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# The Not so Great Writ: The European Court of Human Rights Finds Habeas Corpus and Inadequate Remedy: Should American Courts Reexamine the Writ.

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# THE NOT SO GREAT WRIT: THE EUROPEAN COURT OF HUMAN RIGHTS FINDS HABEAS CORPUS AN INADEQUATE REMEDY: SHOULD AMERICAN COURTS REEXAMINE THE WRIT?

*Allen E. Shoenberger*<sup>+</sup>

Only two English writs of action are mentioned in the text of the United States Constitution. One, the Great Writ—the writ of habeas corpus—is guarded, except in times of rebellion or invasion when the public safety requires it.<sup>1</sup> The other writ, the Bill of Attainder, is prohibited.<sup>2</sup> The latter writ was consigned to the dustbin of history, as a remedy whose time had passed. Recent decisions of the European Court of Human Rights concerning the limitations of the English writ of habeas corpus suggest a need for reconsideration and revamping of federal habeas corpus, else it too should be considered outmoded and consigned to the dustbin. The European court has found several deficiencies in the original writ on which the American writ is based. The federal writ of habeas corpus exemplifies to an even greater extent some of the deficiencies found in the English writ.

The English writ of habeas corpus protected persons against illegitimate confinement by the government. The writ of habeas corpus was described by Blackstone as, “the most celebrated writ in the English law.”<sup>3</sup> Justice Brennan described the writ of habeas corpus as follows:

It is “a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. . . .”

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1. U.S. CONST., art. I, § 9, cl. 2. The First Judiciary Act conferred habeas corpus jurisdiction upon the federal judiciary. Judiciary Act of 1789, ch. 20, 1 Stat. 73, 81-82.

2. U.S. CONST., art. I, § 9, cl. 3. There is also a brief reference to the Attainder of Treason in Article III, Section 3: “[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the life of the Person attainted.” U.S. CONST., art. III, § 3, cl. 2.

3. WILLIAM BLACKSTONE, 3 COMMENTARIES \*129.

... Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.<sup>4</sup>

The English writ ran against both executive and judicial confinement.<sup>5</sup> In the famous *Bushell's Case*,<sup>6</sup> the court confined the jury when they refused to return a verdict of guilty against William Penn and William Mead on charges of tumultuous assembly and other crimes.<sup>7</sup> The Court of Common Pleas, in an opinion by Chief Justice Vaughan, ordered Bushell released from custody.<sup>8</sup>

At English law, the writ not only reached issues involving jurisdiction, but also reached matters such as the denial of due process. Once again, "*Bushell's Case* is [directly] in point."<sup>9</sup>

Recent opinions of the European Court of Human Rights<sup>10</sup> have on numerous occasions found that the writ of habeas corpus is an inadequate remedy for the protection of persons under the European Convention on Human Rights.<sup>11</sup> Since the European Convention on Human Rights is grounded upon the fundamental rights contained in the United States Constitution, including in particular, the Bill of Rights,<sup>12</sup> consideration of this modern court's view of the means needed to protect human rights in the modern world will illuminate domestic difficulties with the writ. Moreover, since the decisions of the European Court of Human Rights determine law for forty-six countries (including the United Kingdom)

4. *Fay v. Noia*, 372 U.S. 391, 400, 402 (1963) (quoting Sec'y of State of Home Affairs v. O'Brien, [1923] A.C. 603, 609 (H.L.)).

5. *Id.* at 404-05.

6. (1670) 124 Eng. Rep. 1006 (C.P.D.).

7. *Id.* at 1006-07.

8. *Id.* at 1017-18. Bushell was one of the jurors in the case. *Id.* at 1006; *see also Noia*, 372 U.S. at 403.

9. *Noia*, 372 U.S. at 404.

10. The European Court of Human Rights consists of judges from forty-five countries in the Council of Europe. European Court of Human Rights, Organisation of the Court, <http://www.echr.coe.int/ECHR/EN/Header/the+court/the+court/organisation+of+the+court> (last visited Oct. 25, 2006). For a more extensive description of this important judicial body, see Allen Shoenberger, *Messages from Strasbourg: Lessons for American Courts from the Highest Volume Human Rights Court in the World—The European Court of Human Rights*, 27 WHITTIER L. REV. 357, 358-60 (2005).

11. The European Convention on Human Rights was originally adopted in 1950 by countries that were then members of the Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. The Council of Europe now consists of forty-six countries, twenty-one of which are from Central and Eastern Europe. About the Council of Europe, [http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/) (last visited Oct. 25, 2006).

12. Shoenberger, *supra* note 10, at 359-60.

and 800 million people, issues are far more frequently decided first in this tribunal than in the United States Supreme Court (a court that decides only a tenth as many decisions on the merits annually, and only a few of these decisions are “human rights” decisions).<sup>13</sup>

#### I. CONFINEMENT OF AN AUTISTIC ADULT: THE INABILITY TO REACH THE CONTINUING MERITS OF CONFINEMENT

In *H.L. v. United Kingdom*,<sup>14</sup> a mentally retarded, autistic adult, H.L.,<sup>15</sup> was confined to a mental hospital without resort to British statutory procedures for the detention of persons dangerous to others or to themselves.<sup>16</sup> Since H.L. did not resist confinement (although he was incompetent to consent to confinement), the doctors and staff responsible simply confined him.<sup>17</sup> The occasion for the confinement was agitation at a day-care center where H.L. began “hitting himself on the head with his fists and banging his head against the wall.”<sup>18</sup> When a sedative prescribed by a doctor did not control the agitation, H.L. was taken to an emergency unit at a hospital, and then after diagnosis, taken to the Intensive Behavioural Unit of the hospital where he was confined from July 22 until December 5, 1997.<sup>19</sup>

Prior to his release, the applicant, through his cousin and “next friend,” applied for judicial review of the decision to admit him, for a writ of habeas corpus and damages based on a theory of false imprisonment.<sup>20</sup> The High Court rejected H.L.’s petition.<sup>21</sup> On appeal, the Court of Appeal found that “the whole approach of the [hospital] in this case was based on a false premise. . . . the belief that they were entitled to treat [the applicant] . . . as long as he did not dissent.”<sup>22</sup> In separate opinions, the House of Lords allowed the appeal (i.e., reversed the Court of Appeal’s ruling), essentially on the ground that the tort of false imprisonment had not been demonstrated.<sup>23</sup>

The European Court of Human Rights noted:

[T]he key factor in the . . . case [was] that the health care professionals treating and managing the applicant exercised complete

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13. *Id.* at 358-59.

14. 2004-IX Eur. Ct. H.R. 191.

15. H.L. could not speak, and “his level of understanding [was] limited.” *Id.* at 198.

16. *Id.* at 199.

17. *Id.*

18. *Id.*

19. *Id.* at 199, 201.

20. *Id.* at 203.

21. *Id.* at 203-04.

22. *Id.* at 204 (alterations in original). Nominal damages were awarded, and the Court of Appeal “granted leave to appeal to the House of Lords.” *Id.*

23. *Id.* at 205-06, 225-26.

and effective control over [the applicant's] care and movements from the moment [the applicant] presented acute behavioural problems on 22 July 1997 to the date he was compulsorily detained on 29 October 1997.<sup>24</sup>

The applicant was not free to leave, and "[a]ny suggestion to the contrary was, in the Court's view, fairly described by [British] Lord Steyn as 'stretching credulity to breaking point' and as a 'fairy tale.'"<sup>25</sup> Thus, the European court determined that the applicant was deprived of his liberty within the meaning of the Convention.

The Court of Human Rights then went on to determine whether the detention was lawful within the meaning of the Convention. The court found that the requirements for deprivation for unsoundness of mind were satisfied in the instant case with respect to the initial confinement considering the margin of appreciation accorded to the national authorities under the Convention.<sup>26</sup> The court then determined that under the then-developing law of necessity in Great Britain, the detention was proper.<sup>27</sup>

However, the court also determined that "the further element of lawfulness, the aim of avoiding arbitrariness, ha[d] *not* been satisfied."<sup>28</sup> The court found "striking the lack of any fixed procedural rules by which [such] admission and detention" should be considered.<sup>29</sup> In particular, "[t]here [was] no requirement to [establish] the exact purpose of the admission (for example, for assessment or for treatment) and, consistently, no limits in terms of time, treatment or care attach [sic] to that admission. . . . Nor [was] there any specific provision requiring a continuing clinical assessment" of the detained person.<sup>30</sup> No person was entitled to represent the detained person as under the civil involuntary detention procedures in the United Kingdom.<sup>31</sup>

Although the court did not doubt the good faith of the hospital personnel, it found that the failure to include such procedural protections constituted an arbitrary deprivation of liberty within the meaning of the Convention.<sup>32</sup>

The court then went on to consider whether the available legal remedies in the United Kingdom, including habeas corpus, complied with the requirements of the Convention under article 5, section 4, which requires

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24. *Id.* at 226.

25. *Id.* at 227.

26. *Id.* at 229-30.

27. *Id.* at 233-35.

28. *Id.* at 235 (emphasis added).

29. *Id.*

30. *Id.* at 236.

31. *Id.*

32. *Id.* at 236-37.

that procedures exist whereby “the lawfulness of [a] detention shall be decided speedily by a court.”<sup>33</sup> The court concluded that no existing remedy, including habeas corpus, did so.<sup>34</sup> The court relied upon its earlier decision in *Smith & Grady v. United Kingdom*,<sup>35</sup> wherein it found that judicial review in the United Kingdom did not constitute an effective remedy because the reviewing court was precluded from considering the underlying merits of the issues posed.<sup>36</sup> In particular, the court in *H.L.* found that the available remedies established the “bar of unreasonableness . . . so high as effectively to exclude any adequate examination of the merits of the clinical views as to the persistence of mental illness justifying detention.”<sup>37</sup> The merits of the continuing detention were simply beyond the scope of judicial review in the United Kingdom, and that was an inadequate remedy according to the court.<sup>38</sup> The possibility of a civil claim for damages was insufficient, as was the possibility of a declaratory judgment action.<sup>39</sup>

In short, the United Kingdom’s writ of habeas corpus, as understood by the European Court of Human Rights, neither permitted examination of the procedural lacunae in English law, nor the underlying merits of whether confinement *continued* to be justified.

Would the scope of habeas corpus be any different in the United States from that in the United Kingdom? The answer appears pretty squarely to be no. Under the writ as currently administered in United States federal courts, for example, only some constitutional errors are cognizable in the first case,<sup>40</sup> not mere procedural errors, and the underlying merits of the reason for detention are ordinarily beyond the competence of the reviewing court. Instead, a strong presumptive validity is to be accorded the initial determinations, be they state or federal. Moreover, the focus of the writ in American courts today is the legitimacy of the original reason for confinement (present in *H.L.*) and not any continuing justification for confinement.<sup>41</sup>

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33. *Id.* at 237 (quoting European Convention on Human Rights, *supra* note 11, art. 5, § 4).

34. *Id.* at 237-39.

35. 1999-VI Eur. Ct. H.R. 45.

36. *H.L.*, 2004-IX Eur. Ct. H.R. at 240-41.

37. *Id.* at 241.

38. *Id.*

39. *Id.* at 241-42. No cases were cited in which a U.K. court accepted that a serious justiciable issue was presented as in the case at bar, and in which there was no allegation of negligence (precluding a civil claim for damages). *Id.*

40. *Cf.* *Stone v. Powell*, 428 U.S. 465, 494 (1975) (holding that Fourth Amendment claims are not cognizable at all in federal habeas corpus proceedings).

41. *Cf. H.L.*, 2004-IX Eur. Ct. H.R. at 228-30.

## II. CONFINEMENT OF THE CRIMINALLY INSANE: INABILITY TO REACH THE MERITS OF RECONFINEMENT

In its earlier decision of *X v. United Kingdom*,<sup>42</sup> the European Court of Human Rights similarly held that the writ of habeas corpus was inadequately narrow under the European Convention of Human Rights to challenge the lawfulness of continued detention of a person detained on grounds of criminal insanity.<sup>43</sup> The particular confinement at issue was the recall to Broadmoor Hospital of a person originally confined for an offense of "wounding with intent to cause grievous bodily harm."<sup>44</sup>

The European Court of Human Rights had no difficulty in determining that the emergency recall procedures were themselves permissible in that they were in accordance with procedures prescribed by law, and were thus "'lawful' in the sense of being in conformity with . . . domestic law."<sup>45</sup> However, the reviewing tribunal must, to some extent, be permitted to decide the merits of the continued detention, not just the technical "lawfulness" in the sense of compliance with procedural substance.

In *X v. United Kingdom*, the government of the United Kingdom argued that habeas corpus provided an adequate remedy permitting the lawfulness of the detention to be judicially determined.<sup>46</sup> The European court, however, finding that habeas relief did not permit a U.K. court to consider "both the substantive and the formal lawfulness of [the] detention," held that habeas was an inadequate remedy in X's situation.<sup>47</sup> All that habeas permits is a formal review of the technical legality of the confinement, it does not go to "the grounds or merits of a decision taken by an administrative authority."<sup>48</sup> Indeed, if discretion is available to the administrative authority, a reviewing habeas court will only examine "the conformity of the exercise of that discretion with the empowering statute."<sup>49</sup> To satisfy the European standard, however, the U.K. court would have needed "to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety."<sup>50</sup>

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42. 46 Eur. Ct. H.R. (ser. A) at 4 (1981).

43. *Id.* at 25.

44. *Id.* at 17.

45. *Id.* at 19.

46. *Id.* at 23.

47. *Id.* at 24-25.

48. *Id.*

49. *Id.*

50. *Id.* at 25.

### III. CONFINEMENT ON REMAND: EIGHT WEEK AND SEVENTEEN-DAY DELAYS NOT “SPEEDY” — HABEAS AN INEFFECTIVE REMEDY

In a case originating in Malta, *Sabeur Ben Ali v. Malta*,<sup>51</sup> the Maltese version of the writ of habeas corpus was found wanting for several reasons.<sup>52</sup> First, a gap of eight weeks between filing the writ and a decision on the writ was “*prima facie* difficult to reconcile with the notion of ‘speedily.’”<sup>53</sup> Second, the court found that the habeas provision, which was primarily aimed at punishing “officials who fail to attend to . . . the lawfulness of the detention,”<sup>54</sup> had not been successfully utilized by detained persons, making the remedy itself inadequate.<sup>55</sup>

A similar case from Malta, *Kadem v. Malta*,<sup>56</sup> dealing with detention for potential extradition, similarly held that the Maltese version of a writ of habeas corpus was inadequate for a speedy determination.<sup>57</sup> The court again emphasized that the punishment of officials for failing to attend to detention complaints was an inadequate remedy.<sup>58</sup> In addition, given the seventeen-day delay in rendering a decision, the court found that the lawfulness of the action was not “decided speedily.”<sup>59</sup>

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51. App. No. 35892/97 (Eur. Ct. H.R. June 29, 2000), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Application Number” for “35892/97”).

52. *Id.* para. 53.

53. *Id.* para. 38. Article 5, section 4 of the European Convention on Human Rights requires that “the lawfulness of [a] detention . . . be decided speedily by a court and [a] release ordered if the detention is not lawful.” European Convention on Human Rights, *supra* note 11, art. 5, § 4.

54. *Sabeur Ben Ali*, para. 39. The Habeas Corpus Act of 1679, for example, provided for a penalty of one hundred pounds forfeitable to the prisoner for the first offense, and two hundred pounds for the second offense. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

55. *See Sabeur Ben Ali*, paras. 39-42. The original writ of habeas corpus in England was enforced through a provision that imposed a significant fine upon an official who failed to promptly justify the detention. *See supra* note 54.

56. App. No. 55263/00 (Eur. Ct. H.R. Jan 9, 2003), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Application Number” for “55263/00”).

57. *Id.* para. 53.

58. *Id.* para. 52. The court awarded non-pecuniary damages of five thousand euro as well as costs and expenses. *Id.* paras. 60, 64.

59. *Id.* paras. 44-45. It is thus unsurprising that the United Kingdom would not bother to argue that the writ of habeas corpus was an adequate remedy when a patient committed for psychiatric care could not be discharged for failure to comply with certain conditions but it took over a year to render a decision mandating release. *Kolanis v. United Kingdom*, App. No. 517/02, paras. 75, 77 (Eur. Ct. H.R. June 21, 2005), <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (search “Application Number” for “517/02”). Non-pecuniary damages of six thousand euros were awarded along with costs and expenses. *Id.* paras. 92, 95.

In a case dealing with detention of suspected terrorists, the court had determined that even a four-day, six-hour delay in bringing a detainee before a judicial officer violated the Convention’s article 5, section 3 requirement of a prompt appearance. *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) 11, 33-34 (1988). However, the Court also held that



Similarly, in *Aquilina v. Malta*,<sup>60</sup> the failure to consider the bail application of an accused until eleven days after arrest was held violative of the Convention's requirement that issues of confinement be promptly submitted to a competent judicial authority.<sup>61</sup>

For comparison purposes, in early English law, a return to the writ of habeas corpus was to be made within three days after service unless the distance to the court was between twenty and one hundred miles, in which case ten days were allowed, or if greater than one hundred miles, then within twenty days.<sup>62</sup> The custodian of a person had only six hours after demand to deliver an official copy of the warrant of commitment and detainer for a prisoner.<sup>63</sup> Indeed, the court itself, including the lord chancellor, lord keeper, any judge, or baron, was potentially liable to the prisoner for five hundred pounds for denial of a required writ of habeas corpus.<sup>64</sup>

#### IV. SUMMARY OF INADEQUACIES OF THE WRIT AS FOUND BY THE EUROPEAN COURT OF HUMAN RIGHTS

In sum, the European Court of Human Rights has found several inadequacies in the writ of habeas corpus. The writ is too limited in nature because it fails to include a method of measuring and limiting grounds for civil commitment. Also, the writ fails to include review of the substantive and formal merits of a detention decision. And, finally, the writ is inadequate because it fails to provide for a timely enough remedy.

#### V. WHY IS THE WRIT OF HABEAS CORPUS INADEQUATE?

The English writ of habeas corpus was developed in a legal culture without a written constitution. United States courts have often overlooked this defining fact in the development of the writ. Once a written constitution became effective in the United States, a completely new potential application became possible, testing detention of the person based upon consistency *vel non* with written constitutional norms.

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the writ of habeas corpus would have been adequate to test this particular confinement if the detainees employed it (which they did not). *Id.* at 34.

60. 1999-III Eur. Ct. H.R. 225.

61. *Id.* at 242-44. However, two days of detention prior to the first appearance before a judicial officer was not inappropriate delay. *Id.* at 243. That magistrate had no authority to order release of the detainee, and could ultimately only consider a narrow ground of lawfulness, not the merits of the detention. Both limitations were violative of the Convention. No non-pecuniary damage was awarded, although costs and expenses were allowed. *Id.* at 244-45.

62. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

63. *Id.*

64. *Id.*

An identical problem is now presented with respect to the application of the English writ (be it in the United Kingdom, Ireland, or Malta): the writ may now be invoked as a potential remedy under the European Convention on Human Rights, a document roughly analogous to the Bill of Rights to the U.S. Constitution. The old aphorism that Britain has no written constitution is no longer quite so true; it does, but only with respect to human rights, and it is found in the European Convention.

The history of the writ of habeas corpus in the United States is complex, but well discussed in many extensive articles and books, such as those by James S. Liebman,<sup>65</sup> Clarke D. Forsythe,<sup>66</sup> and William F. Duker.<sup>67</sup>

Forsythe finds that the history of the writ limits its use as a post-conviction remedy, for it was not used for that purpose at English law.<sup>68</sup> Forsythe insists that Professor Paul Freund, who “was appointed by the Supreme Court in 1951 to argue *United States v. Hayman* . . . countered the previously unassailed (and since unchallenged) understanding that habeas corpus was not available to convicted criminals under the English Habeas Corpus Act of 1679.”<sup>69</sup>

Liebman would give the writ a broader scope under American post-independence jurisprudence. His central thesis is that:

Federal habeas corpus is not a substitute for . . . direct appeal as of right. Since 1789, however, it has provided statutorily specified classes of prisoners with a *limited* and *substitute* federal writ of error or appeal as of right. That appellate procedure has been *limited* because it has lain only to hear claims of particular national importance—which Congress since 1867 has defined as all constitutional claims. It has been a *substitute* because it has served only in default of Supreme Court review as of right.<sup>70</sup>

However, for Liebman, individual guilt determinations are not of national importance, and thus should not be a concern of habeas jurisprudence.<sup>71</sup>

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65. See, e.g., James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992).

66. See, e.g., Clark D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995).

67. See, e.g., WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* (1980).

68. Forsythe, *supra* note 66, at 1164.

69. *Id.*

70. Liebman, *supra* note 65, at 2055.

71. *Id.* at 2056 (“‘Innocence claims’ . . . are both nationally unimportant . . . and subject to little or no review because [review would be of] the central fact determination at trial. For these reasons, the Court has been particularly careful to exclude such claims from habeas corpus.”).

Duker finds that history justifies the conclusion that the habeas writ evolved under the post-Civil War legislation by Congress and interpretations by the Supreme Court:

The writ provided the courts with a forum for articulating societal values. This was no new role for the writ. What was new was the spokesman using the forum. Throughout the nineteenth century it was generally the legislative department that employed habeas to effect change in constitutional values. The substitution of procedural due process for substantive due process meant the use of more discreet means by the judiciary for announcing constitutional values.<sup>72</sup>

Whatever the merits of this disputation about the historical origin and limits of the habeas writ, it is undisputed that today, in United States jurisprudence, the ambit of the writ has been greatly limited—some would say to the virtual vanishing point. Much of that limitation came about through curtailment of the writ by a steady drumbeat of limiting Supreme Court decisions.<sup>73</sup> The final cacophonous beat, however, may have been administered not by the Supreme Court, but by Congress through enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.<sup>74</sup>

Among other provisions, AEDPA established a strict one-year statute of limitations period for filing habeas corpus petitions.<sup>75</sup> The statute was enacted “in the wake of the Oklahoma City bombing,” partly as a conservative overreaction to assertions that prisoners were overusing the habeas writ to delay sentence imposition, particularly death penalty decisions.<sup>76</sup> The result is clear; the writ of habeas corpus is now, as a practical

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72. DUKER, *supra* note 67, at 268-69.

73. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (allowing “habeas relief based on trial error” only for “actual prejudice”); *Teague v. Lane*, 489 U.S. 288, 316 (1989) (limiting retroactive application of newly pronounced constitutional decisions).

74. Pub. L. No. 104-132, 110 Stat. 1214; see also John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 260-62 (2006) (suggesting that AEDPA did not totally “gut” habeas corpus, failing to achieve the results that either its proponents envisioned or its opponents feared, and stating that the major curtailment of the habeas writ is left to the efforts of the Supreme Court).

75. 28 U.S.C. § 2244(d)(1) (2000). The AEDPA also enacted stringent limitations on successive petitions. *Id.* § 2244(b).

76. See Jake Sussman, *Unlimited Innocence: Recognizing an “Actual Innocence” Exception to AEDPA’s Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 344-46 & n.13 (2001-2002). The statute of limitations was made applicable to both state and federal prisoners, supposedly because habeas litigation was employed for the purpose of delay. Benjamin R. Orye, *The Failure of Words: Habeas Corpus Reform, The Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255(1)*, 44 WM. & MARY L. REV. 441, 455-56 (2002). As a practical matter, since both state and federal prisoners who were serving time were already serving their sentences, the delay argument had little application. Only potential death

matter, virtually unavailable to most federal and state prisoners serving substantial jail sentences.<sup>77</sup> A window of a year does exist at some time for all of these prisoners, but that window closes, and remains closed from then on, regardless of such considerations such as actual innocence or the degree of constitutional infringement. It matters not that such important cases as *Gideon v. Wainwright*<sup>78</sup> could no longer be brought today. As Chief District Judge Bennett commented: “Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of confounding and labyrinthine procedural obstacles.”<sup>79</sup> Finally, Jake Sussman contends that “the creation of a statute of limitations for federal petitions represents a straightforward attempt to curtail the tortuous system already in place by cutting petitioners off at the pass.”<sup>80</sup>

The broadening of availability of the writ originally wrought by *Fay v. Noia*,<sup>81</sup> was curtailed by cases such as *Stone v. Powell*,<sup>82</sup> *Wainwright v.*

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penalty recipients would achieve anything through “delay.” *Id.* at 456 n.110. Furthermore, no evidence was provided to Congress that federal prisoners encountered any delay with their federal habeas petitions. *Id.* at 456-57. Delay arguably did apply to much of the state habeas litigation in federal courts, partly, but not solely, because of the unbelievably complex nature of habeas corpus procedural rules—a labyrinth of rules, as Judge Bennett labeled them. *Id.* at 455-57; *Lee v. Kemna*, 213 F.3d 1037, 1048 (8th Cir. 2000) (Bennett, J., dissenting), *vacated*, 534 U.S. 362 (2002). Representative Kastenmeier (D. Wis.) pointed this out in a statement on the floor of the House, where he stated: “There is no evidence that section 2255 motions are delayed in the current system. This new procedural cutoff is simply not needed.” 136 CONG. REC. 27,521 (1990) (statement of Rep. Kastenmeier).

77. See *Felker v. Turpin*, 518 U.S. 651, 658 (1996) (avoiding the issue of whether the AEDPA constituted a suspension of the writ of habeas corpus, by relying on the possibility of an original habeas corpus action in the United States Supreme Court). Frankly, one is more likely to encounter a dodo or a carrier pigeon than such a writ in actual practice today.

78. 372 U.S. 335, 344 (1963) (establishing the right to an attorney, free if necessary, to all persons accused of criminal offenses).

79. *Kemna*, 213 F.3d at 1048 (Bennett, J., dissenting).

80. Sussman, *supra* note 76, at 396.

81. 372 U.S. 391, 438-41 (1963).

82. 428 U.S. 465, 494-95 (1976) (noting that evidence allegedly obtained in an unconstitutional search is not a ground for federal habeas relief if there is a full and fair opportunity to litigate the issue in state court).

*Sykes*,<sup>83</sup> *Sumner v. Mata*,<sup>84</sup> *Rose v. Lundy*,<sup>85</sup> *Barefoot v. Estelle*,<sup>86</sup> *Teague v. Lane*,<sup>87</sup> *Lockhart v. Fretwell*,<sup>88</sup> *McCleskey v. Zant*,<sup>89</sup> *Keeney v. Tamayo-Reyes*,<sup>90</sup> *Duncan v. Henry*,<sup>91</sup> and *Brecht v. Abrahamson*.<sup>92</sup>

As a result, it is virtually impossible for a habeas petitioner, state or federal, to obtain even a hearing on the merits, to say nothing about relief

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83. 433 U.S. 72, 90-91 (1977) (requiring that cause and prejudice be demonstrated before a hearing may be held on an allegedly involuntary confession; as a result, federal habeas review was barred).

84. 449 U.S. 539, 547 (1981) (explaining that a "presumption of correctness" must be accorded to state court determination of facts, even to a state appellate court determinations of facts). The Court of Appeals for the Ninth Circuit had concluded that the pretrial identification procedure employed by the state police was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 543 (quoting *Mata v. Sumner*, 611 F.2d 754, 759 (9th Cir. 1979)). The dissenting opinion by Justice Brennan notes that the Supreme Court did not challenge the Court of Appeals' finding on this issue. *Id.* at 559 (Brennan, J., dissenting).

85. 455 U.S. 509, 519-20 (1982) (holding that a mixed petition, containing both claims exhausted in state court and claims not exhausted in state court, must be dismissed by the federal court).

86. 463 U.S. 880, 887 (1983) ("When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence."). Subsequent statutory modifications to § 2253 altered the matter subject to review on federal habeas from "denial of [a] federal right," *see id.*, at 893, to a "denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2) (2000).

87. 489 U.S. 288, 316 (1989) (arguing that new rules of law, including constitutional law rules, may not be applied retroactively except in very narrow situations in a habeas petition).

88. 506 U.S. 364, 369 (1993) (outlining the Court's test whereby "a criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable'" (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984))).

89. 499 U.S. 467, 493-94 (1991) (holding that a defendant must demonstrate cause and prejudice for why a first federal habeas petition failed to include a claim before a second petition may be heard on the merits).

90. 504 U.S. 1, 8 (1992) (holding that cause and prejudice must be demonstrated by defendant to "excuse [his] failure to develop material facts in state court"). The factual issue in this case related to an alleged failure to properly translate into Spanish a *nolo contendere* plea and its consequences. *Id.* at 3. The defendant asserted that he believed he was agreeing to be tried for manslaughter, not that he was pleading no contest to manslaughter. *Id.*

91. 513 U.S. 364, 366-67 (1995) (Souter, J., concurring) (stating that the failure to exhaust a federal constitutional claim in state court barred habeas review, even though the same claim, phrased as a "miscarriage of justice" claim, was exhausted in state court).

92. 507 U.S. 619, 622-23 (1993) (holding that a constitutional error was found in the state trial but the standard of whether the error had a substantial and injurious effect or influence on the jury verdict was not met, and holding that the test is no longer whether the error was harmless beyond a reasonable doubt). This author represented the petitioner in the Supreme Court and in the U.S. Court of Appeals for the Seventh Circuit.

for a constitutional violation.<sup>93</sup> The complexity of pleading, exhaustion, and cause and prejudice requirements, in light of the requirement that the prisoner prove a substantial and injurious effect from the constitutional violation, are daunting hurdles, overcome by only the most fortunate prisoners.

The European Court of Human Rights requires that claims be heard on the merits by the reviewing courts, else the review is inadequate. For virtually all habeas petitioners in United States courts today, that never happens.<sup>94</sup> Instead, such cases are short-circuited at an earlier stage by procedural impediments.

The strongest indication of the rare vitality of the writ is demonstrated by data compiled by the Administrative Office of the United States Courts. From 1990 onward, annual district court filings of petitions for habeas corpus relief are reported to have risen from 13,068 in fiscal year 1990 to 23,569 in fiscal year 2004.<sup>95</sup> However, in the twelve-month period ending September 30, 2004 only three habeas cases were decided after a trial, 0.1% of all habeas cases.<sup>96</sup> By comparison, in the same judicial year, 3951 civil cases out of 197,743 civil cases were disposed of after trial.<sup>97</sup>

Moreover, proceedings in the United States woefully fail to comply with the European Court of Human Rights' requirement of a prompt submission to a court. Perhaps the best example of the tardy nature of U.S. justice is exemplified by the underlying time frame of *Fay v. Noia*. That case involved an arrest on May 11, 1941.<sup>98</sup> In 1955, the confessions that were the basis of the original conviction were found to have been extracted by beatings, and a co-defendant was ordered to be granted relief under habeas.<sup>99</sup> Habeas relief for Noia, however, was not accorded until after the United States Supreme Court decision in 1963, more than 22 years after the initial detention.<sup>100</sup> Noia, of course, would be precluded

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93. See Blume, *supra* note 74, at 284 tbl.4. (reporting that the number of successful § 2254 cases in the United States courts of appeals from 1997 to 2004 was 321 out of 51,508 cases, or a success rate of 0.62%).

94. See *supra* notes 82-92.

95. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.4.6 (2005), <http://www.uscourts.gov/judicialfactsfigures/alljudicialfactsfigures.pdf>. Two categories of habeas cases are reported separately. One category, "U.S. cases," reflects federal prisoner habeas filings. The other, "private cases," reflects state prisoners filing habeas petitions in federal courts. The figures reported combine these two categories.

96. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS 2004, at 156 tbl.C-4 (2004), <http://www.uscourts.gov/judbus2004/contents.html> [hereinafter JUDICIAL BUSINESS OF THE U.S. COURTS 2004].

97. *Id.* This amounts to approximately 2% of those disposed of by some court action. *Id.*

98. *United States ex rel. Noia v. Fay*, 183 F. Supp. 222, 223 (S.D.N.Y. 1960), *rev'd*, 300 F.2d 345 (2d Cir. 1962), *aff'd*, 372 U.S. 391 (1963).

99. *United States ex rel. Caminito v. Murphy*, 222 F.2d 698, 699-701 (2d Cir. 1955).

100. *Fay v. Noia*, 372 U.S. 391, 399 (1963).

from raising his constitutional claim in any case today because of the one-year statute of limitations in AEDPA.<sup>101</sup>

The federal rules governing the district courts' processing of federal habeas (28 U.S.C. § 2255 cases) and state habeas (28 U.S.C. § 2254 cases) do not command immediate attention, as required by the European Court of Human Rights. For a § 2255 case, 28 U.S.C. § 2243 commands that an order to show cause should be promptly issued (forthwith) and "returned within three days unless for good cause shown additional time, not exceeding twenty days, is allowed."<sup>102</sup> However, in the author's experience, months, rather than days, are likely consumed at this preliminary stage. Published data does not break out the time for processing habeas cases versus other cases at the federal district court level. However, in 2004, 12.6% of all cases at the district court level had been pending for more than three years, and an additional 25% for longer than one year.<sup>103</sup>

For state habeas cases, however, the timetable provided for by rule is not even as pressing as that for federal habeas. By rule, the court is to examine a petition promptly and if the petition is not dismissed, the court is to order a response within an unstated but fixed time.<sup>104</sup> With the press of other business before the district courts, habeas petitions are unlikely to receive accelerated consideration.

For example, in one of the rare, recent cases in which the United States Supreme Court found habeas relief appropriate, the habeas petition was filed with the district court on August 8, 1999, and the district court first granted relief on September 18, 2001, more than two years later.<sup>105</sup> The decision was appealed, and after reversal at the court of appeals level, relief was reinstated by a decision of June 26, 2003.<sup>106</sup> However, in the same case, certiorari had previously been denied twice, first in 1992 and then in 1999.<sup>107</sup> The initial conviction under review was rendered by a jury verdict on August 4, 1989, with a death sentence returned by the jury on October 18, 1989.<sup>108</sup> By the time habeas relief was reinstated, the de-

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101. 28 U.S.C. § 2244(d)(1) (2000).

102. *Id.* § 2243.

103. JUDICIAL BUSINESS OF THE U.S. COURTS 2004, *supra* note 96, at 165 tbl.C-6.

104. Rules Governing Section 2254 Cases in the United States District Courts, Rule 4, 28 U.S.C.A. § 2254 R. 4 (West Supp. 2006).

105. 1 Joint Appendix at 6, *Wiggins v. Smith*, 539 U.S. 510 (2003) (No. 02-311).

106. *Smith*, 539 U.S. at 519. The district court's decision of September 19, 2001, *Wiggins v. Corcoran*, 164 F. Supp. 2d 538 (D. Md. 2001), was reversed by the United States Court of Appeals for the Fourth Circuit, *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002).

107. See *Wiggins v. Maryland*, 528 U.S. 832 (1999); *Wiggins v. Maryland*, 503 U.S. 1007 (1992).

108. *Smith*, 539 U.S. at 515-16.

fendant had lived for fourteen years on death row, and four years had passed since the filing of the successful habeas petition.<sup>109</sup>

*A. Ongoing Confinement: Limitations of the Writ*

The American writ of habeas corpus, like the English writ, tests the original confinement basis. It was not designed to deal with continuing justifications for confinement such as in *H.L. v. United Kingdom*.<sup>110</sup> The American writ is generally not available to test confinement allegedly improper because newly available DNA testing would exculpate a convicted person.<sup>111</sup>

It is undisputed that DNA evidence has great potential utility in the criminal justice system. As one author notes:

In sexual assault cases referred to the FBI in which DNA results could be gathered, twenty-five percent of suspects had been excluded by forensic DNA testing every year since 1989. Additionally, according to the National Institute of Justice, private labs have noted about a twenty-six percent exclusion rate during the same time period.<sup>112</sup>

However, it remains unclear whether DNA evidence will be a sufficient basis for reopening a case on federal habeas. To be sure, in *Herrera v. Collins*,<sup>113</sup> the Supreme Court assumed, but did not hold, that new evidence might be so employed, but that assumption has not yet become law.<sup>114</sup> Many hoped that the Supreme Court's decision in *House v. Bell*,<sup>115</sup> might clarify the matter. The decision, however, failed to resolve the issue, for although the Court reversed and remanded for further proceedings, the blood and DNA evidence was not itself dispositive, it was only a factor in the Court's decision.<sup>116</sup> The bottom line is that this important legal issue remains undecided more than twelve years post-*Herrera*.

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109. See *supra* notes 105-08 and accompanying text.

110. See *supra* notes 14-41 and accompanying text.

111. See FED. R. CRIM. P. 33(b). The traditional method of raising new evidence is by a motion for a new trial. Many states, however, impose a sixty-day time limit on making such motions, and the federal courts impose a three-year limitation for new trial motions. *Id.*; David DeFoore, Comment, *Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted*, 33 TEX. TECH L. REV. 491, 503 (2002).

112. DeFoore, *supra* note 111, at 493 (footnote omitted).

113. 506 U.S. 390 (1993).

114. *Id.* at 417.

115. 126 S. Ct. 2064 (2006). The case had been before the Supreme Court two prior times with certiorari denied each time. See *House v. Tennessee*, 517 U.S. 1193 (1996); *House v. Tennessee*, 498 U.S. 912 (1990). Mr. House has been on death row since 1987. *State v. House*, 743 S.W.2d 141, 142 (Tenn. 1987).

116. *Bell*, 126 S. Ct. at 2086-87.



Prisoners are relegated to the possibility of a state enacting a special statute allowing DNA evidence to be secured and utilized.<sup>117</sup>

What about the application of habeas corpus to civil or quasi-civil commitment situations? Federal habeas appears to be of marginal utility in this context, for deference to state courts remains a linchpin of the federal habeas system. In *Hubbart v. Knapp*,<sup>118</sup> for example, a state prisoner confined under California's Sexually Violent Predator Act was denied federal relief under the application of AEDPA's requirement that the state court's ruling be "contrary to, or involve[] an unreasonable application of,' clearly established Supreme Court precedent."<sup>119</sup>

In state courts, however, the writ has more potency. Delays, however, are also frequent. For example, in *Clarke v. Regier*,<sup>120</sup> release from custody was quite delayed.<sup>121</sup> In *Clarke*, the petitioner was originally involuntarily "committed . . . following his acquittal by reason of insanity for a homicide he committed in 1978."<sup>122</sup> In December 2001, the director of the facility in which Clarke was confined advised the court that Clarke "no longer met the criteria for involuntary hospitalization."<sup>123</sup> Lengthy hearings ensued during which three physicians concurred that involuntary hospitalization was no longer needed.<sup>124</sup> Clarke's release was ordered, but a mental health facility withdrew its participation in the plan, and the court revoked its order.<sup>125</sup> Then, a year and a half passed.<sup>126</sup> Despite the un rebutted, stipulated opinions of each of the physicians, the trial court ordered continued confinement in 2004.<sup>127</sup> A writ of habeas corpus was filed on June 25, 2004, and the District Court of Appeal of Florida finally reversed with "directions to provide the petitioner with an appropriate facility."<sup>128</sup> However, the decision stipulated that if the state was unable to provide such a facility, habeas corpus would again be a resort.<sup>129</sup>

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117. Legislative solutions appear to be necessary since habeas appears inadequate. As a result, legislation has been introduced in Congress and in many states. DeFoore, *supra* note 111, at 521. New York and Illinois were the only two states prior to 2000 to enact post-conviction DNA testing legislation; by October 2001, twenty-one additional states had passed laws, and fourteen states had pending legislation. *Id.* at 521-22.

118. 379 F.3d 773 (9th Cir. 2004), *cert. denied*, 543 U.S. 1071 (2005).

119. *Id.* at 775, 778.

120. 881 So. 2d 656 (Fla. Dist. Ct. App. 2004).

121. *Id.* at 657.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 657-58.

129. *Id.* at 658.

The writ was more effective in *Georgia Mental Health Institute v. Brady*,<sup>130</sup> where a mental health facility refused to release an involuntarily committed patient after an adverse decision on involuntary commitment.<sup>131</sup> The court concluded that “[t]o permit a facility to continue to confine a patient after such a judicial finding would violate the patient’s right to due process.”<sup>132</sup> Moreover, in many state cases, the court reviews the underlying facts to determine whether continued confinement is necessary.<sup>133</sup>

Even in state courts, however, there may be gaps as well as delays in habeas relief. For example, in *M.W. v. Davis*,<sup>134</sup> the Florida Department of Children and Family Services (DCFS), acting as temporary guardian, sought placement of a sixteen-year-old in a locked mental health facility.<sup>135</sup> The child petitioned for a writ of habeas corpus.<sup>136</sup> A trial court had ordered temporary placement in a locked mental facility pending an evidentiary hearing.<sup>137</sup> This procedure was held to have been adequate under the due process requirements set forth in *Parham v. J.R.*,<sup>138</sup> although in point of fact, more judicial process was accorded in *M.W.* than in *Parham*.<sup>139</sup> However, the *M.W.* court went on to hold that after acceding temporary custody to the DCFS, the DCFS was entitled to exercise the statutory rights of a parent to provide medical care, including psychiatric care.<sup>140</sup> While the court ordered rules to be developed to deal with such cases, it appears from the court’s ruling that habeas relief would normally not be appropriate since such hospitalizations are voluntary.<sup>141</sup>

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130. 436 S.E.2d 219 (Ga. 1993).

131. *Id.* at 220.

132. *Id.* at 223.

133. See, e.g., *Hedrick v. Fla. Hosp. Med. Ctr.*, 633 So. 2d 1153, 1153 (Fla. Dist. Ct. App. 1994) (holding that the only evidence of exercise of poor judgment was that “‘inappropriate’ sums of money” had been given to the Boy Scouts); *In re B.B.*, 699 N.W.2d 686, 2005 WL 1225959, at \*2-3 (Iowa Ct. App. May 25, 2005) (unpublished table decision) (finding that substantial evidence supported continued detention); *Lindquist v. Bisch*, 542 N.W.2d 138, 139, 141 (S.D. 1996) (finding that the appellant posed a danger to himself supported by clear and convincing evidence).

134. 756 So. 2d 90 (Fla. 2000).

135. *Id.* at 92, 94.

136. *Id.* at 95.

137. *Id.* An evidentiary hearing was scheduled for six weeks later. *Id.*

138. 442 U.S. 584, 606-08 (1979); *M.W.*, 756 So. 2d at 99. See generally Allen Edward Shoenberger, “Voluntary” Commitment of Mentally Ill or Retarded Children: Child Abuse by the Supreme Court, 7 U. DAYTON L. REV. 1 (1981).

139. See *infra* note 141.

140. *M.W.*, 756 So. 2d at 102-04.

141. See *id.* at 106 n.31, 107. The case went up to the Florida Supreme Court as a certified question from the district court of appeal. *Id.* at 92. The state supreme court held that placement in a locked facility prior to an evidentiary hearing did not violate due process. *Id.* at 99. In *Parham v. J.R.*, no such hearing was ever required. *Parham*, 442 U.S. at 607-08. The exercise of pure discretion by staff physicians of a mental hospital was acceptable

In March 2003, the Florida Supreme Court finally issued a rule on psychiatric and other residential commitments, providing that children are entitled to be represented by an attorney to challenge commitment requests.<sup>142</sup>

Overall, however, the state writ of habeas corpus is apparently more used and more effective than the federal writ. For example, in California, *Doe v. Gallinot*<sup>143</sup> reports that for the year 1975, 35% of the patients at Camarillo State Hospital sought the writ and 6% were successful in obtaining review.<sup>144</sup> The court concluded that once mandated judicial review is sought, a substantial number of patients are released.<sup>145</sup> Statistics for Los Angeles County for 1975 similarly reflect large numbers of releases through the use of the writ, nearly 50% in 1975.<sup>146</sup> More recent data from California indicates a large number of habeas corpus cases. Criminal habeas filings rose from 3944 in 1994-1995, to 5620 in 2003-2004.<sup>147</sup> In the same time frame, civil habeas corpus filings declined, from 5867 to 3249.<sup>148</sup> Unlike the virtual absence of hearings in federal courts on habeas petitions, 1981 cases were disposed of after hearings in California in fiscal year 2003-2004.<sup>149</sup> Of these, 1104 were criminal habeas cases and 877 were civil habeas cases.<sup>150</sup> More than 660 times as many hearings or trials occurred in California state court alone than in the entire federal court system in fiscal year 2004.<sup>151</sup> Of course, disposition after hearing of criminal habeas cases by non-Article III judges is not what the Federal Constitution likely contemplated, but such state habeas reflects

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to the United States Supreme Court. *See id.* Florida thus accords more process than the Fourteenth Amendment's Due Process Clause requires.

142. Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 842 So. 2d 763, 765-66 (Fla. 2003). The full text of Rule 8.350 is set forth in the appendix to the court's opinion. *Id.* at 770-72. *See generally* Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623, 678 (2005).

143. 486 F. Supp. 983 (C.D. Cal. 1979).

144. *Id.* at 989.

145. *Id.* In the following year, 80% sought judicial review by writ. *Id.* Ultimately, 50% were released, with 12% obtaining release through the writ itself. *Id.*

146. *Id.*

147. JUDICIAL COUNCIL OF CAL., 2005 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 56 tbl.11, available at <http://www.courtinfo.ca.gov/reference/documents/csr2005.pdf>.

148. *Id.*

149. *Id.* at 141 tbl.11e. Five thousand seven hundred and four habeas cases were disposed of before a hearing; of the total number, 4843 were criminal habeas petitions and 2842 were civil habeas petitions. *Id.*

150. E-mail from Lynne Mayo, Office of Commc'ns, Judicial Council of Ca. to author (Mar. 22, 2006) (on file with *Catholic University Law Review*).

151. Compare *supra* note 96 and accompanying text, with *supra* note 149 and accompanying text.

at least a potential for substantial relief. The federal writ is unlikely to result in relief.

#### CONCLUSION

It is worthwhile to view the American legal system from the perspective of other legal systems; such viewing allows one to gain further perspectives. Not that foreign viewpoints are necessarily correct, but they may encourage us to contemplate whether or not our rules and procedures are more desirable. From such a viewpoint, the federal writ has ceased to embody the guaranteed protection that the framers of the Constitution and the First Congress envisaged for protecting federal rights against state infringements. As Justice Story stated in *Martin v. Hunter's Lessee*,<sup>152</sup>

The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. . . .

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their [state court] decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states . . . . The public mischiefs that would attend such a state of things would be truly deplorable, and it cannot be believed that they could have escaped the enlightened convention which formed the constitution.<sup>153</sup>

With all due respect to the Supreme Court's habeas jurisprudence of the last three decades, decisions of the European Court of Human Rights suggest it is time to reevaluate that jurisprudence, lest liberty and equality suffer. The procedural hurdles that beset federal habeas should be reevaluated with an eye toward making the remedy an effective, available remedy—particularly for prisoners who can make out credible cases that serious constitutional error may taint their convictions, or when guilt is seriously in doubt. Federal law should recognize the common sense presumption of most Americans that innocent persons should neither be

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152. 14 U.S. (1 Wheat.) 304 (1816).

153. *Id.* at 347-48.

executed nor incarcerated. Constitutional error should be grounds for relief unless the error is truly harmless error.

Both Congress and the Supreme Court should reconsider this important area. When a habeas corpus petitioner in federal court has a one in eight thousand chance of receiving a trial on a habeas petition, but thirteen death row prisoners in Illinois were released from death row because they were proved innocent<sup>154</sup>—it is imperative that American federal habeas jurisprudence be reconsidered.

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154. Elizabeth Brackett, Online NewsHour, Justice Reconsidered (Jan 13, 2003), [http://www.pbs.org/newshour/bb/politics/jan-june03/ryan\\_1-13.html.old](http://www.pbs.org/newshour/bb/politics/jan-june03/ryan_1-13.html.old) [hereinafter Justice Reconsidered]. On January 11, 2003, outgoing Governor Ryan commuted the death sentences of 156 remaining death row inmates. See Michael Sneed et al., *Ryan to Commute all Death Row Sentences*, CHI. SUN-TIMES, Jan. 11, 2003, at A4. Gov. Ryan reasoned:

I have reviewed these cases on many occasions. And I, without a doubt, believe injustice has occurred. I believe that these many are innocent, or I wouldn't have pardoned them. I still have some faith in the system that eventually these men would have received justice in our courts. But I believe the old adage is true: justice delayed is justice denied.

Justice Reconsidered, *supra*.