

The Great Writ Diminished

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I. HABEAS CORPUS: THEN AND NOW

Since the time of the Magna Carta, prisoners have been able to challenge the legality of their incarceration by petitioning for a writ of habeas corpus, long known as the *Great Writ*.¹ We inherited “this powerful tool for . . . protect[ing] . . . individuals’ constitutional and statutory rights . . . from Great Britain,” which formalized it in the Habeas Corpus Act of 1679.² In *The Federalist*, Alexander Hamilton argued that the Constitution should provide for the writ “in the most ample manner” because it served as a bulwark against “arbitrary methods of prosecuting pretended offenses [and] arbitrary punishments upon arbitrary convictions.”³ The drafters of the Constitution imbedded it in Article I before adopting the Bill of Rights.⁴ The Supreme Court has attested to the writ’s significance on many occasions. At different times, the Court has declared that habeas corpus is intended “to liberate an individual from unlawful imprisonment,”⁵ a procedure for “securing to the petitioners their constitutional rights,”⁶ and “the best and only sufficient defense of personal freedom,”⁷ which, if

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1. See generally ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* (2001).

2. *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303, 305-06 (E.D.N.Y. 2003).

3. THE FEDERALIST NO. 83 (Alexander Hamilton). Blackstone described the writ as the “stable bulwark of our liberties.” 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *137.

4. U.S. CONST. art. I, § 9, cl. 2. As the Supreme Court noted recently, “protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no bill of rights.” *Boumediene v. Bush*, 128 S. Ct. 2229, 2235 (2008).

5. *Ex parte Watkins*, 28 U.S. 193, 202-03 (1830).

6. *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).

7. *Ex parte Yerger*, 75 U.S. 85, 95 (1868).

withdrawn, “risk[s] injury to an important interest in human liberty.”⁸ Most recently, the Court described the writ of habeas corpus as a “vital instrument” to securing “freedom from unlawful restraint,” such freedom being “a fundamental precept of liberty.”⁹

The principal function of the writ “is to release an individual from unlawful imprisonment.”¹⁰ The writ tests only whether a person has been afforded due process, not whether he is guilty.¹¹ Habeas corpus is also the means by which individuals convicted in state court can obtain review by a federal court of whether a state procedure violated their constitutional rights.¹² Since Congress enacted the Judiciary Act of 1789, it has authorized, and federal courts have provided, federal review of constitutional issues raised by state court decisions incarcerating individuals.¹³

When meaningfully available, federal appellate review as of right in the Supreme Court on writ of error has been the preferred mode of federal review But when [such] review . . . has been unavailable or has provided insufficient protection of federal law against state court resistance, Congress has authorized the federal courts to employ habeas corpus, along with removal . . . as surrogates for the Court’s direct review as of right.¹⁴

Over the years, as review of right of state court convictions by the Supreme Court became increasingly impractical, Congress imposed responsibility for conducting such review on the lower federal courts through habeas corpus.¹⁵ At present, a significant part of the work of many federal judges involves reviewing habeas corpus petitions filed by state prisoners.

State prisoners are entitled to federal court review of their federal constitutional claims pursuant to habeas corpus for the same reason that Justice Story gave for writ of error review of federal questions as of right in the landmark case of *Martin v. Hunter’s Lessee*:

It is further argued, that no great public mischief can result from a

8. *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

9. *Boumediene*, 128 S. Ct. at 2244.

10. *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303, 305 (E.D.N.Y. 2003) (quoting THE COLUMBIA UNIVERSITY ENCYCLOPEDIA (Columbia Univ. Press, 5th ed. 1993)).

11. *Id.*

12. *Id.* (citing THE COLUMBIA UNIVERSITY ENCYCLOPEDIA (Columbia Univ. Press, 5th ed. 1993)).

13. 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 82 (5th ed. 2005).

14. *Id.* at 82-83.

15. *Id.* at 82-85.

construction which shall limit the appellate power of the United States to cases in their own courts . . . because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity . . . [A]dmitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has proceeded upon a theory of its own . . . The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice . . . In respect to . . . cases arising under the constitution, laws, and treaties of the United States . . . reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of [final federal] jurisdiction.¹⁶

In sum, “federal law is supreme, as is federal adjudication of that law if and when mandated by Congress.”¹⁷

However, a recent study of habeas petitions filed by state prisoners in federal courts suggests that habeas corpus is no longer playing a significant role in protecting the federal constitutional rights of such prisoners.¹⁸ Although federal courts examine an ever-increasing number of habeas petitions each year (likely due to the increasing number of state prisoners serving lengthy sentences),¹⁹ courts are granting far fewer petitions.²⁰ The study, conducted under the auspices of the Vanderbilt University Law School and the National Center for State Courts (hereinafter the Vanderbilt Study), found that of 2384 randomly selected petitions filed in non-capital cases, district courts granted relief in only seven.²¹ This amounts to one grant out of every 284 petitions or a grant rate of approximately 0.35%.²² This percentage represents a decline of about two-thirds from the grant rate

16. 14 U.S. (1 Wheat) 304, 346, 349 (1816).

17. 1 HERTZ & LIEBMAN, *supra* note 13, at 87.

18. *See generally* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 7 (Vanderbilt Univ. Law Sch. Nat’l Ctr. For State Courts 2007) [hereinafter *The Study* or the *Vanderbilt Study*].

19. *See generally* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (Cambridge Univ. Press 2006) (discussing trends in incarceration).

20. *See* KING ET AL., *supra* note 18, at 58.

21. *Id.*

22. *Id.*

in the early 1990s,²³ which itself represented a decline of about two-thirds from the grant rate in the 1970s.²⁴ The grant rate is now so low that it can no longer be reasonably asserted that habeas corpus functions as “the greatest of the safeguards of personal liberty embodied in the common law.”²⁵ Rather, the *Great Writ* is considerably diminished. The Vanderbilt Study’s findings reinforce my impression formed in ten years as a district judge that although many federal judges spend considerable time working on habeas petitions, they grant the writ extremely rarely and a substantial number go through entire careers without granting a writ.²⁶

Of course, theoretically state courts could be protecting defendants’ rights so well that only one out of every 284 petitions warrants relief; however, this seems unlikely. Although state court judges are generally very able, they typically are overburdened and have limited support staff. It would be surprising if they did not make mistakes. My experience strongly suggests that more than one in every 284 habeas petitions filed by state prisoners should be granted. Of approximately 300 petitions that have come before me, I have conditionally granted eleven (i.e., ordered the state to release the petitioner unless it chose to retry him or provide him with a new appeal). In a twelfth case, I granted in part a pre-trial detainee’s petition to

23. See Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 259 (1995) (studying petitions filed in 1990 and 1992).

24. PAUL H. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 5 (1979) (studying petitions filed between July 1, 1975 and June 30, 1977); David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 340 (1973) (studying petitions filed between 1970 and 1972).

25. Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 563 (1994) (citing THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS AND INTERPRETATION 312 (Edward S. Corwin ed., U.S. Gov’t Printing Office 1953)).

26. Processing habeas petitions comprises a significant part of most judges’ workload. Judges must “promptly examine” habeas petitions to determine whether they have possible merit. See Rule Four of the Rules Governing § 2254 Cases. This usually requires the judge to conduct some constitutional analysis without input from either the petitioner, who is likely pro se, or from the respondent, who at this point has not answered. In addition, judges must often take such actions as replacing a respondent, recharacterizing a claim or dismissing claims that are properly raised in other types of actions such as § 1983 suits. Judges must perform these duties carefully because they can inadvertently prejudice the petitioner. Once the case is ready for decision, sometimes judges must expend a lot of time determining whether a petitioner has forfeited his right to bring a particular claim. Assuming a petitioner survives habeas’ many procedural hurdles, the judge must analyze his claims. This also can be very time-consuming. Most petitioners are pro se, and even when their claims may be plausible, they are often poorly formulated. Even petitioners with lawyers often fail to present their claims well, so courts must frequently conduct considerable independent research to resolve a petitioner’s claims. Thus, under the present habeas corpus regime, judges spend a lot of time on habeas cases but almost never grant relief.

2009]

THE GREAT WRIT DIMINISHED

7

bar the state from retrying him.²⁷ In response to a petition in which a state prisoner argued that a near five-year delay in the resolution of his state court appeal constituted a denial of due process, I ordered a hearing to determine whether the state had any reasonable explanation for the delay.²⁸ The state then voluntarily released the prisoner on bail, and soon after, the state court of appeals reversed the petitioner's conviction, mooting the habeas action.²⁹

Thus, my grant rate is considerably higher than that found by the Vanderbilt Study, and I have no reason to believe that the petitions that I addressed were atypical. Nor did I grant relief profligately, and most of the grants survived. Of the twelve grants, the state appealed nine. Subsequently, the state voluntarily dismissed two appeals.³⁰ The Seventh Circuit Court of Appeals affirmed four grants³¹ and reversed three.³² As to the reversals, the Seventh Circuit suggested that one was a close call³³ and, in a second, adopted a rule that had previously been law only in the Second Circuit.³⁴

Concerning the grounds for the grants, I granted two writs based on ineffective assistance of trial counsel,³⁵ one based on denial of the right to a public trial,³⁶ one based on denial of the right to present a defense,³⁷ one based on denial of the right to an impartial jury,³⁸ two based on *Miranda*

27. *Losey v. Frank*, 268 F. Supp. 2d 1066, 1073-75 (E.D. Wis. 2003). I prohibited the state from retrying the petitioner for armed robbery but permitted it to proceed on the lesser included offense of simple robbery.

28. *Haas v. Jenkins*, No. 07C0480, 2008 U.S. Dist. LEXIS 8536, at *8-14 (E.D. Wis. Jan. 31, 2008).

29. *State v. Haas*, 750 N.W.2d 518 (Wis. App. Ct. 2008) (table), No. 2006 AP2171-CR, 2008 Wisc. Ct. App. LEXIS 229 (Wis. App. Ct. 2008) (text).

30. *Casey v. Frank*, No. 04-4307 (7th Cir. Mar. 28, 2005) (order dismissing the appeal based on the state's motion for voluntary dismissal); *Losey v. Frank*, No. 03-3196 (7th Cir. Oct. 27, 2003) (order dismissing appeal as moot based on state's motion) (on file with the author).

31. *Smiley v. Thurmer*, 542 F.3d 574 (7th Cir. 2008); *Carlson v. Jess*, 526 F.3d 1018 (7th Cir. 2008); *Oswald v. Bertrand*, 374 F.3d 475 (7th Cir. 2004); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000).

32. *See Jackson v. Frank*, 348 F.3d 658 (7th Cir. 2003); *see also Morgan v. Krenke*, 232 F.3d 562 (7th Cir. 2000); *Braun v. Powell*, 227 F.3d 908 (7th Cir. 2000).

33. *See Jackson*, 348 F.3d at 665.

34. *Braun*, 227 F.3d at 918 (adopting Second Circuit's triviality standard for determining when exclusion of spectator implicates constitutional right to public trial).

35. *See Casey v. Frank*, 346 F. Supp. 2d 1000 (E.D. Wis. 2004); *see also Washington v. Smith*, 48 F. Supp. 2d 1149 (E.D. Wis. 1999).

36. *See Braun v. Powell*, 77 F. Supp. 2d 973 (E.D. Wis. 1999).

37. *See Morgan v. Krenke*, 72 F. Supp. 2d 980 (E.D. Wis. 1999).

38. *See Oswald v. Bertrand*, 249 F. Supp. 2d 1078 (E.D. Wis. 2003).

violations,³⁹ one based on denial of the right to counsel of choice,⁴⁰ three based on denial of the right to counsel on appeal,⁴¹ and one based on denial of the right not to be placed in jeopardy twice for the same offense.⁴²

I will discuss the grants at greater length later in the article. Here, I note only that some of the state court errors were relatively egregious. For example, in a case involving an ineffective assistance of counsel claim, the petitioner's counsel failed to attempt to subpoena the defendant's principal alibi witness until the second day of a four-day trial, even though he knew that the witness would be difficult to locate.⁴³ He also made no attempt to contact two other alibi witnesses and never discovered the existence of another exculpatory witness because he failed to read the police report.⁴⁴ The Seventh Circuit characterized counsel's performance as "egregiously ineffective"⁴⁵ and his failures as "flagrant examples of ineffective assistance."⁴⁶ In another ineffective assistance case, the petitioner's trial counsel failed to ask the lawyer who had previously represented the petitioner for a copy of his file.⁴⁷ Thus, he failed to discover that the file contained reports of witness statements that substantially undercut the credibility of the principal accuser and tried the case without calling important witnesses.⁴⁸

In another case—a highly publicized case involving the murder of a police officer—the state trial judge sequestered prospective jurors in a jury room while he and the lawyers questioned them one by one in the courtroom.⁴⁹ On the fourth day of voir dire, two prospective jurors testified that throughout the entire four days of voir dire, several prospective jurors were continuously telling the other jurors that the defendant was guilty and that the trial was a waste of time and money.⁵⁰ In addition, another prospective juror, who ultimately served on the jury, wrote a letter to the judge stating that if selected as a juror, he would be so concerned about his

39. See *Smiley v. McCaughtry*, 495 F. Supp. 2d 948 (E.D. Wis. 2007); see also *Jackson v. Litscher*, 194 F. Supp. 2d 849 (E.D. Wis. 2002).

40. See *Carlson v. Jess*, 507 F. Supp. 2d 968 (E.D. Wis. 2007).

41. See *Jones v. Berge*, 246 F. Supp. 2d 1045 (E.D. Wis. 2003); see also *Walker v. McCaughtry*, 72 F. Supp. 2d 1025 (E.D. Wis. 1999); *Wisconsin ex rel. Toliver v. McCaughtry*, 72 F. Supp. 2d 960 (E.D. Wis. 1999).

42. *Losey v. Frank*, 268 F. Supp. 2d 1066, 1073 (E.D. Wis. 2003).

43. *Washington v. Smith*, 48 F. Supp. 2d 1149, 1154 (E.D. Wis. 1999).

44. *Id.* at 1154-56.

45. *Washington v. Smith*, 219 F.3d 620, 632 (7th Cir. 2000).

46. *Id.*

47. *Casey v. Frank*, 346 F. Supp. 2d 1000, 1008 (E.D. Wis. 1999).

48. *Id.* at 1009-10.

49. *Oswald v. Bertrand*, 249 F. Supp. 2d 1078, 1082-86 (E.D. Wis. 2003).

50. *Id.* at 1083.

work that he would not give the trial proper attention and might vote either way just to end it.⁵¹ The defendant's counsel sought permission to question the prospective jurors about whether they had heard the statements in the jury room and, if so, whether the statements had affected their impartiality.⁵² Defense counsel also requested permission to question the author of the letter concerning whether he would decide the case just to get it over with.⁵³ The court denied both requests.⁵⁴ In affirming my grant of the writ, the Seventh Circuit stated that there was a "high probability that some, maybe all, of the jurors who tried Oswald were biased."⁵⁵

Thus, my experience is that state courts wrongly decide federal constitutional claims more frequently than the Vanderbilt Study suggests. Judges in Wisconsin are no less able than judges elsewhere; indeed Wisconsin's judiciary is generally regarded as highly competent. If, as my experience suggests, substantially more than one out of every 284 habeas petitions warrant relief,⁵⁶ it should give rise to a serious concern that a considerable number of state prisoners are in custody because of a constitutionally flawed conviction and do not receive the relief to which they are entitled.⁵⁷

In this article, I explore several of the factors that have contributed to the decline of the writ, some of the things we have lost as a result of the decline, and how we might make habeas corpus more relevant. In discussing these matters, I rely heavily on my own experience. I do so reluctantly both because I am not inclined to tell war stories and because I am hesitant to suggest that one approach to habeas corpus is necessarily right and others are not. However, the point of this article is to discuss one judge's perceptions of the present state of habeas corpus, and I cannot convey those perceptions without recounting some of my experiences. I

51. *Id.* at 1086.

52. *Id.* at 1083-86.

53. *Id.* at 1086.

54. *Id.*

55. *Oswald v. Bertrand*, 374 F.3d 475, 480 (7th Cir. 2004).

56. The Vanderbilt Study did not address appeals of district court decisions. However, based on my experience, I would be very surprised if the numbers reported in the study changed much because of appeals.

57. Some have argued that the additional protection that habeas review affords defendants is not worth the cost, and that as long as state courts give defendants a chance to make their federal arguments, defendants should not get a second chance in federal court. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law & Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 500-19 (1963). I disagree with this view and believe that habeas review is a vital part of our justice system. However, regardless of one's view of habeas corpus, the law *requires* federal courts to review state convictions for constitutional error pursuant to properly filed habeas petitions.

consider only state prisoners' petitions in non-capital cases.⁵⁸ I exclude capital cases both because the grant rate is much higher (which suggests that in death cases, habeas corpus operates quite differently),⁵⁹ but also because I have no experience in dealing with such cases inasmuch as Wisconsin does not have a death penalty.

II. CAUSES OF THE WRIT'S DECLINE

In this section, I discuss some of the factors that have contributed to the low habeas grant rate. Such factors include decisions of the Burger and Rehnquist Courts, the enactment by Congress of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the conservative cast of the federal judiciary. Each of these factors is a product of the tough-on-crime ideology that has been a defining feature of our political-legal culture

58. Federal prisoners may also petition for habeas corpus, but their petitions are governed by a different statute and present different issues. Recently, attention has focused on habeas corpus as it relates to the federal government's treatment of so-called "enemy combatants." Based on terrorism concerns, Congress stripped district courts of jurisdiction over petitions for habeas corpus filed by enemy combatants. 28 U.S.C. § 2241(e) (2000 and Supp. V) (codifying § 7 of the Military Commissions Act of 2006); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror*, 120 HARV. L. REV. 2029, 2061 (2007). Unsurprisingly, the legislation generated great concern, and the Supreme Court recently found it unconstitutional. *Boumediene v. Bush*, 128 S. Ct. 2229, 2237 (2008). The recent focus on enemy combatants has caused less attention to be paid to habeas corpus as it relates to state prisoners, who comprise the largest segment of habeas petitioners.

This article will not address the enemy-combatant situation because, in that context, habeas functions as an element of the separation of powers, *see id.* at 13 (explaining that habeas is an "essential mechanism in the separation-of-powers scheme"), rather than as, in the state-prisoner context, a means to provide a federal forum for reviewing state convictions obtained in violation of federal law. *See id.* at 45 (distinguishing enemy-combatant cases from cases involving federal review of state court convictions). The focus of this article is on federal review of state court convictions. As some have noted, however, language and analysis from *Boumediene* could prove useful to state prisoners seeking habeas relief. *See* Posting of Giovanna Shay to ACSBlog, <http://www.acsblog.org/guest-bloggers-boumediene-whats-in-it-for-the-rest-of-us.html> (last visited Jan. 6, 2009).

59. *See, e.g.,* KING ET AL., *supra* note 18, at 62 (noting that capital petitioners are more often represented by counsel on habeas review than non-capital petitioners); *see also id.* at 63-64 tbl.15. Commentators have suggested various reasons for the higher grant rate in capital cases; *see also* Kent S. Scheidegger, *Habeas Corpus, Relitigation and Legislative Power*, 98 COLUM. L. REV. 888, 943 (May 1999) (noting that the grant rate had dropped from about 40% to 15% by the mid-1990s, and suggesting that the "main reason the rate was initially high was that continual changes in the law imposed an impossible task on state judges"). I suspect that the grant rate is higher in death cases because federal courts more aggressively scrutinize state decisions which terminate a person's life and because many more errors occur during the sentencing phase of death cases than in non-capital cases.

for at least four decades.⁶⁰ With respect to the decisions of the Burger and Rehnquist Courts and AEDPA, I conclude that although they created a variety of problems related to habeas corpus and have had a largely negative effect, they left the core of the writ intact and do not prevent federal courts from granting relief to petitioners with strong constitutional claims.

A. Restrictions Imposed by the Supreme Court

Beginning in the 1970s, the Supreme Court began to limit federal habeas review of state court convictions. Justice Rehnquist, who later became Chief Justice, led the effort to restrict habeas corpus.⁶¹ From his days as Justice Jackson's law clerk, Rehnquist consistently expressed antipathy to the writ, viewing it not as an instrument to protect federal constitutional rights but as an intrusion into state criminal justice systems and a tool used by criminals to obstruct society from punishing them with finality.⁶² Chief Justice Burger and Justices Powell and O'Connor also strongly advocated limiting the authority of federal habeas courts to disturb state court convictions.⁶³ A majority of the Court openly and systematically embarked on an agenda of limiting federal courts' power to grant habeas relief to state prisoners and continued to press this agenda into the 1990s.⁶⁴ In *Calderon v. Thompson*, the Court stated that "in light of 'the profound societal costs that attend the exercise of habeas jurisdiction,' we have found it necessary to impose significant limits on the discretion of federal courts to grant habeas relief."⁶⁵ In *Wainwright v. Sykes*, the Court acknowledged its

60. Some discuss habeas corpus in terms of federalism, but I agree with Professor Erwin Chemerinsky that it is mostly about attitudes toward criminal justice. Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 775 (1987) (suggesting that "conservatives, believing that habeas allows for the release of guilty defendants, may construct federalism arguments or appeals to efficiency not because of genuine concern for the values of federalism or efficiency, but rather as a way of achieving their goal of restricting habeas corpus and keeping defendants in jail.").

61. John H. Blume, *AEDPA: The Hype and the Bite*, 91 CORNELL L. REV. 259, 264-65 (2006); see Robert Weisberg, *Future Trends in Criminal Procedure: A Great Writ While it Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 11 (1990) (discussing Rehnquist's views during his early days on the Court).

62. Blume, *supra* note 61, at 265.

63. *Id.* at 265, 280 n.109 (discussing Justice O'Connor's views regarding habeas corpus); see also Joseph L. Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 165-66 (1989) (discussing Sandra Day O'Connor, *Trends in the Relationship Between State and Federal Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 814-15 (1981) (written when Justice O'Connor was an Arizona appellate judge)).

64. Blume, *supra* note 61, at 265.

65. 523 U.S. 538, 554-55 (1998) (quoting, in part, *Smith v. Murray*, 477 U.S. 527,

“willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.”⁶⁶

It is beyond the scope of this article to discuss in detail the decisions restricting the availability of the writ. However, I will briefly summarize some of the Court’s most important rulings: (1) in *Stone v. Powell*, the Court barred habeas petitioners from raising Fourth Amendment claims in almost all circumstances;⁶⁷ (2) in *Wainwright*, the Court precluded federal courts from addressing issues that the petitioner had failed to properly preserve in state court proceedings unless the petitioner could demonstrate “cause and prejudice” for his failure;⁶⁸ (3) in *Sumner v. Mata*, the Court expanded the circumstances under which state courts’ factual findings are presumed correct;⁶⁹ (4) in *Teague v. Lane*, the Court announced a nonretroactivity doctrine that barred federal courts in most cases from granting the writ if doing so required the application of a new rule of criminal procedure;⁷⁰ (5) in *McCleskey v. Zant*, the Court precluded federal courts from entertaining second or subsequent petitions;⁷¹ (6) in *Keeney v. Tamayo-Reyes*, the Court limited the circumstances under which federal habeas courts could conduct an evidentiary hearing;⁷² (7) in *Duncan v. Henry*, the Court required a habeas petitioner to present his federal claim to the state courts with specificity in order to preserve it for federal review;⁷³ and (8) in *Brecht v. Abrahamson*, the Court adopted a more stringent harmless-error standard.⁷⁴

Thus, from the 1970s through the 1990s, the Supreme Court made it more difficult for state prisoners to obtain habeas relief in two ways: by narrowing the grounds on which courts can grant relief⁷⁵ and by barring petitioners who fail to follow a variety of somewhat complicated rules from obtaining review of the merits of their claims.⁷⁶ The Court’s decisions in *Stone* (barring habeas review of Fourth Amendment claims), *Teague*

539 (1986)).

66. 433 U.S. 72, 81 (1977).

67. 428 U.S. 465, 482 (1976).

68. *Wainwright*, 433 U.S. at 87-88.

69. 449 U.S. 539, 551 (1981).

70. 489 U.S. 288, 310 (1989).

71. 499 U.S. 469, 493 (1991).

72. 504 U.S. 1, 8 (1992).

73. 513 U.S. 364, 366 (1995) (per curiam).

74. 507 U.S. 619, 623 (1993).

75. *See Stone*, 428 U.S. at 482; *see also Brecht*, 507 U.S. at 623; *Teague*, 489 U.S. at 310.

76. *See Wainwright*, 433 U.S. at 87-88; *see also Duncan*, 513 U.S. at 366; *Keeney*, 504 U.S. at 8; *McCleskey*, 499 U.S. at 493; *Sumner*, 449 U.S. at 551.

(prohibiting habeas petitioners from benefiting from constitutional rules not in effect at the time of the state court decision being reviewed), and *Brecht* (making it more difficult for petitioners to show that a constitutional violation caused harm) fall into the first category, and the other decisions cited above fall into the second category.

Concerning the Court's procedural decisions, Justice Blackmun remarked that by erecting "petty procedural barriers" to habeas relief, the Court was "creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . ."⁷⁷ Justice Blackmun's comment was not idle, for the procedural barriers to federal habeas review have real bite. The Vanderbilt Study found that federal courts dismiss 42% of habeas cases without reaching the merits.⁷⁸ Although I have infrequently encountered cases in which a petitioner's procedural failure barred consideration of a seemingly meritorious claim, there can be no doubt that such failures sometimes prevent courts from addressing a real injustice. I recall at least one procedurally-barred case that presented a close substantive question. In that case, the petitioner, a middle-aged alcoholic, struck her boyfriend in the course of an argument, causing his death.⁷⁹ The state agreed to reduce the charge of first-degree intentional homicide (which carried a mandatory life sentence) to reckless homicide (which carried a maximum of forty years), and the petitioner agreed to plead guilty.⁸⁰ The petitioner admitted guilt and made it through most of the plea colloquy when the judge asked her a multi-page compound question.⁸¹ In his question, the judge referred to the elements of first-degree reckless homicide, the burden of proof, the meaning of reasonable doubt, as well as a number of other subjects, at which point the petitioner became confused and flustered.⁸² The judge then cut-off the colloquy and adjourned the case.⁸³

On the morning of the trial date, the defendant again indicated that she wished to plead guilty to reckless homicide.⁸⁴ The district attorney said that he considered that disposition reasonable and that the defendant had made "a ninety-something percent effort" to plead guilty to reckless homicide on the previous court date.⁸⁵ He noted that the victim's family

77. *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

78. *KING ET AL.*, *supra* note 18, at 45.

79. *Braunreiter v. Krenke*, 125 F. Supp. 2d 1121, 1122 (E.D. Wis. 2000).

80. *Id.*

81. *Id.* at 1125.

82. *Id.* at 1122-24.

83. *Id.* at 1124-25.

84. *Id.* at 1125.

85. *Id.*

preferred that the district attorney not reduce the first-degree intentional homicide charge.⁸⁶ The court refused the petitioner's proffered plea, forcing her to go to trial on the charge of first-degree intentional homicide.⁸⁷ The petitioner was convicted and appealed.⁸⁸ The state court of appeals summarily affirmed, and the state supreme court denied review.⁸⁹ The petitioner then sought habeas relief, arguing that the trial judge's action was so arbitrary and unfair as to deny her due process.⁹⁰ However, I could not address the petitioner's claim because in the state courts, she had framed the claim as one involving abuse of discretion rather than due process.⁹¹ Thus, she had procedurally defaulted her due process claim by failing to present it to the state courts.⁹²

Although the Burger and Rehnquist Courts imposed restrictions on habeas corpus, such as the doctrine of procedural default, they left the writ largely intact. Moreover, during their tenure, lower federal courts granted a much higher percentage of habeas petitions than they do now. The Supreme Court itself granted writs to a petitioner who brought

a Fourteenth Amendment due process claim of insufficient evidence to support a conviction; a prisoner on death row who was convicted on information obtained from him by a state-employed psychiatrist in the absence of counsel; a petitioner who was sentenced to life imprisonment for cashing a \$100 fraudulent check; a death-row prisoner who was sentenced by a jury instructed that it need not find the accused guilty beyond a reasonable doubt in order to convict; a prisoner whose conviction resulted from his claiming his right to remain silent after the police repeatedly advised him of his constitutional right and assured him that he could refuse to talk to them without fear of consequences; a defendant who was indicted by a grand jury from which blacks were excluded; a capital prisoner who was sentenced by a jury that was erroneously instructed by the trial judge that, in passing the death sentence, it could not consider the defendant's brain damage, his cooperation with the police, or his potential for rehabilitation; a defendant who was incompetently represented at trial; and a capital prisoner who was sentenced to die by a jury where the jury commissioner, on instructions from the district attorney, had

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1127.

91. *Id.*

92. *Id.* at 1128.

intentionally excluded women and African-Americans.⁹³

While habeas grants were of course “the exception, not the rule,” habeas corpus continued to provide relief to petitioners with strong constitutional claims.⁹⁴ Thus, in the post-Warren Court era, while the Supreme Court made habeas corpus less of a protector of constitutional rights, the *Great Writ* continued to show significant signs of life, even vitality.

B. Restrictions Imposed by the AEDPA

In 1996, Congress enacted the AEDPA, which imposed additional restrictions on habeas corpus.⁹⁵ Although the sponsors of the AEDPA touted its procedural restrictions,⁹⁶ the statute contains a substantive provision requiring habeas courts to defer to erroneous but “reasonable” state court interpretations of federal constitutional law, and barring them from granting relief based on any authority other than “clearly established” Supreme Court precedent.⁹⁷

The requirement that habeas courts defer to “reasonable” state court decisions, whether or not they are correct, is highly problematic. First, it may require prisoners whose convictions are constitutionally flawed to remain in custody simply because the law is insufficiently settled. Second, it shifts the federal courts’ focus away from the traditional concern of habeas corpus—the lawfulness of a prisoner’s custody—and places it on the “reasonableness” of state court decisions. Third, it thwarts the development of constitutional law. Although our first Chief Justice, John Marshall, said that “it is emphatically the province and duty of the judicial department to say what the law is,”⁹⁸ the requirement that federal courts defer to reasonable state court decisions discourages habeas courts from performing this duty because it makes the question of what the law is only marginally relevant to the outcome of a case.

Finally, reasonableness review is problematic because, as former Senator

93. Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 579 (1994).

94. *Id.* at 579, 583.

95. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101-08, 110 Stat. 1217-26 (1996).

96. *See, e.g.*, 141 CONG. REC. S7651, 7658-59 (daily ed. June 5, 1995) (statement of Sen. Hatch).

97. 28 U.S.C. § 2254(d) (2000). Because of the substantive provision, habeas scholars urged President Clinton to veto the bill. Unfortunately, he rejected their recommendation and signed it. Statement of the President of the United States upon Signing the Antiterrorism Bill, 32 WEEKLY COMP. PRES. DOC. 719 (Apr. 24, 1996).

98. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also Boumediene v. Bush*, 128 S. Ct. 2229, 2273 (2008) (reaffirming that it is the duty of Article III Courts to say what the law is).

Joseph Biden put it, reasonableness is “a heck of a standard to have to apply.”⁹⁹ Unfortunately, the Supreme Court has done less than it could have to ease the problem. It could have interpreted the standard to simply require additional respect for state court decisions on mixed questions of fact and law, with pure questions of law remaining subject to *de novo* review.¹⁰⁰ After all, even under the forgiving “abuse of discretion” standard of appellate review, an erroneous conclusion of law remains grounds for reversal.¹⁰¹ But the Supreme Court declined to adopt this construction of the “unreasonable application” clause. Instead, the Court held “that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.”¹⁰² The Court further held that “[s]tated simply, a federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.”¹⁰³ The Court may have attempted to state the standard in a simple way, but unfortunately it provided lower courts with little guidance. As one commentator has suggested, “objective” in this context means no more than a particular judge’s assessment of the merits of a state court decision.¹⁰⁴ Ultimately, reasonableness review permits each judge to grant or deny habeas petitions based on his own subjective understanding of constitutional rights and of the nature of habeas review.¹⁰⁵

This imprecision creates two additional, unfortunate side effects. First, it permits—perhaps even encourages—passivity on the part of judges. Rather than grappling with a difficult constitutional issue, the court may simply declare the state decision “close enough” and deny the writ. Second, it drives constitutional protections for criminal defendants down to the lowest common denominator. Although the Supreme Court instructed that an incorrect state court decision is not reasonable simply because “at least one of the Nation’s jurists has applied the relevant federal law in the same manner the state court did,”¹⁰⁶ this instruction often goes unheeded, as

99. 141 CONG. REC. S7803, 7841 (daily ed. June 7, 1995) (statement of Sen. Biden). This is not to overstate the difficulty of reasonableness review, which federal courts carry out in various contexts. Rather, for the reasons stated later in the text, in the AEDPA context reasonableness review creates peculiar difficulties.

100. See *Williams v. Taylor*, 529 U.S. 362, 384 (2000) (describing this as the prevailing view in the Circuits).

101. See, e.g., *Koger v. Bryan*, 523 F.3d 789, 803 (7th Cir. 2008).

102. *Williams*, 529 U.S. at 410.

103. *Id.* at 409.

104. See Steven Semeraro, *A Reasoning-Process Review Model of Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 898-99 (2004).

105. *Id.*

106. *Williams*, 529 U.S. at 410.

illustrated by the Seventh Circuit's decision in one of my cases. In *Jackson*, during a custodial interrogation, the defendant told the interrogating officer that he wanted a lawyer "right now."¹⁰⁷ The officer told the defendant that he would not be able to obtain an attorney for him at that time but that "a public defender would be assigned when charges were issued."¹⁰⁸ The officer's statement was false because under Wisconsin law and practice, a public defender was available at that time.¹⁰⁹ Shortly after the officer told the defendant that he could not then have a public defender, the defendant waived his *Miranda* rights and confessed.¹¹⁰

In *Jackson*, relying on the admonition in *Miranda* that "any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege,"¹¹¹ I found that the officer had falsely represented to the defendant that a lawyer was unavailable and that therefore the defendant's waiver was involuntary.¹¹² In reversing, the Seventh Circuit stated that it shared my concerns about *Jackson*'s *Miranda* waiver but that given "the lack of clarity regarding the effect of an officer's misstatement on the voluntariness of a *Miranda* waiver," the state court's decision was reasonable.¹¹³ In concluding that *Miranda* lacked clarity, the court cited a Fifth Circuit case, in which the court said a "misstatement of law does not, in and of itself, make a *Miranda* waiver [sic] involuntary."¹¹⁴ Notwithstanding the Supreme Court's admonition in *Williams*, the court appeared to rely heavily on that single case.¹¹⁵

Jackson also illustrates some of the other problems with reasonableness review. The Seventh Circuit declined to say what the law is (i.e., whether the officer's misstatement violated *Miranda*).¹¹⁶ Thus, the contours of an

107. *Jackson v. Litscher*, 194 F. Supp. 2d 849, 852 (E.D. Wis. 2002).

108. *Id.*

109. *Id.* at 852-53.

110. *See id.* at 853.

111. *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

112. *Jackson*, 194 F. Supp. 2d at 864 (relying on *Miranda*, 384 U.S. at 478).

113. *Jackson v. Frank*, 348 F.3d 658, 665 (7th Cir. 2003), *rev'g* *Jackson v. Litscher*, 194 F. Supp. 2d 849 (E.D. Wis. 2002). I see no lack of clarity in *Miranda* but understand it as stating unequivocally that a waiver resulting from a police officer's misrepresentation is involuntary. *See Miranda*, 384 U.S. at 478.

114. *Jackson*, 348 F.3d at 665.

115. *Id.*

116. The Seventh Circuit did not say "whether, in our view, the detective's statements violated the Fifth Amendment." *Id.* It stated only that it could not "find that the conclusion of the Wisconsin Court of Appeals lies well outside the boundaries of permissible differences of opinion." *Id.* (citing *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002)).

important constitutional right remain in limbo.¹¹⁷ No one knows whether a law enforcement officer may mislead a suspect into waiving his *Miranda* rights.¹¹⁸ *Jackson* also illustrates how forgiving the reasonableness standard is. A standard that permits habeas relief only if a state court decision falls outside the boundaries of permissible differences of opinion allows judges to find seriously flawed decisions within such boundaries. *Oswald* also illustrates this point. In *Oswald*, the state trial judge refused to permit the defendant's lawyer to question prospective jurors, even though they had been exposed to four days of statements by other prospective jurors that the defendant was guilty. The *Oswald* court also refused to permit the defendant's lawyer to question a prospective juror who had written to the court that if selected as a juror, he might vote either way just to end the case.¹¹⁹ Although it seemed to me—and two Seventh Circuit judges agreed—that the judge blatantly violated the defendant's right to be tried by an impartial jury, a third Seventh Circuit judge dissented, stating that “we must pay more than lip service to the commands of AEDPA,”¹²⁰ and found the judge's actions reasonable.

As stated, the AEDPA's substantive provision also bars habeas courts from granting relief unless the state court unreasonably applied “clearly established Federal law, as determined by the Supreme Court.”¹²¹ This prohibition arguably intrudes on the judicial branch's authority because while Congress can define the jurisdiction of federal courts, it may not have the power to limit *stare decisis* and thereby instruct courts “how to think, how to ascertain the law, [and] how to judge.”¹²² Further, even assuming that a habeas court finds Supreme Court precedent, if courts or lawyers disagree about its meaning, a petitioner may not be able to show that it “clearly establishes” anything.¹²³ For example, in *Lockyer v. Andrade*, the Court examined its own Eighth Amendment sentencing cases and

117. See Lynn Adelman & Jon Deitrich, *Saying What the Law Is: How Certain Legal Doctrines Impede the Development of Constitutional Law and What Courts Can Do About It*, 2 FED. CTS. L. REV. 87, 91 (2007).

118. *Id.* at 93.

119. *Oswald v. Bertrand*, 374 F.3d 475, 479 (7th Cir. 2004).

120. *Id.* at 484-88 (Evans, J., dissenting).

121. 28 U.S.C. § 2254(d)(1) (2000).

122. *Irons v. Carey*, 505 F.3d 846, 855 (9th Cir. 2007) (Noonan, J., concurring); see also *Evans v. Thompson*, 524 F.3d 1, 2 (1st Cir. 2008) (Lipez, J., dissenting from denial of petition for rehearing *en banc*); *Davis v. Straub*, 445 F.3d 908, 911 (6th Cir. 2006) (Martin, J., dissenting from denial of petition for rehearing *en banc*).

123. See generally Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes “Clearly Established” Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747 (2005).

acknowledged that they had “not been a model of clarity.”¹²⁴ It then stated that because the “precise contours” of the legal proposition that it derived from them were unclear, a federal court must afford state courts even more than the usual deference.¹²⁵ The Court’s jurisprudence in the area of involuntarily committed sexual offenders creates a similar problem. The Court’s decisions are so ambiguous and confusing that they may fail to create clearly established law.¹²⁶ Lower courts disagree about the meaning of the decisions, thus, a habeas petitioner who has been involuntarily committed may be able to cite a Supreme Court decision with facts similar to his own, but nevertheless fail to obtain relief.¹²⁷

As bad as the AEDPA is, it could have been much worse. Some circuits, such as the Fourth¹²⁸ and Fifth,¹²⁹ construed it so as to preclude almost all habeas petitioners from obtaining relief. The Fifth Circuit treated a state court’s factual determination as nearly impervious to being upset by a habeas court.¹³⁰ However, the Supreme Court rejected these interpretations, concluding that they created excessively demanding standards.¹³¹ Clearly attempting to preserve habeas review, the Supreme Court directed lower federal courts to grant relief when the state court decision under review contains clear legal or factual error. Additionally, it emphasized that federal courts have an obligation to scrutinize state court judgments carefully and to grant relief where appropriate.

In my own cases, I have found that although the AEDPA makes it more difficult to grant habeas relief, it has not prevented relief in most of the cases in which I concluded that the petitioner had been deprived of a constitutional right that affected the fairness of the proceeding. The experience of another district court judge, Judge Jack B. Weinstein of the Eastern District of New York, also supports the conclusion that the

124. 538 U.S. 63, 72 (2003).

125. *Id.* at 76 (citing *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991)).

126. Stephen C. Dries, *Sex Predators and Federal Habeas Corpus: Has the Great Writ Gone AWOL?*, 39 SUFFOLK U. L. REV. 673, 692 (2006).

127. *Id.* Another potential problem is that a proposition must be part of a case’s holding rather than its dicta to be clearly established. Justice Stevens and others have strongly criticized this rule. *See Carey v. Musladin*, 549 U.S. 70, 78 (2006) (Stevens, J., concurring).

128. *Williams v. Taylor*, 529 U.S. 362, 408 (2000) (citing *Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998)).

129. *Id.* at 410 (citing *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)).

130. *See Miller-El v. Dretke*, 361 F.3d 849, 854 (5th Cir. 2004), *rev’d*, 545 U.S. 231 (2005).

131. *Miller-El v. Dretke*, 545 U.S. 231, 265 (2004); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (stating that “deference does not imply abandonment or abdication of judicial review.”); *Williams*, 529 U.S. at 408, 410.

AEDPA is not an insurmountable obstacle to granting relief.¹³² In 2003, Judge Weinstein took on 500 non-capital habeas cases that had been pending in the Eastern District of New York for up to six years.¹³³ Although noting that he had to deny the writ in a number of cases “due to the highly deferential standards of review imposed by statute and case law,” he granted relief in nine of the 494 cases that he terminated without transfer, a grant rate of 2%, nearly six-times higher than that found in the Vanderbilt Study.¹³⁴ Thus, although the AEDPA made it more difficult for courts to grant writs, it did not dismantle habeas corpus.

C. Judges

Finally, the identity of the judge is important in habeas cases, and as one observer explained, “by the late 1990s, the federal bench had become overwhelmingly populated with judges who, whether appointed by a Democrat or a Republican, had little connection to the heyday of habeas review . . . [but] were instead products of an era of federal court restraint in habeas cases.”¹³⁵ The centrality of the philosophy of the judge to the resolution of habeas cases is not new. In 1976, Professor David L. Shapiro studied habeas actions brought by state prisoners over a three-year period in the District of Massachusetts.¹³⁶ He found that some judges treated habeas petitions as little more than a nuisance, summarily dismissing them or adopting a magistrate judge’s recommendation without comment.¹³⁷ However, others treated habeas petitions as worthy of consideration, and the most conscientious of them issued written decisions analyzing colorable constitutional questions, giving pro se litigants guidance as to curing defects in their petitions, and/or carefully examining magistrate judges’ recommendations.¹³⁸ Shapiro concluded that “the exercise of habeas corpus jurisdiction [was] . . . a strong test of judicial sensitivity” and “that the range of performance on this test could not have been much wider.”¹³⁹

In 1979, Professor Paul H. Robinson conducted another study of habeas review of state court judgments and similarly concluded that different districts and different judges handled habeas petitions very differently. In the Northern District of Illinois for example, judges granted 8.7% of petitions, whereas in the Norfolk Division of the Eastern District of

132. See *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303 (E.D.N.Y. 2003).

133. *Id.* at 304.

134. *Id.* at 307.

135. Semeraro, *supra* note 104, at 922.

136. Shapiro, *supra* note 24, at 321.

137. *Id.* at 338-39.

138. *Id.*

139. *Id.* at 337.

Virginia, they granted .05% of petitions.¹⁴⁰ While a few judges granted writs at double-digit rates, a substantial number granted none.¹⁴¹ Although at the time of Robinson's study the law made it easier for judges to grant writs than it does now, in every district that he studied except one, one or more judges never granted a petition.¹⁴²

Moreover, since Ronald Reagan's presidency, presidents of both the Democratic and Republican parties have tended to appoint judges who are conservative on criminal justice-related issues.¹⁴³ The Reagan Administration and both Bush administrations sought out judicial candidates who were ideologically compatible with their conservative views.¹⁴⁴ The Clinton administration's judicial appointees represented a "marked shift to the center . . . on the single most critical issue on which Clinton himself . . . moved the Democratic Party to the center—criminal law enforcement."¹⁴⁵ On criminal justice issues such as search and seizure, there is almost no difference in decisions between Republican and Democratic appointees.¹⁴⁶ There is likely little difference in habeas corpus cases, either.

Thus, with respect to habeas corpus, it would not be an exaggeration to say that the factors discussed above (i.e., the decisions of the Burger and Rehnquist Courts, the AEDPA, and the composition of the federal judiciary) have come together to create something of a perfect storm. The Supreme Court's procedural jurisprudence relating to habeas corpus creates numerous traps for unwary petitioners. The AEDPA makes it easy for judges to deny habeas petitions, and a large number of judges, either because of ideology or temperament or both, do just that.

III. THE NEED FOR RIGOROUS HABEAS REVIEW

At its core, habeas review is about justice.¹⁴⁷ It enables a federal court to correct constitutional mistakes and to vindicate not only the rule of law but the rule of our most important law, the Constitution. As indicated earlier and discussed more fully below, in my experience, state courts sometimes

140. ROBINSON, *supra* note 24, at 52.

141. *Id.* at 52-53.

142. *Id.*

143. See generally Nancy Scherer, *Who Drives the Ideological Makeup of the Lower Federal Courts in a Divided Government?*, 35 LAW & SOC'Y REV. 191 (2001).

144. Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 878 (2005).

145. Scherer, *supra* note 143, at 211.

146. *Id.* at 211.

147. Jordon T. Stanley, Comment, "Deference Does Not Imply Abandonment or Abdication of Judicial Review": *The Evolution of Habeas Jurisprudence Under AEDPA & the Rehnquist Court*, 72 UMKC L. REV. 739, 764 (2004).

err when addressing federal constitutional issues.¹⁴⁸ Habeas review exists to correct these errors, at least when the errors are so severe that they satisfy the AEDPA's heightened standard. Beyond merely correcting a single state court error, however, a properly granted writ has the potential to educate state courts and make future deprivations of constitutional rights less likely.

A variety of factors cause state courts to err when addressing constitutional issues. Sometimes, state courts err simply because all human beings make mistakes.¹⁴⁹ Some mistakes, however, are the result of institutional factors. One such factor is that state courts deal primarily with issues of state law. In criminal cases, such issues typically include the meaning of provisions in state criminal codes and the admissibility of evidence. Accordingly, state courts spend the majority of their intellectual energy grappling with state issues. On federal habeas review, however, federal rights take center stage. Habeas courts cannot even consider issues of state law.¹⁵⁰ Rather, they devote all of their attention solely to a petitioner's federal constitutional claims.

Another reason why state courts err when deciding federal constitutional questions is that, instead of relying on federal precedent to resolve a federal claim, they often rely on state supreme court decisions that incorporate Supreme Court rulings into state law.¹⁵¹ But the state supreme court may have misinterpreted the decision of the Supreme Court of the United States. As I will discuss, in one case in which I granted a writ, while in the process of incorporating a Supreme Court decision into state law, the Wisconsin Supreme Court misstated the rule of the case.¹⁵² Even when the state supreme court correctly summarizes a Supreme Court decision—which is most of the time—there is a greater potential for error when a lower state court applies a state supreme court decision rather than the applicable Supreme Court case. A state supreme court may apply a blend of related federal and state legal principles. When the lower state court applies the

148. In this section, I criticize state courts' handling of certain cases. However, I reiterate that I have great respect for state courts and that in 97% of the habeas cases that have come before me, they got things right.

149. Federal courts are not immune from error, either. Habeas review does not guarantee that a federal court will decide a federal claim correctly. However, as discussed in this section, I believe that federal courts have certain institutional advantages over state courts in addressing constitutional issues affecting criminal defendants.

150. See, e.g., *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

151. For example, a state court dealing with a *Miranda* claim might cite and apply a state supreme court decision interpreting *Miranda* rather than *Miranda* itself.

152. *Smiley v. McCaughy*, 495 F. Supp. 2d 948, 953-55 (E.D. Wis. 2007).

state supreme court decision to new facts, the state issues might obfuscate proper application of the federal principles to the federal constitutional claim. State courts would do better to apply the relevant federal precedents directly rather than indirectly through the decisions of their state supreme courts.

A related issue is that some of the constitutional issues raised in state criminal proceedings will be ones that courts encounter infrequently. Unlike federal courts, which regularly deal with the Constitution in a variety of contexts, state courts are largely unfamiliar with infrequently asserted constitutional rights. As I will discuss, in several cases involving such rights, I found that both the state trial and appellate courts failed to identify the issue presented as constitutional in nature and thus failed to apply constitutional standards or cite constitutional cases. In other cases involving infrequently asserted constitutional rights, the state courts recognized the constitutional issue but disposed of it with little analysis. Further, the state court of appeals often uses a summary procedure and unsigned opinions to address criminal appeals. In such cases, many of the defendant's claims receive only cursory treatment, perhaps only two or three sentences. Especially when the constitutional claim is somewhat novel or infrequently asserted, such treatment may lead to error.

Sometimes, state courts seem to deny defendants' constitutional claims almost reflexively. This is so for several reasons. State courts sometimes seem to be so inured to addressing claims without merit that they may overlook the rare meritorious one.¹⁵³ At other times, meritorious claims may arise out of distasteful facts.¹⁵⁴ Unpleasant facts can sorely test a court's ability to exclude evidence based on abstract constitutional doctrine.¹⁵⁵ In addition, state trial courts' primary responsibilities are to take guilty pleas, conduct trials and impose sentences. It may sometimes be difficult for courts to shift gears and contemporaneously enforce the Constitution.¹⁵⁶

The fact that many state court judges must run for reelection may also sometimes affect their ability to address federal constitutional issues dispassionately. Judges know that political opponents can exploit decisions supporting the rights of criminal defendants, and that such decisions can jeopardize their careers.¹⁵⁷ Increasingly, state court judges function in a

153. Admittedly, federal courts may suffer from the same ailment. Habeas petitions generally lack merit, and they can be tedious to analyze. This may lead some federal courts to overlook the rare meritorious petition, which may be a contributing factor to the low grant rate found by the Vanderbilt Study.

154. Semeraro, *supra* note 104, at 916.

155. *Id.*

156. *See id.* at n.85.

157. *Id.*

highly politicized atmosphere.¹⁵⁸ Recently, a candidate for the Wisconsin Supreme Court, who some observers thought only marginally qualified,¹⁵⁹ unseated a respected incumbent justice with the help of special-interest groups. These special-interest groups spent millions of dollars running television commercials that attacked the incumbent justice's votes upholding the constitutional rights of criminal defendants.¹⁶⁰ Moreover, a substantial body of research indicates that elections significantly impact judicial decision-making.¹⁶¹ A recent study of the voting patterns of Wisconsin Supreme Court justices found that a number of justices voted differently in the last two years of their term—as they approached reelection.¹⁶² A study conducted in Pennsylvania found that state trial judges imposed longer sentences as they approached reelection.¹⁶³ Even

158. See Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decision Making*, 7 ST. POL. & POL. Q. 281, 281 (2007) (noting “recent trend towards aggressive, politicized judicial campaigns”), available at <http://sppq.press.uiuc.edu/7/3/abstract3.html>.

159. Adam Liptak, *Rendering Justice, With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A (discussing recent Wisconsin supreme court race and describing challenger as a judge with “thin credentials”).

160. See Patrick Marley & Stacey Forster, *Court Campaign Sets Record*, MILWAUKEE J. SENTINEL, April 18, 2008, at Section B (reporting that special-interest groups spent an estimated \$4.8 million during campaign); see also *Outsider Court Race Cash: \$4.8M*, CAP. TIMES, April 18, 2008, at A1. See also Scott Bauer, *High Court Election Called One of the Worst*, CAP. TIMES, April 3, 2008, at A1 (reporting that observers described election as a tragedy and “a sign of how far special interest groups will go to gain control of the court”). Most of the campaign advertisements were directed at the candidates' voting records on criminal justice issues. See Mark Pitsch, *Epic Won't Deal With WMC Backers*, WIS. ST. J., June 27, 2008, front page (describing special-interest ads on behalf of challenger as touting him as a “tough-on-crime judge and prosecutor,” and reporting that ads criticized incumbent “as supporting decisions benefitting criminal defendants”). One of the most controversial ads of the campaign criticized the incumbent's representation of a child rapist during his service as a state public defender. See Bauer, *supra*; Hon. William C. Griesbach, *Defending Public Defenders*, 81 WIS. LAW. 20 (May 2008). The campaign has drawn criticism from a wide range of observers, including Seventh Circuit judges and former Supreme Court Justice Sandra Day O'Connor. See John Diedrich, *Appeals Court Judges Lament Negative Campaigning*, MILWAUKEE J. SENTINEL, April 17, 2008, at B3; Dinesh Ramde, *O'Connor: Don't Elect Judges*, WIS. ST. J., May 8, 2008, local section; Editorial, *Special-interest Money Threatens An Independent Judiciary*, LA CROSSE TRIB., May 9, 2008; Thomas J. Basting, Sr., *Gutter Politics and the Wisconsin Supreme Court*, 81 WIS. LAW. 5 (May 2008).

Many of the advertisements aired during the campaign can be viewed on the Internet (www.YouTube.com, keywords “Justice Louis Butler” or “Michael Gableman”).

161. See generally Jason J. Czarnezki, *A Call for Change: Improving Judicial Selection Methods*, 89 MARQ. L. REV. 169 (2005) (collecting sources).

162. Jason J. Czarnezki, *Voting & Electoral Politics in the Wisconsin Supreme Court*, 87 MARQ. L. REV. 323, 347-49 (2003).

163. Gregory A. Huber & Sanford C. Gordon, *Accountability & Coercion: Is Justice*

without empirical proof that elected judges treat constitutional claims by criminal defendants less favorably than appointed federal judges, the lack of insulation between state judges and political pressure raises an inference that a state court will hesitate to act on a meritorious federal constitutional claim if the court would appear to be letting a criminal off on a technicality.¹⁶⁴

Again, the recent Wisconsin Supreme Court race provides a vivid example of the price that an elected judge may pay for enforcing the Constitution. During the campaign, a third-party group opposing the incumbent justice ran advertisements calling him “Loophole Louis.”¹⁶⁵ Another advertisement referenced his dissent in a highly publicized murder case. In his dissent, the incumbent justice wrote that the Confrontation Clause¹⁶⁶ did not contain a so-called homicide exception, under which a murder victim’s testimonial statements could be admitted against the accused when the state proves by a preponderance of the evidence that the accused murdered the victim.¹⁶⁷ The advertisement stated that the incumbent’s dissent “almost jeopardized the prosecution” of the accused, who was on trial for allegedly poisoning his wife.¹⁶⁸ The advertisement further applauded the other justices on the Wisconsin Supreme Court, who found that the Confrontation Clause contained a homicide exception, and urged voters to “tell [the incumbent] to stand up for victims, not

Blind when It Runs for Office?, 48 AM. J. POL. SCI. 247, 248 (2004).

164. See Martin H. Redish, *Judicial Parity, Litigant Choice and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329, 333-36 (1988) (noting that fans would not trust a call made by a baseball umpire that was chosen by one of the teams playing in a game officiated by that umpire, and that the same presumption extends to election of state judges).

165. See Stacey Forster & Patrick Marley, *ELECTION 2008: Taking a Closer Look at Ads*, MILWAUKEE J. SENTINEL, March 30, 2008, at Section B.

166. U.S. CONST. amend. VI.

167. *State v. Jensen*, 727 N.W.2d 518, 536-37 (Wis. 2007) (Butler, J., concurring in part, dissenting in part).

168. The advertisement can be viewed on the Internet. See <http://www.youtube.com/watch?v=JoVUUokS1QA> (last visited January 6, 2009). The dramatic voice-over states as follows:

We count on judges to use practical common sense to keep violent criminals behind bars. But faced with an unspeakable crime, Justice Louis Butler almost jeopardized the prosecution of a murderer because he saw a technicality. When prosecutors needed to show critical evidence, Butler dissented, going against six other justices. Thankfully, he didn’t get his way. Jurors said it was the most important piece of evidence they saw. Call Louis Butler. Tell him to stand up for victims – not technicalities.

Id.

technicalities.”¹⁶⁹ Not incidentally, subsequent to the campaign, the United States Supreme Court held that the Confrontation Clause contains no homicide exception,¹⁷⁰ meaning that the Wisconsin courts may have admitted the victim’s statement in violation of the accused’s Sixth Amendment rights.

Because state courts err for the reasons discussed above and others,¹⁷¹ our criminal justice system does not work well in the absence of rigorous habeas review. If federal courts do not perform the “constitutional dirty work” that habeas review requires,¹⁷² defendants are deprived of their constitutional rights, and state courts are deprived of the benefits of the work of their federal colleagues.

In the cases in which I granted writs, one or more of the factors discussed above usually seemed to be at work. For example, in *Carlson*, the petitioner raised an infrequently presented federal constitutional issue: whether the state trial court had denied his qualified Sixth Amendment right to counsel of choice by refusing to grant a brief adjournment to enable his newly retained counsel to prepare for trial.¹⁷³ The case involved an allegation by a fifteen-year-old boy that four to six years before, the defendant had assaulted him.¹⁷⁴ The defendant was arraigned on May 20, 2002, and the judge scheduled the trial for August 27, 2002.¹⁷⁵ The trial was to take one day, two at most. The defendant’s relationship with his lawyer deteriorated, largely because the lawyer wanted the defendant to plead guilty, and the defendant retained new counsel who agreed to pursue an aggressive trial strategy aimed at undermining the complainant’s

169. *Id.*

170. *Giles v. California*, 128 S. Ct. 2678, 2684 (2008).

171. One additional cause of error may be the fact that state judges have a very demanding case load in comparison with federal courts, and have fewer resources to devote to any single criminal case. The quality and quantity of law clerks also plays into this disparity. Most state trial courts have few, if any, law clerks or staff attorneys, whereas federal district judges have as many as three full-time law clerks. Although state appellate judges usually have their own law clerks, I suspect that the higher “prestige” of a federal clerkship may result in more qualified candidates opting for district court clerkships rather than clerkships on intermediate state appellate courts. In this regard, I have noticed that many large law firms offer substantial bonuses to new associates who have served as federal law clerks, but do not offer those bonuses to new associates who served as clerks to state judges, unless the clerkship was with a justice of the state’s highest court. Although I do not want to infer too much from these facts, I suspect that incentive structures such as these have an impact on the quality of the work coming out of state and federal courts.

172. *Semeraro*, *supra* note 104, at 921.

173. *Carlson v. Jess*, 507 F. Supp. 2d 968, 976-78 (E.D. Wis. 2007).

174. *Id.* at 971.

175. *Id.*

credibility.¹⁷⁶ The defendant and his original counsel advised the court that communication between them had completely broken down, and the defendant's new counsel indicated that in order to prepare for trial, she needed a brief adjournment.¹⁷⁷

The court denied the defendant's request for an adjournment, making it impossible for his new counsel to participate in the case and compelling him to go to trial with the lawyer he had fired.¹⁷⁸ The court appeared not to understand that the defendant's request implicated constitutional rights. It made no mention of either the Sixth Amendment right to choice of counsel or the Fourteenth Amendment right to due process, and thus did not analyze the case in constitutional terms or cite constitutional cases. The defendant was convicted and appealed.¹⁷⁹ In affirming, the state court of appeals addressed the constitutional issues summarily, issued an unsigned opinion, and ordered that it not be cited as precedent.¹⁸⁰ The court cited inapplicable state cases dealing with appointed rather than retained counsel.¹⁸¹ The state supreme court denied review.¹⁸²

In several other cases in which I granted writs, the petitioners also asserted constitutional claims with which the state courts appeared largely unfamiliar. For example, in *Braun v. Powell*, the petitioner argued that the state trial court's expulsion of a spectator from the courtroom deprived him of his Sixth Amendment right to a public trial.¹⁸³ His claim arose when the trial judge noticed a person in the courtroom who had served on the venire for Braun's trial, but was not selected as a juror.¹⁸⁴ The spectator was an acquaintance of the defendant's lawyer and a supporter of the defendant.¹⁸⁵ The judge ordered him to leave but did not explain why his service on the venire justified expelling him from the courtroom.¹⁸⁶ The defendant's counsel objected, arguing that excluding a member of the public from a trial without a good reason violated the defendant's right to a public trial.¹⁸⁷ As in *Carlson*, the judge appeared unaware of the constitutional

176. *Id.*

177. *Id.*

178. *Id.* at 974.

179. *Id.*

180. *State v. Carlson*, No. 03-3402-CR, 2005 WL 159467, at *1-4 (Wis. Ct. App. 2005).

181. *Id.* at *1-2 ¶¶ 5-6.

182. *State v. Carlson*, 697 N.W.2d 472 (Table) (Wis. 2005).

183. 77 F. Supp. 2d 973, 990-91 (E.D. Wis. 1999).

184. *Id.* at 989-90.

185. *Id.* at 990.

186. *Id.* at 989-90.

187. *Id.* at 990.

nature of the issue and summarily rejected the defendant's argument.¹⁸⁸

In *Losey v. Jones*, the petitioner also asserted an infrequently raised constitutional claim: double jeopardy.¹⁸⁹ Unlike *Carlson* and *Braun*, the state courts did not ignore the constitutional nature of the issue, but they analyzed the issue incorrectly. They failed to recognize that when the trial court set aside the jury's guilty verdict on the charge of armed robbery with a gun based on the state's failure of proof, the court's decision was the functional equivalent of an acquittal and therefore barred the state from retrying the defendant on the same charge.¹⁹⁰

Finally, as indicated, I granted petitions in three cases, *Jones*, *Walker* and *Toliver*, which involved yet another infrequently asserted constitutional right: the right to counsel on appeal. The state court of appeals held in each case that ambiguous correspondence from the defendant and/or ambiguous action or inaction by the defendant concerning his appeal constituted a waiver of his right to representation.¹⁹¹ The court in each case overlooked the Supreme Court's statements that "courts must indulge every reasonable presumption against waiver" of a fundamental constitutional right.¹⁹² Further, the court may not find a waiver unless the defendant intelligently, voluntarily, and unequivocally relinquishes the right at issue.¹⁹³ The state supreme court declined to review any of the three cases.¹⁹⁴ In none of the cases did the defendant expressly waive his right to representation on appeal, especially not knowingly and voluntarily.

In each of the cases discussed above, state courts addressed infrequently asserted federal constitutional rights. In each case, granting the writ had a number of positive effects. In each case except *Braun*, which was reversed, the writ corrected a constitutional error and provided the petitioner with the relief he deserved: a new trial or a new appeal. In addition, each writ educated the state courts that erred, and perhaps other state courts as well, about the rights at issue. The writ in *Carlson* will likely encourage state courts to be more cautious about denying legitimate requests for adjournments by defendants who have retained new counsel. Despite the

188. Neither the state court of appeals nor the state supreme court addressed the issue, both mistakenly concluding that the defendant had forfeited her Sixth Amendment right to a public trial. *State v. Braun*, 516 N.W.2d 740, 746 (Wis. 1994); *State v. Braun*, 504 N.W.2d 118, 122 (Wis. Ct. App. 1993).

189. 268 F. Supp. 2d 1066, 1070-71, 1075 (E.D. Wis. 2003).

190. *Id.* at 1069-74.

191. *Jones v. Berge*, 246 F. Supp. 2d 1045, 1047-50 (E.D. Wis. 2003); *Walker v. McCaughtry*, 72 F. Supp. 2d 1025, 1029-30 (E.D. Wis. 1999); *Toliver v. McCaughtry*, 72 F. Supp. 2d 960, 967-70 (E.D. Wis. 1999).

192. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

193. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

194. *Jones*, 246 F. Supp. 2d at 1050; *State v. Toliver*, 585 N.W.2d 157 (Wis. 1998).

reversal, the writ in *Braun* likely increased state courts' awareness of the right to a public trial. A number of lawyers advised me that prior to the decision it was a regular practice in state courts for judges to direct their bailiffs to lock the doors to the courtroom during portions of a trial such as opening statements and closing arguments. The writs in cases involving the right to appellate counsel led to a tangible improvement in state law. They caused the state court of appeals to change its procedure for determining whether a defendant had waived the right to counsel on appeal. The court made clear that it would not find a waiver unless the defendant received express warnings about the risks of foregoing counsel and manifested his unequivocal intent to proceed pro se.¹⁹⁵

Other factors that may sometimes cause state courts to overlook constitutional infirmities appear to have been at work in *Smiley v. McCaughtry*.¹⁹⁶ In *Smiley*, the police arrested the defendant and questioned him about a homicide without providing him with *Miranda* warnings.¹⁹⁷ The defendant made a damaging statement, which he later sought to suppress.¹⁹⁸ The state trial court admitted the statement, and the defendant was convicted of first-degree murder and sentenced to life in prison.¹⁹⁹ The state court of appeals affirmed²⁰⁰ and the state supreme court denied review.²⁰¹ On collateral review, the trial court again denied relief, the state court of appeals again affirmed,²⁰² and the state supreme court again denied review.²⁰³

Smiley is remarkable for the fact that Wisconsin courts considered the case six times and each time overlooked an obvious deprivation of a well-established constitutional right: the right of an in-custody defendant to be provided with *Miranda* warnings before being interrogated. The state courts erred in part by relying on *State v. Armstrong*,²⁰⁴ a state supreme court decision that mistranslated the holding of the United States Supreme Court's decision in *Rhode Island v. Innis* into state law.²⁰⁵ *Innis* expanded *Miranda* by holding that police conduct *other than direct questioning* could constitute interrogation if it was reasonably likely to elicit an incriminating

195. See *State v. Thornton*, 656 N.W.2d 45, 52-54 (Wis. Ct. App. 2002).

196. 495 F. Supp. 2d 948 (E.D. Wis. 2007).

197. *Id.* at 949.

198. *Id.* at 950-51.

199. *Id.* at 951.

200. *State v. Smiley*, No. 01-335-CR, 2002 WL 15863, ¶ 9 (Wis. Ct. App. 2002).

201. *State v. Smiley*, 644 N.W.2d 686, 686 (Wis. 2002).

202. *State v. Smiley*, No. 03-2275, 2004 WL 1698180, ¶¶ 18-21 (Wis. Ct. App. 2004).

203. *State v. Smiley*, 689 N.W.2d 57, 57 (Wis. 2004).

204. 588 N.W.2d 606 (Wis. 1999).

205. 446 U.S. 291 (1980).

response.²⁰⁶ However, *Armstrong* mistakenly indicated that *Innis*' "reasonably likely to elicit an incriminating response" language applied to cases involving direct questioning.²⁰⁷ This error led the court in *Smiley* to mistakenly conclude that the police could dispense with *Miranda* warnings when posing direct questions to defendants who were in custody if they did not believe their questions would produce an incriminating response.²⁰⁸ The writ in *Smiley* corrected this error.

In the ineffective assistance cases in which I granted writs, *Washington* and *Casey*, the state courts seemed to deny relief reflexively as if they had seen too many cases in which defendants complained about their lawyers. As indicated in *Washington*, the defendant's counsel not only neglected to contact numerous exculpatory witnesses, but also failed to read the police report.²⁰⁹ His explanation for the latter failure was that he had trouble reading the officer's handwriting.²¹⁰ Despite counsel's blatant failures, the state trial judge found his performance "not inefficient,"²¹¹ by which he presumably meant not ineffective. The judge also observed that this "unfortunately is not an unusual way of proceeding in these criminal cases[.]"²¹² suggesting that the standard by which he determined whether a defendant's lawyer performed adequately was on the low side. The state court of appeals affirmed the denial of relief in an unsigned opinion which recited few facts, contained little legal analysis, and applied an incorrect standard to the prejudice prong of the ineffective assistance claim.²¹³ The state supreme court denied review.²¹⁴

The state courts did not handle *Casey* any better. As indicated in *Casey*, the defendant's trial counsel failed to ask the previous counsel for a copy of the defendant's file.²¹⁵ Because he made no effort to obtain the file, he naturally did not discover that it contained witness statements that substantially undercut the credibility of the defendant's principal accuser. As a result, he tried the case without calling important witnesses.²¹⁶ On post-conviction review, the trial court referred to the defendant's lawyer's

206. *Id.* at 300-02.

207. *Armstrong*, 588 N.W.2d, ¶¶ 37-42.

208. *Smiley*, 2002 WL 15863, ¶¶ 6-9.

209. *Washington v. Smith*, 48 F. Supp. 2d 1149, 1156 (E.D. Wis. 1999).

210. *Id.* at 1155-56.

211. *Id.* at 1156.

212. *Id.*

213. *State v. Washington*, No. 93-1129-CR, 1994 WL 51649, at *3-4 (Wis. Ct. App. 1994).

214. *State v. Washington*, 524 N.W.2d 140 (Wis. 1994).

215. *Casey v. Frank*, 346 F. Supp. 2d 1000, 1003 (E.D. Wis. 2004).

216. *Id.* at 1008-10.

failure to obtain the file as a mere “oversight.”²¹⁷ The state court of appeals affirmed, concluding without any evidentiary basis whatsoever, that the petitioner’s counsel *had* requested the file.²¹⁸ The state supreme court denied review.²¹⁹

The writs in *Washington* and *Casey* corrected serious state court errors and enabled defendants whose lawyers were woefully ineffective to be treated fairly. In addition, they established precedent, which will help future defendants enforce Sixth Amendment rights. Hopefully, they also provide a jolt to a system that seems to deny ineffective assistance claims on an overly routine basis.

Finally, in *Oswald*, both politics and distasteful facts may have played a role in the way the state courts handled the constitutional issue presented. The notoriety of the case may have made it difficult for the trial judge to conduct a full inquiry into whether the statements made by prospective jurors in the jury assembly room had contaminated the jury pool. Such an inquiry might have resulted in the judge’s having to scrap the entire pool and postpone the trial, a step he might have been reluctant to take.

The notoriety of the case could also have made Wisconsin’s higher courts less than eager to decide it. After being convicted of first-degree intentional homicide and numerous other offenses, the defendant in *Oswald* was sentenced to 565 years in prison and appealed.²²⁰ The state court of appeals declined to hear the case, instead certifying it to the state supreme court (a procedure reserved by the court for cases it believes raise important issues of state law requiring resolution by the state’s highest court).²²¹ However, the state supreme court declined to accept certification and sent the case back to the court of appeals.²²² The court of appeals ultimately affirmed the defendant’s conviction²²³ and the state supreme court denied review.²²⁴

As in the other cases, the most important consequence of granting the writ in *Oswald* was that it got things right. However, it also had other positive effects such as enabling the defendant to be tried by an unbiased jury—a significant achievement in such a notorious case—as well as educating the public about the elements of a fair trial.

217. *Id.* at 1013.

218. *State v. Kevin L.C.*, No. 02-0629, 2002 WL 31312698, ¶12 (Wis. Ct. App. 2002).

219. *State v. Kevin L.C.*, 657 N.W.2d 708 (Wis. 2003).

220. *State v. Oswald*, 606 N.W.2d 207, 211 n.2 (Wis. Ct. App. 1999).

221. *State v. Oswald*, Nos. 97-1026-CR, 97-1219-CR, 97-1899-CR, 1998 WL 713805 (Wis. Ct. App. 1998).

222. *State v. Oswald*, 602 N.W.2d 762, 762-63 (Wis. 1999) (Table).

223. *State v. Oswald*, 606 N.W.2d 207 (Wis. Ct. App. 1999).

224. *State v. Oswald*, 609 N.W.2d 473 (Wis. 2000).

In summary, the cases discussed above provide some indication of what we lose if courts are overly reluctant to grant habeas relief. Habeas scholars have long debated whether state courts are capable of fully vindicating federal constitutional rights,²²⁵ and some have lamented the absence of empirical evidence on this issue.²²⁶ While I do not pretend that the cases discussed above amount to empirical evidence, they surely suggest that rigorous habeas review is necessary. Although state courts get things right most of the time,²²⁷ they make enough errors to make it essential that federal courts be willing to step in. If federal courts are not so willing, deprivations of constitutional rights will go unvindicated, and our criminal justice system will be less fair. Further, state courts will be more likely to err in the future and will lose the ancillary benefits of federal review such as those discussed above.

IV. REVITALIZING THE WRIT

As discussed, in the last forty years, politicians and judges dramatically diminished the utility of habeas corpus. Further, while the tough-on-crime ideology that led to the writ's diminishment may have decreased slightly in intensity in recent years as awareness of the problems resulting from mass incarceration has increased,²²⁸ it remains an important part of our politics.

225. See, e.g., Bator, *supra* note 57, at 505, 513-14; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-28 (1977); see also Stone v. Powell, 428 U.S. 465, 493-94 n.35 (1976); Brown v. Allen, 344 U.S. 443, 511-12 (1953) (Frankfurter, J., concurring).

226. See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 236 (1988) ("I fear that the debate over parity is permanently stalemated because parity is an empirical question—whether one court system is as good as another—for which there never can be any meaningful empirical measure."). Despite Chemerinsky's criticism, empirical studies have been conducted. See, e.g., Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 1984 WIS. L. REV. 1315, 1330-43 (1984); see also Solomine & Walker, *Constitutional Litigation in Federal & State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983). An overview of the empirical literature appears in Michael E. Solomine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1465 (2005).

227. "Most of the time" being likely closer to the 97% that I found opposed to the 99.7% the Vanderbilt Study found.

228. A number of scholars have recently written about various aspects of this problem. See, e.g., SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* (2007); PETER EDELMAN, HARRY J. HOLZER, PAUL OFFNER, *RECONNECTING DISADVANTAGED YOUNG MEN* (2006); DAVID GARLAND, *THE CULTURE OF CONTROL, CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS, THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCE OF MASS INCARCERATION (MARC MAUER AND MEDA CHESNEY-LINEL EDS.

Thus, revitalizing habeas corpus will be an uphill struggle. Nevertheless, as also discussed, we have paid a price for having diminished the writ, and the case for breathing new life into it is strong. Judge Weinstein stated it succinctly: “Inevitably, even in the fairest judicial system, deviations from the due process required by our rule of law may intrude. Improper convictions should not be tolerated.”²²⁹ I would only add that in the absence of rigorous habeas review, we undermine the conception of national supremacy that our Constitution embodies.

How then can we make the writ more relevant? In a more perfect world, we could persuade Congress to repeal the section of the AEDPA that bars federal courts from granting the writ unless the state court decision under review unreasonably interpreted a decision of the Supreme Court. As discussed, this provision is deeply flawed. We might also persuade Congress to reduce some of the procedural complexity that surrounds the writ. However, legislative bodies are not at their strongest when asked to protect the constitutional rights of criminal defendants,²³⁰ and Congress is unlikely either to revisit the AEDPA, however flawed it may be, or to simplify habeas procedures.

One step that we could take to increase the utility of the writ would be to make it easier for petitioners who appear to have a chance of obtaining a writ to be represented by counsel.²³¹ This would involve only a small percentage of habeas cases, but it would likely have a positive effect. The presence of counsel can make a big difference in a habeas action. The Shapiro and Robinson studies agreed on this point. Professor Shapiro concluded that:

The evidence from the study is fairly strong that, once the initial pleading has been received, the contribution of counsel is quite

2003); DEVAH PAGER, *MARKED: RACE CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006); JAMES G. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003); Glen C. Loury, *Why Are So Many Americans in Prison, Race and the Transformation of Criminal Justice*, *BOSTON REV.* (July/August 2007).

229. *In re Habeas Corpus Cases*, 298 F. Supp. 2d 303, 306 (E.D.N.Y. 2003).

230. See Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow*, 43 *WM. & MARY L. REV.* 1, 46 (2001).

231. Possibly, state agencies responsible for providing counsel to indigent defendants could, in appropriate cases, authorize such counsel to continue to represent their clients in habeas proceedings. District judges could also appoint counsel in cases where they believe that it might make a difference. See 18 U.S.C. § 3006A(a)(2)(B) (2004) (allowing court to appoint counsel for indigent litigant seeking habeas relief when a court determines that doing so is required by the “interest of justice”).

valuable. Of course, here too the quality of performance varies markedly, among retained as well as appointed counsel, but the record on the whole is a very good one. The caliber of memoranda submitted by appointed lawyers was high and sometimes outstanding, and since the issues raised were frequently issues of law, relatively inexperienced young attorneys were able to perform quite well.²³²

Professor Robinson noted that “[p]etitioners who are represented by counsel are much more likely to be successful than those who file *pro se*.”²³³ He offered several possible explanations as to why this is so:

This might well be due in part to a court screening through the appointment of counsel only for meritorious petitions. On the other hand, the effect of counsel on success may also be directly attributable to the greater skill of the attorney in preparing the petition, to the more serious consideration afforded counsel petitions by the court, or to the screening out of procedurally defective petitions by counsel.²³⁴

I have also found that habeas petitioners fare better when represented by counsel. Although an overwhelming majority of the petitions that I have addressed were filed *pro se*, in more than half the cases in which I granted writs, the petitioners had lawyers. Further, the presence of counsel in habeas cases is even more important today than it was in the 1970s when Professors Shapiro and Robinson conducted their studies. This is so because as discussed, the Supreme Court and Congress greatly complicated habeas procedures, making it more difficult for petitioners to obtain relief.

In attempting to revitalize the writ, we should also focus on the President. Habeas corpus is one of our most important civil liberties, and a President committed to civil liberties could do an enormous amount to strengthen the writ. Most important in this respect is the President’s power to appoint federal judges. As discussed, and as indicated in the Shapiro and Robinson studies, the identity of the judge is critical in habeas cases.²³⁵ This may be even more true now than it was in the 1970s because the AEDPA standard for determining whether a writ should be granted is so imprecise. By appointing judges committed to civil liberties, including habeas corpus, the next President could make the once Great Writ a far more meaningful protection.

Finally, judges must understand that habeas corpus, notwithstanding the AEDPA, remains an important and workable remedy for a violation of a constitutional right and that they should not allow it to fall into disuse. To

232. Shapiro, *supra* note 24, at 345 (footnotes omitted).

233. ROBINSON, *supra* note 24, at 58.

234. *Id.* at 62-63.

235. *Id.* at 53; *see generally* Shapiro, *supra* note 24.

me, the findings of the Vanderbilt Study suggest that federal courts may be overlooking some meritorious habeas petitions. Possibly, the AEDPA's more deferential standard of review has created reluctance to grant relief for fear of reversal. However, even a grant that is reversed can have value. One of my grants that I have not previously discussed illustrates this point. In *Morgan v. Krenke*, I issued a writ on the ground that the state trial court had denied the petitioner's constitutional right to present a defense.²³⁶ The petitioner, a seventeen-year-old girl, attempted to defend a charge of first-degree intentional homicide on the ground that when she shot the victim, she was in a trance-like state caused by post-traumatic stress disorder (PTSD) and lacked the intent to kill.²³⁷ She asserted that the PTSD resulted from repeated exposure to horrific violence while growing up in Milwaukee's inner city,²³⁸ and sought to introduce certain evidence, including expert psychiatric testimony that supported this contention.²³⁹ However, the state trial court excluded the proffered evidence based on a state rule²⁴⁰ that, to oversimplify, barred evidence relating to the mental health of a defendant if it is offered to show lack of capacity to form the intent to kill.²⁴¹ The court's application of the rule prevented the petitioner from presenting most of the evidence that she had developed and, in my view, deprived her of her constitutional right to present a defense.²⁴²

However, when the petitioner raised this issue in the state court of appeals, the court focused almost exclusively on state court issues and devoted only one paragraph to its analysis of the federal constitutional issue.²⁴³ In contrast, on habeas review, I devoted many pages to an important and difficult federal constitutional issue.²⁴⁴ Although the Seventh Circuit reversed my decision to grant the writ, it provided a thorough analysis of the federal issue.²⁴⁵ Thus, even though my decision was not upheld, the grant provoked a serious discussion of the nature,

236. 72 F. Supp. 2d 980 (E.D. Wis. 1999), *rev'd*, 232 F.3d 562 (7th Cir. 2000).

237. *Id.* at 1010.

238. *Id.* at 986.

239. *Id.* at 987-90.

240. The Wisconsin rule is extraordinarily complicated. On direct review the state court of appeals noted "the contorted trail of precedents on this issue in Wisconsin [and was] convinced that only a judge or attorney armed with Theseus' 'clew of thread' could find his or her way through this labyrinth of confusing precedents and dead-end opinions unscathed." *State v. Morgan*, 536 N.W.2d 425, 436 n.15 (Wis. Ct. App. 1995).

241. *Morgan*, 72 F. Supp. 2d at 990-98.

242. *See generally* *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967).

243. *State v. Morgan*, 536 N.W.2d 425, 441-42 (Wis. Ct. App. 1995).

244. *Morgan*, 72 F. Supp. 2d at 1000-06, 1012-22.

245. *Morgan v. Krenke*, 232 F.3d 562, 566-67, 569-70 (7th Cir. 2000).

contours, and implications of an important constitutional right assuring that it received the attention it deserved.

V. CONCLUSION

In this article, I have expressed a vision of habeas review that not all participants in and observers of our criminal justice system share.²⁴⁶ I believe that rigorous federal habeas review is essential to ensuring that the protections of the Constitution are enforced, regardless of the identity of the defendant and the nature of the case. However, whether or not one agrees with my view, the fact remains that despite the AEDPA and the restrictions on habeas relief adopted by the Supreme Court, section 2254 requires federal judges to scrutinize state court convictions for significant constitutional errors. As discussed, however, the Vanderbilt Study and my own experience suggest that in the post-AEDPA era, courts are falling short of providing such scrutiny.²⁴⁷ I hope that this article stimulates further consideration of this issue.

246. Bator, *supra* note 57.

247. In a forthcoming article co-written by one of the authors of the Vanderbilt Study, the authors conclude that the study “exposed the futility of habeas review [in non-capital cases] today.” Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice 2* (Vanderbilt University Law School Public Law and Legal Theory, Working Paper No. 08-43), available at <http://ssrn.com/abstract=1277304>. The authors further conclude that because judges grant so few habeas petitions in non-capital cases, Congress should—with narrow exceptions—scrap all federal habeas review of non-capital state convictions. *Id.* at 13-36. The authors propose that the resources that Congress saves by eliminating habeas review be put into a fund to help secure better counsel for state criminal defendants. *Id.* The premise of this proposal is that by ensuring that criminal defendants have competent counsel during state criminal proceedings, a large percentage of claims (those seeking relief based on ineffective assistance of counsel) that would otherwise appear in habeas petitions will be addressed on the “front-end.” *Id.* at 14.

I agree with the authors’ conclusion that the grant rate found by the Vanderbilt Study is unacceptable. However, I disagree that the answer is to jettison habeas review and hope that governmental bodies spend more on defense counsel in state criminal proceedings. Although it would be desirable if criminal defendants were better represented in state courts, that would not cure all (or even most) of the problems that I identified in Part III. For the reasons discussed, the problem in most cases is that the state courts do not properly handle federal constitutional issues. Better lawyering is unlikely to fix these problems.

Moreover, although Hoffman and King point to the low grant rate and conclude that federal habeas review is futile and should be eliminated, I point to the low grant rate and conclude that federal judges could and should be granting more petitions. As Hoffman and King and others (including me) have noted (*id.* at 13-14), the AEDPA and other hurdles have made it harder for federal judges to grant habeas relief. However, as I discuss in Part II, these hurdles are usually surmountable when a petitioner has a strong claim. In my view, federal courts should be more willing to grant relief. The solution to the problem is to make habeas review more meaningful, not to eliminate it.