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Scalia and the King: The Ancient Writ of Habeas Corpus and the Missing Legitimacy Core of Modern Habeas Law

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ABSTRACT. The law of habeas corpus has been in disarray for a long time. The Supreme Court's recent decisions in *Shinn v. Ramirez* and *Jones v. Hendrix* have significantly narrowed the scope of the habeas power and chipped away at avenues for relief for defendants. This Essay applies the seminal work of Professors Paul Halliday and Lee Kovarsky to argue that habeas corpus must be completely reconceived in light of its historical role as an avenue for judicial power to push back against arbitrary executive decision-making. The Essay argues for a surprising source for this revival: Justice Scalia's late-career criminal due-process jurisprudence. In his attack on the Federal Sentencing Guidelines, Scalia exerted searching judicial review to vindicate core structural rights of criminal defendants—fighting back against a Sentencing Guidelines regime that took discretion away from judges in a realm that had historically afforded them wide latitude. Similarly, habeas law should refocus around vindicating judges' historic habeas power to challenge arbitrary executive incarceration practices. This is an important, specified component of Article III "judicial power," and one connected with a specific privilege guaranteed in the U.S. Constitution: the "Privilege of the Writ of Habeas Corpus."

INTRODUCTION

Habeas corpus, the centuries-old writ by which a judge may order the body of a detained person brought before the court, has come on hard times in the American system. When the Supreme Court decided *Shinn v. Ramirez* in May 2022, the academic prognosis was dire: the Court's latest habeas corpus case had made it, yet again, more difficult for state-court defendants to have their

defaulted constitutional claims heard in federal court.[1] Previously, *Martinez v. Ryan* had created a narrow window for petitioners to raise claims of ineffective assistance at both the trial and postconviction levels by holding evidentiary hearings to gather new evidence that did not exist in the state record.[2] *Ramirez*, however, appeared to shut this window.[3] The Court blocked federal courts from considering ineffective-assistance evidence that was not already presented to the state court or available in records from state-court proceedings.[4] Because ineffective-assistance claims are among the most frequently raised by habeas petitioners today, this narrowing dealt a significant blow to would-be petitioners.[5]

As Professor Leah Litman has suggested, the *Ramirez* decision is perplexing.[6] Both defendants in the case had colorable claims, and, by closing what appeared to be a sensibly narrow exception for doubly-inadequate-counsel claims in states without other avenues for appeal, *Ramirez* further upset a part of habeas jurisprudence that was already teetering on the brink of "chaos."[7] The Court did so in the name of federalism and finality, taking the view that permitting the lower courts to hold evidentiary hearings on these claims invited "[s]erial relitigation" and encouraged prisoners to "sandbag" state courts by "sav[ing] claims for federal habeas proceedings."[8] As the *Harvard Law Review* put it in its dramatic assessment of the case, "'[S]tates' rights' predominate over civil rights once

1. 596 U.S. 366, 371 (2022). *See* Leah Litman, *The Supreme Court Just Gutted Another Constitutional Right*, SLATE (May 23, 2022, 2:30 PM), https://slate.com/news-and-politics/2022/05/scotus-constitutional-right-habeas-corpus-prison-death-row.html [https://perma.cc/D248-48RR]; Noam Biale, *Conservative Majority Hollows Out Precedent on Ineffective-Counsel Claims in Federal Court*, SCOTUSBLOG (May 23, 2022, 6:56 PM), https://www.scotusblog.com/2022/05/conservative-majority-hollows-out-precedent-on-ineffective-counsel-claims-in-federal-court [https://perma.cc/DM56-ELSF]; *Habeas Corpus—Ineffective Assistance of Counsel—Procedural Default*—Shinn v. Ramirez, 136 HARV. L. REV. 400, 408 (2022) (predicting that the Court's holding in *Ramirez* will "mean[] that individuals . . . who [are] appointed counsel because they [cannot] afford an attorney, [will be] unable to vindicate their Sixth Amendment right to counsel").

2. 566 U.S. 1, 17 (2012).

3. *See Ramirez*, 596 U.S. at 404 (Sotomayor, J., dissenting) (asserting that the *Ramirez* majority opinion "eviscerates *Martinez*"). The debate over just how dramatically *Ramirez* impacted the *Martinez* exception is ongoing. *See, e.g.*, David M. Barron, Martinez *Remains Alive After* Shinn v. Ramirez, CRIM. JUST., Winter 2023, at 8, 13 (2023) (characterizing *Ramirez* as "a narrow decision that applies to only a narrow circumstance").

4. *Ramirez*, 596 U.S. at 371.

5. *Habeas Relief for State Prisoners*, 52 ANN. REV. CRIM. PROC. 1125, 1139 (2023).

6. *See* Litman, *supra* note 1 (characterizing *Ramirez* as taking a "wrecking ball" to a previously "simple and elegant solution").

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

8. *Ramirez*, 596 U.S. at 391.

more."[9] For now, at least, federalism and finality have won. But practically, the *Ramirez* Court ensured that federal habeas review now cannot reach many of the cases where it is most needed — cases in which a hypothesized "harm" to the federal system outweighs the need to correct the injustices perpetrated by doubly inadequate counsel and limited state records.[10] The question, then, is how we should reconceptualize federal habeas corpus to correct this injustice.

This Essay argues that decisions like *Ramirez* and other recent Supreme Court habeas cases like *Jones v. Hendrix*[11] rest on fundamental misconceptions of habeas corpus's role and when it should be deployed by courts. *Ramirez* might make sense if habeas were a rarefied final line of review for individual-rights violations, a kind of bonus appeal when state process seems inadequate. After all, state process, and especially state fact-finding, must end somewhere.[12] This frame reflects an effort to balance states' rights and finality on the one hand against the possibility of punishing "actual innocence" — the ultimate individual-rights violation — on the other.[13] But, as scholars have argued in response to Professor Paul D. Halliday's magisterial 2010 history of the habeas writ, and as the landmark decision *Boumediene v. Bush* acknowledged, habeas corpus was historically understood as a "judicial power" to review the carceral actions of the political branches rather than to vindicate individual rights against government misconduct.[14] In other words, habeas was received as a matter of judicial review over and against incarcerating authorities — in more modern parlance, an

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9. *Habeas Corpus — Ineffective Assistance of Counsel — Procedural Default* — Shinn v. Ramirez, *supra* note 1, at 406.

10. *See Ramirez*, 596 U.S. at 391 ("emphasizing the problem of "[s]erial relitigation of final convictions"); *see also id.* at 390 ("Federal courts, years later, lack the competence and authority to relitigate a State's criminal case.").

11. 599 U.S. 465 (2023).

12. Along these lines, the Court describes the hearings ordered by the lower courts in *Ramirez* as an "improper burden imposed on the States," one of which it finds "particularly poignant." *Ramirez*, 596 U.S. at 388. *But see generally* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (criticizing federalism and finality-based justifications for overlooking inadequate state procedures as erroneously imputing congressional purpose).

13. *See, e.g.*, *Hendrix*, 599 U.S. at 480 ("Congress has chosen finality over error correction in [the petitioner's] case."); *cf.* Lee Kovarsky, *The New Negative Habeas Equity*, 137 HARV. L. REV. 2222, 2260-73 (2024) (discussing the emergence of, and arguing the lack of foundation for, an "innocence rule," under which courts would limit habeas relief to claimants who are factually innocent).

14. *See, e.g.*, Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 612 & n.5 (2014) (citing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)) (characterizing Halliday as "responsible for this [historical] work"); *see* 553 U.S. 723, 741 (2008) (citing MATTHEW HALE, PREROGATIVES OF THE KING 229 (1976); and 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1341, at 237 (Boston, Little, Brown & Co. 3d ed. 1858)).

important feature of our checks-and-balances, separation-of-powers-based system. As the *Boumediene* Court put it, "[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of the provision must not be subject to manipulation by those whose power it is designed to restrain"—that is, by "the political branches."[15]

This historical understanding of habeas is also consistent with its still-undertheorized role in our constitutional scheme in protecting and defining due-process rights. The power of federal judges "to decide how much process underlying a federal custody determination proves that it is lawful" is a "privilege" that is expressly guaranteed by the Constitution and therefore one that not even Congress can abrogate.[16] And—although this is a more controversial belief—the power of federal courts to review the detention of state prisoners may be incorporated against the states in the Fourteenth Amendment's Due Process Clause and guaranteed as a "feature of national citizenship" under the Privileges and Immunities Clause.[17] These accounts are contested, but their basic framing is now beyond serious debate.

In this Essay, I attempt to define more clearly just what the "habeas power" is *for*. Building on Professor Halliday's work, this Essay argues that unlike the federalism or innocence-based rationales underlying *Ramirez*, the habeas power is meant to serve as a meaningful check on executive power. The archaic language of "writ" and "privilege" in the Constitution is more than mere window dressing: on habeas review, judges wrest the bodies of the incarcerated into almost an alternative legal system, one marked by what Professor Halliday calls the "equitable intervention into law's normal operation made legal by their being directed 'for the public good,'"[18] or what Justice Holmes memorably called "com[ing] in from the outside."[19] The point of habeas, therefore, is not so much

15. *Boumediene*, 553 U.S. at 765-66.

16. Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 758 (2013). The word "privilege" is used elsewhere in the Constitution only with reference to the congressional "privilege[] from Arrest during [members'] Attendance at the Session of their respective Houses," U.S. CONST. art. I, § 6, cl. 1, and the unenumerated "Privileges and Immunities," U.S. CONST. art. IV, § 2, cl. 1; and U.S. CONST. amend. XIV, § 1. As to the latter, habeas appears on both the well-known list of "fundamental rights" subsumed under Article IV's "privileges and immunities" clause in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1825) (No. 3,230), and the shorter list endorsed by the Supreme Court with reference to the Fourteenth Amendment in the *Slaughter-House Cases*, 83 U.S. 36, 79 (1872).

17. Kovarsky, *supra* note 14, at 612-13; Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH L. REV. 862, 868 (1994).

18. PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 69 (2010).

19. Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

to provide an extra layer of factual review or a second chance at appeal, but to offer a special layer of legitimacy review that lies uniquely within the Article III "judicial power" of the courts.[20] In conjunction with the Privileges and Immunities Clause itself, the Constitution's protection of the "Privilege of the Writ of Habeas Corpus" preserves as if in amber a common-law-informed view of subjecthood that is defined less by property-like, carefully delineated individual rights than by the more flexible, quasi-medieval language of privilege, subjecthood, and subjugation.[21] It is fair to say that this view has not been fully integrated into the United States's federal system of criminal law—even though, along with the jury trial, the availability of the habeas writ is one of the few bedrock guarantees made to anyone accused of a crime there. Reconceptualizing habeas law to conform to these principles will therefore go a long way in correcting the "chaos" of habeas law.

Part I of this Essay argues, consistent with recent scholarship, that habeas corpus is better understood as a matter of judicial power than as a final line of review for individual-rights violations: it is where the judicial branch may correct fundamental errors in the criminal process, counterbalancing the powers of the political branches in this sphere. Part II finds justification for this power in history, identifying how the habeas power was traditionally focused on executive

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20. As Professor Stephen Vladeck points out, "it could hardly have been lost on the Founders that they were simultaneously enshrining in the Constitution a prerogative writ and the structural independence of the judges who would issue it." Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 969 n.135 (2011).

21. Professor Halliday sees an important distinction between "modern liberal ideas exalting the autonomous moral subject" and the "vernacular liberties" that shaped the writ of habeas corpus, which he connects with Christian ideals: "[Christian] [l]iberties, social and spiritual, constrained as they empowered. They were also capacities: privileges granted and revocable from without, arising from subjecthood to God and king. . . . " HALLIDAY, *supra* note 18, at 184. To possess something is not the same as having a property in it by virtue of that which ostensibly inheres in all humans by nature. "Rather, the liberties possessed by parties in habeas litigation show the same qualities . . . observed in Christian and corporate liberties: given from without; to some, not to all; and only enjoyed in conjunction with obligations." *Id.* Similarly, in an article cited at significant points in the Supreme Court's *Boumediene* decision, Professors Halliday and G. Edward White observe that Matthew Hale made a sharp distinction between "those English liberties that are incident to [the] persons [of the English]," and those that "concern the land, and propriety, and disposal of them," which, according to Hale, "are settled according to the King's pleasure." Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 640 (2013) (quoting MATTHEW HALE, PREROGATIVES OF THE KING 43-44 (1976)). Halliday and White interpret Hale to mean that, "the property law of the king's dominions was spatially bounded," but "the law concerning the king and his subjects was bounded only by the relationship of allegiance." Halliday & White, *supra*, at 640. For this reason, "[t]he law concerned with habeas corpus . . . marked a potentially huge zone of allegiance and royal obligation." Halliday & White, *supra*, at 641. For the same reason, it also marked a huge zone of potential creativity.

arbitrariness that denied defendants fundamental due-process rights, beyond just issues of jurisdiction. Part III then argues that Justice Scalia's attack on the mandatory Federal Sentencing Guidelines provides a useful model for thinking about how habeas corpus law, now often rightly criticized as wasteful and redundant, could be streamlined and reinvigorated to reimplement this historic function. Part IV considers the Texas capital-murder regime as an example of how this reformed habeas corpus doctrine could work in practice. The Essay then concludes.

I. THE HABEAS POWER

There is a tension in modern habeas law: a focus on factual innocence and federalism has reduced courts' historic power to a rough-and-tumble balancing of interests. As *Ramirez* illustrates, this framing often results in a habeas review that is narrowly focused on purely procedural issues, like procedural default and exhaustion, while tolerating violations of fundamental due-process protections. This Part seeks to illustrate these issues and to identify a way beyond this impasse. Applying the work of Professors Halliday and Lee Kovarsky on the history and tradition of habeas corpus, and invoking Justice Scalia's sensitivity to habeas's constitutional role, this Part argues that habeas corpus review should instead be oriented toward correcting executive infringements on core due-process protections. This does not necessarily require more habeas review or more wins for petitioners. Whatever the outcome for the *Ramirez* petitioners might have been under this framework, it would at least have permitted federal courts to ask the question at the heart of both of their claims: were fundamental due-process violations concealed in the silence of the state record?

The facts underlying *Ramirez* show why the seemingly narrow, procedural issues raised in the case matter for how we conceive of federal habeas corpus overall. *Ramirez* was a consolidation of two capital cases, both alleging ineffective assistance of counsel based on a failure to investigate.[22] The first case, *Jones v. Shinn*, involved an innocence claim based on evidence the petitioner's trial counsel had failed to discover.[23] The second case, *Ramirez v. Ryan*, turned on the claim that trial counsel had been negligent for failing to investigate potentially mitigating evidence.[24] In both cases, state-appointed postconviction counsel failed to raise an ineffective-assistance-of-trial-counsel claim during initial postconviction review.[25] These claims of ineffective assistance and the evidence supporting

22. Shinn v. Ramirez, 596 U.S. 366, 372-74 (2022).

23. 943 F.3d 1211, 1215 (9th Cir. 2019).

24. 937 F.3d 1230, 1235 (9th Cir. 2019).

25. *Ramirez*, 596 U.S. at 372-74.

them therefore did not appear in the state record—either during the trial or on appeal.

The *Ramirez* Court held that the absence of such claims in the record precludes a federal court from *ever* hearing the evidence needed to support them.[26] Paradoxically, the absence of the claim in the state record demonstrates that there was ineffective assistance of counsel at both the trial and postconviction stage. But without a hearing, there is no obvious way to develop the claim. Nonetheless, placing emphasis on the Antiterrorism and Effective Death Penalty Act's (AEDPA) prior judicial interpretations "that state-court judgments [should be] accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism," Justice Thomas wrote for the Court that lower courts cannot gather the additional evidence required to elaborate the claim.[27]

In addition to demonstrating how federalism concerns can short-circuit federal claims, *Jones* speaks directly to longstanding debates in habeas scholarship about the role of the habeas petition. Influential twentieth-century commentators, such as Judge Henry J. Friendly and Professor William J. Stuntz, have argued that while noninnocence habeas claims clog the courts and risk frustrating state independence—two concerns noted by the *Ramirez* majority[28]—outright innocence claims like Jones's are at the core of what constitutional criminal law should protect and, accordingly, what the federal writ of habeas corpus should be used for.[29] More recently, Professors Joseph L. Hoffman and Nancy J. King have advanced a similar argument on purely pragmatic grounds: they contend that since the vast majority of federal habeas petitions by state prisoners are unsuccessful, the substantial resources spent on habeas litigation would be better spent on securing adequate counsel in the first place.[30] By providing better funding to overworked and underpaid public-defender offices and focusing fewer resources on noninnocence habeas claims, trial and state postconviction counsel would more adequately defend their clients, and fewer issues would arise.[31]

Ramirez presents a related but more intricate federalism problem: the question of just how grossly negligent state counsel's mitigation assistance must be

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26. *Id.* at 385.

27. *Id.* at 386-87 (quoting Martinez v. Ryan, 566 U.S. 1, 9 (2012)).

28. *Id.* at 387-88.

29. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160-64 (1970); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 680-81 (1990).

30. Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009).

31. *Id.* at 820-23.

before federal courts can step in, given AEDPA's facially strict requirements to justify additional evidentiary hearings.[32] Perhaps more so than the innocence claim in *Jones*, the claim in *Ramirez* directly implicates the questions of federalism and comity foregrounded in Justice Thomas's majority opinion, showing how decisive federalism concerns have become for applying AEDPA.[33] Regardless, the Court's ruling in *Ramirez* now blocks both petitioners' claims, because their claims require evidence that they cannot obtain.[34] Cases like the ones consolidated in *Ramirez* show how balancing federalism and finality interests against the possibility of a potential rights violation often requires placing a finger on the scale in one direction: a little more fact-checking might give the petitioners a case on their rights claims; but then again, it might not.[35] Rather than follow the Friendly and Stuntz line to distinguish the "actual innocence" claim from the claim regarding mitigation, the *Ramirez* Court strictly and consistently applies the rule that evidentiary hearings generally may not be held on defaulted state claims.[36] Going beyond weighing federalism and finality against the possibility

32. 28 U.S.C. § 2254 (e)(2) (2018) bars evidentiary hearings on a habeas corpus writ where "the applicant has failed to develop the factual basis of a claim in State court proceedings" — unless, in addition to other requirements, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." *Ramirez* hinges on whether a petitioner may be said to have "failed" to develop facts when both trial and post-conviction counsel were allegedly deficient. *See Ramirez*, 596 U.S. at 397-98 (Sotomayor, J., dissenting). Crucially, both sides of the opinion have a sound interpretive argument; judges end up deciding, in effect, which way the Antiterrorism and Effective Death Penalty Act (AEDPA) leans — for or against habeas review — on what often feels like an essentially ad hoc basis.

33. *See Ramirez*, 596 U.S. at 381-82.

34. *See id.* at 382.

35. The Court's recent habeas jurisprudence is a good example of what Professor Mary Ann Glendon describes as American "rights talk," which tends to view rights as individual trump cards rather than articulated relational schemes: "To a greater degree than any other, the American legal system has accepted Mill's version of individual liberty, including its relative inattention to the problem of what may constitute 'harm to others' and unconcern with types of harm that may not be direct and immediate." MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 72 (1991). Consequently, Glendon argues, "Our rights-laden discourse easily accommodates the economic, the immediate, and the personal dimensions of a problem, while it regularly neglects the moral, the long-term, and the social implications." *Id.* at 171.

36. *See Ramirez*, 596 U.S. at 385 ("[W]e have no power to layer a miscarriage-of-justice or actual-innocence exception on top of the narrow limitations already included in § 2254(e)(2). . . . The same follows here. We have no power to redefine when a prisoner 'has failed to develop the factual basis of a claim in State court proceedings.'" (quoting 28 U.S.C. § 2254(e)(2)). Of course, the *Ramirez* Court retained, as it must under AEDPA, the demanding "clear and convincing" evidence standard for actual innocence claims arising under retroactively applicable, constitutional Supreme Court rulings or previously undiscoverable facts;

of innocence, then, the *Ramirez* majority views the former factors as so decisive that even innocence cannot outweigh them.[37]

Ramirez's deferential, federalism- and finality-centered view of habeas corpus law is not the only view available. In fact, this was not even the view of Justice Scalia, one of the central voices in reducing the scope of habeas corpus. Although the *Ramirez* majority relied significantly on Scalia's prior opinions, Scalia showed a consistent awareness of how central habeas is to the American constitutional scheme, cutting against the *Ramirez* Court's implicit treatment of habeas as a burdensomely intrusive fact-finding device by foregrounding the writ's historic role in vindicating the most fundamental due-process rights.[38] Counterintuitively, then, Scalia's views offer a way beyond the *Ramirez* impasse: not by holding that innocence concerns must outweigh federalism and finality, but by rejecting the balancing act altogether, and reaffirming habeas's historic role in our constitutional scheme.

Justice Scalia's sensitivity to habeas's unique constitutional role shows up in some unlikely places. For example, consider Scalia's dissent in *Brown v. Plata*.[39] On its face, the case had nothing to do with habeas and instead involved an Eighth Amendment challenge to a dramatic downsizing of the California prison system under the Prison Litigation Reform Act (PLRA).[40] The three-judge district-court panel had found prison conditions unsatisfactory, especially with regard to the provision of adequate medical care, and ordered the state to reduce its prison population to 137.5% of the facilities' design capacity.[41] Habeas writs were never issued or requested. Nevertheless, the dissenting Scalia sensed habeas in the air:

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but it slanted the rest of the statute further toward screening out even strong actual innocence claims. *Id.*; 28 U.S.C. § 2254(e)(2). The distinction between innocence and non-innocence claims is arguably more complicated in the capital context anyway, because the Court has indicated that there is such a thing as being, so to speak, "innocent of death." Sawyer v. Whitley, 505 U.S. 333, 341 (1992). An extension of the Court's "death is different" theory, the Court has indicated that it is one thing to claim that one's sentence is too severe in a noncapital context, and another thing to claim that for whatever substantive or procedural reason one should not have been sentenced to death. *See* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring).

37. *See* Litman, *supra* note 1.

38. *Ramirez*, 596 U.S. at 405-07 (Sotomayor, J., dissenting); *see* Hamdi v. Rumsfeld, 542 U.S. 507, 555-56 (2004) (Scalia, J., dissenting) (describing Blackstone's understanding of habeas corpus as "the instrument by which due process could be insisted upon by a citizen illegally imprisoned," an understanding which was enshrined "in the Constitution's Due Process and Suspension Clauses," and citing sources describing the fundamental due process protections of indictment and trial).

39. 563 U.S. 493 (2011).

40. *Plata*, 563 U.S. at 545.

41. Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 962 (E.D. Cal. 2009).

> Recognizing that habeas relief must be granted sparingly, we have reversed the Ninth Circuit's erroneous grant of habeas relief to individual California prisoners four times this Term alone. And yet here, the Court affirms an order granting the functional equivalent of 46,000 writs of habeas corpus, based on its paean to courts' "substantial flexibility when making these judgments." It seems that the Court's respect for state sovereignty has vanished in the case where it most matters.[42]

The core of Scalia's objection to what he called "perhaps the most radical injunction issued by a court in our Nation's history" was a mix of "tradition and common sense."[43] Specifically, he pointed to the "stringently drawn provisions of the governing statute," "traditional constitutional limitations upon the power of a federal judge," and the "institutional capacity" of the federal courts.[44] Beyond the question of what the PLRA did or did not authorize, the *Plata* cases raised deep questions about the scope of federal courts' powers in this area. Were courts the right institution to manage questions of medical care in state prisons?[45] Was judicial intervention in this sweeping way to address systemic criminal justice issues, medical or otherwise, part of the American constitutional design?[46] And what about federalism and state sovereignty?[47]

Justice Scalia was right to detect habeas corpus behind the Court's decision in *Plata*—though not, perhaps, for the reasons he would have given. He raised exactly the right questions about the authority behind the order and about the reach of habeas corpus itself: Do courts have a habeas, or habeas-like, power to review incarcerations on such a sweeping scale, or to challenge executive power in such a dramatic way? Should they? Scalia's *Plata* opinion implies, of course, that they should not. But in saying so, he pointed toward a fundamental question about how habeas corpus should be understood in the American constitutional system—a question whose answer has evolved significantly even since *Plata* was decided, in the wake of *Ramirez* and other cases.

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42. *Plata*, 563 U.S. at 560 (Scalia, J., dissenting) (citations omitted).

43. *Id.* at 550.

44. *Id.*

45. *See* Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV 165, 173-74, 182-84 (2013).

46. *See* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 14 (2010) (noting the existence of "habeas *corpora*" addressed to problems affecting multiple prisoners in England, "collective" forms of habeas in early American Law, and "habeas class actions" in the late twentieth-century United States).

47. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963).

Similarly—but in a dramatically habeas-vindicating way—in *Hamdi v. Rumsfeld*, Justice Scalia famously objected to what he took to be the improper restriction of the writ in the face of prolonged government detention without trial or congressional suspension of the writ.[48] He did so on the grounds that the detention conflicted with "[t]he gist of the Due Process Clause," which was "to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property," particularly the rights to presentment or indictment and trial.[49] As Scalia observed, "These due process rights have historically been vindicated by the writ of habeas corpus," which "[i]n England before the founding . . . developed into a tool for challenging executive confinement."[50]

Underlying both of these opinions is a sense that the habeas power is not to be taken lightly. Bound up with fundamental due-process protections, the habeas writ was viewed by Justice Scalia as a large weapon in the judicial arsenal, to be taken out only when the fundamental criminal due-process rights of indictment and jury trial have been compromised.[51] In this regard, those who would restrict habeas to mere jurisdiction-checking have a point: habeas is not just about providing an extra layer of postconviction review.[52] Habeas is also, as Scalia's sense of its centrality suggests, much *more* than additional postconviction review for what we now might think of as jurisdictional issues.[53] As Professor Halliday argues, "Th[e] broad need to do justice for the subject while protecting the honor of king and court provides the key to habeas corpus, mandamus, and all the prerogative writs."[54] Courts have found it understandably difficult to think about the "honor of king and court" in the American context.[55] But

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48. 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

49. *Id.* at 556.

50. *Id.* at 557.

51. *See id.* at 554-58; McQuiggin v. Perkins, 569 U.S. 383, 411-12 (2013) (Scalia, J., dissenting) (lamenting the "Faustian bargain" of trading the "simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions," and arguing against the vision of "perfect justice through abundant procedure" conjured by the actual innocence frame).

52. *See* Bator, *supra* note 47, at 474-75. This view was recently reiterated by the Court in *Jones v. Hendrix*, 599 U.S. 465 (2023).

53. *See* Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57, 79 (2022) (refuting the "jurisdiction-only" account); *see also* Justice Jackson's dissent in *Hendrix*, 599 U.S. at 526-29 (Jackson, J., dissenting) (describing the "jurisdiction-only" account as a myth, and citing the historically broader understanding of jurisdiction).

54. HALLIDAY, *supra* note 14, at 79.

55. Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 309-14 (2003) (expressing reservations about the scope of the prerogative writs in the context of the American

without this idea — the idea of a review of incarceration that is grounded in principles of fundamental due-process-based legitimacy, as opposed to just factual or procedural correctness — habeas loses its special purpose along with its unique role in our separation-of-powers-based system, and the quasi-"miraculous" tinge that has defined it from its inception.[56]

Boumediene explored the implications of this "power" frame for extending the Court's habeas jurisdiction to include noncitizens in outlying territories.[57] In view of the historical ties between the writ of habeas corpus, due-process jurisprudence, and the Due Process Clause's broader status as the site of contemporary thinking about the legitimacy of incarceration, the best way to apply the writ to federal habeas review of both federal and state convictions now — and the method most consistent with the writ's history — is to apply constitutional due-process protections more rigorously, with a special eye toward the executive branch's abuses of power.[58] Drawing on recent habeas scholarship and on Justice Scalia's own emphasis on the tie between the habeas writ and basic due-process law, a brief examination of the writ's history can further sharpen this understanding. As that history shows, Scalia was right to describe the current habeas regime — albeit in the context of lamenting the overzealousness of federal-court review — as a "Faustian bargain."[59]

II. HABEAS LEGITIMACY: BEFORE FEDERALISM AND INNOCENCE

That habeas corpus should embody a kind of judge-made, due-process-based legitimacy test focused on executive arbitrariness is firmly grounded in the writ's history. As some originalist judges like to point out, historically, the common-law writ of habeas corpus did not have much to do with innocence.[60] The English Habeas Corpus Act of 1679, on which the U.S. Constitution's Suspension Clause was partly based, says nothing about innocence.[61] And the limited records we have from the royal-prerogative writ's first few centuries before the

system, and celebrating the Supreme Court's view of itself as bound by Congress with respect to the writ of habeas corpus).

56. Professor Halliday observes: "The miraculous making of 'an exception of the law of God . . . from the general rules of the law of man' was the key to the prerogative as well as the heart of equity. Both were held together in the hands of the justices of King's Bench." HALLIDAY, *supra* note 14, at 88.

57. *See* 553 U.S. 723, 739-46, 770-73, 797-98 (2008).

58. *See* Steiker, *supra* note 17, at 911.

59. McQuiggin v. Perkins, 569 U.S. 383, 411 (2013) (Scalia, J., dissenting).

60. *See, e.g.*, Crawford v. Cain, 55 F.4th 981, 994 (5th Cir. 2022).

61. 1679 Habeas Corpus Act, 31 Car. 2, ch. 2 (Eng.).

Act say little about innocence and much more about reviewing authority for detention: the King, by proxy of the judge, inquired about the authority by which a person was held in custody; and, as the writ matured, the judge required increasingly thorough explanations of the questioned detention.[62] These explanations took the form of holistic certifications that we might now consider a rough form of due-process law.[63] By the seventeenth century, the requisite explanations generally included the wrong that was done, the statute under which the detainee was apprehended (if applicable), and, at least when relevant, the apprehending authority.[64] These explanations required by the judge were not comparable to defenses of the facts of the case as the authority has construed them or of the ultimate guilt of the party in question.[65] The first question asked when considering a historical habeas writ was *in whose custody*, and a close — often more decisive — second was *on what authority*.[66] The importance of these questions remains evident in the custom of bringing the habeas suit against the person on whose authority the prisoner is held — for example, David Shinn, the Director of the Arizona Department of Corrections, in *Ramirez*.[67]

Nor did the historical conception of habeas involve subordinating review of the legitimacy of the detention to other principles, such as those underlying modern-day federalism. Of course, there was no such thing as federalism in sixteenth-century England, but there was an interconnected and sometimes

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62. *See* William F. Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983, 1054 (1978) ("Release had nothing to do with the guilt or innocence of the party confined."). For the point that the 1679 Act was not the only source of the Framers' understanding of the writ, *see* Vladeck, *supra* note 20, at 962 ("The 'privilege of the writ of habeas corpus' reflected the powerful, judicially controlled writ, the only formal limitation on which was Parliament's (increasingly prevalent) suspension power. And the constraints on suspension, which imposed substantive (if ambiguous) limits on the circumstances in which American legislatures could intervene, were an attempt to remedy the one perceived shortcoming in contemporary English practice.").

63. *See* HALLIDAY, *supra* note 14, at 102-07 (describing the basic requirements of "certainty" and "sufficiency": "Sufficiency generally concerned statements about the wrong committed by the accused and the substance of a magistrate's claims to act as he did. Certainty concerned the clarity with which this was explained.").

64. *Id.*

65. *But see id.* at 108-14 (noting the general rule against challenging a writ return's "factual accuracy," but also describing the flexible ways judges worked around this rule to determine whether a detention was in fact legitimate).

66. HALLIDAY, *supra* note 14, at 102-03 ("In the decades around 1600, returns to habeas corpus lengthened as greater detail was required. We can trace this in the declining number of returns that did not name the jailing authority, the cause of imprisonment, or both. . . . Including or omitting the name of the jailing authority seemed to matter very little. . . . Vagueness about the alleged wrong, however, did make a difference . . . .").

67. Shinn v. Ramirez, 596 U.S. 366, 366 (2022).

redundant array of overlapping spheres of authority—from the King's Bench and Court of Common Pleas that sat across from each other in Westminster Hall, to the county sheriffs and the full-service, magistrate-prosecutor "justices of the peace."[68] In this system, the habeas power held a unique status above others. Because the authority derived from the King—indeed, habeas corpus roughly translates to a pronouncement from the King that "You shall have the body [brought to me]"[69]—the habeas writ that inquired into a prisoner's detention was incomparably superior to other authorities.[70] This meant that the lesser authorities from whom information and (if necessary) the body of the detainee was demanded could not make any claim whatsoever—whether based on authority, jurisdiction, or on evidence of obvious guilt—that the body cannot be brought to King because the King lacks the power to order it brought.[71] With few exceptions, the only possible response to a habeas writ was an adequate explanation of why and by whom the detainee was held; and only when an adequate explanation was made, did the body not need to be brought before the King's justices.[72]

Habeas's origin as a prerogative writ of the King is often lost in the shuffle of modern discussions of habeas law. Understandably so. We have no contemporary analogue for this role, so the distinction looks at first blush like an irrelevant atavism. However, this history makes clear that the habeas power never could be undermined by anything like a modern American claim to states' rights, federalism, or comity.

Much has changed in the last five centuries. Claims about habeas corpus's "original meaning," especially when that meaning is located in the late medieval period, may understandably fall on unsympathetic ears.[73] But before dismissing

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68. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 122 (2009). For the justices of the peace, see *id.* at 229-38.

69. Professor Halliday cites as paradigmatic a 1605 King's Bench writ which begins, in Professor Halliday's translation, "We command you that you have the body . . . together with the cause of his detention . . . before us at Westminster . . . to undergo and receive whatever our court should then and there happen to order concerning him in this behalf . . . ." *Id.* at 39.

70. *See* S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 55 (1951).

71. HALLIDAY, *supra* note 14, at 103 ("Insufficiency in a return might arise in a number of ways. The most egregious derived from insolence, a jailer's claims to be beyond the purview of King's Bench.").

72. *Id.* at 103-04 ("An imprisonment warrant without a cause in it made by an individual, no matter how powerful, was almost always reversed, [even in the case of the Attorney General]. . . . But King's Bench generally permitted both the Privy Council and Parliament to make such returns . . . .").

73. If the historical lens on habeas that I am suggesting is in line with any modern constitutional theory, it is probably "common law constitutionalism," which attempts to do justice to the

these historical interventions, one should ask whether they might have something to do with the discordant landscape of habeas law as it stands now—perhaps today more than ever, in the wake of *Ramirez* and other recent habeas cases.[74] Is there not, after all, a fundamental tension between a writ of last resort originally meant to vindicate the legal "rights" of the King, and an individual-rights-based regime overlayed with conflicting sovereign spheres?[75] The fact that habeas's function may have flipped, in a sense, when it was reconceived in the pivotal seventeenth-century parliamentary act as a tool to ferret out unlawful detentions perpetrated by the King himself does not relax this tension: in either case, habeas was, for its first several centuries, a writ concerned with royal power and meant as a last resort either for or against royal power on grounds of illegitimacy based on an appeal to the ultimate sovereign.[76] This is in stark contrast

common-law background out of which the American Constitution emerges; however, it seems to me important that the "common-law" lens be supplemented by a careful attention to where the Constitution's text leaves obvious room for later reimagining, and where it does not. This is why I stress the special status of the habeas writ as specifically guaranteed in the Constitution's text. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884-91 (1996); *see also* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1190 (2024) (including the "common law" within general law). *But see* J. HARVIE WILKINSON III, COSMIC CONSTITUTIONAL THEORY 11-32 (2012) (noting the tendency of this school to give way to unfettered judicial discretion).

74. In 1983, Professor Charles Alan Wright opened a review of a history of habeas corpus with the flat statement, "Habeas corpus is in disarray." Charles Alan Wright, *Habeas Corpus: Its History and its Future*, 81 MICH. L. REV. 802, 802 (1983). It would be hard to argue that things have gotten better since then. If *Ramirez* shows the Court applying a finality-and-federalism presumption to its reading of AEDPA, 2023's *Jones v. Hendrix* shows it applying a more blanket presumption against affording habeas relief, such that even later invalidations of the laws under which a petitioner was convicted will not afford access to relief, even in the face of a statutory savings clause (and even when, as might have particularly troubled Justice Scalia, the invalidation rested on a finding that the crime of which the petitioner was originally convicted lacked a key, constitutionally required element which the jury in the petitioner's case was never asked to prove). *See* Jones v. Hendrix, 599 U.S. 465, 518-27 (2023) (Jackson, J., dissenting) (describing the *Hendrix* majority's sidestepping of what appeared to be a clear statement rule requiring a clear "signal from Congress that justifies reading a statute as foreclosing access to venerated postconviction review processes"); Noam Biale, *Court Blocks Pathway for Federal Prisoners to Raise Legal Innocence Claims*, SCOTUSBLOG (June 23, 2023, 9:37 AM), https://www.scotusblog.com/2023/06/court-blocks-pathway-for-federal-prisoners-to-raise-legal-innocence-claims [https://perma.cc/8ZYN-8FNL]; Kovarsky, *supra* note 13, at 2257-58.

75. *See* Primus, *supra* note 46, at 4.

76. *See* 1679 Habeas Corpus Act, 31 Car. 2, ch. 2 (Eng.); HALLIDAY, *supra* note 14, at 242 ("The act has traditionally been associated with whig political rhetoric, in which the subject's liberty was set against ostensibly arbitrary kingship. But tories referred to the act more often in the early 1680s, invoking it as an example of the king's concern for his subjects and their liberties.").

with its implicit function, in *Ramirez*, as a final fact-checking device, to be carefully restrained so as not to embarrass the states.[77]

This history also creates awkwardness for those committed to treating habeas as substance rather than procedure. On the one hand, habeas is the most substantive writ possible — an imperious demand that the jailer account for the fundamental justice of the detention in terms of an implicit legitimacy-as-justice model, as opposed to a model that more rotely asks only if the defendant in fact "did it."[78] But in contrast with an innocence-privileging lens like that advanced most prominently by Judge Friendly, historical habeas was pure procedure.[79] The writ asked for no aggravating or mitigating information about the detainee, but only whether the proper procedures had been followed with respect to the offense charged. Habeas therefore may be a sterling example of how, in the famous phrase from Henry Maine, substance is "secreted in the interstices of procedure."[80] One might even go further and say that habeas corpus hails from a time when substance and procedure were, at base, indistinguishable.[81] Innocence is one way — but critically, not the only way — that incarceration can be fundamentally illegitimate.[82]

This history should inform our understanding of what the habeas power is for. As Professor Kovarsky has argued, and as the Court's *Boumediene* discussion portraying habeas as a separation-of-powers issue suggests, we must refocus our attention on what the words of the writ say on its face: habeas is about, first of all, the judicial power to declare an imprisonment illegitimate, and so to order

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77. *See* Primus, *supra* note 46, at 13-16 (describing the "lost purpose" of federal habeas review, as reconceived in the Reconstruction era, to "oversee state action" by entertaining "systemic challenges to state action in federal court").

78. *See* HALLIDAY, *supra* note 14, at 103-05 ("The most important form of insufficiency . . . concerned returns with no cause at all. . . . More often, a judgment of insufficiency arose . . . from a failure to heed the demands of statute. . . . Uncertainty arose less from a failure to possess power to imprison than from a lack of clarity in describing the use of that power.").

79. Friendly, *supra* note 29, at 160-64.

80. HENRY MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 210 (Batoche Books 1999) (1886).

81. This can be usefully compared with Professor James Q. Whitman's analysis of the jury trial's rise as a "moral comfort" device, and its awkward transformation into an ill-equipped "fact-finding" procedure. JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 19 (2008). Similarly, habeas was not originally conceived as a fact-finding device, but rather an authority-finding one. This is not the same as saying that it is all about "jurisdiction."

82. *See generally* Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417 (2018) (discussing legal innocence as a category distinct from, but similar to, factual innocence).

the release of the prisoner's body.[83] This power was focused especially on correcting acts of executive illegitimacy. Professors Halliday and White summarize:

> The justices of King's Bench used habeas corpus, like the other prerogative writs, to supervise the discretion of judicial and administrative officers of all kinds. Subjects, many quite humble, employed the writ — what Sir Edward Coke saw as an example of the court's ability to correct any "manner of misgovernment" — to assert the royal prerogative against those whose authority threatened them most: not the Privy Council, but the justices of the peace and statutory commissioners who lived in their own communities.[84]

Professor Halliday exhaustively documents the use of the habeas writ against the proto-prosecutorial justices of the peace in the first centuries of the writ's development.[85] From the beginning, then, habeas corpus has been about the separation of powers, and specifically about the judicial reining in of the executive branch on issues of incarceration. If habeas corpus is to move past its decades-long impasse in modern American criminal law — or even to make sense again — it must come to terms with its origins as a mode of privileged judicial review for the illegitimacy of executive decisions, where substance and procedure are fundamentally intertwined. This should begin with the language of the writ itself: bring the body before the King. Habeas was originally about the King's rights, and then the subject's rights in relation to the King's.[86] Individuals' rights and states' rights came later.

III. JUSTICE SCALIA'S CRIMINAL DUE-PROCESS LAW

What should a reimagined habeas law look like in light of this history? This Part proposes a surprising source: Justice Scalia's late-career criminal due-process jurisprudence. Despite his reluctance to expand federal habeas review of state judgments, Scalia's close attention to basic criminal due-process protections

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83. *See* Vladeck, *supra* note 20, at 972 ("If King's Bench had the power to order the jailer to release the prisoner — which . . . it always did when the jailer answered to the king — it had the power to effectuate release.").

84. Halliday & White, *supra* note 21, at 608 (footnotes omitted).

85. *See* HALLIDAY, *supra* note 14, at 30-31, 120, 148, 153, 222.

86. *See id.* at 70-71 ("A writ fundamentally concerned with moving, holding, and releasing subjects' bodies touched directly on the most fundamental aspect of the king's authority: his authority to control his subjects' bodies so that they might protect his body, and so in turn, that he might protect theirs. . . . These spiritual bonds were very real: failure to appreciate this can arise only from a modern condescension to the reality in early modern minds of the 'ligamen' imported by an oath, even an implied one.").

in cases like *Hamdi* carried over into one of his most notable jurisprudential interventions: the attack on the mandatory Federal Sentencing Guidelines. With its strong emphasis on bright-line, historic protections against prosecutorial and administrative distortions of basic constitutional rights, Scalia's campaign against the mandatory Guidelines regime offers a strong model for how judges can reassert the relationship between subject and sovereign that habeas has historically vindicated.[87] Buried in Scalia's attack on the Guidelines was an almost-forgotten sense of what it means to be a constitutional subject under not only state and federal positive law, but also under basic common-law rules, like jury fact-finding and unanimity requirements, which were incorporated into the text and structure of the U.S. Constitution and are specially within the judiciary's purview.[88] If habeas is, at its root, a matter of judicial power, it is critical that the writ be reinstated as a way to provide judges with meaningful room to push back against arbitrary or otherwise constitutionally deficient executive incarceration practices — particularly in an era defined by the functionally unchecked power of prosecutors to exercise near-limitless discretion.[89]

The idea of a reinvigorated habeas writ may conjure memories of the Warren Court's criminal-procedure revolution, or of the brief flowering of habeas in that era into an almost-full extra layer of appeal.[90] This Essay does not advocate for a return to such a regime. Instead, Justice Scalia's late-career criminal-procedure opinions should serve as one of the main resources for a legitimacy-based habeas law, focused around basic due-process protections. Scalia's obstinate — and eventually successful — challenge to the mandatory Federal Sentencing Guidelines regime modeled the kind of big-picture, constitutional, and common-law-based analysis by which courts can reach fundamental questions of legitimacy and executive arbitrariness that the historical habeas power empowers them to ask.[91]

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87. *See* HALLIDAY, *supra* note 14, at 70-71.

88. This account broadly resonates with a recent scholarly trend to reassert the central place of the "general law," or "unwritten law derived from general principles and customs and operating across jurisdictions," in the American constitutional scheme. Baude et al., *supra* note 73, at 1194. In congressional debates over the Civil Rights Act and Fourteenth Amendment, the privilege of the writ of habeas corpus was consistently grouped among a select number of fundamental privileges and immunities that were not dependent on positive law. *Id.* at 1223.

89. *See* Hon. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 83 FORDHAM L. REV. 1673, 1676 (2015) ("[T]he only real assessment by the institutions of justice of whether the accused is actually guilty of the offense charged is made by the police and prosecutor . . . .").

90. *See, e.g.*, Fay v. Noia, 372 U.S. 391, 398-99 (1963); Townsend v. Sain, 372 U.S. 293, 309-12 (1963); Sanders v. United States, 373 U.S. 1, 7-15 (1963). The major Warren Court decisions targeted the powers of the police, or required tighter judicial control of criminal trials, rather than the actions of prosecutors.

91. The watershed opinion is *Blakely v. Washington*, 542 U.S. 296 (2004). *See infra* note 106 and accompanying text.

Scalia's forceful insistence on the importance—and due-process-based requirement—of unanimous jury fact-finding has echoed through the Court's later decisions and continues to shape our understanding of what law and justice require in sentencing.[92]

Modern habeas law should follow a similar path. In conjunction with its function of reviewing incarceration for legitimacy, habeas has always traveled together with the right to a jury trial and with general criminal due-process protections.[93] The writ's importance has receded as prosecutorial plea bargaining has expanded to become a de facto trial replacement, minimizing the significance of the right to trial.[94] This is doubly unfortunate: while one might have compensated for the loss of the other, instead both of our primary common-law protections against arbitrary prosecution have been seriously compromised over the course of the last century.[95] Professor Akhil Reed Amar has observed that juries were "widely viewed as the lower half of a bicameral judiciary" at the time of the Founding, as the common-law practice of jury nullification dramatically illustrates.[96] Despite this history, we are now faced with both federal and state executive branches that are, in practice, subject neither to the review of juries nor, in cases where state counsel is doubly deficient, to the review of judges.

Before turning to Justice Scalia's criminal due-process opinions directly, it is important to look first at his contrasting involvement in an earlier case, which marks the real, practical boundary of the Court's late twentieth- and early twenty-first-century habeas jurisprudence and its glaring limitations with respect to the writ's historical origins. Accordingly, the case that most captures the tension at the core of modern American habeas corpus law is the infamous 1987

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92. *See generally, e.g.*, Ramos v. Louisiana, 590 U.S. 83 (2020) (applying the jury-unanimity requirement to all state court convictions for serious crimes).

93. *See* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 124-29 (2017).

94. *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (tracing the rise of plea bargaining to its current place as a dominant institution in the criminal justice system). For the effective death of the jury, see Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 73 (2006).

95. Joseph Story referred in his *Commentaries on the Constitution of the United States* to the habeas corpus writ enshrined in the Constitution as defined by its "remedial power to free a party from arbitrary imprisonment." TYLER, *supra* note 93, at 139-40 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 453 (1833)).

96. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 61 (2005). As late as 1736, Alexander Hamilton was able to claim in court that jurors "have the right beyond all dispute to determine both the law and the fact." JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (1736), *reprinted in* A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 78 (Stanley N. Katz ed., 1972).

capital case *McCleskey v. Kemp*.[97] In *McCleskey*, the Supreme Court effectively threw up its hands and held that statistically demonstrated systemic arbitrariness was not its job to redress on a habeas petition; more precisely, the Court held that dramatic racial-sentencing disparities do not, without more, make a death sentence unconstitutional, under either the Eighth Amendment's prohibition on arbitrariness and disproportionality in punishment or the Fourteenth Amendment's Equal Protection Clause.[98] The *McCleskey* Court asked whether it could consider decisive "systematic and substantial disparities . . . in the penalties imposed upon homicide defendants in Georgia based on race of the homicide victim . . . and defendant[]."[99] With Justice Powell writing for the Court and Justice Scalia joining the majority, the Court decided that the empirically demonstrated racial disparities in sentencing were "a far cry from the major systemic defects identified in *Furman* [*v. Georgia*],"[100] apparently referring to the "unguided sentencing discretion" that was vested "in juries and trial judges" by the state capital statutes that the Court invalidated there.[101] The Court apparently viewed this discretion as either more major, or more systemic, than racial disparities in capital sentencing.

In isolation, this might look like boilerplate constitutional law—disparate impact is, of course, not the same as intentional discrimination. But the later course of habeas jurisprudence and legislation has shown that *McCleskey* marked a pivotal moment where habeas review stopped considering any "systemic" issues whatsoever.[102] A memorandum Justice Scalia circulated to the Court before *McCleskey* was decided is franker about this shift and the reasons for it, more so than the *McCleskey* opinion itself. Scalia wrote, "Since it is my view that the unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot honestly say that all I need

97. 481 U.S. 279 (1987).

98. *Id.* at 297-99, 312-13. In *Furman* and elsewhere, the Court has construed potential arbitrariness as a particular concern in the capital sentencing context. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."); Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.").

99. McCleskey v. Kemp, 753 F.2d 877, 895 (11th Cir. 1985).

100. 481 U.S. at 313 (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)).

101. *Pulley*, 465 U.S. at 44.

102. The high-water mark here is probably *Edwards v. Vannoy*, 593 U.S. 255, 271-72 (2021), where the Court simply reversed the exception to nonretroactivity for "watershed" new rules of criminal procedure.

is more proof."[103] Presented with a chance to check demonstrated executive arbitrariness in capital sentencing—and despite the obvious legitimacy problem that widely known racial sentencing disparities presented—Scalia and the *McCleskey* Court saw themselves as simply unable to intervene.[104]

At the turn of the century, however, Justice Scalia found himself taking a very different line in another important series of cases: cases challenging—and eventually invalidating—the then-mandatory Federal Sentencing Guidelines.[105] Following an opening salvo on the Guidelines regime in his 2004 *Blakely v. Washington* majority opinion,[106] Scalia joined the majority in *United States v. Booker*, articulating the rule that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[107] Because the Guidelines allowed judges to find facts essential to the level of punishment imposed, they violated the fundamental constitutional guarantee of a jury trial.[108] Scalia

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103. Memorandum from Justice Antonin Scalia to the Conference (Jan. 6, 1987) (on file with Thurgood Marshall Papers, Library of Congress).

104. Despite my argument that habeas should be refocused on basic due-process protections, it is not my view that Justice Scalia was right to suggest those protections should be restricted to Blackstone's core concepts of indictment and trial going forward. As due process and views of legitimacy and executive arbitrariness evolve, so too, in my view, should judges' views of what constitute core due process rights. This is consistent with the dynamic quality of the habeas writ from its inception, or, to use a phrase from Professor Vladeck that is quoted in Justice Ketanji Brown Jackson's *Hendrix* dissent, its "protean dynamism." Jones v. Hendrix, 509 U.S. 465, 528 n.24 (Jackson, J., dissenting) (quoting Vladeck, *supra* note 20, at 991). "Trial" itself is a concept bounded by its form, that is, a concept that must be given meaning with reference to decisions about what it means to receive one. On this view, *McCleskey* in effect posed the daunting question whether capital-sentencing disparities offended the core of due process as it was then understood, that is, whether race-based capital-sentencing arbitrariness should now be understood as a denial of due process and an affront to the criminal justice system's legitimacy as grave as the denial of indictment or trial in Blackstone's day. As I hope is also clear, a focus on this question is consistent with implementations that would either broaden or narrow habeas's availability. To those for whom this may sound like a matter of unbridled judicial discretion, I would suggest that the opinions in *Ramirez* show how much one's priors can affect even one's reading of the basic text of AEDPA, and advocate for bringing core disagreements about what due process requires out into the light, as opposed to burying them in disagreements over congressional purpose and statutory interpretation.

105. An analogy with Justice Scalia's historically grounded, bright-line construal of the Confrontation Clause could also be made, such as in *Crawford v. Washington*, 541 U.S. 36 (2004), and with his (since reexamined) administrative law opinions.

106. 542 U.S. 296 (2004).

107. 543 U.S. 220, 244 (2005) (reaffirming the Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (2000)).

108. *Id.* at 235-36, 244.

himself reiterated the core of this decision in his *Ring v. Arizona* concurrence, where, in the capital context, he again insisted:

> [T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors, or Mary Jane — must be found by the jury beyond a reasonable doubt.[109]

This was a systemic critique, although one based on fundamental due-process considerations rather than empirical studies. In the case of *Ring*, the critique also struck at Congress's empowerment of judges to treat factual matters requiring proof to a jury as if they were legal issues, striking down Arizona's practice of allowing judges to find the aggravating circumstances necessary for a capital conviction.[110]

This may seem not to have much to do with the writ of habeas corpus. But the core of Justice Scalia's Guidelines decisions is their separation-of-powers-based pushback against the Guidelines' legislative — and by extension, prosecutors' executive — encroachment on the historic powers of the judicial branch, including both judge and jury. Scalia insisted forcefully in *Ring* and elsewhere that the legitimacy of our system and its fact-finding in criminal cases depends on the jury trial being a creature of the judicial branch run by judges and, importantly, by citizens.[111] As the *Ring* majority put it, citing Scalia's concurrence in *Apprendi v. New Jersey* — the case that firmly established the requirement that all facts raising the maximum punishment imposed must be found by a jury — although a judge-based fact-finding system might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State," the jury-based American system "has never been efficient; but it has always been free."[112] On this view, systemic legislative or executive blurring of the line between elements and other factors (like the judge-found facts mechanism embedded in the mandatory Guidelines regime) represents an illegitimate maneuver away from the ideal constitutional model of the jury trial, with all relevant facts on the table and all necessary elements of the

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109. 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

110. *Id.* at 609 (majority opinion).

111. *Id.* at 610-13 (Scalia, J., concurring); *Blakely*, 542 U.S. at 301-02, 305-06 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); Almendarez-Torres v. United States, 523 U.S. 224, 248-71 (1998) (Scalia, J., dissenting) (expressing doubts about applying even sentencing enhancements based on prior convictions without unanimous jury findings).

112. *Ring*, 536 U.S. at 607 (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)).

crime proven beyond a reasonable doubt. It did not matter, for these purposes, that the defendant might have done more or less what he was accused of doing, nor that judges might have been better or more efficient at deciding these questions. Judge-made findings of fact that increased punishment were simply illegitimate.[113] Defendants were entitled to the Sixth Amendment constitutional "honor" of having every fact essential to their level of punishment found by a jury, and judges could not be made to enforce a fact-finding regime that went against this guarantee.[114]

Without a clear theory of what habeas is for, however, courts have missed opportunities to challenge other forms of executive arbitrariness. As it turns out, a closer look at *McCleskey* would have revealed relatively clear evidence of prosecutorial arbitrariness. For example, the state prosecutor withheld evidence related to an allegedly government-coordinated jailhouse confession as part of what the prosecution represented to be the whole government record.[115] This claim was not heard by the Supreme Court for procedural-default reasons that were arguably misapplied by the court of appeals.[116] *McCleskey* therefore stands as a warning against courts blinding themselves both to systemic issues and to standalone violations for arcane procedural reasons. From a writ meant to cut "through all forms" of legal proceedings and reopen the question whether those forms were just "an empty shell," habeas has become too often a hamstrung practice in formalism, blind to systemic issues and blatant executive overreach.[117]

By contrast, as elaborated in Part II, the ancient writ of habeas corpus was concerned, in the broadest terms, with whether the imprisonment was legitimate, and especially with whether the executive acted arbitrarily in obtaining it.[118] The view that habeas cannot factor in intent-free discrimination comes not from anything to do with the history of the writ, but from extrinsic federalism concerns that Justice Scalia himself explicitly dismissed in the Guidelines context.[119] In line with Scalia's Guidelines and capital-sentencing opinions, the modern core of habeas corpus law should strive to ferret out and redress systemic, executive, or legislatively imposed offenses that threaten due process—

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113. Arizona argued that entrusting judges with finding facts essential to imposing capital punishment might lead to less arbitrary outcomes. The Court responded: "The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Id.*

114. *Id.* at 609, 610-12 (Scalia, J., concurring).

115. ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 199-203 (2002).

116. *Id.*

117. Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes & Hughes, JJ., dissenting).

118. *See supra* notes 60-86 and accompanying text.

119. *Ring*, 536 U.S. at 610-12 (Scalia, J., concurring).

those practices, in Scalia's words, that threaten to compromise "those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property," which are "[t]he gist of the Due Process Clause."[120] Such a focus is analogous to the Court's approach to the Guidelines regime invalidated in *Apprendi* and *Booker*, the capital-sentencing regime struck down in *Ring*, and the mob-dominated trials successfully challenged in previous landmark cases.[121] Used this way, the habeas writ could again obtain the stature of the prerogative writ of royal authority from which it developed, without necessarily offending AEDPA's strictures.[122]

No one should pretend that these issues are not difficult. In the Court's words, "*McCleskey* challenges decisions at the heart of the State's criminal justice system" with a claim that, "taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system."[123] But the sweep of the questions raised by cases like Warren McCleskey's should not keep the Court from asking them. If avoidance were the rule, then the *Apprendi* and *Booker* decisions would never have come to pass. After all, who would have wanted to put all those facts back on the table for jury determination, when the system as it stood depended on the facts' being in the hands of judges and the United States Sentencing Commission? The surprising answer is Justice Scalia.

Likewise, judges who are willing to revisit the historic core of habeas corpus and vindicate the history of the writ—not necessarily by overturning the current Court's rulings on innocence and federalism or by striking down AEDPA—should do so by viewing the writ as an opportunity to discipline prosecutorial arbitrariness and systemic illegitimacy. Just as it is not within judges' power to deny criminal defendants the right to fact-finding by a jury, it is not within their power to deny them the one remedy specifically secured to them by the Constitution. This should entail, at least, a shift away from the rote assumption that AEDPA forecloses most meaningful avenues of relief on grounds of federalism and finality, and toward a lively awareness that the Constitution's fundamental

120. Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2024) (Scalia, J., dissenting).

121. *See* Moore v. Dempsey, 261 U.S. 86, 91 (1923), which recognized mob domination of a trial marked by race riots and mass killing. Justice Holmes, writing for the Court, wrote: "We assume . . . that the corrective process supplied by the State may be so adequate that interference by habeas corpus ought not to be allowed . . . . But if the case is that the whole proceeding is a mask . . . neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights." The core of modern habeas corpus law should be the lifting of similar "masks."

122. The Supreme Court's construal of AEDPA in ever-narrower terms is not necessarily an inevitable outgrowth of that statute's text and purpose. *See* Hon. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219, 1220 (2015).

123. McCleskey v. Kemp, 481 U.S. 279, 297, 314-15 (1987).

due-process protections have "historically been vindicated by the writ of habeas corpus."[124] This does not necessarily mean more habeas; rather, the shift would be toward a habeas more trained on the core rights it has historically protected. In a criminal system that has all but done away with the jury trial, those rights will either be vindicated on habeas review or not vindicated at all.

IV. A CASE FOR CORRECTION: CAPITAL MURDER IN TEXAS

What are the types of errors in our modern-day jurisprudence that this reconceptualized habeas power could correct? To clarify the relationship between Justice Scalia's due-process decisions and the habeas regime that this Essay has advanced, this Part offers one example of a systemic illegitimacy that is ripe for habeas corpus review: Texas's sweeping application of its unusually broad capital-murder statute.

Texas allows defendants to be convicted of capital murder based merely on a showing that the murder occurred in the course of committing another felony, even if there is not a unanimous jury finding on whether the defendant actually committed the felony.[125] The capital statute lists kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, and terroristic threat as felonies that can, when they are committed sufficiently proximate to murder, elevate the offense to capital murder.[126] In what appears to be a violation of *Apprendi* and *Ring*'s requirement that juries must make findings on all facts that raise a defendant's maximum punishment level, Texas allows prosecutors to allege multiple "in the course of" offenses — kidnapping and robbery, for instance, or obstruction and terroristic threat — without asking the jury to make a specific finding on any one.[127] For all intents and purposes, then, a capital-murder case in Texas can be brought merely on factual allegations of murder and some other (unspecified) crime. The *Apprendi* Court had specifically treated the "sentencing factors" at issue — which were also separate crimes — as elements of the crime that must be proven, so it is hard to see how these "in the course of" offenses could be anything but elements of capital murder, requiring unanimous jury findings beyond a reasonable doubt.[128] Even so, the Fifth Circuit delicately avoided this issue and deferred to a state court's interpretations of the state law in the 2007 case *Manns v. Quarterman*, upholding the district court's denial of a habeas petition while observing that the Texas Supreme Court had held that these separate

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124. *Hamdi*, 542 U.S. at 556-57 (Scalia, J., dissenting).

125. TEX. PENAL CODE ANN. § 19.03(a)(2) (West 2023).

126. *Id.*

127. *See* Kitchens v. State, 823 S.W.2d 256, 257 (Tex. Crim. App. 1991).

128. Apprendi v. New Jersey, 530 U.S. 466, 496 (2000).

offenses were "manner and means" allegations, not elements, of capital murder.[129]

Perhaps surprisingly, the lone, uneasy concurrence in the case was written by Judge Emilio Garza, a conservative by reputation. The primary source for Judge Garza's misgivings was the criminal due-process jurisprudence of Justice Scalia.[130] Judge Garza specifically pointed out that the Texas capital-murder statute might violate the Due Process Clause by construing elements as means, in violation of *Apprendi* and *Ring*. As applied in the particular case, he "fear[ed] that . . . Texas's capital murder statute, by allowing a combination of jury findings of kidnaping, robbery, or sexual assault, may be . . . an unconstitutional crime."[131]

Judge Garza was right: there is no obvious reason other than pure federalism-based deference and "comity" not to apply the binding Supreme Court precedent of *Apprendi* and *Ring* to the Texas capital-murder statute and strike it down. No matter what Texas's legislature intended or what its court of criminal appeals may say, the Due Process Clause is violated where, as Justice Scalia put it, a fact "essential to imposition of the level of punishment that the defendant receives" is not found by the jury beyond a reasonable doubt.[132] Moreover, because Texas law construes "obstruction" and "retaliation" broadly, Texas's capital-murder statute now includes murders in which the action of a state authority was or could have been involved, or in which the victim felt threatened — in short, almost any murder.[133] In multiple ways, then, the statute undermines the legitimacy of Texas's capital-sentencing regime by making the elevation to capital murder a matter of blatantly arbitrary prosecutorial discretion and jury caprice.[134]

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129. Manns v. Quarterman, 236 F. App'x 908, 915-16 (5th Cir. 2007) (citing *Kitchens*, 823 S.W.2d at 257-58).

130. *Who Is Emilio M. Garza?*, ABC NEWS (Oct. 27, 2005, 9:05 PM), https://abcnews.go.com/Politics/SupremeCourt/story?id=1257663 [https://perma.cc/76NA-DD5P].

131. *Manns*, 236 F. App'x at 918 (Garza, J., concurring).

132. *Apprendi*, 530 U.S. at 610 (Scalia, J., concurring). In the later case *Reed v. Quarterman*, the Fifth Circuit did apply the relevant Supreme Court precedent to determine that the secondary offenses (there, robbery or aggravated rape) should be understood as means of committing rather than elements of the crime; but it did so without citing *Apprendi* or *Ring*, or acknowledging the history and consensus among other states that the relevant elements test required it to consider. Reed v. Quarterman, 504 F.3d 465, 480-82 (5th Cir. 2007).

133. This raises an issue analogous to the one posed by "outrageously or wantonly vile"-type capital aggravators. The Court has observed that, at least as some state courts have interpreted these aggravators, "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

134. *See* Pulley v. Harris, 465 U.S. 37, 54 (1984) (contrasting the "major systemic defects" recognized in *Furman* with "occasionally . . . aberrational outcomes").

An additional, complicating wrinkle in *Manns* relates to the kinds of complex procedural issues revisited by the Supreme Court in *Ramirez*: there was no trace of the jury-unanimity issue in the record below because, as the petitioner argued at the court of appeals, the defendant's appellate counsel had been ineffective in failing to raise it.[135] Moreover, the Fifth Circuit declined to analyze the straightforward due-process attack on the statute acknowledged by Judge Garza, because the petitioner had invoked only one part of the relevant test.[136] In *Manns*, then, the petitioner raised the relevant claim under the relevant test, but — having already received ineffective assistance of counsel in state court, resulting in his failure to develop the claim there — the petitioner was still blocked from federal-court review of a claim that implicated the fundamental legitimacy of the statute.

As the Fifth Circuit noted, its refusal to hear the obviously most relevant issue was a matter of pure procedure: "*Manns* did not go on to argue in the district court (and does not argue here) that . . . Texas's definition of capital murder, as construed by the Court of Criminal Appeals, violates due process. Hence, we do not address it."[137] Because the petitioner had not made quite the right claim, the Fifth Circuit passed on the opportunity to review a systemically arbitrary, legitimacy-threatening aspect of the Texas capital-murder statute that is practically anomalous among the states, and that empowers prosecutors arbitrarily to decide who is charged with a capital offense and who is not. This strikes a blow to the core of judicial power and the jury trial's fundamental protections. Despite later review by the court of appeals, that illegitimacy has now gone unchecked for another seventeen years. Only a reconceptualized habeas jurisprudence can correct this error.

CONCLUSION

As this Essay has argued, the judge's habeas power was, historically, one of the most important common-law checks on the late medieval and early-modern equivalents of what is now prosecutorial power. Without some meaningful form of habeas, the American criminal justice system risks becoming something unrecognizable from the point of view of its own most basic due-process protections: a putatively adversarial system in which prosecutors make all the most important decisions, and judges and juries have increasingly little power to review them. Perhaps in an administrative criminal-law system like the one that the Guidelines attempted to impose, the seemingly anachronistic application of

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135. Manns v. Quarterman, 236 F. App'x 908, 916 (5th Cir. 2007).

136. Schad v. Arizona, 501 U.S. 624, 637-38 (1991).

137. *Id.* at 916 n.7. This is reminiscent of the allegedly defaulted, coordinated jailhouse confession claim in *McCleskey* that never made it to the Supreme Court.

judicial "habeas power" would not be necessary, and there would be no need to talk about the sacred bonds of obligation between the subject and the sovereign, or the "legal miracles" performed by the King.[138] But in the system we have, it is sometimes hard to see where else mercy — or even basic federal due-process law — could come from.[139]

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138. Halliday & White, *supra* note 21, at 607.

139. Another complicating factor, and reason for habeas's potential continuing relevance to the American system, is the odd survival of retributivism there. *See generally* James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003) (describing and criticizing the American retention of retribution, along with incapacitation, deterrence, and rehabilitation, as legitimate goals of incarceration). If the American system didn't still have medieval-style retribution, perhaps it would not need late medieval mercy. Worries about recidivism, rehabilitation, and overall harm-reduction can be met on the plane of administrative adjustments to the shape of the criminal system of the kind that Rachel E. Barkow and others have advocated for. *See generally* RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (describing the unique role of politically-motivated prosecutors in the American scheme and suggesting reforms); JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (providing an exhaustive accounting of the way prosecutors' decisions impact carceral outcomes). It is not clear that retribution can be.