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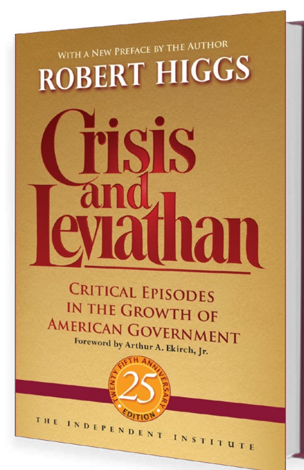

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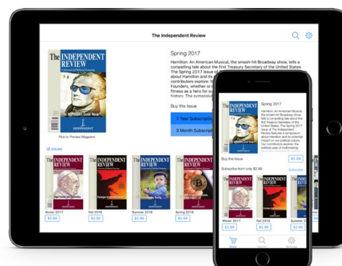

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"The Tissue of the Structure"

Habeas Corpus and the Great Writ's Paradox of Power and Liberty

ANTHONY GREGORY

> [C]onceptually the writ arose from a theory of power rather than a theory of liberty.
>
> —Paul Halliday and G. Edward White, "The Suspension Clause"

At the heart of habeas corpus history is a seeming paradox. The Great Writ, like all judicial writs, is a government power. It is a judicial order, issued by a government official, to compel another person, typically another government official, to bring forth the body of a person, usually a detainee, for the purpose of testing the legitimacy of that person's detention—to ensure that the government's action comports with its own declared rules of conduct.

Yet the writ of habeas corpus is also a libertarian measure. It has been celebrated for centuries in the Anglo-American tradition as a means of questioning government power. It is probably the most revered of all of the checks and balances in our legal history—as William Blackstone commented, "the most celebrated writ in English law" ([1768] 1827, 107).

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This paradox underlies the unusual history in which the writ was apparently first used in England not primarily to serve the interests of the detainees, but the interests of government officials in judicial process and remuneration. This origin explains why so much controversy erupted in regard to whether the Great Writ was, indeed, as Edward Jenks famously said, "originally intended not to get people out of prison, *but to put them in it*" (1902, 65, emphasis in original). The paradox explains why scholars such as Badshah Mian (1984) have seen fit to call this assertion into question, to reclaim the radical history of habeas corpus, and to find its origins not in other judicial mechanisms of similar name, but in those with a similar ultimate function—to release from prison those who do not belong there.

The emphasis on government power rather than on individual rights can be seen in most judicial arguments concerning the scope of habeas corpus in one area or another. In the United States, this emphasis often results from the writ's centralization and the overturning of the common law writ as practiced by state courts. (State courts originally had the power to use habeas corpus to challenge federal detentions. The U.S. Supreme Court overturned this power in *Ableman v. Booth* [62 U.S. 506 (1859)] and *Tarble's Case* [80 U.S. 397 (1871)].) Habeas corpus never truly fulfilled its promise in England, but in the United States it had a chance to develop into a writ truly efficacious in liberating the unjustly detained.

Now, however, most arguments deal with the executive power's proper boundaries and with the judicial power's limits to bring that executive power into question. Complicating the matter is the question of the legislature's proper role in defining the writ's reach. This dialectical balance between different modes of government power has underscored the Great Writ's development over time and explains why, despite many appeals to the fundamental principles of liberty involved, most modern court decisions appear to hinge on the question of whether one government official has the lawful authority to step in to scrutinize the powers of another.

This emphasis can be seen in the works of those who, in a narrow circumstance, argue for extension of habeas corpus. In the wake of the George W. Bush administration's post-9/11 detention policies, legal scholars concerned themselves with whether the executive can establish military commissions without congressional approval or whether a joint decision by the executive and legislature should be checked further by the courts rather than with whether some of the detainees at Guantánamo and elsewhere likely deserved to be released and, therefore, as a corollary of this concern for their liberty, whether the courts should check the executive. In "Habeas Without Rights," Jared Goldstein, one of the attorneys defending Kuwaiti prisoners at Guantánamo, argues that concern had been *overly* focused on the detainees' rights rather than on the legal powers shared by the executive and judicial branches. He states that

> habeas relief does not require the possession of rights. . . . [A]lthough the courts have not decided whether the Guantanamo detainees possess

> enforceable rights, they have uniformly and mistakenly concluded that the detainees' habeas claims, as well as the habeas claims brought by other accused enemy combatants, require a showing that the detainees possess cognizable rights violated by the detentions, most especially rights protected by the Constitution. . . . [F]or most of the long history of habeas corpus, courts resolved habeas claims without undertaking any inquiry into the petitioner's rights by determining whether the jailer had authority to impose the challenged detention. Habeas did not address "rights" in the modern sense of a discrete group of personal trumps against governmental action, such as those protected by the Bill of Rights. Habeas did not protect rights in this sense for a simple reason: habeas predates rights. (2007, 1)

It is true that the writ of habeas corpus predates the modern conception of negative liberties, or the right to be free from government encroachment. It is also true that emphasizing power rather than rights is often a better tactic in the courtroom, where judges are understandably more concerned that the boundaries of their own authority are being respected rather than with what they might view as the abstract consideration of personal liberty of those whose detentions are being brought to them for their scrutiny. In a sense, habeas corpus has always been about power, even before it had much to do with liberty as an ideal. This view arises from a closer reading of the tradition and history of the writ, whereas an idealistic assumption that all detainees, for the sake of their liberty, have had minimal recourse through habeas corpus perhaps gives too much credit to those protagonists in the story of the writ's coming of age.

Judges' interest to have their power respected has always been a crucial part of the Great Writ's history and the legacy of hypocrisy seen in that history. Judicial officers and others' self-interested desire to flex their own muscles in the name of liberty and the rule of law but then to turn around and deny the privilege when it undermined their own power demonstrates the dubiousness of the interpretation that habeas corpus was always about freedom as a first principle or that power-hungry politicians and judges should be commended in unqualified terms for their long battle in securing the freedom of the most vulnerable among us.

Courts in England broadened and seized the writ as a way to assert their own power. The parliamentarians championed the writ in language of high principle, only to switch sides and suspend it when the king's partisans used it against them. The famous Habeas Corpus Act of 1679, "the most wholesome law," was passed not simply to placate the masses, but with the specific desire to protect members of the House of Lords from being arrested by members of the House of Commons (Duker 1980, 48–51, 56). The American revolutionaries wanted the writ for themselves but did not always respect the loyalists' right to use it. Thomas Jefferson asserted that it should never be suspended, but once he was in power, he tried to suspend it

(*Hamdi v. Rumsfeld*, 542 U.S. 507, 565 [2004]). Proponents and opponents of slavery and centralized power in antebellum America found themselves on one side or the other, depending on circumstance (Wert 2004). Chief Justice Roger Taney railed against Abraham Lincoln for his abuse of the Great Writ, but it was he himself who, in *Ableman v. Booth* (62 U.S. 506 [1859]), gutted the most radical use of the writ in U.S. history—its employment by state courts against federal detentions so as to undermine the Fugitive Slave Act. The Reconstructionists pushed through a federal expansion of habeas corpus, largely to punish the South, but then moved to curtail the privilege when it was used against their agenda to free people jailed for the crime of merely criticizing their program (*Ex parte McCardle*, 74 U.S. 506 [1868]). In the twentieth century, Earl Warren advanced an activist use of federal habeas corpus to question the detention of individuals by state governments, but a skeptic might say he regarded this tactic as a way to aggrandize the power of his own governmental body, just as when he was California's attorney general, he was a firm and complicit supporter of Japanese internment, also an aggrandizement of federal power, whereby many more individuals were detained without legal due process than were ever freed by his alleged judicial activism. Senator Barack Obama was a great and vocal champion of the Great Writ until he left the Senate to become the president and custodian, at which point he immediately found ways to justify indefinite executive detention without judicial review (Sanger 2009).

But the Great Writ, aside from the vagaries and inconsistencies that have accompanied its practice and development—apart from the centralizing and hypocritical power that has often employed it for the centralizer's own advantage—has unmistakable significance for how we view ourselves as a society and for the types of principles we claim as defining our civilization. As Cary Federman has written in *The Body and the State: Habeas Corpus and American Jurisprudence,* the fundamental questions raised by habeas corpus pertain just as much to the way in which people perceive and discuss legal reality as to the way legal business is conducted: "The writ reveals a breach, not just institutionally but also in language. It exposes a different way to understand the law, one based on the reality and harshness of the criminal justice system for those unable to secure quality counsel" (2006, 12).

Federman elaborates on the discursive themes involved in habeas corpus and reemphasizes the important principle of empowering the least empowered—the prisoner, with all the weight of the state against him—to take the state's mechanisms for his own interest and redirect them back against the state: "Habeas corpus . . . gives the dangerous classes more than a voice; it gives them a weapon to attack a jury's psychological determination of guilt and dangerousness. It gives the condemned a language to rebut the charges, convictions, misrepresentations in the same terms that were used against them. Habeas petitions turn legal language upside down and with it, the historical evolution of federal–state relations" (2006, 18). Michigan Supreme Court justice Thomas M. Cooley also emphasized this reversal, using the state against itself for the sake of the prisoner's individual liberty: "The important fact to be

observed in regard to the mode of procedure upon this writ is that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent" (15 Mich. 417 [1867], at 439, 440).

This reliance on state power to check the state's depredations, however, also spells a paradox. The discursive value of habeas corpus in causing a revolution in thinking about legal affairs also has potential disadvantages. As Jordan Steiker has pointed out, "[T]he very existence of federal habeas, even in its increasingly truncated form, unjustifiably alleviates anxiety about the accuracy of state court capital proceedings" (2001, 191–92). Jeremy Bentham made a similar point with regard to the English experience: "As for the habeas corpus act, better the statute book were rid of it. Standing or lying as it does, up one day, down another, it serves but to well the list of sham securities, with which, to keep up the delusion, the pages of our law books are defiled. When no man has need of it, then it is that it stands; comes a time when it might be of use, and then it is suspended" (qtd. in Church [1886] 2003, 38).

One might counter that any seeming irony in trusting the state to curb its own abuses can be applied as easily to other checks and balances or to the idea of higher government bodies checking lower ones or of lower ones checking higher ones, all the way to the notion that the state should provide adequate legal counsel to those who cannot afford their own. But, indeed, none of this is a cynical and baseless concern or one without a precedent in the tradition of our polity. Thomas Paine mused in his famous pamphlet *Common Sense,* which sparked revolutionary fervor in British America in 1776:

> To say that the constitution of England is an UNION of three powers, reciprocally CHECKING each other, is farcical; either the words have no meaning, or they are flat contradictions.
>
> First.—That the King it not to be trusted without being looked after; or in other words, that a thirst for absolute power is the natural disease of monarchy.
>
> Secondly.—That the Commons, by being appointed for that purpose, are either wiser or more worthy of confidence than the Crown.
>
> But as the same constitution which gives the Commons a power to check the King by withholding the supplies, gives afterwards the King a power to check the Commons, by empowering him to reject their other bills; it again supposes that the King is wiser than those whom it has already supposed to be wiser than him. A mere absurdity! ([1776] 1995, 5–6)

In this passage, Paine made an observation far more radical than anything he said in questioning the king's power on the basis of heredity or physical distance from the colonies. Indeed, even Paine, who considered government "at best" to be "a necessary evil," would perhaps have thought this passage proved too much had he pondered its full implications: this indictment of the British system of government applies as much to our own government or to any government ever conceived.

If it is a "mere absurdity" to think that the king should check the commons and yet the commons should check the king—if this notion betrays a mistrust in both bodies, despite the trust required to put one's faith in either body of government, much less in the whole system—this mistrust must apply as well to a constitutional system of government, such as that of the United States. If Congress can be trusted, why do we need a president? If the president can be trusted, what's the need for Congress? And, in regard to habeas corpus, if the executive cannot be trusted to detain people without a judge's stamp of approval—whether the review process is a mere assurance that the paperwork is in order, a de novo review of a lower court's case after conviction, or a full consideration of whether the detention power or the statute upon which the prisoner has been convicted is legitimate—why do we trust government executives to detain anyone in the first place?

It might easily be answered that we do not trust them—hence the power of habeas corpus. But insofar as the existence of the judicial remedy calms our fears about an out-of-control executive, we may indeed be suffering from an illusion. Most Guantánamo prisoners were freed without any traditional habeas corpus remedy. Tens of thousands of detainees were released from prison camps in Iraq without any judicial protection. Meanwhile, John Walker Lindh, the "American Taliban" who had his civil trial, is still in prison, whereas Yaser Hamdi, captured in identical circumstances, was deprived of habeas corpus but is now free. Furthermore, the United States has more than two million domestic prisoners, many of whom have been convicted of crimes that were not seen as crimes only a few decades ago, and, in a sense, the existence of habeas corpus, though itself certainly not an evil, may numb the concerns that great evils have been committed in connection with detention by the executive and the criminal justice system.

Federman (2006) founds a significant part of his analysis on the method of philosopher Michel Foucault, who has deconstructed many societal institutions, including the prison system (Foucault 1975), and found that power relations have as much to do with how people discuss matters as with the sheer use of physical force. Indeed, force alone cannot sustain governmental structures. The role of ideology in sustaining political and government power systems has been explicated not only by postmodern theorists, but also by others, including Robert Higgs (1987, 35–56; 2006), Murray Rothbard ([1974] 2000a), and Franz Oppenheimer ([1922] 1975).

From the standpoint of ensuring a free society where people are not unduly imprisoned and a minimum standard of justice obtains, we confront another paradox or at least a tension between two ways of looking at the world. It is indeed important

for society to have a predominant attitude toward habeas corpus so that a government without this remedy loses some of its legitimacy, but it is dangerous to believe that habeas corpus is sufficient to ensure legitimacy. The trick comes in embracing its necessity without believing that its mere existence guarantees justice. The paradox arises because although the state loses moral high ground insofar as it compromises habeas corpus, it does not gain much simply by adopting it.

Foucault himself recognized that a social attitude toward an institution may yield consequences opposite of what we expect. Talking about repression in a manner that would seem to condemn it may actually enhance a culture's repressiveness. To apply this principle to Federman's analysis, we see the paradoxical way in which adopting habeas corpus as part of our societal discourse may undermine our vigilance in guaranteeing individual liberty.

In particular, Federman finds that the nationalization of habeas corpus was crucial in its development into a discursive and mechanical tool on the side of the individual: "By accusing the state of acting illegally, the habeas petitioner aligns himself with the national over the local, with reason over prejudice, with law over vengeance" (2006, 50). But this view neglects the way that the nationalization of habeas corpus has accompanied an expansion in the criminal justice system, the federal courts' abject failure to provide as effective a remedy to state detentions as we might hope (Flango 1994, 62),[1] and the federal government's use of the language of habeas corpus, from the initial adoption of the Suspension Clause in the U.S. Constitution, to pervert its meaning, betray its purpose, and obscure society's power relations. Was expanding federal habeas corpus over state detentions in order to enforce federal taxation in the 1830s, for example, really an example of law and reason superseding prejudice and vengeance?

Dictators in today's world tend to claim the rule of law on their side. The presence of the U.S. Constitution, which purportedly guarantees our liberties, may in fact allow the U.S. government to behave in ways totally destructive of this document's principles, using it as a cover. Just as Great Britain's unwritten constitution has become part of that state's civic religion, so too has the U.S. Constitution become a fig leaf for the U.S. government's violations of individual rights. The idea that the government follows a "rule of law" may lead people to tolerate its lawlessness.

George W. Bush, as president, repeatedly stressed that his administration was following the rule of law, the Geneva Conventions, and the Constitution in his detention policy even though this policy clearly ran counter to all three. Had he announced to the world that he was making up the law as he was going along—which was more or less the truth—perhaps his lawbreaking would have been easier to identify and rein in. Barack Obama, standing in front of the National Archives in

1. Even in the most active years, the number of federal habeas claims from state defendants was hardly more than ten thousand per year. Of these claims, only a very small percentage—about 1 or 2 percent—get relief from the process. Claims in state courts tend to fare considerably better.

May 2009, similarly spoke highly of the Constitution sitting behind him and stressed the importance of the rule of law, all the while unveiling his new program of extraconstitutional "prolonged detention."

Looking at the many technical developments in habeas corpus law, we see strong opinions on all sides of every imaginable controversy. For hundreds of years, scholars have argued on multiple sides about what the Great Writ has "always meant," what its limits "always were," and how its more technical elements should clearly be interpreted in light of real-world circumstances, statutes, and court decisions going back centuries. On the basis of technical arguments alone, we can say that all sides have valid points. There is enough precedent to make a colorable case for liberal habeas corpus activism or for a restrained federal judiciary on virtually any specific question. But out of this Great Writ of liberty, which emerged amid power struggles and evolved into one of the most enviable features of the Western legal tradition, we can perhaps work to derive a moral principle that goes beyond all of the legal jargon and case law of the greater part of the past millennium. If habeas corpus is as meaningful as we all say it is, then perhaps it has taken on a life of its own that not only reaches the foundations of our legal system but transcends it. Perhaps what is lost in much of the discourse over habeas corpus—discourse that both undermines and paradoxically bolsters social faith in the state—is its *essence,* a *meaning* whose radical implications even many of the Great Writ's devotees would not be prepared to consider.

A Remedy in Search of a Principle

The history of habeas corpus can indeed be seen as a history of power relations. Yet a principle is at play here, yearning to be freed from the yoke of technical arguments, judicial loopholes, and back-and-forth polemics over federalism, original intent, and the like.

That the history of the Great Writ is far from a clean linear progression toward an effective remedy against tyrannical imprisonment is clear. The writ has changed from a means of protecting privileged government officials and amassing power and money for high judges to a clarion call for those who believe in the principles of justice and an instrument for securing the rights of the falsely detained. It has gone from a centralizing judicial tool in most of English history to a decentralizing check on the central state, as it was in U.S. history when it was wielded by state courts against federal detention, then back again to a centralized judicial instrument whereby the federal government, in the name of individual liberty, exercises power over lower courts. It has gone from being primarily a preconviction device to a postconviction remedy. It has gone from judge-made law to a procedure defined by statute. Whereas in the traditional common law "successive applications" were a normal undertaking because the principle of res judicata applied only to judgments, not to orders, today in the United States they

are considerably curtailed by statute, and emphasis is placed on the "finality" of previous decisions (Mian 1984, 90).

In the course of the writ's history, the debates over whether judges can issue writs while on vacation, what constitutes custody, what satisfies jurisdiction requirements, whether civil habeas corpus can check military detention power, what it actually means to "suspend" the privilege of the writ and who has that power, as well as other issues have dominated the literature. In modern times, the real-world explosion of the criminal justice system's population has meant that practical concerns, allegedly weighed against the consideration of justice, have become dominant.

In the United States, the criminal justice system has become so gigantic, the prisoners so numerous, that it is impossible for the federal courts to give each convict, to say nothing of each criminal defendant, the quality of due process that he would receive if there were many fewer detainees and court cases. The broadening of federal habeas corpus to oversee state convictions and to act as an approximate substitute for the appeals process has brought with it intractable problems of balancing the interests of "finality" and economical use of resources, on the one hand, and of justice, on the other. This difficulty, along with ideological swings back and forth in the federal judiciary and statutes that have reined in the federal courts, most notably the Anti-Terrorism and Effective Death Penalty Act, has made the job of habeas corpus attorneys more a matter of arguing technicalities than of fighting on the basis of pure principle, as was arguably the case many years ago—and certainly the picture we get from an idealized history of the writ. The writ that came about through judicial activism, rooted in some basic principles, is now constrained by complicated statutes and hundreds of years of case law, where res judicata has been observed more or less, but probably much more than should be the case when we consider the writ's evolutionary history. Federal habeas corpus practice now is largely a task of finding ways to circumvent the intentions of Congress and judicial conservatives in order to get one's client the best chance of challenging his conviction. As one practitioner's guide states, "[W]inning a habeas corpus case for the petitioner has become in no small part a matter of developing a bolt-hole theory of the case: a narrow argument through which your individual client can be slipped away to freedom, with a door somewhere in the passageway that can be slapped shut in the faces of all other prisoners seeking to follow" (Hertz and Liebman [1988] 2005, x). Even in the case of *Boumediene v. Bush* (553 U.S. 723 [2008]), one of the petitioners' arguments amounted to claiming that the Military Commissions Act did not apply to their pending cases, implying that it did apply to others. This argument fortunately was rejected and a more fundamental principle behind habeas was upheld instead.

Constructing such a narrow case is fine fodder for skilled criminal defense attorneys, and we should certainly not disparage them for their attempts to do what is necessary for their clients, but it would be a sad fate for the Great Writ if its last chapter were simply the tale of a writ reduced to technicalities and loopholes.

This complicated and multifaceted history does not lend itself well to either the typical conservative or the typical liberal interpretations of judicial intervention. The conservatives who decry judicial activism and instead champion constitutional literalism and the rule of law are in a bind. The writ of habeas corpus developed because of judicial activism of a sort. The common-law tradition, as it stood at the time of the nation's founding, saw the birth of American habeas corpus in terms of the conventions of judges acting as they saw fit to expand and build on the tradition of habeas corpus that had existed in England.

This juncture is where the conservatives in *Boumediene* missed the common-law forest for the original-intent trees. They argued that the meaning of the common-law writ protected by the Suspension Clause must be inferred from the Crown's use of that writ at the time of the U.S. Constitution's adoption. But it was the inconsistent reach of protections of the Crown's subjects in remote territories, including the failure of habeas corpus to reach such places as Quebec, and the weakness of its effectiveness in the American colonies that in large part motivated the American revolutionaries in the first place (Duker 1980, 115; Mian 1984, 61; Church [1886] 2003, 36).

The Crown's habeas writ, being a judicial remedy controlled in large part by the executive branch, was in many ways an unsatisfactory remedy, and it became weaker and more selectively adhered to until the thirteen colonies seceded from the British Empire. The United States adopted doctrines that were alien to England, such as the separation of powers. Moreover, the "common law," appreciated as an inspirational rallying cry for the colonists, was not the English version that had so often put the executive detention power above the courts' ability to scrutinize it, but an Americanized species that appealed to the Americans above all for its crystallization of the principles of natural law and individual liberty. Americans respected common law insofar as it restricted the executive's prerogative, not insofar as it was a patchwork of legal custom that was ultimately subservient to the executive. English common law at the time of the revolution and the ratification of the Constitution is an important guide, but its insufficiency in practice to restrain the Crown was a major grievance with implications for the proper reach of American common-law habeas corpus. The executive branch's power to rule a territory without effectively being bound in that territory by legal safeguards was at the center of what the Americans were fighting against and attempting to prevent by adopting the Constitution. After all, they had complained in their own Declaration of Independence about the Crown's "abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies."

The American reception of common law depended on the American embrace of the principles of individual liberty and government restraint that were associated with that law. Habeas corpus was proclaimed as a right of the colonies independent of

England's extension of legal norms and codes to the New World (Reinsch 1977). Because no federal government existed at the time American common law was developed and because the federal government was the product of a written constitution, there is no persuasive historical argument that the framers intended to bring into existence a new executive branch with detention powers comparable in their exemption from habeas corpus to the Crown's executive detention powers. Because the Constitution does not specifically authorize a federal executive to detain anybody without common-law oversight and does not allow Congress to suspend common-law habeas corpus except during invasion or insurrection, no federal detention power normally exists beyond the rights of a court to issue common-law habeas corpus writs. Most important, the "common law" against which we must judge U.S. statutory law has to be the Americanized common law, which primarily had to do with the protection of individual liberty and in particular with the rejection of imperial and centralizing power.

A compelling case can be made, as in *Ex parte Bollman* (8 U.S. 75 [1807]), that the federal court system was not meant to have the expansive and organic common-law power of habeas corpus. We can argue, from an originalist point of view in the interest of federalism, that the federal court system can constitutionally be and ought to be restricted in its habeas corpus powers. But the state courts originally had a very strong power of habeas corpus over federal detentions before that power was defanged in *Ableman* and *Tarble's Case*. In discussing questions such as the Anti-Terrorism and Effective Death Penalty Act, the role of federal habeas corpus over federal detentions and immigration policy, and the federal judiciary's authority over military detentions, even if we agree with the conservatives that in the original republic the Supreme Court and lower federal courts had no original jurisdiction over these detentions, we must also, to be consistent, champion the pre–Civil War convention whereby state courts *had* the power to oversee these and any other federal detentions.

Liberals are often stuck arguing on the side of tradition on this matter—even if the tradition is, as they say, an activist one—although their opponents can usually find a technical reason, grounded in the positive national law that they tend to favor, to reject a broad interpretation of habeas.

But much of habeas corpus has been a reflection more of judicial practice that of statutory law. "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement" (*Williams v. Kaiser*, 323 U.S. 471 [1945]).

Yet this situation raises an important question: What constitutes illegal confinement? The conservatives often answer the question narrowly, taking the "rule of law" to mean whatever the statutes say and whatever the police enforce. They can indeed fall back on the traditions of federalism that dominated prior to the Civil War, but even then they are caught in a trap of their own making. The recent controversies over

federal habeas corpus for detainees held under federal authority in the war on terrorism demonstrate that tradition is not completely on their side. How many prison camps did the United States have in foreign lands before the Civil War? How many crimes were punishable by the federal government? The tradition of questioning detentions through habeas corpus on the grounds that the conviction itself arose from an unconstitutional or unjust statute also has a great deal of precedent. Examining certain aspects of the writ's history, we can easily construct a very *traditional* rationale whereby the writ should be used to free anyone who has been detained in defiance of the Constitution, which would include, for example, those punished under federal drug laws that have no basis in the Constitution.[2]

Putting that question aside for now, we must consider what makes a confinement either illegal or in accordance with the "rule of law." Is the rule of law simply what Congress claims it is? Some conservatives would say that is the case—except when they disagree with Congress vehemently and find its edicts unjust. Is the rule of law observed when the police serve a warrant, arrest someone on a drug charge, and put him in jail? Or is this official conduct precisely the type of executive detention that habeas corpus was "always meant" to remedy?

Habeas corpus did indeed precede the Constitution, as did most conceptions of rights against government interference as we today view them, but it would be a mistake to say that it predates rights themselves. At best, habeas corpus is used to secure the liberty of a person whose liberty has been wrongly violated. As Rubin "Hurricane" Carter, the professional boxer who was framed for murder by dishonest police and sentenced to rot in prison by a compromised jury, put it, "The Writ of Habeas Corpus is not just a piece of paper, not just a quaint Latin phrase. It was the key to my freedom" (qtd. in Federman 2006, 1).

Freedom is the key. And the unchecked executive state cannot be trusted to guard that freedom. As Yaser Hamdi's lawyer Frank Dunham said of Deputy Solicitor General Paul Clement, he is "a worthy advocate who is able to make the unreasonable sound reasonable. But when you take his argument at its core, it is: 'Trust us.' And who's saying, 'trust us'? The executive branch. And why do we have the great writ? We have the Great Writ because we didn't trust the executive branch when we founded this government. That's why the government saying 'trust us' is no excuse for taking away and driving a truck through the right of habeas corpus and the Fifth Amendment that 'nor shall any person . . . be deprived of . . . liberty . . . without due process of law'" (qtd. in Ball 2007, 112).

Oliver Wendell Holmes wrote in his dissent in *Frank v. Magnum* (237 U.S. 309, 346 [1915]) that "habeas corpus cuts through all forms and goes to the very tissue of

2. Under Article 1, Section 8, there is no enumerated power for Congress to pass laws against drug manufacture or distribution. Thus, for example, alcohol prohibition required a constitutional amendment. As Justice Clarence Thomas points out in his dissent in *Gonzales v. Raich* (545 U.S. 1 [2005]), if the federal government can ban locally produced and used marijuana, we have abandoned any semblance of a government of enumerated powers.

the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell."

The structure to which he referred comprises the law's formalities and process, whereas the tissue is its essence. "The object of Law," wrote Roscoe Pound, "is the administration of justice" (1913, 1). A theory of justice is necessary to embark on any understanding of what habeas corpus should mean, if we are to go beyond the structure, isolate the tissue, and avoid turning habeas into an "empty shell."

The principle at the nub of all of the discourse about habeas corpus—the principle that actually animates lawyers, excites scholars, and frustrates law-and-order enthusiasts—is the principle of *individual liberty,* along with the recognition that the state can be wrong, the conviction that it is wrong for the state to be wrong, and the belief that all wrongs, even those the state commits, ought to be remedied.

Some might think that mention of this principle is trite, yet it is not. Morality *is* at the heart of the habeas discussion. As Paul D. Halliday remarks, "For millennia, judges and prisoners have understood that knowing the difference between right and wrong when ordering imprisonment is a legal imperative because it is a moral and spiritual imperative" (2010, 1). Many attempt to separate morality from the tale of habeas corpus and to focus on the procedural question. L. W. Yackle writes in a particularly compelling passage about why habeas has become his passion in life:

> I have devoted the lion's share of my academic and professional attention to the writ of habeas corpus. I do not mind saying that I have been rewarded many times over. The writ has profound significance for individual liberty in the United States, for the rights that citizens may assert against governmental coercion, and for the institutional arrangements that form American constitutional democracy. The writ has been at the center of our efforts to define the role of the federal courts, to balance judicial, legislative, and executive power within the national government, and to orchestrate the relations between the national government and the states. No one who explores the writ's rich history and studies its crucial modern functions can fail to appreciate this splendid, fluid, and dramatically effective instrument for holding governmental power in check. (1998, 191)

This passage is a beautiful statement, but notice that Yackle finds it necessary to discuss the "balance" of "judicial, legislative, and executive power" and "the relations between the national government and the states." Such considerations are doubtless important for the purpose of seeking justice in such a statist world and are also necessary in conceiving a framework of government law that is most likely to produce just results, but they are secondary to the purposes of habeas corpus in itself or to the purposes we like to ascribe to it—establishing justice and protecting liberty. Because we value primarily "the rights that citizens may assert against governmental

coercion," we value the legal means by which we can resist that coercion and have an interest in "holding governmental power in check."

Indeed, without rights, who cares which judge does what to which custodian? If flesh-and-blood human beings were not at risk, all the questions of judicial activism or judicial restraint would seem irrelevant, at least to those of us not wearing funny robes and wigs. As Joseph Margulies, counsel in *Rasul v. Bush* (542 U.S. 466 [2004]), has said:

> There was a very famous case called *McCulloch versus Maryland*, and one of the most famous lines. . . . Justice Marshall, Chief Justice Marshall, he said, "This is a constitution. We must remember that this is a constitution we are expounding." And law professors are fond of quoting that, this was sort of almost rabbinical authority, oh, this is a constitution we are expounding, as though just to say it—and students are supposed to stroke their chin knowingly, oh, yes; and no one really knows what it means. And I always tell my students to remember and not to get too wrapped up in the X versus Y, the issue, the case, to remember that this is a human being we are defending. (2007)

A human being stands at the center of our concern, a human being who is being detained, perhaps wrongly, and if he is being detained wrongly, that detention is wrong.

A timeless principle—a principle that transcends legal decisions, dissents, and seven hundred years of judges fighting among one another—is the most important matter here. Only through trial and error and attempts to find justice amid human imperfections have judges developed habeas corpus as a fundamental remedy for a terrible, recurrent government violation of human rights.

Therefore, the conservatives are actually not as traditional as they believe themselves to be. Habeas corpus has always been a judicial activist tool—that is its extraordinary tradition—but its purpose has come to be one that rises far above either statutory law or any single judicial decision or even common practice. The principle that it is wrong to detain people without proper cause in violation of their right to liberty, that it is an immoral act a free people cannot tolerate, may not predate habeas corpus, but it is nevertheless all important—a principle we would wish to have respected even in a world without habeas as a mechanism for its enforcement.

In defending executive detention powers, unencumbered by meddling courts, many conservatives fall back on a conception of the "rule of law" that has never existed and never will. What is seemingly clear-cut, such as what the Constitution means when it says, "Congress shall make no law. . . abridging the freedom of speech," is certainly not as clear-cut as many people think. A rule of law cannot be based on politicians' pronouncements or on the words written in statutes or court

decisions, themselves drafted by men; that is still a rule of men—it only pushes the question back one step (Hasnas 1995).

It is actually a modernist, positivist, utilitarian distortion of the traditional values that conservatives profess to hold when they defer not to the cause of individual justice, but to the interests of social order or to words written in statutes. Under the unchanging natural law—God's law, if you will, or nature's laws—what the police say, what the legislature has done, and how long the state has been punishing people in a certain way should not matter (Rommen 1998). It is irrelevant that slavery persisted for centuries; it was wrong then and always will be wrong. It does not matter that Congress outlawed alcohol during the 1920s; if it is wrong to jail people now for drinking, it was always wrong. Habeas corpus is properly conceived as a judicial instrument wielded by flawed human beings who are attempting within the structure in which they find themselves to liberate unjustly locked-up human beings through an approximation of natural law, as best they can understand it.

This conclusion will surely elicit objections from liberals, too. An assumption prevails on the ideological left that rights themselves are social constructs, in some sense granted by society, if not by the state itself. Checks and balances are crucial for the maintenance of justice, but justice itself is a common good, not rooted so much in individual rights as in social harmony, utilitarian concerns, and the workability of society. Rights come about through cultural evolution; they were not simply "out there," awaiting our discovery.

However, even an evolutionary theory of morality presupposes an evolution toward something. This is not to say that all humanity is a story of progress toward the ideal—far from it—but the idea behind evolution of any kind assumes the development of characteristics to enhance the chances of survival. Yet survival itself is something toward which species evolve, in theory. So too can the natural law be something toward which our understanding can evolve.

To be sure, habeas corpus is a government power—a judicial order from one official to another; it is not *in itself* a natural right. And as Murray Rothbard has noted, people do not have a moral right to due process; rather, they have a moral right not to be aggressed against. Procedural rights are not natural rights, which are instead substantive. As controversial as this claim may seem, consider the following thought experiment.

Which is more unjust, A or B?

A. A government official has a properly signed warrant to search the house of someone suspected of hiding a fugitive slave. The law he is enforcing is as constitutional as any, written directly in the Constitution itself. He goes through all of the legally correct motions, captures the slave, and returns him to his master.
B. A government official without a warrant breaks into a house and finds a serial murderer on the verge of killing someone there. The officer arrests the killer.

The first example conforms to the "rule of law"; the second does not. Yet the first example is a clear case of government injustice, whereas the second is not so clear.

Indeed, if we removed the actors' identity as government officials from the preceding examples, the thought experiment would yield the same conclusions: It is wrong for a police officer or anyone else to capture a slave and return him to his master; it is not so clearly wrong for him to break into a house to stop a murderer about to kill again.

The idea that it is worse to detain someone who is innocent, regardless of the procedures used, than to detain someone who is clearly guilty of an actual violent crime, even when due process might have been compromised, is fairly understandable. This fact gives some credence to Sandra O'Connor's argument in *Murray v. Carrier* (477 U.S. 478 [1986]) that an indication of "actual innocence" was required before the Court could step in. It buttresses habeas conservatives' complaint that convicts whom no one claims were actually innocent use habeas corpus to question their convictions (Friendly 1970). It also renders shocking Justice Harry Blackmun's conclusion in *Rose v. Mitchell* (443 U. S. 545 [1979]) that the Supreme Court could not intervene "merely because we may deem the defendant innocent or guilty" (see Duker 1980, 265–66).

The reason to support due process, the requirement for warrants, the exclusionary rule, Miranda rights, checks and balances, federalism or federal oversight of state courts—the reason to support having a robust habeas corpus regime—has nothing to do with a natural right an individual possesses to have a judge issue a certain writ on his behalf (provided he has exhausted state remedies!). Due process considerations and checks and balances are merely the tools we as a society tend to value as a check on government power because we understand that without them, the government will violate our rights even more than it already does.

No one is taught at a young age that he needs a warrant before personally intervening to stop a rape. Why do government police need warrants? Because they cannot be trusted to act without restraint. And why do we not trust them? Because they have powers that none of us has. And which power is that? The power to act in ways that would be considered illegal if we were to act in the same ways.

If an ordinary person were to stop someone on the street, violently hold him down, search him, find an illegal gun or illegal drugs, take him to the captor's basement, and lock him in a cage, that conduct would be considered criminal—acts of assault and kidnapping. If a police officer were to do the same things, so long as he has the right paperwork, he would simply be doing his job. And the reason we require the paperwork is to limit the number of innocent victims of the police because we all know on some level that they do have innocent victims.

The state—government in the modern form—is, as Albert J. Nock characterized it, a "monopoly on crime." The state can legally do what would be considered a crime if anyone else did it. This reality is what makes the writ of habeas corpus so important. We want to keep the government, especially one of its most powerful

forms of conduct—imprisonment—in line. We want to do so to prevent the government from violating rights because we know that individual liberty is an important value.

But the modern state itself presents a problem. Whereas habeas corpus evolved in medieval England in a legal atmosphere of competing, overlapping, and concurrent jurisdictions and power centers, today's states and certainly the U.S. state represent a much more vertically integrated and even more monopolistic power structure. Hence, habeas corpus has been nationalized and then gutted so that it is no longer a meaningful, decentralist check on the national state's detention policies.

Individual Liberty and the Modern Detention State

Federal habeas corpus has largely become a postconviction review process for individuals sentenced to serve prison terms or to remain in prison while awaiting execution. This situation represents a dramatic shift from the writ's earlier use, which was more focused on pretrial detention to ensure that people were not being wrongly detained in the first place. A conviction under the normal processes of law traditionally was much more rarely dealt with through habeas corpus. Conservatives have noted this shift, arguing that the writ was never meant in early America to apply to convicted felons, but this critique ignores a fundamental point. Prisons were virtually unheard of in early America. From 1691 until 1771, New York colony generated only nineteen prison convictions. Debtors prison existed, but it would often confine people only to a certain part of town, and the punishment generally came with time limits. "The penitentiary system was basically a nineteenth-century invention." Much of the prison system was put in place in the aftermath of slavery to handle freed slaves through an alternative form of oppression, criminalizing behavior such as "vagrancy." Even then, though, as late as 1880 all of the prisons and reformatories in the United States held only about thirty thousand men and women (Friedman 1993, 48). "[T]here were no federal prisons in the United States until the latter half of the nineteenth century" (Federman 2006, 25). There was also no parole or probation system, to which conservatives also complain the Great Writ was never meant to apply.

The Birth of the Modern Detention State

The modern system took shape during the Progressive Era, gaining credit for its advancement of judicial activism and penal reforms, such as parole and juvenile detention. The Progressives also laid the foundations of today's criminal justice system. In reforming the penal system, the Progressives added to the list of punishable offenses and significantly altered popular discourse about crime.

The key Progressive ideological commitment was to use state power to reform the individual. As David Rothman has noted, "The most distinguishing characteristic of Progressivism was its fundamental trust in the power of the state to do good.

The state was not the enemy of liberty, but the friend of equality—and to expand its domain and increase its power was to be in harmony with the spirit of the age" (1980, 60). This desire to reform the individual through centralized state power, freed from the constraints of the old republic, manifested itself in many areas—from adoption of the income tax, the Federal Reserve System, the Interstate Commerce Commission, the Federal Trade Commission, antitrust law, food and drug regulation, tariff reforms, and the national park system to voter referendums, the recall process, the direct election of senators, and a foreign policy that broke with the past by intervening forcibly in Cuba, the Philippines, Colombia, Panama, Venezuela, the Dominican Republic, Nicaragua, Honduras, and then in France in World War I—and was equally evident in the Progressive reforms of the criminal justice system, where individual criminals would be reborn through an "open-ended, informal and highly flexible policies" tailored to allow a "case-by-case strategy for rehabilitation" (Rothman 1980, 43).

In California, one of the key venues of Progressive reform (see Mowry 1951), the legislature passed the Red Light Abasement Act and launched the Industrial Welfare Commission, both to combat prostitution (Mowry 1951, 89). The city of Berkeley was home to one of the first modern city police forces and adopted a fingerprint identification system in 1905 (S. Walker 1998). Also at the state level, three of the most celebrated reforms of the criminal justice system—parole, probation, and the juvenile-detention system—began a legacy that has continued to be both hailed and attacked for its supposed leniency and humanity.

Although some Americans continued to believe that punishment should fit the crime, the Progressives thought that punishment should fit the criminal. From this idea of "individualized" justice—through the bureaucracy—came the policies of parole and indeterminate sentencing, which have been lauded as more humane and liberal than the prisons themselves.

But the parole system from the beginning was not as humane as its defenders claim. First, the parole boards often comprised either busy government agents or people with no qualifications other than party loyalties. Parole in effect had transferred the power over an offender's liberty to incompetent and politically interested men. Another problem had to do with the extensiveness of the parole procedure. The documents given to the parole board for review had little information other than family history, criminal records, and the number of times the parole candidate had been disciplined in prison. The procedure was often brief and superficial, with parole board members basing their decisions on such criteria as whether the applicant "has a good face" (S. Walker 1998, 162–63).

Beyond these procedural problems lay additional invasiveness once parole was approved. People have cheered the process's supposed respect for the individual, but the government used the process for social control, thereby extending the state's violations of individual autonomy beyond its iron cages. Statutes often forbade parolees to associate freely with others deemed "viscous, lewd, or

unworthy" and barred them from entering places of entertainment, such as bars and dance halls, as a condition of parole. And although the parole boards attempted to control the parolees in such intimate ways, they often failed to keep track of them at all. A common complaint by police was that the parole boards often neglected to inform them of where the released inmates were (S. Walker 1998, 179, 191). In addition to these logistical problems, parole and the indeterminate sentence did not deliver as advertised. Often championed and criticized for its perceived leniency, indeterminate sentence actually led to an increase of the average sentence time. Moreover, many arguments arose over whether parole led to higher or lower recidivism rates, and this issue for the most part remained unresolved (S. Walker 1998, 120–21).

As in regard to parole, the Progressives have been applauded for the establishment of probation, which allegedly gave judges an option in sentencing people for whom incarceration would be inappropriate. But the rise in probation greatly exceeded the reduction in the reliance on imprisonment. As Rothman points out, "Between 1908 and 1914 . . . the New York Jail population climbed more slowly than the general population (going from 3,508 to 3,935)—and over the same period, the probation rolls mounted (from 1,648 to 8,141)." Rothman concludes that rather than being used as a substitute for prison, probation was used "as an alternative to doing nothing at all" (1980, 110).

Aside from probation's broad application, this system suffered from extreme bureaucratic inefficiency. In New York, probation officers spent an average of only ten minutes a year with each of their clients, and in Chicago the probation office could not reliably locate its clients' files (Rothman 1980, 87, 90; S. Walker 1998, 125). Despite all of the problems and unintended consequences of the new probation regime, early advocates of probation for the most part did not budge in their commitment to it (Rothman 1980, 113).

Perhaps the most celebrated reform of law enforcement was the Progressives' juvenile court system. Young offenders were being detained in adult prisons, and the enlightened juvenile system, its proponents believed, brought criminal justice for the young into the twentieth century. The paternalist (or maternalist) Progressives jumped at the chance to work with children in any way, whether through schools or criminal justice. Far from saving children from draconian adult punishments, however, the new juvenile justice system transformed children into second-class citizens.

First, children were made subject to many laws that did not apply to adults and that previously had not applied to them. The Progressives empowered courts to deal with "truancy, cursing, masturbation, sexual intercourse, and 'bad associations'" (S. Walker 1998, 113). The degree of moral control was staggering and disproportionately used against girls and immigrants. In Chicago, 31 percent of the girls brought into the juvenile system were accused of "immorality" (116). In Milwaukee, 94 percent of juvenile suspects had at least one immigrant parent (118).

The juvenile court system was composed without the procedural niceties of adult criminal justice. The right to an attorney was scrapped. As Minnesota Judge Greirr Orr said, "[T]he attorney has not very much standing when it comes to the disposition of children in the juvenile court." The rules of testimony and the right to trial by jury also lost their place in the new system (Rothman 1980, 216). In a 1905 Pennsylvania court case, *Commonwealth v. Fisher,* the court ruled that children may be taken away from their parents without a criminal trial. Punishments were often severe. In one case, an accused thief was taken away from his family, compelled to work on a farm, and forcibly circumcised (S. Walker 1998, 116–17).

Some of the most famous and commemorated Progressive reformers had an open cynicism toward constitutional protections. Roscoe Pound (1906, 1913, 1975), probably the best-known Progressive legal theorist and reformer, spoke explicitly of his desire to eliminate the rules of evidence from criminal trials. This disdain for traditional American protections of civil rights transcended theory and entered practice among the acclaimed reformers. Katherine Davis, a celebrated women's prison reformer, developed a system of savage brutality: small violations of behavioral rules were dealt with by such punishments as beatings of a prisoner hung by her wrists (S. Walker 1998, 114, 127).

On the national level, where most Progressive optimism lay, the federal government became a primary crime fighter for the first time. Although the move toward the nationalization of habeas corpus was a major trend in the early twentieth century, so too was the nationalization of police. The two movements shared a certain logic: the presumption that the central state knows best and can elevate and liberate as well as punish and rehabilitate the flawed individual better than any community, religious, family, or local government institution.

Until the twentieth century, the United States never had a national police force, which is consistent with the absence of authority to create a national police force among the enumerated powers in the U.S. Constitution. Under pressure from Progressive reformers, Theodore Roosevelt attempted to create one, but Congress would not cooperate. So Roosevelt created the Bureau of Investigation by executive order in 1908 (S. Walker 1998, 138). Meanwhile, the laudable goal of providing guaranteed public defenders brought into being the American Bar Association (ABA) in 1906, which effectively forced many people, mostly immigrants, out of the attorney business. In the realm of the reformed prison system, criminal justice became even less individualized and specialized in its actual treatment of offenders.

Perhaps the Progressives' most important national legacy in the realm of criminal justice, however, concerned prohibition. In 1906, Congress passed and President Roosevelt signed the Pure Food and Drug Act, and in 1914 Congress passed and President Woodrow Wilson signed the Harrison Narcotics Act, which outlawed heroin and restricted opium and cocaine. These policies remain even today, but the Progressives' most ambitious prohibitionist program, the agenda of one of the largest

political movements of the late nineteenth and early twentieth centuries, was the national abolition of alcoholic beverages.

Robert Wiebe attributes the temperance drive to a "traditional Protestant respectability," the prohibitionist agenda being a pseudo-religious, "disturbing gospel" targeted against a "contaminated community" (1998, 56–57). The movement championing prohibition also included "prominent Southerners with one eye on the Negro and another on the poorer whites" (291). Many people's motivations were certainly based on a desire to impose religion or on bigotry against minorities and immigrants, but the whole program was also simply consistent with the general idea of creating a better American man through national criminal justice policy. The idea of "preventative justice," as Roscoe Pound dubbed it, and of reforming the individual has its clearest expression in passage of the Eighteenth Amendment and the Volstead Act, which made it a federal crime to manufacture, transport, or distribute alcoholic spirits (S. Walker 1998, 112).

Alcohol prohibition soon completely dominated the criminal justice system. Within a few months of the ban on liquor, the federal courts overflowed with Volstead Act violations, and by 1924 the population of federal prisons had nearly doubled (Asbury 1950, 169). A 1923 congressional study found that state attorneys spent about 44 percent of their time working on prohibition cases. Corruption ran rampant. By 1926, prohibition official Lincoln C. Andrews testified in Congress that 875 officials of the Prohibition Bureau had been dismissed for bribery, corruption, and misconduct (Asbury 1950, 169–70, 177). Prohibition ended with ratification of the Twenty-First Amendment and the repeal of the Volstead Act, after a more than a decade of corruption, violence, and immense stress on the criminal justice system.

But the prohibitionist principle, as much as the other general principles of Progressive reform of the criminal justice system, persisted. In 1937, amid hysteria about African American jazz musicians and Mexicans addicted to the devil weed, President Franklin Roosevelt signed the Marihuana Tax Act, effectively banning cannabis. In the 1960s, the Great Society Congress went on to prohibit drugs one by one, including LSD in 1966, and in 1970 Congress passed the Controlled Substance Act. President Ronald Reagan's administration greatly escalated the war on drugs.

The Detention State Today

In December 2006, Reuters reported that a U.S. Justice Department report in November found that seven million people, or one out of every thirty-two adults, were in jail or prison or on parole or probation. Of the total number of persons then enmeshed in the justice system, 2.2 million were inmates in jail or prison. The article cites the International Centre for Prison Studies at King's College in London for the conclusion that more people were in jail or prison in the United States than in any

other nation. Ranking second was China, with 1.5 million behind bars, and third was Russia, with 870,000 (Vicini 2006).

Not only in absolute numbers but also in per capita terms, the United States had clearly become the biggest warden on earth, with 737 people incarcerated per 100,000 population, compared to 611 in Russia. Most Western nations have a rate about one-sixth as large. The report quotes Ethan Nadelmann of the Drug Policy Alliance, who attributes much of the problem to the war on drugs: "The United States has 5 percent of the world's population and 25 percent of the world's incarcerated population. We rank first in the world in locking up our fellow citizens. . . . We now imprison more people for drug law violations than all of western Europe, with a much larger population, incarcerates for all offences" (qtd. in Vicini 2006). This astonishingly large population kept in iron cages—as well as the approximately 5 million in the Progressive-spawned parole and probation systems—represents one of the greatest disgraces in U.S. history.

Bill Kurtis, a former law-and-order enthusiast who became a prominent critic of the death penalty, observed at a 2005 conference on the morality and reliability of execution as policy:

> We're talking about the death penalty. In many ways, it's a red herring. Because, as long as we focus on the death penalty, it's the tip of a big triangle. That triangle is the criminal justice system. It's the same kind of trial, the same mistakes that are made in so-called lesser trials, that have given us two million population [incarcerated] in the United States, largest in the world.
>
> The dirty little secret of the legal profession and the criminal justice system is that we have to do something about that, too. And what I maintain—get rid of the death penalty so we don't have to talk about it anymore, we stop focusing on it, and then let's get to work on that. (qtd. in *The Death Penalty on Trial* 2005)

Indeed, many specific reform proposals and issues taken up by reformers, from the death penalty to habeas corpus, though doubtless important and worthy of our attention, sometimes overlook the elephant in the room—the U.S. criminal justice system itself, which has become a monstrosity.

Prisons in the modern sense grew out of the institution of slavery. Freed slaves were deprived of their liberty through black codes, punishment for violation of vagrancy laws, and other state laws and local ordinances enacted the keep the freedmen "in their place." When the Thirteenth Amendment was ratified, banning slavery and indentured servitude, the language made clear that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." By "duly convicting" blacks and then others under the criminal code,

the states were still permitted to allow forced labor—so long as the master was now the government rather than a private party.

As discussed earlier, the system entered into modernity in the Progressive Era, with the new emphasis of reforming the individual through parole, probation, and juvenile detention as well as the advent of a new class of crimes, such as buying alcohol or heroin. Acceleration in the system's growth has occurred over the past several decades. A brief look at California, a microcosm of the national situation, with the largest and one of the most criticized prison systems in the United States, demonstrates the recent trend.

Judges used to have wide discretion in sentencing, which minimized overcrowding in the prisons. In 1977, Democratic governor Jerry Brown and the legislature stripped judges of this authority. "Over the next decade, California's legislature, dominated by Democrats, passed more than 1,000 laws increasing mandatory prison sentences," according to the *Washington Post* (Pomfret 2006).

Such reforms were followed by President Reagan's escalation of the war on drugs. The number of drug offenders in federal prison rose from about 6,000 in 1980 to more than 22,000 in 1988; the percentage of inmates in federal prison for drug offenses increased from 25 percent to 44 percent during Reagan's two terms. At the state level, reforms in the 1990s such as California's "Three Strikes You're Out" law have led to a swelling of the prison population. The California system is today at nearly double its capacity, "with almost 172,000 inmates in 33 facilities" (Wood 2008). Although violent crime rates nationwide fell about 20 percent between 1991 and 1998, the inmate population increased by 50 percent (Schlosser 1998).

The detention system has become a formidable prison–industrial complex. Furthermore, conditions in the prison system involve violence and staggering rates of sexual abuse. Human Rights Watch released an influential report in 2001 on male prison rape in the United States, which among other things, indicated that

> [a] recent academic study of an entire state prison system found an extremely high rate of sexual abuse, including forced oral and anal intercourse. In 1996, the year before Nebraska correctional officials told Human Rights Watch that prisoner-on-prison sexual abuse was uncommon, Professor Cindy Struckman-Johnson and her colleagues published the results of a survey of state prison inmates there. They concluded that 22 percent of male inmates had been pressured or forced to have sexual contact against their will while incarcerated. Of these, over 50 percent had submitted to forced anal sex at least once. Extrapolating these findings to the national level would give a total of over 140,000 inmates who have been anally raped.

Especially tragic is the condition of juveniles in detention. According to a Justice Department report, a survey of "more than 9,000 young people in custody . . . found

that 12 percent reported being sexually abused one or more times, mainly by staff members. Particularly alarming, the study found several juvenile facilities where 30 percent or more of the young people reported being raped. Some of the institutions with high rates of victimization were in Indiana, Maryland, North Carolina, Pennsylvania and Texas" ("Sentenced to Abuse" 2010).

Whatever one thinks of prisoners, rape is not an appropriate punishment in a civil society, but it is precisely the punishment to which many criminals are effectively being sentenced. The victims include, of course, many thousands who never committed a violent act against anyone but have been condemned to a life of rape, slavery, and totalitarian control because of victimless crimes, such as drug violations or illegal gun ownership.

When the tamer photos of Abu Ghraib detainee abuse surfaced in April 2004, and the broader torture scandal began to erupt, many conservatives minimized the torture, comparing it to fraternity hazing or even consensual sexual activity. Although such horrible statements cannot be defended—under post-9/11 U.S. detention, at least a hundred prisoners have been tortured to death (Greenwald 2009)—in another sense the Abu Ghraib photos should not have been so shocking or have seemed as unusual to Americans as they did. But the ironic way in which this claim is true is not at all what the torture defenders probably had in mind. As Pierre Tristam comments,

> Abu Ghraib was bad. Our domestic prison system is worse, from the unspoken torture of the solitary confinement of thousands (as *The New Yorker*'s Atul Gawande argues in the current issue) to the stunning yet apathy inducing fact that 7.3 million Americans are in prison, on parole or under probation. It's a $47 billion-a-year industry, the opposite of "corrections," that exceeds China's entire military budget. Can that many Americans be so disproportionately more lawless than any other people on earth? On its face, the answer is no. Americans aren't. Their criminal justice system is—the same system, unique in the world, that imprisons 13 year olds for life, carries out executions by conveyor belt (an average of 60 a year since 2000) and turns petty marijuana inhalers into felons swelling prison cells and budget deficits. (2009)

Deaths in U.S. prisons and jails have also begun to attract attention. Thousands of inmates die every year. In California, a 1990s scandal concerning guard shootings of inmates (Arax and Gladstone 1998) gave way to a scandal surrounding the fact that one inmate has died unnecessarily every month owing to lack of sufficient medical care (Moore 2009). Immigrant detention centers nationwide have seen more than a hundred deaths since 2003 (Bernstein 2010). Meanwhile, the use of long-term solitary confinement for tens of thousands of prisoners amounts to psychological torture (Gawande 2009).

The U.S. criminal justice system has effectively become a system of slavery, rape, and torture. Although habeas corpus is ostensibly alive and well in the United States, it, along with all of our due process protections, has done nothing to prevent the confinement of the largest population of domestic prisoners in the history of the planet, many of them peaceful people and noncriminals in the traditional sense, none of their offenses warranting rape or torture under government oversight.

The power to arrest has also become much more widely used in recent years. Arrests themselves were relatively uncommon in both England and early America. When hundreds were detained without just cause in medieval England, the action was a scandal. Today millions are arrested in the United States every year. And habeas was championed as a way to prevent people from being detained for more than a mere forty-eight hours, although in practice this restriction was difficult to enforce.

If the Great Writ of Habeas Corpus as it currently stands cannot do anything about the presently prevailing travesty of justice in the United States, then perhaps we have been overemphasizing its significance, at least in its current form. Perhaps the concept of individual liberty and individual human dignity on which the Great Writ ostensibly rests and purportedly is intended to serve must be revived.

Habeas in the Twenty-First Century and Beyond

Much of the literature concerning habeas corpus in recent years has dealt with narrow questions and details surrounding the war-on-terror detention policies that took shape after 9/11. Aside from this matter, many of the reform proposals for federal habeas corpus as it concerns the domestic justice system similarly focus on details—tweaking a doctrine, enacting a statute, reinterpreting a modern trend in federal practice.

The ABA, starting in the early 1980s, began to push for federal habeas corpus reform. In response to the Anti-Terrorism and Effective Death Penalty Act as well as to other reforms that have limited federal habeas corpus review, the ABA, after years of contemplating reform, called for a moratorium on capital punishment because of the new difficulties in challenging death sentences. Detainees claiming illegal convictions or sentences have been stonewalled. A robust regime of federal habeas corpus for state prisoners is all the more important now because death-row inmates cannot appeal their cases directly to federal court (Yackle 1998, 171–72).

Modern efforts to reform habeas corpus have received some attention in Washington. A wide investigation and a task force launched by the ABA's Criminal Justice Section in 1989 scrutinized federal habeas corpus death-penalty cases and made a few recommendations: death-row defendants should get adequate counsel with a few years of experience with felonies and the relevant court of appeals, a commitment should be made to the "total exhaustion rule," and there should be a federal priority of reviewing neglected federal claims first (Yackle 1998, 176–77).

We can expect reform proposals and legislative efforts to go back and forth between those seeking as many safeguards as possible for convicts and those stressing finality, comity, federalism, and saving resources.

In formulating my own proposals, I encountered a problem in determining what should come first, the habeas corpus–reform chicken or the criminal justice–reform egg. Indeed, much of the criminal justice system, as is, can be scrutinized by a more rigorous regime of habeas corpus, and I discuss later in this article how this scrutiny might be carried out. The problem remains, however, of trying to reform habeas corpus when the entire system is such a formidable enormity.

When millions of people are arrested each year, we cannot expect the government's courts and especially the national courts to give all of them an opportunity to question their detention fundamentally, certainly not before they have been tried. We cannot guarantee that they do not spend more than one night in jail without cause, as the Great Writ guaranteed in simpler times. With more than a million convicts in prison, we cannot expect to scrutinize all of their convictions fairly with federal habeas corpus. The system's hugeness precludes an arrangement by which each defendant or convict can be assured of having his day in a habeas corpus court proceeding. If many fewer prisoners were involved, affording each of them the full smorgasbord of procedural rights might be conceivable.

In recent years, some commentators have focused on how to narrow the scope of review further (Hoffstadt 2000). Jordan Steiker, who believes habeas gives a false sense of security, has even proposed that federal habeas corpus should be "eliminated or revised." If it is not scrapped altogether, we should get rid of its "efficiency-based reforms" (2001, 192).

Indeed, efforts to reduce the federal habeas corpus caseload by creating more obstacles to review can be counterproductive in achieving that pragmatic purpose. Resources are wasted in dealing with procedural matters, such as whether forms were properly filed. As Steiker has pointed out,

> [I]t is clear from published opinions that judges must spend no less time (and considerably more intellectual energy) navigating the maze of procedural rules than they would interpreting the underlying constitutional norms. . . . We appear to have an unparalleled taste for expensive procedural safeguards and yet an extraordinary reluctance to have those safeguards make a difference in terms of constitutional norm enforcement. We want to nod in the direction of the Great Writ (and are willing to bear great administrative costs in doing so), but, at the end of the day, we want our executions to be carried out as well. (2001, 191)

The interests of justice and individual liberty, which habeas corpus has come to symbolize, and the interests of the state that detains and processes so many criminals cannot truly be balanced ultimately. The Great Writ, which evolved somewhat

organically as judges flexed their muscles over a wider range of jurisdictions, has come to be something defined and circumscribed by federal statute and judicial technicalities. Although federal habeas corpus is said to have been broadened in the past century, the paradox is that it has been narrowed at the same time. Randy Hertz and James Liebman explain:

> For over three decades, analyses of habeas corpus have tended to ask—and answer affirmatively—the question whether habeas corpus has expanded substantially over the course of American history. . . . [B]oth the question and answer are historically inaccurate. The more appropriate question is whether the reach and scope of *federal court review as of right of the legality of custody under constitutional law* has expanded. And the answer is that it has *not* done so. From the adoption of the Judiciary Act of 1789 until today, Congress has authorized and the federal courts have provided federal appellate review as of right of all fundamental (including all constitutional) questions raised by the government's or a state's decision to incarcerate an individual. ([1988] 2005, 81, emphasis in original)

In this light, recent restrictive measures such as the Anti-Terrorism and Effective Death Penalty Act arguably have narrowed the reach of habeas, and they certainly have reduced the prisoners' access to it on average. Indeed, these changes are logical consequences of the Great Writ's nationalization, bureaucratization, and statutory codification. Every time a legislature has taken up the writ, whether by Parliament's passage of the Habeas Corpus Act of 1679, the Constitutional Convention's agreement on the Suspension Clause, or the Reconstruction Congress's passage of the Habeas Corpus Act of 1867, the broadening of centralized habeas has not been nearly as much a victory for the individual detainee as one might have hoped. The irony is illustrated further by the fact that although the United States has federal habeas review for state prisoners, there are many more state prisoners as well as many more federal prisoners than before. The nationalization of power that accompanied the nationalization of habeas corpus in U.S. history has been a chief culprit. From alcohol prohibition and Japanese internment to the war on drugs and the war on terror, national power has entailed placing more people behind bars than ever before, and the nationalization of habeas itself must be analyzed in this context, not in a vacuum. If before federal habeas corpus, there were no federal prisons, it is unclear whether, on balance, the nationalization of law and justice has been a blessing for the individual detainee. Given the federal judiciary's tendency to take over the review of state detentions, only to limit effective scope of this review and to demand extraneous processes, and given the federal judiciary's history of usurping the state judiciaries' role in checking federal detentions, only to adjudicate on narrow questions leading to such tensions as that between *Hamdi v. Rumsfeld* (542 U.S. 507 [2004]) and *Boumediene*, to defer to executive power on questions of "national security," and to

find itself in a bind between being an effective instrument of common-law habeas corpus and being respectful of its congressional and constitutional jurisdictional boundaries, it is indeed difficult to demonstrate that the nationalization of habeas corpus has on balance a blessing for individual liberty.

Here's the catch-22: to provide justice for all of those confined by the modern detention state, we need a robust habeas corpus regime, but such a regime is impossible if the detention state is so large because then it is impossible to provide adequate time and resources to each detainee. However, if we focus on the underlying principles in detention and the remedy, we can formulate a new outlook and discourse appropriate to today's circumstances as well as the corollary legal arguments that can be wielded to make habeas corpus more respected and effective than ever. In any event, though, as always, society's philosophical foundations must change before legal arguments radically different from those currently acceptable to conventional wisdom will be considered valid.

Habeas and Detention Reform: Substantive Rights

The first shift that must occur, both culturally and legally, if the effort to protect detainees' rights is to be meaningful is a move away from arresting and locking up so many people. The initial step should be to abolish victimless-crime laws. The concept of habeas corpus, at its admirable core, is a libertarian one. We need to stop detaining people who have committed no act of aggression against others' person and property. People who have violated drug laws, have been accused of merely possessing illegal guns, or stand accused of committing crimes against the state, such as tax evasion, visa violations, and draft resistance, should no longer be criminalized. (If not for victimless-crime laws concerning sedition, peaceful religious practice, forced lending violations, and flouting of price controls, it is unclear that habeas corpus would have ever even become such an important matter in England [Halliday 2010, 319–33]).

When there were far fewer criminal suspects to handle, it was possible for courts to question detention on the basis of victimless-crime laws, such as resisting tyrannical taxes, practicing religion freely, or helping slaves to escape. The question of the morality of a law was long subject to habeas corpus. The principle, spelled out by St. Augustine, that an "unjust law is no law at all," is a radical one for people to confront in the United States today, but it is rooted deep in the tradition of Western legal thinking. "[T]he law may recognize as a right that which is not so in truth, or may fail to recognize one which in truth exists. Hence we have to distinguish between rights in fact and rights in law, that is to say, between natural rights and legal rights" (Pound 1913, 25).

The very idea that we have laws to punish acts that are *malum en se* (a violation of the natural law, such as murder) as well as *malum prohibitum* (a violation of a law that the legislature simply passed) demonstrates that the Western legal tradition is familiar with the distinction. Some acts are obviously wrong and therefore illegal.

Other acts are illegal, however, only because they were made illegal. This distinction raises the question of whether the latter should be illegal at all and, if not, whether it is wrong for the state to criminalize them—whether, in a sense, it is *malum en se* for the state to prohibit acts that are merely *malum prohibitum*. To bolster this principle, we should also bring back jury nullification, a traditional process whereby the jury judges not only the facts, but also the law of the case. Juries should be allowed to nullify unjust laws, just as they did to help escaped slaves, accused witches, and victims of alcohol prohibition.

If we are to believe in not only the mechanism of habeas corpus, but the principles from which it derives, we must recognize that habeas corpus as an instrument has become insufficient to achieve these principles in light of the realities of the modern detention state. If we believe in the moral, not simply the technical, element of habeas corpus, we should look elsewhere to attain the results that habeas corpus demands but cannot achieve. Persons incarcerated for noncrimes should be freed. If the courts can handle the caseload, they should be allowed to free people who are not guilty, but they do not have the time to do so at this point. All executive officers with the proper jurisdiction—governors and presidents—should pardon unconditionally and release all prisoners who are behind bars solely for victimless crimes, and they are morally bound to do so by the principles at the root of habeas corpus.

Conservatives who dislike this idea can accept at least one "rule of law" principle as it concerns the federal level. People traditionally could question the constitutionality of the statute under which they had been prosecuted and convicted. Our federal system is supposed to be one of enumerated powers. The Constitution expressly authorizes the punishment of a short list of crimes at the federal level—counterfeiting, piracy, treason, and little more. Federal drug laws are unconstitutional: they violate the Tenth Amendment and lie beyond the scope of Congress's enumerated powers to legislate in the first place. Anyone convicted on the basis of an unconstitutional federal law should be able to question the statute's constitutionality before a federal judge, who should order them discharged. One might argue that opportunities for such arguments arise at trial, but what's needed is a legal and political culture more dedicated to taking such questions seriously. For the sake of justice, prisoners ought to have more than one genuine chance to question rigorously the law for whose violation they are being tried and punished.

Individualism and Procedural Rights

Much of the purpose of habeas corpus, of course, is to question the detention not only of those who have been detained on the basis of a law that is itself unjust, but to ensure due process even when the crime is a real one, such as murder or theft. Thus, the few actual criminal suspects accused of an actual crime should have as many safeguards on their side as possible.

So long as the state exercises a monopoly on law and legal violence, severe problems are sure to arise. Like all monopolies, the state is bound to make many more mistakes than the free market (Gregory 2006; Stringham 2007). In the long term, we should question the institution known as prison, a relatively recent development that probably would have horrified the Founding Fathers, who had nothing quite like it in their midst (Davis 2003). We should also consider methods of law enforcement and legal protection that do not depend on the state's vagaries. Individualism, the concept of regarding each person as an individual with rights and responsibilities, must be adhered to as much as humanly possible. Moreover, as Barry Goldwater famously declared, moderation in pursuit of justice is no virtue.

Therefore, every step should be scrutinized (Benson 1990), with the enforcers of criminal justice policy held personally responsible for crimes against the innocent. The mere act of detaining someone before prosecution should be questioned—indeed, such questioning was traditionally one of the laudable purposes of habeas corpus. When the innocent are jailed wrongly, they should be compensated and made whole. Police officers and judges should not be free to condemn the innocent to a jail cell, any more than anyone else in society should be free to lock up people in their basement. The same moral principles apply. To deny this claim is to assert that the state's agents stand above the law they claim to enforce, in which case due process becomes mere window dressing to serve as public-relations cover for an organization unbound by morality.

After all, judges are simply men and women in robes, whose orders are followed only because the political and legal culture leads people to believe their orders are worthy of enforcement and obedience. This reality needs to be confronted. It was perhaps more acknowledged when law emerged in the West as a decentralized enterprise practiced by different, competing, and overlapping centers of authority. A judge has no more natural rights than any other person. His orders to free people, just as his orders to detain people, are brought to life only by those who carry them out.

In this light, the federalism question disappears. If a Supreme Court justice says that a state official has wrongly detained a prisoner, what matters most to the prisoner is his liberty, regardless of where the liberating order originates. One need not adopt a view of libertarian centralism or a myopic hope that the federal courts will be wiser than local officials to acknowledge that, from an individualist perspective, federal courts that are correct in questioning the immoral confinement of a prisoner occupy, to that extent, the moral high ground.

As for federal detentions, of course federal habeas corpus should apply, regardless of circumstance. The Constitution does not empower the federal government to detain people for many causes, and when dispute arises in regard to a federal detention, the judicial system should settle such a question. When Congress and the president were more restrained by the doctrine of enumerated powers, judicial restraint might have made sense. Today, however, the federal government is a global empire, the largest government in the history of the planet. It detains people at home

and abroad. So long as it does so, Congress should not reduce the federal courts' jurisdiction over federal detentions in any way. It has the constitutional power to do so, but only insofar as it stays strictly within the bounds of its enumerated powers. However, so far as the U.S. detention power goes, including abroad, so too should the judicial power follow it, in all cases. This principle actually has precedent in the English experience of habeas corpus. As the British empire spread around the world, the writ moved with it, despite many of the affected prisoners' foreign status. As Halliday has written, "The issue was not the prisoner's status—British, Indian, or otherwise—but the jailer's. Where that jailer was a franchise of the British king, justices of the Supreme Court of Calcutta, by virtue of their common law authority to use the king's most sacred judicial instruments, might send the writ, regardless of who that prisoner was" (2010, 285).

Furthermore, any congressional interference with the federal judiciary's authority over federal detentions should be considered a de facto unconstitutional suspension of habeas corpus. If in time of war Congress claims the existence of a "rebellion" or "insurrection" and therefore explicitly or implicitly suspends the writ, the Supreme Court should consider the question of whether the United States is in fact in a state of rebellion or insurrection and declare the congressional action unconstitutional if it finds that such a condition does not exist. Otherwise, the Suspension Clause is completely worthless.

In fact, if it were not for the stupendously large dimensions of the U.S. prison population, the justice system, and the domain of all of the other matters of social policy in which the federal courts have intervened, these courts would have the necessary time and resources to do their most important job: keeping the federal legislature and executive in check. As was said in *Ex Parte Milligan* (71 U.S. 2, 120–21 [1866]), "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." The Constitution includes all people's right not to be deprived of liberty, property, or life without due process. It makes no exceptions. Habeas corpus is the means of ensuring that due process has been carried out in all cases of detention. If the United States goes abroad in search of monsters to detain, the U.S. court system should follow its every move, ensuring that those detained are in fact monsters. The centuries-long battle over habeas corpus was largely a battle with an executive determined to send prisoners beyond the reach of the courts. We dare not allow the executive to win this war.

Legitimate concern exists, however, that federal courts should not be vested with too much power over state institutions. Indeed, as the actual history of the nationalization of individual rights shows, the national government has scarcely ushered in an era of humanity and liberalism in regard to the criminal justice system. This issue is a debatable one. Perhaps the federal judiciary itself should consist of little more than the Supreme Court, with limited jurisdiction over purely federal questions, as was the case when the American republic was first established. In those days,

however, state courts had more leeway. Either way, this question brings us to one of the most important legal reforms required if we are truly to give habeas corpus some teeth.

Jurisdictional Radicalism: Reclaiming True Habeas Corpus Federalism

Much of the modern literature by habeas corpus advocates has involved the vindication of federal habeas corpus, whether against federal executive detentions or state convictions. On both fronts, they have found themselves constructing arguments about what the reach of federal habeas corpus always was or was intended to be. And in both areas, they are stuck in a bind as their conservative opponents raise internal valid counterarguments.

In regard to executive detentions, these advocates are stuck arguing that the common law of habeas corpus was and is a flexible writ and that this writ is and should be flexibly empowered to the federal judiciary. However, to give such an adaptable power to the federal judiciary does not comport comfortably with a federal judiciary regulated by Congress, which, under the Constitution, can largely determine the federal courts' jurisdiction and even abolish all of them except the Supreme Court. As has been discussed, the common-law writ of habeas corpus that the Suspension Clause was to shield from undue congressional meddling was in the hands of the state court system. Although it is consistent with the U.S. legacy of the common law to allow the state courts great leeway in overseeing federal executive detentions, including those related to aliens detained abroad—because the courts' jurisdiction would be over the federal custodians rather than over the detainees themselves—it is much more difficult to argue that Congress cannot meddle with the federal judiciary's habeas corpus reach. Indeed, the Supreme Court in *Hamdi* and *Hamdan v. Rumsfeld* (548 U.S. 557 [2006]) essentially told the president and Congress to go about such detentions with statutory approval, at which point the Court would have less cause to intervene. When Congress and the president heeded this admonition, the Court had to issue its *Boumediene* decision, which the dissenters plausibly denounced as a "bait and switch" and an expansion of federal court power beyond its congressionally authorized jurisdiction.

In regard to state detentions, the advocates of a robust habeas corpus writ have argued that the federal judiciary always had habeas corpus authority. For example, Eric M. Freedman (1999–2000, 2001) has constructed a somewhat novel argument that the Suspension Clause was always meant to guarantee a powerful federal habeas corpus writ and that John Marshall was wrong in his interpretation of the Judiciary Act in *Ex Parte Bollman* that the act precluded federal review of state detentions. In framing his argument, Freedman discusses the common law as a flexible institution that exists outside the state, finds problems with Marshall's interpretation of the Judiciary Act's language, mostly hinging on the location of a clause and the presence

of punctuation, and arguing, as a constitutional matter, that "there is substantial reason to believe that if the statute had the restrictive effect Marshall claimed, it violated the Clause" (2001, 35–37). He presents an impressive argument about how highly the framers regarded the Great Writ and offers up early federal cases of habeas corpus being used to check state detentions, but all of these cases directly pertained to federal policy.

Suppose that Congress had never created the federal judiciary, passed the Judiciary Act, and empowered the Supreme Court to issue habeas corpus writs beyond what was needed to carry out its limited functions of original jurisdiction as laid out by the Constitution? Would Congress's *inaction* constitute a violation of the Suspension Clause? We must recognize that the Suspension Clause did not empower anyone to issue habeas writs and that it most likely was an implicit grant to Congress to suspend habeas corpus in limited circumstances. But how could it be suspended if no court was authorized to grant writs in the first place? Freedman himself gives us the answer: "However odd the notion may appear to modern lawyers, contemporaries all assumed that the state courts would be able to issue writs of habeas corpus to release those in federal custody" (Freedman 2001, 18).

Indeed, according to Steven Semeraro, Freedman's historical evidence "strongly supports the traditional historical interpretations that he seeks to debunk. . . . He cites many historical sources and then-existing policy considerations. But virtually all of the historical evidence appears to point quite strongly in the opposite direction" of his thesis. Everything he presents is completely harmonious with a narrative that emphasizes the reach of state habeas corpus as very broad and that of federal habeas corpus as extremely limited (2005, 319).

With the state courts already issuing the common-law writ—an American version that never had the trappings of the English writ's history of centralization and opportunism—the Suspension Clause was at best merely a guarantee that Congress could not interfere with state issuance of habeas corpus, including issuance to protect federal detainees—such as, it would seem, the men held by executive order at Guantánamo and similar sites.

In June 2007, Attorney General Alberto Gonzales was taken to task for saying at a Senate hearing: "There is no express grant of habeas in the Constitution. There is a prohibition against taking it away" (qtd. in Egelko 2007). Although Senator Arlen Specter (R–Penn.) found this statement absurd, as did most civil libertarians reacting to it, there is truth to it. The common-law right of habeas corpus preceded the Constitution, and it was not made any the more secure by the Constitution's adoption. The Suspension Clause is best seen as a conditional restriction of Congress's power to take away something Americans already had. The nationalization of habeas has meant that now it is up to the federal government to decide the scope of habeas corpus review of its own detentions.

Were it not for *Tarble's Case,* if habeas corpus were still primarily a state court power, modern lawyers could more easily reconcile the common-law stretch of habeas

corpus as effectively checking federal detentions, even of aliens abroad during wartime, with Congress's power over the federal courts. An actual "rebellion" or "insurrection" would be required to justify Congress's involvement in any way with this state judicial power, although some of us might find even that involvement to be a most unfortunate exercise of congressional authority and one we might regret was ever authorized by the Constitution.

Debates over "federalism" and habeas corpus during the past half-century have been superficial. To be sure, liberal federal habeas corpus activism presents problems for local authority and traditional federalism. Yet the real problem is the Great Writ's nationalization in the first place. The most important move toward habeas corpus federalism, one consistent with American principles, individual liberty, and social peace, is to restore true habeas corpus as it once was.

As mentioned earlier, the conservatives have a point that before the mid–nineteenth century federal habeas corpus was much more restricted, especially as it concerned state detentions. Those truly interested in supporting federalism and originalism can and should back a move to reestablish state oversight of federal detentions. If they refuse to accept this restoration out of fear it would compromise presidential and military power, they are not truly concerned with traditional constitutional federalism, but rather with state detention power itself; they are using federalism simply as an excuse to advocate fewer rights for those caught up in the criminal justice system.

Liberals whose true interest lies in civil liberties should also get behind restoration of state habeas corpus for federal prisoners. Proponents of a healthy federal habeas corpus writ, however, tend to look down on the old order in which states checked federal detentions. One scholar has said of *Tarble's Case,* "Not until 1871 could it be said that this situation was rectified" (R. Walker 2006, 111). But if America's loudest defenders of federal habeas refuse to reconsider *Tarble's Case* out of fear it will interfere with the exercise of federal power—such as the enforcement of federal taxation, which was the main reason federal habeas corpus was first expanded over state authority, via the Force Act in 1833—then they are also revealing that their true bias is toward a robust federal government, which would explain their love of federal habeas corpus rather than individual liberties and due process.

To Freedman's credit, he believes the Suspension Clause was intended not simply to grant the federal courts a broad federal writ but also to sustain the state courts' power "to order the release on habeas corpus of both federal and state prisoners" (2001, 19). This view at least puts the idea of liberty above the idea of government power, whereas a view that only the national government should be able to check both levels of detention is more suspect as the product of a bias for nationalism rather than one for liberty. But even Freedman seems content with the Suspension Clause itself, which was where, he claims, Congress was first given the power to suspend the privilege of the writ (as well as where the federal courts were given the power to issue it). An interpretation more supportive of civil liberties would hold

either that the Suspension Clause was a step backward, as the anti-Federalists feared, because it gave the federal government power over the state courts in their review of federal detentions or that the Suspension Clause does not technically grant the power to suspend the privilege to anyone. After all, it merely says that Congress cannot suspend the privilege except under certain conditions—it does not *explicitly* give Congress the power to suspend the writ. Perhaps a new course of argument would be that because Congress was never delegated this power explicitly, the writ of habeas corpus is absolute.

Both conservatives who truly care about federalism and the old republic as well as liberals who genuinely value personal liberties and the protections guaranteed in the Bill of Rights should therefore support the seemingly radical program of restoring state habeas corpus powers over federal detention authority. The Supreme Court should overturn *Tarble's Case* and *Ableman v. Booth,* which gutted state courts' traditional power to question federal detention, or Congress should simply strip the Court of the power to interfere in any way with state habeas corpus for federal prisoners. Many social problems existed before these fateful decisions, but a giant prison–industrial complex and a military empire were not among them. Had the state courts been even more respected, the Fugitive Slave Act would have been much more difficult to enforce and slavery much more difficult to maintain. Moreover, in that old regime local powers could constrain the national-security apparatus.

States-rights advocates have championed nullification and secession, but perhaps no tool in the federalism toolbox has been more forgotten or neglected than a state court's power to bring federal detentions, even federal military detentions, under their scrutiny. Had the United States retained its earlier traditions of federalism yet still waged a global war on terror—putting aside the near impossibility of a pre-Lincolnian state's having the features of today's world empire—consider the implications. A state court, using a long-arm statute and claiming jurisdiction over federal officials with installations in its jurisdiction, would be able to extend habeas corpus protection to those held at Guantánamo. It would be able to undo stop-loss orders by scrutinizing the terms of inescapable military service through the logic of the Thirteenth Amendment, which banned involuntary servitude.

A federal detention power checked by both federal and state courts would scarcely be able to commit the excesses associated with modern federal detentions. At the state level, federal habeas corpus review should be an option as long as Americans must live in a leviathan prison state largely brought on by federal meddling. When the federal government has returned exclusively to its enumerated constitutional functions, we might consider reining in the federal habeas corpus power. In the meantime, to please those attached to a selective federalism, perhaps the federal police should be barred from enforcing federal habeas corpus writs on state custodians, with the caveat that respecting the basic foundations of moral law is a prerequisite to being a member in good standing with the union. To balance this "threat" to the states, the right of secession must also be restored.

Habeas corpus is a paradoxical bundle, comprising both an exercise of state power and a limit on it. There is room for debate about its technical and historical scope, but people must decide which principle they admire more: the empowerment of the judiciary or the curtailment of the executive? The exercise of government power or its limitation? So long as we have unlimited government, the liberals will never have habeas corpus as they want it. So long as we have an imperial detention state at home and abroad, the conservatives will never have limited government constrained by anything resembling traditional conceptions of law.

My reform proposals are grounded in precedent and principle, but they are indeed radical and require a major shift in cultural values. I contend that nothing less will ever allow us to fulfill the Great Writ's promise.

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