

# THE NEW NEGATIVE HABEAS EQUITY

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## INTRODUCTION

Habeas corpus is a grand instrument of the common law,<sup>1</sup> although many describe it colloquially as an equitable power.<sup>2</sup> For its part, the Supreme Court has long asserted equity-like discretion to *limit* habeas relief. I refer to that familiar practice as “negative habeas equity.” On the traditional theory of negative habeas equity, the Court has discretion to formulate nonstatutory restrictions on the habeas remedy, which apply

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<sup>1</sup> King’s Bench and inferior common law courts had exclusive English authority to issue habeas corpus *ad subjiciendum*, which is the “Great Writ.” See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 5 (2010). Along with many others, I consider Professor Halliday’s book to be the defining work of English habeas history, and I reference it often throughout this Essay. See, e.g., Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 947 (2011) (describing archival work as “by far the most comprehensive”). Professor Halliday developed his history based on review of writs issuing from King’s Bench every fourth year between 1500 and 1800, and from comprehensive review of all writs issued “for periods known to contain important developments.” HALLIDAY, *supra*, at 4, 319-33.

<sup>2</sup> See Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1046 n.285 (2015).

across the federal judiciary. This view of negative equity animates, among other things, a harmless-error standard, the procedural default doctrine, and rules against the retroactive application of Supreme Court decisions.<sup>3</sup>

Over the last several terms, however, the Supreme Court has advanced a more ambitious theory of negative habeas equity. *Brown v. Davenport* and *Shinn v. Ramirez* are two recently decided cases that, in different measures, embrace the newer theory.<sup>4</sup> That version asserts more than a *Supreme Court* power to formulate judge-made limits on the habeas remedy—it also asserts discretionary authority for *lower courts* to reject relief to which claimants are otherwise entitled. As *Ramirez* puts it, “[E]ven if a prisoner overcomes all [the limits imposed by statute and announced by the Supreme Court], he is never entitled to habeas relief. He must still persuade a federal habeas court that law and justice require it.”<sup>5</sup> If taken seriously, the transformation in negative equity is also a revolution in habeas law.

I use this Essay to urge skepticism about the new negative habeas equity, which relies on a superficial literalism that is impossible to square with statutory context, structure, and history. In Part I, I set forth the older version of negative equity and then describe the recent departure therefrom, evident in *Davenport* and *Ramirez*. In Part II, I explain why the new negative equity doesn’t follow from any text-centered approach to statutory interpretation—relying substantially on context and drawing heavily from a statutory history that *Davenport*, *Martinez*, and academic discourse have neglected.<sup>6</sup> In Part III, I focus on the most troubling register of the new negative habeas equity, which involves a rule against relief for those who are not “factually innocent.”

This Essay presents a statutory history that remains as-yet unlinked to the new negative equity. It also makes arguments substantially rooted in traditional doctrine, but the timing and stakes make it doctrinalism of unique urgency. The vision of negative habeas equity appearing in *Davenport* and *Ramirez* is dicta,<sup>7</sup> so there remains an opportunity for the Supreme Court

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<sup>3</sup> See, e.g., *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008) (retroactivity); *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (procedural default); *Withrow v. Williams*, 507 U.S. 680, 717 (1993) (Scalia, J., concurring in part) (harmless error).

<sup>4</sup> See *Brown v. Davenport*, 142 S. Ct. 1510, 1524 (2022); *Shinn v. Ramirez*, 142 S. Ct. 1718, 1731 (2022).

<sup>5</sup> 142 S.Ct. at 1731.

<sup>6</sup> This phenomenon remains almost completely unexplored in academic work. One exception is a manuscript by Michael McCue, *Discretion to Deny* (on file with author).

<sup>7</sup> See Section I.B, *infra*.

to course correct. Although the new negative equity is normatively aligned with restrictive habeas innovations more credibly tethered to authoritative law, it attempts to squeeze water from a statutory stone.

## I. THE RUPTURE

Negative habeas equity is a basic story of steady state and rupture. Prior to *Davenport* and *Ramirez*, there was a familiar body of judge-made law supplementing statutory restrictions on habeas relief. The Supreme Court carefully specified these judge-made rules—for example, the doctrine of procedural default, nonretroactivity, and harmless error—and lower courts applied them.<sup>8</sup> The emergent strain of negative habeas equity, by contrast, invites district courts to improvise. It assigns to them a discretionary power to deny claims that otherwise merit relief.<sup>9</sup>

### A. *Habeas and Equity: The Standard Story*

English courts used different kinds of habeas corpus writs to move prisoners around—to bring them to court to testify, to summon them for pardon hearings, to shuttle them between jails, and so forth.<sup>10</sup> What is often called the “Great Writ” is habeas corpus *ad subjiciendum*, which requires that jailors produce prisoners so that judges may decide whether custody is lawful.<sup>11</sup> The power to issue these writs grew out of the royal prerogative to inspect custody exercised in the Crown’s name.<sup>12</sup> Eventually, the Justices of King’s Bench wrested the habeas power from the Crown,<sup>13</sup> using habeas writs to inspect even custody ordered by the Crown itself.<sup>14</sup> Habeas authority also empowered Kings Bench to craft creative remedies. As the world’s leading habeas historian (Professor Paul Halliday) puts it, “[B]ail, discharge, or remand represented only the elemental possibilities for habeas corpus judgments.”<sup>15</sup>

During the American Revolution, Lord North “suspended” the habeas privilege six times,<sup>16</sup> effectively permitting England

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<sup>8</sup> See *supra* note 3 and accompanying text.

<sup>9</sup> See *Ramirez*, 142 S.Ct. at 1731.

<sup>10</sup> See R.J. SHARPE, *THE LAW OF HABEAS CORPUS* 1-2 (1976).

<sup>11</sup> See Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1535 (2007).

<sup>12</sup> See HALLIDAY, *supra* note 1, at 64-95 (discussing the prerogative).

<sup>13</sup> See Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 585 (2008).

<sup>14</sup> See G. Edward White, *Looking Backward and Forward at the Suspension Clause*, 117 MICH. L. REV. 1313, 1314 (2019).

<sup>15</sup> HALLIDAY, *supra* note 1, at 116-21.

<sup>16</sup> See 22 Geo. 3, c. 1 (1782) (Eng.) (renewal); 21 Geo. 3, c. 2 (1781)

to detain former colonists without any judicial review. These suspensions were a defining grievance against their former colonizer, so Americans included the Suspension Clause in Article I of the Constitution.<sup>17</sup> Congress gave statutory habeas power to courts and judges in the Judiciary Act of 1789,<sup>18</sup> and it has remained on the books thereafter.<sup>19</sup>

Courts and treatises frequently describe habeas corpus as an equitable remedy.<sup>20</sup> That's not formally true—English habeas power traces to King's Bench and other common law courts<sup>21</sup>—but it's easy to understand the colloquial usage. Basic features of the habeas writ *feel* like equitable powers.<sup>22</sup> At least historically, habeas power was shot through with the influence of mercy,<sup>23</sup> the discretion to use *ad hoc* procedure,<sup>24</sup> and the authority to craft case-specific remedies.<sup>25</sup> The point of habeas corpus was to “lay[] bare the hidden righteousness of the law.”<sup>26</sup> So when I use the term “equity” in this Essay, I do so in this functional sense.

For a long time, the habeas statutes expressly made discharge mandatory upon any jurisdictionally sound finding that custody was unlawful.<sup>27</sup> Over time, Congress added some statutory limits—most notably in 1996, when it passed the

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(Eng.) (renewal); 20 Geo. 3, c. 5 (1780) (Eng.) (renewal); 19 Geo. 3, c. 1 (1779) (Eng.) (renewal); 18 Geo. 3, c. 1 (1778) (Eng.) (renewal); 17 Geo. 3, c. 9 (1777) (Eng.).

<sup>17</sup> U.S. CONST., art. 1, § 9, cl. 2.

<sup>18</sup> See Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789).

<sup>19</sup> See 28 U.S.C. § 2241 (primary modern provision empowering judges and courts to issue habeas writs).

<sup>20</sup> See, e.g., *Schlup v. Delo*, 513 U.S. 298, 319 (1995) (“At the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy.”); 39 C.J.S. HABEAS CORPUS § 3 (“Habeas corpus is, at its core, an equitable remedy, and a court has some flexibility in fashioning an appropriate disposition for the circumstances of a particular case.”).

<sup>21</sup> See HALLIDAY, *supra* note 1, at 87.

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 87-88.

<sup>24</sup> See Halliday & White, *supra* note 13, at 610-11.

<sup>25</sup> See David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 87 (2006) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*134).

<sup>26</sup> See Halliday & White, *supra* note 13, at 609 (citation and quotation marks omitted).

<sup>27</sup> For example, the 1867 Habeas Corpus Act provided that, “if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she *shall forthwith be charged and set at liberty.*” Act of February 5, 1867, ch. 27, 14 Stat. 385 (emphasis added).

Antiterrorism and Effective Death Penalty Act (“AEDPA”).<sup>28</sup> There is also a set of limits that are creatures of *judicial* making, and it is those limits that are the traditional markers of negative equity.

Those limits are also familiar to anyone who has done post-conviction work and to all students who have taken a federal courts class. First, the Supreme Court has developed habeas restrictions that Congress has subsequently enacted as part of the U.S. Code. For example, 28 U.S.C. § 2254(b) codifies a Court-made exhaustion rule requiring that there be no available state remedies before a federal court could grant relief on a claim.<sup>29</sup> And 28 U.S.C. § 2244(b) codifies a Court-made restriction on claims that may be considered in successive petitions.<sup>30</sup>

Second, the Supreme Court has developed limits on habeas relief that operate alongside limits in the statute. Procedural default doctrine sets the criteria for federal habeas consideration of claims that prisoners forfeit in state courts.<sup>31</sup> Court-made rules also limit the retroactive effect of new laws, meaning that not every convicted prisoner can invoke a new Court decision as a basis for habeas relief.<sup>32</sup> And the harmless-error threshold applicable in federal habeas proceedings comes from *Brecht v. Abrahamson*, which is very expressly grounded in the Court’s equitable authority.<sup>33</sup>

Looking backwards upon five hundred or so years of habeas history, the valence of equity seems to have flipped. Under English common law, equity was *positive*. It was something that judges invoked to skirt rigid boundaries that might otherwise thwart sufficient remediation.<sup>34</sup> Through habeas judgment, a court formally ordered that the jailer do something with the body of the prisoner, and the varied approach to remedies was a mark of habeas power.<sup>35</sup> Under modern American habeas law, however, equity is *negative*. It now operates mostly as license for the Supreme Court to develop procedural restrictions on relief—even in cases when a prisoner’s custody is unlawful.

### *B. The New Negative Equity*

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<sup>28</sup> Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (1996) (codified in part at 28 U.S.C. §§ 2244-2267 (2000)).

<sup>29</sup> See *Rose v. Lundy*, 455 U.S. 509, 516 (1982).

<sup>30</sup> See *Magwood v. Patterson*, 561 U.S. 320, 337 (2010).

<sup>31</sup> See *Dretke v. Haley*, 541 U.S. 386, 392 (2004).

<sup>32</sup> See *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008).

<sup>33</sup> See *Brown v. Davenport*, 142 S. Ct. 1510, 1514 (2022).

<sup>34</sup> See HALLIDAY, *supra* note 1, at 115-21.

<sup>35</sup> See HALLIDAY, *supra* note 1, at 59.

The last several Supreme Court terms have featured a significant analytical shift in the account of negative equity. Instead of invoking equity as a source of *its own authority* to develop new habeas restrictions, the Supreme Court has started to describe equity as a *license for district courts* to discretionarily deny relief. A Court majority did not endorse the new negative equity until *Davenport* and *Ramirez*, but the modern story starts with Justice Gorsuch's concurrence in an earlier case, *Edwards v. Vannoy*.<sup>36</sup>

Even though its content was related only tangentially to the issue decided in *Edwards*, the Gorsuch concurrence sketched a remarkably restrictive view of the habeas privilege.<sup>37</sup> Citing to language in 28 U.S.C. § 2241, Justice Gorsuch reasoned that “The statute provides that writs of habeas corpus *may* be granted—not that they *must* be granted. The law thus invests federal courts with equitable discretion to decide whether to issue the writ or to provide a remedy.”<sup>38</sup> In his own concurrence, Justice Thomas dropped a footnote endorsing Justice Gorsuch's view that “federal courts have equitable discretion to decide whether to issue the writ or to provide a remedy[.]”<sup>39</sup>

The project of new negative equity got started in earnest with *Davenport*. In that case, there was a question about how to treat a harm inquiry on federal habeas review.<sup>40</sup> The Supreme Court ruled against *Davenport*, holding that he had to meet the most exacting combination of harm showings to obtain federal habeas relief.<sup>41</sup> *Davenport*, authored by Justice Gorsuch, offered some “background” in the course of its holding.<sup>42</sup> The background material begins by observing that habeas courts had power (not duty) to issue habeas relief, and that the discretion to deny otherwise warranted habeas relief “lives on in contemporary statutes.”<sup>43</sup> It dwells in the statutes, *Davenport* says, because those statutes provide that “federal

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<sup>36</sup> See *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring).

<sup>37</sup> See *Edwards*, 141 S.Ct. at 1566-73 (Gorsuch, J., concurring.).

<sup>38</sup> *Id.* at 1570 (Gorsuch, J., concurring) (internal citations omitted and emphasis added).

<sup>39</sup> *Id.* at 1566 (Thomas, J., concurring) (internal quotation marks omitted).

<sup>40</sup> See 142 S. Ct. at 1517.

<sup>41</sup> See *Davenport*, 142 S. Ct. at 1517.

<sup>42</sup> *Id.* at 1520. I have taken issue with other parts of Justice Gorsuch's historical account, present in *Davenport*, in earlier writing. See Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57 (2022).

<sup>43</sup> 142 S. Ct. at 1520.

courts ‘may’ grant habeas relief ‘as law and justice require.’”<sup>44</sup> It is the statutory “may” from 28 U.S.C. § 2241 and then the reference to “law and justice” from § 2243 that, according to *Davenport*, had authorized the Supreme Court to develop judge-made limits on habeas relief. And *Davenport* noted that “law and justice” at least require “federal habeas courts to apply this Court’s precedents governing the appropriate exercise of equitable discretion[.]”<sup>45</sup>

After *Davenport*, there was *Ramirez*.<sup>46</sup> In *Ramirez*, the habeas claimant had procedurally defaulted a Sixth Amendment claim that his trial counsel was ineffective.<sup>47</sup> In an opinion that Justice Thomas authored, the Supreme Court held that the habeas statute did not permit Ramirez to introduce any new evidence to prove his claim in federal court.<sup>48</sup> In so doing, *Ramirez* recites the negative equity proposition from *Davenport*,<sup>49</sup> but with a crucial difference. Whereas *Davenport* might plausibly be interpreted to hold only that *existing* judge-made limits on habeas relief were authorized by statutory reference to “law and justice,”<sup>50</sup> *Ramirez* went further. It alluded to the judge made limits, and it invoked § 2243’s “law and justice” language as license for lower courts to impose *additional* limits on habeas relief. Specifically, and citing *Davenport*, it held: “And even if a prisoner overcomes all of these limits, he is never entitled to habeas relief. He must still persuade a federal habeas court that law and justice require it.”<sup>51</sup>

Whatever the difference between *Davenport* and *Ramirez*, the endpoint is the same. *Davenport* had cited the habeas statute as authority for the Supreme Court to formulate judge-made limits on habeas relief, which did not necessarily disrupt the prevailing understanding of habeas power. *Ramirez*, however, expressly exhorted lower federal courts to go beyond established judge-made doctrine and to apply free-floating equitable instincts when adjudicating a claimant’s entitlement to relief.

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Lower courts are still processing *Davenport* and *Ramirez*. The best way to conceptualize the likely response involves a

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<sup>44</sup> *Id.* (internal quotation marks omitted).

<sup>45</sup> *Id.* at 1524.

<sup>46</sup> 142 S.Ct. 1718 (2022).

<sup>47</sup> *See id.* at 1729.

<sup>48</sup> *See* 142 S.Ct. at 1740.

<sup>49</sup> *See id.* at 1731.

<sup>50</sup> *See* 142 S. Ct. at 1524.

<sup>51</sup> *See* 142 S.Ct. at 1740 (alterations and internal quotation marks omitted).

spectrum of negative habeas equity.<sup>52</sup> On one end will be jurisdictions that treat the new negative habeas equity a lot like the old negative habeas equity. On that end, *Davenport* and *Ramirez* simply highlight the link between the Supreme Court’s equitable precedents and the habeas statute.<sup>53</sup> On the other end are appellate jurisdictions that might invoke *Davenport* and *Ramirez* not just as authority empowering them to deny relief discretionarily, but also as authority to formulate new appellate rules barring relief entirely.<sup>54</sup> In the balance of this Essay, I explain why the former is bad textualism, and why the latter something altogether more troubling.

## II. EVALUATING NEGATIVE EQUITY

The new negative habeas equity is bottomed on a basic claim about statutory meaning: that 28 U.S.C. §§ 2241 and 2243 combine to vest lower federal courts with free-floating discretion to deny habeas relief. *Davenport* strongly implies that construction of the statute, and *Ramirez* openly embraces it. But this revised story of negative habeas equity flunks basic interpretive testing. Even in a contextual vacuum, the argument from text is weak—and it is categorically foreclosed by statutory structure and history.

I analyze §§ 2241 and 2243 separately, but it’s worth pausing to consider how awkward the argument linking the two provisions is. The standard telling of the new negative habeas equity threads together a “may” from § 2241 with the reference to “law and justice” from § 2243, as though the two are working together. *Davenport* is a touch misleading, then, when it simply states that “federal courts ‘may’ grant habeas relief ‘as law and justice require’” without clearly indicating that the quoted terms hale from different sections of the U.S.

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<sup>52</sup> There are still courts that invoke § 2243 as a source of positive equity to craft appropriate relief. *See, e.g.*, *Graham v. White*, 2023 WL 4141662, at \*18 (N.D. Okla. June 22, 2023); *Whitehead v. LaManna*, 2023 WL 3588155, at \*16 (N.D.N.Y. May 19, 2023).

<sup>53</sup> For cases that translate *Davenport* and *Ramirez* into a traditional rule of negative equity, *see, e.g.*, *Holt v. Smith*, 2023 WL 3126313, at \*75 (E.D. Cal. Apr. 27, 2023); *Greene v. Chetirkin*, 2023 WL 2401509, at \*5 (D.N.J. Mar. 8, 2023); *Pearson v. Gomez*, 2022 WL 16553040, at \*9 n.8 (N.D. Ill. Oct. 31, 2022); *Williams v. Davis*, No. CV 20-413 (SDW), 2022 WL 4466622, at \*6 (D.N.J. Sept. 26, 2022), *Towers v. Brannon*, 2022 WL 4094138, at \*8 (N.D. Ill. Sept. 7, 2022); *Williams v. Superintendent, SCI Green*, 2022 WL 1321128, at \*5 (M.D. Pa. May 3, 2022).

<sup>54</sup> The primary example of this phenomenon is the disputed Fifth Circuit rule, discussed in Part III, that prisoners show factual innocence in order to obtain habeas relief.

Code.<sup>55</sup> And then *Ramirez* just quotes *Davenport's* conclusion, without any direct citation to §§ 2241 or 2243 at all.<sup>56</sup>

The sleight of hand would be mostly harmless if either §§ 2241 or 2243 were alone sufficient to support the new negative equity, but that's not the case either. The “may” in § 2241 reflects statutory restrictions on relief appearing elsewhere in the habeas statute, and § 2243 is a grant of *positive* equity to craft efficacious remedies. I take the provisions in reverse order because there is a bit more to say about § 2243 than there is about § 2241.

#### A. Analyzing § 2243

Language requiring a habeas judge to “dispose of the matter as law and justice require” is not self-defining. Statutory context, structure, and history are, for that reason, important indicia of statutory meaning.<sup>57</sup> Those indicia array decisively against the new negative equity in general, and the § 2243 argument in particular. The “law and justice” language appears at the end of § 2243 not because it encodes free-floating discretion to withhold relief, but because it affirms the power of habeas judges to craft efficacious remedies.

##### 1. Structure and context

At this juncture, readers should understand a basic division of statutory labor in habeas cases. Underlying any habeas litigation is a substantive “ground” or “claim” alleging that custody (or some other restraint on liberty) is unlawful.<sup>58</sup> The habeas statute defines, by category, permissible claims for relief.<sup>59</sup> Habeas law also contains other restrictions on relief, often barring remedies when the substantive claims are presented in some procedurally defective way.<sup>60</sup> Finally, habeas

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<sup>55</sup> Sections 2241 and 2243 are both cited generally to support the quoted proposition, but there is no indication that the “may” comes from § 2241 and the “law and justice” language comes from § 2243.

<sup>56</sup> See 142 S.Ct. at 1731.

<sup>57</sup> See *Abramski v. United States*, 573 U.S. 169, 179 (2014). Cf. Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1355-73 (2018) (appendix collecting interpretive approaches of federal appellate judges).

<sup>58</sup> See 28 U.S.C. § 2254 (defining “ground” and “claim” for post-conviction challenge of state claimant to be the underlying allegation of constitutional error); *Mullis v. Lumpkin*, No. 21-70008, 2023 WL 4057540, at \*2-\*3 (5th Cir. June 19, 2023) (setting forth broadly accepted proposition that a “claim” refers to the underlying constitutional violation asserted as a basis for relief).

<sup>59</sup> These are generally found in 28 U.S.C. § 2241.

<sup>60</sup> One example is a statute of limitations along the line of that found in 28 U.S.C. § 2244(d).

law prescribes basic claim-processing rules that aren't restrictions on relief at all. A major structural problem for new-negative-equity arguments is that § 2243 is a provision in the third category. Such a provision would be an exceedingly bizarre place to stash (in ambiguous terms) what would be the most important habeas rule in the U.S. Code: freestanding discretion to deny relief.

To appreciate the oddity of the argument, consider the full statutory context for the “law and justice” language:

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and *dispose of the matter as law and justice require*.<sup>61</sup>

Any reader of § 2243 quickly grasps that the provision sets forth the minutiae of habeas procedure. It provides for *nisi* process so that judges can rely formally on show-cause orders rather than actual habeas writs.<sup>62</sup> It also specifies the proper respondent, the number of days for a response, the form of certification, the timing of a hearing, the circumstances under which the claimant may be physically present in court, the

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<sup>61</sup> Emphasis added.

<sup>62</sup> A habeas writ formally requires that prisoner be physically produced in court. The federal statute adopts an English workaround, which requires that the receiving judge send a show-cause order, rather than a habeas writ, to the jailor. As a result, jailors need not actually produce prisoners; they just need to answer a show-cause order. See 28 U.S.C. § 2243; James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1526 n.41 (2001).

right to traverse the return, the rules for amendment, and so on.

To put it as bluntly as possible: Congress did not ambiguously enact free-floating discretion to deny relief at the conclusion of this mundane list of procedural rules. Section 2243 proceeds chronologically through the habeas process. The “law and justice” language appears at the very end, and that’s because it refers to power to craft an efficacious remedy at the conclusion of the habeas proceeding. The statutory history discussed in the next subsection confirms this reading of the provision, and the Supreme Court (before *Davenport*) had long accepted that inference.<sup>63</sup>

## 2. Statutory history

The statutory history of § 2243’s “law and justice” language is a story of *positive* equity, not one of discretion to deny relief. The phrase took a strange route into the U.S. code, but its journey reveals its purpose: to empower courts to craft any relief necessary to address unlawful restraints on liberty. The statutory history therefore reinforces the strong inferences that come from statutory context and structure.

The “law and justice” language first appeared in the 1874 Revised Statutes (“1874 Revisions”), and so that’s the logical place to focus for clues as to statutory meaning.<sup>64</sup> The 1874 Revisions were a complete reenactment of all preexisting federal statutes,<sup>65</sup> which lapsed on December 1, 1873.<sup>66</sup> The 1874 Revisions were compiled by a presidential commission appointed in 1866,<sup>67</sup> and the appointment contemplated that the Revisions would make no substantive changes in the reenacted law.<sup>68</sup> (The initial commission was terminated for having produced a draft with substantive changes.<sup>69</sup>) The insistence that the 1874 Revisions were to make no substantive statutory changes is a *major* mark against the new negative

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<sup>63</sup> See *infra* notes 120 to 126 and accompanying text.

<sup>64</sup> See Revised Statutes of 1874, 18 Stat. 1 (1873). The formal enactment publishing these statutes was the Act of June 20, 1874, ch. 333, 18 Stat. 113 (1874).

<sup>65</sup> See *id.*; U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 449 n.4 (1993).

<sup>66</sup> See John Townsend Rich, *A Bit More on Reading Statutes*, 10 GREEN BAG 2d 419, 420 (2007).

<sup>67</sup> See Act of June 27, 1866, ch. 140, § 2, 14 Stat. 74, 75.

<sup>68</sup> See *Kush v. Rutledge*, 460 U.S. 719, 724 n.6 (1983); see also 2 Cong. Rec. 1210 (Feb. 2, 1874) (“We do not propose to alter the law one jot or tittle.”) (Statement of Rep. Poland).

<sup>69</sup> See Ralph H. Dwan & Ernest R. Fiedler, *The Federal Statutes: Their History and Use*, 22 MINN. L. REV. 1008, 1013 (1938); Erwin R. Surrency, *The Publication of Federal Laws: A Short History*, 79 LIB. L. J. 469, 477-78 (1987).

habeas equity because the idea that courts had freestanding discretion to deny relief would have been a seismic change. After all, the Revisions incorporated the (recently passed) 1867 Habeas Corpus Act (“HCA”), which was unmistakably mandatory: “if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she *shall* forthwith be discharged and set at liberty.”<sup>70</sup>

Timing of the 1874 Revisions also reveals what Congress meant when it empowered judges to dispose of “parties” by reference to “law and justice.” Work on the 1874 Revisions took place as Congress was passing the 1867 HCA and the 1866 Civil Rights Act (“CRA”),<sup>71</sup> ratifying the Thirteenth Amendment, and addressing the rising problem of Black Codes.<sup>72</sup> The early legislative history of the Act discloses that one of its primary objectives was the liberty of freedmen,<sup>73</sup> and so did its text. The 1867 HCA adjusted crucial language, speaking not in terms of relief *for prisoners* but in terms of relief *from restraints of liberty*.<sup>74</sup> That slight reorientation reflected the fact that habeas had become a remedy for liberty that was impaired in ways other than by formal imprisonment—that is, it would reach freedmen who found themselves trapped in a coerced labor relationship.<sup>75</sup>

The idea that American habeas power reached further than prisons closely tracked prominent developments in English habeas practice. By the middle of the nineteenth century, English judges had been using habeas power to reach many different restraints on human freedom that didn’t qualify formally as imprisonment. These English innovations included habeas power to review military impressment, child custody, and coerced labor.<sup>76</sup> In shifting beyond formal imprisonment, the 1867 HCA was just mimicking innovation from across the Atlantic.

That the 1867 HCA was worded to reach beyond imprisonment is also evident from the other procedures that legislation enumerated. The Act included express language

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<sup>70</sup> Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 386 (“1867 HCA”) (emphasis added).

<sup>71</sup> Act of Apr. 9, 1866, c. 31, § 1, 14 Stat. 27.

<sup>72</sup> See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1121 (1997).

<sup>73</sup> See Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 33-38 (1965).

<sup>74</sup> See *id.* at 48.

<sup>75</sup> See Justin W. Aimonetti, *Confining Custody*, 53 CREIGHTON L. REV. 509, 516 (2020); Mayers, *supra* note 74 at 47.

<sup>76</sup> See HALLIDAY, *supra* note 1, at 101.

dealing with a refusal to make a return and conferring upon claimants the right to traverse the respondent's allegations.<sup>77</sup> These were not substantial problems in the existing habeas practice for state jailers.<sup>78</sup> The need to codify these procedural protections arose instead because Congress was concerned about a new type of respondent: recalcitrant former slaveowners.<sup>79</sup> Indeed, the very first decision under the 1867 Act involved a formerly enslaved person who alleged that a coercive apprenticeship restrained her liberty.<sup>80</sup>

So, why does that reorientation matter? The 1867 HCA's coverage is so interpretively significant because, in non-imprisonment scenarios, effective remediation required something other than a discharge order. The 1867 Habeas Corpus Act was of breadth necessary to reach formerly enslaved people subject to other restraints on liberty, so the "law and justice" language in the 1874 Revisions ensured flexibility to efficaciously redress harm in these non-discharge cases. This understanding of "law and justice" explains why the language is listed at the end of the procedural requirements for the habeas proceeding itself. It expanded the menu of available remedies upon a determination that the claimant was entitled to relief.

The habeas statutes contained other corroborating language that has since disappeared over the centuries-long course of legislative revision. For example, § 2243 now says that a court may dispose of the "matter" as law and justice require, but in 1874 it provided that a court dispose of the "party" that way.<sup>81</sup> When the common law spoke of "party" disposition, it was speaking of remedies. At the end of an English habeas proceeding, the remedy was the moment the body "underwent" something, and equitable principles were used to dictate the scope of that remedy.<sup>82</sup> The 1874 Revisions were drafted to include rules for disposing of "parties" because non-discharge remedies would have been on top of mind. And consider another, perhaps clearer indication that the "law and justice" language created non-discharge remedies: The 1966 Amendments to the habeas statute included a provision permitting judges to refuse to hear a ground for relief when the

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<sup>77</sup> See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86 (1867).

<sup>78</sup> See Mayers, *supra* note 74, at 47.

<sup>79</sup> See *id.*

<sup>80</sup> See *In re Turner*, 24 F. Cas. 337 (C.C.D. Md. 1867).

<sup>81</sup> This language appeared in § 761 of the 1874 Revisions. See 18 Rev. Stat. 142.

<sup>82</sup> See HALLIDAY, *supra* note 1, at 58-60.

ground was omitted in a prior order refusing a discharge “or other remedy.”<sup>83</sup>

Perhaps *Davenport* and *Ramirez* missed these interpretive clues because they are buried underneath legislative revisions. The 1966 amendments referencing non-discharge remedies no longer appear in the statute.<sup>84</sup> And, as mentioned above, Congress changed the language referring to disposition of a “party” to language referring to disposition of a “matter.”<sup>85</sup> Finally, Congress has retreated from the expansive vision of habeas corpus relief for all “restraints on liberty” present in the 1867 HCA, in favor of a habeas power that reaches only unlawful custody.<sup>86</sup> These subsequent changes might obscure the original meaning of § 2243’s law-and-justice language, but it’s still quite legible.

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Section 2243’s reference to “law and justice” does not mean that federal district courts have freestanding equitable discretion to deny relief. Instead, it reserves habeas power to order efficacious remedies. The statutory argument for the new negative habeas equity—what would be an impossibly consequential rule of adjudication—is especially puzzling coming from a modern Supreme Court famous for declaring that Congress does not stuff elephants in statutory mouseholes.<sup>87</sup> Congress did not slip a major statutory font of negative equity at the very end of a procedural provision that otherwise specifies things like *nisi* process, the form for certifying documents, and the criteria for granting extensions on pleadings.

#### *B. Analyzing § 2241*

Nor can § 2241 do the work that the new theory of negative habeas equity requires. To analyze the § 2241 argument, begin with the provision’s text—which is adapted from the 1789

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<sup>83</sup> Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104; *see also* *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (noting significance of reference to other remedies).

<sup>84</sup> *See* 28 U.S.C. § 2243 (omitting earlier reference to other remedies).

<sup>85</sup> Although there is little legislative history on that change, it almost certainly reflects the fact that the business of habeas corpus was carried out entirely through *nisi* process (discussed at note 62, *supra*)—an approach based on show-cause orders rather than actual habeas writs moving bodies (parties) around. *See, e.g.*, H.R.Rep. No. 308, P. A178, 1947, 80th Cong., 1st Sess. (indicating change was non-substantive).

<sup>86</sup> *See* *Maleng v. Cook*, 490 U.S. 488, 490 (1989).

<sup>87</sup> *See* *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018) (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)).

Judiciary Act and represents the basic grant of habeas power to federal courts and judges. The subsection containing the “may” at issue isn’t about the scope of habeas power but about which judicial entities wield it:

Writs of habeas corpus *may* be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.<sup>88</sup>

Proponents of the new negative habeas equity cite the “may” from § 2241(a) as a source of a free-floating power to refuse relief.<sup>89</sup>

The problem with any negative equity arguments, and especially those of the free-floating variety, is that the “may” seems to reflect other limitations *in the habeas statute*. Section 2241(b), for example, immediately gives appellate judges discretion to refuse relief—not because all relief can be denied equitably, but because appellate courts can transfer habeas cases to district courts with territorial jurisdiction over the jailor.

The thickest set of statutory restrictions in § 2241 appears in Subsection (c), which bars habeas relief for all claim categories other than those that it enumerates:

- (c) The writ of habeas corpus shall not extend to a prisoner unless—
- (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
  - (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
  - (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
  - (4) [He is a foreign national in custody for acting under color of his country’s laws]; or
  - (5) It is necessary to bring him into court to testify or for trial.

Habeas review of state convictions is typically undertaken under the auspices of § 2254 and by reference to § 2241(c), which permits habeas relief for anyone whose custody violates federal law.

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<sup>88</sup> Emphasis added.

<sup>89</sup> See Section I.B, *supra*.

I won't go through every subsection of § 2241, but my point should already be clear. Section 2241 is structured in a manner typical of power-specifying statutes. Power is granted to an institutional entity in one provision, and then restrictions appear after that. The rub: in conventionally structured power-specifying statutes, the power-granting language must always be permissive because there are limits on the power specified in the statute, and not because there exists free-floating discretion to behave in contravention of the permissive text.

To be more concrete, a version of § 2241(a) providing that courts, judges, and justices “must” exercise habeas power would have been syntactically incoherent in view of subsequent Subsections that identify conditions under which habeas power “may not” or “shall not” be exercised. Take a stylized power-specifying provision:

(a)—Habeas relief *must* be awarded by Article III judges and courts when a prisoner's custody violates federal law.

(b)—Habeas relief *need not* issue when federal appeals court or judge can transfer the case to a district court with personal jurisdiction over the jailer.

(c)—Habeas relief *shall not* issue when the prisoner files his petition more than two years after a state criminal conviction becomes final.

The inclusion of the word “must” in Subsection (a) makes the collection of provisions irreconcilable. If Subsection (a) is mandatory then it is logically inconsistent with Subsection (b), which describes circumstances under which habeas power “need not” be exercised, and with Subsection (c), which describes circumstances under which it “must not.” Section 2241(a) says “may” and not “must” in recognition that the statute will restrict relief in other ways.

Nor is it the case that the “may” in § 2241(a) reflects only statutory limits in § 2241. Textual limits on habeas relief marble the Title 28 of the U.S. Code, and include restrictions based on the type of custody,<sup>90</sup> the identity of the prisoner,<sup>91</sup> the nature of the underlying claim,<sup>92</sup> and the timing of the petition.<sup>93</sup> These limits would be impossible to reconcile with a

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<sup>90</sup> See, e.g., 28 U.S.C. § 2255 (specifying relief for prisoners serving federal sentences).

<sup>91</sup> See, e.g., 28 U.S.C. § 2241(e) (partially invalidated statute barring habeas relief in cases where detainees are properly designated as enemy combatants).

<sup>92</sup> See, e.g., 28 U.S.C. § 2254(a) (permitting relief to people serving state criminal sentences only for claims based on violations of federal statutes, treaties, or the Constitution).

<sup>93</sup> See, e.g., 28 U.S.C. § 2244(d) (statute of limitations applicable to claims made by people serving state criminal sentences); 28 U.S.C. §

version of § 2241(a) that *required* judges, justices, and courts to grant relief in all cases of unlawful custody. The reason § 2241(a) uses “may” rather than “must” is therefore a boring principle of statutory coherence, and not a general reservation of discretionary power for district judges to deny relief.

Aside from arguments about statutory coherence, there are still other reasons to doubt that § 2241(a) is a grand source of negative equity. Section 2241(d) expressly awards some habeas discretion involving the court in which the habeas proceeding is to take place: “The district court for the district wherein such an application is filed *in the exercise of its discretion and in furtherance of justice* may transfer the application to the other district court for hearing and determination.” New negative equity exponents would have a statutory interpreter presume that § 2241(a) silently encodes far-reaching discretion to deny relief even though § 2241(d) includes express language of discretion to govern a far lower-stakes rule of permissive venue.<sup>94</sup>

Or compare § 2241(a), which uses the pertinent “may” when distributing habeas power across federal judges and courts, with § 2255(b), which more specifically instructs district courts what to do in federal-prisoner cases. And § 2255(b) does not seem to recognize any discretion to deny post-conviction relief to people serving federal sentences: “If the court finds that the judgment [unlawful], the court *shall vacate* and set the judgment aside and *shall discharge* the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.”<sup>95</sup>

The bottom line is that the Supreme Court is placing way, way too much interpretive weight on a single instance of the word “may” in § 2241(a). Other parts of the habeas statute strongly contraindicate § 2241(a) as a source of free-floating discretion to deny relief. Congress might have used the word “may” for any number of reasons, all of them far more realistic explanations for the word’s presence than what the new negative equity requires.

### C. *The problem of generalization*

There is another issue with the idea that §§ 2241 & 2243 vest district court judges with discretion to deny relief. Call it a problem of generalization. Those provisions apply not just to claims made by people serving criminal sentences, but to

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2255(f) (same for those serving federal sentences).

<sup>94</sup> Section 2246 also includes an express reservation of discretion regarding whether to take evidence orally, by deposition, or by affidavit.

<sup>95</sup> Emphasis added.

claims by people subject to custody of any sort. Those provisions apply, for instance, to claims by those in military detention,<sup>96</sup> pretrial custody,<sup>97</sup> or immigration proceedings.<sup>98</sup> Whatever story one might tell about the interests at play in post-conviction cases, the attempt to link the new negative habeas equity to §§ 2241 and 2243 strains under the necessary generalization.

Imagine the tenets of the new negative equity operating outside of the post-conviction context. There is no English or early American tradition under which a court with habeas power concluded that custody was unlawful but that, for equitable reasons, would deny relief.<sup>99</sup> If the English Crown unlawfully detained a political prisoner without trial—the quintessential habeas scenario—then there was no “equitable” discretion to leave the prisoner in the dungeon. The 1679 Habeas Corpus Act literally provides that judges “shall discharge” prisoners unless it appears that they are detained

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<sup>96</sup> See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963).

<sup>97</sup> See Jordan Steiker, *Incorporating the Suspension Clause: Is There A Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 864 (1994).

<sup>98</sup> See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward A First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 969 (1997).

<sup>99</sup> See *Habeas Corpus - Right to Release Pending State's Appeal from Decree of Discharge*, 48 HARV. L. REV. 513 (1935) (explaining that, “generally at common law,” a prisoner was “*ipso facto* entitled to release” upon “a final adjudication of the detention’s legality”). See also, e.g., Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385, 386 (making discharge mandatory); *Stallings v. Splain*, 253 U.S. 339, 343 (1920) (“Unless the lawful arrest was promptly followed by such proceedings, the prisoner would be entitled to his discharge.”); *Pettibone v. Nichols*, 203 U.S. 192, 211 (1906) (phrasing habeas inquiry as one into whether a claimant is “entitled” to “release”); *In re Bonner*, 151 U.S. 242, 256 (1894) (discussing infirmities in judgments that “entitle” a claimant to “discharge”); *In re Savage*, 134 U.S. 176, 177 (1890) (reasoning in terms of whether claimant is “entitled to have his liberty”). Cf. also, *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (“[T]he prisoner who shows that his sentencing was unconstitutional is actually entitled to release, because the judgment pursuant to which he is confined has been invalidated[.]”). There is no history of pre-*Davenport* practice—to my knowledge, anywhere—under which a court with habeas power could refuse to relieve unlawful pretrial or military confinement for “equitable” reasons. Post-*Davenport* is a different story. See, e.g., *Santucci v. Commandant, United States Disciplinary Barracks*, 66 F.4th 844, 858 n.13 (10th Cir. 2023) (holding that *Davenport* imposes rule of discretion in court martial cases too).

lawfully.<sup>100</sup> In early American practice, unlawfully detained civilians were entitled to release without an inquiry into, for example, national security concerns.<sup>101</sup> No less a figure than Joseph Story summarized the Anglo-American tradition this way, in his *Commentaries on the Constitution of the United States*: “[The habeas writ is] the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is *entitled* to his immediate discharge.”<sup>102</sup>

#### D. Decisional Pedigree

In setting forth the new negative habeas equity, *Davenport* and *Ramirez* don’t perform serious analysis of statutory text. Even so, the opinions do attempt to justify the rule in other ways. And I don’t mean to shortchange reliance on decisional law, which contains data points for those who regard precedent as important input for statutory construction.<sup>103</sup> The problem is that the pre-*Davenport* cases don’t support the new negative equity either.

For starters, and before *Davenport* and *Ramirez*, no Supreme Court majority had even *suggested* that §§ 2241 & 2243 gave district courts free-floating discretion to deny relief to which claimants were otherwise entitled.<sup>104</sup> The proposition

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<sup>100</sup> See Habeas Corpus Act of 1679, 31 Car II, ch 2, § 2.

<sup>101</sup> See James E. Pfander, *Dicey’s Nightmare: An Essay on the Rule of Law*, 107 CAL. L. REV. 737, 741 (2019); see also Ingrid Brunk Wuerth, *The President’s Power to Detain “Enemy Combatants”: Modern Lessons from Mr. Madison’s Forgotten War*, 98 NW. U. L. REV. 1567, 1580-85 (2004) (sketching several extreme examples). As Justice Scalia memorably put it, “That remedy was not a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, ‘he shall be discharged from his Imprisonment.’ The Act does not contain any exception for wartime.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting) (quoting 1679 Habeas Corpus Act).

<sup>102</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 675, at 483 (Carolina Academic Press 1987) (1833) (emphasis added).

<sup>103</sup> See Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 703 (1999).

<sup>104</sup> Quite the opposite, in fact. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (“Williams is therefore *entitled to relief* if the Virginia Supreme Court’s decision rejecting his ineffective-assistance claim was either contrary to, or involved an unreasonable application of, that established law.”) (internal quotation marks omitted and emphasis added); *Anderson v. Nelson*, 390 U.S. 523, 525 (1968) (observing that claimant was “entitled” to relief after demonstrating

had appeared with varying degrees of clarity in auxiliary opinions,<sup>105</sup> and then there were majority opinions that invoked the older version of negative habeas equity—the idea that it empowered the Supreme Court to create new barriers to relief.<sup>106</sup> Most of the new-negative-equity precedent derives, in some form or another, from Justice Scalia’s partial concurrence in *Withrow v. Williams*.<sup>107</sup> For that reason, the strength of the *Withrow* concurrence warrants some elevated scrutiny.

Three things about the Justice Scalia’s partial *Withrow* concurrence are worth mentioning, and none of them flatter *Davenport* and *Ramirez*. First, the opinion reflects all the interpretive problems recited above. That is, Justice Scalia’s argument splices together the “may” from § 2241 with the “law and justice” language from § 2243 without discussing statutory context, structure, or history.<sup>108</sup> His *Withrow* opinion is the inch-deep textualism of *Davenport*, circa 1993.

Second, the *Withrow* concurrence draws critical inferences that do not follow from accurately stated historical premises. For example, Justice Scalia’s observation that habeas relief didn’t issue whenever an English prisoner asked for it does not mean that judges had a reservoir of equitable discretion to deny relief in cases where a habeas proceeding revealed custody to be unlawful.<sup>109</sup> Additionally, the fact that that habeas was once a “prerogative writ” issued at the Crown’s

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unlawful conviction); *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled on other grounds by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (“State prisoners are *entitled to relief* on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.”) (emphasis added); *Com. of Pa. ex rel. Herman v. Claudy*, 350 U.S. 116, 123 (1956) (“Under the allegations here petitioner is *entitled to relief* if he can prove his charges.”) (emphasis added).

<sup>105</sup> See, e.g., *Edwards v. Vannoy*, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring); *Hamdan v. Rumsfeld*, 548 U.S. 557, 676 n.9 (2006) (Scalia, J., dissenting); *Collins v. Byrd*, 510 U.S. 1185 (1994) (Scalia, J., dissenting from denial of application to vacate stay of execution); *Withrow v. Williams*, 507 U.S. 680, 699 (1993) (O’Connor, J.); *Brecht v. Abrahamson*, 507 U.S. 619, 651 (1993) (O’Connor, J., dissenting); *Kaufman v. United States*, 394 U.S. 217, 236 (1969) (Black, J., dissenting).

<sup>106</sup> See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993); *Reed v. Farley*, 512 U.S. 339, 361 n.2 (1994); *Stone v. Powell*, 428 U.S. 465, 478 (1976); *Fay v. Noia*, 372 U.S. 391, 438 (1963), *abrogated by* *Coleman v. Thompson*, 501 U.S. 722 (1991).

<sup>107</sup> See, e.g., *Davenport*, 142 S. Ct. at 1523 (citing *Withrow* concurrence).

<sup>108</sup> See 507 U.S. 716-17 (Scalia, J., concurring).

<sup>109</sup> See *id.*

discretion<sup>110</sup> ignores subsequent history—namely, when courts and Parliament seized that prerogative from the Crown (during the 1600s), discharge upon a finding of unlawful custody became mandatory.<sup>111</sup> Finally, when Justice Scalia recites language from *Ex parte Watkins*, he simply confuses the proposition that a *lawfully* detained prisoner need not be physically produced in court with the proposition that an *unlawfully* detained prisoner need not have a remedy.<sup>112</sup>

The third feature of *Withrow*, however, is the most salient here. Even Justice Scalia’s partial concurrence did not urge a free-floating judicial prerogative to deny habeas relief.<sup>113</sup> Instead, Justice Scalia was explaining the *Supreme Court’s* authority fashion rules governing habeas adjudication in lower

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<sup>110</sup> *See id.* at 616.

<sup>111</sup> *See* notes 100 and 101, *supra* (discussing 1679 Habeas Corpus Act).

<sup>112</sup> *Williams* cites this sentence from *Watkins*: “No doubt exists respecting the power; the question is, whether this be a case in which it ought to be exercised.” *Ex parte Watkins*, 28 U.S. 193, 201 (1830). It omits the next sentence, which makes clear that the Court is simply referring to the question whether its habeas power to order prisoners to be produced in court so that their custody can be reviewed is necessary when the outcome of such review is evident beforehand: “The cause of imprisonment is shown as fully by the petitioner as it could appear on the return of the writ; consequently the writ ought not to be awarded, if the court is satisfied that the prisoner would be remanded to prison.” *Id.*

<sup>113</sup> Justice Scalia seemed to shift positions (often) on the degree of discretion that §§ 2241 & 2243 gave to the district court. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), for example, he repeatedly insisted that the only remedy upon a determination of unlawful executive detention was either a trial or discharge. *See id.* at 573, 575, & 576. Along the same lines, he held (in 2006) that equity had never permitted a federal court to time bar a habeas petition. *See Day v. McDonough*, 547 U.S. 198, 215. And in 2015, Justice Scalia interpreted § 2243 to grant authority to customize remedies, not authority to discretionarily deny relief. *See Jennings v. Stephens*, 574 U.S. 271, 288 (Scalia, J., dissenting); *see also Wilkinson v. Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J., dissenting) (“We have interpreted this broader remedial language to permit relief short of release.”). Other times, however, he emphasized the idea that equity permitted the Supreme Court to develop judge-made rules restricting relief. *See also, e.g., Reed v. Farley*, 512 U.S. 339, 356 (1994) (Scalia, J.) (“*This Court* has long applied equitable limitations to narrow the broad sweep of federal habeas jurisdiction.”) (emphasis added). And in still other cases Justice Scalia sounded as though all federal courts had discretion to deny relief whenever they wanted. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 676 n.9 (2006) (Scalia, J., dissenting) (“The exercise of habeas jurisdiction has traditionally been entirely a matter of the court’s equitable discretion[.]”).

courts.<sup>114</sup> Specifically, he was advocating that the Court invoke its equitable authority to declare *Miranda* claims beyond the scope of habeas remediation, on the theory that the Court had historically announced such rules “by [equitable] means.”<sup>115</sup>

Aside from the *Withrow* concurrence, *Davenport’s* other cited authority is *Danforth v. Minnesota*,<sup>116</sup> which held that state courts could give new Supreme Court decisions greater retroactive effect than those decisions are to receive in federal habeas proceedings.<sup>117</sup> In explaining the source of authority for the retroactivity rule applicable in federal courts, *Danforth* says: “This Court has interpreted that congressional silence—along with the statute’s command to dispose of habeas petitions ‘as law and justice require,’—as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations.”<sup>118</sup> In *Danforth*, as Justice Scalia had urged in *Withrow*, the Court was citing equity as a source of *its own* authority to declare a raft of equitable rules about the “scope of relief” to be applied in lower courts.

In terms of the doctrinal basis for negative habeas equity, that’s it—the *Withrow* concurrence, *Danforth*, and the *Ramirez* citation to *Davenport* itself. This collection of decisional authority wholly ignores other, often older cases that interpret the statute in the way that I do.<sup>119</sup> As the Supreme Court put it in 1951,<sup>120</sup> the “law and justice” language prevented federal

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<sup>114</sup> See *Withrow*, 507 U.S. at 717-18 (Scalia, J., concurring).

<sup>115</sup> *Id.* at 718.

<sup>116</sup> 552 U.S. 264 (2008).

<sup>117</sup> See *id.* at 266.

<sup>118</sup> *Id.* at 278 (citing 28 U.S.C. § 2243)

<sup>119</sup> Until recently, lower courts also operated under this understanding of the “law and justice” language. See, e.g., *Lujan v. Garcia*, 734 F.3d 917, 935 (9th Cir. 2013) (making downward modification of conviction) *Johnson v. Uribe*, 700 F.3d 413, 428 (9th Cir. 2012) (conditionally granting relief to vacate plea deal and retry); *Kravitz v. Com. of Pa.*, 546 F.2d 1100, 1103 n.5 *Gentry v. Deuth*, 456 F.3d 687, 696 (6th Cir. 2006) (ordering expunction); (3d Cir. 1977) (linking “law and justice” language to recent decision to order federal court to retain jurisdiction over habeas case while identification hearing went forward in state court); *Murray v. Wainwright*, 450 F.2d 465, 472 (5th Cir. 1971) (ordering expunction); *Gentry v. Deuth*, 381 F. Supp. 2d 634, 637 (W.D. Ky. 2005), *aff’d*, 456 F.3d 687 (6th Cir. 2006) (linking “law and justice” language to power to issue conditional relief). In all of American history, I have found only a single district court case in which a federal court invoked “law and justice” as a threatened reason to deny relief entirely—where an escaped prisoner refused to turn himself in unless he obtained relief. See *Lewis v. Delaware State Hosp.*, 490 F. Supp. 177, 182–83 (D. Del. 1980).

<sup>120</sup> *Dowd v. U.S. ex rel. Cook*, 340 U.S. 206 (1951).

courts from “having to choose between ordering an absolute discharge of the prisoner and denying him all relief.”<sup>121</sup> In 1987, The Supreme Court read the “law and justice” text as authorizing discretion over remedies other than “granting relief.”<sup>122</sup> That language therefore accounts for rules permitting habeas relief after custody concludes,<sup>123</sup> the idea that habeas power can be exercised to restore good-time credits,<sup>124</sup> and the discretion to defer discharge until other courts can cure defects in detention orders.<sup>125</sup> In 2005, even Justices Scalia and Thomas opined that § 2243 contained “broader remedial language [necessary] to permit relief short of release.”<sup>126</sup>

\* \* \*

The full view of this precedent, combined with a serious inquiry into statutory text, reveals an exceedingly thin legal justification for negative habeas equity. To the extent that there is controlling precedent that anchors negative equity to the habeas statute, it was *never* the version propounded in the last several Supreme Court terms. If there is a credible argument that free-floating discretion to deny relief sprung from §§ 2241 & 2243, then one would expect someone to have made it carefully and at length before 2022. Yet no such form of that argument exists.

### III. THE FACTUAL INNOCENCE RULE

Among the problems with the new negative habeas equity are its indeterminate boundaries. Some federal jurisdictions have interpreted the new negative equity to work a lot like the old version, by which I mean that equity only justifies the Supreme-Court-made restrictions on habeas relief.<sup>127</sup> On the other end of the spectrum sit other approaches that belie writ’s historic function—and quite a bit of positive law. I consider one such approach at length: an “innocence rule” that some appellate judges are promoting in post-*Ramirez* decisions. Relying on *Davenport* and *Ramirez*, for example, the Fifth Circuit has tentatively held that relief should ordinarily be withheld when the claimant is not “factually innocent.” (That holding is now on pause as the circuit considers the question *en banc*.<sup>128</sup>)

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<sup>121</sup> *See id.* at 209-10.

<sup>122</sup> *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987).

<sup>123</sup> *See Carafas*, 391 U.S. at 239.

<sup>124</sup> *See Preiser v. Rodriguez*, 411 U.S. 475, 488 (1973).

<sup>125</sup> *See In re Bonner*, 151 U.S. 242, 261 (1894)

<sup>126</sup> *Wilkinson v. Dotson*, 544 U.S. 74, 85 (2005) (Scalia, J. concurring).

<sup>127</sup> *See* note 53, *supra* (collecting cases).

<sup>128</sup> *See* Order, *Crawford v. Cain*, No. 20-61019 (5th Cir. Jun. 29, 2023) (granting *en banc* rehearing) (“*Crawford en banc* order”).

The factual innocence rule warrants elevated scrutiny because it is the next plausible frontier of judge-made habeas restrictions. I say that because the Fifth Circuit is a leading indicator of restrictive approaches to habeas relief. It also is a hotbed of federal post-conviction activity, operating as a doctrinal leader in the habeas space. And the upshot is this: even if the vision of negative equity set forth in *Davenport* and *Ramirez* were defensible, a factual innocence rule is not.

A. *The Trial Balloon*

The Fifth Circuit has sent up a trial balloon testing the position I examine here: that there can (or should) be no habeas relief without a demonstration of “factual innocence,” which means a showing that the claimant did not commit an element of the offense. The Fifth Circuit announced that rule in a panel opinion, *Crawford v. Cain*, the facts of which are largely immaterial to my discussion.<sup>129</sup> (When I refer to *Crawford* here, I refer to the panel opinion that has been formally withdrawn pending *en banc* reconsideration.<sup>130</sup>)

According to that innocence rule, *Davenport* and *Ramirez* set up a “two-prong framework” for adjudicating habeas petitions. “The first prong is business as usual: whether the state prisoner satisfies AEDPA and the usual equitable and prudential doctrines (e.g., procedural default and prejudicial error). The second prong is whether law and justice require granting habeas relief.”<sup>131</sup> In justifying the “second prong,” *Crawford* relies in significant part on now-familiar arguments about §§ 2241 & 2243.<sup>132</sup>

But the innocence rule doesn’t stop with *Davenport* and *Ramirez*. It also declares that law and justice do not require relief when a habeas claimant is “factually guilty.”<sup>133</sup> In recognizing a version of this equitable rule, the Fifth Circuit cites: various pieces of *Davenport* and *Ramirez* that describe how innocence shaped the Supreme Court’s judge-made rules,<sup>134</sup> a policy interest in federalism,<sup>135</sup> and some sources discussing the way the habeas privilege worked at English common law.<sup>136</sup> *Crawford* relies most substantially, however, on a famous article by Judge Henry J. Friendly, which argued

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<sup>129</sup> See *Crawford v. Cain*, 68 F.4th 273, 278 (5th Cir. 2023), opinion vacated and reh’g en banc granted by *Crawford en banc* order, *supra* note 128.

<sup>130</sup> *Id.* at 286.

<sup>131</sup> *Id.*

<sup>132</sup> See *id.*

<sup>133</sup> *Id.* at 287.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

that innocence should be the touchstone of federal habeas proceedings.<sup>137</sup>

*Crawford* also took a position on what qualified as of “factual innocence,” holding that proof that a claimant would have prevailed on an insanity defense did not.<sup>138</sup> Questions of factual innocence, *Crawford* reasoned, are resolved entirely by elements of the criminal offense itself; not by reference to affirmative defenses.<sup>139</sup> And so when I refer to the rule of factual innocence, I reference a rule under which federal courts can (or should) deny relief in cases where habeas claimants do not sufficiently disprove elements of the offenses for which they were convicted.<sup>140</sup>

If embraced broadly and natural inferences followed, the innocence rule would be the most important change to habeas law since AEDPA. It would also be the most important decisional move since 1953, when the Supreme Court decided *Brown v. Allen*.<sup>141</sup> Perhaps sensitive to the revolution it implies, *Crawford* attempts to sand down two very jagged edges. In footnotes, it states that its factual innocence rule does not formally apply to people convicted of federal crimes or to those challenging their sentences.<sup>142</sup>

Such language notwithstanding, this Essay takes the innocence rule seriously. If §§ 2241 & 2243 mean that only factually innocent people should get relief, then there is no reason why that principle wouldn’t logically apply to federal prisoners or to people challenging their sentences. Those carve-outs make little sense conceptually, and they would be doctrinal precariousities—not long for a habeas jurisprudence with an innocence rule. I focus more on the idea behind the innocence rule and less on the formal limits of a particular opinion embracing it.

### *B. Legal Authority*

Any traditional variant of doctrinal analysis excludes the innocence rule. The first three subsections nested below are about common-law history, text, and Supreme Court decisions,

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<sup>137</sup> *See id.* at 287-88.

<sup>138</sup> *See id.* at 289.

<sup>139</sup> *See id.*

<sup>140</sup> *Crawford* itself is not entirely clear on whether a district court is *permitted* to deny relief when claimants fail to make a sufficient showing of factual innocence or whether it is required to do so. Nevertheless, subsequent panels and lower courts have interpreted as a mandatory rule. *See, e.g.,* Granier v. Hooper, No. 22-30240, 2023 WL 2645550, at \*3 (5th Cir. Mar. 27, 2023); Medina v. Lumpkin, No. 09-CV-3223, 2023 WL 3852813, at \*7 (S.D. Tex. June 6, 2023).

<sup>141</sup> 344 U.S. 443 (1953).

<sup>142</sup> 68 F.4th at 286 nn. 3 & 5.

but these three indicia of statutory meaning are not so neatly separated. Congress has enacted and re-ratified habeas power in view of prior decisional construction and a specific understanding of the writ's history.<sup>143</sup> And to the extent history is part of the interpretive enterprise, it points in a clear direction: During the nearly five hundred years that King's Bench forged the Great Writ in the crucible of English institutional conflict, innocence was never a precondition for relief.<sup>144</sup> Habeas power instead described a judge's power to consider whether detention (or some other restraint on liberty) was *lawful*.<sup>145</sup>

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<sup>143</sup> See Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949, 1955-56 (2016).

<sup>144</sup> See LARRY W. YACKLE, *POSTCONVICTION REMEDIES* § 3, at 5 (1981) ("The writ in theory has nothing to do with the prisoner's guilt or innocence, but is concerned only with the process employed to justify the detention under attack."); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 323 (1988) (explaining that any habeas focus on innocence is a purely modern phenomenon); Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2535 (1998) (describing its indifference to innocence as a "venerable" feature of the common-law writ).

<sup>145</sup> See David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 707 (2009) ("The writ of habeas corpus [was] a preexisting common law right to challenge the legality of detention in court[.]"); Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 58 (2012) (explaining that the common law habeas privilege "require[d] the jailer to justify the legality of the detention"); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1187 (2007) ("The 1641 and 1679 Habeas Corpus Acts codified ... the common-law standard for issuing habeas relief, the lack of a valid cause of detention ...."); Andrew Kent, *Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case*, 66 VAND. L. REV. 153, 170 (2013) (describing habeas as "a writ dating back to ancient English common law used to test the legality of a prisoner's detention"); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 758 (2013) ("[The authority of a judge to determine what counted as 'lawful' custody was perhaps the signal feature of the habeas writ that emerged from the seventeenth-century English Civil Wars."); Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1411-12 (2010) ("[C]ontemporary English legal scholars began to equate the right to be free from unlawful detention with the central role of habeas corpus in guaranteeing that right."); see also *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973) ("It is clear ... from the common-law history of the writ[] that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody

English habeas process focused not a whit on innocence, and even the modern writ's fiercest critics acknowledge that state of affairs.<sup>146</sup> Early judges and lawmakers understood that that lawfulness was not a question of innocence,<sup>147</sup> and Congress has operated with that understanding for two-and-a-half centuries.<sup>148</sup> The statute now specifies several innocence-based gateways to allow merits consideration of claims that are procedurally defective<sup>149</sup>—but Congress has never even entertained the idea that innocence could be a condition for relief on claims that lacks such defects.<sup>150</sup> The idea that innocence might be a condition for relief in such cases should whipsaw those familiar with the writ's history and statutory expression.

### 1. English History

Judicial decisions applying American habeas statutes are saturated with references to English habeas practice,<sup>151</sup> and for

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<sup>146</sup> See, e.g., Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1100 (1995) (“[H]abeas corpus at common law—as received by the Supreme Court in [early canonical cases]—was not concerned with establishing guilt or innocence.”).

<sup>147</sup> See *id.* at 1100 (describing early Supreme Court decisions).

<sup>148</sup> This principle is reflected in the Supreme Court's understanding of federal habeas powers. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 400–01 (1993) (“[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.”); *Application of Yamashita*, 327 U.S. 1, 8 (1946) (“[O]n application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged.”); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“We are not here concerned with any question of the guilt or innocence of petitioners. Constitutional safeguards ... are not to be disregarded in order to inflict merited punishment on some who are guilty.”); *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923) (“[W]hat we have to deal with is not the petitioners' innocence or guilt but solely the question of whether their constitutional rights have been preserved.”).

<sup>149</sup> See *infra* notes 179 to 180 and accompanying text.

<sup>150</sup> For thorough histories of the federal habeas statute generally, and AEDPA in particular, see, e.g., Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 459 (2007); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 543–53 (2006); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 421–43 (1996).

<sup>151</sup> See, e.g., *Fay v. Noia*, 372 U.S. 391, 422 (1963), *overruled by* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (“The breadth of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ, and conforms with the classic

good reasons. First, enacting Congresses labored under a reasonably shared understanding about how habeas corpus worked, at least in broad strokes.<sup>152</sup> Second, the Supreme Court has repeatedly indicated that statutory interpretation should proceed that way.<sup>153</sup>

Habeas corpus was a prerogative writ originally issued to ensure that custody exercised in the Crown's name was actually authorized.<sup>154</sup> It formally issued out of King's Bench, but the Bench—sometimes allied with Parliament—took habeas power from the Crown over the course of the seventeenth century.<sup>155</sup> The defining seventeenth-century episode began with the *Case of the Five Knights*.<sup>156</sup> In *Five Knights*, King's Bench signaled that it was reluctant to declare detention lawful simply because the Crown declared it so.<sup>157</sup> The Petition of Right followed the next spring, and it reaffirmed that people could not be deprived of a habeas forum to test detention.<sup>158</sup>

Supplemented by even more powers specified in the 1679 Habeas Corpus Act, seventeenth-century English judges transformed habeas corpus *ad subjiciendum* into what we now consider the Great Writ.<sup>159</sup> Judges used it to inspect virtually

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English practice.”); *Ex parte Bollman*, 8 U.S. 75, 80 (1807) (“Accordingly we find that the court of common pleas in England, though possessing no criminal jurisdiction of any kind, original or appellate, has power to issue this writ of habeas corpus.”).

<sup>152</sup> See *infra* note 175 and accompanying text; Goldstein, *supra* note 149, at 188); see also HALLIDAY, *supra* note 1, at 15-16 (discussing how the “popular imagination” has connected habeas corpus with Magna Carta since the early seventeenth century).

<sup>153</sup> See, e.g., *Rasul v. Bush*, 542 U.S. 466, 481, 124 S. Ct. 2686, 2696, 159 L. Ed. 2d 548 (2004) (“Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.”); *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) (“[T]his Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.”); *Townsend v. Sain*, 372 U.S. 293, 311 (1963), overruled by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (“[T]he historic conception of that writ [is] anchored in the ancient common law .... We pointed out, too, that the Act of February 5, 1867 ... restated what apparently was the common-law understanding.”).

<sup>154</sup> See HALLIDAY, *supra* note 1, at 75.

<sup>155</sup> See HALLIDAY, *supra* note 1, at 139.

<sup>156</sup> *Darnel's Case* (1627) 3 Cobbett's St. Tr. 1, 50 (K.B.); see also Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 925-29 (2012) (describing role of *Darnel's Case*).

<sup>157</sup> See Halliday & White, *supra* note 13, at 1620-21.

<sup>158</sup> Car., c. 1, §§ 3, 5 (Eng.).

<sup>159</sup> See HALLIDAY, *supra* note 1, at 139-40.

any form custody. In all cases, the issue was whether the custody was *lawful*,<sup>160</sup> which was generally defined by reference to whether arrest and detention were legally authorized.<sup>161</sup> The relevant questions were therefore about whether a particular custodian had valid power to arrest or detain,<sup>162</sup> and maybe whether they complied with certain procedure.<sup>163</sup>

There is a substantial dispute over the degree to which seventeenth-and-eighteenth-century English judges used habeas process to inspect criminal proceedings, and most have concluded that there was no habeas power to review convictions entered by jurisdictionally competent courts.<sup>164</sup> But there can be no dispute that judges used habeas writs to inspect whether indictments were lawful,<sup>165</sup> and Professor Halliday—far and away the expert on English habeas practice—has documented a number of cases in which writs were in fact used to inspect convictions lacking jurisdictional defects.<sup>166</sup> I am aware of no evidence, however, that habeas claimants in these categories had to show anything like innocence.

*Crawford's* reliance on Professor Halliday's work is particularly strange, insofar as it cites Halliday as support for the proposition that "[the innocence rule] comports with the historical office of the writ. For the first 500 or so years of the writ's existence, it generally could not be used to challenge a judgment of guilt."<sup>167</sup> There are two *major* problems here. First, according to Professor Halliday—and virtually everyone else to study the pertinent history—the modern privilege wasn't used to challenge guilt because innocence was not relevant to the question of lawfulness.<sup>168</sup> Second, *Crawford* misreads Halliday, who most certainly believed that English habeas process was used to review convictions, and that "this practice was on the rise in the early seventeenth century."<sup>169</sup> Halliday collects numerous examples, including one in which King's Bench used habeas power to reform a conviction for murder into

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<sup>160</sup> See HALLIDAY, *supra* note 1, at 95.

<sup>161</sup> See note 149, *supra* (collecting sources).

<sup>162</sup> See SHARPE, *supra* note 10, at 13.

<sup>163</sup> See *supra* notes 145 to 147 and accompanying text; HALLIDAY, *supra* note 1, at 147-53.

<sup>164</sup> See, e.g., Bator, *supra* note 96, at 466.

<sup>165</sup> See *Hartranft v. M'ullowny*, 247 U.S. 295, 299 (1918); *supra* notes 144 to 145 and accompanying text.

<sup>166</sup> See HALLIDAY, *supra* note 1, at 116-21.

<sup>167</sup> 68 F.4th at 287.

<sup>168</sup> See *supra* notes 144 to 145 and accompanying text; HALLIDAY, *supra* note 1, at 7-8, 95, 97, 102-08, 144-47, 156, 184-87.

<sup>169</sup> HALLIDAY, *supra* note 1, at 118.

manslaughter.<sup>170</sup> *Crawford* substantially overclaims the historical record in order to establish a premise from which its conclusion does not even follow.

## 2. Text

Statutory interpreters of all stripes should care about the writ's English history because judges and academics have always treated it as crucial information about what statutory references to habeas corpus mean.<sup>171</sup> But even without that history, text-centered interpreters should find a penumbral innocence rule troubling because it is inconsistent with a statute that carefully sites innocence inquiries in specific places. Those places, moreover, always involve gateways to merits consideration of procedurally defective claims.

The textual incompatibility of an innocence rule again involves the distinction between, on the one hand, limits on procedurally defective claims and, on the other, limits on claims lacking such defects. For claims bearing procedural defects, Congress has enacted finely tuned requirements about when a sufficient showing of innocence disables a procedural bar. But for claims lacking procedural defects, Congress has always refused an innocence limitation.<sup>172</sup> Congress did not tinker extensively with the relationship between innocence and habeas relief and, at the same time, permit penumbral discretion to swamp the enacted linkage.

To make the point more thoroughly, let me say a little bit more about each category of claims. I'll start with claims *lacking* procedural defects. We know that Congress never seriously considered a rule in which innocence limits the habeas remedy because (1) English common law never made innocence a condition of habeas relief,<sup>173</sup> and (2) the first sentence of the 1789 Judiciary Act required that all habeas corpus writs be "agreeable to principals and usages of laws."<sup>174</sup> Chief Justice John Marshall put it this way in his iconic *Ex parte Bollman* opinion, which interpreted the 1789 Act:

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<sup>170</sup> See *id.* at 118-19.

<sup>171</sup> See, e.g., *supra* note 153 (collecting sources). Cf. *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word ...").

<sup>172</sup> See note 150, *supra*.

<sup>173</sup> See *supra* notes 144 to 145 and accompanying text.

<sup>174</sup> Judiciary Act of 1789, § 14, 1 Stat. 81. There is some disagreement about whether this sentence included habeas corpus *ad subjiciendum* but, in *Ex parte Bollman*, Chief Justice Marshall concluded that it did. 8 U.S. 75, 84-85 (1807). The first sentence survives as the modern All Writs Act, 28 U.S.C. § 1651.

“[W]here can we look for the definition [of habeas power], but to the common law; to that code from whence we derive all our legal definitions, terms and ideas, and which forms the substratum of all our juridical systems, of all our legislative and constitutional provisions.”<sup>175</sup>

The second sentence of the 1789 Act’s habeas provision referred even more specifically to habeas corpus *ad subjiciendum*,<sup>176</sup> which is the Great Writ inherited from English common law.<sup>177</sup> That sentence now resides (in altered form) at 28 U.S.C. § 2241, which in turn contains the central cognizability criterion for people serving state criminal sentences: that they be “in custody in violation of the Constitution or laws or treaties of the United States[.]” That language reappears in § 2254, which is the new home of the 1867 Habeas Act and provides that “[a state prisoner’s habeas application shall be entertained] only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

The statutory reference to “custody in violation of the Constitution or laws or treaties of the United States” is the familiar concept of unlawful custody, and there’s no reason to believe that Congress ever meant to permit an innocence filter. In fact, AEDPA was the culmination of a half-century legislative effort to restrict habeas relief for claims lacking procedural defects, and even *that* Congress refused to make innocence a consideration.<sup>178</sup> 28 U.S.C. § 2254(d) bars relitigation of claims decided on the merits in state court, with two exceptions having nothing to do with innocence. If Congress wanted innocence to be a condition for relief on claims lacking procedural defects, why didn’t § 2254(d) say so?

By contrast, Congress inserted innocence inquiries into adjudication of claims *having* procedural defects. For example, AEDPA permitted a claimant to raise a constitutional claim omitted from a prior petition if new facts show that “no

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<sup>175</sup> 8 U.S. 75, 80 (1807).

<sup>176</sup> The second sentence now forms the basis for what is 28 U.S.C. § 2241.

<sup>177</sup> See BRIAN R. MEANS, POSTCONVICTION REMEDIES § 4:2 (“Without further guidance from Congress, the early decisions steered a conservative course, roughly following the English habeas practice.”); See also, e.g., *Stone v. Powell*, 428 U.S. 465, 475 n.6 (1976) (“It is now well established that the phrase ‘habeas corpus’ used alone refers to the common-law writ of habeas corpus *Ad subjiciendum*, known as the ‘Great Writ.’”); *id.* at 475 (“The courts defined the scope of the writ in accordance with the common law and limited it to an inquiry as to the jurisdiction of the sentencing tribunal.”)

<sup>178</sup> See note 150, *supra*.

reasonable factfinder would have found the applicant guilty of the underlying offense.”<sup>179</sup> And for claims that were factually undeveloped in state court, claimants may introduce new federal evidence only if those facts sufficiently demonstrate that “no reasonable factfinder would have found the applicant guilty of the underlying offense.”<sup>180</sup> The statutory requirement for innocence showings in these places presumptively implies the absence of innocence rules in others.

One additional clue about AEDPA might escape attention because the provisions giving rise to it aren’t used. The 1996 legislation included “opt-in” provisions that were to apply as part of a quid pro quo, after a state was certified to guarantee adequate state post-conviction representation.<sup>181</sup> No state has been certified, but the opt-in regime was meant to be especially strict—on the theory that it only applied when confidence in state-court adjudication was particularly high. Yet, even for opt-in cases, there is no innocence-based limit on relief for claims lacking procedural defects.<sup>182</sup>

For anyone whose interpretive practices center statutory text, the case for the innocence rule is impossibly thin. Congress has always taken utmost care to specify the statutory linkage between innocence and habeas relief. AEDPA reflects heightened attention to the issue, yet Congress never hinted that innocence might be a condition for relief on claims lacking procedural defects. To recognize an innocence rule under such conditions, one must insist that the pertinent language in §§ 2241 and 2243 not only does what *Davenport* and *Ramirez* say it does, but also that it trumps all the decisions Congress made when it actually thought about the relationship between innocence and the habeas remedy.<sup>183</sup>

### 3. Innocence rules in Supreme Court decisions

One might argue that the Supreme Court has long justified innocence inquiry by reference to its equitable authority—and perhaps further that Congress has ratified that interpretation. There are two responses, and the first is straightforward. When the Supreme Court has invoked equity to link innocence to relief, the negative equity has been of the older vintage.

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<sup>179</sup> 28 U.S.C. § 2244(b)(2)(B)(ii).

<sup>180</sup> 28 U.S.C. § 2254(e)(2)(B).

<sup>181</sup> See 28 U.S.C. §§ 2261 to 2265.

<sup>182</sup> See 28 U.S.C. § 2264.

<sup>183</sup> *Crawford’s* definition of innocence, which is defined *only* by reference to the elements of a criminal offense, is also inconsistent with the approach to innocence reflected in the habeas statute. See, e.g., 28 U.S.C. § 2244(b)(2) (successive petitions); *id* at § 2254(e)(2) (new evidence).

Never have the Justices given lower courts discretion to require innocence inquiries.

Second, when invoking equity as a source of authority to require innocence inquiries, the Supreme Court has generally done so by requiring a showing of innocence to excuse a bar to a procedurally defective claim. (There is one exception that I'll discuss in a moment.) In some measure or another, this is true of the statute of limitations,<sup>184</sup> successive petitions (before AEDPA),<sup>185</sup> and procedural default.<sup>186</sup> These innocence inquiries therefore work the same way that their statutory analogues do, at least insofar as they do not touch claims that lacked procedural defects.

Now, the arguable exception.<sup>187</sup> In *Stone v. Powell*, the Supreme Court invoked its equitable authority to hold that claimants who had a “full and fair” opportunity to argue Fourth Amendment exclusion in state court would no longer be able to obtain habeas relief on that basis.<sup>188</sup> The Court felt comfortable placing this “particular category[y] of constitutional claims” beyond habeas coverage because, in so many words, the claims in that category did not generally undermine guilt.<sup>189</sup> *Powell* is almost certainly the best authority for an innocence rule, even though *Crawford* doesn't cite it.

Even *Powell*, however, is flimsy support. First, *Powell* was an affirmation that discretion belonged to the Justices, not to lower courts. Second, *Powell* didn't actually require an innocence showing in individual cases, it held that certain claim categories shouldn't trigger habeas remedies because the violations didn't sufficiently undermine guilt findings and because the remedies produced no incremental deterrent

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<sup>184</sup> See *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

<sup>185</sup> See *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

<sup>186</sup> See *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

<sup>187</sup> *Kaufman v. United States*, 394 U.S. 217 (1969), was the (6-3) case that the Supreme Court effectively overruled in *Stone v. Powell*, 428 U.S. 465, 494 (1976), which is discussed below. Justices Harlan, joined by Justice Stewart, wrote expressly to “disassociate [themselves] from any implications [coming from Justice Black's dissent] that the availability of this collateral remedy turns on a petitioner's assertion that he was in fact innocent, or on the substantiality of such an allegation.” *Id.* at 242-23 (Harlan, J., dissenting).

<sup>188</sup> 428 U.S. 465, 494 (1976).

<sup>189</sup> See *id.* at 489-95; see also generally Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. Rev. 303, 363 (1993) (endorsing this orthodox understanding of *Powell*).

effect.<sup>190</sup> Third, and unlike *Crawford*, relief was precluded only if the claimant got full and fair process in state court.<sup>191</sup>

These are all serious problems with the idea that *Powell* alone can support an innocence rule. There is, however, a fourth reason that devastates the argument that § 2243 might do the necessary statutory work. Justices joining the *Powell* majority indeed appeared to believe that the Court's authority to restrict relief came from § 2243, which is cited in footnote 11. Subsequent case law repeatedly interpreted *Powell* narrowly, however, as a rule about violations of *non-trial* rights.<sup>192</sup> After the Court spent nearly two decades wrestling with whether *Powell* might apply beyond the Fourth Amendment policing context, *Withrow* observed: “[W]e have repeatedly declined to extend the rule in [*Powell*] beyond its original bounds.”<sup>193</sup> This lengthy thread of precedent seems to establish that an innocence rule cannot be among the discretionary practices that § 2243 unlocks. AEDPA presumably ratified that understanding just three years after *Withrow*.

### C. *Misunderstanding Friendly*

One of the more disorienting features of the innocence rule—or at least the Fifth Circuit's tentative version—is a heavy reliance on a famous article, *Is Innocence Relevant?*, by Judge Henry Friendly.<sup>194</sup> There are several problems with this position,<sup>195</sup> but one stands out: Judge Friendly was criticizing

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<sup>190</sup> See 428 U.S. at 479.

<sup>191</sup> See *id.* at 482.

<sup>192</sup> See, e.g., *Reed v. Farley*, 512 U.S. 339, 347 (1994) (speedy trial laws); *Withrow*, 507 U.S. at 686-95 (*Miranda*); *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (ineffective assistance of counsel where deficiency is failure to seek Fourth Amendment exclusion); *Rose v. Mitchell*, 443 U.S. 545, 559-64 (1979) (grand jury selection); *Jackson v. Virginia*, 443 U.S. 307, 321-24 (1979) (constitutional sufficiency of evidence to convict)

<sup>193</sup> *Withrow v. Williams*, 507 U.S. 680, 687 (1993).

<sup>194</sup> Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970), cited in *Crawford*, 68 F.4th at 287.

<sup>195</sup> Take one example. According Judge Friendly, the concept of “innocence” is to be litigated without evidentiary restrictions. See Friendly, *supra* note 194, at 160. But the Congress and the Supreme Court have severely restricted the body of evidence claimants can use to demonstrate anything, including innocence. See, e.g., 28 U.S.C. § 2254(d)(2) (factual unreasonability exception to the relitigation bar); *Shinn v. Ramirez*, 142 S.Ct. 1718, 1728 (2022) (evidence supporting claims not factually undeveloped in state court); *Cullen v. Pinholster*, 63 U.S. 170, 180 (2011) (interpreting legal unreasonability exception to the relitigation bar). Judge Friendly therefore struck a balance between innocence and finality that an innocence rule dropped into

what he believed to be a legislative omission in the statute. Citation to Judge Friendly therefore proves the opposite of the interpretive position that *Crawford* takes.

Along with Professor Paul Bator's *Finality in Criminal Law*,<sup>196</sup> Judge Friendly's article frames the dominant arguments against thick post-conviction review.<sup>197</sup> Whereas Professor Bator linked his preferred federal habeas rules to epistemic limits on the knowability of truth,<sup>198</sup> Judge Friendly argued that a resource-intensive federal habeas machine should not churn in favor of those for whom guilt is certain.<sup>199</sup> The Supreme Court has cited *Is Innocence Irrelevant* twenty-eight times, and the law review citation count exceeds five hundred.<sup>200</sup>

The crucial point, again, is that Judge Friendly was not offering an interpretation of the habeas statute. His was an argument for a legislative revision. His introduction insists that "this position ought to be the law and that legislation can and should make it so."<sup>201</sup> Or, as he more pithily put it later: "What Congress has given, Congress can partially take away."<sup>202</sup> Judge Friendly's arguments are about policy, not about what the habeas statute means.

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There is a reason why the Supreme Court has never endorsed an innocence rule: it is at odds with centuries of habeas practice, statutory text, and Supreme Court decisions. The innocence rule doesn't flow so much from law as it does from policy preference. A legal movement sympathetic to Justice Jackson's dissent in *Brown v. Allen* now views the concept of unlawful detention as too broad. And sure, an innocence rule might narrow it, but not because that rule aligns modern habeas law with the historical norms of writ practice.

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the current regime cannot strike.

<sup>196</sup> See Bator, *supra* note 96.

<sup>197</sup> See John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 264 (2006).

<sup>198</sup> See Bator, *supra* note 96, at 447.

<sup>199</sup> See Friendly, *supra* note 194, at 142.

<sup>200</sup> Whenever the Supreme Court cited Judge Friendly in a majority opinion, it did so when considering how to link an innocence inquiry to excuses for procedural defects. See, e.g., *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Schlup v. Delo*, 513 U.S. 298, 321–22 (1995); *Smith v. Murray*, 477 U.S. 527, 538–39 (1986); *Engle v. Isaac*, 456 U.S. 107, 129 (1982).

<sup>201</sup> See Friendly, *supra* note 194, at 143.

<sup>202</sup> See Friendly, *supra* note 194, at 171.

## CONCLUSION

Proponents of the new negative equity envision a reformed era of habeas practice in which judges may deny relief based on either authoritative law or equitable intuition. Equitable power to refuse relief might be consistent with “comity, finality, and federalism,”<sup>203</sup> as it were, but orphaned policy preferences are not law. Under the text-centered approach to law endorsed by most who favor habeas restrictions, such practice is impossible to justify. Although no interpreter can be perfectly certain of statutory meaning, the new negative equity is based on a least-plausible reading of the modern habeas statute.

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<sup>203</sup> These are the policy reasons that are typically intoned as a basis for restricting habeas relief. *See, e.g.*, *Shoop v. Twyford*, 142 S. Ct. 2037, 2043 (2022) (reciting interests); *Davila v. Davis*, 582 U.S. 521, 528 (2017) (same); *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (same); *Fry v. Pliler*, 551 U.S. 112, 112 (2007) (same).