THE PROMISE OF *HABEAS CORPUS* POST-*VAVILOV*: THE PRINCIPLE OF LEGALITY

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This paper evaluates the status of habeas corpus after the Supreme Court's decision in Vavilov from the perspective of the principle of legality. It suggests that while Vavilov should change how habeas corpus applications are reviewed, some courts post-Vavilov are not exploring these options. Instead, some courts are simply referring to the pre-Vavilov state of the law, which focuses on the presumed expertise of prison decision-makers. Renewing the promise of habeas corpus, post-Vavilov, will ask courts to re-evaluate the model of carceral expertise they have constructed.

L'auteur de cet article évalue où en est l'habeas corpus, du point de vue du principe de la légalité, après l'arrêt Vavilov rendu par la Cour suprême. Il fait observer que l'arrêt Vavilov est censé influer sur l'examen des demandes d'ordonnance d'habeas corpus, mais que certains tribunaux ne tiennent pas compte des avenues qu'il prescrit et se contentent de l'état du droit d'avant Vavilov, où l'on fonde l'analyse sur l'expertise présumée des décideurs des établissements carcéraux. Renouveler la promesse du principe d'habeas corpus après Vavilov exige des tribunaux qu'ils réévaluent le modèle d'expertise carcérale qu'ils ont établi.

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1. Introduction

Known as the "Great Writ of Liberty,"[1] *habeas corpus* has a deep constitutional vintage in Canada. From the *Magna Carta*, to the *Petition of Right, 1628,* all the way to the *Charter of Rights and Freedoms*, *habeas corpus* is part of Canada's constitutional fabric, and is likely the "strongest tool" for prisoners to challenge unlawful deprivations of liberty.[2] And yet the doctrine of *habeas corpus* is not aligned with its constitutional promise. Deviations from the simple promise of *habeas corpus* have always plagued the writ.[3] From the concept of "civil death" which deprived prisoners of the right to seek review of internal prison decisions,[4] to technical hurdles involved in invoking the writ, *habeas corpus*' promise has not always been achieved.

Judicial tinkering with the scope and intensity of the standard of review has arguably made matters worse. Despite the writ's deep connection to the Rule of Law,[5] which may raise constitutional concerns warranting arguments for correctness review, *Mission Institution v Khela* held that the deferential standard of reasonableness applied to *habeas corpus* cases, meaning a substantively unreasonable decision will be unlawful.[6] For the Court, deference is proper because of a worry that courts could micromanage prisons,[7] and because decisions subject to *habeas corpus* implicate the "knowledge" and "related practical experience" of prison officials.[8] These generalized assumptions of expertise have long defined judicial reticence to intervene in prison decisions despite the repression

1 *May v Ferndale Institution*, 2005 SCC 82 at para 19.

2 *Mission Institution v Khela*, 2014 SCC 24 at para 29 [*Khela*]. *Habeas corpus* is explicitly protected under s 10(c) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 See e.g. Thomas Cromwell, "*Habeas Corpus* and Correctional Law—An Introduction" (1977) 3 Queen's LJ 295.

4 Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 47–50.

5 Cromwell, *supra* note 3 at 295: "*Habeas corpus* has long been regarded as a symbol of the rule of law. The writ and the Superior Courts which issue it stand between the subject and those who would withdraw his liberty."

6 *Khela, supra* note 2 at para 3.

7 See e.g. *ibid* at para 75.

8 *Ibid* at para 76.

of imprisonment.[9] As some scholars have argued, the endorsement of expertise as a grounding principle dilutes the legal role of *habeas corpus*, calling to mind the legacy of civil death—an in-practice restriction on judicial review, at least in theory.[10]

The Supreme Court recently revisited the entire standard of review framework that applies to all administrative decisions, including *habeas corpus* applications,[11] in *Canada (Minister of Citizenship and Immigration v Vavilov*.[12] *Vavilov*, among other things, settled two aspects of the standard of review controversy. First, it clarified that all administrative decisions are presumptively reviewed on a reasonableness standard,[13] the theoretical justification for which is the legislative delegation of power to the decision-maker.[14] Under this standard, the reasons—or lack thereof—for a decision will be central in a renewed "culture of justification" for administrative decision-making.[15] Part of this culture of justification will require a "heightened responsibility on the part of administrative decision makers" to ensure their reasons are properly responsive to "particularly harsh consequences."[16] Relatedly, and importantly, expertise does not necessarily "inhere" in decision-makers as "institutions."[17] But it is not irrelevant. Under the deferential standard of reasonableness, the court must be sensitive to the "demonstration" of expertise, which may concern the "practical realities" of an administrative setting and the "operational impact" of administrative decisions.[18] In the context of *habeas corpus*, this opens the door to continued application of notions of carceral expertise. Secondly, the presumption of reasonableness review is rebuttable. In

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9 Adelina Iftene, *Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries* (Toronto: University of Toronto Press, 2019) at 160 *et seq* (concluding that "… the history of judicial review is one of very high deference to correctional authorities").

10 Debra Parkes, "The Great Writ Reinvigorated: *Habeas Corpus* in Contemporary Canada" (2012) 36:1 Man LJ 351 at 353, linking civil death to the "hands-off" doctrine of deference.

11 See *Khela, supra* note 2, at para 73 (tying the administrative law standards of review to the standards applicable on *habeas corpus*). See also Ian C Davis, "Taking Prisoners' Rights Seriously on Substantive *Habeas corpus* Review" (2019) 8:1 Can J Human Rights 29.

12 *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

13 *Ibid* at para 23.

14 *Ibid* at para 30.

15 See e.g. *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 41 per Justice Rowe, describing the *Vavilov* approach as a "reasons first" approach; *Vavilov*, *supra* note 12 at para 2, describing the "culture of justification."

16 *Vavilov, supra* note 12 at paras 133–35.

17 *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 33 [*Edmonton (City)*].

18 *Vavilov*, *supra* note 12 at para 93.

certain cases, the rule of law will require "a singular, determinate and final answer to the question before it."[19] This is so especially on "constitutional questions" as defined by the *Vavilov* majority.[20]

All these changes invite us to reconsider the position of *habeas corpus* in the battery of administrative law doctrines and remedies, suggesting a potentially different approach to the concept of administrative "expertise" in prison decision-making, where the institution may, by nature, reject legal constraints.[21] This paper reviews the status of *habeas corpus* post-*Vavilov*, and suggests that—as far as it goes—*Vavilov* could change the way *habeas corpus* operates in a way that better prioritizes the principle of legality. Legality, understood broadly, is a principle that asks courts and administrators to understand and take seriously limits on administrative power, set out in statute, the Constitution, and other sources of authority.[22] The standard of review framework set out in *Vavilov* is the way the principle of legality is upheld by courts, with its restrictions tightening and loosening based on a number of contextual constraints.[23]

Vavilov embraces a more robust version of legality. This is mostly owing to the rise of justification as a way to properly facilitate judicial review,[24] the *Vavilov* Court's focus on preventing arbitrary administrative power affecting vulnerable people, and the downgrading of expertise as a

19 *Ibid* at para 32.

20 *Ibid* at para 55. As we shall see, the Court expressly excepted *Doré v Barreau du Quebec*, 2012 SCC 12 [*Doré*]. That approach applies a reasonableness standard of review to "adjudicated decisions" that implicate *Charter* rights, rather than laws that do so: see *Doré*, at paras 3–5.

21 Much has been written about the "natural drift" of corrections policy towards "callousness at best and brutality at worst": see Mary Campbell, "Revolution and Counter-Revolution in Canadian Prisoners' Rights" (1997) 2 CCLR 285.

22 I will explore more below the idea of legality.

23 *Vavilov, supra* note 12 at para 90:

> The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

24 See Janina Boughey, "The Culture of Justification in Administrative Law: Rationales and Consequences" (2021) 54:2 UBC L Rev 403 at 417 (where the author describes one of the purposes of the culture of justification as facilitating judicial review:

presumptive factor leading to deference.[25] However, there is a distinct risk that, in some cases, courts are still relying on undemonstrated notions of "expertise" in assessing *habeas corpus* applications, which could have the effect of undermining the judicial ability to enforce this writ. Specifically, while expertise does remain a relevant factor in applying the standard of review, some courts are still speaking in presumptive language about prison expertise and processes, eschewing a stronger role for the court on *habeas corpus* review. This conclusion highlights the need to renew the commitment, in administrative law, to some requirement of legality, understood as an ideal constraining—rather than liberating— arbitrary and discretionary power.[26] This is especially so in "total institutions" like a prison.[27]

In Part I, I review the basics of *habeas corpus*. *Habeas corpus* has two features relevant for this paper: (1) it is deeply related to constitutional values and is expressly protected in the *Charter*; and (2) its technical structure, and its now-routine pairing with "*certiorari*-in-aid,"[28] suggests that courts should look to the entire record, evidence, and reasons to determine the legality of a decision on *habeas corpus* review. These two features suggest a certain posture on *habeas corpus* review, yet this posture deviates from the *status quo* endorsed in *Khela*, which merely assumes expertise at the outset. Indeed, *Khela* is similar, though not the same, to a theory called "administrative constitutionalism," under which administrative decision-makers are given meaningful policy space by

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"Reasons are necessary for reviewing courts to fulfill their task of determining whether an administrative decision is lawful and to show that an administrative decision is reasonable").

25 The presumptive deferential approach was criticized by prominent observers: see The Honourable Justice David Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016) 42:1 Queen's LJ 27 at 32; Joseph T Robertson, "Administrative Deference: The Canadian Doctrine That Continues to Disappoint" (2018), online: *Canadian Legal Information Institute* <https://canlii.ca/t/stvr> at 26–27.

26 The idea of legality is a complex one, which I will define for my purposes below. For now, consider Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State" in Colleen Flood & Lorne Sossin, eds, *Administrative Law in Context,* 1st ed (Toronto: Emond Montgomery Publishing, 2008) 77 at 80:

> The import of the principle of legality for the rule of law is that it conveys the basic intuition that law should always authorize the use of public power and constrain the risk of the arbitrary use of public power. The principle of legality restrains arbitrary power in three ways: first, it constrains the actions of public officials; second, it regulates the activity of law-making; and third, it seeks to minimize harms that may be created by law itself.

27 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York, NY: Anchor, 1961) at xiii.

28 Cromwell, *supra* note 3 at 319. See also Davis, *supra* note 11 at 35.

courts to make constitutional decisions arising in their policy ambit.[29] As we shall see, whatever the merits or demerits of administrative constitutionalism, there is a risk that in empowering prison officials to generate constitutional norms, they may end up displacing those norms—in a world of deference, without meaningful justification requirements, it is distinctly possible that an administrator could "displace" rights in favour of loosely-defined bureaucratic aims.[30]

In Part II, I demonstrate two ways in which *Vavilov* reverses the situation so that legality should have more force in the *habeas corpus* context. I specifically focus on *Vavilov*'s rehabilitation of the reasonableness standard, and its focus on demonstrated expertise and justification as the lynchpin of legitimacy. Specifically, courts now should focus on how a prison decision-maker reasons in relation to, among other things: (1) the constitutionally-infused stakes to the prisoner; (2) the key evidence justifying the deprivation of liberty; and (3) while "carceral logics" inevitably reject justification as a general norm,[31] *habeas corpus* does remain an important tool for prisoners to challenge state action.

In Part III, I present findings from a review of post-*Vavilov habeas corpus* cases. The case set I review show that at least some courts are not fully employing *Vavilov*'s tools in the context of *habeas corpus* cases. Some courts, however, are. In other words, at least some courts are not heeding *Vavilov*'s teachings on the importance of subjecting administrative power to the different standards expressed in that case.

In Part IV, I consider some speculative reasons why administrative law standards are just one piece of the puzzle in ensuring legality in the administrative state, particularly in "total institutions." When courts fail, as

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29 See e.g. Gillian Metzger, "Administrative Constitutionalism" (2013) 91:7 Tex L Rev 1897 at 1900; Matthew Lewans, "Administrative Constitutionalism and the Unity of Public Law" (2018) 55:2 Osgoode Hall LJ 515; Rosalie Silberman Abella & Teagan Markin, "Thinking about Administrative Law in Canada: From Doctrine to Principle" in Simon Mount and Max Harris, eds, *The Promise of Law: Essays Marking the Retirement of Dame Sian Elias as Chief Justice of New Zealand* (Auckland, NZ: LexisNexis, 2019) 271 at 299 ("administrative bodies have the authority and expertise to interpret and apply … legal constraints" "supplied by the *Charter*").

30 See e.g. Blake Emerson, "Executive (Administrative State)" in *Cambridge Handbook of Constitutional Theory*, forthcoming 2022, at 1, where the author describes three models of constitutional "decision-making" by administrators: (1) implementing existing constitutional norms; (2) generating new constitutional norms; (3) displacing existing constitutional norms.

31 See Sheila Wildeman, "Habeas Corpus Unbound" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery, 2021) 457 at 461.

they sometimes do, to subject review of deprivations of liberty to the proper scrutiny—relying on broad-based, unproven assumptions of "expertise"—they permit the potential prioritization of bureaucratic exigency over the rights of prisoners. Indeed, this is what is essentially captured by the deferential posture asserted by administrative constitutionalists. While judicial doctrine cannot be the sole answer for ensuring legality, it is an essential tool—especially in the *habeas corpus* context—for prisoners.

As Sheila Wildeman aptly writes, "[p]rison is the administrative state in miniature."[32] The place of *habeas corpus* post-*Vavilov* is just a small reminder of the broader point: the administrative state encapsulates the carceral state, where "law is most apt to take expression as violence: strip searches, 'pain compliance,' use of weapons, solitary confinement and more."[33] This should not be forgotten. While the judicial role on review is a necessarily incomplete focus for ensuring legality in any setting,[34] especially Canadian prisons, these standards are still necessary to expose carceral decision-making to some element of external monitoring.

2. Part I: The Bases Of *Habeas Corpus* And *Vavilov*

A) *Habeas Corpus* and Legality

The practical reality of the "lawless agency"[35] of the modern carceral state is disturbing: there may be plenty of rules, but the Rule of Law struggles to find a home.[36] For this reason alone, *habeas corpus* remains practically important, and it matters how courts conduct review of deprivations of liberty. As we shall see, *habeas corpus* is concerned with the reach of legality in a regime that may otherwise resist it.

Legality—as a component of the broader ideal of the rule of law— is a contested principle,[37] but at the very least it connotes a desire to constrain

32 *Ibid* at 457.

33 *Ibid* at 457–58.

34 A recurring theme throughout will be my insistence that the principle of legality cannot be secured through external review alone.

35 See David Greenberg & Fay Stender, "The Prison as a Lawless Agency" (1972) 21 Buff L Rev 799.

36 This paraphrases the line from Justice Arbour's important report: Solicitor General of Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 189.

37 Like the rule of law, the ideal of legality may be "essentially contested": see Jeremy Waldron, "The Rule of Law as an Essentially Contested Concept" (2021) Public Law and Legal Theory Research Paper Series, Working Paper No 21-15.

the arbitrary exercise of power by public officials.[38] Arbitrariness comes in many forms, but there is always a risk that decision-makers can render decisions based on "mere opinion, preference, stereotyping, or negative discrimination."[39] The goal of legality is to secure compliance with the law governing the exercise of discretion, to the extent possible.[40] Achieving "legality" as some stable position is not the goal of the principle. Rather, legality is best identified as an ideal, or a promise, and different combinations of institutional mechanisms can better achieve it. In other words, there is no practical "utopia of legality"—the principle is, at its best, a guide to the legal craftsperson and institutional designer for how best to secure compliance with certain defined legal standards.[41]

Legality is, as Raz argued, a necessary but not sufficient condition for a just society—nor is it the only measure of an administrative justice system.[42] To be more even more specific, legality is not the measure of the normative *justice* of imprisonment as a punishment technology. This does not mean that the idea of legality is worthless for those seeking recourse in the face of oppressive institutions.[43] In other words, legality advances principles other than just the very fact of securing compliance with law.[44] Securing compliance with law achieves a number of important goals: most practically, the principle of legality provides recourse against the particular evil of arbitrary power exercised by personal whim, an ever-present reality when powers are delegated,[45] especially in closed institutions "administered according to their own logic and preferences."[46] This worry is exacerbated

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38 See Mary Liston, "Everything You Always Wanted to Know About the Rule of Law but Were Afraid to Ask In Class" in Colleen M Flood & Paul Daly, eds, *Administrative Law In Context*, 4th ed (Toronto: Emond Montgomery, 2021) 71 at 79.

39 *Ibid* at 80.

40 Simon Halliday, *Judicial Review and Compliance with Administrative Law* (Oxford: Hart Publishing, 2004) at 8.

41 See Lon L Fuller, *The Morality of Law* (New Haven, Conn: Yale University Press, 1964) at 43.

42 Joseph Raz, "The Rule of Law and its Virtue" in *The Authority of Law: Essays on Law and Morality* (Oxford: Claredon Press, 1979) 211 at 211 [Raz, "Rule of Law"].

43 Waldron, *supra* note 37 at 2, who does not view the contestedness of the rule of law principle (which encompasses legality) as fatal to the project of subjecting government officials to law. For him, it is "a way of showing how the heritage of disputation associated with [the principle of legality] enriches and promotes some or all of the purposes for which the rule of law is cited in political and legal argument."

44 See Halliday, *supra* note 40 at 12.

45 See Andrew Green, "Delegation and Consultation: How the Administrative State Functions and the Importance of Rules" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context*, 4th ed (Toronto: Emond Montgomery, 2022) 103 at 109, outlining the risks associated with the delegation of power.

46 Lisa Kerr, "Easy Prisoner Cases" (2015) 71 SCLR (2d) 235 at 243 [Kerr, "Easy Prisoner Cases"].

in Canadian prison decision-making, where judicial oversight is viewed with suspicion,[47] courts have historically granted extensive deference, and decisions are evasive of review.[48]

Constraint—as opposed to absolute curtailment, which is impossible and perhaps undesirable—of arbitrary decisions can be accomplished through any number of institutional means, but "structuring"[49] discretion is typically done through a general hierarchy of law, statutes, the common law, internal administrative practice and procedure, and perhaps most importantly, the Constitution itself. The constraints of legality bind in particular ways in the administrative state, of which the prison system is a part. Administrative decision-makers are enabled by statutory power, but they are also limited by it, and the hierarchy of laws more broadly, which includes written and unwritten constitutional limits.[50] The basic idea of legality, as Raz argued, is directed "primarily at the judiciary and other subordinate legal institutions such as the police, prosecution service and administrative authorities."[51] This "unimpeachable" idea was put forward well by Justice Beetz in *Bibeault*: "… any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions."[52]

Noting that legality connotes constraint leaves many important questions unanswered. As Raz himself noted, the institutional apparatus designed to promote legality is an important condition for it to exist.[53] There are any number of institutional innovations that can promote legality, and some which can undermine it, but the literature has historically focused on "internal" and "external" controls on administration.[54] Internal controls might be the "processes, guidelines, and policy issuances that an administrative agency adopts to structure the actions of its own

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47 See Debra Parkes & Kim Pate, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48 Can J Corr 251 at 277 (proposing an approach that prioritizes the role of courts "operating alongside and in addition to effective first-instance and pro-active processes").

48 As acknowledged by the Federal Court of Appeal in *Sharif v Canada (Attorney General),* 2018 FCA 205 at para 30 [*Sharif*].

49 KC Davis, *Discretionary Justice: A Preliminary Inquiry* (Chicago: University of Illinois Press, 1977) at 24.

50 See e.g. *Canada (Attorney General) v Utah*, 2020 FCA 224 at para 28.

51 Joseph Raz, "The Politics of the Rule of Law" (1990) 3 Ratio Juris 331 at 335 [Raz, "Politics"].

52 *UES, Local 298 v Bibeault*, [1988] 2 SCR 1048 at 1086, 35 Admin LR 153.

53 Raz, "Rule of Law", *supra* note 42 at 216–17.

54 In the American context, this division was famously adopted by the early work of Bruce Wyman. See Bruce Wyman, *The Principles of the Administrative Law Governing the Relations of Public Officers* (Sydney, Austl: Wentworth Press, 2016), s 4 at 14.

officials"[55] as well as "organizational forms agencies adopt to govern their own operations."[56] These internal controls, provided they are infused and designed with legality in mind, can influence front-line officials.[57] On the other hand, external controls refer to institutional channels that regulate the relationship between citizen and state.[58] Judicial review is one such external control, and it is historically expressed through the prerogative writs, such as *habeas corpus*. In this sense, *habeas corpus* is one particularly important tool in service of legality, and the extent to which its power is guaranteed is deeply related to legality. Particularly in the carceral state, leading scholars have prioritized the importance of external review as an integral part of any suite of institutional reforms.[59]

But the courts as a symbol of legality for prisoners have often been more fantasy than reality, and this illustrates the inherent limits—both inherently and as-designed—with doctrine of judicial review. This is because, for generations, courts took an explicitly "hands-off" approach to review of prison decisions.[60] They did so at first based on concerns about jurisdiction and the role of prisons, notably the idea that because prisoners suffer "civil death" upon imprisonment, they have no rights to assert in court.[61] Deference later developed on the basis of an unquestioned assumption of penal expertise, with courts viewing themselves as a "necessarily amateur outsider at risk of 'micromanagement.'"[62] The result, either through the doctrine of civil death or the assumption of expertise, is a fundamental dilution of the judicial-external control of carceral discretion. In this way, there are still these "traces of the old ways" that reinforce the "deep structure to judicial deference to penal institutions."[63] To the extent this is built-in to the very enterprise of penal institutions, *habeas corpus* is only one tool in the broader array of weapons to secure compliance with law.

55 Gillian E Metzger & Kevin M Stack, "Internal Administrative Law" (2017) 115:8 Mich L Rev 1239 at 1248.

56 *Ibid* at 1253.

57 Halliday, *supra* note 40 at 53.

58 See Wyman, *supra* note 54, s 2 at 4.

59 See e.g. Jeremy Patrick, "Creating a Federal Inmate Grievance Tribunal" (2006) 48 Can J Corr 287 at 288–89.

60 For a description of the doctrine in the United States, which largely dovetails with its operation in Canada, see "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts" (1963) 72 Yale LJ 506. For an application of the doctrine in Canada, see Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43 at 51, 58 [Kerr, "Contesting Expertise"].

61 See Kerr, "Contesting Expertise," *supra* note 60 at 59.

62 Kerr, "Easy Prisoner Cases", *supra* note 46 at 260.

63 Kerr, "Contesting Expertise", *supra* note 60 at 55.

The modern formulation of *habeas corpus*, and the continued embrace of an assumption of expertise, was confirmed most recently in *Khela*. To issue the writ, there is a three-step test, stated in *Khela*:

> To be successful, an application for *habeas corpus* must satisfy the following criteria. First, the applicant must establish that he or she has been deprived of liberty. Once a deprivation of liberty is proven, the applicant must raise a legitimate ground upon which to question its legality. If the applicant has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful.[64]

The standard of review issue comes into play when a court faces the third step of the test. There are two aspects of this prong of the test that are relevant. First, *Khela* merged the definition of substantive "lawfulness" for *habeas corpus* purposes with the definition of reasonableness in administrative law.[65] In *Khela*, the Court held that an assessment for reasonableness—in the administrative law sense—is available on *habeas corpus* review.[66] If a decision is unreasonable, it will be unlawful and the writ should issue.[67] The definition of lawfulness for the purposes of *habeas corpus* is inextricably connected to what "reasonableness" means in administrative law, on the substance of the application.[68]

Second, in applying the third prong of the test, the Court in *Khela* stressed a sort of "epistemic deference"[69] based primarily on a decision-maker's "expertise in the environment of a particular penitentiary."[70] For the Court, ignoring this purported reality could lead to "micromanagement of prisons by the courts."[71] The Court essentially reaffirmed, in the *habeas corpus* context, the long line of deference afforded to prison decisions based on the "unquestioned expertise of prison officials."[72]

This epistemic deference can be usefully compared to the deference endorsed in *Doré v Barreau du Quebec*, as both cases concern constitutional

64 *Khela*, *supra* note 2 at para 30 [footnotes omitted].

65 See e.g. Kerr, "Easy Prisoner Cases" *supra* note 46 at 253.

66 *Khela, supra* note 2 at para 72.

67 *Ibid* at para 73.

68 *Ibid* at paras 72–73, where the Court defines unlawfulness with respect to the then-governing test for reasonableness under *Dunsmuir v New Brunswick*, 2008 SCC 9.

69 See generally Paul Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge, UK: Cambridge University Press, 2012) at 7–35.

70 *Khela*, *supra* note 2 at para 75.

71 *Ibid.*

72 Kerr, "Contesting Expertise," *supra* note 60 at 48.

issues in the abstract.[73] In that case, the Supreme Court concluded that deference was owed to decision-makers exercising discretion that implicates *Charter* rights.[74] This is because of a presumption of expertise, the same sort that underpins *Khela* and the "hands-off" era: "[a]n administrative decision-maker exercising a discretionary power under his or her home statute has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values."[75] In part relying on the experience of the Parole Board in dealing with constitutional rights,[76] the Court was convinced that the policy implications of a statute—with which a decision-maker will be familiar—are directly relevant to dealing with a *Charter* issue. Here, *Khela* and *Doré* find harmony. Both cases, and the doctrines they promulgate, centre around the expertise of a particular decision-maker in managing their statutes and decision-making; and in turn, the Court concludes that the decision-makers hold expertise in any constitutional issue arising in their ambit.

Third, the structure and scope of the writ informs the definition of "lawfulness" as set out in *Khela*. Notably, the writ envisions a justificatory burden on prison decision-makers. Put differently, authorities must explain in the proceeding what facts and law support the deprivation of liberty. In review, the evidence on *habeas corpus* takes on central importance. Historically, this was made possible by the pairing of "*certiorari*-in-aid" with *habeas corpus*. *Certiorari*-in-aid "is invoked for the purpose of informing the court in a matter before it—the modern equivalent of 'Get me the file on such and such a matter'"[77] Historically, while *certiorari*-in-aid could not be employed to convert an application for *habeas corpus* into an appeal on the merits,[78] it could nonetheless permit judicial review on a record.[79] It is no surprise, then, that in *Khela* the Court connected the material and evidence on *habeas corpus* to the scope and intensity of review.[80] For the *Khela* Court, it would be unreasonable if "an

73 In tying *Khela* to *Doré*, I follow Kerr, "Easy Prisoner Cases," *supra* note 46 at 258–59.

74 *Doré*, *supra* note 20 at para 43–45.

75 *Ibid* at para 47.

76 *Ibid* at para 48. See also *Mooring v Canada (National Parole Board),* [1996] 1 SCR 75, 132 DLR (4th) 56.

77 Cromwell, *supra* note 3 at 320.

78 *Khela*, *supra* note 2 at para 66; *R v Miller*, [1985] 2 SCR 613 at 632, 24 DLR (4th) 9.

79 Cromwell, *supra* note 3 at 321. See also *The King v MacDonald (No 2)* (1902), 35 NSR 323, 5 CCC 279 (SC).

80 See *Khela*, *supra* note 2 at para 71: "… the scope of the review is inextricably related to the material before the reviewing court." See also Robert Sharpe, "*Habeas Corpus* in Canada" (1976) 2 Dal LJ 241 at 262.

inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion."[81]

While *Khela*, in many senses, preserves the power of *habeas corpus*,[82] it does repeat the expertise mantra. An assumption of expertise that exists at the outset, and is not questioned by a court, meaningfully reduces access to real external review in service of legality for prisoners. Courts that view prisons as unassailable bastions of "expert" management are less likely to query the soundness of legal and evidentiary justifications, which might create a higher risk of arbitrary exercises of discretion, particularly in a setting that, by nature, may resist external, lawful restraint. The net outcome is a different constitutional role for *habeas corpus*, one in which courts view "unarticulated reservoirs" of prison expertise as virtually unassailable, and which limits the role of justification as a result.[83]

This is not to say, as we shall see, that the reasonableness standard is necessarily opposed to the principle of legality, provided the requirements of *justification* are met. The *Vavilov* Court usefully reminds us that, barring situations where the Rule of Law demands a correctness standard, the reasonableness standard applies, and its contextual constraints will bind more or less tightly depending on the legal and factual set up of the decision. This is still a properly deferential approach, but it is focused on the reasons an administrator provides and the manner in which the administrator connects her decision to the governing statute, the evidence, and the interests to the affected individual. This envisions a role for administrators to properly articulate and apply their expertise if it is to be relevant under a reasonableness standard.

B) *Vavilov*

Vavilov purported to re-evaluate the entire scheme of standards of review in Canadian administrative law that are also linked to the standards of *habeas corpus* described in *Khela*. For that reason, and as we shall see, the definition of a legal decision for *habeas corpus* purposes should also change.

First, the Court changed the test for determining the standard of review. For the Court, the analysis begins with a presumption of reasonableness review whenever a court reviews the merits of an administrative decision.

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81 *Khela*, *supra* note 2 at para 74.

82 See e.g. Davis, *supra* note 11 at 45.

83 Jerry L Mashaw, "Small Things Like Reasons Are Put in a Jar: Reasons and Legitimacy in the Administrative State" (2001) 70 Fordham L Rev 17 at 25.

This presumption is based solely on the legislative choice to delegate power to an administrative actor.[84] Prior to *Vavilov*, relative expertise was the core rationale for deference.[85] It asserted a centrifugal force on the standard of review analysis, and it was difficult to rebut it.[86] Notably, a version of this presumption was previously invoked in *Doré* for decisions implicating *Charter* rights, which also applies to prison decisions.[87]

However, the *concept* of expertise is still important. As the Court says, now "[a]n administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that expertise and experience to bear …"[88] Expertise, then, remains relevant—but its position changes. Instead of a court presuming a generalized and uninterrogated notion of expertise, expertise must be demonstrated in the context of a particular case.

The Court also recognized situations where a court should derogate from the presumption of reasonableness review. Such situations exist because "respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies."[89] With specific reference to the Constitution, the correctness standard serves to ensure consistent definitions of constitutional rights.[90] Importantly, the Court expressly notes that the standard of review employed in *Doré* "is not germane to the issues in this appeal."[91]

The second category of changes introduced by *Vavilov* relate to the definition of "reasonableness." For the *Vavilov* majority, reasonableness is a fundamentally contextual analysis that must "account for the diversity of administrative decision-making."[92] What is reasonable will "always depend on the constraints imposed by the legal and factual context of the particular decision under review."[93]

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84 *Vavilov*, *supra* note 12 at para 24.

85 *Edmonton (City)*, *supra* note 17 at para 33.

86 See e.g. *ibid*, at para 34; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at paras 45–46.

87 See e.g. *Johnson v Canada (Attorney General)*, 2018 FC 582.

88 *Vavilov*, *supra* note 12 at para 93.

89 *Ibid* at para 53.

90 *Ibid* at para 56.

91 *Ibid* at para 57.

92 *Ibid* at para 90.

93 *Ibid*.

A number of these constraints are directly relevant to the *habeas corpus* context. Perhaps most important is the impact of the decision on the affected individual. For the Court, "[c]entral to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised."[94] Where a decision includes consequences that "threaten an individual's life, liberty, dignity or livelihood," those consequences must be considered. Additionally, and relatedly, the evidence on the application for judicial review or *habeas corpus* will be central. This was adverted to in *Khela*, but takes on greater importance post-*Vavilov*.[95] Decision-makers "must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them."[96] Where a decision-maker has "fundamentally misapprehended or failed to account for the evidence before it" a decision will be unreasonable.[97]

These constraints together illustrate a new ethic that permeates the *Vavilov* decision: the "culture of justification."[98] Under the culture of justification, the reasons of a decision-maker are the primary means through which the decision-maker shows that their decision is legal under the reasonableness standard of review.[99] On this account, reasons primarily serve two functions: they justify the decision to the affected parties, but they also provide a window into the stated rationale for a decision, facilitating review.

The doctrine of reasons-giving developed in *Vavilov* promotes the ideal of legality by facilitating judicial review. The provision of reasons prevents the "immunization" of administrative decisions from review, a state of affairs raises concerns from the perspective of legality.[100] Without the provision of reasons where they are required, "a reviewing court cannot conduct reasonableness review."[101] To avoid this possibility, *Vavilov* instructs courts to reason with reference to particular constraints:

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94 *Ibid* at para 133.

95 Wildeman, *supra* note 31 at 24.

96 *Vavilov*, *supra* note 12 at para 126.

97 *Ibid*.

98 *Ibid* at para 2.

99 *Ibid* at para 74, citing the *amici* factum (which says "reasoned decision-making is the lynchpin of institutional legitimacy").

100 See e.g. *Canada (Citizenship and Immigration) v Canadian Council for Refugees,* 2021 FCA 72 at para 102: "For a long time now, Canadian courts have opposed attempts by public authorities to immunize administrators completely from judicial review, whether that be done by full privative clauses or the withholding of evidence or explanations essential for a meaningful review" [*Canadian Council for Refugees*].

101 See *Sharif, supra* note 48 at para 32. See *also Canadian Council for Refugees*, *supra* note 100 at para 102.

the governing statute, the interests of the affected party, and the evidence, among others. While the justifications for a "reasons-first" approach are many, at least one sounds in legality: the facilitation of judicial review.

3. Part II: The Way Forward for *Habeas Corpus*

The changes made by *Vavilov* to the reasonableness standard should have special application in the *habeas corpus* context because they arguably strengthen the role of external review in service of legality. There are three changes introduced by *Vavilov* that are potentially relevant. The first is related to the idea of expertise. As noted above, the basic position is that "the institutional defendant charged with operating the facility begins the proceedings as a *de facto* expert."[102] Even today, what remains is a "historic and lingering habit of offering substantial deference to the taken-for-granted expertise of prison administrators."[103]

Vavilov, however, introduces an improvement to this state of affairs. Rather than presumptive expertise, which has long characterized the review of prison decisions, the evolving standards of administrative law means that expertise must now be *demonstrated*. In other contexts outside of prison decision-making, this has meant post-*Vavilov* that rote, boilerplate reasons will sometimes not suffice to disclose the basis on which a decision was made.[104] Under previous law, boilerplate could be justified in the ordinary course: after all, if expertise is presumed, there is no reason to question if that expertise was actually integrated into a decision.

This is connected to the second shift introduced by *Vavilov*'s reasonableness standard: a heightened justificatory bar, particularly where a person's liberty is impacted by a decision.[105] The case expressly notes that decision-makers "are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us."[106] This means that administrative decision-makers must consider

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102 Kerr, "Contesting Expertise" *supra* note 60 at 48.

103 *Ibid* at 57.

104 See e.g. *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 43–44 [*Alexion Pharmaceuticals*]; *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 [*Osun*]; *Safe Food Matters Inc v Canada (Attorney General)*, 2022 FCA 19 at para 54 [*Safe Food Matters*]; *Gill v Canada (Citizenship and Immigration)*, 2021 FC 1441 at para 34 [*Gill*].

105 See, for more analysis of this factor, Jamie Chai Yun Liew, "The Good, the Bad and the Ugly: A Preliminary Assessment of Whether the *Vavilov* Framework Adequately Addresses Concerns of Marginalized Communities in the Immigration Law Context" (2020) 98:2 Can Bar Rev 389.

106 *Vavilov*, *supra* note 12 at para 135.

and justify decisions where there is "the potential for significant personal impact of harm."[107] This translates into a concrete doctrinal constraint on administrative decision-making: decision-makers must consider the stakes to the individual and justify the decision accordingly.[108]

In *habeas corpus* applications, the stakes could not be higher. Transfers to structured intervention units, for example, raise the most basic liberty questions, and the consequences of solitary confinement are grave—in many cases, life and death.[109] Additionally, a standard case is an unlawful transfer from one security classification to another, entailing potentially more stringent conditions.[110] These security classifications have consequences for those under imprisonment. Higher security classifications, for example, "can result in a longer incarceration."[111] This is despite the fact that the classification process has been criticized as methodologically flawed.[112] The function of *habeas corpus* in these cases, then, is fundamental to any idea of legality. *Habeas corpus* should permit a court to review the justification for these deprivations of liberty, while taking into account their consequences. A failure to tie the decision to these consequences—where they are present— is of particular relevance on *habeas corpus* applications. The *Paul v Correctional Services of Canada* decision, which I review below, is an example of these stakes failing to be taken into account by a decision-maker.

Finally, the revised reasonableness standard endorsed in *Vavilov* will put into focus the evidence and record on *habeas corpus* applications, and how prison officials marshal the evidence to support a particular conclusion. Recall that, in *Khela*, the Court concluded that a failure to take account of evidence, or a reliance on unreliable evidence, will be fatal. *Vavilov* speaks similarly about the role of evidence as a constraint on administrative decision-making. On *habeas corpus* applications, the evidence will often disclose the chain of events leading up to a decision, and

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107 *Ibid* at para 133.

108 *Ibid*.

109 See e.g. Debra Parkes, "Ending the Isolation: An Introduction to the Special Volume on Human Rights and Solitary Confinement" (2015) 4:1 Can J Human Rights VII at X; Justin Piché & Karine Major, "Prisoner Writing in/on Solitary Confinement: Contributions from the Journal of Prisoners on Prisons, 1988-2013" (2015) 4:1 Can J Human Rights 1 at 26–28.

110 See e.g. *Paul v Correctional Services of Canada*, 2020 NSSC 380 [*Paul*]. I will address *Paul* below.

111 D'Arcy Leitch, "The Constitutionality of Classification: Indigenous Overrepresentation and Security Policy in Canadian Federal Penitentiaries" (2018) 41:2 Dal LJ 411 at 418.

112 Standing Senate Committee on Human Rights, *Human Rights of Federally-Sentenced Persons* (June 2021) (Chair: Salma Ataullahjan) at 65 [Senate Report, 2021].

the justifications for the particular deprivation of liberty interests. Post-*Vavilov*, in other contexts, courts have been somewhat wary of a failure by administrators to take seriously the evidence on judicial review. For example, boilerplate reasons will sometimes not suffice to disclose the basis on which a decision was made, or the evidence that was relied upon by a decision-maker.[113] This renders suspect—at least in some cases—general statements and presumptions that "all the evidence was considered."[114] While the failure to account for evidence is a high threshold,[115] and courts cannot re-weigh the evidence,[116] they also cannot themselves fully *recreate* a decision by diving into the record. A decision-maker on a *habeas corpus* case, then, must identify the evidence supporting her conclusions, identify why that evidence is important in contrast to other evidence,[117] and do this with special reference to the stakes and consequences of the deprivation of liberty.

Vavilov expressly mentions "prison administration" as a relevant area of administrative decision-making,[118] and so unsurprisingly, *Vavilov* should be relevant in the context of *habeas corpus*. *Habeas corpus* cases concern fundamental issues of liberty. In these cases, translating *Vavilov*'s reasonableness requirements suggests a different posture for courts. Rather than assuming expertise, courts faced with habeas corpus applications should start with *Vavilov*. As we will see from the case examples below, particular *Vavilov*ian constraints should have a direct impact on *habeas corpus* applications when reviewed under a reasonableness standard:

1. Rather than assuming expertise of correctional officials at the outset, courts should question the extent to which expertise is demonstrated in the reasons.

2. In reviewing the adequacy of reasons in *habeas corpus* cases, the relevant constraints will be important:

113 See e.g. *Alexion Pharmaceuticals, supra* note 104 at paras 43–44; *Osun, supra* note 104; *Safe Food Matters, supra* note 104 at para 54; *Gill, supra* note 104 at para 34.

114 See e.g. *Canada (Citizenship and Immigration) v Montoya*, 2022 FC 105 at paras 17–18. See also *Paul*, *supra* note 110 at para 98.

115 *Makivik Corporation v Canada (Attorney General),* 2021 FCA 184 at para 98.

116 *Vavilov*, *supra* note 12 at para 125.

117 See e.g. *Catalyst Pharmaceuticals Inc v Canada (Attorney General),* 2022 FC 292 at para 186: "I am mindful that the role of the Court, on judicial review, is not to weigh or reweigh the evidence. My assessment of the evidence leads me to find that there existed contradictory evidence known to the decision-maker, but ignored. I find that the OSIP ignored or failed to account for the evidence before it, rendering the Minister's Decision unreasonable."

118 *Vavilov, supra* note 12 at para 11.

(a) Courts should consider the constitutionally-infused stakes to the prisoner who is subject to discretionary authority; particularly, harsh consequences (for example, mental health impacts) should be considered.

(b) Courts should consider the evidence as a whole, as well as the particular evidence relied upon by the prison official in justifying a deprivation of liberty. Boilerplate that "all evidence was considered," without explaining why one part of the evidence was accepted over another, can be fatal. Additionally, as we shall see, courts can and should inquire into the quality of the evidence.[119]

(c) In reviewing the reasons, whether a decision is justifiable will be a product of the extent to which the reasons engage with the specific constraints bearing on the *habeas corpus* context. Some considerations:

   (i) why a prisoner "was initially allowed less liberty …" than others;[120] in other words, the reason and criteria for the change in liberty.

   (ii) why a deprivation occurred for a particular length of time.[121]

4. Part III: The Post-*Vavilov* Case Law

Thus far, I have set out how *Vavilov* arguably brings the doctrine of *habeas corpus* closer to the ideal of legality. The question is whether this theoretical promise has been noticed by courts. The situation is decidedly mixed. I will first explain the methodology I used to explore the universe of post-*Vavilov* cases dealing with *habeas corpus*. I will then outline representative examples of the post-*Vavilov* cases: both ones that rely on the outdated presumption of expertise and cases that shed a light on a potentially new justificatory standard. Since the story is mixed, it suggests that old habits die hard—courts themselves may embrace a conception of prison decision-making that serves to reinforce existing barriers to the application of legal restraints.

119 *Raju v Warden of Kent Institution*, 2020 BCSC 894 at para 24 [*Raju*].

120 *Ibid* at para 109.

121 See *Dumas v Leclerc Institute,* [1986] 2 SCR 459 at 464, 34 DLR (4th) 427.

A) A Brief Methodological Note

In determining the relevant tranche of cases, I conducted a search on Westlaw, Quicklaw, and CanLII under two different queries. In the first, I noted up *Vavilov* with a related search of "*habeas corpus*" to see all the cases citing *Vavilov* dealing with the subject of *habeas corpus*. Then, I conducted a simple general search for "*habeas corpus*" on all three databases, with the search spanning from December 2019 (the date *Vavilov* was decided), ending on October 25, 2021.

This second search retrieved a large number of results, not all of which are relevant to the inquiry I am pursuing here. In reviewing these results, I was only interested in cases going to the substantive lawfulness of a *habeas corpus* case. For that reason, I excluded a number of cases. With these exclusions, the total relevant number of cases dealing with *habeas corpus* post-*Vavilov* is 42. This does not represent the entire universe of cases decided post-*Vavilov*, and as we shall see, the point of conducting this survey is not to extrapolate any broader conclusions about how *habeas corpus* is working in all cases post-*Vavilov*. It is simply designed to identify some interesting single cases or trends that are consistent with the analytical paths I have identified for *Vavilov*ian *habeas corpus* review. I do not claim to have surveyed all of the post-*Vavilov habeas corpus* cases, and none of the conclusions I draw from this dataset are applicable beyond it.

B) The Role of Expertise

One of the more natural applications of *Vavilov*, where it may have more force, is in administrative contexts where the notion of expertise was more readily assumed pre-*Vavilov*.[122] On this line of thinking, there are at least some cases post-*Vavilov* where courts are still assuming expertise at the outset, contrary to *Vavilov*.

Perhaps the most egregious example of this occurred in *Devlin v Canada (Attorney General)*.[123] In *Devlin*, the Court spoke about the importance of *habeas corpus*, saying that *habeas corpus* "is an essential tool for determining the lawfulness of a deprivation of an inmate's residual liberty."[124] The Court applied *Vavilov*. But, oddly, it then went on to suggest that a presumptive notion of expertise played an important role in assessing the *habeas corpus* application: "As a matter of law, I am directed

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122 Of course, the opposite may be true: courts may be more reluctant to apply the full force of *Vavilov*. We have seen this in some contexts post-*Vavilov*: see e.g. *Planet Energy (Ontario) Corp v Ontario Energy Board*, 2020 ONSC 598 at para 31.

123 2020 NSSC 389.

124 *Ibid* at para 9.

by Courts above me, to conclude that the Wardens and the Commissioner possess knowledge and related practical experience in matters of institutional safety and security."[125] The Court, in important language, concluded that "[t]his decision is a nuanced decision within which they *are to be considered* as possessing specialized skill and experience."[126]

The approach in *Devlin* is inconsistent with *Vavilov*, at least in one sense—it assumes expertise at the *outset* rather than genuinely interrogating whether it is demonstrated in the reasons, and to what extent. As a preliminary matter, it is untrue that higher courts have directed lower courts to *presume* expertise. As noted above, *Vavilov* now focuses on *demonstrated* expertise. This is a subtle but important change, especially in the factual and legal contexts of *habeas corpus* applications. The presumed position of expertise, a well-worn tool of judicial rhetoric, has a special force in the carceral context where it became a way for courts to *de facto* decline jurisdiction over prison decisions. Now, however, *Vavilov* tells courts that expertise is still a relevant factor, but that the expertise must now be demonstrated. Only then does it become a reason to consider a result that may, on its face, be inconsistent with any of the constraints bearing on the decision.[127] This is an important shift that realigns the doctrinal promise of *habeas corpus*.

Lest this be seen as an isolated case, a number of other examples presume expertise in a similar manner with specific reference to prison administrators. Interestingly, many of these cases arise in Nova Scotia. Another example is *Coaker v Nova Scotia (Attorney General)*.[128] There, the Court endorsed a 2015 Nova Scotia Superior Court case,[129] concluding that "prison administrators are afforded considerable deference by the court."[130] This language of "considerable deference," as a presumptive matter, is also inconsistent with *Vavilov*, absent any interrogation of whether the expertise has been demonstrated in the reasons, with special explanation to the legal constraints bearing on a decision. Other cases

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125 *Ibid* at para 24.

126 *Ibid* at para 85 [emphasis added].

127 *Vavilov, supra* note 12 at para 93:

Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

128 2020 NSSC 252 [*Coaker*].

129 *Ryan v Nova Scotia (Attorney General)*, 2015 NSSC 286.

130 *Coaker*, *supra* note 128 at para 19.

have similarly made presumptive claims of prison expertise on *habeas corpus* applications, post-*Vavilov*.[131]

There are some cases in which courts are correctly applying *Vavilov*'s teachings on expertise, even if the courts are not sympathetic to the underlying merits of the *habeas corpus* application. This was the case in *Bromby v Warden of William Head Institution*.[132] In this case, the Court looked closely at the record and the warden's reasons. While it endorsed the general concept of prison expertise, citing old case law,[133] it also noted that deference was applicable because "[t]he decision of the warden … set out the basis for why it was that Mr. Bromby presented as being incapable of management within an open-perimeter environment."[134] This suggests that the Court was focused on the demonstrated expertise of the decision-maker in the particular context. As instructed by *Vavilov*, the Warden considered all of the legal and factual constraints bearing on the decision.[135] He also justified his decision appropriately.

While *Bromby* is closer to the mark, these cases show some reticence to fully embrace the departure from presumptive expertise that *Vavilov* instructs. As noted above, this means that the *Khela* tension remains, at least in some form, even post-*Vavilov*.

C) Justification

Another aspect of *Vavilov*'s changes to the law of judicial review concerned the increased focus on justification. The story here is decidedly mixed, as well. While *some* courts are adequately considering the underlying justification for deprivations of liberty as *Vavilov* instructs, virtually none of the courts in the sample are focusing on the impact to the affected parties and their liberty. This is a key consideration on *habeas corpus* review.

While some courts are analyzing justification, others are simply not referring to the reasons of a decision-maker at all, relying on broad, unquestioned assumptions of expertise instead. A good example is *MacNeil v Springhill Institution*, cited above. Despite citing *Vavilov*, the *MacNeil* Court did not actually look to the reasons of the decision-maker.

131 See e.g. *Stubbs v Canada (Attorney General)*, 2021 ONSC 4819 at para 20 (though *habeas corpus* allowed); *Wallace v Nova Scotia (Attorney General)*, 2021 NSSC 101 at para 26; *Rivest v Dorchester Institution (Warden)*, 2020 NBQB 12 at para 68; *Lesko v Attorney General of Canada*, 2021 ONSC 2883 at para 28; *MacNeil v Springhill Institution*, 2020 NSSC 324 at para 27 [*MacNeil*].

132 2020 BCSC 1119.

133 *Ibid* at para 59.

134 *Ibid* at para 63.

135 *Ibid* at para 65–66.

It simply concluded that the transfer decision at issue is "a fact-driven inquiry involving the weighing of multiple factors."[136] But the Court did not explain *how* the Warden balanced these factors, what weight was given to them, and *why* the applicant in that case was transferred from medium to maximum security. While the Court notes that the "Assessment for Decision" accompanying the decision included a "detailed review of noted behaviours since his incarceration …" there was no analysis of these behaviours, which would be particular appropriate given the subjective and fraught concept of "institutional adjustment"[137] Here, it appears the Court did not consider whether the Warden "connected the dots" and linked the "noted behaviours" to the relevant legal standards. This appears inconsistent with the sort of review contemplated in *Vavilov*.

Some cases do focus on justification. One example is *Raju v Warden of Kent Institution*. This case was an application for *habeas corpus* review based on Raju's placement in a structured intervention unit (SIU). Astonishingly, Kent Institution did not agree that placement in SIU constituted a "deprivation of liberty" for the purposes of *habeas corpus* review in general.[138] While the Court allowed the application on the basis of procedural fairness,[139] it also spoke about the sort of justificatory analysis that would be required under *Vavilov*. The Court said that any SIU transfer decision would need to address the reason and criteria for the transfer; it also could not be reasonable if it was supported by "unconfirmed [confidential informant] information from sources of unknown or unproven reliability."[140] In other words, the decision to transfer in such cases must connect reliable evidence to the legal standards for the transfer.

Another promising example of the need for justification occurred in *Paul*, noted above. The facts of this case merit close attention. Paul is a 35-year-old, first time offender, incarcerated at Nova Institute for Women. She is serving a sentence of approximately three years. She is Maliseet, from St Mary's First Nation in New Brunswick. It was undisputed that Paul suffered from various mental illnesses and addictions, in addition to a history of "sexual trauma and family fragmentation."[141]

Because of a positive opiate test in the community, Paul's day parole was suspended. [142] Upon her arrival at Nova, Paul tested positive for

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136 *MacNeil*, *supra* note 131 at para 27.

137 Senate Report, 2021, *supra* note 112 at 63 *et seq*.

138 The respondent only conceded the deprivation for the purposes of Mr. Raju's case.

139 *Raju*, *supra* note 119 at para 21.

140 *Ibid* at para 24.

141 *Paul*, *supra* note 110 at para 3.

142 *Ibid* at para 5.

drugs, and was then placed in a structured intervention unit, where she remained for 6 days.[143] She was then transferred to a maximum security placement. Paul challenged this decision, as she had always been classified as a medium security risk.[144] Specifically, there was a delay in moving her to medium security (of approximately 10 days) because of a failure to convene a Warden's Board.[145] She argued that, given her medium security classification, she should have been placed into general population much sooner.[146]

The Court found this delay unreasonable. Though framing the delay as a matter of procedural fairness, the Court also characterized it as a matter of reasonableness.[147] The Court focused on the lack of justification for this delay. For the Court, the only explanation provided was lacking: "And that explanation appears to consist of (to paraphrase) 'well, look at all the things that have to be considered before we make a decision—it's complicated.'"[148] The Court was disturbed by this lack of justification, particularly in Paul's circumstances: "This is particularly troubling given the fact that the impact of the [maximum security placement] on Ms. Paul was always known by the Respondents to have critical consequences to her well-being."[149] This echoes *Vavilov* and the need for more than boilerplate in the reasons, as well as a need to consider the stakes.

The *Paul* case illustrates how *Vavilov* may, in some small way, resolve the problem that preceded it. A presumption of expertise might give weight to an administrator's statement that the situation is "complicated." But a justification requires more than such boilerplate. It should speak to why the situation is complicated in relation to particular institutional, evidentiary, or legal constraints. *Paul,* as *Vavilov* instructs, gives more weight to justification rather than assumed and uninterrogated notions of carceral "expertise."

5. Part IV: Legality as a Restraining Principle in Prisons

Despite the theoretical promise of a renewed *habeas corpus* post-Vavilov, the picture is mixed in the post-*Vavilov* cases. This is a troubling conclusion, even if it is tempered by some courts exploring the possibilities of *habeas corpus* after *Vavilov.* What this suggests is that the idea of carceral expertise—as an assumptive matter—is sticky. Canadian courts, should

143 *Ibid* at para 8.
144 *Ibid* at para 15.
145 *Ibid.*
146 *Ibid* at para 39.
147 *Ibid* at paras 109–10.
148 *Ibid* at para 98.
149 *Ibid* at para 100.

they wish to integrate *Vavilov* into review of *habeas corpus* applications, may need to recalibrate the way deference works, in order to focus on justification in service of legality and external monitoring. The *habeas corpus* example also demonstrates how courts must revisit the model of carceral "expertise" that they envision when reviewing deprivations of liberty. That model is in serious tension with any idea of legality.

To do this, one must make sense of the general tension between legality—as I have described it—and the assumed expertise of the pre-*Vavilov* prison cases as a matter of doctrine and theory. Starting with expertise, a previous generation of so-called administrative law functionalists, active in the first part of the 20th century, counselled broad-based deference on the basis of the supposed expertise of administrative actors.[150] Their approach to expertise mirrored the approach adopted by Canadian courts to prison decision-making. For the functionalists, Parliament and the courts were ill-suited to implementing the new government programs of the age, and fidelity to law could better be achieved by ensuring that the "right" people were in charge of interpreting the law, rather than courts. The functionalists were, relatedly, skeptical of concepts like "the Rule of Law" as a means to control administrative action, reasoning that these ideas are only anachronisms, serving to render administration ineffective.[151] Characteristically, perhaps the most famous functionalist, John Willis, spoke dismissively of the claims advanced by individuals against the administrative apparatus. He derided "the sweating immigrant" challenging a deportation decision,[152] or the "currently fashionable cults" like "claims by prisoners in penitentiaries, complaining of their treatment there"[153] that could upset effective government.

It is no surprise that, for Willis, the "cult" of individual claims by prisoners would upset this view of effective government. Indeed, for the early generation of functionalists, the administrative state was merely a technology for their preferred political agenda.[154] Certain claims of

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150 The literature is vast: see e.g. John Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1:1 UTLJ 53; Harry W Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17:1 Osgoode Hall LJ 1; JA Corry, "Administrative Law in Canada" (Paper, delivered at the Proceedings of the Canadian Political Science Association, 1933) at 190; WPM Kennedy, "Aspects of Administrative Law in Canada" (1934) 46 Jurid Rev 203; R Blake Brown, "The Canadian Legal Realists and Administrative Law Scholarship, 1930–1941" (2000) 9 Dal J Leg Stud 36.

151 See e.g. Willis, *supra* note 150 at 54.

152 John Willis, "Administrative Law in Canada" (1961) 39:2 Can Bar Rev 251 at 258.

153 John Willis, "Canadian Administrative Law in Retrospect" (1974) 24:3 UTLJ 225 at 229.

154 See e.g. Kennedy, *supra* note 150.

right brought by individuals would be suspect under this agenda. And if the judicial doctrine governing prison decision-making is any clue, the functionalist model was ill-suited to deal with the variable ways that delegated power could be used: in favour of any political agenda, particularly a repressive one for prisoners. Indeed, for generations, as noted above, courts would defer to prison expertise as a means of forestalling micromanagement of prisons. This theory was solidified in *Khela*, but it is a long-time feature of judicial reticence in this area. A characteristic example is *Howard v Stony Mountain Institution*.[155] There, Justice MacGuigan said that because "penitentiaries are not nice places for nice people," "it would be an ill-informed court that was not aware of the necessity for immediate response by prison authorities to breaches of prison order and it would be a rash one that would deny them the means to react effectively."[156] This sort of reasoning could have come from a functionalist: the imperatives of government order—however flawed—take priority over the individual claims of right advanced by those subject to administrative power.

Recognizing the poverty of this approach, modern-day defenders of the administrative state tend to criticize the functionalists for adopting a "cult"[157] of expertise and a vision of administrative government that does not depend on the justification for the exercise of power. For example, while these scholars still see the administrative state as advancing certain political aspirations,[158] they recognize that there was a tension between an administrative state that achieved its legitimacy through assumed epistemic advantages, and one that was legitimate because of *how* it exercised its power. In this "culture of justification," what is envisioned is a democratic dialogue between those who exercise power and those subject to it.[159]

The tension between these two schools of thought—between expertise and justification, as a part of legality—was explored above. A doctrine of deference explained by primary reference to expertise would eschew justification: there is no need to subject experts to extensive

155 [1984] 2 FC 642, 57 NR 280 (CA).

156 *Ibid* at para 79–80.

157 David Dyzenhaus, "The Logic of the Rule of Law: Lessons from Willis" (2005) 55:3 UTLJ 691at 704.

158 See e.g. David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279 at 306 ("[a]lthough the administrative state has become much more than the welfare state, it was put in place in order to follow through on the promise of substantive equality before the law").

159 See Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (or: from Theology to Secularization)" (2005) 55 UTLJ 629 at 631.

reason-giving requirements if courts are already aware that power has been delegated to a particular decision-maker because of its expertise. A doctrine of deference premised primarily on justification would, instead, reject any claim to legitimacy based on a "culture of authority."[160] For its part, *Vavilov* purports to settle this tension rather decisively in favour of justification as a doctrinal ethic. While expertise continues to play a role in the analysis, it is not presumed, and it must be demonstrated through the device of reasons-giving.

The tension between justification and expertise is nested in a broader issue in administrative law—the gap between an ideal of legality and the practice of administrative government. Despite the functionalist worry about courts imposing "lawyer's values" on administrators,[161] scholars have long considered the Rule of Law (or legality) as a fundamental postulate that should, in theory, underpin all exercise of government power.[162] This presupposes that in any given case there could be a gap between what the principle of legality prescribes and what the reality inside particular institutions may tell us. Reflecting on this gap tells us much about whether the current doctrinal and institutional situation bearing on *habeas corpus* is consistent with the commitments a society dedicated to the Rule of Law purports to hold.

This raises the question: what does the *habeas corpus* situation tell us about any gap in legality in this area? While there could be many reasons why *Vavilov*'s promise is not being explored deeply in the prison context, at least in the cases reviewed, one reason is the role that generalized expertise plays in supporting prisons as a closed system impervious to legal restraint. Taken at its best, the reasonableness standard formulated by *Vavilov* can go some way into reaching into the "black box" of prison decision-making[163] and it is important to understand "the extent to which a particular institutional context presents special demands, limitations, and potential for judicial intervention."[164] *Vavilov*'s instruction on expertise should be particularized to this context. In general, administrative law expertise is a generalized notion that is often assumed

160 See generally, David Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 SAJHR 11.

161 John Willis, "The McRuer Report: Lawyer's Values and Civil Servant's Values" (1968) 17 UTLJ 351 at 357.

162 See Jeremy Waldron, "The Rule of Law and the Importance of Procedure" in *Getting to the Rule of Law*, James E Fleming ed, 2011) 3.

163 Lisa Kerr, "How the Prison is a Black Box in Punishment Theory" (2018) 69:1 UTLJ 85.

164 Susan Sturm, "Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons" (1990) 130 U Pa L Rev 805 at 810.

and less often interrogated.[165] Courts do not, and perhaps cannot, define what "expertise" means in particular contexts. Besides a general idea that legal questions, such as constitutional matters, are amenable to resolution based on policy reasoning,[166] expertise can cash out very differently in different administrative contexts.

The judicial model of carceral expertise, to the extent it exists in prison decision-making, is dangerously optimistic. Despite judicial assertions, "expertise" in a carceral setting likely does not relate to constitutional or legal knowledge that is amenable to demonstration through reasons. Instead, expertise in the prison context may refer to something more particular to the regime that decision-makers operate under. As Kerr argues:

> Prison officials are not likely to impress when they make decisions that implicate *Charter* rights. To the limited extent that staff training involves the law, the focus is on prison law and policy rather than the Constitution … The organizational dynamics of prisons tend to resist constitutional constraints … The status of the inmate is defined in relation to managerial goals, rather than in relation to an externally defined moral norm, and prison managers tend to focus on their vision of scientific management rather than the larger legal order.[167]

As Kerr writes, given the organizational context of the prison, uninterrogated expertise could simply act as a false cover for a warden's decision that "is more connected to neglect or animus than to expertise or legitimate concerns."[168] This is simply a function of the bureaucratic form in which prison takes: it is a "dynamic system, consisting of both formal organizational structures and informal subgroups with particular norms, interests, and power bases."[169] And more to the point "[c]orrections systems exhibit a profound lack of the information and expertise necessary to pursue meaningful change."[170]

In Canada, observers of Correctional Services Canada (CSC) are familiar with the idea of bureaucratic resistance of this sort. As is well-known, and for decades, CSC routinely rejects recommendations and external pressures to change.[171] Report after report pile up, with

165 See e.g. Sidney A Shapiro, "The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences" (2015) 50:5 Wake Forest L Rev 1097.

166 *Doré*, *supra* note 20 at para 35.

167 Kerr, "Easy Prisoner Cases," *supra* note 46 at 260.

168 *Ibid* at 258.

169 Sturm, *supra* note 164 at 809.

170 *Ibid.*

171 See e.g. Ivan Zinger, "Human Rights Compliance and the Role of External Prison Oversight" (2006) 48:2 Can J Corr 127 at 130: "What is most striking about the

little institutional movement from CSC.[172] Much of CSC's policy-making process is "characteristically unconstrained by the larger legal framework,"[173] in part because of the difficulty of subjecting mass exercises of private discretion to review of any sort.[174] Relatedly, the reticence for decision-makers—and courts—to change gears may be attributable to "the potential to be overly sympathetic to concerns about institutional security."[175] The broad assertion of security can act as a concept that bundles together all sorts of institutional quirks about how prisons *should* be run, a standalone response to all efforts to subject the institution to any requirement of legality. The result is that, under a benevolent deferential approach, repressive practices based only on internal bureaucratic reasoning could be given sanction by a court, or otherwise not be subject to review. At the very least, the constitutional issue raised in such a context could simply be one more managerial factor to take into consideration, rather than a central institutional "business line" that presages all else.[176] Under this approach, the risk of arbitrary exercises of power is increased.

Yet this is the direct consequence of the administrative constitutionalist approach adopted in *Khela* and *Doré*. While administrative constitutionalists frame their project as one related to the "generation" of law, a sort of democratic public law freed from judicial reasoning,[177] deference can irritate and exacerbate existing bureaucratic pressures that drive prison decision-making away from the ideal of legality. An over-

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federal correctional system in the last decade since the release of the Arbour Report is that the [Correctional Service of Canada] has been the subject of countless inquiries, commissions, and high-profile reports (including some of its own internal reports) calling for significant governance reforms yet has, for the most part, ignored their findings and recommendations."

172 Parkes & Pate, *supra* note 47 at 273: "The sheer number of recommendations, reports, and calls for accountability over the years make the case that an independent inspectorate or ombudsman function alone, without the power to remedy past injustices or order future changes, cannot effectively address the accountability gap."

173 Lisa Kerr, "The Origins of Unlawful Prison Policies" (2015) 4:1 Can J Human Rights 91.

174 *Ibid* at 92.

175 Parkes & Pate, *supra* note 47 at 26.

176 Zinger, *supra* note 171 at 132–33.

177 See e.g. Blake Emerson, *The Public's Law: Origins and Architecture of Progressive Democracy* (New York: Oxford University Press, 2019). Examples of this "democratic-constitutionalist" position arise in Canadian administrative law as well. See the opinion of Justice McLachlin, as she then was, in *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 70, 140 DLR (4th) 193: "The fact that the question of law concerns the effect of the *Charter* does not change the matter. The *Charter* is not some holy grail which only judicial initiates of the superior courts may touch. The *Charter* belongs to the people. All law and law-makers that touch the people must conform to it. Tribunals and commissions charged with deciding legal issues are no exception."

emphasis on presumed expertise ignores not only the role of legality as a principle that should be marshalled to limit bureaucratic convenience; it also bases a doctrine of deference on a presumption that skews the reality that in the prisons, a reference to "expertise," or "safety," or "security" could be cover for something much more sinister. In such administrative schemes—or perhaps in all administrative schemes—ensuring legality should be seen as a "crucial counterweight" to bureaucratic exigency.[178]

It is worth remembering that this is exactly the purpose of *habeas corpus*, protected in Canada's constitutional framework. *Habeas corpus* is designed to force those who deprive liberty to show a valid, legal cause for *why* that deprivation occurred. At the very least, this suggests that courts must look to some contemporaneous justification for a deprivation of liberty. In this framework, the courts—wielding the principle of legality—are acting as a counter-weight to the internal pressures of the bureaucratic apparatus. When courts simply assume expertise, they allow themselves to be drawn into the bureaucratic apparatus, and the legal rights they are meant to uphold are subverted to simply one consideration among many.

The takeaway is two-fold. First, judicial review of *habeas corpus* applications, as envisioned by is an integral part of legality in the carceral state. It is not enough, as Justice Abella and Justice Karakatsanis suggested in *Vavilov*, for decision-makers themselves to foster an environment respectful of legal rights through training,[179] nor are solely internal appellate schemes sufficient.[180] The requirement of judicial review at a certain stringency is therefore functionally important in fostering respect for the law in administrative schemes, particularly in total institutions. Courts should take this requirement seriously, and in turn, discard outdated and incomplete notions of expertise.

Yet while external review is necessary, it is not sufficient, as explored above. This is evidenced by the reaction of courts to *Vavilov* in the *habeas corpus* cases. *Habeas corpus* should be seen as a central case of judicial protection of rights, and yet even in this context, widespread assumptions of expertise remain. Judicial review at the best of times is *ex post*, and many cases of prison recalcitrance will not make it to judicial review. This brings attention to the limits of judicial doctrine in shaping bureaucratic preferences, and a concomitant need for political and legal responses to the problem of legality. While courts hold a special, independent, and necessary role to ensure legality, it is worth asking what reforms are possible to ensure legality in the CSC, and whether such reforms are even

178 Campbell, *supra* note 21 at 327.

179 *Vavilov, supra* note 12 at para 130.

180 Parkes & Pate, *supra* note 47 at 265, 270–71.

possible in light of the stickiness of carceral logics. Nonetheless, courts adopting *Vavilov* in the *habeas corpus* context would take a major step forward in terms of ensuring the defence of legal rights.

6. Conclusion

In conclusion, much more could be said about *Vavilov* and its relationship to *habeas corpus*. For now, it is evident that at least some courts are not adequately considering the pathways that *Vavilov* opens up on *habeas corpus* applications. This is particularly so in reference to two aspects of *Vavilov*: its treatment of expertise, and its renewed focus on justification. While *habeas corpus* is a small piece of the puzzle, it remains an important, constitutionally-entrenched tool for prisoners to challenge state action. And it deserves judicial respect on that score. To the extent that this is not occurring, courts should renew their commitment to using the full force of *Vavilov* to strengthen *habeas corpus*, consistent with its promise and the principle of legality.