The General Law of Judicial Mercy

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In 2023, the Supreme Court held that federal prisoners cannot avail themselves of new interpretations of statutes that make their sentences illegal on second or successive motions for habeas corpus. Later that year, a panel of Fifth Circuit judges held that habeas is not a proper remedy if the petitioner is not factually innocent. These cases rely on a close attachment to—and a narrow reading of—current federal habeas statutes. This Note argues that those statutes do not tell the whole story.

There has been a recent scholarly movement toward an old conception of law, the general law of rights. Scholars argue that the Privileges or Immunities Clause of the Fourteenth Amendment defends access to rights that were broadly accepted across jurisdictions when the Amendment was ratified. Taking a less positivist approach than others in the field, this Note argues that general law secures the right for any detainee to have their habeas petition heard by a judge empowered to grant them relief. Relief is warranted if the judge determines, through both their own moral reasoning and consideration of our shared moral consciousness, that ongoing punishment is fundamentally unjust.

Introduction

Over the past several years, the role of mercy in a broader criminal legal structure has garnered much attention. The typical conception of mercy centers around the executive. The clemency authority, which typically has

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relatively few constraints, has been rightly treated as a critical step in the criminal legal system, and academics have often based their critiques of inadequate access to mercy on the placement of the executive.[1]

However, as of late, the focus has expanded beyond executives. Several authors have considered the role of victims in making the sort of moral determinations inherent to mercy,[2] and others have increasingly focused on prosecutors.[3] Yet much less attention has been paid to judges, perhaps because of our conception of judges as neutral purveyors of legal truth rather than moral actors whose judgment is relevant to their decisionmaking. But there have been numerous arguments that, in practice, judges do not act so mechanically.[4] Further, it is reasonable to question whether judges ought to merely apply written law to facts and, indeed, whether that is even possible.

I argue there is a conception of habeas corpus that, in addition to providing guaranteed relief to people who are incarcerated in violation of the law, allows judges to offer mercy to those they believe should not be punished as severely as their sentence suggests. "Habeas" refers to a set of procedures that all serve the same basic purpose: allowing a judge to require that someone be released from detention when that detention is unlawful. There are two broad categories of habeas: pretrial and post-conviction.[5]

1. *E.g.*, Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 3 (2014) (arguing that there should be a baseline consideration of clemency immediately after direct appeal in capital cases, instead of waiting until habeas remedies have been exhausted, often decades later).

2. *E.g.*, Ekow N. Yankah, *Should Racially Vulnerable Victims Show Mercy?*, 102 TEXAS L. REV. 1515, 1517 (2024); Paul G. Cassell, *On the Importance of Listening to Crime Victims . . . Merciful and Otherwise*, 102 TEXAS L. REV. 1381, 1402–03 (2024).

3. *E.g.*, Lee Kovarsky, *Prosecutor Mercy*, 24 NEW CRIM. L. REV. 326, 365–66 (2021); Jeffrey Bellin, *Principles of Prosecutor Lenience*, 102 TEXAS L. REV. 1541, 1557–58 (2024).

4. *See, e.g.*, Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger & Pauline T. Kim, *Competing Approaches to Predicting Supreme Court Decision Making*, 2 PERSPS. ON POL. 761, 765–66 (2004) (finding that statistical measures of ideology outperformed legal experts in predicting the outcomes of Supreme Court cases).

5. In this Note, I refer to pretrial and post-conviction habeas interchangeably, as both are challenges to confinement. However, it is worth disambiguating them somewhat. First, early habeas was almost exclusively available before trial; post-conviction habeas was much less common. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 29 (Harvard Univ. Press paperback ed. 2012) (reasoning that early habeas was used to bring prisoners to trial—rather than to review earlier decisions—because 90% of those using the writ were facing felony or treason charges). This is likely at least in part due to the frequency of capital and corporal punishment. *See* Michael L. Zuckerman, *When a Prison Sentence Becomes Unconstitutional*, 111 GEO. L.J. 281, 291–92 (2022) (noting how lengthy prison sentences were rare in early American punishments). As incarceration became the dominant form of punishment, post-conviction habeas grew in frequency, and today, it is the far more common type of habeas. Second, the two forms of habeas differ in their procedures. Unlike pretrial habeas, post-conviction habeas is a collateral attack, so a person seeking it will likely have already completed trial and direct appeal. Additionally, there is habeas that cannot be adequately described as pretrial or post-conviction. Immigration habeas, for instance, occurs entirely outside of the criminal process. *See, e.g.*, Obando-Segura v. Garland, 999 F.3d 190, 191

Pretrial habeas, which has become fairly uncommon, is one method of challenging ongoing criminal prosecution where, for instance, it violates the Double Jeopardy Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.

Today, a much larger portion of habeas happens after conviction. Post-conviction habeas allows people to challenge their convictions or sentences after the judgment has already been entered. Post-conviction habeas is a collateral attack and is typically available only after a conviction is final on direct appeal.[6] The issues that are cognizable on post-conviction habeas and whether it is available at all will depend on the jurisdictional source. Under the current regime, this means that post-conviction habeas has three broad categories: First, people who have been convicted in federal court can petition for habeas in federal court. Here, they can argue their conviction violates the "Constitution or laws of the United States," or challenge it if new evidence is discovered.[7] Second, people convicted in state courts can challenge their convictions in federal court. This pathway is only available if the conviction violates clearly established federal law or makes "an unreasonable determination of the facts."[8] Third, people convicted in state courts can petition for habeas in state courts.[9] While the federal Constitution does not require states to make habeas available, all have done so.[10] However, the cognizable claims and procedural hurdles vary greatly state to state.

Most often, post-conviction habeas is used to raise extra-record claims discovered only after trial. Ineffective assistance of counsel, prosecutorial misconduct, and judicial bias are common constitutional claims in habeas proceedings.[11] Post-conviction habeas is also the most common forum for innocence claims.[12] Statutory claims, when they are available, often assert

(4th Cir. 2021) (characterizing immigration habeas as proceedings seeking release from civil detention).

6. Lee Kovarsky, *Custodial and Collateral Process: A Response to Professor Garrett*, 98 CORNELL L. REV. ONLINE 1, 2 (2013); COLUMBIA HUM. RTS. L. REV., A JAILHOUSE LAWYER'S MANUAL 268 (13th ed. 2024).

7. 28 U.S.C. § 2241(c)(3); *see* Schlup v. Delo, 513 U.S. 298, 327 (1995) ("[T]he petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.").

8. 28 U.S.C. § 2254(d).

9. *E.g.*, Tex. Crim. Proc. Code Ann. art. 11.01.

10. Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 651 & n.213 (2014).

11. *E.g.*, Strickland v. Washington, 466 U.S. 668, 671 (1984) (ineffective assistance of counsel); Buck v. Davis, 137 S. Ct. 759, 767 (2017) (same); Glossip v. Oklahoma, No. 20-7466, 2025 WL 594736, at *3 (U.S. Feb. 25, 2025) (prosecutorial misconduct); *Ex parte* Halprin, No. WR-77,175-05, 2024 WL 4702377, at *1 (Tex. Crim. App. Nov. 6, 2024) (judicial bias).

12. *E.g.*, Herrera v. Collins, 506 U.S. 390, 398 (1993).

that the conviction was based on an incorrect reading of the relevant criminal statute.[13]

Post-conviction habeas proceedings take the form of a collateral attack, entirely separate from the initial conviction and appeal. Therefore, post-conviction habeas is treated as civil in federal law and in many—but not all—states. The petitioner (the person who was convicted) carries the burden of demonstrating that their conviction or sentence is invalid and that they are entitled to relief.[14] The government then acts as a defendant. However, the modern regime's focus on narrowing the kinds of issues available to petitioners and raising jurisdictional hurdles to relief is largely ahistorical.

Habeas has long been a tool allowing people to challenge the legality of their confinement. While the earliest habeas-like procedures were tools for judges to consolidate their authority, the practice developed by the seventeenth century into a method for judges to check attempts at unjust criminalization.[15] Thus, habeas in seventeenth-century England was both a tool for confined people to challenge their detention and a tool for judges to attack the purported legal basis for incarceration.[16] Given that England lacked a written constitution, judges considered whether parliamentary action violated the accepted norms of English governance and were willing to invalidate acts of Parliament when necessary.[17] Judges had wide latitude to determine not only that punishment was unlawful but that it was unfair. Or, rather, a determination that punishment lacked fundamental fairness could be tantamount to a finding that it was unlawful.

The notion of habeas as a check on executive and legislative overreach was imported to the United States, and the Suspension Clause was adopted largely to prevent the limitations on habeas that Parliament frequently placed on the colonies.[18] Today, however, habeas looks very different. First, habeas has become a primarily post-conviction remedy. Habeas claims are almost always raised as post-conviction collateral attacks on one's conviction or sentence. This means that challenges to a conviction or sentence take a two-track approach. Claims based on the record, such as incorrect evidentiary rulings, are handled on direct appeal, while extra-record claims like ineffective assistance of counsel are raised on habeas. Further, habeas today is much more restrictive than it was at the Founding. The modern regime descended from the Habeas Corpus Act of 1867, which allowed those under

13. *E.g.*, Jones v. Hendrix, 143 S. Ct. 1857, 1863–64 (2023).

14. 28 U.S.C. § 2254(e)(1).

15. *See infra* Part I.

16. Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 769–70 (2013).

17. HALLIDAY, *supra* note 5, at 27, 250.

18. Lee Kovarsky, *Habeas Privilege Origination and* DHS v. Thuraissigiam, 121 COLUM. L. REV. F. 23, 26 (2021).

federal custody to seek relief from federal courts if their detention violated the laws or Constitution of the United States.[19] It also allowed those under state custody to seek federal relief under much more limited circumstances.[20] This, along with shifts in legal philosophy around the turn of the twentieth century, has taken mercy largely out of habeas consideration.

Access to habeas has been further reduced over the last several decades as finality has become a dominant concern in the theory of punishment. Legislative and judicial restrictions on access to habeas have largely restricted the writ to situations where a person's conviction or sentence was unlawful at the time it was handed down, meaning that changes in law are often unhelpful.[21] This has come to a head recently. The Supreme Court held in *Jones v. Hendrix*[22] that the Antiterrorism and Effective Death Penalty Act (AEDPA), a major 1996 amendment to the federal habeas statutory structure, precludes the use of habeas in many instances to challenge a conviction based on an incorrect reading of the relevant criminal statute.[23] Further, a panel of the Fifth Circuit seems to have held that innocence is required for a grant of habeas.[24]

Nonetheless, the rebirth of an old conception of law may allow modern habeas law to reconnect to its roots while also recognizing the role of mercy in judicial decisionmaking. In their recent article, William Baude, Jud Campbell, and Stephen Sachs argue that general law, the body of law understood to be standard across common law systems, was "secured" by the Privileges or Immunities Clause of the Fourteenth Amendment.[25] As such, those conceptions of law that are broadly understood throughout common law history but not directly codified by statute or constitutional text may have a home in the Fourteenth Amendment.

For habeas, this is a powerful notion. For well over a century, three Supreme Court cases have limited the availability of habeas for federal prisoners to the statutory writ, foreclosing access to common law habeas where it differs from the statutes. First, the Court in *Ex parte Bollman*[26] held

19. Ch. 28, 14 Stat. 385, 385 (1867).

20. Kovarsky, *supra* note 10, at 659.

21. *See infra* subpart III(A).

22. 143 S. Ct. 1857 (2023).

23. *Id.* at 1963.

24. *See* Crawford v. Cain, 68 F.4th 273, 286 (5th Cir. 2023) ("[L]aw and justice do not compel issuance of the writ in the absence of factual innocence."), *aff'd en banc*, 122 F.4th 158 (5th Cir. 2024); Lee Kovarsky, *The New Negative Habeas Equity*, 137 HARV. L. REV. 2222, 2260–61 (2024) (describing the Fifth Circuit's panel opinion as embracing what "would be the most important change to habeas law since AEDPA").

25. William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1191 (2024).

26. 8 U.S. (4 Cranch) 75 (1807).

that federal courts lack common law habeas jurisdiction.[27] This case caused relatively little mischief at first because federal prisoners typically sought habeas in state courts. However, when the Court held state habeas for federal prisoners to be a violation of the Supremacy Clause decades later in *Ableman v. Booth*[28] and *Tarble's Case*,[29] no court retained jurisdiction to make or apply common law conceptions of habeas for federal detainees.[30]

But these cases may contradict the general-law framework Professors Baude, Campbell, and Sachs argue was adopted by the Privileges or Immunities Clause. It is understandable to be cautious of whether the post-Reconstruction Court may have underdeveloped the role of Privileges or Immunities—either intentionally or unintentionally—when considering its potential impact on habeas: *Tarble* was decided around the same time as the much-maligned *Slaughter-House Cases*,[31] which left the Privileges or Immunities Clause as dead letter.[32]

This Note differs from other recent work on mercy in two ways: First, judges have been greatly underdiscussed as merciful actors in the modern criminal legal system. The mercy movement has focused on prosecutors[33] and victims,[34] and executives have long since been seen as a source of mercy,[35] but much less attention has been paid to judges. When reformers do consider how judges can help lessen cruelty in the criminal legal system, they often focus on compassionate release.[36] Because compassionate release comes from a statute,[37] it is subject to congressional requirements and could be restricted or even repealed. By suggesting a constitutional nexus for judicial mercy, I avoid this concern.

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27. *See id.* at 94 ("[B]ut the power to award the writ by any of the courts of the United States, must be given by written law.").

28. 62 U.S. (21 How.) 506 (1858).

29. 80 U.S. (13 Wall.) 397 (1871).

30. *Ableman*, 62 U.S. at 515–17; *Tarble's Case*, 80 U.S. at 410–12.

31. 83 U.S. (16 Wall.) 36 (1872).

32. *See id.* at 74 (holding that the Privileges or Immunities Clause of the Fourteenth Amendment cannot be enforced through citizens suing their states).

33. *E.g.*, Kovarsky, *supra* note 3, at 366; Bellin, *supra* note 3, at 1557–58.

34. *E.g.*, Yankah, *supra* note 2, at 1517; Cassell, *supra* note 2, at 1402–03.

35. *E.g.*, Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker*, 4 OHIO ST. J. CRIM. L. 455, 468 (2007); Adam M. Gershowitz, *Mercy for the Masses: A Default Rule for Automatically Triggered Commutations*, 102 TEXAS L. REV. 1431, 1434 (2024); Carol S. Steiker & Jordan M. Steiker, *Capital Clemency in the Age of Constitutional Regulation: Reversing the Unwarranted Decline*, 102 TEXAS L. REV. 1449, 1449 (2024).

36. *E.g.*, Claire M. Griffin, Note, *An Extraordinary and Compelling Case for Judicial Discretion: Nonretroactive Sentencing Changes and Compassionate Release*, 54 U. TOL. L. REV. 237, 237 (2023); Erica Zunkel & Jaden M. Lessnick, *Putting the "Compassion" in Compassionate Release: The Need for a Policy Statement Codifying Judicial Discretion*, 35 FED. SENT'G REP. 164, 164 (2023).

37. 18 U.S.C. § 3582(c)(1).

Second, this Note's discussion of the relationship between general law and habeas is novel. It has long been understood that the Privileges or Immunities Clause protects habeas,[38] but less effort has gone into showing what sort of habeas it protects.[39] I look to the recent resurgence of general law for clarity. The theoretical grounding of general law has been up for significant debate recently,[40] and while I am generally skeptical of the general-law hypothesis, I believe it can help demonstrate a constitutional floor for procedural rights, including habeas. To this extent, I do not quite agree with any single piece of general-law commentary.

This Note proceeds in three Parts. In Part I, I look into the writ's history, tracing from its origins to the Constitutional Convention to understand the meaning of the Suspension Clause. In Part II, I adopt a narrower approach to general law, arguing that it should serve only as a sort of permanent floor on the breadth of a procedural right rather than as the sole determiner of the force of both substantive and procedural rights. Further, I conclude that a general law of habeas, distinct from the statutory alternative, is secured by the Privileges or Immunities Clause. This law allows any judge with competent jurisdiction to release a detainee if their detention is fundamentally unjust such that it is lawless, regardless of whether the detention violates any written law. In Part III, I consider the implications of this conclusion on incarceration, federalism, and judicial power.

I. The Pre-Constitutional History of Habeas

This Part considers the history of habeas in England and its import into the United States. The history of habeas can be extremely helpful in discerning how it should look today. While this history has been treated as simple for a long time, recent work indicates it is much more complex. These complexities suggest the nature of habeas is different from how the writ has typically been treated. They also solve some of the important questions surrounding the Suspension Clause. As a result, it seems that the type of

38. *E.g.*, Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823).

39. *But see* Kovarsky, *supra* note 10, at 613 (arguing that the Privileges or Immunities Clause defends federal habeas for state prisoners). While I do not disagree with Professor Kovarsky's view that the Privileges or Immunities Clause protects federal habeas for state prisoners, I do not believe his argument precludes my own. It is more than possible that the Clause protects both an expansive view of the petitioners eligible for habeas and an expansive view of the arguments available to petitioners.

40. *Compare* Baude et al., *supra* note 25, at 1090–91 (arguing that the Privileges or Immunities Clause secures already existing rights, defined by general law, rather than conferring them), *with* Reva B. Siegel & Mary Ziegler, *The New Abortion Criminalization—A History-And-Tradition Right to Healthcare After* Dobbs *and the 2023 Term*, 111 VA. L. REV. (forthcoming 2025) (manuscript at 44–46) (on file with journal) (stating that general law "can ground a claim for rights recognition under constitutional liberty guarantees").

habeas considered by the Suspension Clause is better described as a power held by judges than as a right held by claimants.

There is a relatively straightforward history of habeas that was dominant until the last few decades: The Privilege was first recognized in the Magna Carta, affirmed and expanded in the Habeas Corpus Act of 1679, and written into the U.S. Constitution as a response to the Suspension Acts enacted by Parliament against the Colonies during the runup to the Revolutionary War.[41] This is a comfortable history. We lacked rights, were given rights, and now have rights.[42] However, this story is overly simplistic, and scholars have worked to revise and complete this generous history of habeas.[43]

For one, a version of the writ existed before the Magna Carta. Early recognition of habeas-like authority is present in the twelfth century via the Assize of Clarendon.[44] King Henry II created regulated processes in order to vest his judges with legal significance.[45] A relevant power to adjudicate required adjudications to be binding, so judges needed to be able to command local authorities to bring the accused before them.[46] As such, a writ of habeas corpus was an exercise of sovereignty issued by a judge but empowered by the monarch's authority. This distinction in origin is essential—the evolution of habeas over the next several centuries depended on it being a power held by judges.

Habeas power developed naturally—that is, erratically—over time, lacking a definitive arc connecting the writ as it existed in the thirteenth century to its early seventeenth-century counterpart.[47] However, the writ was much more familiar by the turn of the seventeenth century—judges used it to review causes of confinement and remedy perceived parliamentary wrongs.[48] By this time, the writ was a prerogative, a power held by judges that they could use at their discretion.[49] The progress of the habeas in this era is very much a product of the era itself, one before it was easy to find and parse

41. *See* HALLIDAY, *supra* note 5, at 2 (criticizing optimistic histories that see habeas as the "result of an inescapable process, begun in a misty past, carried through Magna Carta, past a tyrannical king or two, and finally to its triumph").

42. *Id.*

43. *E.g.*, *id.* at 4; Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 582 (2008).

44. Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1090 (1995).

45. *See* Kristin Saetveit, *Beyond* Pollard*: Applying the Sixth Amendment's Speedy Trial Right to Sentencing*, 68 STAN. L. REV. 481, 485–86 (2016) (noting how the Assize of Clarendon transformed England's law into an evidentiary model and ensured judges could "make their law").

46. Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1496 (1996).

47. HALLIDAY, *supra* note 5, at 16.

48. *See id.* at 24–25, 30 (suggesting that the history of the writ shows habeas was much more of a judicial power than a conflict between the judiciary and the executive).

49. *Id.* at 8–9.

decades and centuries of legal history.[50] The lack of clear connective tissue uniting the writ throughout its history is most likely the result of the English judiciary's ad hoc, pragmatic decisionmaking, rather than a failure of historians to find—or at least to agree upon—a single, internally consistent history.[51] But one way or another, there was a common law habeas writ that allowed judges to release people from unlawful detention well before the passage of the Habeas Corpus Act of 1679.[52]

The 1679 Act is better understood not as a major expansion or reduction of the writ's availability but rather as a sea change in its application. Proponents of the Act will argue that it greatly expanded the reach of the writ.[53] For one, it ostensibly permitted courts to grant habeas during recess, which constituted a large part of the judicial calendar.[54] More importantly, the Act greatly expanded the geographic force of the writ.[55] As the English Empire grew, courts granted writs in further and further locations.[56] Granting a writ is easier, however, than enforcing it, and there is good evidence that Parliament's decision to involve itself in the function of habeas increased the likelihood that a grant of habeas would result in the release of a detainee.[57] On the other hand, parliamentary involvement meant parliamentary regulation, and suspension was a critical regulation of the writ.[58] Parliament regularly suspended habeas, especially in overseas colonies, and "English suspensions were a defining revolutionary grievance against the Crown."[59]

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50. *See* Halliday & White, *supra* note 43, at 589 (noting that English courts in this era often made decisions through unpublished or unwritten opinions); *cf.* HALLIDAY, *supra* note 5, at 65–68 (discussing the seventeenth-century notion of law as coming from the King's practice, through royal prerogative, and the conception of habeas as an extension of that prerogative).

51. HALLIDAY, *supra* note 5, at 9.

52. Kovarsky, *supra* note 16, at 767–68. This is not a point of contention, but it is important to keep front of mind that habeas was created by common law and not by statute.

53. *E.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *133–34 (1765).

54. Habeas Corpus Act of 1679, 31 Car. 2 c. 2, § 3; *see* HALLIDAY, *supra* note 5, at 55 ("There is a longstanding misapprehension that before the Habeas Corpus Act of 1679, King's Bench could not and did not issue writs of habeas corpus *ad subjiciendum* during the courts' vacations."). The importance of this change is somewhat undermined by the fact that courts had long since been obfuscating any general rule against recess habeas. HALLIDAY, *supra* note 5, at 56 (noting that courts would either grant the writ notwithstanding a presumption against vacation writs or fictionalize the date to the last day of the previous term). *But see* EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 81 (London, E. & R. Brooke 1797) (1644) ("[N]either the King's Bench nor Common Pleas can grant the writ but in the term time . . . ."). Still, even Coke acknowledged that chancery courts could grant habeas during vacation. *Id.*

55. Habeas Corpus Act of 1679 § 12.

56. *See* HALLIDAY, *supra* note 5, at 268–69 ("The insistence on extending the 1679 statute to other dominions would generate . . . the writ's greatest potential beyond the British archipelago . . . .").

57. *See id.* at 267–69 (discussing how frustrations over the extraterritorial force of habeas impacted the 1679 statute).

58. Kovarsky, *supra* note 18, at 25–26.

59. *Id.* at 26.

Given the widespread suspension of habeas during the years leading up to the Revolutionary War, it is unsurprising that one primary goal of the Framers was to prevent this sort of abuse in the future.[60] As such, limits on suspension were uncontested at the Constitutional Convention.[61] The states unanimously agreed that the Constitution should presumptively prohibit suspension.[62] The more difficult question of whether the bar on suspension should be unqualified was settled by a 7–3 vote in favor of allowing suspension in a limited set of cases.[63] An early draft of the Suspension Clause set a strict maximum time limit on suspension, but this was eliminated, resulting in essentially the Suspension Clause as it was eventually ratified.[64]

Still, some mysteries remain. The Suspension Clause is placed in Article I, Section 9, among a set of explicit prohibitions on congressional action.[65] While this seems natural—as the Suspension Clause restricts congressional action—it raises an important question: What is the source of habeas? The drafters of the Constitution insisted their work produced a system of limited and enumerated powers,[66] but there is no obvious source of habeas in the text.[67] For habeas to be suspended, it must first be established, but the Constitution does not expressly state who will do the establishing.

Common law connects the dots. If habeas is statutory law, built and implemented by Congress, then the lack of a theoretical Habeas Clause in Article I, Section 8 could not prevent Congress from abolishing habeas, much less suspending it. On the other hand, if it comes from the judiciary, the lack of enumeration is much more plausible. Judges' ability to hold people in contempt of court has been treated as obvious throughout constitutional history even though such a power never appears on the face of

60. *See* Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1955) (discussing the necessity of limits on habeas suspension).

61. Kovarsky, *supra* note 16, at 778–80.

62. *Id.* at 780.

63. *Id.*

64. *Id.* at 779–80. Even as most states based the suspension clauses in their own constitutions on the federal Suspension Clause, some states felt that a strict upper bound on the length of suspension was important enough to include in their own formulation. Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 247 (1965). Other states prohibited suspension altogether. *Id.* at 249–50. Curiously, the word "where" was changed to "when" after the Clause was initially approved. Kovarsky, *supra* note 16, at 780. Whether this change was merely stylistic or intended to prevent the localized suspensions characteristic of the Parliamentary incursions is not obvious.

65. U.S. CONST. art. I, § 9, cl. 2.

66. William N. Eskridge, Jr. & Neomi Rao, *Article I, Section 1: General Principles*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/749#:~:text=Congress%20has%20limited%20and%20enumerated,delegation%20principle%20reinforces%20these%20limits [https://perma.cc/L3Q9-PWT8].

67. Kovarsky, *supra* note 18, at 26.

Article III.[68] The contempt authority is fundamental to the "Judicial Power."[69] Given the history of habeas as a writ granted by judges—and its usage as a check on parliamentary authority—it is at least *cognizable* that it exists within the judicial power.[70]

The history supports this conclusion. The early adoption of the writ at the Assize of Clarendon was because it was essential to the efficacy of the courts' decisions. Without habeas, rulings of the King's judges would not be binding on defendants or local officers.[71] Habeas secured the authority of judges as the English justice system was being formalized.[72] The non-linear development of habeas over the next four centuries resulted from the writ's role as an instrument of judicial authority—it was a simple, pragmatic solution to practical problems caused by positive law. This is likely why judges felt so comfortable obfuscating ostensible rules governing the availability of habeas in the common law regime: The rules were judicially imposed, not judicially discovered.[73] The primary lessons of the English and constitutional history are twofold: First, there is a common law writ of habeas corpus that existed before and outside of parliamentary action, and second, that writ is a power held by judges, rather than a right of claimants whose boundaries are enshrined in positive law.

The development of habeas from its earliest ancestors to the prerogative imported to the United States is complicated, nonlinear, and murky—but that does not mean it lacks value. Rather, it reflects a changing conception in the role of judges over time. Judges developed habeas into a tool for protecting claimants from unfair punishment, even where punishment may be ostensibly legal. The Framers integrated this authority into the constitutional fabric, allowing the judiciary to make similar decisions that punishment, even if permissible by positive law, is unacceptable nevertheless.

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68. Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 793 (1987); U.S. CONST. art. III.

69. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821). *But see Young*, 481 U.S. at 815 (Scalia, J., concurring in the judgment) ("Prosecution of individuals who disregard court orders (except orders necessary to protect the courts' ability to function) is not an exercise of '[t]he judicial power of the United States.'" (quoting U.S. CONST. art. III, § 1)). The *Young* majority threads this needle by arguing that it would be impossible for courts to exercise judicial power effectively without the inherent power to hold people in contempt. *Id.* at 796 n.8 (majority opinion).

70. *E.g.*, Kovarsky, *supra* note 16, at 775.

71. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 15 (1980).

72. *See id.* (noting that the process of formalizing the English legal system was largely done by vesting habeas power in judges).

73. This stands in contrast to other aspects of the common law notion that judges do not *create* law but instead *find* it. *See* BLACKSTONE, *supra* note 53, at *69 (arguing that common law judges should "maintain and expound the old [law]"). On the question of whether finding law is possible, rather than a mere legal fiction, compare Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 532–36 (2019), with Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1759 (1991).

II. General Law and Habeas

The history discussed in Part I is far more than a genealogy of the writ. Rather, as scholars and judges place increasing emphasis on history in constitutional interpretation, it can have dispositive legal significance.[74] The recent work of William Baude, Jud Campbell, and Stephen Sachs suggests that the Privileges or Immunities Clause of the Fourteenth Amendment had the effect of "securing" liberties that were understood in the general law but not codified in statutory or constitutional text.[75] Their method looks not to how any one court behaved but rather to how courts in general viewed the law to determine whether there is sufficient evidence to suggest there was a robust and applicable general law over the region as a whole.[76] In subpart A, I describe the general-law approach and defend a narrower version of it. In subpart B, I consider the antebellum history of habeas for federal prisoners in both state and federal courts. I conclude by finding that the Privileges or Immunities Clause secures the right of a detainee to have their case for mercy heard by a judge who is empowered to release them if justice so requires.

A. The Fourteenth Amendment and General Law

"General law" refers to the widely accepted common law practices across jurisdictions that influenced, but did not necessarily control, local jurisprudence.[77] While the sweep toward positivism and written law in American jurisprudence over the past century has made modern courts wary of unwritten law,[78] Founding-era legal theorists believed that judges should consider "generally recogni[z]ed and long established law, which forms the substratum of the laws of every state."[79] No individual court can set these rules. They can be adopted, ignored, or modified in any court, but their content can only be changed by the movement of jurisprudential norms in society at large.[80] And when the federal courts seek to apply the general law

74. *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) (applying a positivist framework to determine, descriptively, that originalism is the law); Kevin Tobia, Neel U. Sukhatme & Victoria Nourse, *Originalism as the New Legal Standard? A Data-Driven Perspective* (Georgetown Univ. L. Ctr., Research Paper No. 2023/15, 2024) (surveying the frequency of Founding-era documents in constitutional law opinions by each Justice).

75. Baude et al., *supra* note 25, at 1193.

76. *Id.* at 1195–96.

77. *Id.* at 1190; Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 749 (1838).

78. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928); Erie R.R Co. v. Tompkins, 304 U.S. 64, 73 (1938); Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020).

79. United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694).

80. Baude et al., *supra* note 25, at 1194 (describing how an individual jurisdiction alone could not define the content of a general-law rule).

in the interest of horizontal uniformity, what matters is "how *most* states do things, not whatever the policymakers in one particular state have said."[81]

Today, general law has been declared dead.[82] None less than Justice Holmes argued that it never existed in the first place.[83] And while the extent of general law's demise may be overstated,[84] it is certainly dormant. The popularity of general law was done in by concerns over vertical uniformity.[85] In diversity cases and others where Congress has not created its own rules of decision, federal courts typically must decide whether their results should be consistent with the federal courts in other jurisdictions (horizontal uniformity) or the state court that would have jurisdiction if the case were instead being heard there (vertical uniformity).[86] And both horizontal and vertical uniformity have considerable advantages. Horizontal uniformity prevents courts—particularly circuit courts and the Supreme Court—from making inconsistent decisions with identical facts.[87] If a district court hears a case with identical facts to one settled by the circuit already, the result will be the same, regardless of the underlying state law. On the other hand, vertical uniformity may be a more precise method of enacting the purpose of diversity jurisdiction: applying the law with less risk for bias or strategic filing decisions.[88] In this way, it may promote cooperative federalism to a greater extent than horizontal uniformity.[89]

It is not obvious which uniformity principle to obey when they conflict. For decades, federal courts developed a common law of their own that advanced horizontal uniformity at the expense of vertical uniformity, in total

81. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 503–04 (2006).

82. *Erie*, 304 U.S. at 78–79 ("There is no federal general common law."). *But see* Nelson, *supra* note 81, at 503, 506 (providing a contrary view finding that general law is not obsolete).

83. *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting).

84. Amy J. Griffin, *Problems with Authority*, 97 ST. JOHN'S L. REV. 115, 153 (2023) ("[R]eports of the death of general law are exaggerated.").

85. Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 276 (2008).

86. *Id.* at 283–84.

87. As the Court has previously explained:

> For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the state in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule.

Black and White Taxicab, 276 U.S. at 529–30.

88. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 75 (noting the concern that "[in] attempting to promote uniformity of law throughout the United States, the doctrine [of general law] had prevented uniformity in the administration of the law of the State").

89. *Id.*

opposition to what courts do today.[90] While the normative claim is difficult, the descriptive one is much simpler: *Erie* and its progeny reversed the aim of uniformity. They adopted the essentially unchanged practice of federal courts acquiescing to the choice-of-law rules that would govern the case if it were in state court.[91] Notably, however, these decisions focused on how best to use diversity jurisdiction, and that was not the only way that courts made decisions based on general law.[92] Baude, Campbell, and Sachs argue it also served as a method of defending fundamental rights.[93] There was a robust practice in the antebellum United States of state courts blocking state-government actions that violated the rights—unwritten but unalienable—of the people against whom those actions were taken.[94]

Baude, Campbell, and Sachs argue that today, the location of these rights is in the Privileges or Immunities Clause of the Fourteenth Amendment.[95] In discussions about Section 1 of the Fourteenth Amendment, those championing the Privileges or Immunities Clause were as confident in its necessity as they were vague about its contents.[96] This vagueness may be intentional, however, if the purpose of the Clause was not to enact into law any particular set of rights, but rather to defend the generally accepted bounds beyond which governments could not go—i.e., the general law of rights.[97] If the Privileges or Immunities Clause was intended to secure and constitutionalize rights in the general law that were absent or unclear in the written law, it makes sense that its advocates would be sure of its necessity but unsure of its contents. Those contents would, at minimum, need description, and very likely necessitate mass doctrinal surveys for rights that are rarely invoked.

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90. Perschbacher & Bassett, *supra* note 85, at 283–84. *Compare* Swift v. Tyson, 41 U.S. 1, 18–19 (1842) (embracing general federal common law), *with Erie*, 304 U.S. at 78 (eliminating general federal common law in most cases), *and* Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) (reaffirming *Erie*).

91. Perschbacher & Bassett, *supra* note 85, at 283–84.

92. *Erie*, 304 U.S. at 71–73; Baude et al., *supra* note 25, at 1203–04.

93. Baude et al., *supra* note 25, at 1203–04.

94. *See* William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1471–75 (2024) (discussing nineteenth-century use of general law within the context of the Second Amendment to the United States Constitution). For an argument that the *Bruen* test is unworkable even if general law were accepted, see generally Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023) (critiquing *Bruen*'s "originalism-by-analogy" approach). For an argument that the Supreme Court's decision in *Bruen* misreads the history of firearm ownership and usage in the United States, see generally Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CALIF. L. REV. (forthcoming 2025) (on file with author) (arguing that originalist accounts misread the history of gun culture in the United States).

95. Baude et al., *supra* note 25, at 1225.

96. *Id.* at 1191–92.

97. *Id.* at 1192, 1223.

This concept has important uses in understanding how early American jurists understood rights. Suppose the government were to take action so reprehensible that the framers of the state and national constitutions neglected to include it in the text. If several states then took this action and courts unanimously held that it was impermissible (notwithstanding the lack of written law to that effect), that would provide compelling evidence that the action was impermissible under the general-law hypothesis.[98] But the devil, here, is in the details. Suppose instead that courts blocked the government action in only one out of thirteen states where the issue arose. That seems insufficient for a finding that the Fourteenth Amendment constitutionalized this purported right. Would it be sufficient for courts in five states to have protected the right?[99] Seven states? Ten? Twelve?[100] If the general-law hypothesis is accepted, it seems evident that unanimity is sufficient and equally obvious that a substantial consensus is necessary,[101] but that is roughly where the easy questions end. It is unclear, for instance, how to count states that did not face an issue. Further, a court's holding on one issue may not be dispositive on a related but different issue arising in the future.

To avoid these methodological concerns, I propose a more modest solution by restricting my analysis of the general-law hypothesis to procedural rights.[102] This focus on procedural law works to prevent a situation where people have a vast array of unenforceable rights. Further, it works to recognize that there is a moral component to judicial decisionmaking without allowing judges to fundamentally alter the legal

98. Of course, this raises significant problems. A government action so reprehensible that it went unwritten likely has not been attempted often enough to give rise to a robust doctrine against it.

99. *See* Baude et al., *supra* note 25, at 1224 ("In the nineteenth century, the general law was understood as distinct from what most states then did, and identifying it was not the same as identifying the majority rule in a state-by-state survey.").

100. *See id.* ("[E]ven if nearly every state had recognized a particular right of *local* citizenship . . . that would not itself transform such a right into one of general citizenship, included among the 'privileges or immunities of citizens of the United States.'").

101. Determining whether there is consensus has typically been done through state counting. *E.g.*, Roper v. Simmons, 543 U.S. 551, 564–65 (2005); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022). However, there are significant problems with this method of determining consensus. *See* Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (And Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99, 117–21 (2023) (comparing the use of state counting as a methodology in *Dobbs* to its use as a criticism of *Brown v. Board of Education*, 347 U.S. 483 (1954)).

102. By procedural rights, I refer to rights to a procedure. For instance, the right to petition for habeas from a judge empowered to grant it is a procedural right because what is important is access to the procedure, not the judge's decision. The right is vindicated even where a judge thoughtfully considers, and eventually denies, the petition. (Of course, if the petitioner is detained in violation of some written law, including the Constitution, that will raise other constitutional issues.)

process.[103] Because the right to have one's habeas claim heard is a procedural right, it is possible that the Privileges or Immunities Clause provides a constitutional floor. This requires looking at how courts throughout the country treated habeas from the Founding through the passage of the Fourteenth Amendment and considering what that says about historical habeas practice.

A further concern with the use of general law is that it may be interpreted as requiring a history-and-tradition nexus for every purported unenumerated right. While some commentators may consider this a worthwhile result, this Note assumes that proper constitutional interpretation evolves to respond to changing circumstances and the cultural evolution of American society. However, I do not believe that the general-law method, or at least the general-law-of-procedural-rights method, requires strict originalism. Professors Siegel and Ziegler worry that general law could be used to "explain *Dobbs*, and thus to 'ground and *redefine* substantive due process' . . . . insofar as it applied a history-and-tradition standard that was the 'intellectual descendant' of general law."[104] And while this is likely the path Baude, Campbell, and Sachs see for a return to general law, it is not a necessary one.

Rather, it could be the case—and, I argue, it is the case—that the general law of procedural rights does not define what those rights are but rather sets an interpretive floor. That is, if some procedural right has become more central to society in the time since the adoption of the Fourteenth Amendment, the Constitution may expand to cover that right. This is a straightforward application of living constitutionalism.[105] The effect of general law on procedural rights, I argue, is for the opposite situation: cases where a procedural right has been restricted beyond what would have been acceptable when the Fourteenth Amendment was ratified. To this extent, the law during Reconstruction serves as a sort of hard limit on the capacity for societal change and judges' own moral reasoning to reduce access to procedural rights. Judges employing living constitutionalism may find that

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103. *See* Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 TEXAS L. REV. 1, 44 (noting that moral readers of the Constitution "must start with the text of the Constitution" before imbuing broad or ambiguous sections with moral reasoning).

104. Siegel & Ziegler, *supra* note 40, at 45 (citations omitted) (first quoting Baude et al., *supra* note 25, at 1252; and then quoting Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L & PUB. POL'Y 539, 552 (2024)).

105. *See* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1257 (2019) (noting Justice Brennan's formulation of living constitutionalism, which recognizes that while "[t]he Framers discerned fundamental principles through struggles against particular malefactions of the Crown," "our acceptance of the fundamental principles has not and should not bind us to those precise, at times anachronistic, contours" (quoting William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986))).

people are entitled to stronger procedural rights than were in place when the Fourteenth Amendment was ratified, but the Privileges or Immunities Clause means that they may *never* find that people are entitled only to procedural rights *weaker* than those present at the time of ratification.

This approach to general law is far narrower than that suggested by Baude, Campbell, and Sachs, and this is unsurprising—they are originalists, and I am not. However, the distinctions between substantive and procedural law, and history as the entire law versus history as a floor, carry water. Because habeas is a procedural right, it is next necessary to determine the nature of the habeas writ at the time of the passage of the Fourteenth Amendment.

B. The Antebellum History of Habeas

In this subpart, I look through the history of common law habeas from the Founding through the passage of the Fourteenth Amendment. This history can largely be seen as a conflict between the Supreme Court and all other courts on two primary issues: First, there is disagreement on the source of habeas law. While the Supreme Court held that common law cannot be the source of habeas jurisdiction, lower federal courts generally did not see this as limiting their authority to create a common law structure for substantive habeas law. This is important both because modern habeas law is based on the assumption that relief can only be granted on the basis of statutory substantive law and because the Privileges or Immunities Clause can serve as a jurisdictional grant. Second, the Supreme Court held late into the antebellum period that state courts could not grant habeas to federal detainees. However, state courts typically read this holding extremely narrowly. State and lower federal courts' resistance to limitations on habeas, and the broader presumption of mercy in the antebellum period, suggest that the framers of the Fourteenth Amendment would have understood it to protect structures that allow for judicial mercy.

The history of discretionary habeas in the federal courts is odd. The story generally goes that the Supreme Court in *Ex parte Bollman* held that there was no federal common law of habeas, thus killing discretionary habeas then.[106] While this seems to be *Bollman*'s effect, the analysis here requires a more careful look into the context and intended scope of the opinion, especially given the Marshall Court's willingness to make deeply pragmatic and often-political decisions.[107]

The facts of *Bollman* are unique. Under indictment for killing Alexander Hamilton, Aaron Burr saw it best to travel to the Western Territories of the

106. *E.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1565 (2021) (Thomas, J., concurring).

107. *See, e.g.*, James M. O'Fallon, Marbury, 44 STAN. L. REV. 219, 242–43 (1992) (arguing that the Court's decision in *Marbury* was based on largely political and pragmatic concerns).

United States.[108] He then sought to establish an empire in the region.[109] Burr and several co-conspirators attempted to raise an army but were thwarted when General James Wilkenson (himself involved in the conspiracy) seized Erick Bollman and Samuel Swartwout.[110] Both men were granted habeas, first in New Orleans and again in Charleston, but the orders were ignored as the men were transported by warship to Baltimore.[111] The Senate overwhelmingly voted to suspend habeas to prevent the men from being released.[112] However, the House rebuked this attempt after the initial excitement calmed.[113] After the D.C. Circuit granted an arrest warrant to try Bollman and Swartout for treason, the prisoners sought a writ of habeas corpus from the Supreme Court.[114] There were only two questions: whether the writ should be granted and whether the Supreme Court had jurisdiction to issue it.[115] Justice Marshall quickly disposed of the former issue, holding that conspiracy to levy war against the United States does not constitute treason.[116] The Court gave the latter issue more analysis, eventually concluding that Congress had granted it the power to issue habeas writs even when the case was in another federal court, and that doing so was a valid exercise of the Exceptions Clause.[117]

However, the Court analyzed additional issues in dicta. Marshall began the opinion by stating: "As preliminary to any investigation of the merits of this motion, this [C]ourt deems it proper to declare that it disclaims all jurisdiction not given by the [C]onstitution, or by the laws of the United States."[118] It was unnecessary to consider the Court's common law jurisdiction because the Court determined it had statutory jurisdiction.[119] But

108. Eric M. Freedman, *Milestones in Habeas Corpus: Part I: Just Because John Marshall Said It, Doesn't Make It So:* Ex parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 559 (2000).

109. Robert Longley, *What Was the Burr Conspiracy?*, THOUGHTCO. (Mar. 29, 2022), https://www.thoughtco.com/burr-conspiracy-5220736 [https://perma.cc/4MQQ-4T8B].

110. Freedman, *supra* note 108, at 559.

111. *Id.* at 559–60.

112. *Id.* at 560.

113. *Id.*

114. *Id.* at 560–61.

115. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 125 (1807).

116. *Id.* at 126.

117. *Id.* at 94–95, 100–01. The dispute here is that the jurisdiction grant that allowed the Court to hear this case was ostensibly original, and the Constitution does not provide for original habeas jurisdiction. This is almost identical to the constitutional problem in *Marbury*. The Court distinguished *Bollman* by holding that since habeas always comes after another court has issued an arrest warrant, the writ is inherently appellate. *Id.* at 92, 100–01.

118. *Id.* at 93.

119. Today, in fact, the Court strongly avoids turning statutory interpretation cases into constitutional problems. *See* United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional,

nevertheless, Justice Marshall took up the question, writing: "Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."[120] Justice Marshall said this point was obvious and also one that had been repeatedly stated by the Court, but he neglected to cite any authority for his proposition.[121] Today, courts often cite *Bollman* for the dictum that federal courts cannot make habeas decisions based on common law.[122] This argument is nonobvious. The Court refers to common law jurisdiction, not common law rules of decision, and it is unclear why Congress's grant of habeas jurisdiction would prevent the Court from producing substantive common law within that jurisdiction.

The interpreted result of *Bollman* has gone beyond the holding of the case. In addition to accepting *Bollman*'s holding that there is no common law habeas jurisdiction, courts have also understood it to prevent grants of habeas for reasons other than those contemplated by Congress.[123] But this is not a necessary outcome of *Bollman*'s jurisdictional holding. Consider diversity: Congress, of course, has the authority to bind federal courts' diversity jurisdiction.[124] Until *Erie*, however, the rules of decision in these cases were created by federal courts.[125] Like any other common law rule, the legislature could change these rules of decision, subject to constitutional demands. Even accepting that federal courts' habeas jurisdiction does not extend past congressional enactments, courts still must make the substance unless Congress creates rules of decision.[126] The text of the jurisdictional grant considered in *Bollman* is as follows:

> And be it further enacted, [t]hat all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and

but also grave doubts upon that score."); *see also* Camreta v. Greene, 563 U.S. 692, 707 (2011) ("In general, courts should think hard, and then think hard again, before turning small cases into large ones.").

120. *Bollman*, 8 U.S. at 93.

121. *Id.* at 93–94.

122. *E.g.*, Edwards v. Vannoy, 141 S. Ct. 1547, 1565 (2021) (Thomas, J., concurring).

123. *E.g.*, Crawford v. Cain, 68 F.4th 273, 285–86 (5th Cir. 2023) (focusing on the "law and justice" requirement of AEDPA), *aff'd en banc*, 122 F.4th 158 (5th Cir. 2024).

124. U.S. CONST. art. III, § 2; State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967); 28 U.S.C. § 1332.

125. Swift v. Tyson, 41 U.S. 1, 18–19 (1842).

126. Unlike in the diversity context, there is no applicable state law to fall back on. *See* 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

> agreeable to the principles and usages of law. And that either of the justices of the [S]upreme [C]ourt, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, [t]hat writs of habeas corpus shall in no case extend to prisoners in [jail], unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.[127]

Congress did not provide its own rules of decision. Rather, it granted statutory jurisdiction to consider habeas cases without upsetting common law substantive rules. Further, if Congress had narrowed the pre-Founding conceptions of habeas, that would have raised serious Suspension questions that can be easily avoided by understanding "agreeable to the principles and usages of law" and "power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment" to allow for common law habeas substance.

While *Bollman* has never been reversed (and has been gospel since the Reconstruction era), courts did not treat it as dispositive in habeas cases in the decades after it was decided.[128] Even in the federal courts, there was a willingness to apply common law notions of habeas, *Bollman* notwithstanding, in some cases.[129] While *Bollman* certainly dampened the scope of the common law writ in federal courts, much of its effect was moving those cases to the states rather than preventing them from being decided altogether.[130]

And the states had an incredibly robust habeas doctrine to fall back on. By 1860, every state had a habeas provision in its constitution.[131] Most of the original states also passed habeas statutes, although they did so at a moderate pace, relying heavily on courts' common law jurisdictions.[132] States typically borrowed much of the language from the Habeas Corpus Act of 1679—some even copied the statute directly without changing references to offices that existed only in England.[133] Some states only provided statutory jurisdiction to habeas cases outside of term time, relying on the courts' common law authority when they were in session.[134]

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127. Judiciary Act of 1789, ch. 20, § 14, I Stat. 73, 81–82 (emphasis omitted).

128. Freedman, *supra* note 108, at 596.

129. *Id.*

130. *See* Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 MINN. L. REV. 265, 270–71, 276–81 (2007) (describing the prevalence of state-court habeas for federal detainees).

131. Oaks, *supra* note 64, at 249–50.

132. *Id.* at 251–52.

133. *Id.* at 253. For example, Georgia and South Carolina relied so heavily on the English act that they were later forced to amend their habeas statutes. *Id.* at 253–54.

134. *Id.* at 254–55.

William Duker argues that states are the natural providers of habeas relief to both state and federal detainees under the original Constitution.[135] Until *Ableman v. Booth*, jurists generally understood that state courts could grant habeas to people detained by the federal government.[136] The *Ableman* Court, however, blocked the Wisconsin Supreme Court from granting habeas to Booth, who was convicted of violating the Fugitive Slave Act by aiding the escape of Glover, a runaway slave.[137]

Ableman was distinct from the typical state-court grant of habeas to a federal detainee in multiple ways, and it is not clear which of these is dispositive. For one, the Wisconsin Supreme Court's ruling relied on a finding that the Fugitive Slave Act was unconstitutional.[138] Perhaps state courts can generally grant habeas to federal detainees, but only by finding that there is a factual or legal problem with the case itself, not by holding that a federal law is unconstitutional. It seems more reasonable for a state court to hold that a person's detention is unlawful than that every detention based on a given law is. Further, this case was deeply politically charged: *Ableman* was decided two years after *Dred Scott*[139] and two years before the start of the Civil War.[140] Given the Taney Court's close ties to pro-slavery politics and the possibility that a significant judicial decision would accelerate the oncoming war, the Court likely would have reached this decision regardless of whether it was legally required. The Court reaffirmed its holding that state courts could not grant habeas to federal detainees two decades later in *Tarble*.[141]

The availability of state habeas for federal prisoners was widely accepted before *Ableman* and *Tarble* eliminated it entirely.[142] In the first half of the nineteenth century, states considered it an essential part of their sovereignty and people generally had far more trust in their state than the federal government.[143] This sovereignty was not without limits—the states tended to hold that habeas for federal prisoners was limited to extrajudicial

135. DUKER, *supra* note 71, at 135.

136. *Id.* at 149.

137. Earl M. Maltz, *Slavery, Federalism, and the Constitution:* Ableman v. Booth *and the Struggle over Fugitive Slaves*, 56 CLEV. ST. L. REV. 83, 89–91 (2008). Booth initially petitioned a local judge for the release of Glover, but federal authorities did not honor the request. A mob formed and successfully freed Glover, leading to the charges against Booth. *Id.*

138. Ableman v. Booth, 62 U.S. (21 How.) 506, 510 (1859).

139. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

140. *Ableman*, 62 U.S. at 507; *Dred Scott*, 60 U.S. at 393; *Civil War Begins*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Civil_War_Begins.htm#:~:text=At%204%3A30%20a.m.%20on,beginning%20of%20the%20Civil%20War [https://perma.cc/9C3E-EPC2].

141. Tarble's Case, 80 U.S. (13 Wall.) 397, 409 (1871).

142. Pettys, *supra* note 130, at 271.

143. *Id.*

confinement—but even these limits were subject to change.[144] After *Ableman*, most state courts still held that they could grant habeas to petitioners held extrajudicially.[145]

While the states were allowing federal prisoners to petition for habeas, they were also providing significant limitations on punishment for state prisoners, including those who had already been convicted. It was common practice for felonies whose statutory punishment was death to be handled far less severely. In some cases, people who had been sentenced to death would be set free by the judges who sentenced them if it was their first offense and they showed remorse by praying for forgiveness.[146] In this way, early-American justice systems had a presumption against finality and wide latitude for judges to offer mercy.[147]

These trends—availability of state habeas for extrajudicially held federal detainees, the presumption against finality, and the power of judges to limit sentences—all suggest a common judicial framework for considering mercy in the antebellum United States.[148] State courts were limited in their ability to grant habeas to federal prisoners who had access to the judicial process due to the Supremacy Clause, but they still did what they could on the margins.[149] With regard to state prisoners, on the other hand, courts had essentially unbounded authority to exercise mercy, even after conviction, if they felt that it would be unjust or inappropriate to go through with the full punishment.[150] These grants of mercy were not called habeas, but they served the purpose of habeas in a broader law-as-integrity framework.[151] That is,

144. *See id.* at 280 ("The Massachusetts Supreme Court signaled the change in 1851, when it stated, in dictum, that it possessed the power to grant habeas relief to persons 'held under color of process from the courts of the United States.'" (quoting *In re* Sims, 61 Mass. (7 Cush.) 285, 309 (1851))).

145. *Id.* at 285.

146. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 7–9 (2012). The first-offense requirement often had give. *Id.* at 8.

147. Zuckerman, *supra* note 5, at 290–91.

148. *Id.*; Pettys, *supra* note 130, at 271.

149. Pettys, *supra* note 130, at 280–82.

150. BIBAS, *supra* note 146, at 7; Zuckerman, *supra* note 5, at 291–93.

151. *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (arguing for a "law-as-integrity" approach that focuses on shared community values in the law). Habeas provides an interesting balance between positivist and non-positivist approaches. On one hand, it seems that we should not let judges frolic too much and substantially inhibit the function of the justice system. *Cf.* Schlesinger v. Holtzman 414 U.S. 1321, 1322 (1973) (rebuking Justice Douglas for attempting to exercise judicial authority beyond accepted procedural limitations). On the other hand, there is value in allowing judges to determine that a person's sentence must be altered, notwithstanding the lack of written law requiring that result. The most natural split, to me, seems to be an understanding that positivist methods are immensely beneficial for creating tenable procedural rules. This virtue of positivism is less apparent for substantive law. It is in this way that my proposed structure makes sense. The right to have one's habeas petition considered is an outcome of procedure, so we use

there was no true distinction between a punishment being unlawful (in violation of a written law) and being *lawless*—unacceptable to our moral sensibilities.

III. Prerogative Habeas in Practice

Fundamentally, I argue that the Privileges or Immunities Clause secured a minimum right to habeas procedures, not as they were written about in the seventeenth century, but how they were practiced in the nineteenth century, creating a constitutional floor significantly above the habeas provided by the 1867 Act and separate from the floor provided by the Suspension Clause. By securing general-law procedural rights, the Privileges or Immunities Clause prevents Congress or the courts from denying access to a right widely accepted before the passage of the Fourteenth Amendment. However, this does not guarantee that holdings will remain the same.[152]

Of course, not every habeas petition will be granted; nineteenth-century jurisprudence did not hold imprisonment to be unconstitutional. Rather, this means that every prisoner must be able to petition for habeas from a judge empowered to grant it.[153] This recognizes two fundamentally different ways that judges can exercise their habeas authority: First, a person who is detained in violation of the Constitution or laws of the United States (as well as, for state prisoners, the constitution or laws of their state) is entitled to have their habeas petition *granted* under the Suspension Clause. Second, a person whose conviction or ongoing sentence is lawless—violating our communal morality such that it is fundamentally unjust—is entitled to have their petition *considered* by a judge empowered to grant it under the Privileges or Immunities Clause.

In this Part, I describe three major implications of recognizing Privileges or Immunities habeas power. First, this recognition would call into question statutory restrictions on the availability of habeas. Second, it would raise federalism questions worth addressing. Last, it requires asking what it means for an ongoing sentence to be fundamentally unjust. Judges will be required to face this question continually, and answering it requires considering the role of the judiciary in our constitutional politics.

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general law (a positivist method) to determine whether it is appropriate for the petition to be considered at all. For the substantive question of whether to grant it, however, law-as-integrity approaches will generally lead to better results.

152. *See supra* note 99 and accompanying text.

153. There has been considerable concern over potential "abuse of the writ." *E.g.*, McCleskey v. Zant, 499 U.S. 467, 470 (1991). It is possible, however, to guarantee access to the courts without guaranteeing access to the courts' time. If petitions are duplicative, frivolous, or incoherent, courts could certainly dispose of them summarily.

A. Statutory Restrictions on Habeas

In addition to enlarging the reach of habeas and shifting considerable power to judicial mercy, adopting this model of habeas would upset the finality movement of the late twentieth century. A bevy of major statutes passed by Congress to prevent people from challenging their sentences would be unenforceable.[154] The most relevant statute impacted by this interpretation is the Antiterrorism and Effective Death Penalty Act (AEDPA).[155]

AEDPA restricts habeas in several ways. For federal prisoners, it creates a one-year statute of limitations.[156] Further, inmates can only bring second or successive claims if new facts are discovered or the Supreme Court recognizes a new rule of constitutional law and makes it retroactive.[157] Because the Supreme Court has held it cannot both recognize a new rule and make it retroactive in the same case, a second-or-successive petitioner must wait until someone else brings a habeas claim through which the Court makes the claim retroactive. Still, the statute of limitations does not toll during this time.[158] Further, in *Jones v. Hendrix*, the Court held that its prior determination that a sentence is illegal but not unconstitutional cannot be redressed with a second or successive claim.[159] And although the Court in *Jones* did not reach the question, there is no reason to believe its logic would be any different if the Court found the claimant's conviction unlawful, or even if Congress repealed the statute of conviction.

AEDPA also restricts access to federal-court habeas for state prisoners. In general, a federal court cannot grant habeas on a claim that was "adjudicated on the merits" in state court unless the state-court adjudication involved an "unreasonable application of[] clearly established Federal law" or an "unreasonable determination of the facts."[160] Because the doctrine of procedural default prohibits federal courts from hearing claims not brought in earlier state-court proceedings,[161] the AEDPA bar cannot be avoided by saving strong claims for federal habeas.

Holding that the Privileges or Immunities Clause guarantees access to a judge empowered to grant habeas would change much of this; however, it

154. *E.g.*, Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 208–09 (2014).

155. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

156. This statute for the first claim will typically run from the date on which the conviction becomes final: the date on which all direct appeals are exhausted. 28 U.S.C. § 2255(f). For second and successive claims, the statute runs from the moment the claim becomes available. *Id.*

157. *Id.* § 2255(h).

158. Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 75 (2015).

159. 143 S. Ct. 1857, 1863 (2023).

160. 28 U.S.C. § 2254(d).

161. Litman, *supra* note 158, at 65.

would not eliminate every odious part of AEDPA. For one, AEDPA could no longer prevent a willing federal judge from holding that a non-constitutional change in law is sufficient to grant habeas to a federal prisoner. If a judge with jurisdiction over the case thought the continuing sentence was fundamentally unjust, they could cut it short. However, general-law habeas alone would not make this mandatory. Other scholars have admirably argued that the limitations on second or successive claims for federal prisoners violate the Suspension Clause,[162] and I agree, but the Privileges or Immunities Clause does something slightly different: It embraces a more comprehensive set of claims, while making mercy within those claims permissive. Notably, the Suspension Clause and general-law habeas are both floors and are not mutually exclusive. As such, combined robust doctrines of Suspension Clause and Privileges or Immunities habeas would *require* federal judges to grant habeas to federal detainees where the ongoing detention violates written law, and it would *allow* federal judges to grant habeas to federal detainees when the ongoing detention is fundamentally unjust. The same is true of state judges and state habeas.

B. Federalism

Some serious questions about federalism remain. Can and must federal judges hear state prisoners' claims? I argue the answer depends on whether the state has established a sufficient alternative. The Privileges or Immunities requirement will be satisfied if state courts can grant these claims. However, if the state does not allow these claims (or handles them insufficiently), the federal government has two options: First, the Supreme Court can hold that the state procedure is insufficient and require the state to expand it. While the federal government can require state courts not to discriminate against federal claims, however, it cannot require them to entertain a category of claims.[163] On the other hand, if state courts were not to hear habeas at all—or, in the extreme, state courts were not to exist—they would not be required to hear Privileges or Immunities claims. In this case, federal courts could hear the claim. In any event, Congress could empower federal judges to provide Privileges or Immunities habeas even if a state allows it through a straightforward application of Section 5 of the Fourteenth Amendment.[164]

Alternatively, can and must state judges hear claims that federal prisoners should be released? If the answer to either question is yes, then the Fourteenth Amendment overturned *Ableman*, and *Tarble* was wrongly

162. Steve Vladeck, *35. The Unnecessary Cruelty of* Jones v. Hendrix, ONE FIRST (July 10, 2023), https://stevevladeck.substack.com/p/35-the-unapologetic-cruelty-of-jones [https://perma.cc/LQ23-V876].

163. Testa v. Katt, 330 U.S. 386, 391–92 (1947).

164. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

decided. Of course, the Reconstruction Court generally opposed a broad reading of the Privileges or Immunities Clause, so it is unsurprising that it did not apply the Clause to habeas.[165] However, I do not argue here that *Tarble* is necessarily in direct opposition to the Fourteenth Amendment.[166] Rather, *Tarble* merely assumes that there will always be inferior federal courts.

Article III holds that "[t]he judicial Power of the United States[] shall be vested in one supreme Court[] and such inferior Courts as the Congress may from time to time ordain and establish,"[167] suggesting that the creation of lower federal courts is entirely the prerogative of Congress. This is the Madisonian Compromise.[168] At the Constitutional Convention, the delegates could not agree on how much power should be given to the lower federal courts, as any power granted to them would necessarily be taken from the state courts.[169] So, James Madison suggested a solution: Rather than describing what lower federal courts would look like, the Convention would kick that can down the road and handle the question in Congress.[170] When the time came, Congress created a system of lower federal courts, which have existed ever since. As such, we have never run into some of the most challenging questions about what state courts can and cannot instruct the federal government to do. But the fact that lower courts can hear habeas cases renders *Tarble* practicable, if not correct or beneficial.

However, every federal habeas claim would need to go to the Supreme Court if inferior federal courts did not exist. *Bollman* held this to be an acceptable use of the Court's appellate jurisdiction.[171] This outcome, however, is untenable; the Court does not have the bandwidth to hear that number of cases. The problem becomes even clearer in the case of mandamus. The Supreme Court has held both that state courts cannot grant mandamus against federal officers and that writs of mandamus are not

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165. As Justice Miller wrote for the Court in its infamous *Slaughter-House* decision:

> It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1872).

166. For an excellent argument that *Tarble* is wrong because of the Suspension Clause and the history of state habeas for federal detainees, see Pettys, *supra* note 130, at 309–11.

167. U.S. CONST. art. III, § 1.

168. Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 54 (1975).

169. *Id.* at 53–54. This is not to suggest that federal court jurisdiction is inherently exclusive. Rather, a case is only heard in one court, so a case that is heard in a federal court cannot also be heard in a state court.

170. *Id.* at 54.

171. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807).

appellate, meaning they cannot be heard originally by the Court.[172] Without lower federal courts, no court would have the power to grant mandamus against federal officers. Thus, either the Constitution requires federal courts or state courts may issue mandamus in the absence of federal courts.

The same should be true of habeas. So long as federal courts exist, the Privileges or Immunities Clause does not require state courts to hear petitions for habeas from federal prisoners. Further, it does not require the federal government to comply with those orders when state courts issue them.[173] However, if Congress were to abolish the lower federal courts—or, more likely, disempower them from hearing these claims—then the state courts would be the only courts with the power and capacity to comply with the demands of the Fourteenth Amendment. States and the federal government alike can avoid these federalism concerns through voluntary compliance with the Fourteenth Amendment. If a government, state or federal, allows for its judges to hear claims that a detainee's confinement is fundamentally unjust, satisfying the Fourteenth Amendment obligation, then it does not have to be concerned with raw exercises of power by the judges of another sovereign.

C. Moral Reasons for Discretionary Habeas

Thus far, I have refrained from considering the content of the moral decisions made by judges. Because my focus has been on when and how judges *may* make judicial decisions for moral reasons, I have generally avoided the question of when they *ought* to. However, one may argue that, if it is never true that a judge ought to grant habeas as a result of moral reasoning, then it is of little importance whether they can.

It seems to me that there are five basic kinds of reasons a judge could determine that punishment has become fundamentally unfair: change in our understanding of the facts; change in law; change in society; change in judges; and change in the person being punished. Many would agree that at least one of these reasons, in at least some cases, could make it morally right to relieve a prisoner from punishment.

Change in Facts. Compared to the other reasons listed, there is stronger consensus that a change in our understanding of the facts can justify cutting punishment of an offense short. In the most extreme cases, when we learn that someone is innocent, nearly everyone would agree that person should no

172. McClung v. Silliman, 19 U.S. (6 Wheat.) 598, 604–05 (1821); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–76 (1803).

173. While I believe the federal government must comply with some grants of state habeas to federal prisoners, I do not think it is the Privileges or Immunities Clause that compels such a result. *See* Pettys, *supra* note 130, at 309–11 (arguing that the Suspension Clause compels federal compliance with habeas grants by state courts).

longer be punished.[174] However, the Supreme Court has held that innocence is not an independent constitutional ground for habeas.[175] And while many states allow for innocence as an independent basis for habeas, petitioners with powerful innocence claims are often held in prison or executed nevertheless.[176]

Additionally, there are changes in understanding of the facts that do not go to innocence. Some—like a finding that the defendant is intellectually disabled—are cognizable on habeas because they go to culpability and affect the calculus of how much punishment is justified.[177] But other findings that go to culpability—such as the fact that the defendant was involved in a murder but was not the triggerperson—would not be cognizable on habeas.[178] It is (minimally) arguable that a non-triggerperson should receive less punishment than a triggerperson. But absent a finding of constitutional error, a judge does not have the authority under current doctrine to grant habeas to a claimant after new facts reveal their involvement in an offense was less than previous thought. This is just one sort of case where judges could decide that the severity of the initial sentence is unacceptable and use their habeas authority.

Change in Law. Traditionally, change in law has been one of the most important reasons for habeas. A change in law can potentially justify reducing one's sentence for a few reasons: First, it could be that the Constitution is now interpreted to prohibit a certain sentence for some category of crime or defendant.[179] Second, a court could interpret a statute to exclude some conduct.[180] Third, a legislature could reduce the maximum

174. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 157–60 (1970) (advocating for a strong finality doctrine while still arguing for "an exception to the concept of finality where a convicted defendant makes a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent man").

175. Herrera v. Collins, 506 U.S. 390, 399–400 (1993).

176. *See* Prosecuting Att'y, 21st Jud. Cir., *ex rel.* Williams v. State, 696 S.W.3d. 853, 859–60, 869 (Mo. 2024) (denying habeas despite the prosecutor's assertion that the defendant was innocent); *see also* David A. Leib & Jim Salter, *Missouri Executes a Man for the 1998 Killing of a Woman Despite Her Family's Calls to Spare His Life*, ASSOCIATED PRESS (Sept. 24, 2024, 8:01 P.M.), https://apnews.com/article/missouri-execution-marcellus-williams-8be20e2f252992610a30fa0cfef4185a [https://perma.cc/HR7E-USSL] (noting that the victim's family argued for clemency).

177. Atkins v. Virginia, 536 U.S. 304, 306–07 (2002).

178. Tison v. Arizona, 481 U.S. 137, 158 (1987).

179. *See, e.g.*, Weems v. United States, 217 U.S. 349, 358, 366, 382 (1910) (holding that fifteen years of hard labor is unconstitutional under the Eighth Amendment as a punishment for falsifying government records); Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the death penalty for people who were under the age of eighteen at the time of the offense).

180. *E.g.*, Rehaif v. United States, 139 S. Ct. 2191, 2194 (2019).

statutory sentence for an offense.[181] Last, a legislature could legalize something altogether. In each of these cases, however, it is not necessarily the case that this change in law will be applicable to people who have already been sentenced.[182] Judges, believing that the sentencing disparities between people convicted of the same crime before and after a change in law is unfair, could certainly be justified in seeking to act mercifully.

Change in Society. A related reason for a judge to act mercifully is change in society. If there is clear evidence that society does not feel as strongly about actions it previously thought were reprehensible, continuing the punishment of someone who took those actions might be unjust. Take, for instance, the change in support for marijuana legalization over time, which increased from just over 10% in 1969 to 70% in 2023.[183] If punishment is to be reprobative in nature—and if it is society's dissatisfaction that forms the basis of reprobation—then society changing its collective mind could be reason to cease punishment or lessen its severity.

Change in Judges. An exceptionally controversial reason for punishment is change in judges. Judges can change in two ways: One judge can change perspective over time, or, alternatively, a judgeship can move from one person to another. In either of these cases, the reason for reducing a sentence offered by a judge would merely be that they themselves oppose the inflicted punishment. This implies that the judge believes that the sentence was wrong from the time it was issued, or else the belief could be categorized, at least partly, as some other reason. There is strong opposition to the notion that judges would take action based only on their personal beliefs.[184] Descriptively, however, there is strong evidence that judges do make these sorts of decisions.[185] And, there is normative support for the

181. *E.g.*, *Fair Sentencing Act*, AM C.L. UNION, https://www.aclu.org/issues/criminal-law-reform/fair-sentencing-act [https://perma.cc/6DBS-XA5W] (noting Congress's decision to reduce the sentencing disparity between crack and powder cocaine from 100:1 to 18:1).

182. *See, e.g.*, Jones v. Hendrix, 143 S. Ct. 1857, 1863–64 (2023) (holding that the federal prohibition on second-and-successive habeas applications applies to claimants who seek to get relief based on *Rehaif*).

183. Lydia Saad, *Grassroots Support for Legalizing Marijuana Hits 70%*, GALLUP (Nov. 8, 2023), https://news.gallup.com/poll/514007/grassroots-support-legalizing-marijuana-hits-record.aspx [https://perma.cc/P7YB-HMCZ].

184. Consider, for instance, the words of then-Judge John Roberts:

> Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of J. John G. Roberts, Jr.).

185. *See* Martin et al., *supra* note 4, at 765 (finding that statistical measures of ideology outperformed legal experts in predicting the outcomes of Supreme Court cases).

proposition that judges ought to weigh the moral consequences of their decisions.[186] My purpose here is not to prove that judges ought to make moral decisions—although I am sympathetic to that approach. Rather, I raise change in judges as a potential moral reason for reducing punishment because it is a plausible situation in which a judge could use habeas notwithstanding the lack of positive law demanding release.

Morally Relevant Change. Finally, and perhaps most weighty, reducing a person's sentence could be justified because that person changed in some morally relevant way. Most modestly, it could be that they are old (or sick), and the combination of their lack of threat to the community and the excessive harm done to them by imprisonment renders any further punishment excessive.[187] In other cases, it may be that the passage of time has in some way changed the nature of punishing them.[188] Further, it could be the case that the person has experienced genuine moral change and their punishment can no longer be morally justified.[189] In each of these cases, the argument is that, due to some change in the situation of the person being punished, the moral foundations of punishment are absent. Their sentence no longer prevents crime, they no longer deserve punishment, or society no longer gets any value from expressing its dissatisfaction with their actions. In these cases, a judge could decide—and, in at least one case, has decided[190]—that the lack of supporting positive law is no reason to continue unjust punishment.

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My aim here is not to argue that any one of these aforementioned reasons offers a sufficient moral basis to grant habeas, although I believe each can be. Rather, my point in enumerating the kinds of moral decisions that could lead a judge to grant habeas without positive-law grounding is to add context to the normative weight of Privileges or Immunities habeas. These reasons could all plausibly justify reducing someone's sentence, but there are cases where each is unavailable under current doctrine. If punishment is morally indefensible in any such case, Privileges or Immunities habeas could fill a critical procedural gap.

186. Dworkin, *supra* note 151, at 239, 258–60.

187. 18 U.S.C. § 3582(c).

188. This is most notably the case for people sentenced to death, for whom the passage of time is not, in itself, the sentenced punishment. Some have argued that executing someone after an excessively long wait constitutes cruel and unusual punishment. Lackey v. Texas, 514 U.S. 1045, 1045–46 (1995) (memorandum of Stevens, J., respecting the denial of certiorari).

189. *See* B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1159 (2001) ("[C]apital punishment cannot be deserved where the prisoner has undergone an authentic ethical conversion . . . .").

190. United States v. Holloway, 68 F. Supp. 3d 310, 311 (E.D.N.Y. 2014).

Discretionary approaches to habeas protected by the Fourteenth Amendment fill a major gap in the landscape of mercy. Under the current doctrine, judges are unable to help people who do not deserve the punishment afforded to them. Those who are innocent but are convicted through a fair trial, who were convicted under incorrect readings of law or laws that no longer exist, and who have shown a capacity for genuine personal change for the better are all without recourse. Recognizing the general-law framework for discretionary mercy would allow judges to regain the role they played in mercy at the Founding, interpreting the law as written through the lens of what is right.

Conclusion

Ultimately, the habeas right recognized today would be unrecognizable to a Founding-era observer. While access to formal habeas procedures for post-conviction petitioners has increased, the number of courts and judges empowered to exercise habeas authority has drastically decreased. This is only a part of a larger trend over the last half-century whereby courts have been willing to maintain rights access while restricting remedies. That this process has been so complete in the case of habeas should be a concerning harbinger. If the very means by which we test the validity of executive action is increasingly unavailable, then it spells doubt across the constitutional system.

What's old is new again, and the increasing adoption of general-law methods allows habeas to regain some of its former might. This requires adopting a strong judicial prerogative to grant habeas relief not only when a petitioner's punishment violates the laws or Constitution of the United States but also when it violates our shared notions of fundamental justice. That prerogative is consistent with the vast bulk of the Anglo-American legal tradition, even if it is somewhat out of place in the last half-century of American jurisprudence. We should strive for a constitutionalism of integrity, channeling our historic legal systems through our modern moral consciousness. If done properly, a new, modern habeas regime could recalibrate a core constitutional framework for mercy.