

# Making the Framers’ Case, and a Modern Case, For Jury Involvement in Habeas Adjudication

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## TABLE OF CONTENTS

|  |     |
|--|-----|
| I. THE FRAMERS’ (NOW LARGELY UNFULFILLED) VISION OF JURIES                                 |     |
| SERVING THE ENDS OF DEMOCRACY AND LIBERTY .....  | 890 |
| A. <i>Juries in the Document and Design of Our Constitution</i> .....                      | 890 |
| B. <i>Juries in Decline in Modern Times</i> .....  | 894 |
| II. THE HISTORIC (NOW LARGELY UNFULFILLED) ROLE OF HABEAS                                  |     |
| CORPUS AS A GREAT WRIT OF LIBERTY .....  | 897 |
| A. <i>The Grand, Storied History of the Great Writ</i> .....                               | 897 |
| B. <i>The (Ugly) Modern Realities of the Great Writ</i> .....                              | 900 |
| C. <i>Reforming Habeas Proceedings: Wherefore Judges and Judges</i><br><i>Alone?</i> ..... | 905 |
| III. MAKING THE FRAMERS’ CASE AND THE MODERN CASE FOR JURY                                 |     |
| INVOLVEMENT IN HABEAS ADJUDICATION.....  | 911 |
| A. <i>Making the Case in Theory</i> .....  | 911 |
| B. <i>Making the Case in Practice</i> .....  | 916 |
| IV. CONCLUSION.....  | 917 |

The Framers adored juries, as the Supreme Court’s most vocal originalist is quick to spotlight. In *Blakely v. Washington*, for example, Justice Antonin Scalia stresses that “the Framers put a jury-trial guarantee in the Constitution [because] they were unwilling to trust government to mark out the role of the jury.”<sup>1</sup> In another opinion, Justice Scalia emphasizes that the Declaration of Independence assailed King George III for depriving colonists of “the Benefits of Trial by Jury” and notes that “the right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention.”<sup>2</sup> Justice Scalia

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<sup>1</sup> *Blakely v. Washington*, 542 U.S. 296, 308 (2004).

<sup>2</sup> *Neder v. United States*, 527 U.S. 1, 30–31 (1999) (Scalia, J., concurring in part and dissenting in part).

has also highlighted Justice Joseph Story's explanation that the jury trial right "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'"<sup>3</sup>

Of course, Justice Scalia is not alone in recognizing the Framers' affinity for jury involvement in judicial branch decision-making, especially in criminal cases. Professor Akhil Amar has explained that, in the Framers' view, "[a] criminal judge sitting without a criminal jury was simply not a duly constituted federal court capable of trying cases."<sup>4</sup> Professor Lawrence Friedman has similarly explained that the Revolutionary generation, troubled by "memories of royal justice or injustice," afforded juries "almost unlimited power" as expressed through "a maxim of law that the jury was judge both of law and of fact in criminal cases."<sup>5</sup> U.S. District Court Judge Jack Weinstein describes the Framers' perspective on juries in this way: "The authors known to the founders had a high respect for the wide powers of the jury over law, fact and punishment. . . . In a sense, the jury was, and remains, the direct voice of the sovereign, in a collaborative effort with the judge."<sup>6</sup>

Against this historical backdrop—and especially in light of Justice Scalia's recent assertion that "[o]ur Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury"<sup>7</sup>—it seems unlikely the Framers would have endorsed or ever wanted important judicial proceedings concerning a criminal defendant's rights and liberties to be conducted only by a judge without a jury. And yet, in thousands of federal habeas corpus actions, this is exactly how a defendant's challenge to his criminal conviction or sentence gets adjudicated. Modern habeas review of convictions and sentences involves judges, and judges only, conducting "judicial inquisitions" and then resolving factual and legal disputes without any jury input. I posit that the Framers would find this modern habeas reality troublesome, if not unconstitutional. Moreover, as I hope to explain in this Essay, I further believe that those of entirely modern

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<sup>3</sup> *United States v. Gaudin*, 515 U.S. 506, 510–11 (1996) (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 n.2 (4th ed. 1873)).

<sup>4</sup> AKHIL REED AMAR, AMERICAN'S CONSTITUTION: A BIOGRAPHY 236 (2005).

<sup>5</sup> LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 211 (3d ed. 2005).

<sup>6</sup> *United States v. Khan*, 325 F. Supp. 2d 218, 229–30 (E.D.N.Y. 2004).

<sup>7</sup> *Blakely*, 542 U.S. at 313.

sensibilities now should recognize that the fairness and effectiveness of collateral review of criminal convictions could be greatly aided by providing a role for juries in habeas adjudication.

In this Essay, I shall expound upon my (originalist?) claim that the U.S. Constitution's Framers would have wanted (or at least welcomed) jury involvement in the adjudication of modern federal habeas corpus actions, as well as my (provocative?) claim that modern policymakers and commentators should now want (or at least welcome) juries involved in habeas adjudication.<sup>8</sup> Especially given the widely shared view that current federal habeas review of criminal convictions is deeply flawed<sup>9</sup>—and with Professors Joseph Hoffmann and Nancy King contending that federal habeas is beyond salvaging and proposing total elimination of federal habeas review for most state prisoners<sup>10</sup>—it is time for policymakers and commentators to consider a bold new approach. This Essay suggests that such a new approach could and should incorporate a return to the structural and procedural vision of criminal procedure that the Framers of our Constitution had in mind at the Founding nearly 250 years ago, and it contends that, by incorporating a jury component in federal habeas proceedings, the modern collateral review process will serve as a more effective and robust check on the operations of modern criminal justice systems.

This Essay has three Parts. Part I provides a brief recounting of the Framers' affinity for juries as constitutionally critical actors in the administration of justice. This Part also details how, in modern times, the role and responsibilities of juries in criminal justice adjudication have declined significantly. Part II turns to an examination of the writ of habeas

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<sup>8</sup> Throughout this Essay, my primary focus is upon *federal* habeas corpus actions brought by state prisoners under the statutory authority of 28 U.S.C. § 2254, and federal prisoners pursuant to 28 U.S.C. § 2255. Though I consider the themes and principles developed in this Essay to be potentially applicable to *state* court habeas corpus proceedings, it is possible that the diversity and unique historical pedigree of some state collateral review mechanisms could raise some unique concerns beyond the ambit of this Essay. See generally Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1080 (2006) (noting some diverse facets of state post-conviction procedures).

<sup>9</sup> See, e.g., Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 26 (2010); Steven Semeraro, *A Reasoning-Process Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 898 (2004); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 553 (2006).

<sup>10</sup> See Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 796–97 (2009).

corpus, reviewing briefly the historic pedigree of “the Great Writ” and the modern realities of habeas review in the federal courts. This Part spotlights new research indicating that federal habeas review has largely become a waste of (scarce) resources because it provides virtually no benefit to nearly all petitioners subject to sentences other than death (and, arguably, too much relief for capital defendants attacking death sentences). In this review of ugly aspects of modern habeas realities, my goal is not merely to highlight why collateral review of criminal convictions needs reform, but also to suggest that the central role of judges as finders of fact and law in habeas proceedings may partially account for why modern habeas review has gone badly off the rails.

Part III, in turn, sets out some basic ideas for just why juries should and how juries could play a direct and fundamental role in modern habeas corpus actions reviewing the constitutionality and lawfulness of criminal convictions. The animating spirit of this Part—and of this whole Essay—is the notion that a lay jury may now be an especially appealing modern habeas adjudicator. With a common-sense perspective on law and justice, citizen jurors are likely more eager to seek a kind of case-specific rough justice in any criminal adjudication, and many modern habeas disputes likely will be better resolved by decision-makers focused on achieving a kind of rough justice. As explained in this concluding Part, because of lay jurors’ commitment to rough justice, jury involvement in modern habeas proceedings should appeal not only to those policymakers and commentators eager for collateral review to be a more effective tool for preventing wrongful convictions and correcting constitutional violations, but also to those who want habeas review to be always mindful of the need to conserve limited court resources and the interests of finality.

## I. THE FRAMERS’ (NOW LARGELY UNFULFILLED) VISION OF JURIES SERVING THE ENDS OF DEMOCRACY AND LIBERTY

### *A. Juries in the Document and Design of Our Constitution*

The criminal jury is twice mentioned in our Founding document by the Framers; it appears in both the body of the original Constitution and also in the Bill of Rights. Section 2 of Article III provides: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”<sup>11</sup> The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy

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<sup>11</sup> U.S. CONST. art. III, § 2, cl. 3.

the right to a speedy and public trial, by an impartial jury . . . .”<sup>12</sup> In addition to highlighting the favored status of the criminal jury trial right, this double denomination showcases that the Framers’ embrace of jury trials was a direct by-product of their commitments to both democratic self-governance and safeguarding personal liberties.

The Supreme Court has described jury trials as “fundamental to the American scheme of justice,”<sup>13</sup> and scholars have long noted that the Framers viewed juries as a key component of democratic government in a new nation.<sup>14</sup> In his classic work, *Democracy in America*, Alexis de Tocqueville described the jury as a “political institution” with an essential “republican character, in that it places the real direction of society in the hands of the governed.”<sup>15</sup> More recently, Professor Akhil Amar has explained that the Framers were drawn to juries as “in a sense, the people themselves, tried-and-true embodiments of late-eighteenth-century republican ideology,”<sup>16</sup> and Professor Laura Appleman has marshaled an extraordinary historical record showing that during the Framing era, “the jury trial right was envisioned primarily as a local, community-based right” concerned more with the citizenry’s involvement in government administration than with the accused’s interests.<sup>17</sup>

Indeed, the criminal jury process was seen by the Framers as a community responsibility as much as a right: through jury service, citizens would have not just an opportunity, but an obligation, to participate directly in the actual administration of government.<sup>18</sup> Justice Scalia spotlights this

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<sup>12</sup> U.S. CONST. amend. VI.

<sup>13</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>14</sup> See, e.g., Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1048 (2006); Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2052–54 (2008); Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 155–60 (2009); Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 779–82 (2005).

<sup>15</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 126 (Richard Heffner text 1956).

<sup>16</sup> AMAR, *supra* note 4, at 234.

<sup>17</sup> Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 405–39 (2009).

<sup>18</sup> See *id.*; see also *New York v. Allen*, 653 N.E.2d 1173, 1177 (N.Y. 1995) (describing jury service as “a privilege and duty of citizenship”); DE TOCQUEVILLE, *supra* note 15, at 127 (noting that jury service makes citizens “all feel the duties which they are bound to discharge towards society, and the part which they take in its government”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–84

connection between juries and democratic self-governance in his opinion for the Court in *Blakely v. Washington* when noting that “[j]ust as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”<sup>19</sup> In another opinion, Justice Scalia evocatively calls the Constitution’s jury trial right the “spinal column of American democracy.”<sup>20</sup>

The Framers’ views on the institutional importance of the jury should not overshadow their belief that jury trial rights were essential to securing individual liberty for Americans. As the Supreme Court explained nearly fifty years ago, “[t]hose who wrote our constitutions knew from history and experience that [the right to jury trial] was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.”<sup>21</sup> The Framers regarded jury rights as a critical component of the Constitution’s checks-and-balances protection of individual freedom against potential excesses of other governmental actors: on both federal and state levels, the jury was to ensure that legislatures, prosecutors, and judges could not conspire to convict and harshly punish politically unpopular defendants.<sup>22</sup> Put simply, the Framers trusted and expected local juries to use their common sense and conscience to question and test prosecutors’ allegations, thereby serving as a community-based potential veto over any misguided or unjust prosecutions.<sup>23</sup> And, as noted before, it was widely believed in the Framing era that juries could and should have authority to decide matters of both law and fact when rendering a general verdict about a defendant’s fate.<sup>24</sup>

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(1991) (discussing Framers’ views on links between jury service and self-government); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 217–21 (1995) (same).

<sup>19</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

<sup>20</sup> *Neder v. United States*, 527 U.S. 1, 30 (1999).

<sup>21</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>22</sup> See Federal Farmer No. 15, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 319–20 (Herbert J. Storing ed., 1981); Thomas Jefferson, Letter to the Abbé Arnoux (July 19, 1799), in 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958); see also, e.g., Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 48–65 (2003) (describing the jury’s role in the constitutional structure); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 322 (2003) (explaining how juries “played a central part in the American system of checks and balances”).

<sup>23</sup> See *supra* notes 18, 22.

<sup>24</sup> See *supra* notes 4–6 and accompanying text; see also Mark DeWolfe Howe,

A liberty-focused perspective on jury trial rights is especially evident in one of *The Federalist Papers* authored by Alexander Hamilton. In Federalist No. 83, Hamilton explains why all the players debating a new constitutional structure for the United States recognized that juries had a “friendly aspect to liberty” by serving “as a barrier to the tyranny of popular magistrates in a popular government.”<sup>25</sup> As Hamilton explained in one prominent passage:

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. . . . Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas corpus act, seems therefore to be alone concerned in the question [of how jury rights help protect individual liberties]. And both of these are provided for, in the most ample manner, in the plan of the convention.<sup>26</sup>

In short, the Framers were eager to create a permanent role for juries in the very framework of America’s new system of government. The Constitution’s text was intended to make certain that the citizenry could and would serve as an essential check on the exercise of the powers of government officials in criminal cases. The Framers recognized that abusive use of the criminal justice system posed the greatest threat to individual liberty, and they trusted and expected that guarantees of trial by jury would protect against the ever-present threats posed by, in Hamilton’s words, “[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”<sup>27</sup> (Intriguingly, there do not appear to be many historical examples of the Framers linking jury trial rights and habeas corpus rights as Hamilton does

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*Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 592 (1939) (discussing jury’s authority to decide questions of law in the early 1800s); Jon P. McClanahan, *The ‘True’ Right to Trial by Jury: The Founders’ Formulation and Its Demise*, 111 W. VA. L. REV. 791, 794 (2009) (“[T]he jury’s right to decide questions of law in criminal cases was widely accepted around the country from the time of the passage of the Constitution until the middle of the 1800s.”); Myers, *supra* note 14, at 158 (same).

<sup>25</sup> THE FEDERALIST NO. 83, at 521 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

in the above-quoted passage from Federalist No. 83. Nevertheless, as will be discussed in subsequent parts of this Essay, there are past examples of, and present reasons for, directly connecting jury trials and the writ of habeas corpus.)

### B. *Juries in Decline in Modern Times*

While the affinity for, and authority given to, juries may have been at its zenith at the time of America's Founding, the role and responsibilities of juries have dramatically declined in modern times. The full story of the decline in the role and responsibilities of juries in the American justice system is lengthy and intricate; it involves an array of government officials—judges, prosecutors, legislators—seeking in various formal and informal ways to wrest power from juries in order to increase their own spheres of authority.<sup>28</sup> While others have provided detailed (and varied) reviews of these historical developments,<sup>29</sup> U.S. District Court Judge William Young summarizes one essential modern reality: “[t]he simple fact is that with ever more work to do in the federal courts, jury trials today are marginalized in both significance and frequency.”<sup>30</sup>

Especially with respect to criminal law adjudication, the modern role for juries is practically limited and formally circumscribed. Though the Framers envisioned jurors in criminal cases wielding power over issues of law, fact and punishment,<sup>31</sup> this vision of an active and robust jury role finds little or no functional expression in current criminal law doctrines or criminal justice realities. The Framers embraced juries as the community's democratic representative safeguarding individual liberty, but neither modern doctrines

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<sup>28</sup> See generally WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY* 1–6 (2002); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903–06 (1994); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 553 (1996); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 444–45 (1996).

<sup>29</sup> See THE FEDERALIST, *supra* note 25.

<sup>30</sup> William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 74 (2006); see also John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J. L. & PUB. POL'Y 119, 121 (1992) (highlighting the very limited role of jury trials in modern criminal justice systems).

<sup>31</sup> See *supra* notes 4–6, 24 and accompanying text.

nor practices now enable or even allow juries to function effectively in that role.

For starters, very few criminal cases ever actually reach a jury. More than nine of every ten federal and state convictions are the result of a plea of guilty, not a jury trial.<sup>32</sup> Though a guilty plea may often be a sensible choice for a defendant, any and every plea prevents a jury from having the power or opportunity to make any sort of community-based judgments about the defendant and the charges brought by the state. Put simply, our modern criminal justice system's heavy reliance on pleas formally and functionally takes juries completely out of the loop in the vast majority of cases.

Moreover, even in those rare criminal cases that go to trial, jurors are only asked and only permitted to find facts concerning whether the defendant has committed certain alleged acts. Though juries retain a raw power to nullify through an acquittal in the face of clear factual guilt, modern doctrines do not permit the litigants or the judge to inform jurors that they have the authority to acquit against the evidence or to consider legal and constitutional issues.<sup>33</sup> The jury's power to decide questions of law was largely extinguished during the nineteenth century, as Albert Alschuler and Andrew Deiss have effectively documented:

In America following the Revolution . . . the authority of juries to resolve legal issues was frequently confirmed by constitutions, statutes, and judicial decisions. . . . [But by the early 1800s], the jury's "indisputable" authority to resolve legal questions was frequently disputed in state courts, state legislatures, and state constitutional conventions. . . . After 1850, however, most of the courts that passed upon the question concluded that judges rather than jurors should settle questions of law.<sup>34</sup>

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<sup>32</sup> See BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004 1 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf> (finding that in nation's seventy-five most populous counties more than ninety-five percent of convictions occurred through guilty plea); USSC 2008 ANN. REP. SOURCEBOOK, fig. C (2009), available at <http://www.ussc.gov/ANNRPT/2008/FigC.pdf> (reporting that 96.3% of all federal convictions in fiscal year 2008 were result of guilty pleas).

<sup>33</sup> See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 5–8 (4th ed. 2006); see also Myers, *supra* note 14, at 159–60 (noting that judges are “affirmatively opposed to permitting attorneys to make nullification arguments and to instructing juries on the nullification power”).

<sup>34</sup> Alschuler & Deiss, *supra* note 28, at 903, 909–10.

During the twentieth century, legal doctrines further evolved to shield jurors from even being aware of the legal consequences of the facts they are asked to resolve. Current law generally does not even permit the litigants or the judge to inform jurors about the possible or likely sentencing implications of their factfinding.<sup>35</sup> Modern jurors obviously have their unique voice significantly muted by legal doctrines limiting their tasks and knowledge: jurors can hardly serve as a “political institution” expressing community perspectives on the law’s development and application if treated like mushrooms kept in the dark about the true import and impact of the facts they find.<sup>36</sup>

A lot more can be said about the historical decline and modern diminished role of jurors in criminal cases, and others have taken to the pages of law reviews to call for juries to return to a central place in modern criminal justice administration.<sup>37</sup> For purposes of this Essay, it suffices to highlight the considerable gulf between the Framers’ vision and modern reality. The Framers provided in clear terms in the body of the Constitution that the “trial of *all* crimes . . . shall be by jury,”<sup>38</sup> and yet a remarkably tiny

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<sup>35</sup> See *Shannon v. United States*, 512 U.S. 573, 579 (1994) (“The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury.”).

<sup>36</sup> There is an important exception to the formal and functional limitations placed on modern juries: in the administration of the death penalty, juries still have a profound and profoundly important role. Modern death penalty statutes, enacted in response to the Supreme Court’s Eighth Amendment jurisprudence, ensure juries act as the conscience of the community, making moral judgments, in nearly every capital case. Because of special indictments and jury selection procedures, capital jurors know from the outset of their service that they will be asked to make a moral judgment as to whether a particular offender deserves to die for his alleged crimes. Moreover, capital jurors are not only asked to find whether a capital defendant is factually guilty, they also decide whether a guilty defendant should be sentenced to death for his crimes. And nearly every capital case involves a jury trial because, even if a capital defendant admits guilt, he still can (and usually will) request and receive a jury trial in order to be able to ask jurors to impose a sentence other than death. See generally Douglas A. Berman, *Encouraging (and even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429 (2010) (highlighting distinctions between capital and noncapital criminal justice procedures and litigation realities); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 954 (2003) (noting that juries are given sentencing responsibilities in capital but not in noncapital cases).

<sup>37</sup> See, e.g., Appleman, *supra* note 17, at 400; Barkow, *supra* note 22, at 37; Langbein, *supra* note 30, at 121; Myers, *supra* note 14, at 155–60; Young, *supra* note 30, at 83–85; see also DWYER, *supra* note 28, at 1.

<sup>38</sup> U.S. CONST. art. III, § 2, cl. 3.

percentage of modern criminal cases now come before a jury.<sup>39</sup> Instead of jurors regularly checking the exercise of government power in all criminal prosecutions by making broad judgments about law, fact, and punishment, they now play a far more limited role, formally and functionally, as mere finders of a few facts in a few criminal cases. Recall that Alexander Hamilton in *The Federalist Papers* assured that “trial by jury in criminal cases, aided by the habeas corpus act” would help prevent “[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.”<sup>40</sup> But in modern criminal justice systems, which now process and sentence more than one million felony defendants each year,<sup>41</sup> the protections that the Framers expected would be provided by the constitutional right to jury trial exists principally only in theory, not in fact.

## II. THE HISTORIC (NOW LARGELY UNFULFILLED) ROLE OF HABEAS CORPUS AS A GREAT WRIT OF LIBERTY

### A. *The Grand, Storied History of the Great Writ*

The only legal institution that may have rivaled juries in the hearts and minds of the Framers was the historic writ of habeas corpus. Long known as the Great Writ of Liberty, this cherished legal procedure is frequently traced back to the Magna Carta.<sup>42</sup> In England, before and through the colonial and

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<sup>39</sup> Nearly two decades ago, when the rate of jury trials was even higher than today, Professor John Langbein made these sobering observations about modern jury trial realities:

Although the texts mandate jury trial for “all” criminal cases, the reality is far different. In place of “all,” a more accurate term to describe the use of jury trial in the discharge of our criminal caseload would be “virtually none.” Like those magnificent guarantees of human rights that grace the pretended constitutions of totalitarian states, our guarantee of routine criminal jury trial is a fraud.

Langbein, *supra* note 30, at 119–20.

<sup>40</sup> THE FEDERALIST, *supra* note 25, at 521.

<sup>41</sup> See BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2004 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf> (reporting that in 2004 “[s]tate courts convicted an estimated 1,079,000 adults of a felony”).

<sup>42</sup> See generally NANCY KING & JOSEPH HOFFMANN, HABEAS CORPUS FOR THE 21ST CENTURY (forthcoming 2011); DANIEL JOHN MEADOR, HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY (1966).

Framing eras, the writ of habeas corpus was well-established as a powerful tool for the Judiciary to protect individuals against executive oppression.<sup>43</sup> As the Supreme Court has recently noted, the Framers made sure to provide “protection for the privilege of habeas corpus [as] one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights.”<sup>44</sup> Section 9 of Article I of the U.S. Constitution provides: “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.”<sup>45</sup> Defending the absence of a Bill of Rights in the original Constitution, Alexander Hamilton cited the “establishment of the writ of habeas corpus” in the Constitution as providing “perhaps greater securities to liberty” than a more formal declaration of rights.<sup>46</sup>

The extraordinary history and prestige of the Great Writ has been well canvassed in Supreme Court opinions and in voluminous scholarly works, many of which stress that, though it is technically just a procedural mechanism, habeas corpus has long been associated with the development and expansion of individual rights and liberties.<sup>47</sup> Justice William Brennan stressed this point when writing for the Supreme Court in *Fay v. Noia*, the landmark ruling that fortified the role of habeas corpus as a means for *federal* judges to review *state* convictions:

Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be

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<sup>43</sup> See generally Paul D. Halliday & G. Edward Whit, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008) (highlighting that, through English and early American history, the writ of habeas corpus was given surprisingly wide coverage as to persons and places and thus facilitated broad judicial testing of the bases of imprisonment).

<sup>44</sup> *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

<sup>45</sup> U.S. CONST. art. I, § 9, cl. 2.

<sup>46</sup> THE FEDERALIST NO. 84, at 534 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

<sup>47</sup> See, e.g., *Fay v. Noia*, 372 U.S. 391, 401–06 (1963); *Ex parte Yerger*, 75 U.S. 85, 95 (1868); WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 7 (1980); ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 1–6, 147–53 (2001); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1998–99 (1992). See generally KING & HOFFMAN, *supra* note 42; MEADOR, *supra* note 42.

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>48</sup>

As this quote highlights, the ability and authority of courts to issue writs of habeas corpus has long been tied to ensuring that personal rights and liberties are preserved through judicial branch examination of imprisoning authority. The writ of habeas corpus protects rights and liberties not merely by sometimes resulting in a judicial order to set free a prisoner, but also by enabling the judicial branch to act as an ever-present check on government authority to imprison or otherwise “hold the body” of an individual.<sup>49</sup>

There has been considerable debate, at both the jurisprudential and policy levels, as to just what the storied history of habeas corpus, and its somewhat peculiar constitutional expression, should mean for the legal development and modern scope of the writ.<sup>50</sup> Though these debates have produced no clear victor, the voluminous jurisprudence and scholarship concerning the writ of habeas corpus establishes at least two fundamentally important points: (1) the Framers viewed and expected the writ of habeas corpus to be an important aspect of the checks-and-balances structure of government established by the Constitution to help secure the “blessings of Liberty,” and (2) the most practically significant and persistently controversial role played by habeas corpus over the last half-century has been as a means for *state* prisoners to collaterally challenge their convictions and sentences in *federal* courts. In section C of this Part *infra*, I will seek to connect these undisputed habeas realities with a little-known and rarely discussed bit of habeas history that returns us to some themes stressed in Part I of this Essay. Before synthesizing the first two Parts of this Essay, however, a brief review of the ugly reality of modern habeas corpus is in order.

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<sup>48</sup> *Fay*, 372 U.S. at 401–02.

<sup>49</sup> In full, the writ's proper name is “habeas corpus as subjiciendum et recipiendum,” which is a Latin phrase directing the authority holding an individual to produce in court the body of a prisoner being held, along with whatever document subjected the prisoner to detention, so that the legality of the detention can be subject to judicial examination.

<sup>50</sup> See *supra* notes 42–44, 46–47 and *infra* notes 51–54 and accompanying text; see also LISA M. SEGHELLI & NATHAN JAMES, CONG. RESEARCH SERV., RL 33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 1 (2006) [hereinafter CRS Report] (detailing longstanding debates over federal habeas corpus actions and proposals for reform).

### B. *The (Ugly) Modern Realities of the Great Writ*

As noted in this Essay's introduction, there is a widely shared view that modern federal habeas review of criminal convictions is deeply flawed. But there is anything but a consensus on just what is wrong with federal habeas and how it should be fixed.

Many academics and other commentators, particularly those who believe it important for all or most criminal convictions and sentences to be subjected to rigorous federal judicial review, lament modern developments that have restricted the availability and viability of habeas corpus actions for many incarcerated defendants.<sup>51</sup> In the view of these habeas critics, legislative enactments like the 1995 passage by Congress of the Antiterrorism and Effective Death Penalty Act (AEDPA), as well as related jurisprudential developments before and since AEDPA became law, have prevented modern habeas corpus actions from serving as an effective and efficient tool for criminal defendants to assail constitutionally flawed convictions and sentences.<sup>52</sup>

But many other commentators, particularly those who focus on the delays and reversals that have become especially common in federal habeas review of state death sentences, lament how readily habeas corpus proceedings still can be and are used to postpone executions and to require prosecutors to repeatedly defend seemingly sound criminal judgments.<sup>53</sup> In

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<sup>51</sup> See, e.g., Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 742–44 (2010); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808, 1832–56 (2000); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 252–53, 271–73 (1988); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 480–506 (2007); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 582, 602–03 (1982); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 345, 348–56 (2006); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2333 (1993).

<sup>52</sup> See sources cited *supra* note 51.

<sup>53</sup> See, e.g., *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 18–19 (2005) (statement of John Pressley Todd, Assistant Att'y Gen., Arizona Attorney-General's Office); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 506–07, 512 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148–49 (1970); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L.

the view of these habeas critics, far too many criminal defendants who have already had a full and fair opportunity to appeal their convictions and sentences are still able to repeatedly bring weak or frivolous claims into federal court through habeas petitions that achieve little more than requiring the expenditure of scarce executive and judicial resources and undermining the important values served by finality in criminal judgments.<sup>54</sup>

An impressive and important new empirical study of federal habeas corpus adjudications over the past fifteen years reveals that *both* sets of complaints about modern habeas corpus actions are generally quite well-founded. The recent study conducted by Professor Nancy King of the Vanderbilt University Law School along with researchers at the National Center for State Courts<sup>55</sup> (Vanderbilt-NCSC Study) provides the most recent evidence that modern federal habeas review of criminal convictions has largely become a waste of resources providing little relief to nearly all petitioners—other than for the considerable number of capital murderers able to secure lengthy delays and often reversals of death sentences through federal habeas review.<sup>56</sup>

One of the authors of the Vanderbilt-NCSC Study has recently summarized the study's findings for noncapital cases, and that effective summary merits quoting at length here:

An empirical study of federal habeas litigation completed in 2007 . . . found that between 1992 and 2006 both the average amount of time that elapses from conviction to filing and the median amount of time it takes federal courts to resolve habeas petitions once filed have *increased*, while by contrast the likelihood of obtaining habeas relief has *decreased*. . . .

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REV. 888, 891–93, 940–44 (1998).

<sup>54</sup> See sources cited *supra* note 53.

<sup>55</sup> NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS (2007), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> [hereinafter Vanderbilt-NCSC Study].

<sup>56</sup> The basic themes and essential empirical realities concerning modern federal habeas actions reported in the Vanderbilt-NCSC Study are also reflected in previous empirical reviews of habeas results from prior recent periods. See, e.g., CRS Report, *supra* note 50; ROGER A. HANSON & HENRY W.K. DALEY, FEDERAL BUREAU OF JUSTICE STATISTICS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS (1995), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/FHCRCSCC.pdf>; Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 273–74 (1995).

... The average period from conviction to habeas filing ... in the Vanderbilt-NCSC study sample was 6.3 years ... [and the typical] lag time from sentence to federal filing is over five years.

... [M]ost of the five-year time lag consists of the time consumed during the pursuit of state appellate and postconviction remedies, which must be exhausted before seeking [federal] habeas review. . . .

....

It is also taking more time for federal courts to resolve the habeas petitions that are filed. . . . On average, the slowest 25% of cases dragged on for more than 412 days. . . . [and] habeas cases are averaging at least 11.5 months to complete.

....

Moreover, except in capital cases, those inmates who do manage to obtain federal habeas review can expect to lose. Although federal judges are taking longer to resolve petitions, they ultimately reject almost all of them. . . . The grant rate for noncapital cases has dropped from 1% in the early 1990s to only 0.34% today. Only eight of the 2384 noncapital habeas filings the study examined resulted in a grant of habeas relief, and one of those eight grants was later reversed on appeal. . . .

....

Despite the fact that federal habeas provides little meaningful relief to prisoners and little deterrence of constitutional violations by state courts, these cases entail a significant investment of resources by federal courts and states' attorneys. Today, one out of every fourteen civil cases filed in federal district court is a habeas challenge by a state prisoner. Most of these cases are not summarily dismissed. . . .

....

In addition to the merits of these claims, courts and parties addressed many procedural issues along the way, including statute of limitations and procedural default, as well as substitution of counsel and motions for in forma pauperis status. . . .

Addressing the procedural and substantive questions raised in these petitions takes not only the time of the district and circuit judges and their clerks but in many districts the time of magistrate judges, their clerks, and pro se attorney staff as well. And unlike other civil and criminal cases in which documents are filed and distributed electronically, prisoner cases are

exempted from e-government rules, requiring clerks to scan, print, copy, and mail documents by hand.

To the states, these cases may appear to be less complex or demanding than other civil cases that states may litigate in federal court. Discovery and evidentiary hearings, for example, are rarely granted. But with more than 18,000 habeas petitions filed each year, the cost for the states adds up as well, particularly for those states with the largest prison populations. States can count on winning almost every one of these cases, but they can also count on a significant expenditure of state dollars to defend them.<sup>57</sup>

Though this empirical story contains many highlights (or lowlights), the slow pace and poor success rate for noncapital habeas actions bear emphasis. The Vanderbilt-NCSC study shows that the average noncapital federal habeas petitioner generally will not have his habeas claim filed until more than six years after his criminal conviction.<sup>58</sup> Moreover, only roughly one out of every 300 noncapital habeas petitioners can expect a successful result from his petition during this seven-year federal habeas itch.<sup>59</sup>

Significantly, though the story of considerable delay persists (and gets worse) when the focus turns from noncapital to capital federal habeas petitioners, according to the Vanderbilt-NCSC study the procedural and substantive realities change for those petitioners on death row attacking their judgments:

Capital habeas cases are quite different from non-capital habeas cases, although both types of cases are governed by the same statutory provisions. The single most important difference is that all but 7% of death row filers have counsel to assist them in seeking federal habeas relief, while all but 7% of non-capital prisoners proceed pro se. . . .

. . . .

. . . Capital petitioners raised on average seven times as many claims as non-capital petitioners. Compared to petitions prepared by capital counsel,

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<sup>57</sup> Hoffmann & King, *supra* note 10, at 806–09, 815–16.

<sup>58</sup> Vanderbilt-NCSC Study, *supra* note 55, at 22.

<sup>59</sup> *Id.* at 52. *But cf.* John H. Blume et al., *In Defense of Non-capital Habeas: A Response to Hoffman and King* 18 (Cornell Law Faculty Working Papers, Paper No. 66, 2010), *available at* [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=clsops\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1068&context=clsops_papers) (suggesting that decisions by circuit courts might increase somewhat the success rate of non-capital habeas petitions).

sometimes well over 100 pages long, non-capital petitioners generally filled in the habeas form used in the individual district. . . .

More than eight of every 10 capital petitions included a claim of ineffective assistance of counsel, compared to only half of the non-capital petitions. Claims of innocence, insufficient evidence, and *Brady* violations were more frequent in capital cases than in non-capital petitions. Petitions challenging the sentence alone and not the conviction were more common in non-capital cases than in capital cases.

. . . .

. . . Capital cases in our sample have taken on average at least three and a half times longer to complete than non-capital cases, including pending cases (37.3 months on average in federal court compared to 10.6 months for non-capital cases). . . .

. . . .

. . . The rate at which petitions are granted in capital cases is *35 times* higher than the rate in noncapital cases, a difference that is likely to increase as pending capital cases in our study are resolved.<sup>60</sup>

To summarize some key highlights from this part of the Vanderbilt-NCSC study, federal district judges now take more than three years to resolve an average state death row defendant's habeas corpus petition (which itself is filed usually more than five years after a death sentence was first imposed).<sup>61</sup> The fact that capital habeas petitions take nearly four times longer than noncapital petitions to get resolved in federal court should not be too surprising, however, given that capital petitioners are fifteen times more likely to be represented by lawyers and raise on average *seven times* as many claims as noncapital petitioners.<sup>62</sup> And, perhaps because capital habeas petitioners are so much more likely to be represented by lawyers who raise so many more habeas claims, death row defendants filing habeas actions have their petitions granted by federal district court judges at a rate that is at least 35 times higher than the grant rate in noncapital cases.<sup>63</sup> (Moreover, no

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<sup>60</sup> Vanderbilt-NCSC Study, *supra* note 55, at 62–63.

<sup>61</sup> *Id.* at 63.

<sup>62</sup> *Id.* at 62–63.

<sup>63</sup> The Vanderbilt-NCSC Study details that, despite a much higher modern grant rate for capital habeas petitions, “[f]ewer death row inmates are receiving relief in federal

matter who prevails in the district court, federal habeas challenges to state death sentences will almost always get appealed by the losing party, which in turn ensures that it often can take decades for habeas corpus petitions brought by state death row defendants to be litigated to conclusion in the federal courts.)<sup>64</sup>

In short, the Vanderbilt-NCSC study empirically confirms the fears and laments often expressed by so many of the (disparate) critics of modern federal habeas corpus actions. This study documents that it takes a pretty long time for federal judges to reject nearly every one of the many thousands of noncapital habeas petitions filed each year, and that it takes an especially long time for federal judges to usually deny, though many times grant, the habeas challenges that nearly all prisoners condemned to death bring against their capital sentences. Placing these modern realities against the backdrop of habeas history, it is perhaps now necessary to stop referring to habeas corpus as the Great Writ of Liberty and to instead begin to refer to it as the Great Writ of Delay (with real value only for murderers sentenced to death).<sup>65</sup>

### *C. Reforming Habeas Proceedings: Wherefore Judges and Judges Alone?*

The steady stream of criticisms of modern federal habeas corpus realities has, unsurprisingly, produced a steady stream of proposals for federal habeas corpus reforms. As might be expected, proposed habeas reforms are as

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district court after AEDPA . . .” with only “one in eight or 12.4% [of capital petitioners] receiv[ing] relief . . .[,]” which is “much lower than the 40% grant reported . . .” in a prior study of capital habeas review. *Id.* at 61; *see also* David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, in *THE FUTURE OF AMERICA’S DEATH PENALTY* 261, 267 (Charles S. Lanier et al., eds. 2009) (reporting on a separate study of capital habeas claims showing that “[w]hereas prior to AEDPA death row inmates prevailed somewhere between half and two-thirds of the time [in habeas corpus actions], they now prevail, nationwide, approximately 12 percent of the time”).

<sup>64</sup> *See* Vanderbilt-NCSC Study, *supra* note 55, at 90 (“Although litigation in non-capital cases is largely a district court phenomenon, a large portion of capital cases are regularly appealed to the upper levels of the federal court system.”); *see also* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 *CASE W. RES. L. REV.* 1, 7–11, 16 (1995).

<sup>65</sup> *See* Lynn Adelman, *The Great Writ Diminished*, 35 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 3, 6 (2009) (“The grant rate [for habeas petitions] is now so low that it can no longer be reasonably asserted that habeas corpus functions as ‘the greatest of the safeguards of personal liberty embodied in the common law.’ Rather, the *Great Writ* is considerably diminished.”).

varied as the criticisms that prompt them. Those who assail the legislative and jurisprudential limits which restrict prisoners' access to federal court or opportunities for habeas relief typically urge reforms that would make the Great Writ more broadly available and would more often allow *de novo* federal review of state convictions.<sup>66</sup> In sharp contrast, those who assail how modern habeas actions produce delay and expense while undermining finality interests propose reforms that would further narrow or streamline who can seek habeas review and when habeas relief can be granted.<sup>67</sup> Meanwhile, numerous academics have suggested alternative structural approaches to habeas corpus so that collateral review of convictions would focus on a particular value or interest such as preventing and reversing wrongful convictions of the innocent,<sup>68</sup> ensuring fully adequate review of convictions on direct appeal,<sup>69</sup> or redressing systemic and structural problems in states' administration of criminal justice.<sup>70</sup> The spirit animating nearly all of the proposals for habeas reform is the belief that, if structurally and soundly redesigned or recast, habeas corpus review conducted by federal judges can play a more effective and efficient role in achieving more and better justice in the operation of modern American criminal justice systems.<sup>71</sup>

While the proposals for reform of modern habeas actions are voluminous and varied, there is a noteworthy and pervasive aspect of the aforementioned proposals: they all assume, accept, and generally embrace the notion that

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<sup>66</sup> See sources cited *supra* note 51. See generally Adelman, *supra* note 65.

<sup>67</sup> See sources cited *supra* note 53; see also Kent S. Scheidegger, *Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform* 20–22 (1995), available at <http://www.cjlf.org/publctns/OverdueProcess.pdf>.

<sup>68</sup> See John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691–92 (1990).

<sup>69</sup> Semeraro, *supra* note 9, at 927–28; see also Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 69–72 (2002).

<sup>70</sup> Primus, *supra* note 9, at 26–40; Hoffman & King, *supra* note 10, at 818–33.

<sup>71</sup> As mentioned before, Professors Joseph Hoffmann and Nancy King have concluded that federal habeas review of noncapital habeas petitions is beyond salvaging, though they still believe habeas review in capital cases remains vitally important and they urge preserving traditional habeas review for even some classes of claims brought by noncapital defendants. See, e.g., Hoffmann & King, *supra* note 10, at 806. They have begun advocating for the elimination of federal habeas review for most state prisoners in the hope that resources currently expended on federal habeas review be reallocated by states to improve the quality of defense representation received by federal defendants. See *id.* at 818.

federal *judges* should be the central and sole habeas decision-makers who assess and resolve all factual disputes and legal issues raised by prisoners filing habeas petitions. Federal district judges presently control all aspects and outcomes of the adjudication of habeas corpus petitions: these judges decide whether, when, and how the state must respond to a petitioner's claims; these judges decide whether, when, and how to allow discovery or to conduct an evidentiary hearing; and, after having concluded whatever form of judicial inquisition they deem sufficient, these judges decide whether, when, and how to grant any form of substantive relief. In addition, any appellate review of the process and results of this judge-centric habeas adjudication will itself be conducted by a set of federal judges (who after AEDPA must sometimes first decide whether a habeas petitioner is to be permitted to appeal). Intriguingly, in all the dynamic discussions of habeas reform, few have directly considered whether this judge-centric model itself might be partly responsible for the convoluted and controversial state of federal habeas review. Despite much commentary and general *Sturm und Drang* concerning *how* federal habeas corpus petitions are considered and resolved, there has been little real consideration given to *who* considers and resolves these petitions.

The historical evolution and modern reality of habeas corpus actions justifies questioning whether judges, and judges alone, should be the sole adjudicators of habeas corpus petitions. If the writ of habeas corpus is simply a means to require *executive* officials to justify the imprisonment of persons not yet given any formal *judicial* process—the writ's most prominent role throughout most of history—then the assumption that judges, and judges alone, can serve as effective and sufficient habeas decision-makers seems plausible. It is reasonable to expect that judges will earnestly review, and sometimes reject, executive imprisonment decisions that have been made without the essential forms of due process provided by the judicial branch, a process that judges are institutionally inclined to respect and safeguard, and that judges will be institutionally eager to preserve against executive encroachment.

But when the writ of habeas corpus is being used to assess the lawfulness of the imprisonment of a defendant who has been convicted in a courtroom proceeding and already had the benefit of judicial review through direct appeal—as is the writ's most prominent role in modern times—it is no longer obvious that judges, and judges alone, can and will serve as effective and sufficient habeas decision-makers. Indeed, precisely because we expect that judges will hold the judicial process in high esteem, we should also expect them to be wary of critically reviewing convictions and sentences that are the product of the traditional judicial process, and have already been subject to judicial review through direct appeals. Additionally,

considerations of federalism and comity may cause *federal* judges to be especially chary about acting on *state* habeas petitions because granting the prisoner's requested relief is tantamount to holding that the state court judges who have considered the issue have failed to properly interpret or respect the Constitution.<sup>72</sup> The aggregate effect of these considerations is that "the 'habeas' with which most of us have grown familiar . . . is a process in which the federal judge has been primed to be deferential."<sup>73</sup>

In short, I view the persistent and often mechanical assumption that federal judges can and should be the central and sole habeas decision-makers to be problematic because judges may be situated very poorly institutionally to serve as effective finders of fact and law in *modern* habeas proceedings, and their persistent placement in this role may largely account for why modern habeas review has produced such disconcert and controversy. I suspect and fear that many problems of modern habeas corpus lamented by critics—the considerable delays in adjudication and resolution of petitions, the considerable expenditure of resources repeatedly reviewing final criminal judgments, and the distinctive pattern of habeas results with noncapital petitioners almost never prevailing and capital habeas petitioners quite often prevailing—may well result from just how modern federal judges, forced to critically review and sometimes reject convictions and sentences that were approved and reviewed by fellow judges, are inclined to approach and assess modern habeas actions. Historically, judges could reasonably assume a habeas petitioner seeking relief through the writ was merely asking the judge to ensure that a prisoner was subject to detention consistent with the principles of law and justice traditionally safeguarded by the judicial branch; in modern times, judges should reasonably assume a habeas petitioner is hoping the writ will provide a means for a second (or third or fourth) judicial opinion on the lawfulness of his imprisonment after a first set of judges has already given its blessing to this imprisonment.

In light of these realities, it is perhaps not surprising that, in modern times, the attitudes and perspectives of the judicial officer considering a habeas petition may be as important to habeas review as the substantive

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<sup>72</sup> See Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1130 (2005) (noting how the "habeas paradigm" requires federal judges to take a unique attitude toward state judgment); Kovarsky, *supra* note 51, at 443–44 (explaining how undue concerns about "comity, finality, and federalism" have produced a problematic presumption against habeas petitioners); see also Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENV. U. L. REV. 961, 988 (2009).

<sup>73</sup> Falkoff, *supra* note 72, at 988.

nature and strength of the petition. Indeed, in a recent article lamenting the decline of the Great Writ, U.S. District Court Judge Lynn Adelman has candidly acknowledged that “the identity of the judge is important in habeas cases,” and he spotlighted the empirical research showing that “different judges handled habeas petitions very differently.”<sup>74</sup> Judge Adelman reports that judges can find habeas petitions “tedious to analyze,”<sup>75</sup> especially when filed pro se by petitioners, and he spotlights that “some judges treat[] habeas petitions as little more than a nuisance” and that a “substantial number [of judges] go through entire careers without granting a writ.”<sup>76</sup> He also suggests that judges are naturally inclined to grant more habeas petitions in capital cases “[b]ecause federal courts more aggressively scrutinize state decisions which terminate a person’s life.”<sup>77</sup>

In his article *The Great Writ Diminished*, Judge Adelman laments that “[u]nder the present habeas corpus regime, judges spend a lot of time on habeas cases but almost never grant relief” in noncapital cases.<sup>78</sup> Judge Adelman expresses concern that “courts are overly reluctant to grant habeas relief,” and he urges “revitalizing habeas corpus” by calling upon federal judges to “be more willing to grant relief.”<sup>79</sup> But while Judge Adelman should be praised for candidly acknowledging that most federal judges may not now give adequate attention to habeas petitions, he—and other commentators—may need to consider whether judges dispositionally and institutionally are poorly suited to serve as an effective force for habeas reform and revitalization in modern times.

As the start of this Essay reveals, I have an idea for an alternative to the modern judge-centric realities of habeas review—an alternative that returns to the criminal procedure traditions and perspectives of the Framers of the U.S. Constitution. As others recognize, we need a revised and revitalized approach to how habeas corpus actions can and should serve as a check on the operation of modern criminal justice systems. I contend that such a revised and revitalized approach could and should incorporate a return to the structural and procedural vision of juries playing a central role in criminal

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<sup>74</sup> Adelman, *supra* note 65, at 20–21 (citing PAUL ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 5 (1979) and David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 340 (1973)).

<sup>75</sup> Adelman, *supra* note 65, at 23 n.153.

<sup>76</sup> *Id.* at 6, 20.

<sup>77</sup> *Id.* at 10 n.59.

<sup>78</sup> *Id.* at 6 n.26.

<sup>79</sup> *Id.* at 32–36.

adjudication as the Framers of our Constitution envisioned at the Founding nearly 250 years ago. In Part III *infra*, I will develop more fully why and how I believe juries should play a central role in modern habeas adjudications. But before making this case, a little-known and rarely discussed bit of history merits review—a bit of habeas history which reveals that the notion of jury involvement in habeas adjudication is not entirely without precedent.

Intriguingly, the two leading nineteenth century treatises concerning the writ of habeas corpus both demonstrate that juries were once thought to have a role in the operation of the writ of habeas corpus in the United States. The first treatise of habeas corpus in the United States, which was authored by Rollin C. Hurd and published in 1858 under the title *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus*, had these interesting comments about how habeas actions had been adjudicated in early American history:

[T]he trial of questions of fact under the writ by the court has been deprecated as infringing the right of trial by jury . . . . [But given] the inconvenience and delay consequent upon the jury trial; the desire of prisoners to obtain and of the judges to afford instant relief in cases of wrongful imprisonment, to which, perhaps, should be added the common opinion that an order in habeas corpus had not the force and effect of a final judgment, . . . the practice has long been settled in England and America of submitting all questions arising under the writ to the determination of the court.<sup>80</sup>

A similar passage concerning the involvement of juries in habeas actions appears in William Church's *A Treatise on the Writ of Habeas Corpus* in the second edition published in 1893:

A very important question is whether the issues in habeas corpus proceedings are to be tried by a judge or jury. The trial of questions of fact by the court seems to be the prevailing practice in both England and the United States. . . . [W]hile courts have the undoubted power to have their truth determined by a jury, they have appropriated this province themselves. . . . By the habeas corpus act of the United States, and of many of the several states, the truth of the facts set forth in the return to a writ of habeas corpus may be inquired into, but this trial of the facts will generally be conducted by the judges or courts. This has become a well-established rule of procedure, and is found to be conducive to the best interests of the prisoner. It affords him the invaluable right to have the question of his

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<sup>80</sup> ROLLIN C. HURD, *A TREATISE ON THE RIGHT OF PERSONAL LIBERTY: AND THE WRIT OF HABEAS CORPUS AND THE PRACTICE CONNECTED WITH IT* 299 (1858).

personal liberty determined at once. . . . But the court or judge sitting on the return to a writ of habeas corpus may, in its discretion, order any controverted fact in the matter to be tried by a jury. This power may be exercised, but it is not the practice to do so, and it has met with little favor.<sup>81</sup>

Tellingly, the comments in the Hurd treatise highlight that, at least in the middle of the nineteenth century, there were some (perhaps many) legal commentators troubled by the general practice of habeas corpus actions being resolved by a judge without the input of a jury. Yet, as the passages from both the Hurd and Church treatises further reveal, the prevailing view during this period was that allowing judges to resolve habeas petitions on their own could “afford instant relief in cases of wrongful imprisonment”<sup>82</sup> and thus served the “[b]est interests of the prisoner . . . [by providing] him the invaluable right to have the question of his personal liberty determined at once.”<sup>83</sup> In other words, incarcerated petitioners’ obvious interest in achieving an efficient resolution of their habeas petitions prompted the development of the practice and norm that judges, and judges alone, would assess and adjudicate all habeas petitions.

But, as detailed just above, modern federal habeas actions are now anything but efficiently resolved by judges. Thus, the efficiency justification for an initial move toward habeas adjudication by judges without input from juries no longer is satisfactory and no longer provides a good reason for disregarding the Framers’ hope and expectation that important judicial proceedings concerning a criminal defendant’s rights and liberties should be conducted with the involvement of a jury.

### III. MAKING THE FRAMERS’ CASE AND THE MODERN CASE FOR JURY INVOLVEMENT IN HABEAS ADJUDICATION

#### A. *Making the Case in Theory*

The basic conceptual argument for jury involvement in habeas adjudication should already be clear to the reader, at least if she adopts the mindset of the Framers at the time of the Founding Era. In the Framers’

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<sup>81</sup> WILLIAM CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS § 172 (2d ed. 1893).

<sup>82</sup> HURD, *supra* note 80, at 299.

<sup>83</sup> CHURCH, *supra* note 81, at 256.

view, as Professor Akhil Amar has explained, “[a] criminal judge sitting without a criminal jury was simply not a duly constituted federal court capable of trying cases . . . .”<sup>84</sup> And the very same structural and practical principles that supported the Founder’s belief that jurors could and should play a central role in the “trial of *all* [c]rimes”<sup>85</sup> also support the notion that jurors could and should play at least some role, if not a central role, in the adjudication and resolution of habeas corpus actions.

As noted in Part I, the Framers’ embrace of jury trial rights was a direct by-product of their commitments to democratic self-governance and safeguarding personal liberties, and habeas actions implicate these concerns and needs as do initial criminal trials. Indeed, given that the vast majority of criminal cases result in pleas that circumvent the jury’s role in evaluating the merits of the state’s case, the involvement of juries in habeas actions may provide the first and only opportunity for the “political institution” of the jury to express the community’s evaluation of the charges and punishments sought by the state against one of its members, and to play a role in the criminal law’s development.<sup>86</sup> Tellingly, when discussing the Sixth Amendment’s jury trial right in *Duncan v. Louisiana*, the Supreme Court stressed that “[t]hose who wrote our constitutions knew from history and experience that [jury involvement in criminal adjudication] was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.”<sup>87</sup> This concern of “judges too responsive to the voice of higher authority” is just as applicable to the resolution of habeas actions as it is to the initial resolution of criminal charges.

The concern that habeas petitions typically raise issues of law and not merely disputes of fact should prompt no great objection to jury involvement in habeas actions from those who adopt the perspective of the Framers. As detailed before, it was widely believed in the Framing Era that juries had the authority to decide matters of both law and fact in rendering a general verdict about a defendant’s fate.<sup>88</sup> This principle was widely accepted in the Founding Era because it was believed that granting juries especially broad

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<sup>84</sup> AMAR, *supra* note 4, at 236.

<sup>85</sup> *Id.*

<sup>86</sup> See Appleman, *supra* note 17, at 399; cf. Myers, *supra* note 14, at 142 (proposing that juries be required to vote to censure a defendant in order to “improve the feedback loop between the populace—in the form of the jury—and all three branches of government”).

<sup>87</sup> *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

<sup>88</sup> See *supra* text and notes 4–6, 24.

powers would enable them to interpose their common sense and conscientious judgment in between members of their community accused of criminal activity and potentially overzealous government officials, beholden to their own agendas.<sup>89</sup> Creating a role for jury involvement in the adjudication of habeas actions could further the Constitution's democratic interests by ensuring that legislatures, prosecutors, and judges are at least somewhat accountable to the common-sense vision of justice recognized by the community.<sup>90</sup>

Put most simply, the Framers obviously regarded *both* jury trials and the writ of habeas corpus as critical components of the Constitution's checks-and-balances that protect individual freedom against potential excesses of government actions. Unsurprisingly, connecting jury involvement in criminal justice adjudication with the historic writ of habeas corpus fits seamlessly with the points stressed by Alexander Hamilton in Federalist No. 83. Recall that Hamilton cautions that individual liberty is threatened by "the great engines of *judicial* despotism" in the form of "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions."<sup>91</sup> Praising the proposed U.S. Constitution, Hamilton in turn asserted that "trial by jury in criminal cases, aided by the habeas corpus act" would protect against these forms of "judicial despotism" and, in his words, "both of these are provided for in the most ample manner in the plan" of our Constitution.<sup>92</sup>

In sum, if one adopts a Founding Era perspective on the potential evils posed by a criminal justice system and the potential tools to safeguard individual liberty, it is not difficult to think that the U.S. Constitution's Framers would have at least welcomed, and may well have genuinely wanted, jury involvement in the adjudication of modern federal habeas corpus actions. Moreover, as suggested in Part II *supra*, there is reason to believe that those of entirely modern sensibilities now should be willing to consider the possibility that the fairness and effectiveness of collateral review of criminal convictions could be improved by providing a role for

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<sup>89</sup> See Amar, *supra* note 18, at 1183–85 (explaining the role of jurors as "populist protectors" capable of serving as a check against prosecutorial abuse).

<sup>90</sup> See Richard E. Myers II, *Restoring the Peers in the "Bulwark": Blakely v. Washington and the Court's Jury Project*, 83 N.C. L. REV. 1383, 1408 (2005) (describing the jury as "fundamentally democratic, and thus centrist, institution . . . interposed between the defendant and the legislature, and between the defendant and the prosecutor").

<sup>91</sup> THE FEDERALIST, *supra* note 25, at 498.

<sup>92</sup> *Id.* at 498–99.

juries in habeas adjudication. Because lay juries will always bring a common-sense, community-based perspective on law and justice to their decision-making, a jury may in fact be the ideal entity to consider for improving the modern habeas system. As discussed in Part II Section C, the judge is the law's ultimate insider, "primed to be deferential"<sup>93</sup> to the prior judicial proceedings of a criminal conviction by the structural institutions as well as the political realities of her position. By contrast, cross-sectional juries comprised of men and women from the community can take advantage of a certain "outsider" status. They could view a prisoner's arguments from a perspective that is unencumbered by the concomitant burdens that accompany judges reviewing other judges' determinations. Moreover, where a habeas jury is called upon to review the factual sufficiency of the evidence that resulted in a jury conviction at the trial court, their fresh and thorough review should not push up against the same kinds of institutional pressures to show deference to their predecessors that results when judges are the central and sole habeas adjudicators. For example, many habeas appeals turn, at least in part, on the recanting of supposed "eyewitness" testimony from government witnesses who admit now, that they were, at trial, coached, encouraged, or coerced to identify the defendant by police or prosecutors. In such situations, a habeas jury will not feel any special pressure to defer the trial jury, which did not have all of the information now available; instead, they will be able to use their collective wisdom to test whether the comparison of the evidence that is now questionable with the remaining prosecutorial evidence suggests that the defendant's conviction was unfair. What's more, empanelling a habeas jury in this situation restores members of the community to the exact role we expect them to serve on a trial jury: they evaluate the factual evidence offered by a witness while assessing her credibility and determine whether or not a particular proffer suggests a defendant is guilty or not guilty.

Incorporating a lay jury into the adjudication of habeas actions could be a positive force for both the community and the substantive values underlying our criminal justice system. With a lay audience hearing a habeas claim, petitioners would cast their claims for relief not with fanciful legal doctrines hoping to convince a federal judge that there was some technical flaw in the prior review of the defendant's conviction and sentence, but rather as a pitch for common-sense rough justice to convince a jury that there was some substantive or procedural injustice inherent in his conviction or sentence. Unlike a judge, who is the law's ultimate insider, lay juries have an outsider status that should allow them to better understand and empathize

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<sup>93</sup> Falkoff, *supra* note 72, at 988.

with a criminal defendant—but only in those settings in which equities regarding the offense and offender, combined with the norms of community justice, give jurors a reason to seek to better understand and empathize with a criminal defendant. Having lay jurors listen to a criminal defendant, now in the form of a habeas petitioner, seek to explain to them—keeping in mind that lay jurors as a group, will have a breadth of different experiences with legal issues and the justice system than the insider experience possessed by a single federal judge—just why his conviction and sentencing was unfair and unlawful would help ensure that the community is content with the fairness and justice of the petitioner’s conviction and sentence.

Though a lot more could be said in support of the idea of incorporating a lay jury into the habeas adjudication process, I will conclude making the conceptual case by quoting an eloquent passage from, ironically, U.S. District Court Judge William Young’s explanation for why we should be concerned with the marginalization of jury involvement in our justice system:

We place upon juries no less a task than discovering and declaring the truth in each case. In virtually every instance, these twelve men and women, good and true, rise to the task, finding the facts and applying the law as they, in their collective vision, see fit. In a very real sense, therefore, a jury verdict actually embodies our concept of “justice.” Jurors bring their good sense and practical knowledge into our courts. Reciprocally, judicial standards and a respect for justice flow out to the community. The acceptability and moral authority of the justice provided in our courts rest in large part on the presence of the jury. It is through this process, in which the jury applies rules formulated in light of common experience to the facts of each case, that we deliver the best justice our society knows how to provide.

The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government. . . . Through the jury, we place the decisions of justice where they rightly belong in a democratic society: in the hands of the governed.

. . . .

. . . In a government “of the people,” the justice of the many cannot be left to the judgment of the few. Nothing is more inimical to the essence of democracy than the notion that government can be left to elected politicians and appointed judges. . . . [W]hile liberty flourishes through the rule of law, “there can be no universal respect for law unless all Americans feel” the law is theirs. Through the jury, the citizenry partakes in the execution of the nation’s laws and, in that way, each citizen can claim rightly that the law belongs partly to him or her.

Only because juries may decide most cases may we tolerate the reality that judges decide some. However highly we view the integrity and quality of our judges, the jury—the judges' colleague in the administration of justice—is the true source of the courts' glory and influence. The involvement of ordinary citizens in a majority of a court's tasks provides legitimacy to all court actions.<sup>94</sup>

### B. *Making the Case in Practice*

Making the case for jury involvement in habeas adjudication is much easier in theory than in practice: the conceptual arguments for incorporating lay juries into the resolution of habeas petitions flows directly from the spirit animating the constitutional text, but developing practical and pragmatic mechanisms for operationalizing the voice of the jury in modern habeas review does not flow easily from any ready source. Indeed, because the goal of this Essay is principally to urge consideration of jury involvement in habeas adjudication, working out the challenging details of just how this could and should come to pass must be left for another project. Nevertheless, it is still useful at this stage to begin to sketch out some possible models or visions for how jury involvement in habeas actions might be structured.

To begin, it bears noting that there is no obvious constitutional or statutory impediment to federal judges right now opting to empanel juries to aid with the resolution of some disputes of fact that are common in many habeas actions.<sup>95</sup> Factual disputes over the conduct of prosecutors and defense attorneys during the initial charging and prosecution of criminal cases, not to mention enduring factual disputes over guilt and innocence, are often central aspects of habeas adjudication. Though court-created doctrines concerning the proper roles and responsibilities of judges and juries would currently prevent judges adjudicating habeas petitions from asking juries to resolve Fifth Amendment claims alleging prosecutorial misconduct or Sixth

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<sup>94</sup> Young, *supra* note 30, at 69–72.

<sup>95</sup> The start of the chief federal statutory provision concerning habeas actions simply provides that the “Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus.” 28 U.S.C. § 2254(a) (2006). The reference to “a district court”—in notable contrast to the reference to “a Justice” and “a circuit judge”—might well be read to sanction or at least permit a district judge to empanel a jury to help her court assess and resolve factual issues raised by an application. In addition, the other subsections of 28 U.S.C. § 2254 set forth the substantive standards applicable for the consideration of habeas applications without any specific mention that district judges, and district judges alone, must be solely responsible for adjudication under these standards.

Amendment claims of ineffective assistance of counsel, there is no express doctrine that would appear to categorically prohibit judges considering habeas petitions from deciding to empanel a jury to help resolve the factual disputes that underlie these common types of habeas claims.

Further, it is possible to imagine the creation by statute of a special kind of lay jury to have a special role and responsibilities in the adjudication of habeas petitions. We might, for example, envision the development of a habeas jury role that is more akin to the traditional forms of grand juries rather than petit juries, so that it would involve a body of lay citizens that serves together for a period of time helping to resolve numerous habeas petitions. The investigative grand jury model provides a potential mechanism for ensuring a special form of jury involvement in habeas adjudication, with the habeas petitioner making requests to the jury to investigate typical claims that prosecutorial misconduct or inadequate defense representation resulted in unlawful convictions or unjust sentences. Or perhaps a mini-petit jury model could efficiently and effectively bring a lay perspective to habeas review. A group smaller than the typical twelve lay citizens could still exercise the role and responsibility of carefully considering the evidence and arguments put forth by the petitioner and the state concerning the problems (or lack of problems) with the prisoner's conviction and sentence.

As suggested before, a fundamental functional benefit flowing from lay jury involvement is that the habeas petitioner (and his counsel) would understand and appreciate that his challenge is not to devise some technical legal claim that calls for a judge, and a judge alone, to declare the petitioner's conviction or sentence invalid. Rather, the petitioner's goal and challenge would be to develop a more general argument in terms of equity and justice that would allow the jury to reasonably assess whether the facts and claims put forth by the petitioner raised serious concerns about a fundamental miscarriage of justice regarding the convictions and punishments about which the petitioner is complaining.

#### IV. CONCLUSION

The many difficulties and controversies surrounding modern habeas corpus review have been long-known, longstanding, and long-unresolved. Though the notion of jury involvement in the habeas process may seem like ivory tower musings, the potential and essential value of incorporating a lay-citizen, community-based voice into the collateral review of criminal convictions and sentences is worthy of serious and reflective consideration. As Laura Appleman has rightly suggested in making an argument for jury involvement in the plea process, "restoring interest, power, and accountability to the local community is a critical step in fixing some of the

current problems with our criminal justice system.”<sup>96</sup> She makes these additional astute observations, which seem equally applicable to my proposal to incorporate great jury involvement in the back end of the criminal justice system:

There is a tremendous need to restore a populist aspect to the punishing and sentencing of criminal offenders. When the public feels too distant from the workings of crime and punishment, and only sees the media representation of crimes and the occasional (in)famous trial, they often react by calling for ever harsher and lengthy sentences. In contrast, allowing the community to participate in a much larger slice of criminal procedure gives the lay public a more realistic—and more personalized—view of the criminal justice system, hopefully fostering a less punitive streak.

As both a practical measure and a fundamental matter of political theory, the people should be involved in the machinations of criminal punishment.<sup>97</sup>

Incorporating juries into habeas review surely will not magically solve all or even most of the difficulties and controversies that surround collateral review of criminal convictions. But, in addition to helping to ensure that a piece of our constitutional tradition is preserved, we might also enhance the perceived legitimacy of the double-check that habeas represents if and when it is the people themselves that have the central role and responsibility in doing that checking.

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<sup>96</sup> Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 776 (2010).

<sup>97</sup> *Id.*