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## Right Problem; Wrong Solution

Joseph L. Hoffmann<sup>†</sup>

Nancy J. King<sup>††</sup>

For the Great Writ of habeas corpus, these are the best of times and the worst of times.

In *Boumediene v. Bush*, the Supreme Court, in a powerful and eloquent majority opinion by Justice Anthony Kennedy, vindicated the right of a non-U.S. citizen, held in custody at a military base outside the United States, to use the writ to challenge the legality of his incarceration.<sup>1</sup> *Boumediene* was a triumph of both the individual petitioner and the judiciary over the powers of the executive, and represents a high-water mark in the long and celebrated history of habeas.

At the same time, in a different context, habeas is under siege. The version of the writ that state prisoners use to collaterally attack their criminal convictions—long a matter of controversy—is drawing fire once again. A recent empirical study, headed by one of the co-authors of this essay, reveals how habeas litigation in the criminal context has become almost completely futile.<sup>2</sup> Excluding the unique category of capital cases, the success rate for

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<sup>†</sup> Professor Hoffmann is the Harry Pratter Professor of Law at Indiana University Maurer School of Law.

<sup>††</sup> Professor King is the Lee S. & Charles A. Speir Professor of Law at Vanderbilt University Law School.

1. *See generally* 553 U.S. 723 (2008).

2. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>. This study is cited and discussed in Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal*

challenging state criminal judgments in habeas is only one-third of 1 percent.<sup>3</sup> Yet such litigation continues to consume scarce resources and engender frustration among federal judges, members of Congress, state government officials, crime victims, and academics.<sup>4</sup>

The new empirical evidence demonstrating the failure of criminal habeas has helped spawn a new wave of scholarly proposals for habeas reform. One such proposal is the subject of Professor Eve Brensike Primus's article, *A Structural Vision of Habeas Corpus*.<sup>5</sup>

There is much to like in Professor Primus's article. First and foremost, we completely agree with her primary premise that habeas litigation in criminal cases cannot be justified as a case-by-case remedy for individual violations of federal constitutional rights.<sup>6</sup> This is the crucial lesson of the recent empirical findings, and it is a lesson that Professor Primus takes to heart. Too many habeas scholars cling to the romantic vision of habeas as a curative for, or a deterrent of, individual case-specific errors in the enforcement of federal rights in state criminal cases.<sup>7</sup> But the hard data, and the structural explanations that lie behind them, obliterate the notion that habeas can possibly serve such a romantic role. Professor Primus, to her credit, accepts this reality and moves on.<sup>8</sup>

We also completely agree with Professor Primus that the solution to the myriad problems of criminal habeas lies in the recognition that habeas has always been about something else—namely, it has always been about addressing structural issues, not individual case-by-case violations.<sup>9</sup> Along these lines, Professor Primus helpfully traces the particular version of habeas used by state convicts today<sup>10</sup> to the federalism crisis of Reconstruction.<sup>11</sup> During the Reconstruction, Congress extended the writ to convicted state prisoners as a way to ensure the obedience of defeated Confederate officials

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*Justice*, 84 N.Y.U. L. Rev. 791 (2009) [hereinafter Hoffmann & King, *Rethinking*].

3. Hoffmann & King, *Rethinking*, *supra* note 2, at 809.

4. See, e.g., *Hearing on Habeas Reform: The Streamlined Procedures Act of 2005: Hearing on S. 1088 Before S. Comm. on the Judiciary*, 109th Cong. 2–3 (2005), available at [http://www.constitutionproject.org/pdf/eisenberg\\_11\\_16\\_05\\_testimony1.pdf](http://www.constitutionproject.org/pdf/eisenberg_11_16_05_testimony1.pdf) (testimony of Ronald Eisenberg, Deputy District Att'y, Phila., Pa.) (“In the last decade, the number of [our] lawyers employed exclusively on habeas work has increased 400% . . . . The truth is that, whether or not they end up reversing a conviction, federal habeas courts drag out litigation for years of utterly unjustifiable delay, creating exorbitant costs for the state . . . .”).

5. 98 CALIF. L. REV. 1 (2010) [hereinafter Primus].

6. See *id.* at 6.

7. See, e.g., Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 360 (2006) (“Repeal or suspension of the [habeas restrictions contained in the] AEDPA [statute] is now required to improve the quality and reliability of criminal justice in the United States.”). The “romantic” vision of habeas was perhaps best articulated by Justice William J. Brennan in his majority opinion in *Fay v. Noia*, 372 U.S. 391 (1963).

8. Primus, *supra* note 5, at 9–12.

9. *Id.* at 6–7.

10. 28 U.S.C. § 2254 (2006).

11. Primus, *supra* note 5, at 13–16.

and sympathizers to federal laws that they still viewed as foreign and hostile.<sup>12</sup>

As Professor Primus also describes, the Supreme Court, under the leadership of Justice William Brennan during the 1960s, came to rely upon habeas to deal with a similar crisis of federalism.<sup>13</sup> The Warren Court prompted that crisis through its so-called criminal procedure revolution, which recognized a plethora of new federal criminal procedure rights to coerce the states into transforming their criminal justice systems.<sup>14</sup> As Justice Brennan explained at the time, the Court's newly minted federal rights could not be enforced properly in most states, due to a combination of two factors.<sup>15</sup> First, some state judges and officials opposed the new rights, viewing their imposition by the federal government as illegitimate and insulting.<sup>16</sup> Second, most states had no post-conviction review process that would allow those new federal rights to be asserted in state court.<sup>17</sup>

These two examples from habeas history—the expansion of the writ after the Civil War and during the Civil Rights Era—reveal that habeas is about more than case-by-case litigation over individual rights. We believe, however, that a true understanding of habeas and its unique role in our society requires pushing beyond the boundaries of criminal habeas altogether. Instead, habeas must be examined in all of its varied contexts and applications.

In a forthcoming book, we have sought to do just that.<sup>18</sup> Our analysis concludes that habeas has always been about providing the federal judiciary with a flexible, but extremely powerful, tool to use whenever a significant societal change or crisis places the governmental balance of powers in serious jeopardy.<sup>19</sup>

Sometimes the balance at stake is the one between the three branches of the federal government. In times of crisis, the executive, often aided and abetted by the legislature, may seek to imprison those who are perceived to

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12. The most important of these new laws consisted of the 13th, 14th, and 15th Amendments to the U.S. Constitution and various federal statutes promulgated to help enforce those constitutional provisions. *See generally* John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209 (1997) (describing history and purposes of the 13th, 14th, and 15th Amendments).

13. Primus, *supra* note 5, at 13–14.

14. *See id.*

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

16. *See id.* at 440 (“[T]he sensitivity of state judges towards federal habeas corpus has been heightened as the Supreme Court has dealt increasingly with state administration of justice in constitutional terms.”).

17. *See id.* at 441 (“I have the personal conviction that if such [state post-conviction] procedures were the rule and not the exception, redress by state judiciaries of violations of the Federal Constitution would ordinarily result, and intervention by any federal court including the United States Supreme Court would become unnecessary.”).

18. *See* NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS CORPUS FOR THE TWENTY-FIRST CENTURY* (forthcoming 2010) (expanding in the first chapter upon the argument presented here), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1517840](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1517840).

19. *See id.* at 10.

pose a threat.

Sometimes, as occurred after the Civil War and during the civil rights era, the balance at stake is the one between the federal and state governments.<sup>20</sup> During such a crisis of federalism, the hostile states may disregard federally guaranteed rights or even seek to imprison those who represent federal interests.

In both kinds of national crises, the federal judiciary—and especially the Supreme Court—must possess the ability to respond flexibly to the particular crisis at hand. Habeas is an inherently flexible remedy. It allows the courts to deal with any kind of governmental overreaching that seriously threatens individual liberty, even when the particular form of overreaching could not have been anticipated. The judiciary can readily adapt the writ to address any kind of new situation involving fundamentally unjust incarceration. This is the great power that led the Framers to view habeas with such respect, even reverence.<sup>21</sup>

But with great power comes great responsibility. Habeas is a potent remedy that the judiciary must use prudently, lest the courts inadvertently drain the deep reservoir of respect that has sustained it for centuries. Sweeping habeas decisions, like *Boumediene*<sup>22</sup> and *Gideon v. Wainwright*,<sup>23</sup> that assert the power of the federal judiciary to block other institutions of government from imprisoning persons in defiance or disregard of the Constitution, are built on that foundation of respect.

The twin attributes of flexibility and prudence have long shaped the story of habeas. Viewed across the entire sweep of American history, and in varied contexts including but not limited to the review of criminal cases, habeas repeatedly has been pressed into service as an emergency stop-gap measure, allowing the courts to intervene and order the release of prisoners who would otherwise be left without an adequate remedy.<sup>24</sup> However, as the issuance of the writ becomes common, lawmakers' attention turns to tailoring a remedy for the specific threat to liberty at hand, developing alternative avenues for judicial review. Eventually, these alternative procedures supplant habeas litigation. When habeas works well, in other words, it gradually brings about its own obsolescence. This story has been repeated time and time again, in controversies involving immigration, terrorism, war, and federal crimes.<sup>25</sup>

The problem with habeas review of state criminal cases is that, even though the particular crisis of federalism that gave rise to its twentieth-century expansion has long since passed, the federal courts continue to entertain, on a routine basis, vast numbers of habeas petitions filed by convicted state

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20. *See id.*

21. *See id.* at 11.

22. *Boumediene v. Bush*, 553 U.S. 723 (2008).

23. 372 U.S. 335 (1963).

24. *See KING & HOFFMANN, supra* note 18, at 12–13.

25. All of these examples, and more, are discussed in our new book. *See id.*

prisoners.<sup>26</sup> This remains true even though such prisoners today generally enjoy the full opportunity to seek judicial review in state court for asserted violations of their federal constitutional rights.<sup>27</sup>

Professor Primus points out that these state courts do not always side with the prisoner, and she clearly sees the glass of state judicial review as half empty.<sup>28</sup> We beg to differ. Compared with the structural barriers to state judicial review that state prisoners faced in the 1960s, which Justice Brennan described, the glass today is much more than half full. All states now provide convicted prisoners with not only an opportunity for direct appeal of their federal claims, but also some form of modern post-conviction review to deal with non-record federal claims, such as ineffective assistance of counsel or prosecutorial withholding of exculpatory evidence.<sup>29</sup> And today, state judges as a rule no longer resist federal law simply because it is federal. Disagreements over the scope and content of federal constitutional rights persist in state courts as well as lower federal courts, but state judges are no longer fighting the enforcement of criminal procedure rules simply because they arise from the federal constitution rather than from state law.<sup>30</sup>

This wholesale acceptance of the supremacy of federal criminal procedure law makes all the difference, once habeas is properly viewed as a flexible remedy for serious disruptions in the balance of government powers. Professor Primus argues forcefully that we “underestimate[] the degree to which state courts still routinely violate defendants’ constitutional rights,”<sup>31</sup> and she provides many examples. But even if her argument holds water, she does not claim that the state courts are failing to vindicate those federal rights *because they are federal*. If this were still true, then we might still be facing the kind of structural crisis involving government powers that habeas is designed to address. We are convinced, however, that this is no longer true.

We acknowledge that reasonable persons might disagree over the “half-full, half-empty” characterization of state judicial review of federal constitutional claims in criminal cases. But the Supreme Court and Congress clearly no longer perceive the need for more aggressive federal habeas oversight of the state courts in non-capital cases.<sup>32</sup> Yet the habeas dance goes

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26. In 2006, habeas corpus petitions filed by non-capital state prisoners made up one of every fourteen civil cases filed in the United States district courts. JAMES C. DUFF, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 162 (2007) (Table C-2), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/front/completejudicialbusiness.pdf>.

27. Hoffmann & King, *Rethinking*, *supra* note 2, at 795, 835–36.

28. See Primus, *supra* note 5, at 16–23 (explaining the reasons behind her view that a “coercive” model of federal judicial review is still necessary).

29. Hoffmann & King, *Rethinking*, *supra* note 2, at 841–42 nn. 187–188.

30. Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 77–80 (1994).

31. See Primus, *supra* note 5, at 17.

32. See Hoffmann & King, *Rethinking*, *supra* note 2, at 805–06 (noting congressional restrictions on habeas review under the 1996 Antiterrorism and Effective Death Penalty Act); *id.*

on, with convicted state prisoners filing tens of thousands of habeas petitions each year that must be defended by states' attorneys and reviewed by federal courts.<sup>33</sup>

In the end, we think Professor Primus does not go far enough with her structural analysis. When Professor Primus refers to the "structural vision" of habeas,<sup>34</sup> she is talking about using habeas to try to force a change in the structure of *state criminal justice*. When we talk about a "structural approach" to habeas, by contrast, we are talking about using habeas to force a change in the *relationship between institutions of government*—either a change in the federal balance of powers, or a change in the balance of federalism. During the 1960s, habeas *did* help to bring about such a change in the balance of federalism, by forcing reluctant states to accept the supremacy of federal criminal procedure law and to provide a state judicial review process appropriately designed to vindicate that law.<sup>35</sup> Problems in state criminal justice may persist, but they are no longer caused by state resistance to federal authority. The problems of today—whether they involve the failings of police, prosecutors, defense attorneys, jurors, judges, or legislators—are not the kinds of problems that habeas is designed to, or can, solve.

This leads to our final observation about Professor Primus's article. After providing a comprehensive review and critique of habeas reform proposals advanced over the past several decades, Professor Primus proposes a truly novel approach. Her approach would convert habeas from a case-by-case remedy into a remedy for constitutional violations that occur in many different cases—to address what she defines as a "systemic" problem.<sup>36</sup> In other words, she proposes to turn habeas into something that would resemble the substance—although certainly not the form—of class-action litigation. She would provide federal attorneys to help individual habeas petitioners develop the facts in support of their claims of "systemic" violations.<sup>37</sup> And she would authorize the federal courts to order the release of individual petitioners, and—via separate habeas petitions handled on a "fast-track" basis—all other petitioners similarly situated.<sup>38</sup> This release authority would be available unless and until the particular state fixed the particular "systemic" problem identified by the federal courts.<sup>39</sup>

We have already explained why we think the problems of state criminal justice today are not the kinds of problems that post-conviction litigation in

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at 812 n.74 (listing limitations on habeas review imposed by the Court since 1973).

33. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 43 (2004) (Table C-2), available at <http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf> (reporting that 18,552 petitions were filed in federal district courts in 2004).

34. See Primus, *supra* note 5, at 1 (article title).

35. See Hoffmann & King, *Rethinking*, *supra* note 2, at 835.

36. See Primus, *supra* note 5, at 5 (defining "systemic" violation).

37. See *id.* at 35–39.

38. See *id.* at 31–33.

39. See *id.* at 32–33.

habeas can solve. Professor Primus's proposal purports to overcome these shortcomings by (1) requiring Congress to pay lawyers to represent (all?) indigent prisoners who allege violations that they claim are "systemic"; (2) eliminating the exhaustion requirement (even for appeals?) so that thousands of additional prisoners would be able to file their claims directly in federal court; and (3) adding a new prerequisite for relief requiring that a petitioner not only clear existing procedural hurdles, but also establish that some unspecified proportion of other prisoners (should have?) succeeded based on the "same" claim.<sup>40</sup> Implementing this complicated new scheme and resolving the many questions left unanswered in the proposal would increase, rather than decrease, the volume, complexity, and cost of habeas litigation in the federal courts. At root, the proposal is yet another version of the same strategy we argue is both obsolete and unwise.<sup>41</sup> The proposal would continue to sink even more tax dollars into post-conviction litigation of claims of error that competent defense counsel likely could have prevented or cured earlier at much lower cost. Moreover, under Professor Primus's proposal, many of these claims, even if valid, will continue to be waived in pleas, forfeited by mistakes, and ignored after conviction as harmless.

Professor Primus's particular version of post-conviction litigation, we fear, would prove especially unworkable. The proposal would effectively place the federal courts in the position of not only catalyzing, but also supervising on an ongoing basis, the reform of innumerable aspects of state criminal justice. We are deeply skeptical that federal courts are appropriate for this supervisory role, since they lack the ability to conduct studies, hold legislative-type hearings, balance competing governmental needs and interests, or deal with complex political pressures.

More importantly, the proposal stands little chance of adoption. Professor Primus acknowledges the need for a quid pro quo kind of trade-off that would provide Congress and the states an incentive to buy into any new idea that could lead to serious state criminal justice reform.<sup>42</sup> But her proposal offers precious little "quid" in exchange for a very large "quo." Habeas litigation would become more costly and complicated under her proposal, for both the federal government and the states. And the states will understandably resist any proposal that may force them to relinquish control over their criminal justice systems to the ongoing close supervision of the federal judiciary. The lack of a more balanced quid pro quo dooms Professor Primus's proposal to the netherworld of academic commentary.

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40. See *id.* at 26–40.

41. This is the strategy of post hoc litigation in the federal courts, as opposed to our suggested strategy that focuses on a comprehensive federal approach to stimulating and supporting reforms at the state level. See generally Hoffmann & King, *Rethinking*, *supra* note 2 (presenting and explaining our suggested strategy).

42. See Primus, *supra* note 6, at 41 (stressing need for "compromise between rival political camps").



We have previously proposed what we think is a more plausible quid pro quo. Our proposal, outlined in an article we published in the *New York University Law Review*, is less ambitious, focusing on the reform of just one key aspect of state criminal justice: the adequacy of defense representation.<sup>43</sup> We consider this to be the most important aspect because competent defense attorneys can help to protect all other rights, for innocent as well as guilty defendants. Our proposal relies on state-driven best practices, contemplates voluntary, not forced, reforms, and includes the “carrot” of federal grant funding for states, to whatever extent Congress might be persuaded to authorize such funding.<sup>44</sup> Perhaps this is also politically unlikely, especially in the current economy. But without such a supply of additional resources for the states, no proposal to reform state criminal justice is likely to make much of a difference. We believe our reform proposal, limited as it is, has a much better chance of being adopted and eventually achieving some kind of success than Professor Primus’s proposal, which would exacerbate even further the cost of post-conviction litigation and put the federal courts in charge of a potentially unlimited reform agenda.

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43. Hoffmann & King, *Rethinking*, *supra* note 2, at 823–25.

44. *Id.* at 823–33.