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Lynn Adelman

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FEDERAL HABEAS REVIEW OF STATE COURT  
CONVICTIONS: INCOHERENT LAW BUT AN  
ESSENTIAL RIGHT

*Lynn Adelman*

## FEDERAL HABEAS REVIEW OF STATE COURT CONVICTIONS: INCOHERENT LAW BUT AN ESSENTIAL RIGHT

Lynn Adelman\*

I thank the editors of the *Maine Law Review* for the opportunity to participate in a discussion about the present state of post-conviction review of criminal convictions. This discussion is important and timely both because the quality of the procedures by which state prisoners can obtain post-conviction review varies greatly from state to state and because state prisoners who seek federal court review of their constitutional claims by petitioning for a writ of habeas corpus face many obstacles. As a federal district judge, my experience is primarily with the latter problem. Thus, in this article, I will offer a few comments about federal habeas corpus as it applies to prisoners who are in state custody as the result of a criminal conviction. Because I sit in Wisconsin which, like Maine, is one of those enlightened states that does not have a death penalty, my experience with habeas corpus is limited to non-capital cases, and, for that reason, I will focus primarily on such cases.

The writ of habeas corpus, long known as the Great Writ or the Great Writ of Liberty, has been available since the Magna Carta as a means by which a prisoner can challenge the legality of his custody.<sup>1</sup> In the Judiciary Act of 1789, Congress conferred habeas jurisdiction on the newly created lower federal courts.<sup>2</sup> And in the Habeas Corpus Act of 1867, Congress extended the benefits of the writ to prisoners in state custody.<sup>3</sup> The reason that federal courts are authorized to review the federal constitutional claims of state prisoners is not that federal courts are better than state courts but because, for a variety of reasons, they are institutionally better situated to address such claims. Federal court review of state court convictions serves several important functions. First, when state courts address the merits of a federal constitutional claim, federal courts must determine whether they did so correctly.<sup>4</sup> Second, when state courts do not address the merits of a federal constitutional claim, federal courts must ensure that they have a sufficient reason for not doing so.<sup>5</sup> Thus, just as federal law is supreme, so is federal adjudication of that law as mandated by Congress.<sup>6</sup>

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\* United States District Judge for the Eastern District of Wisconsin. Judge Adelman thanks his law clerk, Jon Deitrich, and courthouse librarian, Barbara Fritschel, for their assistance with this article.

1. See Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 3 (2009).

2. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4(d)(i), at 49 (6th ed. 2011).

3. *Id.* at 53.

4. Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 542 (2006).

5. *Id.*

6. See HERTZ & LIEBMAN, *supra* note 2, at 91.

Although federal courts have always granted writs of habeas corpus sparingly, in modern times, they granted them less infrequently in the 1950s and 1960s.<sup>7</sup> In that period, the Supreme Court interpreted the Due Process Clause of the Fourteenth Amendment to require states to provide criminal defendants with various procedural rights. For example, in *Mapp v. Ohio*, the Court held that defendants had the right to have items seized in violation of the Fourth Amendment excluded from evidence.<sup>8</sup> And, in *Miranda v. Arizona*, the Court held that defendants who were in custody were entitled to warnings before being interrogated by the police, and if they did not receive warnings, their responses could not be admitted in evidence.<sup>9</sup> Many law enforcement officials, among others, were less than enthusiastic about these decisions, and state court judges sometimes did a poor job of enforcing them. In order to insure that the new rules of constitutional criminal procedure that it had developed were enforced, the Supreme Court removed some of the obstacles faced by state prisoners who wished to bring their federal constitutional claims before federal courts by petitioning for a writ of habeas corpus.

In *Brown v. Allen*, the Court made clear that state prisoners could bring constitutional challenges to their convictions in federal habeas proceedings even though state courts had rejected such challenges in full and fair proceedings.<sup>10</sup> Subsequently, the Supreme Court authorized federal habeas courts to review claims that state prisoners had not previously presented to state courts.<sup>11</sup> The Court also allowed state prisoners to develop a factual record in federal habeas proceedings<sup>12</sup> and to file more than a single petition challenging a state court conviction.<sup>13</sup> In combination with the expansion of state defendants' constitutional criminal procedure rights, the Court's habeas jurisprudence made federal habeas corpus a viable means by which state prisoners could challenge the legality of their custody.<sup>14</sup>

In 1968, however, Richard Nixon was elected President, and things began to change. The era of the Warren Court came to an end, and an ever more conservative Supreme Court, first led by Warren Burger and later by William Rehnquist, came up with a variety of ways to limit federal habeas review of the constitutional claims of state prisoners. Rehnquist played a major role in this process. From his days as a Supreme Court law clerk, he viewed habeas corpus not as a mechanism for vindicating federal constitutional rights but as an improper federal intrusion into state criminal justice systems and as a tool by which criminals could prevent their punishment from becoming final.<sup>15</sup>

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7. See John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Non-Capital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 440 (2011).

8. 367 U.S. 643, 660 (1961).

9. 384 U.S. 436, 498-99 (1966).

10. 344 U.S. 443, 462-63 (1953).

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

12. *Townsend v. Sain*, 372 U.S. 293, 312 (1963).

13. *Sanders v. United States*, 373 U.S. 1, 6 (1963).

14. Blume et al., *supra* note 7, at 440.

15. John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 264-65 (2006).

First, the Court prohibited habeas courts from reviewing virtually all claims raising Fourth Amendment issues.<sup>16</sup> It also barred consideration of most claims that petitioners had not properly raised in state court.<sup>17</sup> It expanded the circumstances under which federal courts had to presume that state courts had found the facts correctly.<sup>18</sup> It barred federal courts from considering habeas petitions which contained some claims that had been exhausted in state court and some that had not, so-called mixed petitions.<sup>19</sup> It generally prohibited federal courts from granting relief to habeas petitioners based on a new rule.<sup>20</sup> And it declared that any rule was new if at the time a petitioner's conviction and sentence became final on direct review, a state court might reasonably have determined his claim adversely.<sup>21</sup> The Court prohibited consideration of so-called second or subsequent petitions absent exceptional situations.<sup>22</sup> It limited the circumstances under which federal courts could conduct an evidentiary hearing,<sup>23</sup> and it required federal courts to employ a stringent harmless error standard when determining whether a state prisoner was entitled to a writ.<sup>24</sup> In sum, the Burger and Rehnquist Courts created numerous procedural obstacles for habeas petitioners to navigate, and it substantially narrowed the substantive grounds on which federal courts could grant relief.

It has never been entirely clear why the Burger and Rehnquist Courts (as well as their successor, the Roberts Court, which has continued down the same well-trodden anti-habeas path) were so hostile to the idea that federal courts should be able to vindicate the constitutional rights of state prisoners. Possibly, they were sincerely motivated by concerns about federalism. However, it is hard to understand how federalism can legitimately trump the claim of a prisoner whose confinement is based on the deprivation of a constitutional right. Possibly, they were concerned about efficiency and regarded requiring federal courts to spend time addressing the habeas petitions of state prisoners as a wasteful use of judicial resources. But, in truth, while some federal courts are overburdened, most are not, and addressing habeas petitions is not particularly onerous. Another possibility is that a majority of the Courts' members shared the law and order and pro death penalty views that have been so prominent in the last four decades. Again, however, the only petitioners who are granted writs are those who have been imprisoned because of the violation of a constitutional right.

In any case, for justices like Rehnquist, ideas about federalism, judicial efficiency, and criminal justice added up to a strong antipathy to habeas corpus. This antipathy included a distinct lack of sympathy for the constitutional rights that prisoners were asserting as well as hostility to the fact that the creation of such

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16. *Stone v. Powell*, 428 U.S. 465, 494 (1976).

17. *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

18. *Sumner v. Mata*, 449 U.S. 469 (1981).

19. *Rose v. Lundy*, 455 U.S. 509, 518-20 (1982).

20. *Teague v. Lane*, 489 U.S. 288, 299 (1989) (holding by plurality that a rule should not be applied retroactively to cases on collateral review).

21. *O'Dell v. Netherland*, 521 U.S. 151, 156-57 (1997).

22. *McCleskey v. Zant*, 499 U.S. 467 (1991).

23. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

24. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993).

rights was part of a broad movement aimed at establishing a less harsh and more egalitarian society. In a word, the responses of the majorities of the Burger, Rehnquist and Roberts Courts to the habeas jurisprudence of the Warren Court was, and is, reactionary.

Many members of Congress, mostly Republicans but also some Democrats, responded to the habeas jurisprudence of the Warren Court, like the later Supreme Court majorities, and supported bills to restrict federal habeas corpus review.<sup>25</sup> In large part, their purpose was to prevent prisoners who had been sentenced to death from using the writ to avoid or postpone execution.<sup>26</sup> Initially, the legislative initiatives were focused on procedure, but as time went on, the bills included restrictions on the substance of federal court authority.<sup>27</sup> Conservative critics inveighed against federal judges being able to “substitute their judgments about federal rights for the contrary judgments of state courts (especially decisions about the validity of death sentences).”<sup>28</sup>

However, even from a conservative perspective, because of the restrictions imposed on federal courts by the Burger and Rehnquist Courts, it was hard to make a legitimate argument that restrictive legislation was necessary.<sup>29</sup> Nevertheless, in 1994, when the Republicans sought control of the House of Representatives, they made habeas corpus “reform” part of their so-called Contract with America.<sup>30</sup> And when, in 1995, Timothy McVeigh and others bombed the federal courthouse in Oklahoma City, the Republicans, who by then had captured majorities in both houses of Congress, seized the opportunity to enact legislation imposing additional restrictions on habeas corpus.<sup>31</sup> Congressional Republicans drafted a bill containing a hodgepodge of limitations grabbed from a variety of proposals.<sup>32</sup> However, they made no effort to discuss the policies included in the bill or the specific language of the bill with habeas experts or with their Democratic counterparts.<sup>33</sup> They also refused to hold hearings on the bill, thereby preventing anyone from commenting on it.<sup>34</sup> In addition, they fast-tracked the bill onto the floor of the House and Senate without an explanatory report.<sup>35</sup> And, although the bill had nothing to do with terrorism, its promoters named it the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Unsurprisingly, it passed with large majorities.

Sadly, and over the objection of habeas scholars, civil libertarians, and others, President Clinton signed the bill. One would have hoped that Clinton, who had previously taught constitutional law, would have been loath to sign such a poorly drafted bill, much less weaken the Great Writ of Liberty. He could have vetoed the bill with limited political cost. For all its importance to prisoners who have been

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25. Yackle, *supra* note 4, at 543.

26. *Id.* at 543-44.

27. *Id.* at 544-45.

28. Larry Yackle, *AEDPA Mea Culpa*, 24 FED. SENT’G. REP. 329-30 (2012)..

29. *Id.*

30. *Id.*

31. *Id.*

32. Yackle, *supra* note 4, at 546.

33. *Id.*

34. *Id.*

35. *Id.*

deprived of constitutional rights, habeas corpus is an obscure subject in which the general public has little interest. However, crime is always unpopular, and Clinton was no stranger to anti-crime politics, having gone out of his way on a number of occasions to show people that he supported the death penalty. And, of course, habeas corpus had no politically significant constituency. Thus, a bad bill became the law of the land.

The AEDPA was advertised as legislation designed to reduce the number of successful habeas challenges in death penalty cases and to speed up the adjudication of those challenges.<sup>36</sup> However, the law included provisions unrelated either to the death penalty or to procedural delay. It made substantive and procedural changes in addition to changes applicable to non-capital as well as capital cases. The AEDPA contained the following major provisions: a one-year limitations period for state prisoners seeking habeas relief; a new limitation on relief requiring that a prisoner demonstrate not only that the state court made a harmful constitutional error but also that the court's decision was contrary to or unreasonably applied a decision of the Supreme Court or was factually unreasonable; a more restrictive rule on the availability of fact development; and a virtual prohibition on second or successive applications for habeas relief.<sup>37</sup>

The most objectionable provisions of the statute are those requiring federal habeas courts to defer to erroneous but "reasonable" state court interpretations of federal constitutional law and barring them from granting relief based on any authority other than "clearly established" Supreme Court precedent.<sup>38</sup> The former provision prevents federal courts from ordering new trials for some prisoners whose convictions were obtained through unconstitutional means.<sup>39</sup> It also requires federal courts to focus on the wisdom, or lack thereof, of a state court's decision rather than on the lawfulness of a prisoner's custody, the traditional concern of habeas corpus.<sup>40</sup> The latter provision bars habeas courts from relying on circuit court decisions or on their own understanding of constitutional jurisprudence, and by doing so thwarts the development of constitutional law.<sup>41</sup>

By enacting the AEDPA on top of two decades of restrictive Supreme Court decisions, Congress in many respects made habeas law incoherent.<sup>42</sup> And the Supreme Court's decisions interpreting the AEDPA have only made matters worse.<sup>43</sup> The Court has made no attempt to arrive at an interpretation of the statute which makes sense from a policy standpoint.<sup>44</sup> It has insisted that every provision of the statute be read to alter habeas law in some way even though it is unlikely that the drafters intended that result.<sup>45</sup> Also, the changes that the Court has found have

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36. See Adelman, *supra* note 1, at 15 (citing 141 CONG. REC. S7651, 7658-59 (daily ed. June 5, 1995) (statement of Sen. Hatch)).

37. See Blume et al., *supra* note 7, at 442. See also Adelman, *supra* note 1, at 15.

38. 28 U.S.C. § 2254(d) (2006).

39. Adelman, *supra* note 1, at 15.

40. *Id.*

41. *Id.* at 18-19.

42. Yackle, *supra* note 28, at 329-30, 333.

43. *Id.* at 329.

44. *Id.* at 329-30.

45. *Id.* at 330.

generally been harmful to state prisoners seeking habeas relief.<sup>46</sup> Thus, together the Supreme Court and Congress have made it much more difficult for state prisoners to use habeas corpus to obtain relief for violations of federal constitutional rights. As a result, in non-capital habeas cases, a very small percentage of the petitions filed are granted.<sup>47</sup> This fact has led two scholars, Nancy J. King and Joseph L. Hoffmann, to advocate that, with a few exceptions, federal habeas review in non-capital cases be eliminated altogether.<sup>48</sup> Hoffmann and King argue that federal habeas review in non-capital cases was necessary in the 1960s but that state post-conviction review procedures have improved since then such that today habeas review is largely superfluous.<sup>49</sup> They also argue that federal habeas review of non-capital cases does not result in meaningful benefits and costs more than it is worth.<sup>50</sup>

The reaction to the Hoffmann/King proposal has been largely negative.<sup>51</sup> However, the mess that the Burger and Rehnquist Courts and Congress have made of habeas law has caused other habeas scholars to advocate various changes in federal habeas review. One scholar has suggested reconfiguring federal habeas to focus on systemic state violations, defined as violations which recur in a pattern across multiple cases.<sup>52</sup> Another argues that federal habeas review should focus not on the result of the claims of individual prisoners but on the fairness of the post-conviction procedures that states used to resolve the claims.<sup>53</sup> A third contends that habeas procedures should be changed to enable juries to play a role in the adjudication of claims.<sup>54</sup> In addition, the American Bar Association has established a Task Force on Post-Conviction Remedies, which is preparing revised standards to guide future reform efforts. The Task Force's reporter, also a habeas scholar, while understandably concerned about the present state of habeas review, believes that "at some point, professionals will surely draw back, take stock, and

46. *Id.*

47. See generally NANCY J. KING, FRED L. CHEESMAN, II, & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 7 (2007).

48. See NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS CORPUS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 91 (2011).

49. *Id.* at 106-107.

50. *Id.* at 99, 106-107.

51. See, e.g., Blume et al., *supra* note 7; Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH & LEE L. REV. (forthcoming 2012); Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. (forthcoming 2012); Larry Yackle, *Untangling the Twists of Habeas Corpus*, JUDICATURE, Sept-Oct. 2011, at 90. See also Ronald L. Kuby, Lamar W. Hankins, James E. Coleman, Jr., Stephen J. Fartunato, Jr., & Bob Davidow, Letter to the Editor, *A System for Courts to Redress Wrongs*, N.Y. TIMES, Apr. 23, 2011; Douglas A. Berman, *Important New Book Urges "More Prudent Use of Habeas in State Criminal Cases,"* SENTENCING L. & POL'Y (Apr. 17, 2011), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/04/important-new-book-urges-more-prudent-use-of-habeas-in-state-criminal-cases.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/04/important-new-book-urges-more-prudent-use-of-habeas-in-state-criminal-cases.html); Andrea Lyon, *Liberty Requires More Habeas in This Corpus*, HUFF POST, Apr. 24, 2011, [http://www.huffingtonpost.com/andrea-lyon/liberty-requires-more-hab\\_b\\_853020.html](http://www.huffingtonpost.com/andrea-lyon/liberty-requires-more-hab_b_853020.html).

52. Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 5 (2010).

53. Marceau, *supra* note 51.

54. Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L. J. 887, 889 (2010).



set about reconstructing federal habeas corpus in a sensible, coherent form.”<sup>55</sup>

In thinking about what, if anything, can be done, it is important to remember that as badly as the Supreme Court and Congress have treated federal habeas corpus, they have by no means totally dismantled it. Federal habeas review continues to present state prisoners with an opportunity to vindicate federal constitutional rights of which they have been deprived. To take advantage of this opportunity, a prisoner must have a strong substantive claim, navigate a difficult procedural path (or have a lawyer who can do so), and be fortunate enough to have his petition assigned to a judge who is sensitive to the types of issues raised by habeas petitioners. Obviously, there are many contingencies, but petitioners can prevail. And those who do will either receive a new trial at which their constitutional rights will be respected, a more favorable disposition of the charges against them, or outright release. Although it would be wonderful if Congress or the Supreme Court would make federal habeas review more coherent and less unfair than it presently is, our focus in the meantime should be on preserving it and making it work as well as possible.

The Hoffmann/King proposal that federal habeas review in non-capital cases be almost completely eliminated is highly objectionable. It is also somewhat dangerous because the fact that it has not been well-received is no guarantee that one or more legislators, eager to appear tough on crime, will not decide to promote it. And we know from the AEDPA and other experiences that in the legislative process almost anything can happen. As stated, Hoffmann and King base their argument on the premise that unlike in the 1960s and 1970s, state courts now fully protect criminal defendants against the deprivation of federal constitutional rights. For a variety of reasons, this premise is deeply flawed.

First, although all states offer some form of direct and collateral review of non-capital convictions, the quality of such review varies significantly. In many states, “meaningful access to state review procedures—particularly state post-conviction review—is . . . difficult to come by.”<sup>56</sup> In some states, it is very hard for criminal defendants to bring ineffective assistance of counsel claims.<sup>57</sup> And prisoners who file such challenges are often unable to do the necessary investigative work.<sup>58</sup> But aside from these issues, another problem exists which Hoffmann and King don’t face up to, namely that, in important respects, state courts are not well positioned to be able to consistently enforce the federal constitutional rights of criminal defendants.

Second, whereas federal judges have life tenure, in most states, judges are elected or subject to appointment or reappointment by officials who themselves are subject to election.<sup>59</sup> For a prisoner claiming the deprivation of a constitutional procedural right, there is a substantial difference between having the claim heard by a judge or judges with life tenure and a judge or judges who must be re-elected or re-appointed. This problem has only gotten worse as judicial elections are

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55. Yackle, *supra* note 28, at 333.

56. Blume et al., *supra* note 7, at 444.

57. Primus, *supra* note 51, at 8.

58. See Blume et al., *supra* note 7, at 444-45.

59. See, e.g., Margaret Tarkington, *Attorney Speech and the Right to an Impartial Adjudicator*, 30 REV. LITIG. 849, 852 n.5 (2011) (discussing methods of judicial selection).

increasingly contested; increasingly involve substantial spending, both by the candidates' campaigns and by independent special interest groups; and increasingly result in the defeat of incumbents.<sup>60</sup> Judges are well aware that decisions which favor criminal defendants can easily be exploited in elections. With enough money, it is not difficult to create an impression that a judge is soft on crime, and such an impression can be fatal to a judge's re-election prospects.

Moreover, there is considerable evidence that fear of defeat at the polls or of engendering opposition to reappointment affects judicial behavior.<sup>61</sup> In the years after three California Supreme Court justices were ousted for refusing to uphold death sentences, the California Supreme Court upheld such sentences at a very high rate.<sup>62</sup> Moreover, studies indicate that judges decide criminal cases differently as they get closer to an election. Pennsylvania sentencing judges, for example, became significantly more punitive the closer they came to standing for re-election.<sup>63</sup> This was so even though they served ten-year terms and faced non-partisan retention elections.<sup>64</sup> Judges, like other political figures, "have a tendency to vote in accordance with perceived constituency preferences on visible issues simply because the failure to do so is politically dangerous."<sup>65</sup> Moreover, judges who campaign on "law and order" platforms are likely to keep their campaign promises once they are on the bench. A criminal defendant faced with a judge who was elected after a tough-on-crime campaign faces an uphill fight. My home state of Wisconsin provides an example of this problem. In 2008, with some three million dollars worth of help from a special interest group, Wisconsin Manufacturers and Commerce, a little known trial court judge, and former prosecutor, Michael Gableman, ousted an incumbent state supreme court justice by contrasting his own law-and-order philosophy with the incumbent's supposedly soft-on-crime views. Gableman ran a television ad representing that he had "committed his life to locking up criminals to keep families safe, putting child molesters behind bars for over 100 years."<sup>66</sup> Given this kind of campaign, it is unsurprising that Justice Gableman almost never votes in favor of a criminal defendant. As a result of the statements made in his campaign, defense lawyers have asked Gableman to recuse himself in criminal cases on grounds of bias. These requests were, of course, denied.<sup>67</sup> It is not an exaggeration to say that the manner in which Gableman secured his seat on the Wisconsin Supreme Court is a powerful argument in favor of federal habeas review.

A court made up of elected judges can have difficulty with a high profile

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60. See, e.g., Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 628, 640 (2009).

61. See, e.g., *id.* at 683-84.

62. See Kenneth J. Aulet, *It's Not Who Hires You but Who Can Fire You: The Case Against Retention Elections*, 44 COLUM. J.L. & SOC. PROBS. 589, 608-609 (2011).

63. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004).

64. *Id.*

65. Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 AM. POL. Q. 485, 489 (1995).

66. Symposium, *State Judicial Independence—A National Concern: Session 1: One Symptom of a Serious Problem: Caperton v. Massey*, 33 SEATTLE U. L. REV. 569, 573 (2010).

67. See, e.g., *State v. Allen*, 778 N.W.2d 863 (Wis. 2010).

criminal case, no matter how impartial and well-intentioned its members. Consider, for example, the case of Ted Oswald, who was convicted of the murder of a police officer and other crimes in a conservative, suburban Wisconsin county.<sup>68</sup> Because the case was highly publicized, the judge sequestered prospective jurors in a jury room while he and the lawyers questioned them one by one in the courtroom.<sup>69</sup> On the fourth day of voir dire, a prospective juror testified that throughout the voir dire several prospective jurors in the jury room had been telling the others that the defendant was guilty and that a trial would be a waste of time and money.<sup>70</sup> In addition, another prospective juror wrote a letter to the judge stating that if he were selected as a juror, he would not give the trial the attention it deserved and might vote either way just to get it over with.<sup>71</sup>

The defendant's lawyer asked to question the prospective jurors about the impact of the jury room statements and the author of the letter about his ability to be impartial, and the judge denied both requests.<sup>72</sup> It is difficult to understand this ruling apart from the notoriety of the case. Voir dire had already consumed four days, and the judge likely feared that more questioning would result in the loss of the entire jury pool. Neither the expense of empaneling a new pool nor delaying the case would have gone over well with county voters. The case's high profile likely also affected the appellate courts. Both the state court of appeals and the state supreme court attempted to avoid deciding the case, the former by certifying it to the supreme court, and the latter by declining to accept the certification.<sup>73</sup> After a long delay, the court of appeals ultimately affirmed the conviction and the state supreme court declined further review.<sup>74</sup> After I granted Oswald's habeas petition (even with life tenure, some decisions cause trepidation), the Seventh Circuit affirmed noting that there was a "high probability that some, maybe all, of the jurors who tried Oswald were biased."<sup>75</sup>

Thus, unfortunately, politics and money play a role in the outcome of some criminal cases. For this reason alone, the Hoffmann/King argument that state courts sufficiently protect the federal constitutional rights of criminal defendants is unrealistic. Even with the difficult AEDPA standard, many defendants likely have a better chance before a life-tenured federal judge than they have in a state court. This, of course, was the reason that the framers of the Constitution provided federal judges with life tenure and that Congress enacted the Habeas Corpus Act of 1867.

For other reasons too, state courts are not well positioned to decide the constitutional claims of state prisoners. State court judges receive less training in federal constitutional law than their federal counterparts and face federal constitutional issues less often. Federal judges receive a great deal of education about such issues both when they take the bench and on an ongoing basis. For

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68. See *Oswald v. Bertrand*, 249 F. Supp. 2d 1078, 1082 (E.D. Wis. 2003), *aff'd*, 374 F.3d 475 (7th Cir. 2004).

69. *Id.* at 1083.

70. *Id.*

71. *Id.* at 1086.

72. *Id.* at 1085.

73. *Id.* at 1082.

74. *Id.*

75. *Oswald*, 374 F.3d at 480.

example, they regularly attend workshops about the past term's Supreme Court decisions. They also have two to four law clerks who are usually among the brightest members of their law school classes. State court judges receive less training, have less staff, and often have to face long daily calendars.

The Hoffmann/King assertion that federal habeas review does not result in meaningful benefits is also mistaken. In some cases, federal habeas courts correct state court errors. Federal habeas review also provides an incentive to state courts to vindicate federal constitutional rights. No court likes to see its decisions vacated by another tribunal. If federal review were eliminated, state courts would likely not perform as well.<sup>76</sup> Also, federal habeas review sometimes creates a dialogue between state and federal courts. Federal habeas decisions can illuminate federal constitutional issues to which state courts may not be attuned. I have written elsewhere about how a case I decided, which dealt with a defendant's constitutional right to a public trial, had this effect.<sup>77</sup>

Although the previously mentioned ideas of other scholars regarding possible changes in habeas review are interesting, none are compelling. Like Professors Blume, Johnson, and Weyble, I disagree with the notion that habeas corpus is or should be a mechanism for addressing broad governmental problems. Habeas is and should be a remedy for individuals who are wrongfully imprisoned. The fact that the Supreme Court and Congress have made it less effective (hopefully temporarily) does not mean that we need to find new functions for the writ to serve. The problem with habeas corpus is that it is too hard for prisoners who have been deprived of constitutional rights to obtain relief. The procedures are too complicated, and courts sometimes cannot grant relief to deserving applicants. An ideal habeas corpus would look pretty much like it did before the Burger and Rehnquist Courts and Congress messed it up. And while real reform might not be imminent, our immediate task is to educate the public, the bar, the judiciary and Congress.

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76. Blume et al., *supra* note 7, at 453.

77. Adelman, *supra* note 1, at 29.