

VIII

Beyond Conviction and Sentencing

Section Highlights

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What Happens Next?

If a defendant is convicted, he or she may elect to challenge the conviction. This can be accomplished in two ways. The defendant (now convict) can appeal. Alternatively, the convicted criminal can file a habeas corpus petition. In practice, however, appeals almost always precede habeas corpus petitions. The purpose of this section is to discuss appeals and habeas corpus, with attention to the purpose and scope of the appeals process and current issues, such as recently imposed limitations placed on appeals. We conclude with a brief look at clemency, which is gubernatorial or presidential pardons of certain convicted criminals.

 **Underlying Concepts**

Direct and Indirect Appeals

Once a person is convicted and sentenced, there are two ways to challenge the trial outcome. A defendant may file either a direct appeal or an indirect appeal, also known as a writ of habeas corpus. *Habeas corpus* translates as “you have the body,” and the writ requires the person to whom it is directed to either produce the person named in the writ or release that person from custody. A direct appeal is essentially a request made by the now-convicted defendant to a higher court (the appeals court) to review the trial to determine whether it was fair. There is no federal constitutional right to an appeal, but every state allows a direct appeal, either by statute or state constitutional provision.

The writ of habeas corpus is considered an indirect appeal because it does not directly challenge the defendant’s conviction but instead challenges the authority of the state to incarcerate the defendant. The state defense to a habeas writ is based on the conviction, however—that is why the defendant has been incarcerated. Habeas corpus is an ancient legal remedy, dating back at least to the Magna Carta. It is often referred to as the Great Writ.

There is no time limit for filing a habeas petition, unlike direct appeals, which in most jurisdictions must be filed within a set period, usually several months. However, Congress recently restricted the use of habeas corpus by imposing time limits on federal habeas petitions if there is evidence of intentional delay by the defendant that injures the prosecution’s case. Additionally, Congress and the Supreme Court have restricted habeas corpus by imposing limits on how such appeals are filed and pursued.

Precedent and *Stare Decisis*

After an appeals court considers either a direct or an indirect appeal, typically it issues a written opinion explaining its decision. These opinions serve to explain to both the current litigants and future litigants why the appeals court decided the appeal the way it did. Under the common law system, a final decision by an appeals court creates a precedent. This precedent governs the court issuing the decision as well as any lower, or “inferior” courts—primarily the trial courts. The common law system, developed in England, was brought to America by the early colonists. Many of the principles of the common law, including precedent and a belief in *stare decisis*, remain in force today in American courts. Thus, all courts in a state are bound to follow the decisions of the highest court in the state, usually known as the state supreme court. All courts in the federal court system are bound to follow the decisions of the United States Supreme Court.

Precedent is binding only on those courts within the jurisdiction of the court issuing the opinion. Thus, a decision of the Idaho Supreme Court is not binding on a court in Arizona. Arizona courts are not subject to the jurisdiction or control of Idaho courts and thus are free to interpret the law differently from Idaho courts, if they see fit to do so. Decisions from courts in other jurisdictions, though not binding, may be persuasive, however. This simply means that another court may give consideration and weight to the opinion of other courts. Thus, an Arizona court may consider, if it chooses, the judgment of an Idaho court, or an American court can consider the judgment of a British, Australian, New Zealand, or any other common law court. Courts may do this when faced with an issue that they have not dealt with but that other courts have examined.

Stare decisis means “let the decision stand.” Under the principle of *stare decisis*, if there is a prior decision on a legal issue that applies to a current case, the court will be guided by that prior decision and apply the same legal principles in the current case. *Stare decisis*, then, is the principle behind establishing the value of prior decisions, or precedent. It is a principle that ensures that issues that have been decided one

way will continue to be decided that way in future cases. As a result of the reliance on precedent and the principle of *stare decisis*, common law courts are able to provide litigants with some degree of predictability regarding the courts' decisions.

Precedent establishes a legal principle, but not every pronouncement that a court makes in a ruling establishes precedent. Pronouncements that establish precedent are known as **ratio decidendi**, meaning “the reason for the decision.” Ratio decidendi is the legal principle or rationale used by the courts to arrive at their decisions. Additional supporting statements are called **obiter dicta** (meaning “things said by the way”), or simply dicta. These statements are other legal or nonlegal arguments used to support the ratio decidendi and do not set a precedent.

Precedent is not necessarily unchangeable. Judge-made law may be set aside, or overruled, by an act of the legislature if the constitution permits the legislature to do so. Additionally, the court that issued the precedent may overrule it, or a higher court may reverse the decision of a lower court. If an intermediate-level appeals court decides an issue one way and the losing party appeals to a higher appeals court (such as a state supreme court), the higher court may reverse the decision of the lower court. Higher level courts are not bound by the judgments of lower courts. They are bound only by the decisions of courts above them in the court structure.

Stare decisis, then, involves a respect for and belief in the validity of precedent. Precedent is simply the influence of prior cases on current cases. Understandably, courts are reluctant to reverse decisions they made previously, as this is a tacit admission of error. Courts do so, however, when presented with a compelling justification. Thus, *stare decisis* is not an inflexible doctrine but merely the general rule. There are always exceptions, as with most areas of the law.

Alternatively, rather than expressly overrule a prior decision, a court may instead seek to distinguish the prior case from the present case on grounds that the facts are slightly different. By doing so, the court can avoid overruling a prior decision while coming to what it considers the proper result in the present case. Until a decision is expressly overruled, it stands as an accurate statement of legal principles, or “good law.”

Judicial Review

Given the varied sources of law, and the ambiguous language of many statutes and constitutional provisions, it is inevitable that laws will conflict or interpretations of statutes will differ. When this happens, who decides which law is paramount? In the United States, the answer to that question is the courts, through the power of judicial review.

Judicial review simply means the power of the court to examine a law and determine whether it is constitutional. To make this determination, judges must examine the law and compare it with the Constitution. This requires them to interpret the language of both the statute and the Constitution. If the judge determines the law is constitutional, he or she upholds the law; if not, the judge declares it unconstitutional and therefore void. For example, the Fourth Amendment prohibits “unreasonable” searches. Suppose a state legislature passes a law allowing police officers to search anyone they encounter on a public street. Is this law constitutional? Or does it violate the prohibition on unreasonable searches? To answer this question, judges must examine the history and meaning of “unreasonable” as contained in the Fourth Amendment. They do this by examining precedent.

Judicial review is not specifically provided for in the Constitution. Rather, judicial review is judge-made law. *Marbury v. Madison* (1803) established the authority of the United States Supreme Court to engage in judicial review of the acts of the other branches of government. The Supreme Court stated in *Marbury* that it was the duty of the judiciary to interpret the Constitution and to apply it to particular fact situations. The

Court also said that it was the job of the courts to decide when other laws (acts of Congress or state laws) were in violation of the Constitution and to declare these laws null and void if they were. This is the doctrine of judicial review.

Appeals

When convicted criminals appeal their conviction, they ask a higher court to examine the trial court's decision to determine whether the proper procedure was followed. In other words, the convicted argue that the trial court made a legal error that prevented them from receiving a fair trial. The United States Constitution requires a criminal defendant receive due process. This term is obviously vague, but it has consistently been interpreted by courts and legislatures as requiring that a criminal defendant receive a fair trial. The appeals process helps ensure that trial courts apply the law correctly. Appeals can also be filed at a higher level. For example, if an intermediate appellate court rules against a party, that party may be able to appeal to the next highest court, such as a state supreme court or one of the U.S. circuit courts of appeals.

Appeals are quite common in the American criminal justice system, but the Supreme Court has never held that they are constitutionally required; the Constitution does not specify the granting of a certain number of appeals to each convicted criminal. In *McKane v. Durston* (1894), the Supreme Court stated that a "review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law." Even in the face of this decision, every state and the federal government has rules providing a certain number of appeals.

When an appeal is heard, the appellate court can reach a number of decisions. Most often it will either affirm or reverse the lower court's decision. As an alternative, it may remand the case for further proceedings consistent with its opinion. This is akin to asking the lower court to "do it again the right way." Importantly, if an appeal is successful, that does not mean that the defendant will be released from confinement. Consider this example: If an appellate court reverses a lower court's decision to exclude evidence, this simply means the evidence should have been excluded, not that the defendant should be acquitted and released. Instead, the defendant is merely entitled to a new trial. Many students are familiar with the famous *Miranda* case (*Miranda v. Arizona*, 1966), in which the Supreme Court laid down rules for advising criminal suspects of their Fifth Amendment privilege against compelled self-incrimination. Though the Court agreed with Ernesto Miranda's argument, it only granted him a new trial, whereupon he was convicted and sentenced to more than 20 years in prison.

The Appellate Process

The appellate process has evolved to the point that the U.S. Supreme Court has granted a number of protections to appellants. These protections are intended to ensure access to trial transcripts, the right to counsel, and the right to be free from government retaliation for successful appeals. Our concern is more with those protections than with the rules for appeals one finds in one jurisdiction to the next.

In *Griffin v. Illinois* (1956), the Supreme Court decided that indigent defendants *must* be given access to trial transcripts. The Court held that the government cannot act "in a way that discriminates against some convicted defendants on account of their poverty" (p. 18). Why is access to the transcripts important? They form the basis for an appeal. When a court reporter documents the trial, a record of the trial is produced. If, say, the defense attorney objects to the introduction of some testimony or a piece of physical evidence, the objection is noted in the record. Such objections often provide the basis for an appeal.

The Supreme Court has also required that counsel be provided to indigent defendants on appeal, as a matter of either equal protection or due process. This decision was reached in the case of *Douglas v. California* (1963), where the Court concluded that the government must provide indigent defendants with counsel to assist in their appeals of right. It stated that “where the merits of the *one and only* appeal an indigent has as of right are decided without benefit of counsel . . . an unconstitutional line has been drawn between rich and poor” (p. 357). The Court also held that more than just counsel is necessary—the counsel needs to be effective (*Evitts v. Lucey*, 1985).

The Court has not been so sympathetic when it comes to discretionary appeals:

A defendant in respondent’s circumstances is not denied meaningful access to the State Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court, since at that stage, under North Carolina’s multitiered appellate system, he will have, at the very least, a transcript or other record of the trial proceedings, a brief in the Court of Appeals setting forth his claims of error, and frequently an opinion by that court disposing of his case, materials which, when supplemented by any pro se submission that might be made, would provide the Supreme Court with an adequate basis for its decision to grant or deny review under its standards of whether the case has “significant public interest,” involves “legal principles of major significance,” or likely conflicts with a previous Supreme Court decision. (*Ross v. Moffitt*, 1974, pp. 614–615)

It is also important that the government not retaliate following successful appeals. This was the decision reached in *North Carolina v. Pierce* (1969), a case in which a defendant was not only reconvicted after a successful appeal but punished more harshly the second time around. The Court concluded that due process required that the “defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge” (p. 725). A similar decision was reached in *Blackledge v. Perry* (1974), in which the Supreme Court held that a prosecutor’s decision to increase the charge against a defendant who was convicted but appealed was unconstitutional.

Timing Issues

A convicted criminal can appeal at one of two stages during the adjudication process. An appeal first can be filed prior to the reading of the verdict. Appeals also can be filed following adjudication. Appeals filed prior to adjudication are known as **interlocutory appeals**. The only interlocutory appeals likely to succeed are those addressing critical constitutional questions and those that have no bearing on the defendant’s guilt (or lack thereof). If either of these conditions is not met, defendants face what is known as the **final judgment rule**. This rule limits appeals until the court hands down its final judgment as to the defendant’s guilt.

In *Cohen v. Beneficial Industrial Loan Corp.* (1949), the Supreme Court held that only a few interlocutory appeals are likely to succeed, namely, those that involve the following:

a small class [of pre-adjudication decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. (p. 546)

Some additional examples shed light on the Court’s observation. In *Stack v. Boyle* (1951), the Court held that the defendant could appeal a judge’s decision rejecting the defendant’s argument that bail was excessive,

in apparent violation of the Eighth Amendment. In another case (*Abney v. United States*, 1977), the Court held that a defendant's appeal of a preadjudication order denying dismissal of the indictment on double jeopardy grounds was permissible. Both of these appeals dealt with critical constitutional questions, which is why they were granted.

Appeals filed after adjudication, in contrast, are subject to few restrictions. Such appeals can raise a number of issues, perhaps challenging the following actions:

1. An involuntary guilty plea,
2. The use of a coerced confession,
3. The use of evidence gained pursuant to an unconstitutional search or seizure,
4. The use of evidence obtained pursuant to an unlawful arrest,
5. A violation of the privilege against self-incrimination,
6. The unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to him or her,
7. A violation of the Fifth Amendment's double jeopardy clause,
8. A conviction based on a jury that was unconstitutionally selected and impaneled,
9. The denial of effective assistance of counsel, or
10. The denial of the rights to speedy trial and appeal.

The typical appeal is by someone convicted of a crime. Surprisingly, though, the prosecution can also appeal some trial court decisions prior to the entry of a final judgment by the trial court. Such appeals are permitted only as authorized by law. For example, a federal statute found in 18 U.S.C.A. Section 3731 provides for interlocutory prosecution appeals of a district court's decision to suppress or exclude evidence from trial. In other words, if a trial judge excludes evidence, which then makes it difficult for the prosecution to present its case, then the prosecution is allowed to file an interlocutory appeal.

Harmless Errors

Sometimes an appellate court agrees to hear an appeal, and it may even agree with the appellant's argument, but nonetheless rule that the lower court's error was harmless. In other words, lower courts' **harmless errors** may not lead to the reversal of a conviction.

For example, in *Chapman v. California* (1967), the Supreme Court considered whether a trial court made a harmless error by permitting the prosecutor, during closing arguments, to repeatedly refer to the defendant's refusal to take the stand and testify. The Court reversed the defendant's conviction, claiming that "though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners, it was also a case in which, absent the constitutionally forbidden comments, honest fair-minded jurors might very well have brought in not-guilty verdicts" (pp. 25–26).

Similarly, in *Connecticut v. Johnson* (1983), the Court concluded that a judge's flawed instructions to the jury could not be considered harmless. The judge told the jury that it could infer the defendant's guilt when the defendant was charged with a specific intent crime (actually, the prosecutor is supposed to present evidence of intent for such offenses). The Court said that the judge "permitted the jury to convict respondent without ever examining the evidence concerning an element of the crime charged" (p. 88).

Habeas Corpus

Habeas corpus is not unlike the appellate process in the sense that it affords the convicted an opportunity to challenge convictions. But, unlike an appeal, habeas corpus is something of an indirect method of challenging a conviction, as we show later in the text. Also unlike an appeal, habeas corpus is a constitutional right, which is spelled out in Article I, Section 9, Clause 2 of the United States Constitution.

How does habeas corpus work? Only incarcerated people can seek a writ of habeas corpus. If the prisoner chooses to do so, he or she petitions a federal court, most often a district court, and asks it to issue a writ of habeas corpus. If the court decides to issue the writ, then the prisoner (called the petitioner) is brought before the court so the constitutionality of his or her confinement can be reviewed. Importantly, the Constitution only provides the right to petition for habeas review, not the right to a hearing. The court decides whether it wants to grant a hearing.

The writ is also different from an appeal in its purpose. Whereas an appeal is intended to challenge a lower court's legal decision, habeas corpus challenges the constitutionality of one's confinement. It is an option only after one has been convicted and sentenced to a term of confinement. The Supreme Court emphasized the importance of habeas corpus in a number of decisions. For example, it pointed out that "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged" (*Sanders v. United States*, 1963). Likewise, in *Kaufman v. United States* (1969), the Court held that the writ is necessary to provide "adequate protection of constitutional rights."

More recently, though, the Supreme Court argued that the writ should be restricted. To illustrate, in one decision (*Stone v. Powell*, 1976), the Court held that writs should not be liberally issued for claims arising from state courts:

Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.

The recently enacted Antiterrorism and Effective Death Penalty Act (AEDPA), which we touch on later, is also illustrative of sentiments that habeas corpus should be restricted, to some extent.

Origins of the Writ

Why did the framers make habeas corpus a constitutional right? As we explained earlier, the U.S. Supreme Court has not held that appeals are constitutionally granted, but habeas corpus is. Why? Robert Pursley, whose article on the habeas corpus process we included in this volume, showed that the writ has origins in four centuries of English common law. As early as the 13th century, courts were given the power to summon individuals held by the executive. The purpose of this practice, though, was not to challenge convictions but rather to challenge unwarranted confinement of citizens by the executive. Only later was the opportunity afforded to higher courts to review lower court convictions. This came to be known as the writ of *habeas corpus cum causa*.

Pursley also described how the writ became a "pawn in the struggle for judicial primacy." It gave the Crown courts an opportunity to free individuals wrongfully convicted in lower courts, such as the ecclesiastical courts. Parliament then adopted the Habeas Corpus Act of 1679. Given the framers' English heritage and concern over the prospect of an intrusive executive, it is no mystery why the writ was incorporated into

the U.S. Constitution. Pursley did a fine job of explaining the rest of the history of the writ, as well as the habeas corpus process. We can, however, offer a short overview here.

Process Concerns

The habeas corpus process is much more restrictive than the appellate process, for several reasons. First, several types of writs will not be issued. For example, in *Stone v. Powell* (1976), the Court held that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim” a federal court should not issue a writ of habeas corpus. Also, if a claim is “dictated by precedent” it cannot be heard on habeas review (*Teague v. Lane*, 1989). There are exceptions to this rule, but habeas courts generally steer clear of creating new rules of criminal procedure.

Habeas corpus petitions also must raise constitutional questions. In one relevant case, the petitioner claimed that his death sentence should be vacated because new evidence pointed to his innocence. The Supreme Court did not grant review, explaining that “in light of the historical availability of new trials . . . and the contemporary practice in the States, we cannot say that Texas’ refusal to entertain petitioner’s newly discovered evidence eight years after his convictions transgresses a principle of fundamental fairness” (*Herrera v. Collins*, 1993). Harmless errors by lower courts also cannot form the basis of a habeas petition.

There are also timing restrictions for habeas corpus petitions. Usually, there are strict timing guidelines that must be followed (this is especially true in regard to the recent legislation we touch on in the next section). Only if the petitioner can show evidence of “actual innocence” can a habeas corpus petition filed after the cutoff date be considered. To do this, the Supreme Court held that

the prisoner must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt. (*Kuhlmann v. Wilson*, 1986, note 17)

In other words, when a prisoner has failed to file a habeas petition in a timely manner, he or she may still succeed in doing so provided that the petition sets forth sufficient facts as to the prisoner’s “actual innocence.”

Before habeas corpus becomes an option for a prisoner, he or she must usually exhaust all available state-level appeals. As the Supreme Court stated, “ordinarily an application for habeas corpus by one detained under a state court judgment of conviction will be entertained . . . only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari have been exhausted” (*Ex parte Hawk*, 1944). Next, there are restrictions, especially recently, on filing multiple petitions, especially those that repeatedly raise the same claims.

Finally, habeas corpus is difficult because there is no right to counsel. Because habeas corpus is purely discretionary, the Supreme Court held that no right to counsel exists (*Ross v. Moffitt*, 1974). Of course, if the petitioner can hire an attorney, then one can most certainly draft a petition and represent the petitioner. The Court held, however, that federal prisoners have a “constitutional right of access to the courts (*Bounds v. Smith*, 1977)” and decided that states cannot prohibit prisoners from helping each other prepare and submit habeas corpus petitions (*Johnson v. Avery*, 1969). Finally, the Supreme Court held that indigent habeas corpus petitioners are entitled to a free transcript of their trial to assist in preparing the appropriate paperwork (*Griffin v. Illinois*, 1956). Taking all these process restrictions into account, it is easy to see how habeas corpus petitions do not succeed in record numbers. They are most definitely the exception.

The Antiterrorism and Effective Death Penalty Act

The 1995 Oklahoma City bombing was certainly overshadowed by the September 11, 2001, attacks in New York City, but the Oklahoma bombing was America's first major encounter with terrorism. No sooner did attention turn to radical fringe militia groups throughout the United States than Congress started debating various legislative proposals to combat the new problem. The result was passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

AEDPA supporters heralded it as a significant bipartisan achievement that would help root out terrorism. Critics claimed that its very name, with emphasis on the death penalty, was evidence that it would do little, if anything, to combat domestic terrorism. It is difficult to disagree with the critics in this regard because one of the most significant components of AEDPA places restrictions on habeas corpus petitions for death row inmates. You can draw your conclusion as to the relationship between habeas corpus and domestic terrorism, but the end result was legislation that basically restricted federal habeas corpus petitions by death row inmates—in the name of terrorism prevention. The portion of the AEDPA dealing with habeas corpus is what concerns us here.

The AEDPA significantly altered habeas corpus procedure in the United States. For example, it permits habeas review only when the state-level decision (1) “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States” or (2) “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding” (28 U.S.C.A. Section 2254[d]).

Second, the AEDPA alters habeas review in capital cases by providing that prisoners who “default” and fail to submit a petition in a timely fashion will only be granted review when the prisoner's failure to file a petition is (1) “the result of State action in violation of the Constitution or laws of the United States”; (2) “the result of the Supreme Court's recognition of a new federal right that is made retroactively applicable”; or (3) “based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for state or federal post-conviction review” (28 U.S.C.S. Section 2264[a]).

The legislation also restricts successive habeas corpus petitions. It states that a “claim presented in a second or successive habeas corpus application shall be dismissed” (28 U.S.C.A. Section 2244[b][1]). Moreover, it restricts a prisoner's successive and different petition to one that (1) “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable” or (2) a claim “the factual predicate [for which] could not have been discovered previously through the exercise of due diligence” and which “would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense” (28 U.S.C.A. Section 2244[b][2]).

Strict habeas corpus filing petitions have also been put into effect as a result of the legislation. The AEDPA requires, for instance, that most habeas corpus petitions be filed within one year of the date of the final state-level appellate judgment. For death penalty cases, the legislation is even more restrictive, requiring that death row petitions be filed within six months of the “final state court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking review” (28 U.S.C.S. Sections 2244[d][1][A] & 2263).

Considering Clemency

Often lost in discussions over appeals and habeas corpus is the concept of **clemency**, also known as a pardon. The power to grant a pardon or clemency (both terms are synonymous for our purposes) rests with the chief executive—the president at the federal level, the governor at the state level. Pardons can be (and have

been) issued for all manner of crimes. One of the most well-known pardons was that given by President Gerald Ford to Richard Nixon on September 8, 1974. Others include President Jimmy Carter's grant of amnesty to draft evaders following the Vietnam war, President George H. W. Bush's pardon of various Reagan-era officials involved in the Iran Contra scandal, and President Clinton's pardon of 16 members of FALN, a violent Puerto Rican group that set off more than 100 bombs in the United States. Perhaps no pardons are more controversial, though, than those granted to death row inmates. The American Bar Association has put it this way:

Perhaps no decision in the course of a governor's term has a more direct or immediate effect on the welfare of an individual and his or her family than executive clemency. Yet, it is a prickly issue in that it concerns a readily identifiable individual who the state has successfully prosecuted, and who may be perceived to have committed a crime (which may or may not be true). The act of clemency is not like other executive powers that are easily generalized as matters of policy, the ultimate fate of an individual who is easily identified and known to the public—and perhaps even despised—is in question. (Ortiz, 2002, p. 121)

According to the Death Penalty Information Center, since 1976, 229 death row inmates have been granted clemency, largely for humanitarian reasons (see <http://www.deathpenaltyinfo.org>). These have included three broad grants of clemency by governors in New Mexico, Ohio, and Illinois to all death row inmates in those states.

Summary: Beyond Conviction and Sentencing

The appeal is perhaps the most complicated part of the entire criminal adjudication process. Criminal defendants have, at the time of their conviction, several ways to challenge that conviction. They may challenge the conviction through a direct appeal. If convicted in a state court, the defendant can receive a review of the trial by an intermediate appellate court and, possibly, the state supreme court. If the defendant claims a violation of a federal constitutional right, then the appeal may go to the United States Supreme Court, although the likelihood of this is very slight, as the Supreme Court has almost total discretion over which cases to accept on appeal.

The criminal defendant may also challenge his or her conviction indirectly, through the use of the writ of habeas corpus. This writ, which is of ancient origin and is enshrined in the United States Constitution and the various state constitutions, allows an incarcerated person to go to court to challenge the legality of his or her confinement. The state typically justifies this confinement on the basis of the defendant's conviction and sentence to prison. Habeas corpus is considered an indirect appeal because, though the writ is intended to challenge the person's incarceration, the incarceration is based on a conviction, so the defendant/inmate will argue that the incarceration is illegal because his or conviction was illegal. Habeas corpus may be pursued in both state and federal courts.

The result is an appeal process that, combined with overburdened and understaffed courts (particularly at the federal level), may take many years to play out. For those inmates serving the longest and harshest sentences (i.e., life in prison, death sentence), this means they have many years to fight their conviction. Appellate courts have developed a number of procedural rules that govern the appeals process and generally serve to make it very difficult for convicted people to have their conviction or sentence overturned. Procedural bars such as filing deadlines, exhaustion requirements, choice of venue rules, and the harmless error

standard all serve to make the process both difficult and confusing. Added to these procedural bars in recent years are legislative acts such as the AEDPA, which imposes significant limits on the ability of federal courts to entertain writs of habeas corpus arising from state proceedings.

KEY TERMS

Clemency	Interlocutory appeal	Ratio decidendi
Final judgment rule	Judicial review	
Harmless errors	Obiter dicta	

DISCUSSION QUESTIONS

1. Why does the court system provide defendants with the opportunity for both a direct appeal and an indirect appeal? What purpose does each appeal serve?
2. Why are precedent and stare decisis such important concepts? How do appellate courts use them to guide their decision making?
3. What is the difference between a “harmless error” and an error that requires an appellate court to reverse the decision of a lower court? How do appellate courts determine when an error is harmless?
4. Why does the writ of habeas corpus exist? How is it used today in ways that early common law courts would not recognize?
5. Is the Antiterrorism and Effective Death Penalty Act (AEDPA) an appropriate response to the increase in inmate litigation? Why or why not? What other means can courts use to deal with the flood of inmate lawsuits?

WEB RESOURCES

American Bar Association: <http://www.abanet.org/>

American Judicature Society: <http://www.ajs.org/>

Death Penalty Information Center: <http://www.deathpenaltyinfo.org/>

Federal Judiciary Center: <http://www.fjc.gov/>

National Center for State Courts: <http://www.ncsconline.org/>

OYEZ (discusses current and recent Supreme Court decisions): <http://www.oyez.org/oyez/frontpage>

The Sentencing Project (information on the appeals process and habeas corpus): <http://www.sentencingproject.org/>

State Attorneys General Association: <http://www.naag.org/>

State Bar Associations: <http://www.vtbar.org/Links/StateBarAssociations.htm>

Supreme Court homepage: <http://www.supremecourtus.gov/>

READING

The use of habeas corpus, particularly in death penalty cases, has created a great deal of controversy and led to a number of judicial and legislative efforts to curtail its use by the federal judiciary. In this article, the author explores the historical origins of the writ of habeas corpus, its evolution, recent efforts to limit its use in federal courts, and the major issues that it presents in courts today.

The Federal Habeas Corpus Process

Unraveling the Issues

Robert D. Pursley

The writ of habeas corpus has become a much-maligned legal principle, one that has been widely vilified by the general public. Yet, like the insanity defense, many have an opinion on the subject, but few, including even members of the criminal justice and legal communities, really understand this arcane area of the law. What understanding exists is relegated to a few lawyers and judges, and even then, only to those who have occasion to entertain and explore its complexities. The article is not meant to be a legal exposition on the subject as found in law reviews, legal journals or treatises. The subject of habeas corpus is framed in the context of an issue of public policy—especially the issue of the writ’s use in the so-called federal habeas process. By providing an oversight of this area of the law without the complex technicalities of the ever-evolving and tortuous case law holdings in this area, it is hoped that it will make the subject and its surrounding debate more understandable to the criminal justice professional.



The History of Habeas Corpus

The writ of habeas corpus was referred to by Chief Justice John Marshall as “the Great Writ” (*Ex Parte Bollma*, 1807). Others have been far less complimentary. The origins of the writ can be traced to an English common law creation that was four centuries in evolving. Legal historians have traced its beginnings to the thirteenth century. The English Crown courts of the time, faced with the widespread reluctance of the executive authority to surrender prisoners to the courts for review, were empowered to use a summoning process to produce the prisoner. In its origin, the writ was not designed to challenge judgments of conviction rendered after trial, but only to challenge unlawful detention of citizens by the executive. Later, in an effort to correct any injustices of an initial trial court in reviewing the petitioner’s plea for relief, the summons was accompanied by a central court issued order giving such a court the authority to

question the cause of imprisonment. Together, the summons process and the order eventually united to form what became the writ of *habeas corpus cum causa* (Mells and Duffey, 1991).

But this tells only part of the story. Beyond any concern to merely protect the prisoner from injustices inflicted by the executive authority, the writ had a more practical application in English jurisprudence: It became a pawn in the struggle for judicial primacy. During the 15th and 16th centuries, the English courts verged on the chaotic. The Crown courts had evolved into the superior common law courts and these courts found themselves involved in a struggle for supremacy. The encroaching jurisdictional reach of the equity and ecclesiastical courts and various quasi-legal councils were developing threats. In that environment the writ became a tool in this struggle. It provided the means by which common law courts in their role as a rival tribunal could release a subject convicted by these other courts. How often this occurred history fails to reveal, but it seems likely that under such circumstances, habeas corpus was nothing if not a disruption to a well-functioning system of English jurisprudence.

Recognizing the need for reform, Parliament adopted the Habeas Corpus Act of 1679. While not supplanting its common law origins, the Act supplemented the common law foundation by creating a coexisting statutory authority for the writ and its method of issuance. Although not removing all common law features, the Act managed to remedy some existing abuses and clarified what courts could issue the writ and under what circumstances. It also spelled out certain procedural conditions such as requirements for jailers to return the writ within a specified time.

Given their English heritage, the framers of the Constitution were aware of the writ and it was incorporated in Article I, Sec. 9 of the Constitution. The importance of the writ can be seen from the fact that it was incorporated into the Constitution itself, and not as an amendment in the later adopted Bill of Rights. As originally constituted—and following the English model—it too, was solely for protecting citizens from arbitrary imprisonment by the executive authority. It

would remain so for many years. Interestingly, in spite of the arguments of Jefferson and others, the Constitutional delegates declined to incorporate an affirmative guarantee, instead opting to include a provision that in seemingly simple and straightforward language merely barred suspension of the writ.¹ With the passage of the Judiciary Act of 1789 came the first grant of federal court jurisdiction, and with it, following early Constitutional principle, authority for the federal courts to issue the writ where federal prisoners were held under provisions of federal law.

During the early years of our nation's history there existed so few federal prisoners that the writ proved to be of little legal consequence simply because so few federal prisoners actually existed, and because the federal courts of the time were generally unwilling to employ it. As for relief for state prisoners detained by executive authority, in 1845 the Supreme Court went as far as to hold that the federal common law writ of habeas corpus did not extend to such individuals (*Ex Parte Dor*, 1845). The Civil War focused attention on the writ. Many Americans are familiar with the fact that Lincoln suspended the habeas corpus writ during the Civil War and imprisoned several thousand putative southern sympathizers. The public are less aware that when murmuring from the Supreme Court about this action reached his ears, Lincoln considered an even more drastic and Constitutionally thought-provoking step: abolishing the Court's habeas review power itself.²

An important step—and one that would prove to be of major consequence—was taken in expanding the doctrine in the immediate post Civil War period. Fearing that southern states might vengefully incarcerate postwar northern reconstructionists, Congress sought a means to provide the federal courts with a mechanism for the oversight of state court convictions. Responding to this fear, the right to federal court habeas review by state prisoners was granted by Congressional enactment in 1867.³ With this legislative step, the “federalizing” protection of the writ had been accomplished. The 1867 Congressional action is an extremely important feature of habeas corpus and it has become a current focus of today's raging debate over the use and reform of the writ. It was also the point at which the machinery was

set in place for the writ to evolve into what it has primarily become today: A postconviction remedy to challenge trial judgment.⁴

Since the provisions for the writ and the legal process itself is primarily statutory in nature, in theory at least, it is Congress who holds the power to be the major player in at least defining federal habeas procedure. But, as in other areas of public policymaking, it has been the federal courts that have stepped in to assume an important role. And not unlike other areas of legal policymaking by the federal judiciary, the Courts' major role has been a relatively recent phenomenon. In 1953 an important Supreme Court decision interpreted the 1867 statute as providing the federal courts with broad review of federal habeas petitions (*Brown v. Allen*, 1953). This proved to be only the prologue. An important expansion of the rights of state prisoners to have their cases reviewed under federal habeas corpus was part of the so-called due process revolution during the Warren era of the Supreme Court in the 1960s (Bureau of Justice Statistics, 1989).

In hindsight it seems that the Supreme Court of the time meant to develop habeas corpus as the enforcement machinery not only for carving-out new principles of constitutional law, but, perhaps even more importantly, to serve as a cachet for charting a new era in federal-state judicial relations. The writ of habeas corpus provided an important mechanism whereby the federal courts could review state court determinations. The civil rights/due process expansionists on the Court understood the obvious: Through the vehicle of habeas corpus, the Court had within their power an important tool to further extend the supervisory constitutional review authority of the federal judiciary.

1963 seems to have been the watershed year. The Supreme Court in three separate cases expanded the rights of state prisoners to seek federal habeas relief.⁵ As a result of these specific Supreme Court decisions, together with the simultaneous expanding doctrine of due process and the broad extension of prisoners' rights doctrines, the filing of federal habeas petitions by state prisoners began to grow. Whereas the number of habeas petitions filed with the federal courts

remained, on average, uniformly low with less than a thousand such filings a year from 1941–61, since then the number of habeas filings has generally been going up with an all-time high of nearly 12,000 filed with the federal courts in 1992.⁶ Although a significant portion of this increase can be accounted for by the simple fact that state inmate populations have increased so drastically, even factoring in the increase in number of state prison inmates over this period cannot alone account for such a proportional increase.

However, the long-term analysis of federal habeas corpus filings by state inmates shows some interesting facts and changes. First, the last several years shows a general decline in number of federal filings. Given the increases in numbers of state prisoners, this figures out to a large relative decline. When plotting increases in state inmate populations against state prisoner initiated habeas corpus filings in the lower federal courts since 1961, the peak years for filing reached an all-time high in the early 1970s. As a percentage of state prisoner population, it hit its peak in 1970. In that year, as a percentage of the overall state prisoner population, state prisoner filings stood at over 5 percent. Today, as a percentage of state inmates it hovers around 1 percent (Flango, 1994). It might be inferred from this that changes in procedural requirements instituted by the Supreme Court, are having an effect.⁷ But this is highly conjectural in the absence of specific empirical evidence that the two are related.⁸

It is also interesting to compare the size of the state's inmate population with the number of federal habeas corpus filings by prisoners in that state. Although there is some relationship, it is a weak one. Several larger states such as New York, Illinois and Ohio, who have large inmate populations, have fewer habeas corpus petitions filed in federal court than would be expected based upon this fact alone. Conversely, states such as Alabama, Louisiana, Nebraska, Tennessee and West Virginia have a higher percentage of their prison populations filing for federal habeas corpus relief. In research done by the National Center for State Courts it was found in 1990 that more than half of all federal habeas filings in that year came from only nine states (Flango, 1994: 18–20).⁹

General Characteristics

Habeas corpus petitions constitute what is called in the law *collateral* attacks upon state criminal judgments: separate civil legal filings that call into question the validity of those judgments as a basis for incarceration. These collateral attacks are supplemental to and occur after *direct* attacks. Direct attacks (or postconviction appeals) are ones in which the appellate court considers whether the conviction should be affirmed. Convicted defendants have the right to file direct appeals based upon their conviction. Over the course of state proceedings, criminal defendants usually have an opportunity to raise federal complaints about their treatment and the state courts adjudicate such issues routinely.¹⁰ These are filed through the various state appellate courts and certiorari appeal to the U.S. Supreme Court. Upon conclusion of these direct appeals, the defendant then can attack the judgment of the trial court by means of a collateral attack on the issues.

Both state and federal courts have jurisdiction to entertain habeas corpus petitions from state prisoners claiming they are held in custody in violation of the Constitution. In federal courts this is extended to federal laws and treaties.¹¹ This usually takes the form of some kind of Constitutional issue that the habeas petitioner contends has violated his or her rights. A common claim, for example, is that the petitioner was denied effective assistance of counsel in violation of the Sixth Amendment. The fact that he or she is incarcerated together with this violation of federal law becomes the co-joining basis for the federal habeas petition. In the case of a habeas petition before the federal court, the federal court is asked to determine whether the petitioner's rights may have been violated in the state process that resulted in "custody."

The Issues in Federal Habeas Corpus Today

In recent years, habeas corpus—really, more correctly, federal habeas corpus—has become a very heated and widely debated legal principle. The debate regarding

habeas corpus seems to focus on a number of issues. These can be placed into four broad categories: Crime control and its political underpinnings; jurisprudential, constitutional, and workload issues; federal-state considerations; and recent attempts by the Supreme Court to curtail the right of state prisoners to seek federal review.

The Debate Over Habeas Corpus and the "Politics" of Crime Control

Federal habeas corpus of state prisoner petitions has been injected into the "politics" of crime control. It is argued that habeas corpus has a deleterious effect on anti-crime efforts and the overall administration of justice. It is, for example, said that habeas corpus procedures defeat the goal of deterring crime by undermining the certainty that sanctions will be applied where criminal laws are violated. The writ also comes under attack by those claiming that the lengthy time delays and uncertainties that may result from federal review of habeas corpus actions frustrate the interests of victims. Its widely publicized delay-inducing nature is also criticized for bringing disrepute to the administrative machinery of justice and it is also said it encourages ridicule of the system and fosters lack of witness cooperation and public respect. It is also argued that the length of time that elapses prior to federal habeas corpus review (and subsequent relitigation at the state level) limits the availability and reliability of evidence and witnesses. Finally, there are those who suggest that changes in the scope of habeas corpus review might have an impact on prisoners' conduct by increasing prisoners' frustrations (Bureau of Justice Statistics, 1984:1).

In the area of crime control it is especially in the ongoing debate over the death penalty that the federal habeas process has assumed a centerpiece role. Although the right to habeas review extends to the conviction (and incarceration) for any offense, it has become an issue most closely identified with those convicted and sentenced to death. More than anything,

federal habeas has become singularly associated with inordinate delays in the carrying out of the death penalty.¹² This has led to a widespread denunciation of the writ.

Still, these death-penalty habeas filings are only the tip of the iceberg as the bulk of state prisoner habeas petitions emanate from non-capital convictions. Just as death sentences constitute only a small number of felony-level sentences imposed by our courts, so, too, are habeas corpus appeals from such sentences only a small portion of all such habeas filings. The vast majority of habeas petitions directed at both state and federal courts come from prisoners in state prisons who have been convicted of more conventional violent and property crimes. For the state prisoner filing a petition in a non-capital sentence, the federal courts have been much more reluctant to entertain the writ and to grant relief to the petitioner.¹³ However, unlike the “non-capital” state prisoner federal habeas corpus case, the federal courts, including the U.S. Supreme Court, have granted relief to a more significant proportion of prisoners under sentence of death.¹⁴

Part of the reason for the denunciation of the federal habeas process is the chaotic situation habeas appeals have become in death penalty cases. Several years ago, a scholar in the field placed the issue into perspective when he said: “As the process operates, a state court and jury can sentence an offender to death and, through a series of appeals usually culminating in habeas corpus petition(s) to the federal courts, the convicted offender is able to stave off legal execution for years. As things stand, the least complicated case in which relief is denied at every stage can be presented to the U.S. Supreme Court a minimum of three times, and to the federal district and appellate courts at least twice each.”¹⁵ Whether this is still the case today given the “tightening up” of the appeals procedure by recent actions of the Court is, at present, an unanswered question. The effects of the Court’s newly imposed guidelines on the lower federal courts have yet to be studied, or at least reported.¹⁶ Such a circumstance has permeated the consciousness of the American public. Given the publicity surrounding execution delays, this

difficult to understand legal remedy is seen (but certainly not fully understood by even the knowledgeable public) as a cause for this delay.

The delay problem is abetted by the fact that in capital cases there is no incentive to speed up the exhaustion of direct state and federal appeals in order to be eligible for federal collateral review. Nor is there an inherent statute of limitations. In conventional felony convictions, someone who is convicted and sentenced to prison for a term of years in state court, and wishes to challenge that conviction and sentence in a federal habeas proceeding, has every incentive to move promptly to make that challenge. He must continue to serve his sentence while his federal claims are being adjudicated in the federal courts. The sooner a decision can be reached, the more quickly he receives any benefits. On the other hand, the offender sentenced to death knowing that all federal review must take place before the sentence is actually carried out, has no incentive to apply until the death warrant is issued by the state.

Adding to the controversy is the ideological struggle over the death penalty: Anti-capital punishment groups have made the habeas writ a tool of their determined efforts to at least frustrate the states in their imposition of the ultimate sanction. Citing one controversial study—one that claims that since 1900, 350 persons have been wrongfully convicted of capital or “potentially capital” crimes and twenty-three innocent persons have in fact been executed—has become a rallying cry for those opposed at efforts to restrict federal court review (Swafford, 1995).¹⁷ Abolitionists might hope that federal habeas relief in association with other available postconviction appeal remedies, will weary state legislative bodies. Given the drawn out delay inherent in court challenges, lawmakers might just abolish capital punishment rather than continue the lengthy and costly court battles that anti-capital punishment groups have effectively waged.

This strategy has had obvious consequences. In a resolution passed in 1990, the Conference of State Chief Justices noted that the abuse of the writ existing at that time and encouraged by existing practices, “has effectively negated the law of the 37 states that impose the

death penalty.¹⁸ Federal habeas procedures have pitted as antagonists the anti-capital punishment and the pro-death penalty punishment groups. It has certainly singled out federal habeas as a major flash point in this ideological battle. It is no mere accident that pro-death penalty interests are strongly in favor of the Court's recently imposed restrictions on federal review and those opposed to the death penalty are howling about the Court's efforts.

In the crime control area, the federal habeas process has also taken a centerpiece position in the Congressional and administration debates that ultimately led to a new federal crime bill. Over the years that Congress haggled over a comprehensive crime bill, it provided the trappings of a highly charged political issue. Both the Reagan and Bush administrations sought to have Congress introduce legislation to cut back on the availability of the federal provisions of the writ to state prisoners. It was in fact, one of two cornerstones—the other being the “war on drugs”—of the Bush administration's anti-crime efforts.

In 1991, the Senate approved significant restrictions on habeas corpus as proposed by the Bush administration. A less restrictive proposal that emerged from the House as part of the crime bill that nearly passed the Congress, included watered-down limits on convict appeals. But in the end it could not survive a wave of attacks. Republicans and conservatives felt that the proposed curbs did not go far enough; liberal Democrats argued that anything more restrictive would permit executions of innocent persons who would not have an adequate chance to make their cases in the trial and appellate courts. In the end, Republican objections to the language, together with the objections of many state prosecutors, the National District Attorneys Association, and state attorneys general—all of whom wanted greater restrictions imposed on its availability to state prisoners—enabled opponents of the proposal to marshal their efforts and capture the necessary Congressional support to defeat the bill.

The issues of crime control and the effect of the federal habeas process on crime control measures have

also been important to Chief Justice Rehnquist and other conservative members of the Supreme Court. Although these members of the Court have not addressed directly the issue of their feelings about the role of habeas in anti-crime efforts, their concerns over the delays caused by the use of the tactic and, implicitly then, the deterrent effect of the law, especially in capital cases, can be inferred from both their public comments on the issue and their case decisions.¹⁹

There have also been two prestigious groups that have joined the fray. In 1989, the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases (called the Powell Committee after its chair, retired Justice Lewis F. Powell, Jr., of the United States Supreme Court) produced a report suggesting alterations to the habeas statutes (Bureau of National Affairs, 1989). The committee found that the existing system of multi-layered state and federal appeal and collateral review resulted in piecemeal and repetitious litigation. This resulted in years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law. The report listed several major recommendations: to limit the period within which a federal habeas petition must be filed to 180 days after exhaustion of direct appeal and certiorari petition to the U.S. Supreme Court; to establish an automatic stay of execution until federal habeas proceedings are completed to avoid the last minute time pressures caused by impending execution; and to prevent prisoners from filing repetitive claims for habeas corpus in federal court (unless it is a claim of actual innocence) after they have had one full course of judicial review.

At about the time of the Powell Committee report, a voluminous report was issued by the American Bar Association Task Force on Death Penalty Habeas Corpus (1989). In its report, it set forth the findings and recommendations of its year-long study of the entire system of postconviction review of state capital convictions and sentences. Like the Powell Committee, the ABA Committee came out in favor of expediting the process (although the time frames were longer than the Powell Committee recommendations).²⁰

The ABA Task Force was particularly unequivocal in its feelings that streamlining the postconviction death penalty review must include assurances that qualified counsel as determined by explicitly imposed ABA standards be provided at every step in capital proceedings—all stages in all courts. On the other hand, it was the Powell Committee's recommendation that such assurances for counsel be provided in state postconviction relief, but the states were to be free to determine the establishment of qualifications of counsel.

The outcome was inevitable: Conservatives embraced the Powell Committee report while more liberal law scholars and the defense bar inveighed against it (for example, Berger, 1990; Mello and Duffey, 1990–1; Goldstein, 1990–1). Liberals, on the other hand, sought some measure of solace in the ABA recommendations. Much of the criticism of the Powell report was focused on the fact that it was formed by Chief Justice Rehnquist who is no darling of the liberal legal establishment. The querulous liberal law factions were quick to accuse the committee of being composed of parochial, Rehnquist mirror-imaged southern judges. The inference was that the Courts of Appeals judges selected from the southern Circuits to serve on the committee (ostensibly because these were the Circuits with the largest number of habeas filings) were biased pro-death penalty and anti-habeas advocates.²¹ It was this kind of tone that established the legal (and ideological-laden) disquisition in the law review articles that were to follow.

Adding to the issue was the so-called Biden proposal named after Senator Joseph Biden, chair of the Senate Judiciary Committee, who promptly introduced legislation, the "Habeas Corpus Reform Act" containing some Powell Committee Report's recommendations and altering others to fit the ABA report (S.1441, Sec. 2., 1993). In response, Senator Strom Thurmond, supported by the Bush administration, proposed to make the Powell Committee's recommendations law.²² Vigorous debate on these proposals ensued. The habeas controversy has been one of the reasons, along with such controversial topics added to the mix as gun control and increasing the number of federal death penalty crimes, that Congress found itself stymied from 1988 until 1994

in adopting a new comprehensive federal crime bill. Finally, after prolonged haggling the Violent Crime Control and Law Enforcement Act of 1994 was passed.

This new Act is absent any reference to federal habeas corpus appeal. This is an interesting omission. It can only be inferred that Congressional conferees in their concern to enact a crime bill under scathing media attack over political partisanship and legislative ineptitude chose purposely to exclude such a flash-point issue. After six unsuccessful years of trying to get a comprehensive federal crime bill passed, they were not ready to jeopardize the tenuous thread of adoption by prolonging the debate over yet another controversial feature.

Hidden in all the controversy over the new crime bill is a little known fact. Although President Clinton as candidate made no direct reference to his position on habeas corpus, in 1993, when the Clinton administration sent to Congress its proposed provisions for consideration in the crime bill, it contained specific habeas-related recommendations.²³ The administration, aware of what had happened in earlier attempts at reaching accord on a federal crime bill, and perhaps sensing the need to mollify the nation's district attorneys, state judges, and attorneys general, proposed an adoption of the Biden and Powell Committee recommendation—one that will set a six-month time limit on inmates to file a single, federal habeas corpus appeal. As conceived, this time limit would generally operate from the exhaustion of all direct appeal rights. In this respect, the proposal, in terms of language and intent, interestingly paralleled the efforts of the Reagan and Bush administrations who, too, sought Congressional action that would limit the number of times a petitioner can use the process as a vehicle of review before the federal courts.

However, there was one important difference in the Biden and Clinton administration proposals and it may have been a good one. The major complaint of state inmates on habeas appeal is that they did not have competent counsel at their trial. This is especially true among those inmates sentenced to death. Since a large majority of criminal defendants are represented by

indigent defense schemes, there may be some merit in such claims. The bill as proposed by the administration, and in line with the ABA Task Force recommendations, would have required that in all states that have the death penalty, a state counsel authority be established.

The state counsel authority as conceived by the administration would have been an agency partially supported by federal funds that would be responsible for seeing that defense counsel in capital cases meet certain standards. This includes required defense experience in capital cases, including trial, appellate and postconviction evidentiary hearing experience. It would also be required to establish application, training and certification procedures for attorneys defending such cases. Such composed qualified defense teams would then be made available to a defendant in a capital case as well as for direct and collateral (including habeas corpus) appeals upon conviction. Such a sweeping proposal is not incorporated in the 1994 crime bill; instead, Congress chose to ignore the thrust of the administration's major recommendation. The new crime bill merely requires that in federal death penalty cases, two defense counsels be assigned, one of whom at least "shall be learned in the law applicable to capital cases" (See: Sec. 60026, Violent Crime Control and Law Enforcement Act of 1994).

In the final analysis it is questionable whether habeas corpus has managed to foil our nation's anti-crime efforts as some detractors suggest. Any such cause and effect pronouncements on an issue as complex as the nation's crime problem rests on very shaky common sense, let alone empirical grounds. Although it is true that its complexities and awkward procedures have lengthened delay, the problems of crime in the United States cannot be laid at the doorstep of a single legal process, especially a procedure that involves only a very small percentage of all convicted offenders. This is especially true when one considers that for those who are successful in obtaining its application to overturn a conviction, the number of such successes is ridiculously small. What it does seem to do, however, is serve as a convenient jeremiad for the nation's frustration with crime.

Where it may have an impact, however, is on the public's perception. This should not be ruled out as unimportant. Habeas corpus litigation has created among wide segments of the American public another way to criticize and hold in disrepute the administration of justice, our legal system, and our nation's legal culture itself. The idea, for example, that it has and continues to lead to delays in death penalty cases has caused extensive public criticism—especially when the public perceives that its basis is generally frivolous and turns on the mockery of construed legal technicalities rather than on the issue of substantive innocence. Such attitudes are no doubt abetted by the publicity given official pronouncements. One such widely-publicized denunciation was by former Attorney General Edwin Meese who reportedly said, "most habeas cases are frivolous" (Chicago Daily Law Bulletin, 1986).

Jurisprudential, Constitutional and Workload Issues

It is also argued that habeas corpus affects both proper notions of legal jurisprudence and Constitutional safeguards. For example, some common arguments are that the current likelihood that issues may be relitigated at the federal level affects the incentives for a comprehensive analysis of cases in the state courts. This could be construed to be then affecting the rights of those individuals who do not pursue federal review actions.

There are also those who say that habeas corpus claims are often determined to be without merit, and yet, result in an undue workload at both the state and federal court levels. State officials, for example, often complain of the additional workload imposed upon them to defend the actions of state courts and juries as unwarranted, costly and burdensome—that in periods of limited financial resources, the drain of time and cost is becoming prohibitive. Such criticism has become more strident in recent years as state courts struggle to maintain some control of growing civil and criminal case dockets.

Yet, the limited four-state study of state and federal habeas corpus filings by the National Center for State

Courts contradicts some of these assumptions and pronouncements. They found among other things that few of the petitions are successful in either state or federal courts. The vast majority are dismissed summarily without hearing. This alone limits the time-consuming nature of the process. While the researchers found overlap and duplication of effort between the two levels of courts, this comes as no surprising revelation given the inherent nature of the process. They concluded that in both the state and federal courts that they studied, habeas corpus petitions were found to be a very small part of the overall judicial workload (Flango, 1994:23).²⁴

In spite of such findings, this workload issue has become one of concern among at least some members of the federal judiciary. For example, Chief Justice Rehnquist in a 1990 speech delivered to the American Law Institute did voice open criticism of the imposed workload. He pointed out that “the members of the federal appellate judiciary were often faced with having pending appeals within a matter of days of not merely one application for a stay of execution but two from the same person; one seeking review of collateral state proceedings and the other seeking review of federal habeas proceedings, both brought in the court of first instance within a matter of days before the execution is set to take place.” He referred to the situation as “[verging] on the chaotic” (Rehnquist, 1991).

Along this line, although no one would argue that constitutional issues are ever to be superseded by resource requirements and associated costs, there is still the question and the contention that practical factors (such as manpower and fiscal matters) should be reasonably considered in evaluating procedures designed to protect alleged constitutional violations.²⁵ The Supreme Court has been moving in this direction by emphasizing that mere constitutional error should not be solely determinative; it is the effect of any such error on trial court disposition that should be the issue.

There is no doubt that some of these claims have a basis. Still, one must consider the obvious: the protection and uniform enforcement of federally established constitutional rights through habeas corpus review represents overriding considerations in the American

system of jurisprudence. It is often said, for example, that rights without remedies are rights denied. There is a significant risk factor here. Any limitation on habeas corpus review poses the threat of undermining the constitutional rights of individuals. Under such circumstances, it is an area that must be approached with extreme caution.



Federal and State Relations: Federalism

Unknown to most citizens and even many members of the legal and criminal justice communities is the bitterness that has developed over the federal courts’ willingness to use the habeas process and over the unwillingness of Congress to entertain a number of proposals that would provide more deference to state court determinations. The subject of habeas corpus relief has evolved to a point where it has managed to assume the trappings of a federal-state issue, even the issue of federalism itself—the fundamental question of what is the proper balance between the lawful authority of the states and the role of federal courts in protecting constitutional rights (Lungren, 1991). The Federal Courts Study Committee has said: “the scope of federal habeas corpus is one of the most politically divisive questions of federal jurisdiction.”

At stake in the habeas corpus process are decisions made by two sovereign court systems. It begins with the state court process that produced a conviction and a sentence of imprisonment which have been upheld on direct appeal by the court of last resort in the convicting and sentencing state. It is also a conviction and sentence that have at least passed the implied muster of refusal by the U.S. Supreme Court to hear the appeal by means of a certiorari filing.

This is the cusp of the issue: arguments of state court finality and comity balanced with the concern for the rights of convicted defendants and the fundamental concept of federalism—that state courts be given every opportunity to manage their own criminal dockets before federal review (Lay, 1993:1048). It is in this context that many legal historians see habeas corpus as one of the penultimate questions of legal federalism—the sharing

of powers and responsibilities between the federal and state governments. As Robbins, a noted legal scholar in this area, has said, “It echoes the debates of more than 200 years ago: the sovereignty of the states in preserving domestic order versus the preeminence of the federal government in vouchsafing national interests—in this case, constitutional criminal law” (Robbins, 1990:215).

State courts along with state prosecutors and attorneys general have grown increasingly restive over the federal courts’ preemptive willingness to entertain, and in some cases overturn, by means of prisoner habeas filings, state court decisions, judgments that have been fully reviewed by the full-range of state courts at the trial and appellate levels and not found wanting.²⁶ Such bodies as the Conference of State Chief Justices in a series of resolutions in 1989, came out strongly for efforts at identifying ways to relieve the existing tensions between state and federal courts resulting from the writ of habeas corpus.²⁷ An unprecedented step was taken in 1994 when 26 state attorneys general went on record severely criticizing the federal courts in capital appeals cases for “undermining state judicial processes” and [for] “ignoring the constitutional precepts of federalism and the traditional authority of the state court determinations in the criminal process” (Roberts, 1994).

To state prosecutors and Attorneys General the issues are clear: Current federal procedures reduce or eliminate the finality of criminal cases by allowing federal collateral review of decisions that have been fully appealed on the state level. It is said that potential federal re-analysis of issues and facts that have been fully adjudicated at the highest level in the state judicial system exacerbates existing federal-state judicial relations (Bureau of Justice Statistics, 1984:1–2). States have complained, for example, that under federal habeas corpus, their post-conviction remedies are “out of control” (Lay, 1993:1025). One of the results of this continuing controversy has been found in the attempts by some states to limit their collateral procedures.

One cannot separate the arguments over habeas corpus use today without also dealing with these issues. The federalism issue does not center on the filing of these petitions in state courts by state inmates.

The real issue has become the right of convicted state prisoners to attack state court determinations by the use of a writ of habeas corpus *filed with the federal courts*. This continuing controversy is being fueled in an era when Congress is showing increasing deference to the states and the Supreme Court seems to be increasingly restive with its (and the federal government’s) supervisory intrusiveness over the states.

In the final analysis, it is proving to have all the characteristics of a defining example of inherent federal-state tensions. After all, the 1867 Act was specifically brought about because the federal government felt that the states could not be trusted. Not only did it extend federal habeas corpus to state prisoners, it also furnished an additional collateral method independent of direct Supreme Court review of state court decisions for the vindication of new Constitutional guarantees (Jochmer, 1993:251). This legislation profoundly altered the balance of federalism. One must be struck by the irony that this legislation came at a time in our nation’s history when Americans had just concluded their most sanguinary war—a momentous struggle that in itself was in large part precipitated by the issue of federal-state powers.



Attempts by the Court to Limit Review

Any discussion of federal habeas corpus would be incomplete without some brief attention to recent attempts by the Supreme Court to limit, or at least change, the procedures governing the availability of this remedy to state inmates. Civil libertarians and anti-capital punishment groups are very disturbed by the efforts of the existing Supreme Court to reintegrate the use of this tactic in the federal courts (for example, see Frank, 1991; Patchell, 1991; Weisberg, 1990; Ledewitz, 1990–1; Tabak and Lane, 1991). This opposition, first begun during the Burger Court, such efforts have picked up momentum in recent years. Like liberal members of Congress, opponent groups argue that this will have disastrous consequences. Liberal anti-revisionist legal scholars and groups such as the American Civil Liberties Union (ACLU), and

anti-capital punishment interests argue that the Court's case decisions in the area of habeas corpus in recent years have dangerously and improperly foreclosed the federal courts to state prisoners (for example, see Koosed, 1993; Hallisey, 1993; Rice, 1991). At least one of these groups contends that federal appellate courts have found constitutional flaws in as many as 73 percent of state death penalty cases reviewed on the merits.²⁸ While this is an exaggeration not supported by the facts, still it has become a gravamen of concern. The issues and the arguments have been further abetted among legal scholars and the defense and prosecution bars by the recommendations of those committees that have studied the subject and the issues.

Those who favor full federal habeas review argue that it is justified by the liberty interest at stake in habeas proceedings, by the importance of vindicating constitutional rights, by the structural superiority of federal courts in considering issues of federal constitutional law, and by the importance of federal court appellate style review of constitutional questions given the impracticality of Supreme Court review (Woolhandler, 1993:578–579).

There is no doubt that a majority of the Supreme Court has shown in recent years a willingness to limit this recourse to state petitioners. An examination of recent court decisions indicates that a majority of the Court by a series of case decisions seems bent on charting out still another page in federal-state judicial relations. In an effort to return to state review finality, the Court has, by a series of decisions, managed to begin to restrict habeas review by the federal courts.

Some major decisions are illustrative of this trend. In the past few years, the Court's majority has among other things: held that "new rules" of criminal procedure did not apply retroactively to cases that had become final on direct review at the time the new rule was decided (*Teague v. Lane*, 1989); federal courts may not hear successive habeas claims raising new issues unless the petitioner has cause for failure to bring the claim earlier, such as constitutionally ineffective assistance of counsel or interference by state officials (*McClesky v. Zant*, 1991); and barred the habeas appeal of a death-row inmate because his lawyers had filed

notice that they would appeal a state habeas decision three days late (*Coleman v. Thompson*, 1991).

The last two sessions of the Court have generally seen a continued trend toward greater restriction on federal habeas appeal. The Court made it harder for persons to obtain habeas relief based on constitutional errors during the trial by holding such error harmless if it did not have a substantial and injurious effect or influence on the verdict (*Brecht v. Abrahamson*, 1993); ruled that habeas petitioners are entitled to a federal evidentiary hearing on their petition only if they can show cause for their failure to develop the facts in state court proceedings and actual prejudice resulted from that failure (*Keeney v. Tamayo-Reyes*, 1992); and pronounced perhaps its most controversial recent ruling, that a death row inmate who offers new evidence suggesting that he is innocent is not ordinarily entitled to a federal habeas corpus hearing, unless he can show a Constitutional violation in the underlying state court procedure (*Herrera v. Collins*, 1993).

What is happening is noteworthy. For example, Chief Justice Rehnquist, writing for the majority in the recent case barring a hearing on the petitioner's contention that he is innocent, expressed clearly the conviction of the Court's majority members: that the state's interest in the finality of the conviction must be considered and that state courts have equal ability, and perhaps are in a superior position, to evaluate the effect of trial error.

Yet, the Court has also zigzagged a bit. Its decisions have not always been following the path of closing off habeas review by a state prisoner. In 1993, a 5–4 majority held that Miranda errors must be continued to be entertained in federal habeas proceedings. In this case the state argued that the Court should invoke in Miranda cases a doctrine applied in a 1976 case that forbids federal courts to grant habeas relief to state prisoners on the basis of Fourth Amendment claims that have been fully and fairly adjudicated in state courts (*Stone v. Powell*, 1976). In 1994 thru early 1995, it established more lenient guidelines for successive claims if a successive claim bears on the innocence of the accused in death penalty cases (*Schlup v. Deb*, 1995). In another case, the Court ruled that the lower

courts if they find Constitutional error and are in doubt about its “substantial and injurious effect” on the jury’s verdict, must side with the petitioner (*O’Neal v. McAninch*, 1995).

Conclusion

What will come out of all the controversy that surrounds the federal habeas corpus process is anybody’s guess. It promises to remain an open question that will not suddenly disappear. While the present majority composition of the Supreme Court seems clearly inclined to limit the use of habeas corpus tactic to obtain federal review. But the Court’s inclination can change with a change in the composition of the Court’s membership. And it could be an abrupt change. During each session of the Court in recent years, at least several habeas corpus cases have come before it for decision. There is ample opportunity then, for a new ideological majority of the court to have a significant impact.

As for Congress, it may be poised to become the prominent player in addressing the many issues that federal habeas corpus presents. It seems to be moving in that direction. While the 1994 Crime Bill stands as an excellent example of Congressional paralysis to address the issues of federal court oversight in this area, this may now be changing with the heightened Republican presence in Congress. Congress under Democratic control was obviously reluctant to enter the fray. While under Democratic leadership, the 1994 Crime Bill managed to increase substantially the number of federal capital crimes while sidestepping the issue of habeas corpus reform. It even found itself embroiled in other controversial features of the death penalty such as the efforts by the Congressional Black Caucus for the inclusion of a “Racial Justice Act” provision that would have extended rather than curtail federal appeal jurisdiction; one that would allow appeals to review statistical disproportionality of the death penalty meted out to minority defendants.

In the final analysis, the 1994 Crime Bill was an expedient political compromise to shore-up the flagging fortunes of the Democrats in both Congress and the administration. It was also recognized as an expedient

political necessity: A need to address the widespread concern among Americans that something was being done to combat crime. Congress now seems to be returning to this issue of federal oversight of habeas corpus for state prisoners. Anti-terrorism legislation just passed by the Senate has major provisions to overhaul federal habeas corpus law. Not surprisingly, the habeas corpus part of the new Senate anti-terrorism law again proved to be the most partisan and heatedly debated part of the proposed legislation. Democrats led by Senator Biden (D-Del.) tried to limit the habeas corpus measures in the bill to federal prisoners, arguing that because the bill as a whole concerned the federal response to terrorism, provisions changing habeas as it applies to state prisoners were not germane. But Senator Hatch (R-UT) among others, spoke against a “piecemeal approach” to habeas reform and said the amendment proposed by Biden would “gut” the bill’s habeas provisions. Hatch’s view prevailed, and the bill as passed addresses habeas petitions by federal and state prisoners in both capital and non-capital cases (Criminal Law Reporter, 1995).²⁹ The proposal now goes to the House. Proponents contend these proposed reforms would shorten delay in state imposed death penalty cases from an average of eight years to five (Washington Post, 1995). Congress, it seems, cannot continue to sidestep the problem. It is likely, that now a full Congress will be forced to address it.

In the end, the whole may be greater than the sum of the parts. After all there are two primary actors involved: Congress itself and its statutory role in habeas corpus, and the Supreme Court in its existing interpretive role (and subsequent interpretation should Congress act), which could be affected by a changing mix of Supreme Court members. There are, of course, other considerations, not the least of which are special interest groups and the tugs and pulls of an American public and its feverish concern over crime and our nation’s crime control policies, two factors that seem to have carved-out a stake in the future of habeas corpus.

One thing about “the Great Writ” is obvious: its use and even its symbolism far transcend mere concern over its effect as an appellate remedy—or its argued practical effect as a means to delay justice. Hidden

within habeas corpus are some broad and fundamental issues of governmental sovereignty, the administration of criminal justice, constitutional review, rights of the convicted, political partisanship and issues of race, the public's perception of our legal system, and our nation's crime control anxieties.

Notes

1. "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

2. Although criticized for his suspension of the writ and the imprisonment of thousands of suspected southern sympathizers, Lincoln had no compunctions about his action. In a letter to Eustus Corning and others, dated June 12, 1863 he states: "Ours is a case of rebellion. . . . [The Suspension Clause] plainly attests the understanding of those who made the Constitution that ordinary courts of justice are inadequate to cases of rebellion—attests their purpose that, in such cases, men may be held in custody whom the courts, acting on ordinary rules, would discharge. Habeas corpus does not discharge men who are proved to be guilty of defined crime; and its suspension is allowed by the Constitution on the purpose that men may be arrested and held who cannot be proved to be guilty of defined crimes." Lincoln's actions were unanimously overturned by the Supreme Court in 1866, a year after his death and the conclusion of the Civil War in *Ex Parte Milligan*, 1866.

3. Actually, the 1867 act did not specifically mention states. This amendment by Congress to the federal habeas corpus statutes authorized federal courts to issue writs of habeas corpus on behalf of any person in custody "in violation of the Constitution." This implicitly extended this review authority of prisoners held by state action.

4. Author's note: This system is unique to the United States. No such collateral attack is allowed on a conviction in England, where the writ of habeas corpus originated.

5. The specific cases expanding habeas corpus were *Fay v. Noia*, 1963; *Townsend v. Sain*, 1963; and *Sanders v. U.S.*, 1963.

6. Information supplied by Statistical Analysis Section, Administrative Office, United States Supreme Court, 1994.

7. Of course, more than merely "tightening up" the availability of this remedy may be playing a role in this decline. It may reflect this fact coupled with the changes in inmate characteristics. For example, a growing segment of state inmates are imprisoned on drug charges. The filing of federal habeas corpus petitions are more likely to be filed by those serving long-term sentences. Perhaps many state drug sentencing patterns and parole policies do not trigger the long periods of incarceration that are necessary to exhaust all state and federal direct post-conviction remedies that are first

required before the federal courts will entertain a habeas corpus petition. There is also the fact that drug-related charges are most likely to be contested on the grounds of illegal search and seizure. Such Fourth Amendment challenges as a basis for federal habeas have been generally foreclosed by the Supreme Court. It would be interesting to see if the new "three strike" laws being adopted by states which mandate life imprisonment proves to increase federal habeas filings by those so sentenced.

8. Still, it may reflect the fact that the Supreme Court in recent years has limited the opportunity for inmates to file successive petitions, requiring that they be "bundled" for consideration. The fact that inmates except in certain circumstances cannot file successive petitions, but must lump them together into one, would decrease the number of petitions filed as counted against an ever-growing number of state prisoners. A report by the Federal Courts Study Committee, *Working Papers and Subcommittee Reports* (July 1, 1990, at 468), speculates that the decline in filings are attributable to the lack of prisoner success in obtaining habeas review combined with the liberalizing for prisoners of Title 42, Section 1983 (civil rights violation). The report suggests that this has "deflected" many habeas cases to filings under Section 1983.

9. The states were California, Texas, New York, Florida, Pennsylvania, Alabama, Missouri, Louisiana and Michigan. What accounts for this is anybody's guess. It could be any number of factors: More "jailhouse lawyering," personal characteristics of the inmates, state sentencing schemes, and policies and views of state and federal courts in certain geographical areas. One possible explanation is pointed out by the National Center for State Courts in its recent examination of federal habeas filings by state inmates. They suggest that procedural differences among the states in how they handle state post-conviction relief seems to be associated with the number of inmates filing federal habeas corpus (Flango, 1994:18–20).

10. Defendants may raise federal defenses to state trial courts before, during, and after trial-level proceedings. They may ask state appellate courts to review trial courts determinations for error, and they may seek state postconviction relief in both trial-level and appellate courts.

11. See: 28 U.S.C. 2241(c)(3), 2254(a) 1988. Technically, habeas corpus is available only to state prisoners because actions under these statutes by federal prisoners are "motions" that are part of an ongoing federal action.

12. This opinion is strongly held by Chief Justice Rehnquist who, in his 1989 remarks to the ABA mid-year meeting, remarked: "[T]o my mind the flaw in the present system is not that capital sentences are set aside by federal courts, but the litigation ultimately resolved in favor of the state takes literally years and years and years."

13. This was also obvious from some recent research conducted by the author as part of a habeas corpus project conducted by the National Center for State Courts into habeas filings and actions in four selected states.

14. According to one source, federal appellate courts have found constitutional flaws in as many as 73 percent of state death penalty cases reviewed on the merits. See Brief Amicus Curiae for the NAACP Legal Defense and Education Fund at 1-b *Barefoot v. Estelle*, 1983. Still, as one noted expert points out, this figure may be misleading as virtually every death penalty state had to amend its laws after 1976 (Robbins, 1990). Other sources have put the figure at 40–60 percent.

15. Robbins (1990) has pointed out, the first petition for certiorari to the U.S. Supreme Court will typically follow affirmance of conviction by the state's court of last resort. Following state post-conviction proceedings (including appeals within the state judicial system of lower state court denials of post-conviction relief, and perhaps including as well another petition for certiorari to the Supreme Court), a first federal habeas petition will be filed in federal district court, where a full-scale hearing will often be held. An appeal will follow, in which the appeal will also be given full—not expedited—attention. Another petition for certiorari will be filed in the Supreme Court. Following Supreme Court review, if any, the case will become the subject of state executive branch clemency proceedings. If clemency is denied, emergency post-conviction proceedings will be filed in both state and federal trial courts, with expedited appeals to the state and federal intermediate and ultimate appellate courts.

16. The Federal Court Study Committee, Working Papers And Subcommittee Reports (July 1, 1990) suggested that the falling numbers of federal habeas petitions in recent years as a percentage of inmate populations may be a combination of lack of prisoner success with this remedy combined with a “deflection” by inmates to 42 U.S. Sec. 1983 (civil rights) filings in its place.

17. What they are referring to is Radelet, Bedau and Putnam (1992). Also see Bedau and Radelet (1987). Their methodology and conclusions have come under sharp attack; for an example see Markman and Cassell (1988).

18. Resolution XVIII, Habeas Corpus in Capital Cases, adopted as proposed by the State-Federal Relations Committee of the Conference of Chief Justices (February 1, 1990).

19. For example, Chief Justice Rehnquist in *Coleman v. Balkcom* (1981) in dissent wrote “[the current system] has made it virtually impossible for States to enforce with reasonable promptness their constitutionally valid capital punishment statutes.”

20. The ABA committee recommended a required time period to file federal habeas relief of a full year after exhaustion of direct appeals and certiorari to the U.S. Supreme Court. It also recommended the possibility of a 90 day extension for cause and an overall exception to any time limit for a colorable claim, not previously presented, either of factual innocence or the petitioner's ineligibility for the death penalty.

21. It should be pointed out that even some of the chief judges of the U.S. Court of Appeals in an unprecedented move

attacked the Powell Committee report and Chief Justice Rehnquist's behavior in directly submitting the Committee's report to Congress (Reinhardt, 1989).

22. Senator Strom Thurmond (R-SC) introduced the “Reform of Federal Intervention in State Proceedings Act” beginning with the 97th Congress, which would bar federal habeas corpus litigation of a claim if the issue was “fully and fairly” litigated in state court.

23. The Clinton bill had three major provisions. In addition to the federal habeas corpus feature, the other two major prongs of the administration's crime bill was the so-called Brady Bill and its five-day waiting period for purchase of handguns, and a \$3.5 billion scheme to put more police officers on the street.

24. However, it should be noted that this is only part of the issue. Most non-death row prisoners' claims are filed pro se. This requires staff time to screen for constitutional violations and determine if counsel should be appointed. U.S. District Courts have pro se clerks who have this responsibility. In death penalty cases a great deal of “tracking” of such petitions by court staff occurs. Keeping up with both non-capital and capital case filings can be time-consuming and tedious.

25. The Chief Judge of the Court of Appeals (Eighth Circuit) argues that if states eliminated the death penalty, a large amount of litigation would disappear and the savings to state government would be enormous (Lay, 1993). The cost of reviewing cases in state and federal courts has been estimated to be between \$3.5 and \$4.5 million dollars per death row inmate (Linder, 1993). There are those, however, who argue that death penalty abolitionists purposely exaggerate death penalty costs while understating the cost of life imprisonment.

26. For example see, *Schneckloth v. Bustamonte*, 1973, quoting Massachusetts Supreme Court Justice Paul C. Reardon on the “humiliation of review from the full bench of the highest state appellate court to a single, United States District Court judge.” Yet, at least one state judge has testified to the necessity of federal oversight. Justice Garter, a former state judge noted that state court improvements were encouraged by such oversight (*Withrow v. Williams*, 1993).

27. Specifically, Resolution XI as adopted August 31, 1989 as proposed by the State-Federal Relations Committee. It mentions that “the Conference of Chief Justices has repeatedly expressed the view that duplicative and overlapping reviews of state criminal convictions by federal courts unduly prolong and conflict with state criminal proceedings.” It also expressed the need to reduce resulting tensions between state and federal courts.

28. See Amicus Curiae brief by the NAACP Legal Defense and Education Fund in *Barefoot v. Estelle*, 1983. However, noted legal authority on the subject Robbins (1990) feels this may be misleading as virtually every death penalty state had to amend its laws after 1976. He appears to be more inclined to agree with those who put the figure at 40–60 percent. For example, the ABA studied published

habeas decisions by federal appeals courts in capital cases from July 1976 to May 1991. It found that in 40 percent of the cases, the state conviction or death sentence was reversed because of constitutional violations or errors (Moss, 1992).

29. Among some of the main features of the proposed bill are the following: State prisoners in non-capital cases would have just one year to apply for habeas relief; in capital cases it would add to Title 28, a new chapter titled, "Special Habeas Corpus Procedures in Capital Cases." In brief, it would establish timetables and limit the issues available on habeas, but these provisions would apply only if the state established a system for appointing and compensating competent counsel for post-conviction proceedings brought by condemned prisoners. If such a system is in place, then a prisoner would have 180 days to file for federal habeas. The period would run from the final state court affirmation of the conviction and sentence on direct review, but would be tolled while the U.S. Supreme Court review or state postconviction relief is sought. It bars second or successive application of claims. The language of the proposal pays a much greater deference to state court determinations that have been litigated in state courts. Federal review would be limited to claims raised and decided on the merits in state courts, unless the failure to raise the claim is the result of such things as state action in violation of the federal Constitution or laws; the recognition of a new federal right recognized and applied retroactively by the Supreme Court; or based on a factual predicate (e.g., the facts underlying the claim would be sufficiently established by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the offense).



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DISCUSSION QUESTIONS

1. What makes the writ of habeas corpus so controversial? And, if it is so controversial, why has it survived for so long?
2. How has the use of habeas corpus changed in the past 50 years? How has this change affected public perception of the writ?
3. Do you believe the writ of habeas corpus is necessary in today's modern criminal justice system, or has it outlived its usefulness?



READING

Criminal Justice System Reform and Wrongful Conviction

A Research Agenda

Marvin Zalman

The exoneration of hundreds of prisoners since 1989, and the plausible belief that thousands of wrongful convictions occur each year, underlie the importance of wrongful conviction as a policy issue (Gross, Jacoby, Matheson, Montgomery, & Patil, 2005).

“Wrongful conviction” is not only the conviction of a factually or “actually” innocent person.¹ It also describes an emerging movement and an evolving multidisciplinary academic subject. Paradoxically, although wrongful conviction has generated extensive legal,

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psychological, and forensic science research, the subject has not been significantly addressed by criminal justice scholars (Leo, 2005). This article highlights the issue's policy significance and suggests avenues for research by criminal justice scholars.

Wrongful Conviction as a Policy Issue

This section describes the policy salience of wrongful conviction, the nature of the emerging innocence movement, the movement's reform and research agenda and the limited nature of innocence research by criminologists and criminal justice scholars. This discussion sets the stage for discussing potential avenues of criminal justice innocence research.

Wrongful Conviction on the Public and Policy Agendas

Fear of convicting the innocent is intrinsic to justice systems and predates the wrongful conviction (or innocence) movement (Blackstone, 1769/1979, p. 352; Volokh, 1997). Several 20th-century books and films identified wrongful convictions but had little influence on criminal justice thinking or practices prior to the mid-1980s (Borchard, 1932; Frank & Frank, 1957/1971; Leo, 2005).² Earle Stanley Gardner (1952), creator of the fictional defense attorney Perry Mason, failed in the late 1940s to institutionalize a short-lived "Court of Last Resort" created to correct miscarriages of justice. In political science terms, wrongful conviction was not on the public or governmental agendas.

The innocence movement that now exists is based in part on research that significantly undermined faith in the accuracy of the criminal justice process, especially DNA testing, first used to exonerate a defendant in 1989 (Leo, 2005, pp. 205–206; Medwed, 2005, p. 1117). Its ability to prove with astronomically high probability that likely perpetrators deposited biological evidence, and its power to absolutely rule out DNA donors among convicted defendants, shattered social and professional disinterest in miscarriages of justice and created traction

for wrongful conviction as a public issue (Connors, Lundregan, Miller, & McEwun, 1996; Leo, 2005, p. 205). In addition to DNA testing, the cumulative work of psychologists since the 1970s has cast doubt on the unerring accuracy of eyewitness identification (Doyle, 2005, pp. 129–132; Wells et al., 1998). The "DNA revolution" forced a reevaluation of the criminal justice system's capacity to function according to Packer's (1968, pp. 160–161) crime control model, in which factual errors are thought to be minuscule.

Two factors were especially salient in putting wrongful conviction on the public and policy agendas. First, Attorney General Janet Reno authorized an influential Justice Department study that highlighted the ability of DNA testing to undermine convictions, especially those based on eyewitness identification (Connors et al., 1996; Doyle, 2005, pp. 127–130, 165–167). The Justice Department followed up with a report on improved methods of interviewing witnesses and conducting lineups (Doyle, 2005, pp. 169–187; Technical Working Group for Eyewitness Evidence, 1999). Second, *Actual Innocence* was published (Scheck, Neufeld, & Dwyer, 2000). To their great credit, the lawyer and journalist authors of this popular book went beyond empathetic storytelling about the innocent people they helped free. They conceptualized the wrongful conviction project in terms of specific kinds of errors and organized the chapters of *Actual Innocence* around them. These were drawn together in an appendix—a "Short List of Reforms to Protect the Innocent" which was slightly expanded in the 2003 edition (Scheck et al., 2000; Scheck, Neufeld, & Dwyer, 2003, pp. 351–362). The book's lack of academic refinement is an advantage in reaching a mass audience. The inclusion of sources, however, acknowledges the debt owed by the innocence movement to varied and expanding fields of knowledge outside the law. To a significant degree, the innocence movement's policy and research agenda is set out in *Actual Innocence* and has been shaped by Scheck and Neufeld's leadership in opening new arenas, including programs to assist exonerees.³

Wrongful conviction is now an issue on the public agenda. The news media, long supportive of prosecutors, are now sensitized to miscarriages of justice, and

their continuing reports of exonerations keeps the issue in the public eye (Tulsky, 2006; Warden, 2003). A stream of popular books and documentaries attest to a market for true accounts (Blakeslee, 2005; Edds, 2003; Holden, 2005; Humes, 1999; Johnson, 2003; Junkin, 2004). Novels and dramas portray wrongful convictions (Barnes, 2005; Feige, 2006a; Patterson, 2005). *The Exonerated* (Blank & Jensen, 2004) not only played off Broadway and on tour but was made into a television production and shown on Court TV. This publicity is not entirely happenstance, as innocence projects (described in the next section) have promoted some of it (Scheck et al., 2000; Vollen & Eygers, 2005). The movement's leaders appear to understand that innocence reforms require public opinion support.

Innocence movement reforms are on the governmental agenda (see Zalman, 2005). The Innocence Protection Act, passed after four years in the congressional hopper, was a most significant movement victory (Leahy, 2004a, 2004b). This watered-down part of the 2004 Justice For All Act provides, inter alia, standards and funding for DNA testing of potential exonerees (Weich, 2005). At least 38 states and the District of Columbia have passed innocence statutes allowing appeals by prisoners with claims based on DNA evidence but who have exhausted appellate remedies (C. E. Jones, 2005, p. 1249; Zacharias, 2005, pp. 193–195). The videotaping of police interrogations is spreading (Sullivan, 2005). Several states and a number of police departments have begun to adopt lineup reforms (Lindo, 2000). The Justice for All Act “increased the amount of compensation for those wrongfully convicted of federal crimes to up to \$100,000 a year for death row exonerees, and \$50,000 a year for non-death row exonerees” (Innocence Project, n.d.), and bills to compensate exonerees have been introduced in several state legislatures, including those of Georgia, Michigan, and Utah (Hunt, 2006; “State Should Offer,” 2006; C. Tucker, 2005).

The most notable item on the innocence reform agenda is capital punishment. In what is arguably the best known wrongful conviction story, by 2000, 13 men on death row in Illinois had been exonerated, prompting then-Governor George Ryan to impose a moratorium on executions, appoint a commission to study the

death penalty, and, before leaving office in 2002, commute the death sentences of all Illinois death row inmates. The 207-page report of the Illinois Governor's Commission on Capital Punishment (2002) made 85 recommendations that have become blueprints for reform. Other states have considered or imposed death penalty moratoria, and the American Bar Association (ABA) established a Death Penalty Moratorium Implementation Project. Widespread knowledge of death row exonerations is credited with reenergizing the anti-death penalty movement and with a decline in capital sentences and executions since 2000 (Kirchmeier, 2002; Steiker & Steiker, 2005; Warden, 2005).

The Innocence Movement

Unlike Gardner's (1952) abortive efforts to create a court of last resort, an institutional response has emerged to do the legal work needed to exonerate prisoners and the policy work designed to promote the issue. It began with a law school-based clinical program in 1992 led by Barry Scheck and Peter Neufeld (Scheck et al., 2000, 2003), which has grown into a multipurpose nonprofit organization—the Innocence Project (n.d.). About 40 law school clinical programs or other legal organizations (e.g., public defenders' offices), half of them established after 2000, now screen and litigate cases for prisoners claiming innocence (Medwed, 2003; Stiglitz, Brooks, & Shulman, 2002). These projects reflect an American penchant for grassroots solutions to contentious issues that involve governmental impropriety (Zalman, 2005, pp. 187–189).

Two innocence projects, the Innocence Project (n.d.) at Cardozo Law School and the Center for Wrongful Conviction (n.d.) at Northwestern University, have expanded into multifunction organizations designed to promote systemic reforms.⁴ The Center for Wrongful Conviction has three stated functions: legal representation, research into the systemic problems that cause wrongful convictions, and community service to raise awareness of the causes and costs of wrongful conviction. The latter goal includes assisting exonerees to reintegrate into the community after years in prison (Center for Wrongful Conviction, n.d.).

Beginning in 2001, Scheck and Neufeld and other innocence project leaders met annually to consider their collective interests. The National Innocence Network was formalized in 2005 with membership limited to innocence projects. Its three goals are to represent potential exonerees in court, to provide assistance for exonerees on release, and to work for policy reforms designed to reduce wrongful convictions. To advance the latter goal, the Innocence Project hired a policy director to manage legislative and policy reform and to train local innocence projects' personnel in lobbying skills (National Innocence Network Conference, 2005). In one policy area for example—improving the accuracy and integrity of forensic laboratories—the Innocence Project has worked to create audit oversight committees in a number of states to ensure laboratory quality, to suggest improvements, “and possibly to evaluate wrongful convictions and assist in determining what went wrong” (Cromett & Thurston Myster, 2005).

The innocence movement is not limited to innocence projects. It includes cognitive psychologists who have tested new lineup methods in thousands of experiments (Wells et al., 1998) and innocence commissions established to investigate the wrongful conviction issue (Mumma, 2004). It includes nonprofit organizations designed to promote the goals of criminal justice reform (Justice Project, n.d.), to investigate cases (Centurion Ministries, n.d.), or to report wrongful conviction news (Justice Denied, n.d.). It includes authors who write about miscarriages of justice, documentary filmmakers, lawyers who take appeals on behalf of potentially innocent appellants, therapists who help exonerees and scholars who research wrongful conviction issues. Exonerees such as Kirk Bloodsworth have become part of the movement by working for innocence reform or by participating in publicity events. The innocence movement has some attributes of a reformist social movement, a point of departure for potential research initiatives discussed below.

The Innocence Movement's Reform and Research Agenda

If wrongful conviction is viewed as a multidisciplinary academic subject, its backbone of knowledge is contained

in a list of topics that are deemed to be causes of wrongful conviction. This perspective makes the innocence movement's reform agenda coterminous with the wrongful conviction research agenda. Leo (2005) notes that the “standard list” of causes began with Borchard's (1932) tally of factors associated with wrongful convictions. A version is found in the chapter outline and appendices of Scheck et al. (2003, pp. 205, 212–213), and it may have achieved canonical status with its adoption by an ABA committee (Gianelli & Raeder, 2006). The ABA report includes separate chapters with analyses and recommendations on six causes of wrongful conviction: false confessions, eyewitness identification procedures, forensic evidence, jailhouse informants, defense counsel practices, investigative policies and personnel, and prosecution practices. It concludes with a chapter on compensation for the wrongly convicted. Similar lists and parallel analyses are found in many sources, including the Illinois Governor's Commission on Capital Punishment (2002), the Innocence Commission for Virginia (2005), and a scholarly anthology (Westervelt & Humphrey, 2001). The basic list of causes and remedies can be expanded. Scheck et al. (2003, pp. 358–362), for example, include creating statewide innocence commissions and the creation of an innocence network, reflecting the Innocence Project's goals.

A point worth noting is that some rhetoric of innocence advocates is radically transformative. Neufeld asserted that the larger goals of innocence projects “is ‘nothing less than the complete overhaul of the criminal justice system with a new awareness of how to make it more reliable’” (Vollen & Eggers, 2005, p. 256). A lawyer who litigated cases for exonerees believes that large judgments in civil lawsuits for exonerees might bring “diverse actors together to collaborate on systemic change in our criminal justice system,” leading to “widening ripple effects throughout the policing industry . . . [having] a great impact on law enforcement” and “the most far-reaching and effective criminal justice system reform that our country has experienced since the Warren Court's criminal procedure revolution” (Garrett, 2005, pp. 45, 7–8, 111).⁵ Although not all rhetoric by the movement's leaders is

so transformative,⁶ it suggests that emotions among innocence activists are akin to those of participants in reformist social movements. Transformative rhetoric may be driven by a belief that urgent action is needed because widespread DNA testing in criminal cases will eliminate easily observable miscarriages; this may cause publicized exonerations to decline and so undermine popular support for innocence reforms before the problems that cause wrongful convictions are corrected (Scheck et al., 2003, p. 323; Steiker & Steiker, 2005, p. 622).⁷ This fear is belied by the high proportion of exonerations not based on DNA testing and by the plausibility that thousands of miscarriages of justice occur every year (Gross et al., 2005).

Each component of the standard list of innocence reform is itself a major area of research, whose scholars and scientists command daunting bodies of recondite knowledge and research. This poses potential tensions between activists eager to implement reforms based on existing knowledge and scholars who argue for continuing research. A legal scholar eager for implementation, for example, has incautiously suggested that “the scholarly work on false confessions, faulty eyewitness identifications, and other predictable problems of proof is largely complete” (Siegel, 2005, p. 1222). Few doubt that imposing best-practices laboratory standards, videotaping interrogations, improving lineup procedures, or the like will reduce errors and improve criminal justice practices, but it seems risky to shut the door on continuing research in these areas. In addition, further research may qualify or enrich earlier findings, necessitating updating and modification. Conflicting research findings or challenges to the quality of innocence research can be expected to generate controversy.⁸

The wrongful conviction research agenda is curiously incomplete. It fails to acknowledge the adversary system itself as a source of error despite recent innovative scholarship on comparative trial and justice systems and on evidence law theory and practice (Burns, 1999; Damaska, 1996, 1997; Lerner, 2001). Perhaps such studies are so theoretical and so unlikely to change constitutionally embedded practices as to be irrelevant to the innocence movement. But more practical jury research exists on issues such as the comprehensibility

of jury instructions, juror note taking and witness questioning, and jurors discussing cases before formal deliberations begin (Dann & Hans, 2004). Jury research has been underway for decades and has generated proposals adopted in several jurisdictions, so it is unlikely that innocence movement leaders are unaware of it. These practical jury reforms might plausibly reduce wrongful convictions and yet are not found on the standard list of wrongful conviction issues.

Speculation as to why the innocence movement has largely overlooked the adversary trial includes the fact that the innocence narratives did not make a connection between trial procedures and erroneous verdicts. Such connections are not as easily observed as the effects of mistaken eyewitness identification and the like. Trial errors are embedded in trial transcripts (which are expensive and not automatically provided), and it requires painstaking legal analysis to sift through them to identify errors, as was done by pro bono lawyers for the Innocence Commission of Virginia (2005). In addition, the innocence movement’s leaders are litigators who are not conditioned to see a properly operating trial as a problem, even while documenting such failures as a prosecutor, acting within the bounds of professional propriety, befuddling an honest witness on cross-examination (Scheck et al., 2003, pp. 25–27).

Trial issues were not entirely ignored by legal scholars concerned with wrongful convictions. An early and insightful article explored but did not completely answer the questions of whether the adversary jury trial, when working properly, can be a source of error and why trials often fail to filter out errors occurring earlier in the criminal justice process (Givelber, 1997). More recently, an evidence law theorist has generated an intriguing potential solution to trial-generated error by proposing two kinds of adversary system jury trial procedures (Risinger, 2004). The usual criminal trial would be reserved for cases involving “polyvalent facts” (e.g., intent in a homicide or rape case) where the criminal act is stipulated and a jury is well-suited to explore issues of motive and intent. For “who done-it” cases, where a jury is called on to determine what happened (“binary facts”), Risinger (2004) sketches a

stipulated procedure in which the adversaries agree to forego the rich storytelling tradition of adversary advocacy and instead focus on the facts (pp. 1307–1311). He also suggests adopting an “unsafe verdict” standard of guilt under such a procedure that has been adopted for appeals in England (pp. 1313–1333). Additional recent analyses by legal scholars have explored trial issues and wrongful conviction including acquittals (Givelber, 2005), the pretrial process (Leipold, 2005), an archaic and arguably unconstitutional South Carolina procedure that allows prosecutors to control criminal trial dockets (Sieget, 2005), and the preservation of evidence (C. E. Jones, 2005).

A final point about the wrongful conviction policy agenda, related to its partial locus, is the practicality of the standard list of reforms. The list was derived from counting factors associated with miscarriages of justice in the wrongful conviction narratives, beginning with Borchard (1932; see Harmon, 2001; Leo, 2005). Given the terrible consequences of wrongful convictions, there is an urgency to establish policies to correct such deficiencies as inadequate defense counsel, poorly equipped and operated forensic laboratories, and the like. There is little premium on conducting theoretical or basic research into the items on the innocence agenda, although some exists (e.g., Cole, 2005). Many items on the agenda are the special preserve of lawyers (e.g., prosecution and defense counsel issues), and most of the law review writing on innocence-related subjects is aimed at generating policy rather than legal theory. Issues concerning forensic science require major input from forensic scientists, laboratory directors, and forensic examiners, and innocence activists are not competent to generate innovation but only to lobby to ensure that proper procedures are followed. Police investigation intersects with important matters on the innocence agenda, but the study of the investigative process had its heyday in the 1970s, and there has been little research focusing on investigation by criminal justice scholars in recent years. In sum, much of the research on wrongful conviction is fragmented into various specialties, is mostly applied research, and is not within the competence of most criminal justice scholars.

The Paucity of Criminal Justice Innocence Research

Richard Leo (2003, pp. 208–211), noting that most wrongful conviction research has been conducted by lawyers and psychologists, identified three specialized areas of empirical research: eyewitness identification, child suggestibility, and false confessions. Significantly, this work has led to proposed reforms. Leading research psychologists, for example, made their findings about eyewitness identification accessible to policy makers and have assisted in policy reform efforts (Doyle, 2005; Wells, 2001; Wells et al., 1998). Research by child witness experts has led to substantial improvements in how police and courts treat child witnesses (ABA Task Force on Child Witnesses, 2002; Ceci & Bruck, 1995; Gilstrap, Fritz, Torres, & Melinder, 2005). Leo, a leading authority on confessions, has helped to make the study of false confessions an area of sociolegal and criminal justice scholarship (Drizin & Leo, 2004; Leo & Ofshe, 1998) and a concern of psychologists (Gudjonsson, 2003; Wrightsman & Kassin, 1993). As a result, many police departments have begun to videotape interrogations (Sullivan, 2005).

In contrast, Leo (2005, p. 214) identified only two or three studies by criminologists that have explored the causes of wrongful conviction (Harmon, 2001; Huff, Rattner, & Sagarin, 1986; Lofquist, 2001).⁹ Although a few others can be located (Denov & Campbell, 2005; Poveda, 2001; Schehr, 2005; Schoenfeld, 2005), this is remarkable when considering that Wells et al. (1998) estimated that more than 2,000 psychological research articles on eyewitness identification were in print almost a decade ago. I estimate that several hundred law review articles have been published on wrongful conviction topics in recent years, with a few based on empirical analysis (e.g., Campbell & Denov, 2004; Gross et al., 2005).¹⁰ Leo does not ask why so few criminologists have studied wrongful conviction but seeks to stimulate empirical research by urging criminologists to eschew research into the “legal causes” and instead study the “actual root causes” of wrongful

convictions. In this perspective, it is a simplistic or unexamined assumption that once the causes of wrongful conviction are identified “we will know how and why the problem of wrongful conviction occurs” (Leo, 2005, p. 213). Deeper causal and theory-generating research is needed to determine why the causes of wrongful conviction occur in the first place. Criminologists, for example, should ask, “What are the causes of eyewitness misidentification?” and the like (Leo, 2005, p. 213). Leo cites Lofquist (2001) as an exemplary study. Lofquist explored the structural dynamics within a police department that led to the identification of an innocent suspect as the perpetrator. Note that Leo’s conclusion that the deeper “criminological” research called for relies on organizational methods and theory.

Leo (2005) concludes by urging criminologists to move beyond legal categories and to draw on “existing social science frameworks” to build theories of miscarriages of justice. He specifically references psychological, sociological, and organizational frameworks for research. For example, psychological research could “study how the process of memory and perception formation” and the like “underlie a variety of psychological errors, and how those errors then lead to wrongful prosecution and conviction” (p. 215). “Sociologically, [criminologists] . . . need to study how the institutions of criminal justice . . . are structured and how the decision making, actions, and ideologies of these social actors are patterned in the production of both accurate and inaccurate outcomes” (p. 215). As for an organizational perspective, Leo recommends that “criminologists need to look at the microlevel and macrolevel forces, contexts, and structures that underlie the normal processes and production of perception, belief, and error in American criminal justice” (p. 216). He ends by tempering enthusiasm of potential wrongful conviction scholars by specifying the huge obstacles to this research: the lack of a database, the unlikelihood of police and prosecution support, and the inherent difficulties of determining whether wrongful convictions occurred from assembled case files (pp. 217–218).



A Criminal Justice Wrongful Conviction Research Agenda

Leo’s (2005) insightful depiction of the state of wrongful conviction research misspecifies the target audience by directing his remarks to criminologists and suggests too narrow a model of empirical innocence research, oriented mainly toward generating theories of the causal dynamics of wrongful convictions. He then suggests that this worthy goal is virtually unattainable because no database exists, primary case materials are very difficult to assemble, and it is inherently difficult to prove that a conviction was erroneous (pp. 216–217). Curiously, by holding up Lofquist (2001) as a model of wrongful conviction research, Leo glosses over the fact that it is more aptly categorized as organizational rather than criminological research. Analysts in business schools and in departments of public administration, organizational psychology, sociology, and criminal justice are better equipped to pursue such studies. Leo may be using criminology as shorthand for criminology and criminal justice, a reasonable assumption as these disciplines are coming to be housed in the same departments and as their research foci overlap to a greater extent than heretofore. If so, Leo takes a narrow view of criminological research. Kraska (2006), by contrast, posits criminal justice as a multifaceted discipline that, like criminology, has generated a variety of theoretical constructs. The theories generated by the subdisciplines within criminal justice may be macro theories of the entire criminal justice system (e.g., systems theory, late modernity), micro theories of system components (e.g., a theory of police management, of investigator behavior), or normative theories (e.g., democracy and policing, criminal jurisprudence).

Building on this broader foundation, I propose a number of innocence research strategies that could be pursued by “justician” scholars, whether their academic roots are in criminology, criminal justice, or allied disciplines. This perspective diverges from Leo’s (2005) hint that undervalues existing lines of innocence research because of the “simplistic assumption” that the standard list of causes provides a theoretically robust explanation

of wrongful convictions. I agree that the kind of empirical and theory-building research conducted by Harmon (2001) and Lofquist (2001) ought to be pursued. In addition, however, criminal justice scholars capable of conducting eyewitness identification experiments, for example, or adept at the legal analysis of recent bills designed to strip federal courts of habeas corpus jurisdiction (Bergman, 2005) ought to attend to these and other areas where research questions need to be refined and resolved. Likewise, American scholars of police and prosecution need to explore the construction of the truth in criminal cases, an understudied area, in the light of recent knowledge of miscarriages of justice (Fisher, 1993; Martin, 2001; McConville, Sanders, & Leng, 1991; Schoenfeld, 2005). That said, much of the research agenda proposed in this article is aimed not only at understanding wrongful convictions but also at understanding the reform process (i.e., the innocence movement and its research agenda).

The Context of Reform

The DNA revolution is used as a shorthand explanation for the emergence of the innocence movement. This kernel of truth masks other likely reasons for why the movement emerged when it did. Edwin Borchard (1932), Jerome Frank (Frank & Frank, 1957/1971), and Gardner (1952) understood the deep problems of criminal justice, but their failure to establish lasting reforms such as widespread exoneree compensation or prisoner review tribunals suggests that structural factors impeded progress on the wrongful conviction issue.

A social history of wrongful conviction that goes beyond a description of the 20th century wrongful conviction literature is needed (Leo, 2005, pp. 203–205). The current innocence reform movement presupposes a criminal justice system with national prosecutorial standards, criminalistics labs in every jurisdiction, managerial-style police departments, and the like. The criminal justice system of the early 21st century is a product of major changes that began in the 1960s. Police are far more professional today, as measured by increased education, less corruption, a managerial mentality among ranking officers, a legacy of constitutional reform that makes policing relatively

law abiding, and a growing commitment to community policing (Silverman, 1999; S. Walker, 2005). Another structural change critical to the existence and operation of innocence projects is the rise of law school clinical education in the 1970s (Panel Discussion, 1987). A research question amenable to social historical inquiry is whether the 2006 innocence research agenda (Gianelli & Raeder, 2006) was feasible, or even conceivable, in the middle of the 20th century. A study of these kinds of institutional innovations would have to be placed in the context of evolving social expectations such as Lawrence Friedman's (1985) sociolegal theory of total justice

Understanding the Innocence Movement

Study of the innocence movement itself can shed light on the capacity of the criminal justice system to change. Several large, well-developed, and partially overlapping subfields of sociology and political science—social movements, interest groups, policy analysis—provide models of inquiry (Burstein, 1999; Burstem & Linton, 2002; Heinz & Manikas, 1992; Mack, 1997, pp. 18–24; Weed, 1995; Zalman, 2005). Characterizing the innocence movement as a social movement may be odd as the latter category typically applies to the collective behavior of masses of people with common grievances who are typically excluded from political decision making and who coalesce to protest policies and to promote various interests (Eyerman & Jamison, 1991; Green & Bigelow, 2005; Morris & Mueller, 1992). It may be more accurate to describe the Innocence Network (n.d.) as an association type of interest group because of its organizational membership (31 innocence projects; Lowery & Brasher, 2004, p. 5). The lawyer leaders of the innocence movement seem to fit the model of interest group participants in that they are highly educated and well positioned to get results in various policy venues. They can marshal arguments before legislative committees, newspaper editorial boards, and a host of places where public opinion is shaped and policy decisions made. They are adept at working with scientists and experts and in mobilizing recondite information and techniques to gain attainable ends. The innocence movement, however,

promotes a highly generalized interest—justice—and is marked by the kind of fervor encountered in reformist social movements. This is seen in the prodigious efforts of pro bono litigators on behalf of truly innocent (Blakeslee, 2005) and ultimately guilty defendants (Dao, 2006; J. C. Tucker, 1997). This zeal also motivates movement participants toward criminal justice system reform efforts.

Research strategies and themes from sociology and political science can produce useful insights about the movement. Methodological modifications may be necessary as the innocence movement can be viewed as a species of social movement organization (SMO) without a mass social movement as a foundation (McCarthy & Zald, 1977). The sociology of social movements, which prior to the 1960s emphasized the social psychology of collective behavior, has been eclipsed by newer theoretical models. The resource mobilization model, although perhaps not the focus of recent sociological analyses, provides useful research themes. Researchers could explore, among other themes, the constellation of innocence SMOs as organizations, studying their mobilization patterns, the confederated structure of the movement, modes of cooperation and competition, alliances with congruent groups (e.g., NAACP-Legal Defense Fund, ACLU: Death Penalty Information Center, n.d.), strategies for survival and growth, and the division of labor among innocence projects in regard to different areas of policy innovation (McCarthy & Zald, 1977; pp. 1226–1227; Minkoff, 2002). These kinds of organizational studies can be categorized under Kraska's (2004, pp. 177–213) theoretical orientation of criminal justice as a "growth complex." This list is meant to be suggestive of the wide variety of issues that could be explored through the resource mobilization lens.

Successful social movements often generate countermovements (Marx, 1979; Meyer & Staggenborg, 1996). Recent writings indicate some outright prosecutorial opposition to the innocence movement's policy goals (Marquis, 2005) and potential rifts among those supportive of the innocence movement's aims (Steiker & Steiker, 2005).¹¹ Although prominent conservatives have strongly supported and even led innocence reforms (Mumma, 2004; Sevsions, 2003), the dogged opposition by many prosecutors to postconviction DNA testing

(Medwed, 2004) suggests an ideological component among prosecutors at the core of a countermovement. Defense lawyers and prosecutors are natural enemies. However much they may cooperate in plea negotiations, they are combatants in an adversary system, reflexively wary and initially antagonistic to any proposal coming from the "other side" (Doyle, 2005, pp. 169–187).

Research at this point can explore whether the oppositional themes sounded by Marquis (2005) are widespread among prosecutors, what threats are perceived by potential opponents that could mobilize a countermovement, whether the innocence movement has framed its agenda in a way to avoid opposition, and the elite sponsorship of both the movement and any countermovement that arises (Loge, 2005). Given the relatively high status of innocence movement leaders, they may be able to win the allegiance of political elites.

More recent social movement research has focused theory-building energies on individuals within social movements, examining the social psychology of recruitment patterns into SMOs and the influence of social movements on individuals' political activities (Eyerman & Jamison, 1991; Morris & Mueller, 1992). This is linked to the emergence of "new social movements," such as the environmental movement, that are largely postindustrial, middle-class movements that focus on contemporary quality of life issues (Pichardo, 1997). Such approaches may yield useful insights as innocence movement participants for the most part are middle class. More recent attention to broader theoretical themes in social movement research, including mobilizing political opportunity structures and cultural dynamics and emphases on tactical solutions, movement leadership, and the impact of transformative events, readily suggests applications to the study of the innocence movement (Morris, 2000).

Studies of SMOs can also be approached from the political science interest group perspective. Some studies examine the mobilization of individuals and institutions through the lenses of niche theory and exchange theory to explain organizational maintenance (Lowery & Brasher, 2004, pp. 29–69). Given the newness of the innocence movement, it may be premature to study its environment (a parallel concept to that of a social movement "industry"). The logic of studying the innocence

movement's organizations as interest groups is that they seek policy changes in government agencies and from legislatures and courts. Although the study of interest groups has waxed and waned within political science, there is no doubt that interest groups are a large and important sector in the public policy universe (Baumgartner & Leech, 1998). A variety of issues are open to innocence movement researchers. One is the way in which the news and popular media have promoted the movement's interests or how the movement has utilized the media (i.e., "lobbied the public"; Browne, 1998, pp. 84–108; Kingdon, 1984, pp. 61–64; Molotch, 1979); this parallels the sociological category of frame analysis. Given the salience of legal issues, attention can be paid to legal strategies used by innocence groups to influence judicial bureaucracies and to use litigation as a policy lever (Smith, 1997; Wasby, 1983). As a small movement consisting mostly of tiny organizations, it is worth examining the nature of the lobbying or influence strategies employed (e.g., inside vs. outside strategies; Green & Bigelow, 2005; Kingdon, 1984; Strate & Zalman, 2003). These approaches could be applied to a case study of the passage of the Innocence Protection Act or to studies of other policy advances.

Network analysis, described as "a powerful new approach to the study of social structure" (Emirbayer & Goodwin, 1994, p. 1411), is used by interest group and social movement researchers. Network analysis examines relationship patterns to overcome the limits of explaining human behavior "solely in terms of the categorical attributes of actors." Its central insight is that networks of social relations ("nodes" or behavioral networks), which can be precisely described, constrain and enable "patterned relationships among social actors within systems" (Emirbayer & Goodwin, 1994, pp. 1414–1418). Two "conceptual strategies" used to explain patterned relationships are (a) a social cohesion approach "that focuses on the direct and indirect connections among actors" (Emirbayer & Goodwin, 1994, pp. 1419–1422) and (b) a "positional" strategy that explores "actors' ties not to one another, but to third parties," so as to define an actor's position relative to other actors in a social system (Emirbayer & Goodwin, 1994, pp. 1422–1424).

A number of methods used in conjunction with network analysis could help describe and explain the

behavior of innocence movement participants when acting as policy entrepreneurs (Diani, 2002; D. Friedman & McAdam, 1992). Scheck, one of the most prominent figures in the innocence movement, has, for example, placed himself in existing policy networks as past president of the National Association of Criminal Defense Lawyers and as a commissioner on the New York Forensic Science Review Board. By deliberately pursuing a networking strategy, Scheck has almost perfectly followed the script of a policy entrepreneur who creates opportunities to "persuade others to support their policy ideas" (Mintrom, 1997) and thus stimulate the diffusion of innovation (discussed below; Kingdon, 1984, pp. 188–193; Ward, 1998).¹² The quantity and intensity of network ties could, when combined with substantive knowledge of policy events, produce the kind of rich understanding that has illuminated elite criminal justice networks in one jurisdiction (Heinz & Manikas, 1992).

Studying the Innocence Reform Agenda

In addition to studying the innocence movement itself, criminal justice scholarly analysis and research can improve the understanding of the innocence reform agenda and its prospects for success. The focus of such research can include studies of established reforms and evaluations of claims about the innocence research agenda.

Diffusion of Innocence Innovations

The diffusion of innovation is an autonomous research tradition employed in many disciplines and is reported in more than 5,000 publications in the social and behavioral sciences and in other disciplines (Rogers, 2003, pp. 43–45, 477). "*Diffusion* is the process in which an innovation is communicated through certain channels over time among the members of a social system" (p. 5). The four elements of innovation, communication, time, and social system have been the focus of much diffusion research (pp. 11–38), and much research has also been devoted to the process of making innovations decisions, focusing on the elements of knowledge, persuasion, decision, implementation, and confirmation (pp. 168–218).

The unit of analysis in most diffusion research has been individuals, but in recent years diffusion research has focused more on organizations (pp. 402–435) and can include states of the union in political diffusion studies (Mintrom, 1997; J. Walker, 1969).

An opportunity exists to capture the recent spread of innovations such as videotaping interrogations and lineup reforms because the ability to “gather data at several points during the diffusion process” (Rogers, 2003, p. 129) can be helpful in resolving causality issues. Of special importance to innocence reform studies are the existence of diffusion networks. This can allow criminal justice scholars to move away from the study of the innocence movement and to focus on more familiar venues such as police agencies. Political and policy analysis among criminal justice scholars could examine the spread of state innocence laws (C. E. Jones, 2005), perhaps analyzing the role of policy entrepreneurs (Kingdon, 1984, pp. 188–193; Mintrom, 1997). An important concept of diffusion research is the critical mass, akin to the idea of a “tipping point,” which is “the point after which further diffusion becomes self-sustaining” (Rogers, 2003, p. 343). This concept, interestingly, was borrowed from social movement research. Given the tendency of pro-innovation bias in innovation research, innocence movement scholars should be cautious in finding that a critical mass has occurred and should be sensitive to the existence of reinvention of innovations, which is common (Rogers, 2003, pp. 106, 180–189).

Diffusion methods could be applied to the spread of state innocence commissions (Mumma, 2004; Scheck & Neufeld, 2002) or to a group of specific issues on the standard list of reforms. Correcting errors caused by lying jailhouse informants, for example, requires not one but a variety of solutions. Diffusion research could measure the spread of (a) jail procedures regarding the placement and control of prisoners, (b) police and prosecutors’ policies on screening panels and evaluative techniques for properly evaluating the use of informants’ testimonies, (c) judicial precedents allowing or requiring cautionary instructions to juries concerning the weighing of informants’ testimonies, (d) prosecutorial policies requiring prosecutors to divulge any inducements to informants and procedures to ensure compliance, and (e) rules requiring extensive discovery when

informants’ testimonies are used (Gianelli & Raeder, 2006, pp. 63–78). One can imagine a legal analysis of appellate-judicial precedents concerning jury instructions that sheds light on that rule. Such a study, however, would not fully cover the more important question of whether policies have been adopted that in combination may reduce wrongful combination caused by jailhouse snitches. Awareness of diffusions research could stimulate such broader studies.

Criminal justice researchers should be aware of political fragmentation in the United States as an impediment to the diffusion of innovations within criminal justice agencies. Consider, for example, the videotaping of interrogations. Sullivan (2005, p. 1128) reported that all police departments in Alaska and Minnesota and more than 300 additional departments have adopted the innovation. As of this writing, seven states and the District of Columbia have required electronic recording by statute or judicial decision, with a variety of conditions and limitations.¹³ Sullivan (2005) noted that although many police departments have voluntarily adopted a recording requirement, “they represent only a small percentage of all law enforcement departments in the country” (p. 1136). A recent study indicates that 40% of big city police department administrators oppose videotaping, suggesting considerable potential resistance (Zalman & Smith, 2005). This finding, in light of the existence of 3,070 sheriff’s offices, 12,666 local police departments, and 49 state police agencies in the United States, suggests at least that the diffusion of recording interrogations will be a major undertaking (Hickman & Reeves, 2003, p. 1). The fragmentation of the American polity refers not only to the large number of jurisdictions but to the relative autonomy of local units of government. With no centralized authority over local police departments or sheriffs, the adoption of an innovation such as the recording of interrogation will be made on a department-by-department basis.

Case Studies of Innocence Legislation

A few law review articles have described the federal Innocence Protection Act of 2004, which was a watered-down version of its original proposal and was passed as

part of the comprehensive Justice For All Act that included support for law enforcement. In addition, almost 40 states have passed laws that authorize postconviction appeals on the grounds of innocence, typically where DNA evidence can be found. Legal writing tends to be instrumental and practical, and legislative surveys published in law journals are useful to innocence policy advocates in understanding the strengths and limitations of the legislation (C. E. Jones, 2005; Kleinert, 2006). A retrospective case study of the efforts needed to pass the Innocence Protection Act, perhaps utilizing network analysis, ought to lead to a more theoretically robust understanding of the innocence movement and shed more light on the nature of the movement's policy goals. Indeed, Sen. Patrick Leahy's statement on passage of the act names the Justice Project (n.d.) and a number of individuals and legislators who were instrumental in the passage of the act (Leahy, 2004b). The discrepancy between the act's initial goals and the act as passed could be analyzed in terms of the incrementalism that is characteristic of American politics and policy making (Haller, 2001; Kingdon, 1984, pp. 83–88).

Critiquing the Innocence Reform Agenda

As noted above, some of the descriptive, legal, or policy-oriented innocence movement rhetoric is often transformative. Criminal justice scholars can analyze the innocence reform agenda, applying what is known about change in criminal justice, to suggest the possible shape and limits of reform. However sympathetic researchers may be to the aims of innocence reforms, deep knowledge of the nature of justice bureaucracies suggests that claims of imminent criminal justice transformation may be premature.

The limits of litigated reform. Garrett (2005), for example, asserted that criminal justice can be transformed through civil litigation on behalf of exonerees. Because defendants' constitutional rights are viewed negatively as "truth-defeating" in criminal cases by a conservative judiciary, few defendants win retrials based on police or prosecution error. Federal civil rights actions by exonerees against the police under 42 U.S.C. §1983, however, reverse the "guilt

paradigm." In civil cases, "fair trial rights vindicate the truth, while government misconduct is revealed as having concealed evidence of a person's innocence, leading to a gross miscarriage of justice" (Garrett, 2005, p. 38). Many such cases have resulted in large monetary awards. Garrett's legal tour de force, proposing that the cost of civil lawsuits will force wholesale criminal justice reforms and even restore the Warren Court-era respect for defendant's rights, is a rationalistic idea that needs to be subjected to empirical testing.

Sociolegal and political science research offers at best a tempered view of the ability of court cases to effect social change. Some political scientists have written well-researched books positing that Supreme Court cases have had limited or no effect on important areas of social life (Horowitz, 1977; Rosenberg, 1991). Other authors counter that litigation strategies have a place in social action as, for example, catalyzing correctional reform (Epstein & Kobylka, 1992; Feeley & Rubin, 1998; Zalman, 1991, 1998). Even if a view that the law has no effect is too extreme, empirical evaluations of the law's impact simply do not find that litigation itself can institute radical institutional change. A program of sustained litigation can initiate and highlight problems, but without other levers of change, it is unlikely that deep policy modifications will occur (Feeley & Rubin, 1998). Cross-sectional research could compare innocence reforms in police departments that have been hit with large awards (and perhaps in close-by departments) to a matched set of police departments that have not been subjected to such suits to find whether the suits have had a policy effect.

Implementing reforms. Most legal writing on innocence reforms is conceptual and descriptive and tends to equate reform with rule creation. The formal adoption of a policy by legislation, court decision, or administrative rule, however, is only the beginning of reform; to be effective, a policy must be implemented. Implementation is only one step in the policy process, which extends conceptually from problem perception and agenda building, to policy formulation, legitimation, adoption, and budgeting, and to implementation, evaluation, and termination or redesign (C. O. Jones, 1984).¹⁴ Every step of the policy process may be the subject of policy analysis, and this author has previously called for a

public policy approach to understanding the innocence movement's agenda (Zalman, 2005). Criminal justice researchers, with their knowledge of criminal justice system functioning, are well positioned to engage in implementation research at a time when a number of agencies are formally adopting innocence reforms.

Implementation is a well-developed area of policy analysis that provides a variety of methodological and conceptual tools. Criminal justice scholars contemplating the study of agency adoption of lineup procedural changes or the like should be aware of the consensus among policy scholars that implementation is itself a political process that is intimately connected to earlier policy design stages. In other words, implementation is not a mechanical process but a continuation of policy making. The inevitable gap between early policy designs and the programs that emerge led early policy researchers to view the entire policy process in harshly negative terms. On mature reflection, they have come to accept such gaps not as policy failures per se but as evidence of a dynamic policy process that endures through the implementation phase (Hill & Hupe, 2002; C. O. Jones, 1984, pp. 164–195; Palumbo & Calista, 1990).

Again using the electronic recording of interrogation as an example, case studies of implementation could apply qualitative and quantitative methods. Researchers would have to define what is meant by implementation (the dependent variable). For example, if a state law mandated recording, the statutory elements can provide measures of compliance. Independent variables could include such organizational features as the strength of the chief's policy support, officer training and monitoring, the means interrogating detectives might have to evade recording, and internal sanctions for rules violations. Such research potentially transcends the innocence issue and provides the foundation for theory-oriented research about police agencies.

Conclusion

Wrongful conviction narratives have exposed serious flaws in the investigation, prosecution, and adjudication of felony cases. As a result of the DNA revolution, it is now thought that wrongful convictions are so numerous

as to constitute a major policy concern that poses a serious challenge to the fairness and accuracy of the criminal justice process. Most innocence research has been conducted by psychologists and lawyers and has focused on specific subprocesses such as lineups. This research has been oriented toward understanding the ways in which these processes have failed and have caused wrongful convictions. Innocence research that goes beyond these specific areas can potentially provide a better understanding of the way in which the criminal justice system systemically generates errors. Unfortunately, the difficulties in collecting and evaluating case materials and unresolved issues in defining a wrongful conviction limits this kind of research at the present time.

This article has proposed a broad research agenda addressing the new innocence movement that works to exonerate wrongly convicted inmates and to generate and publicize policy changes that logically should reduce miscarriages of justice. The innocence research agenda sketched here is primarily useful for understanding the innocence movement, itself a worthy object of research. Beyond this, the proposed kinds of research into the innocence movement and its reform agenda will possibly illuminate the capacity of the criminal justice system to reflect on its own shortcomings and to correct them. This wider goal should be of interest to the community of criminal justice policy scholars.

Notes

1. A strict legalist differs:

I count myself among those who use the term “wrongful conviction” to refer not only to the conviction of the [factually] innocent but also to any conviction achieved in part through the violation of constitutional rights or through the use of systems and procedures that render the proceedings fundamentally unfair. (Siegel, 2005, p. 1219)

Factual innocence can include a “wrong person” error (i.e., the person had no involvement with the facts of a criminal event) and legal innocence under substantive criminal law:

An acquittal is historically accurate whenever the jury correctly determines that the defendant either did not

engage in the prohibited conduct or, if he did so engage, he either lacked the state of mind required to make the conduct criminal or his action was the product of appropriate beliefs that justify it. (Givelber, 2005, p. 1175)

Forst (2004) describes two broad kinds of errors of justice: errors of due process, which can range from violations of a defendant's rights to the conviction of a factually innocent person, and errors of impunity, which range from the failure to apprehend a criminal to the acquittal of a factually guilty defendant. The latter kinds of cases have caused dismay in recent decades (Fletcher, 1995). Nevertheless, it seems improper to speak of "wrongful acquittals," however logical the term. This reflects the common law balance that accepts such acquittals as a necessary price to be paid, however grudgingly, for a fair trial.

Take the following hypotheticals. (a) A defendant whom the police investigator thinks is guilty is acquitted. Depending on the crime's heinousness, different reactions are deemed acceptable. In a drug case, for example, the chagrined officer can expect the defendant to recidivate and get caught in the future, thinking, "We will put together a stronger case and get a conviction." Another reaction to a vicious crime, say the rape and murder of a child, is to have the acquitted defendant closely monitored as a means of individualized crime prevention. A third approach, arguably improper but facially lawful, is to monitor the defendant to catch him or her in any criminal act for which some punishment can be imposed. This may have happened to Oreste Fulminante (*Arizona v. Fulminante*, 1991). This is the strategy of organized crime enforcement. In contrast to these acceptable reactions, it is beyond the pale, even after acquittal for a vicious crime, for the officer to engage in private retribution. (b) After a conviction the investigating officer is left with a belief that the wrong man was convicted. Although not obliged to do so, the officer investigates the case on her own time. This results in an exoneration. Such action is deemed noble. The different societal reactions to private retribution in (a) and private investigation in (b) bring out the essential difference between social acceptance of an acquittal of the factually guilty and the moral imperative to free the factually innocent. Incidentally, the error of wrongful conviction can be compounded if police in hypothetical (a) wrongly believe that an innocent defendant has been acquitted and add the person to a list of usual suspects in later criminal investigations. This can lead to a wrongful conviction (Johnson, 2003).

2. Films based on actual cases include *The Wrong Man* (1956), directed by Alfred Hitchcock, starring Henry Fonda and *Call Northside 777* (1948), starring James Stewart (see Mnookin & West, 2001). "From the time Borchard published his book . . . until the early 1990s, there was typically one big-picture book or major article published every decade or so on the subject of miscarriages of justice" (Leo, 2005, p. 203).

3. They learned to their surprise that exonerees face many adjustment problems and helped to establish a framework for action—the establishment of the Life After Exoneration Program (n.d.), an organization that provides assistance for exonerees (Vollen & Eggers, 2005).

4. A comparable organization in Canada is AIDWYC, Association in Defence of the Wrongly Convicted (<http://www.aidwyc.org>).

5. Brandon Gurrett practiced with law firms headed by innocence movement leaders (Cochran Neufeld & Scheck, LLP) and with Beldock Levine & Hoffman LLP, one of whose partners, Myron Beldock, represented Rubin "Hurricane" Carter (Hirsch, 2001). The acknowledgments in Garreti (2005, p. 35) include many leaders in the wrongful conviction movement.

6. Scheck (2005), in a more restrained vein as president of a national defense lawyer's association, expressed "cautious optimism" for reforms emanating from the innocence movement.

7. The "policy window" for innocence reforms can be the subject of more sustained discussion or analysis (Kingdon, 1984, pp. 173–204).

8. News accounts discuss a rare 2006 field experiment of lineup methods in Chicago that purportedly finds more error using sequential compared to simultaneous lineups, contrary to the general findings of lab experiments. Some claim that this undermines reform efforts; others claim that the study was flawed (Feige, 2006b; Paulson & Liana, 2006; Zernike, 2006).

9. A number of studies can be bundled into a frequency-of-wrongful-conviction category: Bedau and Radelet (1987); Huff, Rattner, and Sagarin (1986, 1996); Rattner (1988); Poveda (2001); Ramsey and Frank (in press); and Zalman, Smith, and Kazaleh (2006).

10. A Lexis search for the terms *wrongful conviction* or *innocence* in the files of U.S. and Canadian law journals produced 226 articles, and a search for the term *wrongful conviction* anywhere in the article produced 1,455 articles (June 7, 2006). The author's personal bibliography on the subject is extremely long.

11. Some defense lawyers worry that an emphasis on actual innocence will make jurors and appellate courts even more hostile to procedural claims of defendants who are or appear to be "factually guilty" (Siegel, 2005, p. 1221).

12. The practice of networking is not the focus of network analysis; network analysis assumes that networks arise naturally from contacts between individuals and organizations and studies the nature and intensity of those contacts and their influence on behavior.

13. Alaska: *Stephen v. State* (1985); District of Columbia: D.C. Code (2006); Illinois: 20 ILCS (2006); Maine: 25 M.R.S. (2005); Massachusetts: *Commonwealth v. DiGiambattista* (2004); Minnesota: *State v. Scales* (1994); New Mexico: Michie's Ann. Stat. (n.d.); Texas: Tex. Crim. P. Code Ann. (2005).

14. Diffusion of innovation research has also examined implementation by individuals and organizations and has generated

findings about the “re-invention” of innovations as implementers modify the innovation or how it is used in a number of ways (Rogers, 2003, pp. 179–180, 424–433).



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