# Hiding Behind Habeas's Hardness

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Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, (August 6, 2021), available in draft at SSRN.

Habeas is hard. Even among law professors—indeed, even among law professors whose teaching and writing includes habeas—the statutes and doctrines governing collateral post-conviction review in the federal courts have become so complicated and convoluted that there is a temptation to skip it in the Federal Courts syllabus (and, I dare say, to gloss over any paper the title of which includes the h-word). Whether you are a habeas scholar or not, though, you should make an exception for Jonathan Siegel's forthcoming essay.

Siegel's paper centers on Edwards v. Vannoy—by far the Supreme Court's most important habeas decision from its October 2020 Term—and explains why even those of us who have paid attention to it have missed what really matters. In the process, we have missed ominous portents of the future of the current Court's approach to post-conviction habeas—and of how the current Supreme Court decontextualizes older rulings and statutes to rewrite history and to free itself from the strictures that proper understandings would impose. Siegel's paper is equal parts trenchant and terrifying, and it is a must-read even for those who do not know, to this point in the review, what *Edwards* was actually about.

Let's start there: The Court granted certiorari in *Edwards* to decide a relatively straightforward question. In 2020, a 6-3 majority in Ramos v. Louisiana held that the right to a unanimous conviction required by the Sixth Amendment's Jury Trial Clause also applies to the states through the Due Process Clause of the Fourteenth Amendment. By incorporating against the states a new rule of constitutional law, *Ramos* raised the question of whether its new rule applied retroactively to those state prisoners whose non-unanimous convictions had become final. Under the framework the Court articulated in its 1989 decision in Teague v. Lane, a new constitutional rule is generally not enforceable on collateral review (as opposed to direct appeal) unless it invalidates the substantive basis for the petitioner's conviction or sentence or it is a "watershed" rule of criminal procedure—one that implicates the fundamental fairness of the underlying criminal trial. The question in *Edwards* was whether *Ramos* belonged in this latter category.

For a 6-3 majority, Justice Kavanaugh said "no." Far more than that, the *Edwards* majority (in a huge favor to future Federal Courts students) eliminated the "watershed" rule exception—since, in the 32 years it had been on the books, the Court had never identified a single new example (and the only old example was Gideon v. Wainwright). Not surprisingly, most commentary on *Edwards* focused on this rather aggressive and wholly unnecessary move by the majority and the troubling implications of the Court's certitude that it would never again identify such a rule. For one especially good example, see Jeffrey Ho's note in the June 2021 issue of the *Stanford Law Review*.

Here's where Siegel comes in. His focus, unlike just about every other commentator, is on the two concurring opinions in *Edwards*—by Justices Thomas and Gorsuch (each of whom joined the other). As he (quite correctly) notes, the Justices used their separate opinions to attack the foundation of modern post-conviction review, arguing that historical practice and a proper interpretation of the relevant habeas statute (itself a descendant of the Habeas Corpus Act of 1867) should limit federal courts to reviewing only whether the state court was one of competent jurisdiction. As Siegel writes, "Under this rule, it wouldn't matter if the state court that tried the prisoner's original criminal case violated the prisoner's right to a jury trial, to the assistance of counsel, to call witnesses, to avoid self-incrimination, or any of the numerous other federal constitutional rights that apply in state criminal proceedings." After all, as we understand "jurisdiction" today, a criminal case in which a state court lacks it is exceedingly rare.

The problem, as Siegel's paper thoroughly and convincingly explains, is that is not how "jurisdiction" was understood at the relevant times—by antebellum state and federal courts and by the Radical Republicans in Congress who drafted the Habeas Corpus Act of 1867 (and, to a lesser extent, the radical Republicans in Congress who drafted the Antiterrorism and Effective Death Penalty Act of 1996). To the former, Siegel marshals significant evidence in support of a different framing—that "[t]hese cases used the term 'jurisdiction' as a term of art with a specialized meaning quite different from the meaning it would have today. Federal courts issued habeas relief to prisoners in custody by virtue of courts' judgments even though the courts had what would today be regarded as jurisdiction." Indeed, as even non-habeas nerds know, the Supreme Court spent a good part of the early 2000s clarifying what the term "jurisdiction" means, after so many lower courts had read it far more capaciously. The Court's modern terminological formalism vis-à-vis the concept of "jurisdiction" underscores what Siegel's paper makes explicit—that this formalism is new.

To the latter, Siegel walks through the evolution of the federal habeas statutes from 1867 to today, and shows—again, convincingly—how, at each step along the way, Congress understood the scope of relief it was authorizing to extend beyond what we would understand today as collateral attacks on the subject-matter jurisdiction of the trial court. Even AEDPA would have had no need to impose many of the controversial limits that have formed the backbone of modern habeas jurisprudence if Gorsuch and Thomas were right.

There is a lot to commend this punchy, short, and direct paper. It is accessible to non-habeas scholars. It does not try to include a literature review that would bog down the footnotes. It engages directly with the reasoning of the Thomas and Gorsuch concurrences. And it attempts to offer broader lessons about judges doing history and hermeneutics—and the importance of reading not only statutes in context (including what their language necessarily implies), but judicial decisions as well.

Alas, in habeas scholarship, this is hardly a new theme. From James Liebman to Randy Hertz to Amanda Tyler to Paul Halliday to Todd Pettys to Baher Azmy to Lee Kovarsky to (you get the idea), one could fill a library with two decades of convincing, unrebutted academic work demonstrating beyond peradventure that habeas was far more robust before the Supreme Court's canonical 1953 decision in *Brown* v. *Allen* than is widely understood. To similar effect, much of this work has attempted to demonstrate that many contemporary conservative jurists continue to misstate the origins and historical understanding of habeas. Yet, as the Thomas and Gorsuch concurrences in *Edwards* underscore, none of that scholarship seems to have broken through. Meanwhile, as Siegel notes, the changing composition of the Court makes the project much more urgent, with a growing possibility that a majority exists to adopt this deeply revisionist view of 18th, 19th, and even 20th century habeas practice at the expense of the constitutional rights of state (and, it would seem to follow, federal) prisoners. Here's hoping that Siegel's succinct and scary essay breaks that cycle—and that the Supreme Court does as well.

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