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Post-AEDPA Compromise: Increased Habeas Corpus Relief for Capital Cases and Tighter Restrictions for Noncapital Cases

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Post-AEDPA Compromise: Increased Habeas Corpus Relief for Capital Cases and Tighter Restrictions for Noncapital Cases

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INTRODUCTION

Federal habeas corpus' once narrow scope changed dramatically over two centuries through statutory expansion in the late nineteenth century and judicial expansion in the early twentieth century. Consequentially, the latter half of the twentieth century saw a rapid rise in habeas petitions that threatened conservation of judicial resources, federalism, and finality in criminal convictions. In response, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[1] which created new procedural and substantive hurdles for state prisoners to pass through before they could receive federal habeas relief.

Post-AEDPA empirical studies show that many of AEDPA's goals have not been accomplished. Furthermore, scientific developments in DNA testing have questioned whether one of the underlying reasons for passing AEDPA—finality in criminal convictions—warrants as much weight as it once did. This Article will outline judicial decisions that expanded federal habeas corpus, subsequent criticisms that led to AEDPA, and AEDPA's empirical results. Finally, in light of these developments, this Article proposes several changes to AEDPA that can act as a starting point for compromise between AEDPA's proponents and detractors. These proposals would loosen AEDPA's procedural hurdles for capital cases while restricting and streamlining procedures for noncapital cases. This way, prisoners on death row are offered a stronger procedural guarantee of fairness while principles of federalism, state comity, and finality are preserved in the great majority of cases.

I. JUDICIAL EXPANSION OF THE WRIT FROM ANTEBELLUM TO THE EARLY TWENTIETH CENTURY

"The historic purpose of the writ [of habeas corpus] has been to relieve detention by executive authorities without judicial trial."[2] Compared to how the writ is used today, the original understanding of habeas corpus was far narrower in scope. Modern federal courts have had greater discretion to grant habeas relief for prisoners in response to an assortment of procedural errors.[3] Conversely, in the Antebellum era, a federal court's inquiry into the legality of a prisoner's detention was limited to whether the trial court had subject matter jurisdiction.[4] Thus, in 1830, the Supreme Court entertained a habeas petition from Tobias Watkins who was tried and convicted in a lower federal court for defrauding the federal government.[5] On his collateral attack, Watkins argued that defrauding the federal government was neither a state common law offense nor a federal crime and therefore his detention was illegal.[6] The Court rejected Watkins's argument and

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[1] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132.

[2] Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring).

[3] *See infra* Part II.

[4] *See Ex parte* Watkins, 28 U.S. 193, 193 (1830).

[5] *See id.* at 194–96.

[6] *See id.* at 194–95.

held that the lower court's decision on whether Watkins committed a federal crime was conclusive because the lower court was a court of general jurisdiction.[7] Consequently, a lower court with subject matter jurisdiction could make egregious substantive and procedural errors but remain shielded from collateral attacks on its decision after conviction.

Following *Watkins*, defendants sought to expand the definition of jurisdiction in order to succeed on collateral attacks. For example, in *Ex Parte Siebold*, the defendants collaterally attacked the sentencing court's jurisdiction after they were convicted "under sect. 5515 and partly under sect. 5522 of the Revised Statutes of the United States."[8] The defendants argued that Congress lacked constitutional authority to enact those statutes, thereby depriving the court of jurisdiction to hear the case..[9]

In expanding the concept of jurisdiction, the Supreme Court determined the constitutionality of a statute is "proper for consideration on habeas corpus" because an unconstitutional statute is "not merely erroneous, but is illegal and void." [10] Therefore, "if the laws are unconstitutional and void, the [lower court] acquired no jurisdiction of the causes."[11]

Subsequently, a pair of early twentieth-century cases would determine whether constitutional error could fall within federal habeas corpus review. First, in *Frank v. Mangum*, the Supreme Court determined whether habeas relief could be granted to a defendant who asserted an unruly crowd "amounting to mob domination" made his trial constitutionally deficient.[12] Despite the defendant's assertions, the Court decided it could not grant federal habeas relief because the state of Georgia—who had jurisdiction over the case—provided adequate corrective procedures for the defendant's claims.[13] Justice Holmes dissented and argued that "where the processes of justice are actually subverted" by a hostile mob, "the Federal court has jurisdiction to issue the writ."[14]

Eight years after *Frank*, the Supreme Court again determined whether legal proceedings likely influenced by hostile mobs constituted grounds for habeas relief. On September 30, 1919, a church congregation of African Americans was attacked by white men.[15] Racial violence broke out over the next few days, and Frank Moore,

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7 *Id.* at 198–99. The Court cited as authority its understanding that English courts never used habeas corpus as a form of post-conviction relief. *See id.* at 202. However, modern research shows that this is untrue. *See generally* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (Belknap Press 2010) (discussing the Writ's history and previously misunderstood use in a variety of legal proceedings).

8 *Ex Parte* Siebold, 100 U.S. 371, 373–74 (1879).

9 *Id*. at 374 (1879).

10 *Id.* at 376.

11 *Id.* at 377.

12 Frank v. Mangum, 237 U.S. 309, 311–12, 332 (1915).

13 *Id.* at 327-29.

14 *Id.* at 347 (Holmes, J., dissenting).

15 Moore v. Dempsey, 261 U.S. 86, 87 (1923).

among several others, was indicted for the alleged killing of a white man.[16] Like in *Frank*, Moore's legal proceedings were under the threat of mob violence.[17]

The Court acknowledged its decision in *Frank* explained "corrective process supplied by the State may be so adequate that interference by [h]abeas corpus ought not to be allowed."[18] However, Justice Holmes, now writing for the majority, held that if the "whole proceeding is a mask--that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong," then no amount of corrective process "can prevent [the] Court from securing to the [defendants] their constitutional rights."[19]

So far, habeas relief had already expanded far beyond its humble beginnings. Habeas petitions began as a challenge to the sentencing court's jurisdiction. The concept of jurisdiction was then expanded, and finally, extreme due process violations were added as a basis for relief. But this was just the beginning. More and more constitutional errors, both procedural and substantive, would come into the purview of federal habeas jurisdiction.

II. THE WRIT'S EXPANSION THROUGH THE MID-TWENTIETH CENTURY

In 1953, the Supreme Court decided *Brown v. Allen* and set up the modern framework for postconviction jurisprudence. In *Brown*, a North Carolina state court convicted Brown of rape and sentenced him to death.[20] Brown appealed on the ground that a coerced confession and racial discrimination during grand and petit jury selection violated his federal constitutional rights.[21] The Court ultimately affirmed Brown's conviction.[22] However, the significance of the decision was that the Court did not decide the case on the adequacy of State procedures, "but by reaching and rejecting *on the merits* the federal claims presented which had been previously adjudicated by the state courts."[23] Now, the question on federal habeas review was not simply whether the State provided adequate corrective process—which is still important—but whether the State correctly decided the merits of constitutional issues.

Although this decision is considered a breakthrough and a fundamental shift in federal habeas review, it is not wholly inconsistent with Justice Holmes' decision in *Moore v. Dempsey*. Recall that in *Moore* the Court did not necessarily find an issue with the state's corrective process but decided there was a federal constitutional violation where no amount of corrective process could make up for a

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16 *See id.*

17 *Id.* at 88-90.

18 *Id.* at 91.

19 *Id.*

20 Brown v. Allen, 344 U.S. 443, 466 (1953).

21 *Id.*

22 *Id.* at 487.

23 Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 500 (1963) (emphasis added).

sham trial.[24] Although *Brown* is not inconsistent with *Moore*, *Brown* is likely considered more significant because it was the first link in a chain of cases that rapidly expanded federal habeas review. According to Professor Paul Bator, "ever since *Brown v. Allen* the Supreme Court has continued to assume, without discussion, that it is the purpose of the federal habeas corpus jurisdiction to redetermine the merits of federal constitutional questions decided in state criminal proceedings."[25]

Just as criminal defendants tried to expand jurisdictional claims in the wake of *Watkins*, criminal defendants then tried to push through a wide assortment of claims based on the merits of their conviction. One of the most highly criticized post-*Brown* cases was *Fay v. Noia*. There, the defendant, Noia, was given a life sentence after his felony murder conviction in a New York state court.[26] Noia did not seek direct appellate review of his constitutional challenge—inadmissible use of a coerced confession—until the time to do so under New York law had elapsed.[27] Twenty years later, Noia finally challenged the coerced confession through a federal habeas petition.[28]

The issue was whether Noia's petition was barred by 28 U.S.C. § 2254,[29] which provided in relevant part: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State."[30] To put it succinctly, § 2254 appeared to require that a defendant use all available state remedies to challenge their conviction before filing a federal habeas petition. So, what would happen now that Noia can no longer directly appeal his conviction and habeas is his only remedy?

Writing for the Court, Justice Brennan held that "§ 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court."[31] In other words, a federal judge should excuse a state prisoner's procedural default so long as the prisoner did not deliberately bypass state remedies.[32] This holding eviscerated § 2254's exhaustion requirements. It did not matter that Noia had at one time an option to appeal, but that twenty years after his conviction such an option was no longer available.

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[24] *Moore*, 261 U.S. at 91.

[25] Bator, *supra* note 23, at 500.

[26] Fay v. Noia, 372 U.S. 391, 394 (1963).

[27] *Id.* at 395–97.

[28] *See id.*

[29] *Id.* at 396–98.

[30] *Id.* at 396 (citing 28 U.S.C. § 2254).

[31] *Fay*, 372 U.S. at 435.

[32] There is an obvious advantage to a deliberate bypass in this scenario. Twenty years after the conviction, any witnesses against Noia would either be dead, unattainable, or have limited memory of the event. Justice Brennan apparently did not find enough evidence to conclude that such a procedural tactic was deliberate.

III. PUSHBACK AGAINST THE WRIT'S EXPANSION

Brown and its progeny led to much academic and political backlash. This Part highlights some of the major criticisms and the resulting legislation to narrow the writ.

A. Considerations Leading to AEDPA

Paul Bator led the charge against the writ's expansion in his influential paper *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*.[33] One underlying premise of Bator's arguments is that "no detention can ever be finally determined to be lawful."[34] What Bator means is that no court, including the U.S. Supreme Court, can be infallible in determining the facts and applying those facts correctly to the proper law. Assuming that an ultimately "correct" determination of fact or law exists, "we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether the right rule was applied, whether a new rule should not have been fashioned."[35] Because we cannot say any tribunal is "correct" in the ultimate sense, the question then becomes: *When can we be satisfied that a decision is final?*

Bator's main concern is that the *Brown* Court did not answer this question. Bator argues that lower courts have had difficulty defining the scope of habeas review because the *Brown* Court "did not provide a principled rationalization of the purpose being served by affording the federal court the right to review the determination of the state court in the first instance."[36] Bator offers two possible purposes for the Court's rationale. First, the purpose of federal habeas review may be to ensure that no error is made by state courts.[37] If so, however, there is no reason why a reviewing court should give deference to the trial court's factual findings but review the findings of law de novo. Alternatively, "if the purpose is to assure 'correct' determinations that purpose should not be disregarded when the allegation is that the state court has erred in finding the facts bearing on a constitutional claim."[38] But again, if state courts can—after providing adequate procedural safeguards—sufficiently guarantee that correct factual conclusions were made, why cannot the same be said for legal conclusions?

Without clear direction from the Court on this question, there remained no principled answer to various federalism issues. Bator believes that a federal district court judge should not overturn the decision of a state's highest court without a

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33 Bator, *supra* note 23.

34 *Id.* at 446.

35 *Id.* at 447.

36 *Id.* at 502.

37 *See id.*

38 *Id.*

"principled institutional justification" for it.[39] One potential justification is that federal habeas review is just an extension of the Supremacy Clause.[40] However, it is not automatically "better for federal judges to pronounce [federal law] than state judges," especially if the state court has done a fair and adequate job investigating the issue.[41] Furthermore, unprincipled decisions to strip state court judges of their findings of law, regardless of the adequacy of their process, may damage their "inner sense of responsibility, to the pride and conscientiousness, . . . in doing what is . . . under the constitutional scheme a part of *his* business: the decision of federal questions properly raised in state litigation."[42]

Finally, Bator points out that the federal judicial system has limited resources.[43] Those limited resources are continuously strained against a rapidly increasing number of federal habeas petitions filed by state prisoners.[44] In 1950, "there were 560 habeas petitions filed by state prisoners in the federal district courts."[45] However, by 1961, two years before Bator published his article, the number increased to 906.[46] As will be discussed below, the upward trend of habeas petitions has accelerated at a pace far greater than the resources provided to the federal judicial system.[47]

Judge Henry J. Friendly shared the same concerns over judicial conservation of resources. In his article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, Judge Friendly regards the drain of judicial resources as "the most serious single evil with today's proliferation of collateral attack."[48] In support of this notion, Judge Friendly brings up "Justice Jackson's never refuted observation that '[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones.'"[49] In the same vein, Bator writes that it is not only the lack of time and money that prejudice meritorious claims, but also the strained "intellectual and moral energies and intensities of our judges."[50]

Judge Friendly provides three more reasons in support of his argument that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."[51] First, that "it is essential to the educational and deterrent functions of

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39 *Id.* at 505.

40 *See* U.S. Const. art. VI.

41 *Id.*

42 *Id.* at 506 (emphasis in original).

43 *See id.*

44 *Id.* ("[T]he doctrine of *Brown v. Allen* must be assessed in light of the strains put on the federal judicial system itself by the ever increasing flood of habeas petitions from state prisoners.")

45 *Id.* at 506 n.183.

46 *See id.*

47 *See infra* Part IV.A.

48 Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970).

49 *Id.* at 149 (alteration in original) (citing Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)).

50 Bator, *supra* note 23, at 506.

51 Friendly, *supra* note 48, at 142.

the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment."[52] Second, that the "longer the delay" in final determinations of fact, the "less the reliability of the determination of any factual issue giving rise to the attack."[53] And finally, the societal desire for finality in criminal cases.[54]

The concerns and criticisms laid out by Bator and Judge Friendly resonated strongly within the legal community. In the 1980s, a commission was formed to guide congressional action for federal habeas corpus.[55] The result was the Antiterrorism and Effective Death Penalty Act of 1996.

B. The Powell Committee and AEDPA

In June 1988, Chief Justice Rehnquist created the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases ("The Powell Committee").[56] The Powell Committee formed in response to "piecemeal and repetitious litigation and years of delay between sentencing and a judicial resolution as to whether the sentence was permissible under the law," and a "lack of finality [that] undermine[d] public confidence in [the] criminal justice system."[57] Chief Justice Rehnquist directed the Committee to "inquire into the necessity and desirability of legislation directed toward avoiding delay and the lack of finality in capital cases in which the prisoner had or had been offered counsel."[58]

The Powell Committee found three major issues with the then-current state of federal habeas review. First, the Powell Committee found widespread "unnecessary delay and repetition."[59]

These deficiencies were due to:

> (1) a lack of coordination between federal and state legal systems, resulting in prisoners moving back and forth between the two systems before exhausting state remedies; (2) prisoners filing excessive, last minute motions for stays of execution; and (3) the absence of a statute of limitation allows for prisoners to file multiple petitions at any point during their incarceration.[60]

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52 *Id.* at 146 (quoting Bator, *supra* note 23, at 452) (internal quotations omitted).

53 *Id.* at 147.

54 *Id.* at 149.

55 *See infra* Part III.B.

56 AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES, AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES COMM. REP., *as reprinted in* 135 CONG. REC. 24,694 (1989). The Committee was spearheaded by former Associate Justice Lewis F. Powell, Jr. *Id.*

57 *Id.* at 24,694.

58 *Id.* (internal quotations omitted).

59 *Id.*

60 LISA M. SEGHETTI & NATHAN JAMES, CONG. RSCH. SERV., RL33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 3 (2006).

Second, the Powell Committee found a "pressing need for qualified counsel to represent inmates in collateral review."[61] Capital habeas litigation may be complex, and capital inmates are "almost uniformly" indigent and "often illiterate or uneducated."[62] This dichotomy "results in delayed or ineffective federal collateral procedure[ ]" and "appointment of qualified counsel only when an execution is imminent."[63] Unfortunately, competent counsel at this stage of litigation amounts to little as many constitutional challenges are often waived and the severe time pressure is severe.[64]

Third, the then-current system resulted in last-minute litigation whereby constitutional claims would only emerge "when prompted by the setting of an execution date."[65] In a nod to Bator and Judge Friendly's concerns, the Powell Committee found that "[j]udicial resources are expended" as a result of the time pressures.[66] The exigent time pressure caused concern that "[j]ustice may be ill-served" in capital cases.[67] Noteworthy is the Powell Committee's concern over sandbagging, which was the source of heavy criticism in *Fay v. Noia*. Here, the Committee wrote that sometimes "attorneys appear to have intentionally delayed filing until time pressures were severe."[68] Furthermore, the Powell Committee "believe[d]" that successive petitions usually "are filed at the eleventh hour seeking nothing more than delay."[69]

The Powell Committee proposed several statutory procedures for federal habeas corpus review of capital sentences where competent counsel had been provided. Some of the proposals include "a six-month period within which the federal habeas petition must be filed"; an "automatic stay of execution" that stays "in place until federal habeas proceedings are completed or until the prisoner . . . fail[s] to file a petition within the [statutorily] allotted time"; and an exhaustion requirement, which requires prisoners to raise their claims in state court first.[70] The goal of these proposals was to achieve the following: "Capital cases should be subject to one complete and fair course of collateral review in the state and federal system, free from the time pressure of impending execution, and with the assistance of competent counsel for the defendant. When this review has concluded, litigation should end."[71]

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61 AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES, AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES COMM. REP., *as reprinted in* 135 CONG. REC. 24,694, 24,695 (1989).

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

Following the Powell Committee's findings, Congress passed AEDPA and received President Bill Clinton's signature.[72] AEDPA reformed habeas litigation for both capital and noncapital prisoners and sought to resolve previously "unclear standards and confusing rules."[73] The most significant changes include "tighter filing deadlines, limitations on successive petitions, restrictions on evidentiary hearings, heightened exhaustion and deference standards and specific capital case standards."[74]

It is important to understand that although AEDPA reformed habeas litigation for capital and noncapital cases, the focus of the Powell Committee was strictly capital cases.[75] The Committee reasoned that capital inmates "ha[ve] every incentive to delay the proceedings that must take place before that sentence is carried out."[76] Conversely, noncapital prisoners "have every incentive to bring their claims to resolution as soon as possible in order to gain relief."[77] The thesis of this Article, which advocates loosening AEDPA's procedural hurdles for capital cases, is antithetical to the Powell Committee's findings and to AEDPA's major purposes. However, the following Part highlights post-AEDPA statistics that show AEDPA's goals have not been met.[78] Rather, the issues that led to AEDPA have only been exacerbated. Therefore, change is needed and the compromise outlined in this Article offers the best solution among competing interests.

IV. AEDPA'S STATISTICAL RESULTS

This Part will first show that empirical data supports the need to amend AEDPA. Next, data will be used to suggest where change ought to be made.

A. Statistics Support Change

Statistical evidence concerning the number of post-AEDPA habeas petitions filed by state prisoners sheds light on AEDPA's mixed success. Before diving into the statistics, recall the underlying premises and concerns that led to AEDPA.

First, there was a massive increase in state prisoner habeas corpus filings following *Brown* and its progeny. Per the Department of Justice, habeas petitions by state prisoners increased from 1,020 in 1961 to 8,059 in 1982.[79] This is nearly a

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72 CONGRESS.GOV, *S.735 - Antiterrorism and Effective Death Penalty Act of 1996*, https://www.congress.gov/bill/104th-congress/senate-bill/735.

73 Thomas F. Gede, *Major Habeas Reform Package Becomes Law*, FEDERALIST SOC'Y (Dec. 1, 1996), https://fedsoc.org/commentary/publications/major-habeas-reform-package-becomes-law.

74 *Id.*

75 AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES, AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES COMM. REP., *as reprinted in* 135 CONG. REC. 24,694, 24,695 (1989).

76 *Id.*

77 *Id.*

78 *See infra* Part IV.A.

79 BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FEDERAL REVIEW OF STATE PRISONER PETITIONS: HABEAS CORPUS 2 (1984).

700% increase in twenty years and understandably led to concern over judicial resources. As Bator put it, there was concern over conservation of "not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system."[80] The strain on judicial resources would supposedly "prejudice the occasional meritorious application" because it is "buried in a flood of worthless ones."[81]

It was not only the sheer number of habeas petitions that led to AEDPA. The Powell Committee was also adamant about reducing the length of time it took for a capital prisoner to actually receive his death sentence.[82] This coincides with Bator's and Judge Friendly's need for finality in criminal judgments.

It logically follows that if AEDPA were successful, it should have achieved at least the following three goals. First, the total number of federal habeas filings by state prisoners (in proportion to prison populations) should have decreased. Second, in response to the decrease in habeas petitions, there should be a higher percentage of granted relief because the judiciary can focus their resources and energies on meritorious claims. And third, capital cases should come to a final resolution more quickly. What do the results show?

Starting with total number of habeas petitions filed by state prisoners, a 2007 empirical study on AEDPA's effects found that each year since AEDPA was passed, "more than 18,000 cases, or one out of every 14 civil cases filed in federal district courts, are filed by state prisoners seeking habeas corpus relief, and more than 6,000 of these cases reach the courts of appeals."[83] At face value, the increase from 8,059 filings in 1982 compared with over 18,000 each year after AEDPA was adopted is daunting. However, the raw numbers must be compared with the exponential increase in the U.S. prison population. Since the Supreme Court decided a state prisoner's habeas petition on the merits in *Brown*, the prison population rose from "less than 150,000 prisoners in the 1940s to about 1,400,000 prisoners today."[84] When habeas petitions are combined with prisoner population data, the statistics show that "habeas filings per prisoner [have] remained roughly constant."[85] Indeed, Professors Nancy King and Joseph Hoffmann argue that "[t]he modern explosion in state prisoner populations overwhelmed, and masked, a long and gradual decline in the rate of habeas filings per prisoner."[86] It is hard to tell if this is a victory for AEDPA's advocates. Technically, the decreased rate of habeas filings suggests that AEDPA has been somewhat successful. But if the total number

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80 Bator, *supra* note 23, at 451.

81 Brown v. Allen, 344 US. 443, 537 (1953) (Jackson, J., concurring).

82 *See* AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES, AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES COMM. REP., *as reprinted in* 135 CONG. REC. 24,694, 24,695 (1989).

83 NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 9-10 (2007).

84 BRANDON GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS 136 (1st ed. 2013).

85 *Id.*

86 NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY 70 (2011).

of filings is still double that of 1982, then conservation of judicial resources has not been achieved.

Regarding capital cases, two comparative findings between post- and pre-AEDPA studies are of concern. First, the total time for a habeas filing to reach resolution has *increased*,[87] and not by a little. Rather, capital habeas filings took "at least twice as long to finish, on average, than prior to AEDPA."[88] Pre-AEDPA, "the average disposition time[s] for . . . capital habeas case[s] involving . . . first petition[s] was 15 months," while after AEDPA, there were "averages of 29 months for the disposition of terminated capital cases, 30.4 months for non-transferred first petitions, and 37.3 months so far for all cases including those still pending."[89]

The second comparative finding of concern is that the rate of granted relief for capital cases has *decreased*. The 2007 study found "[a]bout one in eight or 12.4% of 267 terminated capital cases that filed in 2000, 2001, and 2002 received relief."[90] Compared with the "40% grant rate" for "capital cases that had already made it through both the federal district and appellate courts by 1995," the current grant rate is shockingly low.[91]

Similar results were found for noncapital cases. The 2007 study found that "[o]verall disposition time per case has increased on average since AEDPA," with an average of "at least a year in federal court before they are completed."[92] Additionally, like capital cases, the grant rate by district courts for non-capital cases has decreased from one in 100 (pre-AEDPA) to one in 284 (post-AEDPA).[93]

What can we make of these statistics? The most obvious inference is that the Powell Committee's goal to reduce the "years of delay between sentencing and a judicial resolution" has not been achieved.[94] Furthermore, it is not clear that meritorious claims have distinguished themselves from frivolous claims. Otherwise, there would have been an increase in the relief rate for both capital and noncapital prisoners.

Of course, it is impossible to pinpoint AEDPA's direct effects on both the delays between sentencing and resolution, and the reduction in relief rates. This is mainly because of the exponential increase in the prisoner population that undoubtedly has strained judicial resources as much as, or likely more than, the expansion of the writ. It is possible that without AEDPA the delays and relief rates would be even worse, but this is simply speculation. What we do know, however, is that the main priorities of AEDPA have not been achieved. Therefore, statutory changes are warranted.

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87 KING ET AL., *supra* note 83, at 60.

88 *Id.*

89 *Id.*

90 *Id.* at 61.

91 *Id.* (emphasis omitted)

92 *Id.* at 59 (emphasis omitted).

93 *Id.* at 58.

94 AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES, AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES COMM. REP., *as reprinted in* 135 CONG. REC. 24,694, 24,694 (1989).

B. Where Can Change Be Made?

This Article posits that statistical evidence would support a potential compromise between expanding the writ and supporting fundamental concepts (such as federalism and state comity) by loosening AEDPA's procedural hurdles for capital prisoners while further restricting procedures for noncapital prisoners.

Between 1990 and 1996 (pre-AEDPA), there was an average of 12,656 state non-capital federal habeas corpus petitions and 141 state capital federal habeas corpus petitions filed per year.[95] Capital petitions were therefore, on average, about 1.1% of all habeas petitions filed by state prisoners. Between 1997 and 2004 (post-AEDPA), an average of 18,758 state non-capital cases and 198 state capital federal habeas corpus cases had been filed by prisoners in state custody.[96] Post-AEDPA, capital petitions made up 1.05% of the total federal habeas petitions filed by state prisoners. In total, non-capital petitions increased by 48% while capital petitions increased by 40%.

These statistics show that rate of increase for noncapital petitions is outpacing that of capital petitions. While this immediately suggests the focus of AEDPA reform should lie on noncapital cases, these numbers are not the whole story. Empirical data shows that "[i]t takes on average one extra year for death row inmates to reach federal court compared to non-capital petitioners."[97] Furthermore, "[c]apital petitioners raised on average seven times as many claims as non-capital petitioners."[98] However, while this shows that capital cases certainly take up more resources *per case*, it does not compare to the sheer volume of noncapital cases. Indeed, noncapital petitions have also increased the number of claims per petition since AEDPA's enactment. Whereas between 11% and 25% of noncapital cases included four or more claims prior to AEDPA, as of August 2007 over 41% of noncapital cases included four or more claims.[99] But let's assume for argument's sake that every single noncapital petition includes only, on average, two claims. That would equal, on average, 37,516 claims by noncapital prisoners.[100] Now let's assume that every single capital petition includes *100* claims. The total number of capital claims would be 19,800.[101] In this extreme scenario, capital claims would only make up 34.5% of total claims. Therefore, the statistics show that loosening procedural hurdles for capital prisoners would put a minimal strain on judicial

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95 LISA M. SEGHETTI & NATHAN JAMES, CONG. RSCH. SERV., RL33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 7 (2006) (emphasis omitted).

96 *Id.* (emphasis omitted).

97 KING ET AL., *supra* note 83, at 62.

98 *Id.*

99 *Id.* at 57.

100 Multiplying the claims with the average state noncapital cases found in CRS Report. LISA M. SEGHETTI & NATHAN JAMES, CONG. RSCH. SERV., RL33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 7 (2006)

101 Multiplying the claims with the average state capital cases found in CRS Report. *See id.*

resources while efforts to curtail noncapital petitions would better conserve such resources.

Even though the compromise advanced in this Article would likely conserve judicial resources, one of the major criticisms of the writ's expansion was the lack of finality in criminal convictions.[102] Indeed, the purpose of the Powell Committee was "to inquire into 'the necessity and desirability of legislation directed toward avoiding delay and the lack of finality' in capital cases."[103] While this Article acknowledges the need for finality in criminal convictions, this Article nevertheless posits that death is different.

V. DEATH IS DIFFERENT: A RESPONSE TO FINALITY

While finality in criminal convictions is important for society, no punishment is as final as death. Once the sentence is executed, any errors are moot. Therefore, if it takes longer to get it right, so be it.

The Powell Committee wrote in its proposal that the guilt of the "inmate under captial [sic] sentence" is "frequently . . . never in question."[104] However, the Powell Committee made its conclusions in 1989 when DNA testing just began its major role in the criminal justice system.[105] As early as 2002, the Supreme Court stated that "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated."[106] Per the Innocence Project, "375 people in the United States have been exonerated by DNA testing, including 21 who served time on death row."[107] However, "DNA evidence is not available or probative in the vast majority of criminal cases."[108]

This is not a moral tirade against the death penalty. In certain cases, the death penalty serves an important societal purpose as both punishment and deterrent. However, the importance of finality as argued by Bator is severely diminished in the face of so many exonerations. A single innocent man or woman that is wrongly sentenced to death is one too many. With that said, society should strictly adhere to the law, and judges should impose the death penalty when required by law, even if doing so is against their own moral beliefs. But as a start, AEDPA can become more accommodating to capital prisoners so that we know death row inmates had every chance to challenge a potentially erroneous sentence.

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102 Bator, *supra* note 23.

103 AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES, AD HOC COMM. ON FED. HABEAS CORPUS IN CAP. CASES COMM. REP., *as reprinted in* 135 CONG. REC. 24,694, 24,694 (1989).

104 *Id.* at 24,695.

105 The first DNA exoneration came that very same year. INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/.

106 Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002).

107 *Exonerate the Innocent*, INNOCENCE PROJECT, https://innocenceproject.org/exonerate/ (last visited May 9, 2021).

108 Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 116 (2008).

VI. POTENTIAL COMPROMISES

While it has strongly focused on the ultimate finality of the death penalty, this Article will not dismiss the underlying concerns that led to AEDPA, including conservation of judicial resources, state comity, and federalism. Indeed, federalism, through which "a double security arises to the rights of the people," must be respected in this complex area of law.[109] Therefore, the following are potential changes to AEDPA that may serve as a compromise between the many competing interests in federal habeas corpus.

A. Innocence Gateway for Successive Petitions: Return to Schlup

In capital cases, the innocence gateway for successive claims should be expanded. Prior to AEDPA, federal courts followed the *Schlup v. Delo* standard.[110] In *Schlup*, a death row prisoner alleged in his second habeas petition that the jury at his trial was deprived of evidence that would establish his innocence.[111] The district court denied the petition because the prisoner did not show "by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found" him guilty.[112] Although the U.S. Supreme Court previously articulated the "clear and convincing standard"—called the *Sawyer* standard[113]—the Court had to decide whether that "standard provides adequate protection against the kind of miscarriage of justice that would result from the execution of a person who is actually innocent."[114] The Court held that the *Sawyer* standard was too stringent[115] and instead required the prisoner to show "a constitutional violation has probably resulted in the conviction of one who is actually innocent."[116]

The Court acknowledged that Congress previously fashioned rules that disfavored successive claims due to "increasing burdens on the federal courts and to contain the threat to finality and comity."[117] However, the Court noted that "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'"[118] AEDPA overturned the *Schlup* standard and now provides:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior

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109 THE FEDERALIST NO. 51.

110 *See, e.g.*, House v. Bell, 547 U.S. 518 (2006) (applying *Schlup* standard); Schlup v. Delo, 513 U.S. 298, 301 (1995).

111 *Schlup*, 513 U.S. at 301.

112 *Id.* (quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992)) (internal quotations omitted).

113 *Id.*

114 *Id.*

115 *Id.* at 326–27.

116 *Id.* at 321.

117 *Id.* at 318.

118 *Id.* at 320–21 (quoting Murray v. Carrier, 477 U.S. 478, 495 (1986)).

> application shall be dismissed unless . . . (B)(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[119]

The return to *Sawyer's* clear and convincing evidence standard goes against habeas corpus' core purpose as "an equitable remedy."[120] Furthermore, as discussed, the countervailing assertions of finality have been greatly diminished in light of the vast number of exonerations. The balance between justice and finality has simply shifted toward the former. Therefore, AEDPA should be amended to direct courts to apply the *Schlup* standard where a capital prisoner asserts a claim on a successive petition that was not presented in a prior application.

B. Reinvigorate Retroactivity Relief

For capital cases, Congress should expand retroactive relief by removing AEDPA's "clearly established Federal law" language. AEDPA provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[121]

Section 2254(d) bars relief for claims based on new decisions by the Supreme Court. Rather, habeas relief is restricted to those claims based on "clearly established" Supreme Court rulings.[122] This suggests that if the Supreme Court has yet to address an issue, a district court cannot grant habeas relief based on precedent by the courts of appeals or other district courts—even if the prisoner's constitutional rights are clearly violated.

The goal for amendment of this provision would be to abolish the distinction between whether the Supreme Court has established a "new" rule or clarified an "old" one. By eliminating this distinction, a capital prisoner could benefit from a "new" or "old" rule. This would hopefully prevent constitutional dilemmas where two prisoners sentenced to death under violation of the same law would have different outcomes based on whether they were sentenced before or after the Supreme Court ruled on an issue.

To illustrate, consider *Schriro v. Summerlin*, where Summerlin was convicted of first-degree murder and sexual assault by the jury, and the judge determined and

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119 28 U.S.C. § 2244 (b)(2)(B)(ii).

120 *Schlup*, 513 U.S. at 319.

121 28 U.S.C. § 2254(d)(1).

122 *Id.*

applied aggravating factors and raised the punishment to death.[123] While Summerlin sat on death row, the Supreme Court decided *Ring v. Arizona* and held that aggravating factors must be determined by a jury, rather than a judge.[124] In determining whether to apply *Ring* retroactively to Summerlin's case, the Court held that it did not because the *Ring* rule was neither a substantive nor a procedural rule central to an accurate determination of innocence or guilt.[125]

One issue pointed to by the dissent is that while Summerlin will be sentenced to death, a subsequent prisoner will have the advantage of *Ring's* constitutional ruling and will avoid the death penalty.[126] How can it be that two men who violate the same law will have a different outcome when the Supreme Court's ruling on the issue could theoretically be applied to both?

The issue is due to the distinction between "new" and "old" rules that is now codified in § 2254(d)(1).[127] By abolishing this distinction in the capital case context, we can create uniformity for prisoners on death row, and prevent death sentences reached through unconstitutional procedures.

C. Remove Court of Appeals Authorization for Successive Petitions

AEDPA creates an unnecessary procedural hurdle that should be removed for both capital and noncapital cases. AEDPA provides: "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."[128] A "three-judge panel of the court of appeals" can then authorize the filing of the successive or second petition if it determines that the petitioner "makes a prima facie showing that the application satisfies the requirements of" § 2244(b).[129]

Why have this extra step in the process? Could we not bypass the court of appeals and direct the district court judge to dismiss successive petitions that do not make a prima facie showing that the § 2244(b) exceptions are met? This provision purports to create a screening process whereby frivolous matters are dismissed before a hard inquiry is taken. But it is difficult to see how any of the purposes of AEDPA—state comity, conservation of judicial resources, etc.—are met by this procedural hurdle.

If the petitioner fails to make a prima facie showing, then the petition consumes the resources (in terms of time, money, and intellectual capacity) of three judges. The post-conviction process would be better served if only one judge's resources (that is, the district court judge's resources) were used. And if the panel

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123 Schriro v. Summerlin, 542 U.S. 348, 350 (2004).

124 *See id.* at 350–51.

125 *Id.* at 353, 355–58.

126 *See id.* at 363 (Breyer, J., dissenting).

127 28 U.S.C. § 2254(d)(1).

128 28 U.S.C. § 2244(b)(3)(A).

129 *Id.* § 2244(b)(3)(B)–(C).

does find a prima facie case was shown and the case is sent off to the district court, now a total of *four* judges have reviewed the case when, again, only one was necessary. Is any reason provided why extra judges must be involved in this step? Surely a single district court judge can make the prima facie determination as competently as a panel of appellate judges. Furthermore, it seems that state comity is further diminished by adding a second layer of review to state determinations of fact and law. Because judicial resources are wasted and state comity is not furthered, removal of this arbitrary step is a win-win for both anti- and pro-AEDPA advocates.

D. Shift Harmless Error Burden on Noncapital Petitioners

On collateral review, noncapital state prisoners should have the burden of proving that a trial error was not harmless. As Chief Justice Traynor has described,

> [harmless errors] are the insects of the world of law, travelling through it in swarms, often unnoticed in their endless procession. Many are plainly harmless; some appear ominously harmful. Some, for all the benign appearance of their spindly traces, mark the way for a plague of followers that deplete trials of fairness. [130]

Despite this, the "well-being of the law encompasses a tolerance for harmless errors adrift in an imperfect world."[131] The question is, therefore, when do we permit harmless errors? And whose burden is it to prove whether an error is harmless?

In *Brecht v. Abrahamson*, the Supreme Court appeared to give the habeas petitioner the burden of proving harmless error on collateral attack.[132] The petitioner challenged the prosecutor's "use for impeachment purposes of petitioner's post-*Miranda* silence."[133] Based on principles of state comity and federalism, the Court decided that the previous *Chapman* standard, which on direct appeal required the State to prove beyond a reasonable doubt that an error was harmless,[134] did not apply to collateral review.[135] Rather, on collateral review, the Court adopted the *Kotteakos* standard, which requires that the error have a "substantial and injurious effect or influence in determining the jury's verdict" in order to grant relief.[136] This *Kotteakos* burden appeared to fall squarely on the prisoner because the Court stated that habeas petitioners are "not entitled to habeas relief based on trial error unless *they* [the defendant] can establish that it [the error] resulted in actual prejudice."[137] However, in *O'Neal v. McAninch*, the

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130 ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR ix (1970).

131 *Id.*

132 *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

133 *Id.* at 622–23.

134 *See id.* at 619 (citing Chapman v. California, 386 U.S. 18, 24 (1967).

135 *Id.* at 636–37.

136 *Id.* at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)) (internal quotations omitted).

137 *Id.* (emphasis added) (internal quotations omitted).

Court explained that there is not a "burden," so to speak, because a court's harmless error analysis requires an assessment of the entire trial record.[138] Rather, the Court held that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not harmless. And, the petitioner must win."[139]

In noncapital cases, a burden should be imposed on the habeas petitioner under a preponderance of the evidence standard. To word it alternatively, if the harmless error analysis appears to be a fifty-fifty determination, then the State should receive the benefit of the doubt. Presumably, at this point in the litigation the State has already met their burden at trial and throughout the State appellate process. So long as the State appellate procedures were fair, then it would diminish state comity and federalism to now put the State on the defensive.

AEDPA does not speak on the issue of harmless error. Therefore, this proposal is an addition, rather than a revision, of the federal habeas corpus statutes. With this addition, the integrity of the trial court and the jury is fortified while principles of state comity and federalism are maintained.

CONCLUSION

The scope of federal habeas corpus is an ever-changing landscape. The ideologically driven debates that led to AEDPA are still prominent but must now be reassessed in light of AEDPA's actual, and not theoretical, results. AEDPA's main goals for finality, conservation of judicial resources, and shortening the length between sentencing and punishment, have not been met. Therefore, change is clearly warranted and a compromise between capital and noncapital habeas laws appears to be a good starting point.

This Article has suggested several statutory changes as a basis for this compromise, including: expansion of the innocence gateway for successive petitions and increasing retroactive relief for capital prisoners, removing the arbitrary screening panel of federal appellate judges for both capital and noncapital prisoners, and shifting the harmless error burden onto noncapital prisoners on collateral review. These changes will likely improve conservation of judicial resources, promote federalism, and maintain state comity. Simultaneously, prisoners on death row will be guaranteed a procedurally sound avenue for ensuring that their constitutional defenses are heard.

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138 O'Neal v. McAninch, 513 U.S. 432, 435 (1995).

139 *See id.*