

# Tulsa Law Review

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Volume 47  
Number 1 *Book Review Issue*

Volume 47 | Number 1

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Summer 2011

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### Recommended Citation

Lee Kovarsky, *Habeas Verite*, 47 Tulsa L. Rev. 13 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol47/iss1/2>

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# HABEAS VERITÉ

Lee Kovarsky\*

PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (Harvard Univ. Press 2010). Pp. 512. Hardcover. \$39.95.

NANCY J. KING AND JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (Univ. Chi. Press 2011). Pp. 272. Cloth. \$45.00.

JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* (Univ. Press of Kan. 2011). Pp. 296. Cloth. \$34.95.

Pick a federal habeas corpus opinion at random, and it is likely to describe the writ reverentially — as a durable check on majorities, as a snow-driven-pure monument to freedom, or with some other gauzy reference to liberty’s march through history. If the “Great Writ” had a seamy underbelly, then it had never been probed by modern habeas decisions in the U.S. Reporter.<sup>1</sup> Three recent books from varied academic disciplines, however, demonstrate that habeas is as much about *power* as it is about *liberty* — the power of some judges over other magistrates, the power of the judiciary over coordinate governing institutions, and the power of dominant political coalitions over the opposition. With respect to habeas corpus, liberty may be power’s footnote, not the other way around.

In *Habeas Corpus: From England to Empire*, History Professor Paul Halliday produces the definitive account of the pre-Revolutionary English writ, the vehicle by which King’s Bench transformed its power over custodians into power to decide the merits of custody’s cause — and, by extension, the terms of the Crown’s empire.<sup>2</sup> In *Habeas Corpus in America: The Politics of Individual Rights*, Political Science Professor Justin Wert hops the pond and presents the American writ as a tool that dominant political coalitions have used to enforce their conceptions of constitutional governance.<sup>3</sup> In *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ*, Law Professors Nancy King and Joseph Hoffmann present an unflinching, data-driven account of how modern habeas has failed to protect its purported goal, liberty, in most

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1. This circumstance changed markedly in *Boumediene v. Bush*, 553 U.S. 723 (2008), in which the Court encountered much of the source material for Paul Halliday’s book for the first time. *See id.* at 740, 747, 752 (citing Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008)).

2. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010).

3. JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* (2011).

criminal proceedings.<sup>4</sup>

At the outset, I cop to being selective in the source material that this brief “Review” discusses, if only because I use much of my allotted space to make two source-derivative points about (1) the methodological pitfalls of lawyers mining legal opinions for history and (2) how this problem has terrifically screwed up our modern understanding of the habeas writ and its limitations. I hope my discussion nonetheless shows potential readers that each of these books deserves a read both on its own disciplinary merit and as an entry in a larger, more ambitious discussion about how habeas constructs and reflects institutional power.

#### THE ENGLISH WRIT OF POWER

University of Virginia History Professor Paul Halliday takes the squarest aim at the problematic methodology behind the “Whiggish” habeas narrative:<sup>5</sup> “If we [read Coke & Blackstone] while countless parchment court records and case reports surviving only in manuscript lie unread in archives, then we have been derelict as historians. If we act upon such claims in our courts, we may be derelict in our jurisprudence . . . .”<sup>6</sup> The centerpiece of his work is a 2,757-document sample of habeas corpus *ad subjiciendum* writs from every fourth year between 1502 and 1798 — data about what English judges actually used habeas to do.<sup>7</sup> In less than two years since its publication, Professor Halliday’s work has secured a status as the definitive historical account of the pre-Revolutionary writ. That stature reflects a consensus shared by courts, lawyers, and academics, and it is one that I join.<sup>8</sup>

To put Professor Halliday’s basic insight pithily: at the American Founding, habeas was the most important source of judicial *power* making its way across the Atlantic, and the boundaries of that power were not always (or even frequently) set pursuant to a substantive conception of liberty. Habeas was a muscular writ that judges sent to all kinds of custodians, for any reason and to any place, to test the lawfulness of any detention. There were no “jurisdictional” limitations in a government without a written constitution; judges sent the writ to recipients that could be forced to honor it. Professor Halliday’s history contains many bitter-pill propositions for a legal culture that is both engorged with “originalist” constitutional interpretation and skeptical of structural principles that do not aggressively cabin judicial discretion.

As Professor Halliday eloquently puts it, the defining attribute of pre-Revolutionary habeas was not *how* judges decided cases, but *that* judges decided them.<sup>9</sup> Until the end of the eighteenth century, the “jurisdiction” of English courts was splintered and lacking in familiar modern hierarchies. Different types of tribunals or

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4. NANCY J. KING & JOSEPH L. HOFFMAN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (2011).

5. I use the term “Whiggish” to describe the cluster of sanitized habeas narratives that present the writ as a procedure tending, inexorably and at every turn, towards liberty of the British subject or American citizen.

6. HALLIDAY, *supra* note 2, at 3-4.

7. *Id.* at 462-73 (presenting data in chart form).

8. See *supra* note 1 (collecting Supreme Court references to Halliday’s work); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941 (2011) (analyzing what Halliday’s research means for modern Suspension Clause law).

9. See HALLIDAY, *supra* note 2, at 7.

magistrates had different powers over different territories. Professor Halliday shows us how King's Bench used habeas to exert authority — to “make and order” jurisdiction — over all of these other judicial and custodial entities.<sup>10</sup> Habeas encoded King's Bench into the DNA of English Government. The justices issued writs to custodians that would comply, and the Bench transformed its power to review detention into a power to decide legal questions affecting custody.

The anachronistic notion that judges only exercised their habeas authority in conformance with a particular conception of liberty collides with Professor Halliday's data, showing that the only meaningful limit on habeas power was the ability of King's Bench to force compliance. At first, the Bench invoked the authority of the Crown to ensure prompt returns and to enforce its ultimate dispositions. As time wore on, however, the Bench no longer relied upon the Crown for institutional legitimacy. In the English Civil Wars, King's Bench turned habeas authority against Crown from whence it sprung. By the time England was at war with the Colonies, the writ reached every judge, council, court, and jailor; it reached the Crown itself, the Privy Counsel, Justices of the Peace, specially-commissioned authorities, chartered courts, the military, courts-martial, ecclesiastical courts, and Parliament. The writ reached naval impressments; it was used to aid felony process, to adjudicate the custody of slaves, to inspect ecclesiastical orders, and to decide family custody.

In short, Professor Halliday shows us that the ancestral English form of the Great Writ was more about what bodies could send and respond to parchment than it was about vindicating the rights of a prisoner. The essence of habeas was not as a structural guarantee to secure liberty; it was first and foremost an instrument of aggrandizing, consolidating, and enforcing judicial power.

#### ANTEBELLUM FEDERAL POWER

In senses both geographic and chronologic, University of Oklahoma Political Science Professor Justin Wert picks up the critique of Whiggish history where Professor Halliday leaves off. Professor Wert scrutinizes the habeas writ in the context of American constitutional governance. Article I, Section 9 of the Constitution enshrines the habeas privilege between the clause barring bills of attainder and the clause specifying rules for “migration and importation” of slaves.<sup>11</sup> That unsettling constitutional sequence is a fitting reflection of the sometimes-ugly intersection of power, habeas, and liberty in American political history.

Professor Wert fastidiously documents how dominant American political movements impose paradigms of constitutional governance through habeas law, and he is at his best when dissecting the period just before the Civil War.<sup>12</sup> Even though Professor Wert's book is far more than antebellum history, the Taney Court's paradigm of constitutional governance effectively illustrates my broader point about how habeas marks boundaries of institutional power. Antebellum habeas became an important tool of federal supremacy at a time when the Jacksonian political coalition badly needed one,

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10. *Id.* at 141.

11. U.S. CONST. art. I, § 9, cl. 2.

12. See WERT, *supra* note 3, at 26-72.

and the habeas law was more responsive to that structural objective than to any principled conception of liberty.

Like most antebellum legal practice, habeas procedure was warped by slavery's political vortex. The Fugitive Slave Act of 1793 provided for extraterritorial capture and rendition,<sup>13</sup> and a slave-owner needed only a southern-judge-signed affidavit of slave ownership to commence summary rendition process.<sup>14</sup> The Fugitive Slave Act survived the Compromise of 1850, enraging northern state electorates and provoking new legal theories of interposition.<sup>15</sup> In two ways, habeas figured prominently in the post-Compromise fight over slavery and the corresponding dispute over paradigms of constitutional governance.

First, *federal judges* used the habeas writ to stop *state imprisonment* of U.S. Marshals that were enforcing the fugitive slave provisions. After 1850, northern states began arresting federal law enforcement officials — usually U.S. Marshals — that effected violent recapture. Because the Marshals were enforcing federal law when they were detained, they successfully invoked the habeas provisions of the 1833 “Force Act” — originally passed to allow federal tax collectors to remove South Carolina cases to federal court during the nullification controversy.<sup>16</sup> Second, *state judges* used habeas to invalidate *federal imprisonment* of citizens convicted under the fugitive slave provisions. In 1854, United States Marshal Stephen Ableman arrested abolitionist Sherman Booth for aiding a fugitive slave's escape to Canada. Aggressively challenging the constitutionality of the Compromise, the Wisconsin Supreme Court issued state habeas relief to free Booth. The U.S. Supreme Court finally resolved *Ableman v. Booth* against Wisconsin four years later, in a famous and intensely nationalistic opinion by Chief Justice Taney.<sup>17</sup> Among other things, the Court held that federal supremacy prohibited a state from releasing a federal prisoner.

Antebellum writ practice creates a largely controlled comparison between the use of federal habeas to challenge state confinement and the use of state habeas to challenge federal confinement. That symmetry allows Professor Wert to expose just how peripheral “liberty” was to the development of habeas law during this period. Antebellum habeas outcomes were a series of political victories for the Jacksonian coalition. Broad federal and narrow state habeas authorities were each consistent with the Jacksonian paradigm of constitutional governance, the paradigm with which the Taney Court sympathized. That governing coalition dissolved at the start of the Civil War, but the nationally ascendant Republicans had their own reasons for preferring a habeas jurisprudence that promoted federal supremacy. Professor Wert demonstrates that this story — whereby habeas law vindicates structural principles of dominant political regimes — repeats itself throughout American history.

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13. See Act of Feb. 12, 1793, ch. 7, § 4, 1 Stat. 302, 305 (repealed 1864).

14. See WERT, *supra* note 3, at 54.

15. See Act of Sept. 18, 1850, ch. 60, 9 Stat. 462, 464 (repealed 1864); WERT, *supra* note 3, at 62 (describing deterioration of pro-Compromise coalitions in northern states).

16. Act of Mar. 2, 1833, ch. 57, 4 Stat. 632.

17. *Ableman v. Booth*, 62 U.S. 506, 526 (1858).

## STATE CRIMINAL CONFINEMENT

Professors Halliday and Wert each show, for different Anglo-American legal eras, that habeas was as much a means of distributing institutional power as it was a means of promoting liberty. In *Habeas for the Twenty-First Century*, Law Professors Nancy King (Vanderbilt) and Joseph Hoffmann (Indiana) are more concerned with the modern writ's liberty-securing function. Professors King and Hoffman dutifully canvass the types of custody for which habeas issues, but the authors' gravity centers over their groundbreaking study of federal habeas for *state* prisoners ("Post-Conviction Study Data"). The results are staggering — for noncapital state prisoners, "the Great Writ is a pipe dream."<sup>18</sup>

Before I discuss the authors' recommendation ("Recommendation"), a brief historical digression is in order. During the first half of the twentieth century, federal courts began to use habeas as a remedy for due process violations in state criminal proceedings.<sup>19</sup> When the Warren Court incorporated new types of constitutional rules against the states, it used habeas to enforce the evolving concept of due process. Starting in the 1970s, the Burger and Rehnquist Courts imposed numerous procedural restrictions on federal habeas relief, including a retroactivity rule, heightened exhaustion requirements, a procedural default rule largely precluding relief for claims denied on adequate and independent state grounds, a presumption against federal evidentiary hearings, and limits on claims asserted in successive petitions.<sup>20</sup> In the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress added a one-year statute of limitations, fortified the presumption against federal evidentiary hearings, and limited habeas relief to cases involving state decisions that were both erroneous *and unreasonable*.<sup>21</sup>

The Post-Conviction Study Data represents previously unavailable information about the resources that society expends in reviewing the federal habeas challenges of state inmates. Professors King and Hoffman also specify a culprit for the system's gross inefficiency: litigation over procedural defects in non-meritorious petitions. They assert that the historical object of federal habeas is to deter states from violating the constitutional rights of criminal defendants.<sup>22</sup> They argue that such deterrence is no longer necessary and that, in any event, federal habeas is an inefficient means to that end.<sup>23</sup> The Recommendation has two planks. The federal habeas plank would strip federal habeas jurisdiction over state criminal confinement, with exceptions for capital

18. KING & HOFFMAN, *supra* note 4, at 75.

19. See, e.g., *Moore v. Dempsey*, 261 U.S. 86, 96 (1923) (holding that a mob-dominated trial violated the due process rights of the criminal defendant); *Frank v. Mangum*, 237 U.S. 309, 335 (1915) (expressing willingness to reach due process questions when a state failed to supply adequate corrective process).

20. See *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (new claims in successive petitions); *Teague v. Lane*, 489 U.S. 288, 310-15 (1989) (plurality opinion) (imposing retroactivity rule); *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (creating rule requiring exhaustion of all claims in a petition); *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977) (discussing procedural default requirements).

21. 28 U.S.C. § 2244(d) (setting statute of limitations); 28 U.S.C. § 2254(d) (imposing substantive limit on relief); 28 U.S.C. § 2254(e) (creating presumption against evidentiary hearings).

22. See KING & HOFFMAN, *supra* note 4, at 50-54.

23. *Id.* at 74.

cases and for habeas claims involving “compelling” showings of innocence. The state criminal reform plank would create a federal entity to administer grants and to otherwise improve legal representation in collateral proceedings.

*Habeas for the Twenty-First Century* merits careful academic consideration, no matter what I say about the Recommendation. The Post-Conviction Study Data is the best empirical content in the field, and it will be the starting point for any assessment of habeas as a form of post-conviction relief. The Study Data indeed demonstrates the central argument advanced by Professors King and Hoffmann — that a commitment to complicated state and federal habeas procedure is unsustainable. Even in my criticism of the Recommendation, I question only the federal habeas plank. With respect to the state criminal reform plank, Professors King and Hoffmann correctly observe that state criminal and post-conviction representation is abysmal. Any serious attempt to enforce the constitutional rights of criminal defendants requires society to devote considerably greater resources to improving representation in state criminal and post-conviction proceedings.

The Recommendation’s federal habeas plank is nonetheless problematic in at least two respects that I want to highlight here.<sup>24</sup> First, the Survey Data does not suggest the inherent futility of federal habeas relief upon which the Recommendation is premised. The authors frequently note that only 0.34 percent of noncapital Study Data cases resulted in relief, but that number refers to cases that were *unsuccessful*, not necessarily to those *lacking in merit*. If the Study Data captures many habeas claims that were meritorious but unsuccessful — because a federal court denied them either as procedurally defective or because they challenged a state decision that was not “unreasonable” error<sup>25</sup> — then society would want fewer habeas restrictions, not more.

Second, the Recommendation invests heavily in the idea that, because federal habeas no longer deters state constitutional violations effectively, it should be largely unavailable to state prisoners. As Professors Halliday and Wert show, however, habeas corpus was never conceptualized as an instrument of deterrence, even if deterrence was incident to the writ’s *raison d’être* — judicial power. Though Warren-era habeas had a significant deterrent effect, it does not follow that habeas exists for that purpose. In Anglo-American legal systems, habeas has primarily been a vehicle for judges to rule on what kinds of imprisonment were unlawful, and, in America, secondarily as a means of enforcing federal supremacy.

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24. With respect to the federal habeas plank, there are at least two very serious problems that I omit in the interest of space. First, despite considerable evidence to the contrary, the authors assume without explanation that elected state judges enforce constitutional rights in criminal cases as aggressively as do their federal counterparts. Second, they suggest that the Court would use the Suspension Clause to correct state failures to enforce federal rights of criminal defendants, but the notion that the Supreme Court would clearly use the Clause to ensure adequate and effective *state* post-conviction review is almost unthinkable. The Court has never even held that the Suspension Clause reaches *federal* criminal convictions. Such an aggressive Suspension Clause reading is inconsistent with the authors’ assumptions about the writ’s limited original function. For a more robust discussion touching on these issues, see John H. Blume, Sheri Lynn Johnson, & Keir Weyble, *In Defense of Non-capital Habeas: A Response to Hoffman and King*, 96 CORNELL L. REV. 435 (2011).

25. This measurement problem is particularly acute because of AEDPA’s changes to the *substantive standard* for relief. Because AEDPA barred relief for otherwise meritorious challenges where the state decision was not unreasonable, the volume of meritorious-but-unsuccessful claims in the Study Data is probably substantial.

## CONCLUSION

In some quarters, support for the idea of stripping federal habeas jurisdiction enjoys support on the originalist ground that the “appropriate” scope of federal habeas review must be assessed against a conception of *liberty* fixed at some time in the past. Much of the discussion in the last several years, however, has turned to whether such a narrative has crowded out an equally important story about the writ’s role in allocating *power* among government institutions—certain courts versus others, judiciaries versus other branches, and the federal government versus the states.



