Bring Back Collateral Attack

Eric Pepke 16 September 2019, original December 2018

Once upon a time in America, there were criminal trials.[1] People accused of and indicted for alleged crimes had to be proven guilty beyond a reasonable doubt before a jury of their peers. If the jury found a defendant guilty, a judge would pronounce sentence.

Even in those days of old, merely convicting a defendant was not enough. The law and process had to be lawful under the constitution, preserving due process, definiteness, and other legal principles and rights. Under English law, there was a secondary mechanism by which conviction, imprisonment, and other punishment could be attacked. This was different from a direct appeal concerning the defendant's guilt or innocence. Instead, it was collateral, challenging the legality of the government's actions convicting and punishing.

There have been many names for this process.[2] The most common is "habeas corpus." This is Latin for "you have the body" (of the prisoner).[3] A prisoner can petition a court for a writ of habeas corpus, sometimes also called The Great Writ.

Various writs for collateral attack were used even before the Magna Carta of 1215. Habeas corpus was used to free prisoners imprisoned by the Privy Council during the reign of Henry VII (1485-1509). It was secured by the English Habeas Corpus Act of 1679.[4] Habeas corpus was adopted by the United States and was considered important enough to be mentioned in the body of the Constitution.[5]

Collateral attack in the United States gained importance somewhere between 1915 and 1926.[6] An appeal to the Supreme Court (called a petition for certiorari) was never a right for a criminal defendant. When the United States had fewer than ten million inhabitants, there were nine Supreme Court justices. There still are. As the population has grown, the Supreme Court has not been able to keep up. Collateral attack effectively became a substitute for certiorari.[7]

By the 1960s, an elaborate federal system of approaches to collateral attack had been legislated. 28 U.S.C. §2241 provides a more traditional habeas corpus, while §2254 provides a federal way to challenge state convictions after state collateral attack has been exhausted. §2255 provides limited means of attacking federal sentences and convictions; it differs from traditional habeas

corpus in that the motion is to the sentencing judge, not a judge in the district of the prison. Habeas corpus became "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."[8]

Nowadays the trial has become a thing of the past. 94% of state and 97% of federal convictions result from plea agreements.[9] Yet these "agreements" frequently amount to deals the defendant can't refuse.[10] The government's bag of tricks to force them include simple lying, chicanery, and third degrees;[11] egregiously long sentences;[12] threats and unconstitutionally vague "Silly Putty®" laws, which can be stretched to pick up anyone the government does not like;[13] entirely nonexistent offenses;[14] and physical torture and written death threats.[15]

These tricks have doubtless been effective in achieving mass incarceration and factory justice and are perennial favorites for politicians who want to appear tough on crime. Still, they run afoul of some basic values such as the presumption of innocence[16] and the reasonable doubt standard[17]. Despite popular assumption, the guilty pleas they force are not reliable indicators of guilt.[18]

The United States imprisons between five and ten times the percentage of its population as other Western countries.[20] Reason indicates that either (1) people in the United States are five to ten times more criminal than average, or (2) the overwhelming majority of prisoners in the United States do not belong in prison. Either way, the status quo is wrong is desperately in need of a change.

Collateral attack does not directly deal with guilt or innocence, but it is the only effective chance most innocent prisoners have. The need for the remedy of collateral attack is more urgent than ever.

However, the Supreme Court has made collateral attack more and more difficult[21] since the middle of the 1980s. If that weren't enough, the misleadingly named Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 dealt collateral attack an almost killing blow.[22] It was passed by a bipartisan coalition in which President Bill Clinton was prominent.[23]

Unfortunately for justice, the constitution of the United States only prevents <u>suspending</u> habeas corpus. Article I Section 9 states,

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The constitution apparently does not prevent gutting habeas corpus, which is more like what the AEDPA does. The problematic provisions have nothing whatsoever to do with terrorism and little to do with the death penalty. They impose a one-year limitation for the first collateral attack[24] and make it much more difficult to mount a second or successive attack[25].

One year is simply not enough time for a prisoner untutored in the law to learn how successfully to navigate the "procedural thicket" of collateral attack.[26] Even before the AEDPA, some judges viewed the process as a "Catch-22."[27] The AEDPA, which the Supreme Court has compared to a pig's ear,[28] has made matters much worse.

To ensure wrongful convictions stick, all the government has to do is keep prisoners from filing for one year. After a year, barring extremely unusual circumstances, the government is safe, no matter how innocent the prisoner or how egregious the violations. This is quite easy to do, and prisons employ a variety of tactics even more sophisticated than the ones prosecutors and police use to force convictions.[29]

All of this could be fixed or at least ameliorated with simple legislation. The power of the legislature is clear with respect to the AEDPA; a law that can be passed can be repealed. In addition, many of the problems with the courts, who seek to prevent justice with procedural defaults and other tricks,[30] can also be fixed by means of legislation.

All that is required is that the people of the United States reverse a trend of three decades of apathy and automatically voting for former prosecutors and other politicians who promise to be "tough on crime" and choose to care about justice. If this can ever happen, restoring collateral attack would be a good place to start.

This may be easier said than done. When I told fellow prisoners I was writing this essay, they all laughed derisively. They all knew that it is straightforward to figure out what to do. The problem is getting anybody to care.

My experience is quite consistent with this observation. I have written over 1000 letters to hundreds of journalists and

organizations, with very little response. The few in the United States who do care are generally overwhelmed, because nobody else helps them.[31]

I do not know how to solve the problem of apathy in the United States, but I will continue trying. For now, I can only imagine that there exist people like me still in what I laughingly call the free world, people who are willing to speak up for civil and human rights but are not sure what to do.[32]

In my view, if it were ever possible to summon political will, the first step would be to eliminate the time limit of one year and the excessive restrictions on second or successive collateral attacks. This is a matter of simple legislation, undoing what the AEDPA did and continues to do.

One potential objection is that it would result in an increase in the number of applications. This, of course, is quite true, but that is how it should be. Prisons are not supposed to be dumping grounds for those the government dislikes and wants to oppress for political reasons. The status quo is certainly not what the Founders intended.[33] The courts are supposed to put a brake on mass incarceration.[34]

Restoring the independence of and the balance between the three branches of government will, indeed, take time, money, and effort. This is no reason not to do it. Nor is the present system free of cost. Even without considering the cost in terms of lives, in 2017, each prisoner cost, on average, about $36,000 per year to imprison.[35] Social costs are doubtless much higher.

The penny-wise and pound-foolish arguments smack of rationalization rather than reason. Abuses that would and do elicit howls of outrage and talk of sanctions when they happen in North Korea, Iran, or Russia, are business as usual when perpetrated by Uncle Sam in the land of the free and the home of the brave. The people of the United States seem nearly wholly unmoved.

Simply fixing what the AEDPA damaged would, of course, not fix every problem. There are still innumerable abuses by the courts, police, and prosecutors at every level, especially in the federal government. That, however, is beyond the scope of this paper.

Undoing the AEDPA would be a good start to bringing back collateral attack in the United States. This in turn would be a good start to bringing back justice, which after all is part of what the constitution was intended to do. It would not only free many wrongfully imprisoned people but would also bring to light many lawless prosecutorial and police practices that have previously mostly been ignored.

Endnotes

[1]"[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant." Herrera v. Collins, 506 US 390, 416 (1993). Quite a lot has changed over the past quarter century.

[2]"Call it a motion for a new trial, arrest of judgment, mandamus, audita querela, certiorari, capias, habeas corpus, ejectment, quere impedit, bill of review, writ of error, or an application for a Get-Out-of-Jail card; the name makes no difference. It is substance that controls." Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004).

[3]The name is from the fact that the court's writ is served on the jailer asking for the prisoner in body. There are several kinds of habeas corpus; this essay is only concerned with the form the term is most often used to express, which is habeas corpus ad subjiciendum, for the purposes of collateral attack after conviction. Habeas corpus can also be used to challenge the detention of someone before conviction or even without charge, see Boumediene v. Bush, 533 US 723 (2008). There is also habeas corpus ad testificandum, which is used to order the delivery of a detainee or prisoner for the purpose of testifying before court.

[4]"Habeas Corpus," The New Encyclopædia Britannica, Micropædia Volume 5, Chicago: Encyclopædia Britannica, Inc. 2010. Also see Ex parte Yerger, 8 Wall 84 (1869), which also states, "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defense of personal freedom." at 95.

[5]The Constitution of the United States of America, Article I, Section 9. Otherwise, the body of the constitution mentions no rights and few principles of law. The reasonable conclusion is that the Founders considered habeas corpus rather important.

[6]This seems to have changed some time between Frank v. Magnum, 237 US 309 (1915) and Moore v. Dempsey, 261 US 86 (1923). Both cases involved convictions resulting from racist pressure on the jury. Frank was Jewish, was denied relief, and was later lynched, all of which led to the recrudescence of the Ku Klux Klan. Moore et. al. were black and were correctly granted relief. See Dershowitz,

Alan, Trials of the Century, from the early 2000s. Better to hear it than see it, as the compact discs contain excellent material not in the accompanying short book.

[7]Hertz, Randy and Liebman, James S., Federal Habeas Corpus Practice and Procedure, §2.4, New Providence: Matthew Bender & Co., 2017.

[8]"The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 US 286, 290-91 (1968).

[9]"[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Lafler v. Cooper, 566 US 156, 182 L.Ed.2d 398, 411 (2012). Also see Yoffe, Emily, "Innocence is Irrelevant," The Atlantic, Sept. 2017.

[10]"Astute observers of the federal criminal justice system have long since given up believing that the guilty plea reveals true culpability. It's all too common for such pleas to be the product of risk avoidance at the expense of truth." Silverglate, Harvey A., Three Felonies a Day: How the Feds Target the Innocent, p. XIX, New York: Encounter Books 2011.

[11]Leo, Richard A., "The Whole Truth" an interview with Mark Leviton," The Sun, Issue 499, July 2017.

[12]United States v. Reedy, 395 US 286, 290-291 (9th Cir. 2002) shows Thomas Reedy receiving a sentence of 1335 years for running a credit card verification service for websites. It claims that some of the products sold by the websites were illegal. One wonders, given that the credit card verifier was sentenced to five times the age of the country, what those who actually sold the products must have gotten. In any event, it seems doubtful that Reedy thought, "whew! I'm glad they didn't give me 1400, because that would have been bad!" Sentences have become so obscene as to lose any meaning except as threats to shock the accused into pleading guilty.

[13]Silverglate, op. cit. p. 220. "Silly Putty®" is his coinage.

[14]Powell, Sidney, Licensed to Lie: Exposing Corruption in the Department of Justice, Dallas: Brown Books Publishing Group, 2014. See also Silverglate, op. cit. Chapter 5.

[15]Pepke, Eric, "Dead Man," Dead Man's Switch, Washington DC: PrisonsFoundation.org, 2019. It wasn't until well after I arrived in prison that I discovered "torture" was the proper legal term for extended sleep deprivation. "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." Ashcraft v. Tennessee, 322 US 143-174, 174 n. 6 (1944). Ashcraft was only kept awake for

36 hours straight. I can tell you from personal experience that 500 continuous hours is much more effective. It was only a year later that I made significant recovery, just in time for my certiorari.

[16]"The law presumes innocence;" Cannon v. United States, 116 US 55, 69 (1885).

[17]"The reasonable doubt standard in a criminal case was bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re. Samuel Winship, 379 US 358, 375 (1970). Alan Dershowitz argues convincingly in Trials of the Century that people in the United States do not really believe in this idea.

[18]"This is not to say that guilty plea convictions hold no hazards for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do do, whether conviction is by plea or by trial." Brady v. United States, 397 US 742, 757-58 (1970). Since 1970, the rate of guilty pleas has increased dramatically, and the courts appear to be not nearly as careful. See Leo, op. cit.

[19]"Criminologists estimate that between 2 and 8 percent of convicted felons—from 40,000 to 160,000 people—are innocent of the crimes to which they pleaded guilty according to federal judge Jed S. Raboff." Goldet, Antoine, "Why Did This Innocent Man Plead Guilty?" Reader's Digest, June 2017, p. 120, originally from Reveal.

[20]"The United States has the highest incarceration in the world, 677 inmates per 100,000 people according to the United Nations Office on Drugs and Crime. [] Norway's incarceration rate is 80 inmates per 100,000 people." Beyer, Rebecca, Prison Law Blog, October 18, 2017. Since then, the Bureau of Prisons has banned the Prison Law Blog, preventing prisoners from obtaining information like this. Prison Legal News, producers of the blog, have some experience challenging such bans, see Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005), but the process is costly and takes years. The federal government with practically unlimited resources wages a constant war against the First Amendment, preventing prisoners from obtaining the information they need to challenge illegal convictions and conditions. See also Alexander, Michelle, The New Jim Crow, New York: The New Press (2012).

[21]"[T]he complexity of this [Supreme] Court's habeas corpus jurisprudence—a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure." Edwards v. Carpenter, 529 US 446, 454 (2000).

[22]"AEDPA, enacted at the crest of the shock wave set off by the Oklahoma City bombing, reflected a passion-fueled, extreme, and not well thought out form of habeas corpus bashing. It overshot by a considerable margin the habeas-curbing doctrines that the

Supreme Court had been developing progressively, though controversially, case-by-case since the mid 1980's." Amsterdam, Anthony, forward to Hertz and Liebman, op. cit.

[23]Though it is tempting for some to believe that President Bill Clinton was forced into a corner by a conservative Congress, not only was 1996 a bit early, but by all accounts Clinton was enthusiastic about this "habeas corpus bashing." In his Statement By the President on April 24, 1996, he said, "as strong as this bill is, it should have been stronger" and "[t]his is no time to give criminals a break." Disdain for the constitution and a concommitant desire to prevent justice is clearly bipartisan.

[24]28 U.S.C. §§2244(d)(1) and 2255(f).

[25]28 U.S.C. §2244(a), 2244(b)(2), and 2255(h).

[26]Nowaczyk v. Warden, 299 F.3d 69 (1st Cir. 2002).

[27]"What a marvelous Catch-22 the law of federal habeas corpus now is!" Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991) (dissent).

[28]"All we can say is that in a world of silk purses and pig's ears, the [AEDPA] act is not a silk purse of the art of statutory drafting." Lindh v. Murphy, 521 US 320, 336 (1997).

[29]The means by which jail and prison staff enfeeble prisoners would take an entire book at minimum to explore. It is truly multifarious, and my experience is that it is overwhelmingly effective. Fewer than 5% of prisoners ever even think to challenge even the worst aspects of their imprisonment, let alone their imprisonment itself, no matter how worthy their cases. This prison, the Petersburg Low-Security compound, has about a dozen library computers to serve a thousand prisoners. These are the only official way to obtain legal information. Only twice have I ever seen every computer in use at once.

[30]"[F]ar too often in recent years, concern for efficiency and procedure has overshadowed concern for basic fairness, and has transformed our fidelity to 'process' into an undue obsession with formalism and technicalities. In short, a concern for procedure has far too often obscured or eclipsed the equally important if not greater role to be played by our dedication to justice. It was, after all, in order 'to establish justice' that our Constitution was written. [U.S. CONST] pmbl. Phelps' case represents the epitome of our obsession with form over substance [] Over eleven years ago, a man came to federal court and told a federal judge that he was being unlawfully imprisoned in violation of the rights guaranteed to him by the Constitution of the United States. More than eleven years later, not a single federal judge has ever once been allowed to seek to discover whether that claim is true." Phelps v. Alameida, 569 F.3d 1120, 1141 (9th Cir. 2009).

[31]Pepke, "Attempts to Write the Press" pp. 17-19 and "Results from Letters to Organizations" pp. 20-22, op. cit. I have written a great deal more since that was published. Results from the press remain nugatory. Responses from organizations have improved only slightly, to about 15%. Results from authors, academics, artists, and people quoted in articles are nonexistent.

[32]I know from experience that the federal government of the United States targets political critics and tortures them into pleading guilty to bogus charges, because that is what the government did to me. That fact is bad enough, but my experience that hardly anybody cares is too much to bear, compared to which imprisonment is a minor inconvenience. I don't expect people to care about me, but it is extremely troubling that they do not care about themselves. I once expected that at least one member of the press would be interested in a threat to them, but there has been no response. Of course, perhaps the mail is so censored that none got any, but I have never seen a news article about prison censoring mail, so the upshot is the same: they don't care. I have tried every way I can think of to avoid this conclusion without success.

[33]"On at least one point, most criminologists agree with [Roger Roots]: no one can say for sure whether the Founders would have approved of modern policing, but it's relatively certain that they wouldn't have recognized it." Balko, Radley, Rise of the Warrior Cop: The Militarization of America's Police Forces, p. X, New York: Public Affairs, 2014.

[34]"Our system of checks and balances depends on a vigorous judiciary and legislature serving as a brake on excessive prosecutorial zeal." Dershowitz, Alan, foreward to Silverglate op cit., p. XXXVI.

[35]Federal Register, Vol. 83 No. 83, April 30, 2018 p. 18663 reports the cartoonishly precise figure of $36,299.25 for Fiscal Year 2017.