For example, the Court does exercise its jurisdiction in cases that are quite difficult to distinguish from *Stone*. 428 U.S. 465 (1976). *See* Withrow v. Williams, 507 U.S. 680, 694-96 (1993) (exercising habeas jurisdiction over *Miranda* claim); Rose v. Mitchell, 443 U.S. 545, 564-65 (1979) (exercising habeas jurisdiction over equal protection claim of racial discrimination in selecting a state grand-jury foreman).

[29] Jordan Steiker has shown that changes in statutory law have done little to guide the courts. Instead, much of the development of habeas law has taken the form of federal common law rather than statutory interpretation. Although he supports that conclusion well, and uses it to argue effectively that the Court could thus decide to reach pure innocence claims on habeas, he offers no theory to explain the evolution of the common law of habeas that he identifies. Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 310-11 (1993).

[30] Numerous commentators have thoroughly mined the federal courts' apparently conflicting nineteenth century decisions. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 465-77 (1963) (reading early cases to permit habeas review only where trial court lacked jurisdiction); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2057-81 (1992) (reading early cases limiting habeas review as hinging on the right to direct review in U.S. Supreme Court); Peller, *supra* note 20, at 603-43 (reading early cases to permit broad review on habeas). *See generally* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993) (reading early cases limiting habeas review as hinging on the existence of now defunct common law remedies for illegal official conduct).

unconstitutional.[31] Yet, the Court also granted the writ in cases where jurisdiction and valid statutory authority were present.[32]

In the early 1950s, the Court held that the writ reached all violations of the Federal Constitution,[33] and in the 1960s, the Court even acted like it meant what it said.[34] While aspects of the writ contracted in the 1970s, the courts continued to use it liberally to overturn death sentences.[35] Although the Court's decisions in the late 1980s and 1990s – and the amendment of the statute in 1996 – projected an era of significant narrowing of the habeas statute, the Court itself has continued to employ the writ, in some ways more aggressively than it had in recent decades.[36]

B. Theories of Habeas's Doctrinal Change

Theories abound seeking to explain the changes in habeas doctrine over time.[37] Though they vary widely, what

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[31] *Ex parte* Hawk, 321 U.S. 114, 118 (1944); Ashe v. United States *ex rel*. Valotta, 270 U.S. 424, 425-26 (1926); Knewel v. Egan, 268 U.S. 442, 445 (1925); DUKER, *supra* note 2, at 244-48. Despite the language of the cases, some have read them as constitutional decisions rather than habeas decisions. Justice O'Connor summarized this interpretation of the history of the writ in her concurring opinion in Wright v. West, 505 U.S. 277 (1992):

> While it is true that a state prisoner could not obtain the writ if he had been provided a full and fair hearing in the state courts [through the first half of the twentieth century], this rule governed the merits of a claim under the Due Process Clause. It was not a threshold bar to the consideration of *other* federal claims, because, with rare exceptions, there *were* no other federal claims available at the time.

Id. at 297-98 (O'Connor, J., concurring).

[32] *See, e.g.*, Walker v. Johnston, 312 U.S. 275, 286-87 (1941) (extending the writ to claim that uncounseled guilty plea violated due process); Moore v. Dempsey, 261 U.S. 86, 91 (1923) (extending the writ to a claim the jury was improperly influenced by a mob).

[33] Brown v. Allen, 344 U.S. 443, 458 (1953) (holding that a state court decision was not res judicata).

[34] Fay v. Noia, 372 U.S. 391, 391-99, 426-27 (1963) (granting writ in twenty-one-year-old case in which defendant had failed to appeal the denial of a motion to suppress his confession and explaining that the Court had "consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by *anything that may occur in the state court proceedings*. State procedural rules plainly must yield to this overriding federal policy." (emphasis added)).

[35] Maynard v. Cartwright, 486 U.S. 356, 365-66 (1988); Hitchcock v. Dugger, 481 U.S. 393, 397-99 (1987).

[36] *See infra* Part II.C.8.

[37] Forsythe, *supra* note 2, at 1124-63 (discussing the Supreme Court's habeas cases and other leading commentary).

unifies them all – and distinguishes them from the two theories offered here – is the vision of a single true *writ of habeas corpus*. In moments of clarity, these commentators suggest, the Court has comprehended that truth. But then, the Justices have wallowed in ignorance, applying the writ in an utterly incorrect way.[38]

The roots of modern habeas theory date back to Paul Bator's 1963 article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,[39] and Judge Friendly's 1970 reprise, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,[40] both of which advance the historical premise that habeas corpus as originally understood could not be used to review a conviction by a court with subject matter jurisdiction.[41] The Court's decisions broadening the writ, these commentators thought, had lost touch with the true habeas.

The numerous subsequent theories are by and large response briefs to Bator's thesis – as supplemented by Friendly

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[38] Wholly apart from the merits of the arguments, there are at least two reasons to seriously doubt explanations of habeas doctrine that rely on these theories of mistake. First, when the Court has rejected a body of doctrine as a mistake, it has said so. For example, when the Court rejected its *Lochner* era jurisprudence, it did so explicitly. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in Lochner [and its progeny] – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."). The Court's own references to habeas doctrinal change have borne the ring of evolution rather than mistake correction.

Second, stark divergence between doctrine and theory can often be explained by conflicting understandings about the nature and purpose of the law. As Bruce Ackerman described this phenomenon, theorists tend to assume "that the judges have been strikingly inept" when in fact the courts may understand the law "in a way that is strikingly different" from the theorists. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 24-25 (1977). In the case of habeas, theorists may have been overly focused on liberty interests while courts employed the writ to protect their own power. *See infra* Part II.

[39] Bator, *supra* note 30.

[40] Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

[41] Bator and Friendly were not the first to advance this argument. Seymour Thompson propounded many of the same concerns nearly 80 years earlier in response to the first expansion of federal habeas beyond pure jurisdictional questions. *See* Thompson, *supra* note 7, at 17-18 n.1 (collecting cases as of 1884 in which habeas corpus had been limited in the context of challenging convictions to cases in which the court lacked subject matter jurisdiction); *id*. at 16 ("[I]t is not at all clear that it was intended that [habeas corpus] should become a means in the hands of the [F]ederal district and circuit judges of revising and reversing the judgments of the courts of the States without regard to their rank or dignity."); *id*. at 19 (emphasizing that state judges have an obligation to follow federal law that "is just as strong as the same obligation when resting upon the shoulders of a judge of a Federal court"); *id*. at 21 ("[T]he interior Federal courts have unlocked the penitentiaries of the States . . . .").

– that the Warren Court dramatically and without justification expanded federal habeas review. While some commentators present sound arguments and lay bare serious errors in Bator's historical analysis, they too are unable to account for the development of habeas over the course of the twentieth century. Either the Court lost its way in the twenty years from roughly 1953 through 1973 when habeas review was quite broad, or it subsequently lost its way in refusing to reach the merits of many habeas petitions alleging non-harmless constitutional violations. The two bodies of doctrine, for these commentators, are irreconcilable.[42]

Over the past twenty years, some commentators have attempted to articulate theories of habeas that do not accuse the Court of reaching wholly erroneous decisions during one era or another. Much of this literature is extremely enlightening.[43] But none of it succeeds in presenting a theory that reconciles the broad habeas regime that existed in the 1960s and the narrower one in place today. Although some commentators lay claim to a unified theory of habeas that explains both historic and modern doctrine, each is ultimately

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[42] *See, e.g.*, Peller, *supra* note 20, at 586-92 (arguing that Bator and Friendly are wrong in criticizing the Court's extensive use of habeas in the mid-twentieth century but offering no explanation for the subsequent narrowing of the writ).

[43] James Liebman has explained the initial expansion of federal habeas as a natural outgrowth of two independent developments in federal law: (1) the federal courts' evolving level of scrutiny of questions of fact and the application of particular facts to established legal standards, or so-called mixed questions of fact and law, and (2) changes in the United States Supreme Court's own jurisdiction to review state law convictions. He explained that what appeared to be narrow habeas review in the late nineteenth and early twentieth centuries was a function of the limited grounds for review combined with a right to appellate review in the Supreme Court. Habeas appeared to expand when new grounds for review were created, because the caseload made mandatory Supreme Court review impossible. Liebman, *supra* note 30, at 2058, 2072, 2075-81, 2091-92. *See also* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 274-75 (1988) (making the same points as Leibman with somewhat less historical documentation, along with a third point that certiorari petitions were often incomprehensible during the late nineteenth and early twentieth centuries, further justifying habeas review).

Ann Woolhandler has argued that (1) the expansion of habeas was part of the federal courts' recognition that ad hoc individual action could violate the Constitution, and (2) the subsequent narrowing of the writ is part of a mistaken trend toward limiting remedies for these ad hoc violations. Woolhandler, *supra* note 30, at 630-32.

Larry Yackle argues that litigants have a right to have federal issues decided in federal court, but that the compelling benefits of diverse centers of criminal-law making in the various states justify exhaustion of state court remedies. Yackle, *Explaining*, supra note 7, at 1032-40. He thus concludes that the Court struck the right balance in the 1950s and 1960s by (1) requiring that state criminal litigation occur initially in state court, and (2) permitting convicts to re-litigate federal issues collaterally through the federal habeas process. *Id*.

critical of core aspects of modern doctrine that do not fit the theory.[44]

Two approaches are emblematic of the standard thinking about the development of habeas doctrine. First, Ann Woolhandler and Larry Yackle have argued that the modern contraction in habeas law is an outgrowth of the post-Warren Court's ambivalence about, if not outright opposition to, protecting individual rights, particularly from ad hoc violation

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[44] For example, Liebman attempts to fit modern law within his normative vision, contending that habeas is, has always been, and should continue to be a practical substitute for direct appellate review of state criminal cases in the U.S. Supreme Court. Liebman, *supra* note 30, at 2056 (claiming to make "an effort to show how most or all the Court's cases map onto this rule"). Case law existing when his article was published, however, was inconsistent with his theory. For example, throughout the 1970s and 1980s, the Court aggressively reviewed on direct appeal state court decisions on Fourth Amendment issues. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 36 (2000); Knowles v. Iowa, 525 U.S. 113, 115-16 (1998); Hayes v. Florida, 470 U.S. 811, 812-13 (1985); Ybarra v. Illinois, 444 U.S. 85, 87, 90 (1979). Yet, the Court permitted virtually no federal habeas review of Fourth Amendment questions. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976). In addition, Liebman says that the Court's procedural bar jurisprudence on habeas was consistent with the Court's direct review jurisdiction. Liebman, *supra* note 30, at 2095 (arguing that the cause and prejudice test "provides a nearly perfect proxy for the 'adequate and independent state grounds' doctrine on direct appeal"). Federal habeas courts, however, retain an ad hoc power to address serious miscarriages of justice despite the adequacy of a state ground for denying a constitutional claim. Murray v. Carrier, 477 U.S. 478, 496 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). Doing justice cannot overcome the Court's lack of jurisdiction on direct appeal. *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1875) (explaining the ordinarily limited nature of federal jurisdiction to review state court decisions). Most importantly, the enactment of AEDPA, and the Court's subsequent interpretation of it, have clearly established separate standards for direct and habeas review. Although the U.S. Supreme Court can review direct challenges to state criminal convictions *de novo,* a federal habeas court may reach the merits only if the state court unreasonably applied federal law. For further discussion of AEDPA, see *supra* note 5.

Larry Yackle also claims to explain modern doctrine, but he too disagrees with several aspects of it. *See* Yackle, *Explaining*, *supra* note 7, at 1051 (explaining how his analysis supports a more flexible exhaustion doctrine than current doctrine requires); *id.* at 1052-54 (describing deference to state fact finding in modern doctrine as inconsistent with his approach); *id.* at 1058 ("If my alternative explanation for habeas were adopted, the federal habeas courts might well disregard procedural default in state court altogether and entertain federal claims even when petitioners 'deliberately bypassed' state procedures.").

Barry Friedman's claim that his proposal "describes the emerging trend of Court decisions with some accuracy," Friedman, *supra* note 43, at 329, also turns out to be overstated. He ultimately argues that his theory supports significant changes to existing law. *See id*. at 287 (concluding that the appellate model of habeas "suggests that *Stone* simply is incorrectly decided"); *id.* at 298-99, 324-25, 340-46 (articulating a significant change in the law with respect to procedural bar); *id.* at 319 (arguing that the total exhaustion rule should be overruled); *id.* at 328 (arguing for significant changes to the test for ineffective assistance of counsel); *id.* at 337 (suggesting change in exhaustion rules to require prisoners to seek habeas review before seeking review in the U.S. Supreme Court).

by individual government actors.[45] However true that description may be with respect to the personal views of particular Justices, one cannot readily ascribe it to a Court that has continued to expand criminal procedure rights[46] and ad hoc constitutional review of them,[47] while it has constricted habeas.

Second, Evan Tsen Lee emphasizes that modern habeas doctrine rests in large part on the belief that the writ deters

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[45] Woolhandler, *supra* note 30, at 635 ("More recently . . . the Court has returned to its prior ambivalence about the status of some constitutional rights – particularly rights to be free from ad hoc official illegality. This ambivalence has translated into dilution of remedies available in federal courts, including relief on habeas."); Larry W. Yackle, *Hagioscope*, *supra* note 7, at 2331 (1993) ("The battle over habeas is driven, in the main, . . . by an ideological resistance to the Warren Court's innovative interpretations of substantive federal rights.").

[46] The entire body of the Court's death penalty jurisprudence, which imposed vast new obligations on the states, was developed after the initial restraints on habeas. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980) (applying principle of guided discretion to vague factor used to determine eligibility for the death sentence); Woodson v. North Carolina, 428 U.S. 280 (1976) (adopting the constitutional guided-discretion principle for cruel and unusual punishment claims challenging death sentences). In addition, long after it had virtually eliminated federal habeas review of search and seizure claims, the Court continued to expand the scope of the Fourth Amendment. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (holding that stopping of automobiles without cause to prevent drug trafficking violates the Fourth Amendment); Hayes v. Florida, 470 U.S. 811, 817 (1985) (holding that detention without cause for fingerprinting violates the Fourth Amendment); Ybarra v. Illinois, 444 U.S. 85, 91-92 (1979) (holding that warrant to search tavern and bartender did not give police authority to frisk patrons without cause). Similarly, after substantial narrowing of habeas review in general, the Court continued to expand other rights under (1) the Fifth Amendment, *see, e.g.*, Minnick v. Mississippi, 498 U.S. 146, 153 (1990) (extending right to counsel during custodial interrogation); Edwards v. Arizona, 451 U.S. 477, 486-87 (1981) (adopting per se rule that police may not initiate questioning of a defendant who invokes *Miranda* rights); (2) the Sixth Amendment, *see, e.g.*, Michigan v. Jackson, 475 U.S. 625, 636 (1986) (holding that request for counsel at a hearing must extend to subsequent interrogation); Maine v. Moulton, 474 U.S. 159, 176-77 (1985) (holding right to counsel violated by using uncover agent to question suspect who had been indicted for crimes relating to the communications); Brewer v. Williams, 430 U.S. 387, 404-05 (1977) (interpreting right to counsel to require exclusion of statement made outside the presence of counsel that was not a product of interrogation), and (3) general due process protections, *see, e.g.*, Simmons v. South Carolina, 512 U.S. 154 (1994) (requiring that the jury be instructed that the alternative to a death sentence is life without possibility of parole where the state introduces evidence of future dangerousness as an aggravating factor).

[47] For example, in the twenty years since United States v. Leon, 468 U.S. 897, 920 (1984), created the good faith exception to the exclusionary rule, the Court has applied it only to searches authorized by an entity other than the police themselves. *See* Arizona v. Evans, 514 U.S. 1, 14-15 (1995) (explaining that the *Leon* exception to the exclusionary rule applies where the error is *not* attributable to a "law enforcement team engaged in the often competitive enterprise of ferreting out crime"); *id*. at 16-17 (O'Connor, J., concurring) (explaining that if error were attributable to an unreasonable police decision, the *Leon* exception to the exclusionary rule would not apply).

state actors from violating constitutional rights.[48] Lee's focus on deterrence captures the flavor of the analysis that the Court has ostensibly undertaken in modern habeas cases – balancing the deterrent value of granting the writ against its cost in terms of finality and comity. For example, the federal courts generally will not entertain constitutional claims that were not raised in state court. The cost in terms of retrial or release of a potentially guilty defendant is deemed high, while the need for deterrence where no objection is lodged is quite low. But if the defendant demonstrates cause attributable to the state – conduct that would likely be deterred in the future if the writ were granted – and prejudice to the defendant's case, then a federal habeas court will address the claim.

As an interpretive device, a deterrence/finality/comity theory leads to nowhere. Granting the writ could always, in theory, deter state court action inconsistent with federal standards, yet granting the writ always undermines finality and federal-state comity.[49] The inability to quantify any of the variables enables this rationale to justify every past decision, but to predict no future ones.

Moreover, the premises that (1) broad habeas deters state court decisions inconsistent with federal law and (2) modern restrictive habeas review shows more respect for finality and state processes may be wrong as well. Elected state judges may be more likely to deny constitutional challenges if they know that life-tenured federal judges are waiting to clean up the mess.[50] And current doctrine's near absolute deference to state fact finding and default rules, combined with continuing scrutiny of substantive

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[48] Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151, 219 (1994) ("The deterrence theory is the best interpretation of the text, history, and structure of the present federal habeas statute and ought to be augmented by notions of process and innocence."). Other commentators and members of the Court have also identified deterrence as a role played by habeas doctrine. *See* Teague v. Lane, 489 U.S. 288, 306 (1989) (plurality opinion) ("[T]he threat of habeas [corpus] serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." (quoting Desist v. United States, 394 U.S. 244, 262-263 (Harlan, J., concurring))); Liebman, *supra* note 30, at 2032 ("Habeas corpus is designed to deter state courts from misapplying federal law in effect at the time the state courts acted."); Peller, *supra* note 20, at 668.

[49] Hoffman & Stuntz, *supra* note 6, at 109 ("[C]omity and federalism *always* offer an argument for further restricting habeas.").

[50] *See* Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 97-98 nn.50-56 (2002) (citing psychological evidence tending to show that those who know someone else has ultimate responsibility for a decision will minimize negative outcomes and take the decision less seriously).

constitutional decisions, suggests that state judges, although capable of handling mundane matters of compiling a record and enforcing procedural rules, cannot be trusted to enforce individual constitutional rights. The deterrence/finality/comity theory is thus at best indeterminate and possibly wholly misguided.[51]

II. EXPLAINING CHANGE IN HABEAS DOCTRINE THROUGH THE JUDICIAL-POWER THEORY

This Part advances the theory that courts use the writ to enforce their power rather than to remedy individual deprivations of liberty. After a brief review of the common law writ and the early American experience, each significant development of habeas doctrine in the United States during the twentieth century will be explored through the prism of this judicial-power theory. Beginning with *Frank v. Magnum,*[52] and continuing through the modern cases limiting the scope of the writ, this Part shows how interpreting habeas corpus as an instrument of judicial power helps explain not only the cases expanding the writ, but also those cases restricting its scope from the guilty plea trilogy in 1970[53] through the Court's 1993 decision in *Brecht v. Abrahamson*[54] and the 1996 habeas reform act.[55] This Part identifies a neglected consideration that brings a measure of coherence to otherwise inexplicable doctrinal changes. The judicial-power theory does *not*, however, provide a unique cause-and-effect explanation for each doctrinal development. As Part III shows, other interpretations also enrich our understanding of habeas's evolution.

A. Common Law Use

William Duker's "A Constitutional History of Habeas Corpus" carefully examined inconsistencies between the

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[51] Even putting these problems aside, the deterrence/finality/comity theory, as Lee demonstrates, cannot explain key modern decisions limiting habeas review. *See* Lee, *supra* note 48, at 220.

[52] 237 U.S. 309 (1915).

[53] Parker v. North Carolina, 397 U.S. 790, 797-98 (1970); McMann v. Richardson, 397 U.S. 759, 771 (1970); Brady v. United States, 397 U.S. 742, 758 (1970).

[54] 507 U.S. 619 (1993).

[55] *See infra* Part II.C.

individual liberty theory of habeas and early habeas practice.[56] He showed that by the Fourteenth Century, English courts were entertaining petitions seeking release from unlawful detention. But this practice, he wrote, "was largely attributable to the superior courts' desire to extend and secure their jurisdiction" rather than a perceived right to individual review to safeguard personal liberty.[57] "Release [under the writ]," he believed, "had nothing to do with the guilt or innocence of the party confined."[58]

In a number of recorded cases during the common law period, the courts simply refused to scrutinize even apparently serious claims of unlawful detention when the detention order came from a trusted source.[59] Duker thus described the then-accepted notion that "habeas corpus developed primarily to protect the liberty of the subject" as a "myth."[60] Although he did not see it this way, the individual liberty explanation was a myth because it explained only those cases in which the courts exercised their habeas authority. Those cases in which they did not, despite apparently wrongful detentions, could only be explained as erroneous decisions. The judicial-power theory, by contrast, explains the cases in which the English courts refused to grant the writ as well as those in which they did.

B. Early U.S. Experience

During this era, Congress expanded federal habeas jurisdiction three times. Each responded to specific state court intrusions on federal authority.[61] Two pre-1850 amendments

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[56] Initially, the writ was used to compel a party's presence for trial or some other purpose rather than to test the legality of confinement. DUKER, *supra* note 2, at 23, 27; SOKOL, *supra* note 7, at 4.

[57] DUKER, *supra* note 2, at 8, 26-48 (discussing various jurisdictional battles among English courts and other branches of government in which habeas corpus played an important role); SOKOL, *supra* note 7, at 4-5, 7-8 (explaining that in the Sixteenth Century the writ "became a weapon in . . . inter-court competition").

[58] DUKER, *supra* note 2, at 62.

[59] *See* Regina v. Paty, (1704) 91 Eng. Rep. 431 (K.B.); Proceedings in the King's-Bench, upon the Earl of Danby's Motion for Bail, (1682) 11 St. Tr. 831, 853-54 (K.B.) (refusing to examine cause of confinement where defendant held by Parliament); Five Knights Case, (1627) 3 St. Tr. 1, 59 (K.B.) (refusing to examine cause of confinement where defendants held directly by order of the King); DUKER, *supra* note 2, at 29-60.

[60] DUKER, *supra* note 2, at 8. Although Duker reads the early history of habeas in a way that is consistent with this Article, he believes that the writ later transformed into a doctrine that focuses directly on preserving individual liberty. *Id.*

[61] *See* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV.

extended federal authority to state prisoners confined for fulfilling their obligations to either (1) the federal government or (2) a foreign government.[62] Expanding federal habeas to those imprisoned for performing federal duties directly reinforced the supremacy of federal law-making authority. And permitting foreign citizens to petition for federal habeas review reinforced the supremacy of federal authority to deal with foreign nations.

The third expansion occurred in the immediate aftermath of the Civil War in an amendment to the habeas statute creating federal jurisdiction "where any person may be restrained of his or her liberty in violation of the constitution."[63] At first blush, this post-Civil-War amendment appears to have been motivated by an intent to protect individual liberty by extending federal habeas review to all state prisoners.[64] Congress's desire to enforce *federal authority* to abolish slave-holding, however, may have had as much to do with this expansion of the writ as the liberty of particular former slaves.

C. Twentieth Century Developments in Habeas Doctrine

This section explores each significant doctrinal development in modern habeas law. Where prior histories have interpreted many of these changes as mistakes inconsistent with the true habeas, the judicial-power understanding of the writ coherently explains each of them. In the early years of the century, the writ was employed in an ad

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862, 869, 882-83 (1994) ("The statutory expansions of the writ between 1789 and 1867 were all aimed at specific challenges to federal supremacy."); Thompson, *supra* note 7, at 14-16 (explaining contemporary events driving each amendment).

[62] In 1833, Congress extended the scope of federal habeas to cases in which a prisoner was held by a state tribunal as a result of conduct undertaken in the service of the federal government. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634-35 (1833) (extending power of federal courts to grant the writ in favor of a prisoner "committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof"). In 1842, the power was further extended to prisoners who were "subjects or citizens of a foreign State" held under federal or state law for acts protected by the law of a foreign state and principles of international law. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (1842) (extending the power of the federal courts to grant the writ in favor of a prisoner held "on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exception, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof").

[63] Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 385 (1867).

[64] *Id*.

hoc fashion to curtail what the Court saw as lower court insensitivity to serious abuses of due process.[65] In mid-century, the writ was applied more systematically in response to the state courts' confusion about, if not open hostility to, the selective incorporation of much of the criminal procedure elements of the Bill of Rights.[66] By the 1970s, incorporation had become mainstream, and the justification for the systematic application of the writ waned. During this period, the Court began to limit habeas review in ways that are consistent with the judicial-power theory.[67]

Simultaneously with the narrowing of the writ in the 1970s, the Court articulated a new body of substantive constitutional law governing death penalty cases.[68] Like the incorporation of the Bill of Rights a generation earlier, this new doctrine engendered confusion and resistance in the state courts. The Court's restraints on habeas were thus strategically placed to limit habeas review of then well-accepted doctrines, but not – or at least not so much – the Court's new death penalty law.[69] By the mid-1990s, constitutional death penalty doctrine had established itself on firmer ground, and the Court extended restraints on habeas more systematically.[70] With Congress's help in 1996, the Court again came to apply the writ in an ad hoc fashion to curtail inferior court defiance of Supreme Court precedent.[71]

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[65] *See infra* Parts II.C.1-2.

[66] *See infra* Parts II.C.2-5.

[67] *See infra* Part II.C.6.

[68] *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 432-33 (1980) (applying principle of guided discretion for cruel and unusual punishment claims to vague factor used to determine applicability of death sentence); Woodson v. North Carolina, 428 U.S. 280 (1976) (adopting the constitutional guided discretion principle and applying it to statute not permitting consideration of mitigating evidence).

[69] *See infra* Part II.C.7.

[70] *See, e.g.*, McClesky v. Zant, 499 U.S. 467, 493 (1991) (adopting single standard for excusing failure to state a claim in state procedural default and abuse of the writ cases).

[71] Since 1996, the Court has granted the writ six times: Rompilla v. Beard, 125 S.Ct. 2456, 2462-64 (2005) (granting the writ because of ineffective assistance of counsel); Miller-El v. Dretke, 125 S.Ct. 2317, 2339 (2005) (granting the writ because of improper exclusion of African-American jurors); Banks v. Dretke, 540 U.S. 668, 693-94 (2004) (overturning twenty-three-year-old death sentence where prosecution had withheld information relevant to impeachment); Wiggins v. Smith, 539 U.S. 510, 534 (2003) (overturning death sentence for inadequate investigation by defense counsel); Penry v. Johnson, 532 U.S. 782, 803-04 (2001) (overturning death sentence based on juror bias and prosecutorial misconduct); Williams v. Taylor, 529 U.S. 420, 440-42 (2000) (overturning death sentence for inadequate investigation by defense counsel). The Court has also held that a habeas court could address the merits of a claim despite a state court's reliance on a procedural bar. Lee v. Kemna, 534 U.S. 362, 376 (2002).

1. *Frank* and *Moore*

In 1912 and 1923, respectively, the Supreme Court decided *Frank v. Magnum*[72] and *Moore v. Dempsey,*[73] two cases raising the question whether mob violence can undermine the fundamental fairness of a criminal trial. These cases are often cited as watershed moments in the transformation of habeas doctrine from a limited remedy for cases in which courts lacked authority to punish – either because they lacked jurisdiction or the statute at issue was unconstitutional – to a broader remedy for ad hoc injustices in otherwise lawful proceedings.[74]

Frank was a notorious case in which the influence of the mob on the trial is quite well documented.[75] Nevertheless, the Court refused to grant the writ on the ground that the state had provided sufficient corrective process in the form of appellate review.[76]

In *Moore*, the Court held that a hearing on the merits of the writ could go forward in similar, albeit even more egregious, circumstances.[77] Justice Holmes distinguished the two cases, explaining that the corrective process in *Moore* was not "so adequate that interference by *habeas corpus* ought not to be allowed."[78] The state supreme court had opined only that it was not "necessarily" the case that the mob rendered the trial unfair, and it had prohibited a collateral inquiry into the facts necessary to prove otherwise.[79]

The basis for the different outcomes in *Frank* and *Moore* has never been adequately explained. Some have speculated that *Moore* de facto overruled *Frank*.[80] But that claim is undermined by post-*Moore* cases in which the Court cited

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[72] 237 U.S. 309, 324 (1915).

[73] 261 U.S. 86, 89-90 (1923).

[74] *Compare In re* Eckart, 166 U.S. 481, 483 (1897) (denying review on habeas claim where the alleged error was "committed in the exercise of jurisdiction" and thus was not the sort of "jurisdictional defect, remediable by the writ"), *with* Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (holding that use of the writ to "test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction").

[75] FREEDMAN, *supra* note 7, at 53.

[76] *Frank*, 237 U.S. at 335-36.

[77] FREEDMAN, *supra* note 7, at 68-85.

[78] *Moore*, 261 U.S. at 91.

[79] *Id*. at 91-92.

[80] Fay v. Noia, 372 U.S. 391, 421 & n.30 (1963); Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84, 105 (1968); Peller, *supra* note 20, at 646-48; Reitz, *supra* note 2, at 1329.

Frank with approval.[81] Others have read *Moore* as an application of *Frank*. Where *Frank* required state corrective process, *Moore* rested on the lack of a state corrective process.[82] But that explanation is difficult to square with the availability of an appellate review process in both cases.[83]

The judicial-power theory provides an alternative explanation for the results in these cases. In *Frank*, the Court was addressing the problem of mob dominance on something of a clean slate. And it was satisfied that the state supreme court had appreciated the problem and taken it seriously in upholding the judgment.[84] In *Moore*, by contrast, the federal due process concern with mob influence was firmly established by *Frank*. Given that, the state appellate court's cursory dismissal of the issue was deemed unacceptable.[85] The problem was not the lack of a protective process. Rather, the Court bristled at the state court's apparent brushing aside of an important federal concern with just a few unilluminating words.

2. The Years Between *Moore* and *Brown v. Allen*

Throughout the depression and World War II years, the Court sometimes used the writ more broadly to remedy constitutional violations that earlier decisions suggested were not remediable on habeas.[86] The traditional explanation for

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[81] *See, e.g.*, Ashe v. United States *ex rel.* Valotta, 270 U.S. 424, 426 (1926); Knewel v. Egan, 268 U.S. 442, 445 (1925).

[82] *See* Wright v. West, 505 U.S. 277, 299 (1992) (O'Connor, J., concurring in judgment); Bator, *supra* note 30, at 484-89 (explaining that *Frank* required state corrective process to comport with due process and that the state court in *Moore* failed to provide it).

[83] Liebman, *supra* note 29, at 2042-47.

[84] Frank v. Magnum, 237 U.S. 309, 333 (1915).

[85] Moore v. Demsey, 261 U.S. 86, 91-92 (1923).

[86] Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (extending writ to challenge a claim that the FBI coerced a guilty plea and describing standard):

> The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.

Id.; Walker v. Johnston, 312 U.S. 275, 287 (1941) (extending habeas to cover same violation).

these cases is that the Court gradually expanded the scope of the writ in response to expanding notions of due process rights in criminal cases.[87] Through the 1930s, due process required little more than conformity with a jurisdiction's own law.[88] By the late 1930s, however, the Court began to hold that the due process clause imposed more specific requirements on the state judicial systems.[89] As it recognized these requirements, the traditional argument goes, the Court applied them on habeas until, in *Brown v. Allen*,[90] it acknowledged that habeas review extended to all constitutional violations.

This interpretation of the writ's expansion fails to account for the Court's repeated insistence during this period that habeas review did not extend to all constitutional violations.[91] And certainly, nothing in the historical record of the deliberations in the *Brown* case suggests that the Court decided to reveal suddenly what it had been secretly doing for a decade.[92]

The judicial-power theory, by contrast, explains why the Court used the writ only in certain cases. When the law was debatable, the Court typically denied the writ.[93] Where the Court had, by contrast, announced clear federal law, it used the

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[87] *Wright*, 505 U.S. at 298 (O'Connor, J., concurring in judgment).

[88] *See* Palko v. Connecticut, 302 U.S. 319, 322-23 (1937) (holding aspect of double jeopardy clause prohibiting retrial after conviction on motion of the state not fundamental principle of liberty as demonstrated by disagreement among Justices of the U.S. Supreme Court in deciding the issue) ("Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case."); Twining v. New Jersey, 211 U.S. 78, 106-110 (1908) (holding privilege against self-incrimination not "a fundamental principle of liberty and justice"); Maxwell v. Dow, 176 U.S. 581, 590-91 (1900) (same regarding right to a jury trial in a criminal case).

[89] *See* Wolf v. Colorado, 338 U.S. 25, 27-28, 33 (1949) (holding that Fourteenth Amendment's Due Process Clause incorporates the Fourth Amendment's prohibition on unreasonable search and seizure); *In re* Oliver, 333 U.S. 257, 266-68, 273 (1948) (same regarding rights to public trial and to notice of charges); Brown v. Mississippi, 297 U.S. 278, 287 (1936) (holding that Fourteenth Amendment's Due Process Clause prohibits introduction of evidence obtained from a coerced confession even though the privilege against self-incrimination did not apply to the states).

[90] 344 U.S. 443, 458 (1953).

[91] *Ex parte* Hawk, 321 U.S. 114, 118 (1944) (explaining that federal habeas may not be used to challenge claims based on ineffective counsel and a prosecution's knowing use of perjured testimony where adequate state processes were employed to test the claims); Ashe v. United States *ex rel.* Valotta, 270 U.S. 424, 426 (1926) (holding no basis to challenge in habeas an otherwise proper trial on two indictments simultaneously); Knewel v. Egan, 268 U.S. 442, 446 (1925) (holding insufficiency of indictment may not be challenged on habeas).

[92] FREEDMAN, *supra* note 7, at 95-130 (citing internal memoranda among the Justices and their clerks).

[93] *See supra* note 88.

writ to ensure that state courts respected its superior role. For example, in a 1932 direct appeal, the Court held that the right to counsel in a capital case is a critical component of due process.[94] Subsequently, on habeas review the Court concluded that the writ should issue if a lower court accepted a waiver of the right to counsel under anything but the strictest standard.[95] Similarly, in 1935 and 1936, respectively, the Court held that presenting perjured testimony[96] and coercing a confession[97] violate fundamental principles of fairness. In the early 1940s, the Court on habeas review analogized a coerced confession to a coerced guilty plea.[98] Rather than establishing that constitutional claims became cognizable on habeas as soon as they became constitutional claims – a conclusion conflicting with language in other opinions during this period – these cases stand for the more limited proposition that the federal courts will exercise their power to grant the writ where a lower court appears to have ignored or trivialized the law articulated by a superior court.

3. *Brown v. Allen*

Brown has long been interpreted to hold that the writ reached all constitutional violations.[99] But not everyone agrees with that reading. The dense opinions in the case, and the lead opinion's cryptic description of the inquiry into whether the state court had reached a "satisfactory conclusion,"[100] have led some to speculate as to the Court's actual intent.[101] Eric

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[94] Powell v. Alabama, 287 U.S. 45, 71 (1932).

[95] House v. Mayo, 324 U.S. 42, 46-47 (1945) (overturning denial of habeas in right-to-counsel case where state court had refused to address issue on the merits); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (extending habeas to review of waiver of counsel in capital case).

[96] Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam) (applying prohibition against use of perjured testimony).

[97] Brown v. Mississippi, 297 U.S. 278, 285-86 (1936) (holding that coerced confessions violate due process even though the Fifth Amendment privilege against self-incrimination does not apply to the states); *id.* at 287 ("The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence.").

[98] Waley v. Johnston, 316 U.S. 101, 104 (1942).

[99] *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

[100] Brown v. Allen, 344 U.S. 443, 463 (1953).

[101] Wright v. West, 505 U.S. 277, 287 (1992) (plurality opinion) ("We had no occasion to explore in detail the question whether a 'satisfactory' conclusion was one that the habeas court considered *correct*, as opposed to merely *reasonable*, because we concluded that the constitutional claims advanced in *Brown* itself would fail even if the state courts' rejection of them were reconsidered *de novo*.").

Freedman's historical research on the case, however, demonstrates that the scope of review was a critical point for the Court and that the majority intended to require *de novo* review of all constitutional claims.[102]

The Court's change of course in *Brown* has been explained as the culmination of events that had been occurring gradually for many years. Different commentators point to different factors, but all of them center on changing attitudes toward criminal procedure rights and the appropriate way to enforce them. These accounts would be quite persuasive if habeas doctrine had remained fixed after *Brown*. But it did not, and the prior accounts fail to explain the initial continued expansion of the writ in the two decades after *Brown* as well as its subsequent contraction.

The judicial-power theory's explanation of *Brown*, by contrast, is more consistent with later developments. More than a response to changing social conceptions of liberty, *Brown* can be read as a peremptory strike at difficulties likely to arise because of the incorporation of the Bill of Rights. By the early 1950s, the Court had held that the right to a public trial,[103] the right to notice of charges,[104] and the prohibition against unreasonable searches and seizures[105] applied to the states. The contemporary struggle with desegregation served as a harbinger of the challenges attendant to extending federal criminal procedure rights to the states. Just as the 1867 Congress expanded habeas review, in Justice Brennan's words, "anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments,"[106] the 1953 Court, after having limited the scope of the 1867 Act for some 80 years, expanded habeas review anticipating state resistance to broader understandings of the Fourteenth Amendment.

But *Brown* should not be overstated. Four years before, the Court explicitly declined to apply the Fourth Amendment exclusionary rule to the states,[107] substantially limiting the number of cases in which constitutional issues would arise.

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[102] FREEDMAN, *supra* note 7, at 95-130 (citing internal memoranda among the Justices and their clerks).

[103] *In re* Oliver, 333 U.S. 257, 266-73 (1948).

[104] *Id*. at 273.

[105] Wolf v. Colorado, 338 U.S. 22, 27-28 (1949).

[106] William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961).

[107] *Wolf*, 338 U.S. at 33.

And by ruling against each petitioner in *Brown* – in one case without reaching the merits because of a minor procedural default in state court[108] – the Court indicated that it did not intend to implement a pervasive new level of federal review.

4. Mass Incorporation of Criminal Procedure Rights into the Fourteenth Amendment

The Court's 1961 decision in *Mapp v. Ohio*[109] to apply the Fourth Amendment exclusionary rule to the states began a period during which the Court incorporated most of the criminal procedure protections in the Bill of Rights,[110] and arguably some that were not there,[111] into the Due Process Clause of the Fourteenth Amendment. Although the incorporation process continued for much of the decade, March 18, 1963 stands out as a defining moment both for the substantive law made that day and for the procedural decisions governing federal habeas corpus.

Substantively, the Court decided *Gideon v. Wainwright*[112] and *Douglas v. California*,[113] which held that defendants in state criminal proceedings had a federal constitutional right to counsel at trial and during a first appeal as of right. These decisions in conjunction with *Mapp* transformed the landscape facing habeas review. Where the *Brown* Court may have assumed that constitutional challenges would continue to be extraordinary matters, by March 1963 the Court had abandoned that illusion. Claims of illegally seized evidence and inadequate assistance of counsel could be brought

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[108] Daniels v. Allen, *decided sub nom.* Brown v. Allen, 344 U.S. 443, 486 (1953).

[109] 367 U.S. 643, 654-55 (1961).

[110] In the six years after *Fay*, the Court incorporated several criminal procedure rights: Malloy v. Hogan, 378 U.S. 1, 8 (1964) (privilege against self-incrimination); Pointer v. Texas, 380 U.S. 400, 403 (1965) (right of confrontation); Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967) (right to a speedy trial); Washington v. Texas, 388 U.S. 14, 17-19 (1967) (right to compulsory process); Duncan v. Louisiana, 391 U.S. 145, 148-62 (1968) (right to a jury trial in a criminal case); Benton v. Maryland, 395 U.S. 784, 794-96 (1969) (prohibition of double jeopardy).

[111] Miranda v. Arizona, 384 U.S. 436, 467-69 (1966) (holding that even voluntary statements from a suspect subjected to custodial interrogation, but not warned of rights to remain silent and to counsel, must be excluded from evidence).

[112] 372 U.S. 335, 344 (1963) (holding that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

[113] 372 U.S. 353, 357 (1963) (holding that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor").

in virtually every criminal case, increasing exponentially the percentage of state criminal cases in which the defendant could seek federal habeas review. As Judge Friendly declared in 1970, "[t]oday, it is the rare criminal appeal that does *not* involve a 'constitutional' claim."[114]

The traditional habeas histories interpret this period as the inevitable extension of *Brown*'s holding that any constitutional claim was cognizable on federal habeas. As each new right was applied to the states, this theory assumes, habeas doctrine naturally responded by providing a remedy for its violation.[115] But there was nothing inevitable about what happened. On the contrary, there were at least two other alternatives open to the Court. It could have reaffirmed the limits on federal habeas that the *Brown* Court accepted, or even returned to the limits that it had applied before that case to guard against an onslaught of federal habeas litigation. Instead, it broadened the writ beyond anything that could have been anticipated after *Brown*.

Given the likely dramatic expansion in federal constitutional claims in state criminal cases and thus the potential for federal habeas claims, the Court's decision to take up key habeas corpus issues on the same day as the right-to-counsel decisions was no mere coincidence.[116] More interesting is the Court's decision to impose sweeping and systematic oversight obligations on the federal courts in *Townsend*, with respect to fact finding, and *Fay,* with respect to review of claims defaulted in state court.[117]

Again, the judicial power model explains these decisions consistently with later habeas doctrine. Where the *Brown* Court may have foreseen state resistance to the few federal rights that had then been applied to the states, by 1963 the Court faced a certain period of confusion as states struggled to apply not only *Mapp* and *Gideon*, but also the federal rights

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[114] Friendly, *supra* note 40, at 156.

[115] For example, after the Court decided in Mapp v. Ohio, 367 U.S. 643, 655 (1961), that the Fourth Amendment exclusionary rule must apply in state cases, it soon used habeas review to enforce that decision. *See, e.g.*, Whiteley v. Warden, 401 U.S. 560, 568-69 (1971) (granting writ where arrest warrant not supported by probable cause).

[116] Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[117] Shortly thereafter, the Court issued a similarly sweeping decision dealing with successive petitions. Sanders v. United States, 373 U.S. 1, 18-19 (1963) (holding that even when a successive petition raises new claims "the federal judge clearly has the power – and, if the ends of justice demand, the duty – to reach the merits").

that the Justices surely foresaw would be applied to the states in the ensuing five years.[118]

Specific incidents of state court resistence or incompetence were surely a concern.[119] But the Court also had more systemic issues in mind. Even state courts that conscientiously sought to follow federal precedent had to rely on counsel who were not used to presenting federal issues in state criminal proceedings. The 1963 Court may have intended two effects to flow from *Fay* and *Townsend*. First, these cases would compel state trial judges and prosecutors to take a more proactive approach to federal constitutional questions, knowing that issues not raised in state proceedings could be re-litigated in federal court.[120] Criminal trial judges have a knack for spotting issues that could give rise to an appeal. The Court's 1963 cases can be seen as a way to force state trial judges to develop a similar "'sixth sense' to detect lurking constitutional questions."[121] Second, the federal judiciary was unaccustomed

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[118] Contemporaneously with *Mapp*, Justice Brennan, in a speech at the Utah Law School, predicted both the expansion of habeas as rights were incorporated into the Fourteenth Amendment and likely increased state resistance to habeas in light of its expanding scope. Brennan, *supra* note 102, at 439-40. The experience over the proceeding decade reviewing confession cases under due process principles likely gave the Justices insight into the reaction of state courts to new federal constitutional standards. *See, e.g.*, Spano v. New York, 360 U.S. 315, 315 (1959) ("This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment."). And in the month immediately following its March 1963 decisions, the Court itself vacated and remanded no less than eighteen habeas cases for reconsideration in light of *Gideon*: Hartsfield v. Wainwright, 372 U.S. 782 (1963); Doughty v. Maxwell, 372 U.S. 781 (1963); Jordan v. Wiman, 372 U.S. 780 (1963); Douglas v. Wainwright, 372 U.S. 779 (1963); Tull v. Wainwright, 372 U.S. 778 (1963); Linder v. Nash, 372 U.S. 777 (1963); Patterson v. Warden, 372 U.S. 776 (1963); Tyler v. North Carolina, 372 U.S. 775 (1963); LaForge v. Wainwright, 372 U.S. 774 (1963); Walker v. Randolph, 372 U.S. 773 (1963); Haynes v. Florida, 372 U.S. 770 (1963); Watt v. Wainwright, 372 U.S. 769 (1963); Arnold v. Dir., Fla. Div. of Corr., 372 U.S. 769 (1963); Garner v. Pennsylvania, 372 U.S. 768 (1963); Vecchiolli v. Maroney, 372 U.S. 768 (1963); Weigner v. Russell, 372 U.S. 767 (1963); Rice v. Wainwright, 372 U.S. 766 (1963); Hatten v. Wainwright, 372 U.S. 766 (1963).

[119] Brennan, *supra* note 102, at 439-40; Daniel J. Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286, 290 (1966).

[120] A few years after *Fay* and *Townsend*, Daniel Meador explained that the pre-1963

> system made it possible for the [state court] trial judge to assume a more or less passive role, relying on defense counsel to make objections and simply ruling on matters raised by the opposing parties. . . . Correspondingly, the prosecution was under no pressure to expose the facts underlying . . . any . . . possible federal objection.

Meador, *supra* note 119, at 287. *Fay* and *Townsend* forced the prosecutor and trial judge to "[i]n effect . . . assume that defense counsel may not be doing his job." *Id*. at 290.

[121] *Id*. at 297.

to the routine of state criminal law practice. The 1963 Court may thus have felt a need to compel the federal judiciary to impose greater scrutiny in federal habeas cases than it might otherwise have in order to ensure that state courts followed the law as proclaimed by the Supreme Court.[122]

5. *Townsend* and *Fay* as Bridges to the Modern Restraints on Federal Habeas

In 1963, the Court surely believed that regularized careful scrutiny of state criminal proceedings by federal habeas courts would be required during the disruptive period of incorporation. And broad dicta in both *Townsend* and *Fay* encouraged that scrutiny.[123] Both cases, however, can be interpreted more narrowly. First, each can be read as an example of state defiance because they involved quite egregious incidents of state disdain for the law as articulated by the Supreme Court.[124] Recognizing that habeas relief was appropriate in such instances did not require that it be available universally. Second, both cases firmly accepted the notion that prudential considerations in some circumstances justified a federal court's refusal to exercise habeas jurisdiction. They thus left open the possibility for less active scrutiny of state procedures when the states adjusted to the new federal requirements.[125]

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[122] Joseph Hoffman and William Stuntz have argued that during this period "habeas served as the Supreme Court's most powerful weapon, allowing it ultimately to prevail in reshaping the criminal justice systems of the states." Hoffman & Stuntz, *supra* note 6, at 83.

Commentators disagree on how readily state courts complied with new federal rights. *Compare* Note, Gideon*,* Escobedo*,* Miranda*: Begrudging Acceptance of the United States Supreme Court's Mandates in Florida*, 21 U. FLA. L. REV. 346 (1969) (arguing that the state of Florida was slow to embrace new federal rights), *with* Meador, *supra* note 119, at 292 (arguing that "[t]he Court's recent decisions regarding the procedural requirements of the fourteenth amendment seem to be given effect by state courts with no more than the normal divergence and time-lag to be expected between two different sets of courts").

[123] Fay v. Noia, 372 U.S. 391, 426-38 (1963); Townsend v. Sain, 372 U.S. 293, 310-18 (1963).

[124] *Fay*, 372 U.S. at 439-40 (holding that failure to appeal when faced with the possibility of being sentenced to death on retrial does not bar federal habeas relief); *Townsend*, 372 U.S. at 320-22 (holding that an evidentiary hearing must be held where state courts apparently applied the wrong legal standard and a critical fact was not considered in determining whether a confession was coerced).

[125] Meador, *supra* note 119, at 299 (predicting that the Court would relax the requirements of *Fay* and *Townsend* when state courts became more accustomed to federal procedures).

a. The State Defiance Readings of Townsend *and* Fay

In *Townsend*, the trial judge without any fact-finding or statement of grounds for his decision denied a motion to suppress a confession possibly induced by involuntarily administered drugs.[126] Given the attention that the Court was then paying to coerced confessions,[127] the knee-jerk denial of a serious motion likely irritated the Court.

The situation in *Fay* was more complicated. In 1942, Noia and two co-defendants were convicted based solely on confessions signed by each.[128] Noia refrained from filing an appeal in part because he faced a potential death sentence on retrial (a prospect made all the more real by the trial court's comments at sentencing).[129] Noia's co-defendants did appeal, albeit unsuccessfully.[130] In 1952 and 1956, however, federal habeas courts held that the state extracted the confessions unconstitutionally and overturned Noia's co-defendants' convictions.[131]

In light of those federal court decisions, Noia sought state court review of his case. Although (1) the facts surrounding each question were essentially the same; (2) a state trial court held that the confession was coerced; and (3) the state admitted as much in federal habeas proceedings, the state courts ultimately refused to reach the merits on the ground that Noia, unlike his co-defendants, had not filed a timely appeal.[132] That waiver, the state courts held, barred Noia from seeking relief.

The state court's decision to leave a federal constitutional violation unremedied obviously riled a majority of the Court. Justice Brennan wrote that "surely no just and humane legal system can tolerate a result whereby [two men] are at liberty because their confessions were found to have been coerced yet a [third man], whose confession was also

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[126] *Townsend*, 372 U.S. at 302-03.

[127] *See, e.g.*, Spano v. New York, 360 U.S. 315, 315 (1959) ("This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment.").

[128] *Fay*, 372 U.S. at 395.

[129] *Id*. at 397 n.3.

[130] *Id*. at 392 & n.1. They unsuccessfully sought additional state court review in 1947, 1948, and 1954. *Id*. at 392 n.1.

[131] *Id*. at 392 n.1.

[132] *Id*. at 396 & nn.2-3.

coerced, remains in jail for life." Where a lower court decision amounts to such an "affront[] to the conscience of a civilized society," the Court explained, habeas corpus is most appropriate.[133]

b. Prudential Restraints on Jurisdiction

Townsend and *Fay* solidified the concept originated in *Ex parte Royall*[134] that federal courts need not exercise their habeas jurisdiction if prudential considerations weigh against it. Where *Royall* permitted federal courts to dismiss a habeas case in which a petitioner had not exhausted state remedies, *Townsend* and *Fay* defined two additional situations in which federal courts need not reach the merits of a habeas petition.[135] During this period, the need to indoctrinate the state courts into federal constitutional criminal procedure justified regularized federal review. Over time, however, that consideration would fade in importance and other prudential considerations would become more significant. The opinions in *Townsend* and *Fay*, expansive as they were, left plenty of room for the scope of habeas review to change based on the perceived need at particular times to stem state defiance of federal law and the prudential considerations justifying deference to state decisionmaking.[136]

6. Modern Restraints on Federal Habeas

As systemic concerns with the judicial expansion of federal law to the states were replaced with acceptance of the dominant role of federal law in state criminal proceedings,

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[133] *Fay*, 372 U.S. at 441.

[134] 117 U.S. 241, 252-53 (1886) (holding federal court ordinarily should not reach merits of habeas claim unless state procedural avenues are first exhausted).

[135] *Fay*, 372 U.S. at 438-39 (holding that federal judge may in certain cases refrain from exercising power to review merits of a constitutional claim); Townsend v. Sain, 372 U.S. 293, 318 (1963) (holding federal judge has discretion to refuse to hold an evidentiary hearing in many cases despite having the power to conduct such a hearing).

[136] Meador, *supra* note 119, at 286 ("[A]fter three years state trial practice in many places has not been adjusted to take [*Fay* and *Townsend*] into account."); *id.* at 299 (predicting that the requirements of *Fay* and *Townsend* would be relaxed when federal constitutional requirements were better integrated into state proceedings); Steiker, *supra* note 29, at 326 ("[D]efenders of *Noia* would be hard pressed to insist that *Noia* somehow struck the *final* balance."); *id.* at 389 ("[T]he single greatest flaw animating current criticism of the Court's new habeas is the notion that the balance struck in *Noia* and *Sanders* was a permanent one and that all further modifications of the writ therefore bear a presumption of illegitimacy.").

habeas began to contract. In a variety of different and apparently unrelated ways, a common thread can be seen. Habeas review was limited to cases in which state courts defied or trivialized federal law.

a. Harmless Error

In 1967, the Court first recognized that individual liberty interests did not compel a federal court to overturn a state criminal conviction infected with federal constitutional error. In a direct appeal, the Court held that a criminal conviction should stand if the government could demonstrate beyond a reasonable doubt that the defendant would have been convicted even if the state had not violated the Constitution.[137]

For many years, the Court assumed that the same harmless error standard applicable on direct appeal also applied to federal habeas review.[138] In the 1990s, the Court adopted a broader harmless error standard for habeas review, holding that a federal court could grant the writ if the constitutional violation "had substantial and injurious effect or influence in determining the jury's verdict.'" The distinction in harmless error standards appears difficult to justify. If federal review of constitutional errors on habeas is intended to deter state prosecutors and courts from violating the constitution, there is no basis for employing a more lenient harmlessness standard than is applicable to direct appeal.[139]

If, however, the issue on habeas is whether the state court has defied or trivialized federal law, a different test may be appropriate. The heavy burden placed on the state in individual-liberty-focused direct appeals becomes unnecessary when the focus of the inquiry on habeas shifts to the state court's fidelity to federal law. A state court that recognizes a presumably clear error of federal law should bear a significant burden to justify denying a remedy. To hold otherwise would be to sanction open defiance of federal law. By contrast, a state

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[137] Chapman v. California, 386 U.S. 18, 24 (1967).

[138] *See, e.g.*, Yates v. Evatt, 500 U.S. 391 (1991); Rose v. Clark, 478 U.S. 570 (1986); Milton v. Wainwright, 407 U.S. 371 (1972); Anderson v. Nelson, 390 U.S. 523 (1968) (per curiam).

[139] Brecht v. Abrahamson, 507 U.S. 619, 644, 648 (1993) (White, J., dissenting) (describing use of a different standard for harmlessness on habeas as creating "illogically disparate treatment" based on the assumption that habeas is intended "to deter both prosecutors and courts from disregarding their constitutional responsibilities").

court that fails to recognize an error that does not substantially affect the proceedings is not challenging the authority of a superior court system and thus need not meet such a heavy burden to justify the denial of habeas relief.

b. The Guilty Plea Trilogy

In 1970, the Court held that a constitutional violation would not support federal habeas relief if the petitioner had pled guilty with the appropriate assistance of counsel.[140] The decision was announced through three cases decided on the same day – *Parker v. North Carolina*, *McMann v. Richardson*, and *Brady v. United* States – which together became known as the guilty plea trilogy.[141] In these cases, the Court reasoned that a defendant who admits his guilt after receiving the effective assistance of counsel may be incarcerated even if the state violated a constitutional right in the process leading up to the plea.[142]

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[140] Parker v. North Carolina, 397 U.S. 790, 797-98 (1970) (guilty plea may not be attacked on habeas despite erroneous advice of counsel that coerced confession would be admissible); McMann v. Richardson, 397 U.S. 759, 771 (1970) (guilty plea influenced by prior coerced confession may not be attacked on habeas); Brady v. United States, 397 U.S. 742, 758 (1970) (guilty plea entered knowingly and voluntarily but pursuant to a statute, part of which the Court had found to be unconstitutional, may not be upset on habeas).

[141] *Parker*, 397 U.S. at 797-98; *McMann*, 397 U.S. at 771; *Brady*, 397 U.S. at 758. See *supra* note 53 and accompanying text.

[142] In the mid-1970s, the Court elaborated upon the reasoning in the guilty plea trilogy, explaining that

> The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established.

Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) (holding that prohibition on collateral attack of guilty pleas does not rest on waiver). *See* Tollett v. Henderson, 411 U.S. 258, 266 (1973) (prohibiting collateral attack based on claim about which counsel and defendant could not have been aware, prohibiting waiver theory). Even the Court's decision permitting a guilty plea without an admission of guilt has been read this way. Where he refused to admit guilt,

> the defendant could intelligently have concluded that, whether he believed himself to be innocent and whether he could bring himself to admit guilt or not, the State's case against him was so strong that he would have been convicted anyway. Since such a defendant has every incentive to conclude otherwise, such a decision made after consultation with counsel is viewed as a sufficiently reliable substitute for a jury verdict that a judgment may be entered against the defendant.

The limits on habeas review applied in the guilty plea trilogy are difficult to explain.[143] If a habeas petitioner has a sufficient liberty interest to justify granting the writ when he has been convicted by a jury and makes no claim of innocence, the defendant should have no less of a liberty interest when he pleads guilty. The failure to review guilty plea cases also seriously undermines the writ's deterrent function in the majority of cases that end in pleas, which of course are the majority of cases.

By viewing habeas as a matter of judicial power, however, the results in these cases can be explained more easily. A state that simply accepts a guilty plea is not defying or trivializing federal law as egregiously as one that continues to prosecute after wrongly denying a constitutional challenge. When the state's conduct in accepting a plea did smack of defiance of federal law, the Court has permitted federal habeas review.[144]

c. The Procedural Bar Cases

For more than a decade, *Fay* required federal habeas courts to reach the merits of a constitutional claim unless the defendant "deliberately by-passed" an avenue for relief in state court.[145] In the mid-1970s, the Court began to narrow *Fay*'s holding.[146] Although *Fay*'s holding that the federal courts had jurisdiction to reach claims defaulted in state court remained good law,[147] the Court held that a federal court should decline to reach defaulted claims as a prudential matter unless the defendant could demonstrate both (1) cause attributable to the

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Henderson v. Morgan, 426 U.S. 637, 649 n.1 (1976) (White, J., concurring).

[143] *See* Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 470-83 (1980) (discussing the many puzzles created by these cases).

[144] Blackledge v. Perry, 417 U.S. 21, 31 (1974) (permitting collateral attack on guilty plea where prosecutor impermissibly charged more serious offense upon exercise of right to trial *de novo* on misdemeanor conviction).

[145] Fay v. Noia, 372 U.S. 391, 438 (1963).

[146] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 85 (1977).

[147] Smith v. Murray, 477 U.S. 527, 533 (1986) ("[A]lthough federal courts at all times retain the power to look beyond state procedural forfeitures, the exercise of that power ordinarily is inappropriate.").

state for the failure to raise the claim;[148] and (2) actual prejudice as a result of the alleged constitutional error.[149]

The Court's procedural default doctrine has baffled commentators.[150] Similarly situated defendants are treated differently in federal habeas based on two factors that often have little to do with the defendant's liberty interests: (1) whether the defendant's attorney was skillful or prescient enough to raise the relevant federal constitutional claim at all of the required points in the state process;[151] and (2) whether the state court chooses to address the merits of the claim despite any default.[152] Such a disparity of outcome for similarly situated defendants mysteriously penalizes the individual for reasons that have nothing to do with the rights at stake[153] and

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[148] Murray v. Carrier, 477 U.S. 478, 491-92 (1986); Engle v. Isaac, 456 U.S. 107, 129-34 (1982).

[149] *Carrier*, 477 U.S. at 494; United States v. Frady, 456 U.S. 152, 170 (1982). An additional exception was also recognized for petitioners who could show that they were probably innocent. *Carrier*, 477 U.S. at 496 ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). The Court has been quite strict in interpreting these tests to prevent federal habeas courts from reaching defaulted claims. Dugger v. Adams, 489 U.S. 401, 406-10 & 410 n.6 (1989).

[150] In many ways, the Court simply returned the law to what it had been in the decade before *Fay*. In *Brown v. Allen*, the Court held that federal habeas corpus could not be used as an alternative to state processes of review that the defendant had by-passed. 344 U.S. 433, 485 (1953) ("To allow habeas corpus in such circumstances would subvert the entire system of state criminal justice and destroy state energy in the detection and punishment of crime."). Nonetheless, there has been substantial scholarly condemnation of the Court's approach. Friedman, *supra* note 43, at 251 ("The Court should have explained what it is about the writ of habeas corpus that entitles some petitioners to both federal and state review of constitutional claims, while other petitioners receive no adjudication of their claims on the merits."); Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 338 (1987-88); Frank J. Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339, 356 (1987-88); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 363 (1991).

[151] Confusingly, the Court has found cause when a defendant could not have known about the basis for a claim, Reed v. Ross, 468 U.S. 1, 3, 20 (1984), while holding that the universe of claims about which a defendant should have been aware is quite broad, extending to some claims that were percolating in, but not yet recognized by, the courts, *Engle*, 456 U.S. at 130-34 (denying habeas relief when petitioner could have been aware of the claim even though state court had rejected it).

[152] If the state court overlooks a defendant's procedural default and reaches the merits of the claim, federal review is appropriate. Caldwell v. Mississippi, 472 U.S. 320, 326-27 (1985); *see* Harris v. Reed, 489 U.S. 255, 265 & n.11 (1989) (extending the "plain statement" rule to habeas review).

[153] *See, e.g.*, Hoffman & Stuntz, *supra* note 6, at 113 (explaining that by barring defaulted claims from habeas review "defendants are routinely penalized for their lawyers' errors" no matter how serious the constitutional violation); John C.

weakens the writ's deterrent effect by encouraging reliance on procedural defaults whenever possible to insulate the state decision from federal review.[154]

The judicial-power rationale for habeas, by contrast, explains both *Fay* and more recent doctrine. In 1963, the *Fay* Court foresaw widespread confusion of both state courts and defense counsel with respect to the expansion of federal criminal procedure rights.[155] A generation later, that concern was no longer broadly applicable.[156] Yet, the Court remained concerned about ad hoc state defiance of federal rights. Given that focus, current doctrine is quite coherent. Federal courts retain the power to review state convictions despite adequate and independent state grounds for the denial of a federal constitutional claim if the Court senses state defiance. A situation in which the defendant's default is explicitly attributable to the state is one example.[157] But others exist, and when they do the Court has found a way to reach the merits.[158]

Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691-93 (1990) (same). Of course, there are other factors that create apparent inequities between similarly situated defendants, including prosecutorial charging decisions, disparate plea bargaining policies, and differing jury compositions. *See* Steiker, *supra* note 28, at 333. But habeas courts are institutionally incapable of remedying these inequities, and the existence of irremediable inequities is little reason to create doctrine that needlessly generates additional inequities.

[154] During the period from the late 1970s through the mid-1990s, the U. S. Supreme Court effectively encouraged this practice by prohibiting federal court review of constitutional claims subject to a procedural bar, while maintaining that federal courts must review properly presented claims *de novo*. Wright v. West, 505 U.S. 277, 300-03 (1992) (O'Connor, J., concurring) (stating holding of Court that the federal habeas statute required federal habeas courts to review state court decisions on legal issues and most mixed questions of fact and law *de novo*). If the federal court upheld the procedural bar, it conducted no substantive review. But if it did not uphold the procedural bar, it applied completely *de novo* review. After AEDPA, discussed *infra* II.C.8, of course, state courts have less to fear in this regard than they once did. But even now, greater scrutiny is applied to the reasoned judgments of state courts than to the reflexive invocation of a procedural bar.

[155] *See supra* Part II.C.4.

[156] Hoffman & Stuntz, *supra* note 6, at 67-68, 111.

[157] Amadeo v. Zant, 486 U.S. 214, 219, 228-29 (1988) (upholding district court's grant of habeas when state officials deliberately hid information revealing racial discrimination in jury composition).

[158] Lee v. Kemna, 534 U.S. 362, 376 (2002) (addressing defaulted claim on habeas review without applying cause-and-prejudice test on ground that the case was an exceptional one "in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question"). *See* Ford v. Georgia, 498 U.S. 411, 423-25 (1991) (holding state court decision barring challenge to racial discrimination in jury selection on ground that claim was not timely raised was inadequate to bar federal review); James v. Kentucky, 466 U.S. 341, 348 (1984) (same

d. Fourth Amendment Cases

In *Stone v. Powell*,[159] the Court held that as a prudential matter federal habeas courts should not review search-and-seizure claims unless the state failed to provide an opportunity for full and fair litigation of the claim.[160] In rejecting Fourth Amendment federal habeas claims, the Court relied primarily on the belief that state police are unlikely to perceive a significant additional deterrent from extending the Fourth Amendment exclusionary rule to federal habeas review.[161] Congress, however, intended the writ to deter erroneous state court decisions.[162] A state court, unlike state police, would likely perceive a deterrent as significant in search-and-seizure cases as it would in any other constitutional case.

The judicial-power rationale, by contrast, explains the decision in *Stone*. By 1976, *Mapp* had been in place for over a decade. State courts were now comfortable resolving motions to suppress in criminal cases. Unlike more controversial and less commonly litigated constitutional provisions, the Court could confidently presume that mistakes were just that: good faith errors in judgment about the constitutional protection, and not defiance of the legal pronouncement of a superior court or the product of systematic confusion with respect to an entirely new federal requirement.[163] A state decision denying any procedural avenue for reviewing a motion to suppress, however, would rise to the level of defiance, and the *Stone* decision made clear that the Court would continue to address claims of that nature on habeas.[164]

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with respect to a claim that the court refused to instruct the jury not to draw a negative inference from the defendant's failure to testify).

[159] 428 U.S. 465 (1976).

[160] *Id*. at 494.

[161] *Id*. at 493-94.

[162] Teague v. Lane, 489 U.S. 288, 306 (1989) (plurality opinion) ("[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting))).

[163] *Stone*, 428 U.S. at 494 n.35 ("[T]he argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems.").

[164] *Id*. at 494. *See* Philip Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1, 30-31 (1982) (advancing a similar rationale to explain why the *Stone* Court did not prohibit all collateral review of Fourth Amendment claims and interpreting *Stone* to permit habeas review of "'systemic'" errors "in that their occurrence is, or is likely to become, widespread among

e. The Retroactivity Cases

Contemporaneously with the expansion of federal constitutional rights, the Court developed retroactivity doctrine to prevent habeas courts from applying newly recognized rights to cases decided before those rights were announced. For two decades, the Court handled retroactivity matters on an ad hoc basis considering (1) the purposes of the exclusionary rule; (2) the state's reliance on an old rule; and (3) the effect of applying the new rule on the administration of the criminal justice system.[165] These decisions produced a number of different outcomes, though most could reasonably be described as limits on the scope of habeas review.[166]

In the late 1980s, the Court adopted a more bright-line approach to retroactivity. It held that newly announced rules would apply to all criminal cases on direct review at the time the rule was announced,[167] but that new rules generally would not apply on habeas review to a case in which the direct review process was completed before the rule was announced.[168] The Court further defined the concept of a new rule expansively to include any decision about which reasonable jurists could differ with respect to the outcome.[169]

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the courts of a particular state"). Some lower federal courts also expressed willingness to reach the merits of Fourth Amendment claims on habeas if a state court willfully refused to apply the controlling constitutional standard. *See, e.g.*, Riley v. Gray, 674 F.2d 522 (6th Cir. 1982); United States *ex rel.* Maxey v. Morris, 591 F.2d 386 (7th Cir. 1979); Gamble v. Oklahoma, 583 F.2d 1161 (10th Cir. 1978).

[165] *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 297 (1967) (addressing retroactivity of constitutional rules respecting lineups); Linkletter v. Walker, 381 U.S. 618, 636-40 (1965) (discussing retroactive application of rule requiring states to apply exclusionary rule to evidence seized in violation of the Fourth Amendment).

[166] *Teague*, 489 U.S. at 302 (plurality opinion) (explaining that retroactivity doctrine had been used "to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced").

[167] Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

[168] *Teague*, 489 U.S. at 310 (plurality opinion).

[169] *See id*. at 301 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."); *see also* Butler v. McKellar, 494 U.S. 407, 415 (1990) (holding that the Court announces a new rule where "the outcome . . . was susceptible to debate among reasonable minds"); Teague, 489 U.S. at 333 (Brennan, J., dissenting) ("Few decisions on appeal or collateral review are '*dictated*' by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way. Virtually no case that prompts a dissent on the relevant legal point, for example, could be said to be '*dictated*' by prior decisions."). For applications of this new doctrine, see Sawyer v. Smith, 497 U.S. 227, 233-41 (1990); Saffle v. Parks, 494 U.S. 484, 488-94 (1990).

All retroactivity doctrine is inconsistent with an individual liberty rationale for habeas because the liberty to which particular individuals should be entitled does not vary based on the timing of the announcement of a criminal procedure right. An individual should not forfeit constitutional protection because the courts hearing his case lacked the foresight to recognize the full extent of the law.

Some have argued that current retroactivity doctrine is consistent with a federal review theory of habeas – that one is entitled to federal court review of a federal claim – because the defendant receives the same level of scrutiny that would have been available had the Supreme Court granted certiorari to review the case.[170] But that reasoning is flawed. Had the Court agreed to hear the case on direct appeal it would have been free to recognize any claimed right that it found in the Constitution. Under modern retroactivity doctrine that aspect of federal review is lost once a case enters the habeas process. A federal habeas court may apply only clearly established law.

Others argue that a state court cannot be deterred when its only error is the failure to apply a constitutional rule that has yet to be announced. But that description of the role of the state courts understates the duty of all courts to faithfully apply the Constitution, not just the U.S. Supreme Court's interpretations of it.[171] Even outright reversals of prior

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[170] Liebman, *supra* note 30, at 2095-96; Steiker, *supra* note 61, at 922 (assuming Court did not define the concept of a new rule too broadly).

[171] U.S. CONST. art. VI, cl. 2 (asserting that "Judges in every State shall be bound" by federal law). The Supreme Court has long recognized that Article VI demands that state judges fully enforce federal law even at the expense of conflicting state law. As the first Justice Harlan described the obligation:

> Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.

Robb v. Connolly, 111 U.S. 624, 637 (1884); *see* Mooney v. Holohan, 294 U.S. 103, 113 (1935) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution." (citing *Robb*,

constitutional rules of criminal procedure can sometimes be anticipated,[172] and more often there is no clear guidance in the case law. Modern retroactivity doctrine thus surely lessens the deterrent force that habeas would exert if state courts were compelled to decide cases as the U.S. Supreme Court *would* today, rather than merely as it *has* decided them in the past.

Once again, however, the judicial power rationale explains the doctrine. If an inferior court is applying the precedents of a superior court in a reasonable fashion, it is not defying the law as proclaimed by the lawmaker. Reasonable applications of existing law thus need not be scrutinized under a habeas regime that exists to insure only against outright defiance or trivialization of the law announced by the high court.[173]

Despite the ostensibly bright-line nature of modern retroactivity doctrine, the Court has found ways to grant the writ when it senses state court defiance. At least three cases

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111 U.S. at 637)); Semeraro, *supra* note 5, at 926-27 (applying this rationale to modern habeas doctrine).

[172] For example, in *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court affirmed the Missouri Supreme Court's decision granting the writ on the ground that the execution of a seventeen-year-old murderer was categorically unconstitutional. *Id.* at 578-79. That decision directly conflicted with federal law established in *Stanford v. Kentucky*, 492 U.S. 361 (1989), which upheld the death penalty for minors. *Roper*, 543 U.S. at 556. Nevertheless, the Missouri court correctly concluded that subsequent developments would lead the U.S. Supreme Court to decide the case differently in 2005 than it had in 1989. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399-400 (2003) (en banc).

A second example arises out of the Court's decision to overrule prior precedent and permit constitutional attacks on racial discrimination in the selection of individual juror panels. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court overturned its prior decision in *Swain v. Alabama*, 380 U.S. 202 (1965). *Batson*, 476 U.S. at 90-93. Prior to *Batson*, however, in a case in which the Court denied certiorari, five Justices had indicated serious concern with the rule in *Swain*. McCray v. New York, 461 U.S. 961, 961-62 (1983) (Stevens, J., joined by Blackmun & Powell, JJ.); *id.* at 964-65 (Marshall, J., joined by Brennan, J., dissenting). Although the Court ultimately refused to apply *Batson* retroactively to the date on which certiorari was denied in *McCray*, *Teague*, 489 U.S. at 295-96, state courts would surely have been aware of the potential for a change in the law.

[173] The Court's application of its habeas doctrine supports this interpretation. It has generally refused to upset state decisions that reasonably apply existing federal law even in the face of clear evidence that the practice later held unconstitutional tended to produce a higher proportion of death sentences. *Compare* Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (requiring that the jury be instructed that an alternative to the death sentence is life without possibility of parole where the state introduces evidence of future dangerousness as an aggravating factor), *with* O'Dell v. Netherland, 521 U.S. 151, 172 (1997) (Stevens, J., dissenting) (refusing to apply *Simmons* retroactively despite evidence that sentencing juries are significantly less likely to impose a death sentence if instructed that a life sentence will not include the possibility of parole).

fit this mold. In *Penry v. Lynaugh*,[174] a five-member majority feared Texas had defied federal law by abandoning its promise that the state's death penalty law would permit the sentencer to consider all mitigating circumstances.[175] In *Penry*, the Court first recognized that Texas did not provide an avenue for the sentencing jury to give effect to mitigating evidence of mental retardation.[176] The five-to-four split demonstrated beyond question that the substantive law was debatable. Nonetheless, the Court granted the writ.[177]

A similar result occurred in *Stringer v. Black*,[178] a case in which the Court likely concluded that Mississippi had trivialized the federal constitutional rule that vague factors could not be used to determine eligibility for a death sentence.[179] In *Stringer*, the Mississippi Supreme Court, the Fifth Circuit Court of Appeals, and three dissenting Justices on the U.S. Supreme Court all concluded that Mississippi's approach did not violate prior federal law.[180] Nevertheless, the six-member majority held that reasonable minds could not differ and granted the writ.[181]

The same concern likely explains the result in *Yates v. Aiken*,[182] in which the state relied on a rebuttable presumption to establish an element of the crime. The Supreme Court held in *Francis v. Franklin*[183] that such a presumption was unconstitutional, and remanded *Yates* for reconsideration in light of that decision.[184] The state court refused to consider *Francis*, holding instead that a previously decided state case

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[174] 492 U.S. 302 (1989).

[175] *Id.* at 327; *see* Jurek v. Texas, 428 U.S. 262, 272-74 (1976).

[176] *Penry*, 492 U.S. at 320.

[177] *Id*. at 315 (holding that claim did not impose new obligation on the state because petitioner "simply asks the state to fulfill the assurance upon which *Jurek* was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence that a defendant may present in imposing a sentence").

[178] 503 U.S. 222 (1992).

[179] The Court stressed the importance of careful review in *Stringer*, *id.* at 230, a point it had made repeatedly in earlier cases. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 890 (1983); *Jurek* , 428 U.S. at 276; Proffitt v. Florida, 428 U.S. 242, 250-51 (1976); Gregg v. Georgia, 428 U.S. 153, 195 (1976); Griffin v. United States, 336 U.S. 704, 717 (1949).

[180] *Stringer*, 503 U.S. at 226-27 (describing prior proceedings in the case, all of which affirmed the death sentence); *id*. at 247 (Souter, J., dissenting) (citing two other Fifth Circuit cases denying habeas review in cases alleging the same error).

[181] *Id*. at 227-37.

[182] 484 U.S. 211 (1988).

[183] 471 U.S. 307 (1985).

[184] Yates v. Aiken, 474 U.S. 896 (1985).

reaching the same holding did not apply retroactively to Yates's case.[185] The Supreme Court reversed, holding that the state could not deny relief on retroactivity grounds because *Francis* had not announced a new rule, but instead applied an old one existing prior to Yates's trial.[186] In *Francis* itself, however, four Justices had dissented, and three of them explicitly argued that the Court's decision was not dictated by precedent but had "needlessly extend[ed]" the holdings in prior cases.[187] Despite the disagreement among the Justices, the Court unanimously granted the writ in *Yates*, in all likelihood because of the state court's defiance of the federal mandate to apply *Francis*.[188]

7. The Death Penalty Cases

At the same time that the Court was restraining the scope of habeas generally, it used the writ – and allowed lower federal courts to use it – quite liberally to enforce the death penalty jurisprudence that the Court developed in the late 1970s. As an initial matter, cases identifying constitutional flaws in death penalty statutes led to the overturning of all death sentences, retroactivity concerns notwithstanding. Even after the states adopted ostensibly constitutional death sentencing statutes, the federal courts continued to police those statutes carefully for many of the same types of constitutional concerns first applied to state criminal trials in the 1960s.[189] And for nearly a decade, the Court all but ignored retroactivity

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[185] Yates v. Aiken, 349 S.E.2d 84, 85 (S.C. 1986) (asserting that the state "is free to determine our own standards regarding retroactivity of state decisions").

[186] *Yates*, 484 U.S. at 216-17.

[187] *Francis*, 471 U.S. at 332-33 (Rehnquist, J., dissenting).

[188] *Yates*, 484 U.S. at 214-15 ("The portion of the state court's opinion concluding that the instruction in petitioner's case was infirm for the reasons 'addressed in *Francis*' was responsive to our mandate, but the discussion of the question whether the decision in *Elmore* should be applied retroactively was not. Our mandate contemplated that the state court would consider whether, as a matter of federal law, petitioner's conviction could stand in the light of *Francis.* Since the state court did not decide that question, we shall do so.").

[189] *See, e.g.*, Bullington v. Missouri, 451 U.S. 430, 446-47 (1981) (applying principles of double jeopardy to capital sentencing); Beck v. Alabama, 447 U.S. 625, 627 (1980) (requiring lesser-included-offense instruction where supported by the evidence in a capital case); Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that "the hearsay rule may not be used mechanistically to defeat the ends of justice" by excluding evidence in mitigation of a death sentence at a capital sentencing trial); Presnell v. Georgia, 439 U.S. 14, 16-17 (1978) (prohibiting imposing death penalty on basis of evidence supporting a charge on which no jury finding of guilt was rendered); Gardner v. Florida, 430 U.S. 349, 362 (1977) (holding that state may not base death sentence on information not disclosed to defendant).

questions as federal habeas courts granted the writ in forty percent of capital cases.[190]

Even when the Court purported to extend its habeas restrictions to capital cases, as it did with respect to procedurally barred claims[191] and those seeking to apply new rules of constitutional law,[192] it was more willing to ignore a restriction when faced with what it saw as state court defiance of its commands.[193]

For example, in *Hitchcock v. Dugger*,[194] the Court granted the writ based on a claim that the sentencer was prohibited from considering relevant mitigating evidence. Full consideration of that type of evidence was by then a firmly established principle.[195] The defendant, however, had never objected to a restraint on the scope of admissible mitigating evidence,[196] and the state supreme court apparently denied the challenge for that reason.[197] Yet, the Court granted the writ without mentioning the default issue, presumably to make the

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[190] James S. Liebman, *Lesson Unlearned*, 253 THE NATION 217 (1991) (between 1976 and 1990, federal courts found constitutional violations justifying overturning a death sentence in forty percent of the capital cases brought to federal court).

[191] In *Smith v. Murray*, 477 U.S. 527, 533 (1986), the Court applied the cause-and-prejudice standard to an error in a capital sentencing trial without any alteration from the demanding showing that must be made in a non-capital case. *Compare id.* at 530, 539 (holding constitutional claim procedurally barred in a capital case), *with* Murray v. Carrier, 477 U.S. 478, 497-98 (1986) (holding constitutional claim procedurally barred in a non-capital case under the same standard); *compare* Coleman v. Thompson, 501 U.S. 722, 738 (1991) (assuming state court intended to rely on independent state procedural default rule when Court summarily denied claim), *with* Williams v. Georgia, 349 U.S. 375, 391 (1955) (refusing in a pre-*Furman* case to assume that state court would rely on procedural bar to deny consideration of a challenge to the jury panel in a capital case).

[192] See *supra* note 169 (citing capital cases applying the restrictive retroactivity doctrine announced in *Teague*).

[193] Penry v. Johnson, 532 U.S. 782, 796-804 (2001) (granting writ on ground that new state jury instruction on the jury's use of evidence of mental retardation was inadequate even though Court had never considered that argument before); Maynard v. Cartwright, 486 U.S. 356, 362-65 (1988) (granting writ on ground that an aggravating circumstance was unconstitutionally vague even though that circumstance had not previously been deemed vague by the Court); Hitchcock v. Dugger, 481 U.S. 393, 397-98 (1987).

[194] 481 U.S. 393 (1987).

[195] Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding that capital defendant must have opportunity to present all relevant mitigating evidence).

[196] Brief of Petitioner at 29-31, Hitchcock v. Dugger, 481 U.S. 393 (1987) (No. 85-6756) 1986 WL 728190 (arguing the failure to object should not preclude claim).

[197] Hitchcock v. State, 413 So. 2d 741, 748 (Fla. 1982) (denying claim on the ground that defense counsel had presented all mitigating evidence that he concluded necessary).

point that its mitigating evidence rule should not be trivialized by the state courts.

8. The Antiterrorism and Effective Death Penalty Act of 1996

In 1996, Congress institutionalized and strengthened many of the restraints that the Court had previously adopted.[198] One might have expected this Congressional affirmation of the Court's restrictive approach to embolden the Justices to effectively end federal habeas review except in cases embodying the most extreme and uncontroversial denials of liberty. But that has not happened. Instead, the Court has shown a continued willingness to grant the writ even in cases in which only a slim majority perceives that the state court ignored or trivialized federal law.[199]

For example, in 1984 the Court adopted a test to determine whether trial counsel was constitutionally ineffective.[200] Through the 1996 enactment of the habeas reform act, the Court had never granted the writ based on a claim of ineffective counsel. Since 1996, however, a divided Court has three times found meritorious ineffective counsel claims,[201] despite the formally stricter standard of review.[202] Similarly, in the two decades before the 1996 Act, the Court in a habeas case had never reached the merits of a procedurally defaulted claim absent a showing of cause and prejudice. Yet, in the 2002 *Lee v. Kemna*[203] case, the Court did exactly that.[204]

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[198] Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (2000) (strengthening exhaustion of state remedies and retroactivity doctrines).

[199] *See* Penry v. Johnson, 532 U.S. 782, 803-04 (2001) (six-to-three decision rejecting a new jury instruction on the use of evidence of mental retardation in a capital case that the state intended to cure the constitutional defect in the instruction used at the defendant's original trial).

[200] Strickland v. Washington, 466 U.S. 668, 791 (1984).

[201] Rompilla v. Beard, 125 S.Ct. 2456, 2467-69 (2005); Wiggins v. Smith, 539 U.S. 510, 523-30 (2003); Williams v. Taylor, 529 U.S. 420, 439-40 (2000).

[202] Bell v. Cone, 535 U.S. 685, 698-99 (2002) ("For [a petitioner] to succeed [on an ineffectiveness claim] he must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under § 2224(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner.") (citation omitted).

[203] 534 U.S. 362 (2002).

[204] *Id*. at 376 (addressing defaulted claim on habeas review without applying cause-and-prejudice test on ground that the case was an exceptional one "in which

III. EXPLAINING HABEAS DOCTRINAL CHANGE THROUGH THE CONFLICTING-IDEOLOGIES THEORY

A unifying weakness among the explanations for changes in habeas doctrine, including the judicial-power theory, is that each interprets the doctrine as a response to a need external to the habeas system. Some see new habeas doctrine as a response to evolving social attitudes about individual liberty, arguing only about which liberty interest is important enough to justify the writ's protection.[205] Others view habeas doctrine as part of a broader response to the social forces shaping global shifts in federal court review of trial-level decisions.[206] Still others see habeas as responding to societal demands for differing safeguards against error in the criminal justice system depending on the type of right allegedly violated.[207] And the judicial-power theory interprets the development of habeas doctrine as a response to externally created instability in the criminal justice system.

None of these accounts are wrong. Indeed, all of them contribute something to our understanding of the writ's evolution. But each account is incomplete in a way that makes the need-response hypothesis misleading. To achieve a fuller understanding of the development of federal habeas doctrine one must look beyond doctrinal responses to society's evolving attitudes about criminal law and take account of the ideological role that habeas corpus doctrine has played in shaping those attitudes.[208]

Throughout the twentieth century, more or less systematic crises threatened the legitimacy of the criminal justice system. Examples include convictions tainted by mob violence[209]; barbaric, brutal treatment of suspects[210]; disturbing

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exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question").

[205] *See supra* Part I.B.

[206] *See id*.

[207] *See id*.

[208] *Cf*. Robert Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1021 (1981) (concluding that a rich understanding of the U.S. Constitution requires an understanding of the prevailing legal ideology of the era in addition to social and economic influences).

[209] The problem of mob influence on criminal proceedings during this era is highlighted by the Supreme Court's decisions in *Frank v. Magnum*, 237 U.S. 309 (1915), and *Moore v. Dempsey*, 261 U.S. 86 (1923). FREEDMAN, *supra* note 7, at 55-64, 68-91 (describing the *Frank* and *Moore* cases).

psychological gamesmanship to coerce confessions[211]; the crime wave of the 1970s and 1980s[212]; concerns about the death penalty[213]; and most recently the challenge of dealing with those accused of international terrorism.[214] In each case, habeas corpus doctrine developed as it did not just in response to social concerns about inappropriate interference with individual liberty, but also as a creative force that played a role in how we saw and understood those developments. Habeas ideology helped create a way of thinking about criminal law that enabled different parts of society to accept a system for protecting individual liberty, despite an equally firm commitment to law enforcement, that might otherwise not have developed.

This Part explores the creative aspects of habeas corpus. All legal doctrine, being part of a social structure, will have some creative impact on the development of social attitudes and new doctrine.[215] The role of habeas corpus may be more complex, however, because of fundamentally contradictory attitudes in American society about criminal law. We fear the prospect of wrongfully denying liberty,[216] while we

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[210] For example, the 1931 Wickersham Report brought to light the use of "third degree" treatment to obtain confessions from suspects. Schaefer, *supra* note 2, at 10-11.

[211] This practice was described in some detail by the Court in Miranda v. Arizona, 384 U.S. 436, 448-58 (1966).

[212] Violent crime rates increased dramatically from approximately 160 incidents per 100,000 population in the early 1960s to nearly 600 incidents by 1980. After a brief leveling off period, the rate again increased to over 720 incidents by the early 1990s. A STATISTICAL PORTRAIT OF THE UNITED STATES: SOCIAL CONDITIONS AND TRENDS 245-46 (Patricia C. Becker, ed., 2d ed. 2002).

[213] Death penalty concerns include the moratorium prior to the Court's 1972 decision in Furman v. Georgia, 408 U.S. 238 (1972), and the immediate response to the *Furman* decision by nearly three dozen states to adopt new death penalty laws. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 226-27, 238-41 (1986).

[214] The Court recently decided two habeas cases arising out of the aftermath of the September 11th attacks, holding that American citizens held as enemy combatants may challenge the factual basis of their detention, Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004), and that the federal courts have jurisdiction over detainees held in Guantanamo, Rasul v. Bush, 542 U.S. 466, 481 (2004).

[215] Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60-62 (1984).

[216] The principle is often described in the phrase: "one would much rather that twenty guilty persons should escape the punishment of death than that one innocent person should be condemned and suffer capitally." Coffin v. United States, 156 U.S. 432, 455 (1895) (quoting De Laudibus Legum Angliae). Similar formulations of this maxim date back to the Roman Empire – "it was better to let the crime of a guilty person go unpunished than to condemn the innocent," *id.* at 454 (quoting Trajan); "it is better five guilty persons should escape unpunished than one innocent person should

simultaneously question the criminal justice process – the constitutional rights of suspects and the accused – that makes our fear of convicting an innocent less likely to materialize.[217]

The criminal law is but one of many areas of law infected by equally strong commitments to conflicting goals. Most often, commentators analyzing this doctrine have observed oscillation in the doctrine. As a favored pole appears to be producing undesirable results, the doctrine swings back toward the other. A stable resting place is never reached, because the contradictory commitments cannot be balanced. A strong commitment to each pole always provides a compelling ground to shift doctrine to the other pole.[218]

Habeas ideology may have enabled constitutional criminal procedure doctrine partially to avoid this oscillation. An ideology in which habeas corpus is widely revered as the

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die," *id*. at 456 (quoting Lord Hale); "the law holds that it is better that ten guilty persons escape than that one innocent suffer," *id.* at 456 (quoting Blackstone); SIR WILLIAM BLACKSTONE, KT., COMMENTARIES OF THE LAWS OF ENGLAND, BOOK IV, CHAP. XXVII, § 406 at 358 (William Carey Jones ed., 1976). More recently, the Supreme Court has used the principle to justify finding that proof beyond a reasonable doubt is a constitutional requirement of due process, *see* Addington v. Texas, 441 U.S. 418, 423-24 (1979); *In re* Winship, 397 U.S. 358, 363-64 (1970); and that a jury of less than six violates the Sixth Amendment, Ballew v. Georgia, 435 U.S. 223, 234 (1978) (relying in part on fact that a smaller number of jurors would increase "the risk of convicting an innocent person" even though it would decrease the "risk of not convicting a guilty person").

[217] *See, e.g.*, Susan Blaustein, *Congress's Drive-By Killing: Crimes Against Habeas Corpus*, THE NATION, June 20, 1994, at 71 (quoting Representative Charles Canady as explaining that he opposed efforts to undue Supreme Court restraints on habeas because "[h]ow can anyone explain to the American people . . . that we should grant convicted murderers on death row more opportunities to delay . . . justice – and more opportunities to torment the families of their victims? Let me tell you, the people will not buy it.").

[218] Mark Kelman summarized the critical view of law as infested with contradiction, writing that "liberal thought" can be seen as "a system of thought that is simultaneously beset by internal *contradiction* (not by 'competing concerns' artfully balanced until a wise equilibrium is reached, but by irreducible, irremediable, irresolvable conflict)." MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3 (1987). Commentators have identified pervasive conflicts in a wide variety of legal doctrines. Many focus on the choice between strict rules and open-ended standards in choosing the form of legal doctrine. *See, e.g.*, Al Katz & Lee Teitelbaum, *PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law*, 53 IND. L.J. 1 (1978) (juvenile supervision orders); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (contract law); Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177 (2002) (antitrust refusal-to-deal doctrine); Carol Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (property rules); William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) (welfare system operation). Conflicts based on intentionalistic and deterministic accounts of human conduct have also been identified. Clare Dalton, *An Essay on the Deconstruction of Contract Law*, 94 YALE L.J. 997 (1985) (contract law); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981) (criminal law).

ultimate protector of liberty helps mediate the contradiction in our beliefs about criminal law by allowing us to believe that those improperly incarcerated are never without a potential remedy. During those periods where the rights of the accused have expanded, habeas ideology has played a powerful role in both (1) motivating and emboldening Supreme Court Justices to enhance liberty by transforming state criminal procedure and (2) enabling state courts to accept those changes.

Just as American society's love of liberty is tempered by a fear of crime, habeas ideology too has come to embody a darker side. This *counter-habeas ideology* conjures up a world in which the writ unjustly honors anti-social deviants as constitutional crusaders and rewards them undeservedly with freedom. Ironically, however, this aspect of the ideology too may ultimately advance liberty interests. It does so by enabling those who would narrow constitutional criminal procedure rights to imagine a restrictive writ in which convicts whose rights have been violated are nonetheless denied a remedy. Disturbing as that result may be to one who is committed to a regime of expansive rights, it preserves liberty interests by inhibiting judges and legislators from eroding the substantive content of those rights.

The following sub-sections briefly explore how habeas ideology has helped shape the existing regime of liberty-enhancing rights.[219]

A. Stimulating The Expansion of Criminal Procedure Rights

Commentators have long recognized that habeas corpus held a special place in the ideology of the early United States.[220]

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[219] To fully understand the creative aspects of habeas doctrine one would need to explore the legal history of the United States in considerable depth, a project that would extend far beyond the scope of this Article. This Part attempts to open the exploration by looking to some newly accessible sources of political and legal commentary that provide a glimpse into the role habeas has played in American legal history. The searchable database of articles in *The Nation* dating back to the 1860s, and the Gale Group's equally accessible "Making of Modern Law" database, which gathers historical journals and treatises dating back to the early nineteenth century, provide many intriguing references to habeas corpus. As more databases of this type are created, historical research will become a more manageable task.

[220] That a strong habeas ideology existed in the early United States is virtually uncontested. Historians of the era have found "abundant evidence of an early and persisting attachment to 'this darling privilege' in pre-1787 America." Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 602, 608 & n.16. "The prestige of the [English habeas corpus] Act of 1679, was so high that several states

In one commentator's words, "habeas corpus was deeply embedded in the interstices of colonial thought . . . ."[221] Nineteenth Century views were no different. The legal historian Rollin Carlos Hurd wrote of "the favorable regard of the people" for the writ, and he explained that habeas "became inseparably associated with [the] right [of personal liberty]; and in proportion as the right was valued, so was the writ by which it was defended."[222] By the 1860s, virtually every state had enshrined the writ in its own constitution.[223]

The most fundamental legal battles of the mid-nineteenth century were intertwined with and influenced by habeas corpus ideology. Fugitive slave laws were attacked through habeas corpus proceedings seeking to free both (a) detained slaves who were attempting to flee slave-holding states and (b) those who aided slaves in their escape.[224] Critically, much of this litigation was based on the theory that state courts had jurisdiction to free prisoners held pursuant to federal authority. Federal courts had proven remarkably unreceptive to antislavery arguments. Reformers used habeas corpus proceedings to create "a sharply defined struggle between state and federal courts" to restore dialogue on the antislavery issue.[225] The Wisconsin Supreme Court responded, granting the writ to free two men convicted under federal law of aiding and abetting an escaped slave.[226] Although the U.S. Supreme Court ultimately upheld the supremacy of federal

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enacted almost word-for-word copies and others almost certainly regarded it as part of their common law." *Id*. at 622 & n.64. During the debates surrounding the drafting of the Constitution, no one questioned the importance of the writ. *Id*. at 608-17; *see* FREEDMAN, *supra* note 7, at 12-18; Cantor, *supra* note 2, at 74 (explaining that the writ "was taken for granted by the delegates"); *see also* THE FEDERALIST NO. 84, at 557 (Alexander Hamilton) (Modern Library ed., 1941) (noting the importance of habeas corpus as a protection against the "the practice of arbitrary imprisonments," which Hamilton labeled one of the "favorite and most formidable instruments of tyranny"). By 1800, seven of the original thirteen colonies had adopted habeas statutes, and others surely had recognized the writ through common law practice. Cantor, *supra* note 2, at 72-73.

[221] Cantor, *supra* note 2, at 73.

[222] ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND ON THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT: WITH A VIEW OF THE LAW OF EXTRADITION OF FUGITIVES 144 (Albany, W.C. Little & Co. 1858).

[223] Oaks, *supra* note 11, at 249; *see also* E. INGERSOLL, THE HISTORY AND LAW OF THE WRIT OF HABEAS CORPUS 39-46 (Philadelphia, T.K. & P.G. Collins 1849) (discussing the use of the writ in various states during the first half of the nineteenth century).

[224] ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 159-91 (1972) (discussing fugitive slave act litigation).

[225] *Id*. at 182.

[226] *In re* Booth & Rycraft, 3 Wis. 157, 176 (1854).

law,[227] the writ's importance to the antislavery movement cannot be overstated.

Lincoln's decision to suspend the writ of habeas corpus ignited a new period of debate that drew on habeas ideology. Much legal scholarship played to the vaulted image of habeas in attacking Lincoln's decision. One commentator declared that "[t]he nation is now afflicted with two terrible wars going on together. The war against the Union, and a war against the Constitution . . . . Each wears a threatening aspect of great peril."[228] Another commentator wrote that

> [l]ying at the foundation of all our liberties is the great Writ of Freedom. . . . [L]et us above all things, preserve the integrity of that hallowed instrument in all its parts; but most especially in those features of it which embrace and guarantee the liberties of the people.
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> . . . [I]n defending this priceless Writ of liberty, we are simply vindicating the authority of the people.[229]

Even after the war, habeas doctrine and its accompanying ideology continued to shape the debate. Political commentary repeatedly cited Lincoln's decision to suspend the writ as emblematic of more general criticism about governmental restraints on liberty.[230]

Habeas also played a central role in the legal battle to define the rights of Native American Indians. Arguing against confinement to specific Indian territories, counsel for Standing Bear "traced the history of the writ of *habeas corpus* from its origin, and claimed that it applied to every *human being*. He . . . showed that the position taken by the government

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[227] Ableman v. Booth, 62 U.S. 506 (1858).

[228] S.S. NICHOLAS, A REVIEW OF THE ARGUMENT OF PRESIDENT LINCOLN AND ATTORNEY GENERAL BATES, IN FAVOR OF PRESIDENTIAL POWER TO SUSPEND THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS 21 (Louisville, Bradley & Gilbert 1861).

[229] A MEMBER OF THE PHILADELPHIA BAR, REPLY TO HORACE BINNEY ON THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION 3 (Philadelphia, James Challen & Son 1862).

[230] *Circumstances Alter Cases*, 2 THE NATION 487, 487 (1866) (describing those who opposed war time restraints on liberty as "[s]tern patriots, who denounced Abraham Lincoln as a tyrant and a usurper for suspending the *habeas corpus*"); *Congress and the Constitution*, 4 THE NATION 254, 254 (1867) (chastising "[s]ome journals – the New York *Times* for one – which, during the war, unhesitatingly justified the suspension of the *habeas corpus* without the authority of Congress"); *The Desperadoes and Habeas Corpus*, 20 THE NATION 108 (1875) (using suspension of habeas corpus as the leading rhetorical device in attacking the Klu Klux Klan Act of 1871); *Mr. Jennings on Republican Government in the United States*, 6 THE NATION 133 (1868) (addressing Supreme Court review of Lincoln's attempt to suspend habeas corpus).

counsel undermined the very foundations of human liberty."[231] The judicial declaration that Native American Indians were persons under United States' law thus responded to the question of whether an Indian could prosecute a habeas petition.[232]

Political commentary through the first half of the twentieth century indicates that habeas corpus retained its high stature.[233] Some commentators personified the writ, giving it hero-like qualities. James Scott and Charles Roe, for example, contended that the "great Writ . . . saw the light of day and at once grappled with tyranny and oppression."[234] During this period, the Thomas Mooney case provoked praise for habeas review.[235] Some commentators even supported statutes permitting damages actions against judges who wrongly refused to issue the writ.[236]

The impact of habeas ideology may have reached its zenith with the Supreme Court's decision to incorporate federal criminal procedure rights into the Fourteenth Amendment. Unlike the contemporaneous desegregation cases, habeas ideology made the Court's entry into state criminal proceedings easier than it would have been if the Court had to create entirely new legal doctrine to facilitate the enforcement of newly recognized rights.[237]

Through the 1960s, the existence of habeas doctrine, and the positive ideology accompanying it, made the possibility

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[231] ZYLYFF, THE PONCA CHIEFS: AN INDIAN'S ATTEMPT TO APPEAL FROM THE TOMAHAWK TO THE COURTS 104 (2d ed., Boston, Lockwood, Brooks & Co. 1880).

[232] *Id*. at 126.

[233] *See, e.g.*, *Editorial Paragraphs*, 126 THE NATION 393, 395 (1928) (rebuking state officials for suggesting that the writ should be ignored); *An Inalienable Right*, 133 THE NATION 589, 589 (1931) (describing habeas as "[o]ne of the strongest safeguards the American people have in defending themselves against encroachments upon their human liberties").

[234] JAMES A. SCOTT & CHARLES C. ROE, THE LAW OF HABEAS CORPUS 3 (1923).

[235] *Editorial Paragraphs*, 139 THE NATION 603, 605 (1934) (praising potential review on habeas of the conviction of Thomas Mooney, allegedly obtained through perjured testimony); *Editorial Paragraphs*, 140 THE NATION 725, 726 (1935) (praising result in *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), which ordered California Supreme Court to reconsider Mooney's habeas petition).

[236] *An Inalienable Right*, 133 THE NATION 589, 589 (1931) (approving statutes providing for damage actions against judges who wrongly refused to issue the writ).

[237] *See* Schaefer, *supra* note 2, at 16-17 (explaining that while state responses to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), differed, most states created their own systems of collateral review that included scrutiny of federal constitutional violations); Thomas Sancton, *The Liberal Dilemma*, 168 THE NATION 573, 573 (1949) (quoting Dean Acheson as rebuking Spain for failing to uphold the writ of habeas corpus, which he described as "[t]he fundamental protection against [unlawful confinement] in free countries").

of reforming state criminal procedure seem not only possible, but at times inevitable. The idea of habeas corpus as embodied in the opinions of Justice Warren in *Townsend* and Justice Brennan in *Fay* both emboldened the Court to launch the criminal procedure revolution and limited the possibilities conceivable to state courts and legislatures for resisting. Those seeking to enhance the rights of suspects and the accused achieved a triumphant victory. But it was neither inevitable, nor invariable.[238]

Even as habeas contracted over the last quarter of the century, the high esteem in which the writ was held likely delayed and moderated Congressional action to narrow the writ's scope. For over a decade, conservatives had introduced, but were unable to pass, bills that called for the abolition of federal habeas review unless a state wholly failed to provide a process for litigating the federal claim.[239] The 1996 habeas reform act was more moderate, requiring not just a review process, but also that state courts apply federal law reasonably.[240]

B. Blunting The Potential Contraction of Criminal Procedure Rights

From the country's earliest days, there has been what might be called a counter-habeas ideology. This paradigm sees habeas corpus as a dangerous device that disrupts otherwise well functioning criminal processes. The framers expressed concern with a constitutional habeas clause that might grant the federal government too much power. To be sure, the

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[238] For significant periods during which the writ was expansively employed, bills were introduced in Congress that would have eliminated or substantially narrowed the scope of federal habeas. Contemporaneously with *Brown v. Allen*, 344 U.S. 443 (1953), Congress considered a proposal that would have eliminated federal habeas review if a state court provided the defendant an opportunity to raise the federal issue in state proceedings. Schaefer, *supra* note 2, at 23 (citing H.R. 5649). In the midst of the incorporation era of the 1960s, Congress considered eliminating federal habeas entirely. Paschal, *supra* note 212, at 606 & n.9 (citing 114 CONG. REC. 11,186, 11,189 (1968)). And as federal review of death sentences expanded in the early 1980s, Congress again considered limiting federal habeas to cases in which the state failed to provide a full and fair opportunity to litigate the claim. *See infra* note 239. For a detailed treatment of proposed habeas reform legislation from the 1940s through the early 1990s, see Yackle, *Hagioscope*, *supra* note 7, at 2344-73.

[239] *See, e.g.*, S. 1356, 103d Cong. § 705 (1993); S. 2216, 97th Cong. § 2 (1982). The debates on these bills invariably contained invocations to the "Great Writ" and the need to preserve it. *See, e.g.*, 142 CONG. REC. S3447 (1996) (statement of Sen. Moynihan).

[240] *See supra* Part II.C.8.

primary focus was improper federal suspension of state court authority to grant the writ.[241] But the first Congress's decision to deny federal courts the power to free prisoners in state custody confirms some concern with the overuse of the writ as well.[242]

Seymour Thompson's 1884 polemic *Abuses of the Writ of Habeas Corpus* may constitute the first thoroughly realized expression of the counter-habeas ideology.[243] He accused the federal courts of being "greedy of jurisdiction, just as kings are greedy of territory"[244] and cautioned that "the police regulations of the States, their criminal codes, the decisions of their highest judicatories, and even their constitutions, lie at the feet of the inferior Federal judges."[245] The late nineteenth century political press also summoned the counter-habeas ideology, accusing lawyers of using the writ to delay criminal processes.[246] And the Court's own early twentieth-century rulings interpreting the writ quite narrowly to ensure that "every judgment of conviction would [not] be subject to collateral attack and review on habeas corpus"[247] are cut from the same cloth.

The most prominent articulation of this vision of habeas is embodied in Paul Bator's and Henry Friendly's influential articles arguing that federal habeas should be available only where a state fails to provide a corrective process or the defendant is innocent of the crime.[248] Bator's attack was intellectual, deriding expansive habeas review for undermining the educative function of the criminal law, subverting the "inner subjective conscientiousness" of the state judiciary, and

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[241] FREEDMAN, *supra* note 7, at 12-19.

[242] Steven Semeraro, Book Review, *Reconfirming Habeas History: Reviewing Eric M. Freedman's* Habeas Corpus: Rethinking the Great Writ of Liberty, 27 T. JEFFERSON L. REV. 317, 326-27 (2005).

[243] Thompson, *supra* note 7, at 20 ("It cannot be doubted that [federal judges] have come to regard themselves as entitled to exercise . . . a supervisory authority over the State courts, because they have said so.") (footnote omitted).

[244] *Id*. at 5.

[245] *Id*. at 22.

[246] *The Week*, 52 THE NATION 489, 490 (1891) (arguing that lawyers who use the writ to delay criminal cases should be disciplined by the Supreme Court). *See also The Week*, 566 THE NATION 285, 285 (1876) (criticizing the release on habeas of a prisoner who refused to answer the questions of a House committee).

[247] Knewel v. Egan, 268 U.S. 442, 446 (1925) (explaining that "[i]t is fundamental that a court upon which is conferred jurisdiction to try an offense has jurisdiction to determine whether or not that offense is charged or proved" and those decisions are thus immune from collateral attack in federal court).

[248] *See supra* Part I.B.

threatening the "psychological necessity in a secure and active society" of finality in the criminal law.[249] Friendly was blunter, arguing that the effort to uncover constitutional violations for the benefit of guilty offenders was not worth the cost.[250]

By the early 1970s, many expected that the Court would cut back significantly on the federal rights it had recognized. As Bob Woodward and Scott Armstrong wrote in *The Brethren*, "[a]s crime soared, the Court [in expanding criminal procedure rights] had brought the country's wrath upon itself. . . . The nation's fear of crime had enabled Nixon, who had exploited that fear, to be elected President."[251] Judges and commentators stridently opposed the continued use of the exclusionary rule,[252] and Justice Black, in a 1971 dissenting opinion, predicted backlash against decisions apparently "calculated to make many good people believe our Court actually enjoys frustrating justice by unnecessarily turning professional criminals loose to prey upon society with impunity."[253] The mood of the era was expressed well by a Supreme Court clerk: "*Mapp* is dead."[254]

Ironically, the rhetoric attacking the expansion of the exclusionary rule in *Mapp*,[255] *Massiah*,[256] and *Miranda*,[257] never produced the reversal of a significant procedural right. In fact, the scope of these decisions continued to expand long after

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[249] Bator, *supra* note 30, at 451-53.

[250] Friendly, *supra* note 40, at 146-49.

[251] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 116 (1979); *see* Yackle, *Hagioscope*, *supra* note 7, at 2351 ("Nixon's stump speech invariably included the charge that the Court had 'weaken[ed] the peace forces as against the criminal forces' in America and the promise that he, if elected, would strike blows for 'law and order.'" (quoting Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 438-39 & n.11 (1980) (quoting Arlen J. Large, *"Law and Order" – Into the Fuzzy Swirl*, WALL ST. J., Oct. 22, 1968, at 20))).

[252] *See, e.g.*, Stone v. Powell, 428 U.S. 465, 496-502 (1976) (Burger, J., concurring) (arguing that exclusionary rule should be repealed entirely or limited to cases of "egregious, bad-faith conduct"); *id*. at 538-40 (White, J., dissenting) (stating willingness to overturn exclusionary rule in cases when police acted with reasonable and good faith belief they were not violating the constitution); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); WOODWARD & ARMSTRONG, *supra* note 251, at 116; Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 256 (1961).

[253] Whiteley v. Warden*,* 401 U.S. 560, 570 (1971) (Black, J., dissenting).

[254] WOODWARD & ARMSTRONG, *supra* note 251, at 116.

[255] Mapp v. Ohio, 367 U.S. 643 (1961).

[256] Massiah v. United States, 377 U.S. 201 (1964).

[257] Miranda v. Arizona, 384 U.S. 436 (1966).

habeas review began to contract,[258] and the Court's use of the exclusionary rule has remained quite broad.[259]

Anti-habeas ideology may have played a pivotal role in forestalling the anticipated assault on constitutional criminal procedure. Three avenues were open to the Nixon administration to combat the perceived crime problem. First, it could have engaged in meaningful criminal justice reform. Even if Nixon had the will, however, he would likely have been unable to identify the means. Effective crime control measures are hard to uncover. As Stanford Law School Professor Lawrence Friedman, a leading legal historian, has explained, "the historical records suggest that fluctuations in crime rates are largely independent of changes in the criminal justice system . . . . The honest answer . . . is that no one knows why crime rates go up and down."[260]

More palatable options were (1) curtailing the rights of the accused or (2) restricting the means through which those rights are enforced. The early Nixon administration considered both.[261] The former would have had a powerful symbolic impact. The latter approach surely seemed less attractive because remedial adjustments would be harder to communicate to the public at large. Yet, a Court with four Nixon appointees pursued the remedial approach almost exclusively.

Anti-habeas ideology, expressed by Justice Lewis Powell in his crusade against broad habeas review,[262] provided a

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[258] *See supra* note 46. Even the exclusionary rule remained largely intact. Although the Court adopted a good faith exception, it applied the limitation only to cases in which the police reasonably relied on a warrant or statute authorizing the search. *See supra* note 47.

[259] Although the Court did limit the use of the rule for grand jury proceedings, United States v. Calandra, 414 U.S. 338, 351-52 (1974), or to impeach a testifying defendant, Walder v. United States, 347 U.S. 62, 65-66 (1954); *see* Oregon v. Hass, 420 U.S. 714, 721-22 (1975) (extending *Walder* to the exclusion of a defendant's statements obtained in violation of *Miranda*), it continued to apply the rule to prevent most uses of unconstitutionally obtained evidence. *See*, *e.g.*, James v. Illinois, 493 U.S. 307, 309 (1990) (refusing to extend the exception permitting the use of excluded evidence to impeach the testimony of a non-defendant witness).

[260] Fox Butterfield, *Major Crimes Fell in '95, Early Data by F.B.I. Indicate*, N.Y. TIMES, May 6, 1996, at 1.

[261] Yackle, *Hagioscope*, *supra* note 7, at 2355-57 (discussing early Nixon administration efforts to combat Warren Court criminal procedure holdings and stimulate legislation restraining habeas corpus).

[262] Kuhlmann v. Wilson, 477 U.S. 436, 444-55 (1986) (plurality opinion); Kimmelman v. Morrison, 477 U.S. 365, 391-98 (1986) (Powell, J., concurring); Rose v. Mitchell, 443 U.S. 545, 579 (1979) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465, 474-81, 489-96 (1976); Schneckloth v. Bustamonte, 412 U.S. 218, 224-26 (1973) (Powell, J., concurring).

stalking horse capable of satisfying the demand to change *something* without seriously altering the rights of the accused.[263] Restraints on habeas, because of its place in the American legal consciousness, were both readily apparent and likely to be seen as important anti-crime steps despite the inconsequential role they play in crime prevention.[264]

Justice Powell's opinions are often read to betray a hostility to federal criminal procedure rights that was limited to remedy only because of his inability *to get the votes* to overrule those rights. Just the opposite may have been true. Were it not for Powell's focus on habeas, the *Stone* case could easily have overturned the exclusionary rule.[265] And like its more overtly liberty-friendly fraternal twin, the counter-habeas ideology may thus have played a significant role in maintaining the broad criminal procedure rights existing today.

CONCLUSION

Habeas corpus doctrine in the United States has taken many twists and turns. To date, the commentators have concluded that only the twists – or maybe the turns – make sense. This article presents two theories that help explain

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[263] Yackle, *Hagioscope*, *supra* note 7, at 2351 ("Viewed in historical context, then, the campaign to curtail habeas was not fueled primarily by an outcome-neutral concern that proper respect be shown to the state courts, nor by concerns about docket congestion. The resistance to federal habeas was a political statement about the Warren Court's alleged tendency to protect the rights of defendants at the expense of public safety.").

[264] *See, e.g.*, Blaustein, *supra* note 217, at 871; David Cole, *Courting Capital Punishment*, THE NATION, Feb. 26, 1996, at 20 (explaining that Congress cut funding for resource centers that assisted death row inmates in prosecuting habeas corpus petitions attacking their sentences); James S. Liebman, *Lesson Unlearned*, 253 THE NATION 217, 217 (1991) (drawing connection between concerns about deterring crime and a recent Court case and Senate vote to narrow federal habeas review); Michael Meltsner, *On Death Row, The Wait is Over*, 239 THE NATION 274, 275 (1984) (quoting Chief Justice Burger describing defense lawyers' seeking federal habeas review as "calculated efforts to frustrate valid [death penalty] judgments") (alteration in original); Amy Singer, *The Man in Solitary: Who's Afraid of Habeas Corpus?*, 237 THE NATION 361, 361 (1983) ("A recent wave of complaints by judges and prosecutors that 'jailhouse lawyers' are clogging the court system with habeas corpus appeals has made Federal judges cautious about granting them. . . . [T]he Supreme Court echoed the concern about alleged abuse of habeas corpus with its ruling in *Barefoot v. Estelle*."); Bryan Stevenson, *The Hanging Judges*, THE NATION, Oct. 14, 1996, at 16, 18 (quoting Chief Justice Rehnquist arguing against federal habeas review for claims of innocence in capital cases because of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases").

[265] WOODWARD & ARMSTRONG, *supra* note 251, at 429-31 (explaining that Justice Powell's decision to cut back on habeas jurisdiction may have blunted the elimination of the exclusionary rule in all but the most blatant cases of police abuse).

these doctrinal changes. The judicial-power theory views habeas as a means for the United States Supreme Court to enforce its authority to proclaim federal constitutional law. Each significant step in the development of habeas doctrine throughout the twentieth century, many of which have been derided as utterly inexplicable, can be explained through reasoning that protecting judicial power rather than safeguarding individual liberty drove the development of the legal doctrine. This account concludes that the demise of broad, systematic, *de novo* federal habeas review in the 1990s should not be interpreted as the end of habeas. On the contrary, those restrictions are part of the normal expansion and contraction process. Ad hoc habeas review that safeguards the Supreme Court's power to proclaim criminal procedural law remains alive and well,[266] and more expansive review may be expected to return with the next significant expansion of federal authority.

Though a useful explanatory tool, the judicial-power interpretation of changes in habeas doctrine is incomplete because it fails to take account of the doctrine's influence in mediating the contradictory commitments in American society to both vigorous anti-crime structures and strong protection for individual liberty. Traditional histories interpret habeas doctrine as reactive, changing to take account of evolving societal attitudes about crime. The second theory presented here – the conflicting-ideologies theory – contends that habeas doctrine did not merely react to changing social forces, it helped create the change by enabling those responsible for reform to believe it was possible, when of course it was, and compelling those opposed to reform to believe it was inevitable, even though it was not. Even during periods dominated by opposition to the writ, the doctrine may have helped preserve a regime of expansive protection for liberty interests by serving as a lightning-rod for criticism and thus absorbing attacks that might otherwise have weakened the liberty-enhancing rights themselves. In this way, habeas corpus has indeed made a

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[266] Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (overturning federal appellate court's refusal to grant a certificate of appeal from the denial of habeas relief in state court explaining that "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence."); *see* Tennard v. Dretke, 542 U.S. 274, 288-89 (2004) (reversing denial of certificate of appeal).

significant and lasting contribution to the liberty-protecting expansion of criminal rights in the latter half of the twentieth century.