



2019

# Death, Law & Politics: The Effects of Embracing a Liberty-Restrictive vs. a Liberty-Enhancing Interpretation of Habeas Corpus

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## Recommended Citation

Astrada, Marvin L. (2019) "Death, Law & Politics: The Effects of Embracing a Liberty-Restrictive vs. a Liberty-Enhancing Interpretation of Habeas Corpus," *University of Baltimore Law Review*: Vol. 48 : Iss. 2 , Article 2.

Available at: <https://scholarworks.law.ubalt.edu/ublr/vol48/iss2/2>

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**DEATH, LAW & POLITICS: THE EFFECTS OF  
EMBRACING A LIBERTY-RESTRICTIVE VS. A LIBERTY-  
ENHANCING INTERPRETATION OF HABEAS CORPUS**

**Marvin L. Astrada\***

I. INTRODUCTION

Habeas corpus, commonly referred to as the “[G]reat [W]rit,” essentially prevents the State from unlawfully depriving a subject of its liberty.<sup>1</sup> Habeas played a fundamental role in the development of American law since the inception of the United States.<sup>2</sup> Habeas, inherited from the English common law, has remained a mainstay of U.S. criminal law and procedure.<sup>3</sup> This is the case, in part, because habeas historically embodies cardinal notions of due process and fair representation in law— notions associated with the preservation of civil rights and liberties that have underpinned the character and content of American law from the founding to the present.<sup>4</sup> As early as “the Philadelphia Convention and in the struggle for ratification, there was never the slightest objection to according a special preeminence to the Great Writ.”<sup>5</sup> James Madison’s notes on the Constitutional Convention document some of the Founder’s views of habeas in the constitutional order, demonstrating how “[t]he American colonists . . . linked habeas corpus with due process of law.”<sup>6</sup> “In 1787, the drafters of the Constitution assumed that some

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1. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3 (1980).

2. *See id.* at 6–7.

3. *See id.* at 6.

4. *See id.*

5. Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 608 (1970).

6. Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2337 (1993). From Madison’s notes on August 28, 1787:

Mr. Pinkney, urging the propriety of securing the benefit of the Habeas corpus in the most ample manner, moved “that it

form of habeas corpus would be available and thus provided that the privilege of the writ could not be ‘suspended’ except in ‘Cases of Rebellion or Invasion.’”<sup>7</sup> Habeas has thus been an integral part of the development of U.S. constitutional history, American political philosophy, and law.<sup>8</sup>

In the present, competing interpretations of what habeas entails and how it should be applied reflect both continuity and change regarding the role that the federal courts should assume in overseeing the exercise of the States’ police power.<sup>9</sup> As far as continuity, habeas remains a reflection and product of a national ethos that, at its core, expresses an overarching American preoccupation with checking the power of the State(s) to deprive individuals of their liberty interest, including a basic right to life.<sup>10</sup> Over time, habeas, as with other constitutional norms, values, and textual references, has evolved; its interpretation, role, and legal effect have undergone substantial change since 1787.<sup>11</sup> The political and judicial branches have reconfigured habeas in form and substance, and presently, habeas has been reinterpreted in a manner that substantially restricts the scope of its application.<sup>12</sup> Modern habeas, in practice, “is laced with doctrinal

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should not be suspended but on the most urgent occasions, & then only for a limited time not exceeding twelve months.”

Mr. Rutledge was for declaring the Habeas Corpus inviolable – He did [not] conceive that a suspension could ever be necessary at the same time through all the States –

Mr. Govr Morris moved that “The privilege of the writ of Habeas Corpus shall not be suspended, unless where in cases of Rebellion or invasion the public safety may require it.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 438 (Max Farrand ed., 1911), <http://oll.libertyfund.org/titles/farrand-the-records-of-the-federal-convention-of-1787-vol-2> (alteration in original).

7. Yackle, *supra* note 6, at 2337.

8. CHARLES DOYLE, CONG. RESEARCH SERV., FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 1, 3 (2006), <https://fas.org/sgp/crs/misc/RL33391.pdf>.

By the colonial period, “habeas corpus” had come to be understood as those writs available to a prisoner, held without trial or bail or pursuant to the order of a court without jurisdiction, ordering his jailer to appear with the prisoner before a court of general jurisdiction and to justify the confinement.

*Id.* at 3.

9. *See id.* at 1.

10. *See* Eric M. Freedman, *Habeas Corpus in Three Dimensions Dimension III: Habeas Corpus as an Instrument of Checks and Balances*, 8 NE. U. L.J. 251, 303, 305 (2016); Phillip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 728–30 (1980) (discussing ethos and its role in the law).

11. *See* DOYLE, *supra* note 8, at 3–9.

12. *See id.* at 14.

intricacy, which conceals underlying disagreements over [some fundamental] values: the vindication of individual rights, the decentralization of governmental power, and, [more importantly,] cutting across these themes, the role of the federal courts in our national life.”<sup>13</sup>

In light of the foregoing, this article explores the notion that modern habeas, until relatively recently, has in part functioned as an explicit check on state judicial power to deprive petitioners—especially poor people of color—of their liberty interest in the post-conviction review of capital cases wherein race and class each play a negative role in capital convictions.<sup>14</sup> “In the post-*Furman* era, American courts have routinely rejected challenges to death sentences based on race . . . .”<sup>15</sup> Yet, race continues to play a profoundly negative role in skewing the aim of obtaining equal justice under law via due process and fair representation in the realm of capital punishment.<sup>16</sup> This article critically examines the role that habeas assumes in the administration of justice pertaining to capital punishment, especially in procedural and substantive collateral challenges to states’ capital convictions.<sup>17</sup> More specifically, this article contextualizes and examines select structural issues immanent in the present post-conviction regime ushered in by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>18</sup> codified at 28 U.S.C. § 2254.<sup>19</sup>

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13. Yackle, *supra* note 6, at 2334.

14. *See infra* notes 31–43, 70–75 and accompanying text.

15. John D. Bessler, *The Inequality of America’s Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 547 (2016), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol73/iss1/22> (citing *United States v. Fell*, 944 F. Supp. 2d 297, 349–51 (D. Vt. 2013); *United States v. Williams*, No. 4:08-cr-00070, 2013 WL 1335599, at \*7 (M.D. Pa. 2013); *Jackson v. United States*, 638 F. Supp. 2d 514, 616 (W.D. N.C. 2009); *Brown v. United States*, 583 F. Supp. 2d 1330, 1349 (S.D. Ga. 2008)).

16. *See id.* at 565–67.

17. *See infra* Part III, Sections IV.A–B.

18. *See infra* Part III, Sections IV.A–B.

19. The AEDPA can be described as follows:

Major mid-1990s reform of habeas corpus as used to challenge criminal convictions. Among other provisions, the law limits both the procedural and substantive scope of the writ. Procedurally, it bans successive petitions by the same person, requiring defendants to put all of their claims into one appeal. Substantively, it narrows the grounds on which successful habeas claims can be made, allowing claims only to succeed when the convictions were contrary to “clearly established federal law” or

AEDPA's legal regime, which codifies the Supreme Court's habeas jurisprudence since the 1970s, has the effect of negatively impacting state habeas petitioners (which as a class are overwhelmingly poor and people of color), specifically petitioners' liberty interest based on due process and representational fairness.<sup>20</sup> This article explores the notion that AEDPA, as a legal regime, encompasses an overarching tension between viewing habeas as a liberty-enhancing versus a liberty-restrictive legal mechanism.<sup>21</sup> The liberty-enhancing effect of habeas, generally speaking, can be observed when the law and the courts privilege due process and fair representation in the provision of adequate and learned capital counsel on behalf of petitioners.<sup>22</sup> The liberty-restrictive effect of habeas, generally speaking, is observed when the law and the courts privilege efficiency, cost-effectiveness, comity, finality of legal process, and state police power.<sup>23</sup> The tension between habeas as liberty-enhancing versus liberty-restrictive occurs within the larger context of federalism, and what standard of review should constitute proper federal oversight of states' police powers.<sup>24</sup> This article thus selectively examines and discusses habeas in the context of AEDPA to explore modern habeas' impact as liberty-restricting or liberty-enhancing.<sup>25</sup>

#### A. *The Politics of Modern Habeas*

The exact role of the federal courts in national life, generally, and the deference that the federal courts owe state court judgments, specifically, has informed the overarching debate over modern habeas.<sup>26</sup> Habeas, historically and especially in the present, reflects tension, conflict between competing views of the role of federal

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an "unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254.

*Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/antiterrorism\\_and\\_effective\\_death\\_penalty\\_act\\_of\\_1996\\_%28aedpa%29](https://www.law.cornell.edu/wex/antiterrorism_and_effective_death_penalty_act_of_1996_%28aedpa%29) (last visited Jan. 13, 2019).

20. See Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 414 (1998) ("Although the AEDPA is written vaguely, it clearly attempts to speed up execution sentences and eliminate multiple appeals. In addition, the Act also appears to reduce federal habeas corpus to a meaningless process.") (citations omitted).

21. See *infra* Section IV.C.

22. See *infra* notes 57, 66, 75–78 and accompanying text.

23. See *infra* notes 74, 107–08, 143–44 and accompanying text.

24. See *infra* notes 79–80, 210–14 and accompanying text.

25. See *infra* Section IV.C.

26. See Woolley, *supra* note 20, at 418–19, 421.

oversight of state police power.<sup>27</sup> The power dynamics of habeas, and interpolations of habeas doctrinally, also have profound consequences for a class of petitioners that rely upon it to secure a semblance of substantive and procedural due process.<sup>28</sup> Although modern developments in interpreting habeas have arguably restricted access to the writ, at no point has the Court ever relegated “state prisoners to the state courts for the protection of their constitutional rights” because “[t]he need for broad federal review of state criminal convictions was recognized throughout . . . [as] the only effective means of preserving the constitutional rights of state prisoners.”<sup>29</sup> Historically and in the present, state courts have not fully effectuated state prisoners’ constitutionally protected rights in the realms of criminal justice generally, and capital punishment specifically.<sup>30</sup> Habeas petitioners seeking due process and fair representation in the federal courts have traditionally employed habeas to question the constitutionality of state capital convictions based on explicit racial animus and discrimination.<sup>31</sup> Race, as well as socioeconomic class, have played a profoundly negative and formative role in the administration of capital punishment.<sup>32</sup>

It is impossible to find a time in American history, even well before the birth of the Republic, when the use of the death penalty was not racially inflected. Even in 17<sup>th</sup> century colonial America, a frontier society in which overall populations were small and black inhabitants few, the rate of execution of blacks still far exceeded that of whites on a per capita basis.<sup>33</sup>

Arguably, modern habeas has played what can be termed a liberty-enhancing role in federal judicial oversight of state capital punishment.<sup>34</sup> State petitioners have relied upon modern habeas to

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27. *See id.* at 434–36.

28. Carlos M. Vázquez, *Habeas as Forum Allocation: A New Synthesis*, 71 U. MIAMI L. REV. 645, 651 (2017).

29. *See id.* at 700–01.

30. *See* Jennifer Schweizer, *Racial Disparity in Capital Punishment and Its Impact on Family Members of Capital Defendants*, 10 J. EVIDENCE-BASED SOC. WORK 91, 92–93 (2013).

31. *See* DOYLE, *supra* note 8, at 14.

32. *See* Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 245–53 (2015).

33. *Id.* at 245.

34. *See* Vázquez, *supra* note 28, at 681.

help counter the explicit racial and class bias embedded in various state capital punishment schema.<sup>35</sup> Habeas is thus emblematic of a procedural regime that has very real substantive effects, consequences on the very lives of those who rely upon it to obtain a modicum of fairness in the form of federal review.<sup>36</sup> Consider, for example, the disconcerting case of *Peek v. Florida*.<sup>37</sup> In this 1986 case, the trial judge removed himself from the penalty phase of the trial after the defense counsel heard the judge state “[s]ince the nigger mom and dad are here anyway, why don’t we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state.”<sup>38</sup>

Racial prejudice, hate, and discrimination, in conjunction with socioeconomic status, are at minimum brought to light and can be addressed in a federal forum that privileges due process and fairness of capital convictions.<sup>39</sup> Race and class have continued to severely attenuate substantive due process of law and fair representation of poor people of color seeking equal justice under the law.<sup>40</sup> Habeas

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35. See Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 458–61 (1981); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 509 (1994); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1388 (1988).

36. See Zeisel, *supra* note 35, at 458–61; see also Stevenson & Friedman, *supra* note 35, at 509; Kennedy, *supra* note 35, at 1388.

37. *Peek v. State*, 488 So. 2d 52 (Fla. 1986).

38. *Id.* at 56 (stating that “[A]nother person heard the comment as: ‘Since the niggers are here, maybe we can go ahead with the sentencing phase.’”).

39. See *infra* notes 41–46 and accompanying text.

40. See, e.g., *Goodwin v. Balkcom*, 684 F.2d 794, 805 n.13. (11th Cir. 1982) (granting petitioner habeas relief for ineffective assistance of counsel due, in part, to appointed counsel referring to him as “a little old nigger boy” in court proceedings). For another example of a disturbing case wherein race is explicitly used by the bench, prosecutor, and defense attorney to deprive a black defendant of due process and fair representation, see *Dobbs v. Zant*, 720 F Supp. 1566, 1575–78 (N.D. Ga. 1989), *aff’d*, 963 F.2d 1403 (11th Cir. 1991), *rev’d on other grounds*, 506 U.S. 357 (1993).

It goes without saying that many institutions, as evidenced throughout America, have progressed towards racial equality: there are now teachers, mayors, doctors, and a United States (US) President of color. However, there is one crucial institution that despite years of social activism and progress is still burdened by the heavy yoke of discrimination. The criminal justice system is the one part of American society that has been least affected by the social progress that has virtually transformed other areas of society. Nowhere within the criminal justice system is this lack of progress more evident than in the practice of the death penalty.

assumed a liberty-enhancing character prior to the 1970s.<sup>41</sup> Modern habeas, especially as construed during the Warren Court era, had the effect of providing petitioners with a degree of substantive due process and representation in protecting their liberty interest.<sup>42</sup> During the 1970s, with the advent of the Burger Court, habeas was substantially reconfigured as a liberty-restrictive mechanism, culminating with the passage of AEDPA in 1996.<sup>43</sup>

Modern habeas, from the Warren Court until the Burger and subsequent Rehnquist Court, has provided state capital petitioners with a viable means to challenge state capital convictions in a federal forum.<sup>44</sup> This was a significant development due to the fact that habeas petitioners at the state level have consistently been disproportionality comprised of poor people of color.<sup>45</sup> Habeas has had the effect of bolstering the representation of petitioners' liberty interests by curbing representational deficiency in the state capital punishment context.<sup>46</sup> *Moore v. Dempsey*<sup>47</sup> is indicative of a trend

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Michael Fraser, *Crime for Crime: Racism and the Death Penalty in the American South*, 10 Soc. Sci. J. 20, 20 (2010), <http://repository.wcsu.edu/ssj/vol110/iss1/9>.

41. See Vázquez, *supra* note 28, at 681.

42. See Sergey Tokarev, *Habeas Corpus: Modern History*, U.S. CIV. LIBERTIES (Sept. 7, 2012, 1:15 PM), <http://uscivilliberties.org/historical-overview/3893-habeas-corpus-modern-history.html>.

43. See *id.*

44. See *id.*

45. As noted in the Summary of Statement by The Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, to the Subcommittee on Civil and Constitutional Rights May 20, 1993 (page 7):

[R]estrictions on habeas corpus will not affect those persons who can afford competent and experienced counsel. It will, however, affect the poor, the uneducated and minorities - people typically represented by assigned, overworked, understaffed and frequently inexperienced and underpaid counsel. The Writ is essential for their protection, and its availability should not be curtailed merely to avoid last minute petitions in death penalty cases.

*Habeas Corpus: Hearings Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 103d Cong. 7 (1993). In 2017, blacks constituted 1,168 or 41.8% of death row inmates, and Latinos constituted 373 or 13.24% of death row inmates. CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A.: SUMMER 2017 (2017), <https://deathpenaltyinfo.org/documents/DRUSASummer2017.pdf>.

46. See Shelly Song, *Race Consciousness in Imposing the Death Penalty*, 17 RICH. J.L. & PUB. INT. 739, 744 (2014).

Research shows that racial bias is prevalent in cases where the prosecutor seeks the death penalty. Racial bias exists when the prosecutor uses his or her discretion to determine which crimes are truly heinous enough to warrant the death penalty, including

wherein race plays a weighty role in the severe attenuation or utter disregard of the constitutional rights of people of color accused of capital crimes.<sup>48</sup> In *Dempsey*, the Court found that the State judicial proceedings

were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result [of conviction and death]. The counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted.<sup>49</sup>

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the race of the defendant and the victim. Additionally, indigent capital defendants face the problem of inadequate defense counsel assigned to them by the court. Since 1973, 143 people on death row have been exonerated for the crimes for which they were convicted based on their innocence. Of the 143 death row exonerations, 72 people were black, 57 people were white, 12 people were Latino, and 2 were other. Since 1973, more African Americans have been exonerated from death row than any other racial population, providing further support that race is also a significant factor in wrongful convictions.

*Id.* (footnotes omitted). See also Charles J. Ogletree, Jr., *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 55, 64 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006); Michael L. Radelet & Glenn L. Pierce, *The Role of Victim's Race and Geography on Death Sentencing: Some Recent Data from Illinois*, in FROM LYNCH MOBS TO THE KILLING STATE, *supra*, at 117, 137; Maxine Goodman, *A Death Penalty Wake-Up Call: Reducing the Risk of Racial Discrimination in Capital Punishment*, 12 BERKELEY J. CRIM. L. 29, 29–30, 73 (2007).

47. *Moore v. Dempsey*, 261 U.S. 86 (1923).

48. See *id.* at 87–90.

49. *Id.* at 89. See *Powell v. Alabama*, 287 U.S. 45, 49, 71 (1932) (“In the light of the facts outlined in the forepart of this opinion – the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and, above all, that they stood in deadly peril of their lives – we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.”).

Race played a fundamental and negative role in the proceedings and was viewed by the Court as a factor that directly motivated the mob mentality that obliterated the integrity of the state legal proceedings that, in turn, supported issuance of the habeas entitling the defendants to federal review.<sup>50</sup> *Dempsey* is part of a long history wherein race continues to be a salient factor that negatively affects substantive due process, fairness and representation in capital punishment.<sup>51</sup>

With the Court's articulation of procedural due process grounds for reviewing and overturning a state capital conviction, and in the context of habeas and capital punishment, the role of the federal courts in national life gradually became the fulcrum of a restrictive versus expansionist view of the habeas.<sup>52</sup> Habeas' significance in the present can be summed up in the contrary politico-ideological positions of Professor Paul Bator and Justice Brennan, which reflect a liberty-restrictive versus liberty-enhancing interpretation of habeas.<sup>53</sup>

In Professor Bator's view, the limited scope of federal habeas review meant that the state courts often had the final word regarding the federal constitutional rights implicated in state criminal proceedings. This view was disputed by Justice Brennan, who, in *Fay v. Noia*, [372 U.S. 391, 426–27 (1963),] maintained that habeas courts had always

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50. After *Dempsey*,

[I]t became clear that federal habeas was not limited to instances of mob intervention or other external contaminants of the judicial process; it reached deficiencies from within the process which rendered the process so unfair as to result in a loss of life or liberty without due process of law, whether they took the form of a prosecutor's knowing use of perjured testimony and suppression of evidence that would impeach it, or of a denial of the assistance of counsel in criminal prosecutions, or of confessions or guilty plea secured by government coercion.

DOYLE, *supra* note 8, at 6–7 (footnotes omitted).

51. See Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1395, 1395–96 (2016) (finding that the American criminal justice system exemplifies institutions that are deeply affected by race and class).

52. See Vázquez, *supra* note 28, at 646–47.

53. See *id.* at 647.

provided plenary review of state prisoners' fundamental rights.<sup>54</sup>

The debate that contextualizes modern habeas thus centers on the degree to which federal courts should provide substantive oversight over state capital punishment schema.<sup>55</sup> Under a restrictive view, federal courts should apply a rational basis of review, rendering oversight minimal,<sup>56</sup> and under an expansionist view, federal courts should apply strict scrutiny because "Constitutional guarantees of habeas corpus and the fundamental rights of life and liberty can only be protected under a system of judicial review which is strict in capital cases . . . ."<sup>57</sup> These opposing positions reflect a fundamental tension in habeas between preserving the integrity of state power and ensuring that the law, in actuality, provides due process and representational fairness.<sup>58</sup>

For those that adhere to a liberty-enhancing view, as Judge Motley notes, "habeas corpus is simply an area that cannot be left to the states" because the "very essence of habeas corpus claims implicates the United States Constitution and its Amendments."<sup>59</sup> Historically, "[s]tandardless discretion in state capital statutes allowed prosecutors and juries to reach different results in similar cases and insulated

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54. *Id.* (footnote omitted).

55. *See id.* at 663–64 (discussing the disputed scope of permissible federal habeas corpus review).

56. *See* Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 611 n.310 (1994); *see also* Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233, 1248–49, 1276, 1280 (2006) (describing the restrictive view as giving more deference to states over habeas review).

57. Margolis, *supra* note 56, at 562; *see also* Semeraro, *supra* note 56, at 1237 ("[T]he writ in the United States has long embodied two competing ideologies. First, a powerful liberty-supporting ideology has enabled reformers to conceive of, and opponents to accept, new possibilities for expanding liberty-enhancing rights. Second, a counter-habeas ideology sees the writ as a dangerous get-out-of-jail-free card that enables criminals to avoid just punishments.").

58. *See supra* notes 56–57 and accompanying text.

59. Constance Baker Motley, *Civil Rights-Civil Liberties Litigation in the U.S. Supreme Court: Are the State Courts Our Only Hope?*, 9 HARV. BLACKLETTER J. 101, 110 (1992); *see also* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 2 (2010) ("[S]tates systematically violate criminal defendants' rights. Michigan, for example, routinely denies indigent criminal defendants' access to counsel, leaving them to represent themselves. Capital defendants in Idaho who discover six weeks after sentencing that the state withheld impeachment evidence about prosecution witnesses are statutorily barred from challenging the state's misconduct in state court. In New York, courts routinely violate defendants' due process rights by misconstruing state procedural rules to prevent defendants from raising substantive federal violations.") (footnotes omitted).

racial disparities from judicial review.”<sup>60</sup> Modern habeas as interpreted by the Warren Court had the effect of providing some form of substantive relief from the racially discriminatory application of capital punishment.<sup>61</sup> This is the case because habeas

provides a procedural mechanism for raising claims that were not or could not have been raised on the direct appeal. Most of these claims challenge the prisoner’s detention on federal constitutional grounds. The claims are constitutional in nature because federal courts only have jurisdiction to review constitutional challenges or the laws and treaties of the United States.<sup>62</sup>

While it is the case that the Court has expressed “concern for federal-state comity . . . for respecting the ‘dignity’ of the states as sovereign entities,”<sup>63</sup> and recognizing that the criminal law is mostly a state affair premised on the states’ police power,<sup>64</sup> it is also the case that the Court appointed itself as the protector of “discrete and insular minorities.”<sup>65</sup> Protecting the latter is in line with the Warren Court’s expansive liberty-enhancing interpretation of habeas.<sup>66</sup> By restricting habeas as a viable means through which to challenge state capital proceedings, poor people of color, who fall into the “discrete and

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60. Steiker & Steiker, *supra* note 32, at 257.

61. *See id.* at 245, 253, 279, 282–84 (discussing the Court’s positive impact on discriminatory application of the death penalty despite its insistence on race-neutral rulings).

62. Cristina Stummer, Note, *To Be or Not to Be: Opt-in Status Under the Antiterrorism and Effective Death*, 25 VT. L. REV. 603, 605 (2001) (footnote omitted).

63. Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1149 (2005) (footnote omitted).

64. *See United States v. Morrison*, 529 U.S. 598, 627 (2000) (invalidating the civil remedy provisions of the Violence Against Women Act as beyond Congress’s authority to enact under the Commerce Clause); *see also United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones Act of 1990 as beyond Congress’s authority to enact under the Commerce Clause); *but see Gonzales v. Raich*, 545 U.S. 1, 5, 9 (2005) (upholding Congress’s authority to apply the federal Controlled Substances Act against personal use quantities of marijuana grown for medical purposes).

65. Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 165–66 (2004) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

66. *See id.* at 169–70 (discussing the Warren Court’s shift in protecting individual rights and liberties after Footnote Four).

insular” classification, are directly and negatively impacted.<sup>67</sup> The Court has had alternative justifications, i.e., preserving the integrity of state power and protecting “discrete and insular minorities,” for either expanding or constricting habeas.<sup>68</sup> Presently, the Court has embraced the former.<sup>69</sup>

Habeas has, for the past several decades, been steadily attenuated,<sup>70</sup> with the passage of AEDPA codifying the Court’s restrictive interpretation of habeas since the 1970s.<sup>71</sup> Federal overview of state courts’ capital processes, which have historically deprived poor people of color of due process and fair representation,<sup>72</sup> is thus caught within the opposing poles of liberty-restricting and liberty-enhancing interpretations of habeas.<sup>73</sup> The desire to render capital habeas efficient, to make habeas cost-effective, and to procure finality, while simultaneously respecting the states’ police power, has resulted in a liberty-restrictive interpretation of habeas.<sup>74</sup> This interpretation is diametrically opposed to a liberty-enhancing interpretation of habeas.<sup>75</sup> In *Spencer v. United States*,<sup>76</sup> for instance, a dissent noted that “finality is not ‘the central concern of the writ of

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67. See Semeraro, *supra* note 56, at 1236 n.5; Gilman, *supra* note 65, at 172–73 (quoting *Carolene*, 304 U.S. at 152 n.4).

68. See Hoffstadt, *supra* note 63, at 1149; see also Gilman, *supra* note 65, at 165–66.

69. See Primus, *supra* note 59, at 56.

70. *Id.* (“At its inception, federal habeas corpus review of state court criminal convictions was designed not just to correct individual errors but also to check systemic state disregard for constitutional rights. That vision has faded over time. Today, judges and scholars who disagree about many aspects of habeas corpus share the assumption that the point of habeas is to remedy individual violations, and their disagreements concern which individuals should be entitled to relief—those who are actually innocent, those who were not afforded fair process, or those who had certain preferred rights violated. The struggle among these positions has created an unwieldy maze of procedural obstacles that currently prevents habeas from acting as a meaningful check at the systemic level. As a result, many states now violate criminal defendants’ federal rights not just with impunity but also as a matter of routine.”).

71. *Id.* at 10.

72. See Goldfarb, *supra* note 51, at 1403, 1405.

73. See *supra* notes 52–61 and accompanying text.

74. See Vázquez, *supra* note 28, at 677, 679–80, 688.

75. See *Rose v. Mitchell*, 443 U.S. 545, 585 (1979) (Powell, J., concurring) (“Nowhere has a ‘proper respect for state functions’ been more essential to our federal system than in the administration of criminal justice. This Court repeatedly has recognized that criminal law is primarily the business of the States, and that absent the most extraordinary circumstances the federal courts should not interfere with the States’ administration of that law.”) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

76. *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014).

habeas corpus’—‘fundamental fairness is.’”<sup>77</sup> The Court has vacillated between finality and fundamental fairness in the context of habeas.<sup>78</sup>

The tension between representation and efficiency, which takes place in the larger context of federalism, is reflected in AEDPA opt-in procedures for states that seek an expedited and deferential standard of federal habeas review of their capital punishment regimes and process.<sup>79</sup> Interpretation of 28 U.S.C. § 2254, which governs federal review of state death sentences, provides a case study that highlights structural issues that directly inform and impact the representational deficiency that undergirds habeas.<sup>80</sup> Although AEDPA is a procedural legal regime, it nonetheless has very real substantive socioeconomic consequences.<sup>81</sup>

Decisions about procedure are bound up with decisions about the particular individuals or disputes affected . . . . [P]rocedures for habeas corpus express views about what procedural features are important and also about the moral worthiness of prisoners . . . . Examining which features of process are employed and which are neglected illuminates the underlying political and social judgments.<sup>82</sup>

## II. CONTEXTUALIZING MODERN HABEAS & THE POLITICS OF REVIEW

As the Court notes in *Gardner v. Florida*,<sup>83</sup> “death is a different kind of punishment from any other and . . . the sentencing process, as well as the trial itself, must satisfy . . . [d]ue [p]rocess.”<sup>84</sup> Habeas is

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77. *Id.* at 1164 (Jordan, J., dissenting) (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)).

78. *See infra* notes 129–47 and accompanying text.

79. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (2012); John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259, 275–76 (2006).

80. 28 U.S.C. § 2254 (2012); Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 875 (1984).

81. *See* Nathan Nasrallah, Comment, *The Wall that AEDPA Built: Revisiting the Suspension Clause Challenge to the Antiterrorism and Effective Death Penalty Act*, 66 CASE W. RES. L. REV. 1147, 1153 (2016), <http://scholarlycommons.law.case.edu/caselrev/vol66/iss4/13>.

82. Resnik, *supra* note 80, at 859.

83. *Gardner v. Florida*, 430 U.S. 349 (1977).

84. *Id.* at 357–58. *See also* *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“[Death is] the most irremediable and unfathomable of penalties.”); *California v. Ramos*, 463 U.S. 992, 998–99 (1983) (“[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital

mentioned in the U.S. Constitution,<sup>85</sup> but it is not explicitly defined as a right.<sup>86</sup> Because habeas has not been explicitly defined as a right in the fundamental law, it is readily subject to the ebb and flow of ideological currents in the political and judicial branches.<sup>87</sup> In the case of modern collateral challenges to state court death sentences, habeas “is available to inmates in both federal and state custody,” and “the writ allows a state prisoner to argue federal claims in federal court.”<sup>88</sup> Whether conceived of as a right or a legal mechanism, habeas has functioned to protect the liberty interest of petitioners.<sup>89</sup>

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sentencing determination.”); *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) (“[C]apital cases . . . stand on quite a different footing than other offenses.”).

85. U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

86. *Id.*

87. *See supra* notes 11–13, 41–44, and accompanying text.

88. Woolley, *supra* note 20, at 417.

In 1996, Congress narrowed the writ of habeas corpus through the passage of . . . [AEDPA]. AEDPA has three important aspects: first, it imposes a one-year statute of limitations on habeas petitions. Second, unless a United States Court of Appeals gave its approval, a petitioner may not file successive habeas corpus petitions. Third, habeas relief is only available when the state court’s determination was “contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.

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Federal statutes (28 U.S.C. §§ 2241–2256) outline the procedural aspects of federal habeas proceedings. There are two prerequisites for habeas review: the petitioner must be in custody when the petition is filed, and a prisoner who is held in state government custody must have exhausted all state remedies, including state appellate review. Any federal court may grant a writ of habeas corpus to a petitioner who is within its jurisdiction. The habeas petition must be in writing and signed and verified either by the petitioner seeking relief or by someone acting on his or her behalf. The petition must name the custodian as the respondent and state the facts concerning the applicant’s custody and include the legal basis for the request. Federal courts are not required to hear the petition if a previous petition presented the same issues and no new grounds were brought up. Finally, a federal judge may dismiss the petition for the writ of habeas corpus if it is clear from the face of the petition that there are no possible grounds for relief.

*Habeas Corpus*, LEGAL INFO. INST., CORNELL L. SCH., [https://www.law.cornell.edu/wex/habeas\\_corpus](https://www.law.cornell.edu/wex/habeas_corpus) (last visited Jan. 13, 2019).

89. *See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, *supra* note 19.

Habeas has procedural and substantive protections built into it as a legal regime in thought and in practice. Habeas requires a state to provide justification for holding an individual in custody, and “[p]rompt resolution of prisoners’ claims is a principal function of the habeas corpus procedure.”<sup>90</sup> Further, habeas claims are only available after all other court and administrative remedies have been utilized.<sup>91</sup> The “exhaustion doctrine,” as articulated by the Court in *Wainwright v. Sykes*,<sup>92</sup> has been codified<sup>93</sup> and remains an indispensable prerequisite for asserting habeas review.<sup>94</sup> Habeas thus enables federal courts to exercise substantive review of state death sentences to ensure that a sentence does not violate the U.S. Constitution.<sup>95</sup> As noted previously, post-conviction review is based on arguments that are purely constitutional in nature.<sup>96</sup>

The irreversible effect of capital punishment—death—in conjunction with socioeconomic realities that attach to its implementation, e.g., overt racial and class factors that permeate capital punishment and poor people of color being fodder for capital punishment schema, merits examination.<sup>97</sup> As Justice Douglas noted

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90. Elizabeth M. Bosek et al., *Nature of Habeas Corpus Proceeding*, in 15 CYCLOPEDIA OF FEDERAL PROCEDURE § 86:2 (3d ed. 2018) (footnote omitted); see also Ronald Quy Tran, Comment, *State Trial Courts as the New Champions of the Great Writ: An Argument for a Statement of Decision in the Criminal Context*, 47 U.S.F. L. REV. 163, 193 (2012); Woolley, *supra* note 20, at 417.
91. *Ex parte Hawk*, 321 U.S. 114, 116–17 (1944) (holding that “[o]rdinarily an application for habeas corpus by one detained under a State court judgment of conviction . . . will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in this Court by appeal or writ of certiorari, have been exhausted.”).
92. *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977).
93. 28 U.S.C. § 2254(b)(1) (2012) (“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 unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State; or . . . there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant.”).
94. Jude Obasi Nkama, *The Great Writ Encumbered by Great Limitations: Is the Third Circuit’s Notice Requirement for Habeas Relief a Structural Bias Against “Persons in Custody?”*, 26 SETON HALL LEGIS. J. 181, 193 (2001).
95. *Id.* at 197.
96. Stummer, *supra* note 62, at 605 (footnote omitted).
97. See *Furman v. Georgia*, 408 U.S. 238, 249–50 (1972) (Douglas, J., concurring) (quoting U.S. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUST., *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 143 (1967)); Betsy Dee Sanders Parker, Note, *The Antiterrorism and Effective Death Penalty Act (“AEDPA”): Understanding the Failures of State Opt-in Mechanisms*, 92 IOWA L. REV. 1969, 1972 (2007).

in *Furman v. Georgia*,<sup>98</sup> “[t]he death sentence is disproportionately imposed and carried out on the poor [and] the Negro.”<sup>99</sup> Review is important because

[t]he finality of a death sentence is unlike that of any other penalty . . . . [A] prisoner is suddenly confronted with the reality of impending death. Such finality frequently prompts an especially vociferous pursuit of habeas corpus claims. These claims are often a desperate attempt by the petitioner to find a violation of the prisoner’s constitutional rights, thereby allowing for relief from the impending sanction.<sup>100</sup>

In light of this fact, competent post-conviction state counsel is necessary for petitioners to receive any degree of due process and fair representation.<sup>101</sup>

Adequate and learned counsel, among other things, is key to meaningful and substantive representation to protect the liberty interest of petitioners.<sup>102</sup> Capital litigation, due to its highly complex and technical nature, requires counsel that is sufficiently learned in the law to provide adequate representation which, in turn, helps ensure substantive due process.<sup>103</sup> Yet, “the present system often does not provide this for indigents charged with a capital crime at the trial level,” ultimately undermining equality in the collateral review process, as there is no constitutional requirement ensuring post-conviction counsel.<sup>104</sup> In both the politics of death and the final application of procuring a death sentence, learned counsel is particularly important:

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98. *Furman*, 408 U.S. at 240–57 (Douglas, J., concurring).

99. *Id.* at 249–50 (quoting U.S. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUST., *supra* note 97, at 143).

100. Parker, *supra* note 97.

101. See Stummer, *supra* note 62, at 610–11.

102. See *id.*; *Furman*, 408 U.S. at 249–50 (Douglas, J., concurring) (quoting U.S. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUST., *supra* note 97, at 143).

103. See Stummer, *supra* note 62, at 606–07.

104. *Id.* at 610–11 (footnotes omitted) (“This impairment undermines the fairness of the collateral review process, because the constitution fails to provide post-conviction counsel. Because of this failure, competent post-conviction counsel is not available to cure trial defects. Since state post-conviction review usually provides a first time opportunity for capital appellants to attack the constitutionality of their detention in preparation for federal habeas review, a state’s failure to provide competent counsel to indigent capital petitioners can literally be the difference between life and death.”).

[T]he majority of capital appellants are indigent, uneducated or illiterate . . . . These petitioners need access to competent post-conviction counsel to decipher cryptic state and federal habeas statutes and to provide a searching and impartial examination of the claims that may warrant appeal on post-conviction and federal review. As Justice Kennedy [has] recognized, “[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.”<sup>105</sup>

Those who are in most need of having learned competent counsel due to indigency, illiteracy, and being mis- or under-educated require said counsel in order to ensure equal justice under law via due process.<sup>106</sup>

A. *The Development of Modern Habeas Debate: Pre-AEDPA*

The modern debate over the role of habeas can be contextualized as emanating from the following binary: between proponents of broad federal habeas who subscribe to the notion that every petitioner is entitled to review of a death sentence based on constitutional challenges to a conviction and sentence, and those who subscribe to the notion that federalism demands that the states’ police powers be respected and protected from intrusive federal oversight.<sup>107</sup> The former notion is liberty-enhancing and the latter is liberty-restricting.<sup>108</sup> Under the expansive view of habeas, federal courts are not—nor should they be—deferential to state courts’ findings and proceedings.<sup>109</sup> The federal courts can—and should—engage in de novo review of constitutional challenges, effectively undercutting state police power over capital punishment.<sup>110</sup> In the noteworthy

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105. *Id.* at 606–07 (second alteration in original) (footnote omitted) (quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring)).

106. *See id.*

107. *See, e.g.*, William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 423–42 (1961); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 254, 262, 264–68, 271, 334–35 (1988); John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 171–73, 175–76 (1948); Frank W. Wilson, *Federal Habeas Corpus and the State Court Criminal Defendant*, 19 VAND. L. REV. 741, 741–44, 746 (1966).

108. *See Semeraro, supra* note 56, at 1236–38.

109. *See id.* at 1257; *Daniels v. Allen*, 344 U.S. 443, 508–09 (1953).

110. *See Semeraro, supra* note 56, at 1257.

By the early 1950s, the Court had held that the right to a public trial, the right to notice of charges, and the prohibition against

case of *Brown v. Allen*,<sup>111</sup> the Court construed habeas expansively.<sup>112</sup> This posture, however, gradually changed with the advent of the Burger and Rehnquist Courts.<sup>113</sup> The latter Courts sought to rein in and severely restrict the expansive interpretation of habeas by the Warren Court.<sup>114</sup> Chief Justice Rehnquist opined that habeas needed to be “crimped and [that] state court judgments should only be disrupted under extreme circumstances.”<sup>115</sup> Additionally, the debate over habeas has been informed “by the equally vigorous and ongoing debate about capital punishment.”<sup>116</sup>

The modern habeas debate can be traced through Court opinions, wherein the Court began a process of expanding the scope of federal habeas against the states.<sup>117</sup> In *Ex parte Hawk*,<sup>118</sup> the Court enhanced

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unreasonable searches and seizures applied to the states. The contemporary struggle with desegregation served as a harbinger of the challenges attendant to extending federal criminal procedure rights to the states. Just as the 1867 Congress expanded habeas review, in Justice Brennan’s words, “anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments,” the 1953 [Brown] Court, after having limited the scope of the 1867 Act for some 80 years, expanded habeas review anticipating state resistance to broader understandings of the Fourteenth Amendment.

*Id.* (quoting Brennan, *supra* note 107, at 426). In *Daniels*, the Court stated that, a “District Judge [must] decide constitutional questions presented by a State prisoner even after his claims have been carefully considered by the State courts.” *Daniels*, 344 U.S. at 508.

111. *Brown v. Allen*, 344 U.S. 443 (1953).

112. *See id.* at 463–65. *Brown* can be viewed as a product or part of the Court’s expansive “interpretations of the procedural guarantees of the Bill of Rights and of the extent to which those guarantees were binding upon the states through the due process clause of the Fourteenth Amendment.” DOYLE, *supra* note 8, at 7.

113. *See* Blume, *supra* note 79, at 265–66.

114. *See, e.g.,* *McClesky v. Zant*, 499 U.S. 467, 493 (1991) (adopting a single standard for excusing failure to state a claim in state procedural default and abuse of the writ cases).

115. Blume, *supra* note 79, at 264; *see* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988).

116. Blume, *supra* note 79, at 264 (“Almost all state death row inmates whose convictions and sentences were affirmed by the state courts sought (and to this day seek) federal review of their convictions and death sentences . . . after the . . . modern era of capital punishment in 1976, the habeas debate intensified . . . To the anti-habeas camp, death row inmates used the writ of habeas corpus to cheat (or at least delay) the executioner; to the pro-habeas contingent, however, searching federal habeas review was absolutely essential to avoid unjust executions.”).

117. The Court established the basis for modern federal habeas review in 1807. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100–01 (1807). In *Ex parte Royall*, 117 U.S.

federal overview of state's police power, historically considered to be in the province of the states.<sup>119</sup> In *Hawk*, the Court found that

[W]here resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because, in the particular case, the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain [a] petition for habeas corpus . . . .<sup>120</sup>

In *Brown v. Allen*,<sup>121</sup> the Court held that when a state prisoner has exhausted all state remedies and qualifies for federal court habeas corpus application, if “the state action was based on an adequate state ground, no further examination is required unless no state remedy for the deprivation of federal constitutional rights ever existed.”<sup>122</sup> *Brown* had a significant impact on habeas “because it eliminated the Hawk [sic] restriction that habeas corpus would not lie where the state provided a fair opportunity to adjudicate the issues.”<sup>123</sup> *Brown* required that due process be substantive as well as procedural; procedural due process alone would not insulate state courts from federal overview.<sup>124</sup>

Under the Warren Court, habeas became more robust as applied to federal oversight of state capital punishment schema and collateral attacks on state death sentences.<sup>125</sup> An expansionist interpretation of habeas that began in *Brown* “arrived in full force with the Warren

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241, 252–54 (1886), the Court articulated the exhaustion of remedies doctrine, further developed in *Ex parte Hawk*, 321 U.S. 114, 117–18 (1944).

118. *Ex parte Hawk*, 321 U.S. at 114.

119. *Id.* at 118.

120. *Id.* (citations omitted).

121. *Brown v. Allen*, 344 U.S. 443 (1953).

122. *Id.* at 447–49, 452, 457–58, 461–62.

123. 39 AM. JUR. 2D *Trials* § 4, Westlaw (database updated Aug. 2018) (“Under *Brown*, as long as the petitioner showed a violation of constitutional rights and that available state remedies had been exhausted, the federal courts would entertain the petition on the merits.”).

124. *Brown*, 344 U.S. at 536–37.

125. See Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1068 (2002) (“[The Warren Court reconfigured the] limited conception of habeas, advancing a broad remedial vision for habeas in which the federal courts would serve as the ultimate guardian of the rights of criminal defendants not just in the extraordinary case, but in every case where the habeas jurisdiction was invoked.”).

Court's 1963 decisions of *Townsend v. Sain* and *Fay v. Noia*.”<sup>126</sup> In *Townsend*, the Court found that

where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding . . . [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it

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126. Resnik, *supra* note 80, at 877. In 1963, the Court handed down three substantial decisions pertaining to habeas: *Fay v. Noia*, 372 U.S. 391, 394 (1963), *overruled* by *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 4–6 (1992); *Townsend v. Sain*, 372 U.S. 293, 310–13, 317, 322 (1963); and *Sanders v. United States*, 373 U.S. 1, 15 (1963) (finding that that “[c]ontrolling weight may be given to denial of a prior application for federal habeas corpus . . . relief only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, . . . (3) the ends of justice would not be served by reaching the merits of the subsequent application”).

In the aggregate, these cases cut through the procedural thicket of state comity and state concerns about finality, and mandated federal relief from state court decisions which were in violation of the Federal Constitution or the Bill of Rights. Furthermore, these habeas corpus decisions were consistent with the main thrust of the Warren Court in the 1960s to insure that the protections of the Bill of Rights were extended to defendants in state courts as well as to those in federal proceedings.

However, these decisions also affected the balance of power between state and federal governments in the enforcement of the criminal laws. As a result of these Warren Court decisions, the notion that there were ‘fifty laboratories’ to experiment with the rights of defendants died, and the balance of power with respect to the method of enforcement of these laws shifted dramatically to the federal government.

Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 340 (1997).

appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.<sup>127</sup>

In *Fay*, the Court reaffirmed *Brown*, finding that “additional evidence could be taken at an evidentiary hearing” and federal habeas relief was possible “even though the petitioner was procedurally barred from obtaining collateral relief under state law because of his failure to utilize state remedies,” so long as the petitioner had not “intentionally bypassed” state remedies.<sup>128</sup>

During the Warren Court era, the Court provided “powerful tools for state prisoners asserting federal habeas claims to challenge their convictions and ‘greatly expanded the role of federal habeas corpus, allowing federal courts significant power to overturn state court decisions.’”<sup>129</sup> By expansively interpreting habeas, the Court bolstered federal oversight of state capital punishment, and in doing so attenuated the states’ police powers, which, in turn, had the effect of providing poor people of color a more viable means of obtaining some degree of due process and fair representation of their liberty interest under the U.S. Constitution.<sup>130</sup> Protecting petitioners’ liberty interest and the provision of equal justice under law outweighed the states’ police power in effectuating capital punishment schemes.<sup>131</sup> In doing so, the Warren Court effectively protected the liberty interests of a basic right to life via due process of “discrete and insular minorities.”<sup>132</sup> As noted by Judge Helen Ginger Berrigan of the District of New Orleans, Louisiana, the “poor quality of indigent defense is largely ignored by the public and by policy-makers. After all, it’s about people accused of crime who are presumed guilty. They’re poor people, often unattractive, inarticulate, with no apparent constituency and no voice in public policy.”<sup>133</sup>

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127. *Townsend*, 372 U.S. at 312–13.

128. 39 AM. JUR. 2D *Trials* § 4, Westlaw (database updated Aug. 2018) (summarizing *Fay*, 372 U.S. at 398–99, 414, 421–22).

129. Casey C. Kannenberg, *Wading Through the Morass of Modern Federal Habeas Review of State Capital Prisoners’ Claims*, 28 QUINNIPIAC L. REV. 107, 115 (2009) (quoting Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 467, 476 (2000)).

130. See Kannenberg, *supra* note 129, at 115; U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

131. See Kannenberg, *supra* note 129, at 115.

132. See Gilman, *supra* note 65, at 165–66.

133. Barbara E. Bergman, *Verbatim: Inaugural Remarks: August 6, 2005 – Portland, Oregon*, CHAMPION (Nat’l Ass’n of Criminal Def. Lawyers), Sept./Oct. 2005, at 42.

Although the Warren Court's interpretation of habeas had the effect of bolstering the representational capacity of petitioners, the Court subsequently began reconfiguring habeas.<sup>134</sup> In *Stone v. Powell*,<sup>135</sup> the Court found that if a "[s]tate has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial."<sup>136</sup> In *Wainwright v. Sykes*,<sup>137</sup> the Court further restricted habeas review, replacing the "deliberate bypass standard for prisoners' procedural defaults with the requirement of 'cause and prejudice,'"<sup>138</sup> rendering state habeas relief more elusive.

In *Keeney v. Tamayo-Reyes*,<sup>139</sup> the Rehnquist Court made a further change in federal habeas reflecting courts' desire to substantially restrict the scope of federal overview of the states' exercise of police power in carrying out capital punishment.<sup>140</sup> In *Tamayo-Reyes*, the Court reversed the 9th Circuit's holding that the petitioner "was entitled to a federal hearing because counsel's failure to make a sufficient factual record did not amount to a deliberate bypass of state procedures."<sup>141</sup> The Court noted that the stricter "cause and prejudice" standard should be "applied in instances where a petitioner has failed to develop a material fact in state court proceedings . . . ."<sup>142</sup>

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134. See *Parker v. North Carolina*, 397 U.S. 790, 797–98 (1970); *McMann v. Richardson*, 397 U.S. 759, 764–67 (1970); *Tollett v. Henderson*, 411 U.S. 258, 262–66 (1973).

135. *Stone v. Powell*, 428 U.S. 465 (1976).

136. *Id.* at 482.

137. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

138. Kannenberg, *supra* note 129, at 115 ("Under the new procedural default standard, 'the petitioner [must] show a cause for the noncompliance with state rules and actual prejudice resulting from the alleged constitutional violation . . . .' In overruling *Fay v. Noia*, the Court provided a 'far more restrictive test,' making it much more difficult for prisoners to challenge their state convictions.") (alteration in original).

139. *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

140. See *id.* at 9.

141. Michele M. Jochner, *Til Habeas Do Us Part: Recent Supreme Court Habeas Corpus Rulings*, 81 ILL. B.J. 250, 260 (1993) (citing *Tamayo-Reyes*, 504 U.S. at 11).

142. *Id.* at 543–44 (holding that "petitioners are entitled to a federal evidentiary hearing only if they can show cause for their failure to develop the facts in state court proceedings and actual prejudice resulting from that failure, although the Court provided a narrow exception in instances where a 'fundamental miscarriage of justice' will occur in the absence of such a hearing," and "a federal habeas court should not grant an evidentiary hearing unless the petitioner shows the error was the difference between winning and losing").

From the 1970s through the 1990s, the Court reversed the trajectory of habeas, finding that the previous liberty-enhancing interpretation of habeas had the deleterious effect of diluting what it now felt constituted more important norms, values, and principles, including “finality, comity, [and] judicial economy”<sup>143</sup>—which are privileged in a liberty-restrictive interpretation of habeas.<sup>144</sup> The Court further held that

[a]pplying the cause-and-prejudice standard in cases like this will obviously contribute to the finality of convictions, for requiring a federal evidentiary hearing solely on the basis of a habeas petitioner's negligent failure to develop facts in state-court proceedings dramatically increases the opportunities to re-litigate a conviction. Similarly, encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance. It reduces the “inevitable friction” that results when a federal habeas court “overturn[s] either the factual or legal conclusions reached by the state-court system.”<sup>145</sup>

The dissent in *Tamayo-Reyes*, on the other hand, argued that, “[u]nder the guise of overruling ‘a remnant of a decision,’ and achieving ‘uniformity in the law,’ the Court has changed the law of habeas corpus in a fundamental way.”<sup>146</sup> Indeed, the Court’s interpretation had the effect of shifting habeas from a liberty-enhancing to a liberty-restricting mechanism, further attenuating the representational integrity of state petitioners.<sup>147</sup> Four years after *Tamayo-Reyes*, Congress enacted AEDPA.<sup>148</sup>

### III. CAPITAL PUNISHMENT & AEDPA

#### A. AEDPA: Federal Habeas & Representational Deficiency

Under AEDPA, habeas has become, amongst other things, a site of intense interpretive contestation between those who would expand

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143. *Tamayo-Reyes*, 504 U.S. at 8.

144. *See supra* note 23 and accompanying text.

145. *Tamayo-Reyes*, 504 U.S. at 8–9.

146. *Id.* at 12 (O’Connor, J., dissenting) (citations omitted).

147. *See supra* notes 126–33 and accompanying text.

148. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(e) (2012).

and those who would restrict the federal courts' capacity to review post-conviction state death sentences.<sup>149</sup> The Court, historically, has recognized, to varying degrees, the importance of habeas in the overarching legal system. For example, in *Preiser v. Rodriguez*,<sup>150</sup> the Court noted that habeas preserves "for the state prisoner an expeditious federal forum for the vindication of his federally protected rights, if the State has denied redress."<sup>151</sup> Contestation over how and when exactly a state "has denied redress" has informed the debate as to how far to expand or constrict habeas.<sup>152</sup> AEDPA, an attempt by the political branches to address the competing values and norms that undergird capital punishment in thought and practice, exemplifies the deep tension between representation (liberty-enhancing) and efficiency (liberty-restricting) in the interpretation of habeas.<sup>153</sup>

The enactment of AEDPA resulted in the codification of a liberty-restrictive ethos.<sup>154</sup> AEDPA, generally speaking, has been criticized as "a complex, poorly drafted statute that is impossible to interpret logically and consistently," the text of which, "read as a whole, is irresolvably ambiguous."<sup>155</sup> Aside from the text itself being problematic, AEDPA also embodies the politics of death in that it is underpinned by ideological fidelity to the preservation of and deference to state police power.<sup>156</sup> AEDPA is entrenched in a perspective that privileges the integrity of state police power over the federal court's mandate(s) to protect "discrete and insular minorities" and provide equal justice under law via due process and fair representation.<sup>157</sup> Although habeas is a creature of and emplaced in the fundamental law put forth in the U.S. Constitution,<sup>158</sup> the states

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149. See *infra* notes 150–78 and accompanying text.

150. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

151. *Id.* at 498.

152. See Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J. L. & SOC. CHANGE 1, 16–18 (2016).

153. See *id.* at 5–7.

154. "The debate that led to passage was marked by complaints of delay and wasted judicial resources countered by the contention that federal judges should decide federal law." DOYLE, *supra* note 8, at 14.

155. Amy Knight Burns, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 206–07 (2013) (footnote omitted).

156. See Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 109–10 (2012).

157. See *id.*

158. U.S. CONST. art. I, § 9, cl. 2.

are nonetheless given preference in the administration of death via capital punishment.<sup>159</sup>

Some of the changes inaugurated by AEDPA that have diminished the due process and representational integrity of federal oversight of state capital proceedings include the following:<sup>160</sup>

1. It enacts a statute of limitations for habeas review. Prior to AEDPA, there was no set time limit on a petitioner's ability to seek federal review. AEDPA contains a one-year statute of limitations with various tolling provisions. In most cases, the limitations period commences on the date the Supreme Court denies certiorari following direct appeal.

2. It places restrictions on a petitioner's ability to file subsequent petitions after the initial petition. The federal courts must dismiss any claim raised in a previous petition. Claims not previously raised are also subject to dismissal unless the petitioner is able to demonstrate either that the claim relies on a new retroactive legal rule, or that new facts have been discovered (which could not have been discovered previously), and that these facts establish by clear and convincing evidence that no reasonable fact-finder would have found the petitioner guilty.

3. It provides the Courts of Appeals, rather than the District Courts, final say as to whether a subsequent petition may be filed after the initial petition. This has the effect of petitioners having to rely upon courts that are quite removed from the undocumented dimensions of a trial that the District Courts have direct access to.

4. It regulates the circumstances under which a District Court is permitted to convene an evidentiary hearing in cases wherein the petitioner fails to take advantage of State court fact-development opportunities.

5. It alters the exhaustion of State remedies requirement.

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159. See Marceau, *supra* note 156, at 109–10.

160. See Blume, *supra* note 79, at 270–71; Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J. L. & POL. 773, 804–05 (2002).

6. It modifies preexisting law regulating appeals in habeas matters.<sup>161</sup>

AEDPA's Chapter 154 created a new set of procedures for capital cases in opt-in jurisdictions,<sup>162</sup> and § 2254(d) limits the circumstances under which a federal court can actually grant habeas review.<sup>163</sup> One of its objectives was to provide "expedited procedures in federal capital habeas corpus cases when a state is able to establish that it has provided qualified, competent, adequately resourced and adequately compensated counsel to death-sentenced prisoners."<sup>164</sup> When AEDPA was first enacted, the federal courts were originally tasked with analyzing and ascertaining whether states qualified for expedited federal habeas procedures, but the enactment of the USA Patriot Improvement and Reauthorization Act of 2005 shifted eligibility determination to the Attorney General from the judiciary.<sup>165</sup> It appears the shift was intended, in general, to further distance the federal courts from habeas, placing eligibility

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161. See Daniel J. O'Brien, *Heeding Congress's Message: The United States Supreme Court Bars Federal Courthouse Doors to Habeas Relief Against All but Irrational State Court Decisions, and Oftentimes Doubly So*, 24 FED. SENT'G REP. 320, 322 (2012); *Slack v. McDaniel*, 529 U.S. 473, 480–81 (2000).

162. See 28 U.S.C. §§ 2261–2266 (2012). For the states that 'opt-in,' the AEDPA provisions apply to habeas corpus appeals from prisoners in that state. See § 2261(a). States that opt-in must create a mechanism for the appointment and compensation of counsel in post-conviction proceedings brought by indigent death row prisoners. See § 2262(b). Prisoners in states that opt-in cannot present claims of ineffective assistance of counsel during state or federal post-conviction proceedings in section 2254 proceedings. See § 2261(e). The provision seems to be redundant in light of section 2254(i), which states that a section 2254 claim for relief cannot be based on the ineffective assistance of counsel during collateral post-conviction proceedings. See § 2254(i). However, section 2261(e) adds that the court may appoint a different counsel at any phase of state or federal post-conviction proceedings based on the ineffectiveness or incompetence of counsel in such proceedings. See § 2261(e). For state death row prisoners in states that opt-in to the AEDPA, the time limits for filing a habeas corpus petition in federal court are more stringent than the one-year limit for other habeas corpus petitioners. See § 2263(a). Instead of a one-year time limit, condemned prisoners are given only 180 days to file from the time of the last state court review or final disposition of the United States Supreme Court review of the final state court review. *Id.*; 6 WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 6956 (2018).

163. See 28 U.S.C. § 2254(d); 17B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261.1 (3d ed. 2018).

164. *Habeas Corpus Res. Ctr. v. United States Dep't of Justice*, No. C 13-4517 CW, 2013 WL 6326618, at \*1 (N.D. Cal. Dec. 4, 2013).

165. *Id.*; USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (amending Chapter 154).

determination in the hands of the Executive.<sup>166</sup> The overall changes wrought by AEDPA in reconfiguring habeas have laid the foundation for isolating petitioners seeking federal review.<sup>167</sup> In particular, section 2254(d)(1) has the effect of silencing petitioners' attempts for review and redress, "leaving them powerless against state abuses" because it "bars habeas petitioners from obtaining federal post-conviction relief for any claims decided in state court, unless the petitioner can show that the state court decision is irrational—a standard that has proven almost impossible to meet."<sup>168</sup>

Expedited federal review of state capital proceedings via state opt-in, as governed by Chapter 154, provides a number of procedural advantages to qualifying states.<sup>169</sup> Granted, no state has yet qualified for opt-in due to their persistent failure to provide "qualified, competent, adequately resourced and adequately compensated counsel."<sup>170</sup> Nonetheless, opt-in procedures are designed to encourage states to participate in a federal habeas review process underpinned by the overarching aim of promoting efficiency and maintaining state integrity vis-à-vis the criminal law.<sup>171</sup> States can be considered the primary beneficiaries of AEDPA because the legal regime it implements is premised on a liberty-restrictive basis that privileges state independence from federal overview in the exercise of its police power.<sup>172</sup> Deference to the states in the realm of

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166. See USA Patriot Improvement and Reauthorization Act of 2005.

167. Nasrallah, *supra* note 81, at 1148.

168. *Id.*

169. Marianne L. Bell, Note, *The Option Not Taken: A Progressive Report on Chapter 154 of the Anti-Terrorism and Effective Death Penalty Act*, 9 CORNELL J. L. & PUB. POL'Y 607, 607–08 (2000).

170. *Id.* at 150; *Habeas Corpus Res. Ctr.*, 2013 WL 6326618, at \*1.

171. See Nasrallah, *supra* note 81, at 1151; *Habeas Corpus Res. Ctr.*, 2013 WL 6326618, at \*3 (describing the expedient timeline of federal review of "opt-in" states).

172. Nasrallah, *supra* note 81, at 1148.

AEDPA has the purposive effect of marginalizing the due process and fair representation of poor people of color by gutting habeas of its functional liberty-enhancing effect as interpreted by the Court in the 1960s. This is the case because the present iteration of habeas under AEDPA mandates deference to States, and it makes it so that (1) all claims "adjudicated on the merits" in state court receive deference; (2) that deference requires petitioners to show that the state court decision was "contrary to or an unreasonable application of" federal law, perhaps the most deferential standard in all of Supreme Court jurisprudence; (3) the federal law applied in the state court must be "clearly established, as determined by the Supreme Court of the United States."

*Id.* at 1149.

criminal law generally and capital punishment in particular remains problematic, however, given the states' lengthy, negative relationship with people of color (and poor people of color, in particular).<sup>173</sup>

Issues pertaining to race and class persist in the realm of criminal justice.<sup>174</sup> While overt discrimination within the criminal justice system has been reduced over the past several decades, the U.S. continues to work through real and perceived systemic unfairness that is evidenced by racial and ethnic disparity and overrepresentation of minorities in "delinquency, offending, victimization, and at all stages of the criminal justice process from arrest to pretrial detention, sentencing (including capital punishment), and confinement."<sup>175</sup>

Hence, the deleterious effects that a liberty-restrictive interpretation of habeas has on poor people of color that seek due process, representation, and fair review of sentences imposed by states that have a very poor history of providing actual due process of law and ensuring genuine representation of petitioners' liberty interests.<sup>176</sup> Indeed, "[t]he death penalty has frequently targeted the illiterate, the poor, the intellectually disabled, and racial minorities, and often in not-so-subtle ways."<sup>177</sup> Some of the more vulnerable members of society are thus irreparably harmed rather than helped by attenuating the procedural and substantive protections that habeas provides when articulated from a liberty-enhancing perspective.<sup>178</sup>

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173. KATHERINE J. ROSICH, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM, AM. SOC. ASS'N 2 (2007), <http://www.asanet.org/sites/default/files/savvy/images/press/docs/pdf/ASARaceCrime.pdf> ("For much of the twentieth century, crime and punishment have provided some of the most powerful symbols of the racial divide in America. In the early decades, lynchings, chain-gang style penal practices, and prosecutorial and judicial bigotry were common, particularly in the southern criminal justice systems. Throughout the United States, racial minorities were generally tried by all white juries in all white courtrooms, as was the case, for example, in the 1931–32 Scottsboro rape trial. In 1910, African Americans, who were about 11 percent of the U.S. population, were 31 percent of the prison population. African Americans accounted for 405 of the 455 of executions for rape between 1930 and 1972. Sentencing laws were discriminatory, with the harshest sanctions given to blacks who victimized whites.").

174. *Id.* at 2–3.

175. *Id.*

176. See Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 5–6 (2010) (arguing that the AEDPA's constraint of federal review constitutes a lack of due process).

177. Bessler, *supra* note 15, at 499.

178. See Marceau, *supra* note 176, at 5–6.

B. *AEDPA – Impact on Federal Habeas Review*

In *Calderon v. Ashmus*,<sup>179</sup> the Court noted that AEDPA’s expedited review process accomplishes the following aims: it imposes a 180–day limitation period for filing a federal habeas petition; treats an untimely petition as a successive petition when considering a stay of execution; allows a petition to be amended after answer is filed only when petitioner meets the requirements for a successive petition; obligates a district court to render final judgment on petition within 180 days of filing; and requires that a court of appeals render a final determination within 120 days.<sup>180</sup> The *Ashmus* Court’s declaration favors the states because petitioners must file for habeas “even if they do not have officially appointed counsel, they do not know which statute of limitations applies, and they are unsure of which claims must be included . . . [and] only by filing a federal habeas petition may a prisoner argue that the state does not meet the statutory requirements to opt-in.”<sup>181</sup>

AEDPA’s shorter statute of limitations period, construing an untimely-filed petition as constituting a subsequent petition, and its permitting the amendment of a petition only after a response is filed if the petitioner satisfies rigorous standards for a successive petition, both produce a liberty-restrictive effect.<sup>182</sup> These procedural changes in obtaining habeas are not designed to enhance or facilitate petitioners’ interests in obtaining substantive federal review of state convictions but rather help streamline the process so that quicker resolution can be obtained for state courts.<sup>183</sup> In many cases, for instance, Chapter 154 prevents a federal court from reviewing a claim that the state courts found to be procedurally defaulted, as well.<sup>184</sup> This has the effect of favoring procedure that moves the appeals and review process along by restricting and constricting federal review.<sup>185</sup>

Section 2254(d), which many commentators agree is the centerpiece of the AEDPA legal regime,<sup>186</sup> bars habeas review or relief on a claim already passed upon by a state court out of

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179. *Calderon v. Ashmus*, 523 U.S. 740, 742 (1998).

180. *Id.*

181. *See Bell*, *supra* note 169, at 622.

182. *Cf. id.* at 622.

183. *Habeas Corpus Res. Ctr. v. United States Dep’t of Justice*, No. C 13-4517 CW, 2013 WL 6326618, at \*1 (N.D. Cal. Dec. 4, 2013).

184. *Blume*, *supra* note 79, at 272.

185. *See id.* at 270–72.

186. *Id.*

deference to state courts.<sup>187</sup> According to the Court, “an unreasonable application of clearly established federal law” transpires “when a state court ‘identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts.’”<sup>188</sup> Furthermore, the federal courts are not to assess whether or not the state court correctly applied federal law, but that a state court did so in a manner that was not “objectively unreasonable.”<sup>189</sup> The Court has also declared that, “[s]tate-court factual findings . . . are presumed correct; the petitioner has the burden of rebutting the presumption by ‘clear and convincing evidence.’ § 2254(e)(1).”<sup>190</sup>

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187. 28 U.S.C. § 2254(d) (barring relief “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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding”).

This statutory language had no habeas pedigree; for example, it was not taken from any Supreme Court decision, like other AEDPA provisions, nor was it part of any previous habeas reform proposal offered by Congress . . . . The floor debates and the perfunctory conference report on AEDPA are also un-illuminating regarding § 2254(d)’s intent. Thus, for the most part, the federal courts were forced to divine its meaning from scratch.

Blume, *supra* note 79, at 272–73.

188. *Rompilla v. Beard*, 545 U.S. 374, 380 (2005) (citing *Wiggins v. Smith*, 539 U.S. 510, 520 (2003)).

189. *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)).

It is not enough that a federal habeas court, in its “independent review of the legal question,” is left with a “‘firm conviction’” that the state court was “‘erroneous.’” We have held precisely the opposite: “Under § 2254(d)(1)’s ‘unreasonable application’ clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” Rather, that application must be objectively unreasonable.

*Id.* (citations omitted). “The question under . . . (AEDPA) is not whether a . . . state court’s determination was incorrect but whether that determination was unreasonable, which is a substantially higher threshold. 28 U.S.C.A. § 2254. *Schriro v. Landrigan*, 127 S. Ct. 1933 . . . (U.S. 2007)[.]” 39 AM. JUR. 2D *Trials* § 7.5, Westlaw (database updated Sept. 2018). See generally *Death Penalty Reform & Savings Act*, Cal. Proposition 66, 150–51 (approved Nov. 8, 2016) (changing California state court procedures for challenges to capital punishment convictions).

190. *Rice v. Collins*, 546 U.S. 333, 338–39 (2006) (citing *Miller-El v. Dretke*, 545 U.S. 231, 284 (2005)).

Lastly, the Court's interpretation of § 2254(d) has not fully clarified the intent undergirding the statutory language and how it is supposed to work in practice exactly, other than explicitly curbing the federal courts' power to grant habeas review and relief.<sup>191</sup> In *Lindh v. Murphy*,<sup>192</sup> the Court declared that it was clear that § 2254(d) dictates a "highly deferential standard for evaluating state-court rulings" but does not provide specific standards by which to ascertain the exact application of the statutory language.<sup>193</sup> Additionally, the "Court has also said little about how § 2254(d) fits in with prior judge-made habeas doctrines," rendering this area of the law unclear.<sup>194</sup>

### C. Codifying Deference to the State Courts

While AEDPA has ostensibly balanced the competing interests of maintaining the integrity of State sovereignty and police power with while concomitantly "providing an avenue for federal relief in extreme cases,"<sup>195</sup> this is not the case in practice.<sup>196</sup> AEDPA does less balancing of competing interests; it actually accords more weight to state interest.<sup>197</sup> This is the case because AEDPA does not function in a vacuum.<sup>198</sup> Merely mandating adequate and competent

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191. See, e.g., DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS app. A at 12–13 (2018) ("[A] habeas petitioner's arguments ultimately must be assessed under the deferential standard required by 28 U.S.C.A. § 2254(d)(1): relief may not be granted unless the state court adjudication "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"; under 28 U.S.C.A. § 2253(c)(2) a certificate of appealability should issue if the applicant has made a substantial showing of the denial of a constitutional right, which we have interpreted to require that the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong; under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.") (citing *Tennard v. Dretke*, 542 U.S. 274 (2004)).

192. *Lindh v. Murphy*, 521 U.S. 320 (1997).

193. *Id.* at 333 n.7.

194. Blume, *supra* note 79, at 273 ("For the most part, the Court has gravitated towards talismanic characterizations of § 2254(d)(1)'s 'contrary to' and 'unreasonable application' clauses, while remaining virtually silent about § 2254(d)(2).").

195. Samuel R. Wiseman, *What Is Federal Habeas Worth?*, 67 FLA. L. REV. 1157, 1160 (2015).

196. See *id.* at 1160–61.

197. See *id.*

198. See *id.* at 1194.

counsel during the post-conviction review process, while desirable, will not address the historical and socioeconomic and political (structural) context within which capital punishment transpires.<sup>199</sup> The lengthy, violent, discriminatory treatment of poor people of color based on racial animus in the state criminal justice context, combined with finite and scarce human and financial resources to provide said adequate and competent counsel, reinforce the liberty-restrictive effect of AEDPA in legal actuality.<sup>200</sup>

The overarching aim of AEDPA is to “ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction. Enactment of [AEDPA] served to limit, rather than expand, availability of habeas.”<sup>201</sup> AEDPA has thus further negatively and disproportionately impacted poor people of color in the realm of capital punishment that have employed habeas to obtain a degree of due process, fair representation, and equal justice under law.<sup>202</sup> Overall, AEDPA has altered “the standard of habeas corpus review in

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199. See, e.g., Steven B. Bright, *Rigged: When Race and Poverty Determine Outcomes in the Criminal Courts*, 14 OHIO ST. J. CRIM. L. 263, 263–66 (2016).

200. See Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 793–94 (1981); MICHAEL K. BROWN, ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 135–41 (2003); DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 1–2, 286 (1990).

201. 39 AM. JUR. 2D *Trials* § 7.5, Westlaw (database updated Aug. 2018); see also Death Penalty Reform and Savings Act, Cal. Proposition 66, 149–51 (approved Nov. 8, 2016) (showing that the timelines in California’s statute were substantially longer than those laid out in the AEDPA); *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 (10th Cir. 2017); *Rountree v. Balicki*, 640 F.3d 530, 537 (3d Cir. 2011); *Lounsbury v. Thompson*, 340 F.3d 998, 1001 (9th Cir. 2003) (withdrawn and superseded by 374 F.3d 785); *Habeas Relief for State Prisoners*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 1026, 1081 (2017); Sara Rodriguez & Scott J. Atlas, *Habeas Corpus: The Dilemma of Actual Innocence*, 34 LITIG. 35, 38 (2008).

202. See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 341–50 (2006); see also ROSICH, *supra* note 173, at 20 (discussing how “[t]here is strong evidence that racial discrimination exists in the capital sentencing process of many states. Numerous empirical studies clearly and consistently demonstrate that African Americans are at far greater risk for capital punishment, particularly when considered in context of victimization patterns. Even before the landmark death penalty cases of the 1970s, research (mostly conducted in the South) showed that African Americans were much more likely than whites to receive the death penalty . . . . The review by Baldus and his colleagues indicates that, although these early studies (dating back to the 1930s) have methodological limitations (i.e., key information such as defendants’ relative culpability, the heinousness of the crime, prior criminal record, or the race of the victim may not be included), several show strong race-of-victim effects.”).

ways that appeared to call for greater deference to state court rulings on legal issues and mixed questions of fact and law.”<sup>203</sup> In *Woodford v. Visciotti*,<sup>204</sup> for instance, the Court found that “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly.”<sup>205</sup> The state’s prerogatives are thus privileged over that of the petitioner, who historically has been discriminated against by the criminal justice system and normalized as the “super predator” (i.e., a poor person of color); this perspective fueled and is a mainstay of present mass incarceration of racial and ethnic minorities in the criminal justice system.<sup>206</sup>

In *Williams v. Taylor*,<sup>207</sup> the Court addressed section 2254(d)(1), which allows the federal courts to grant habeas only if a state court had unreasonably applied Supreme Court precedent or unreasonably determined the facts of the case.<sup>208</sup> In granting habeas, the Court emphasized an important difference between an “incorrect” application and an “unreasonable” application of clearly established federal law.<sup>209</sup> Although the Court did not explain exactly what makes a decision unreasonable instead of simply incorrect, subsequent interpretations of AEDPA have established precedent according a high degree of deference to state court decisions when

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203. Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702–03 (2002). In *Williams v. Taylor*, 529 U.S. 362 (2000), however, the Court rejected lower court interpretations that called for substantial deference to State court rulings on legal and mixed legal-factual rulings. *Id.* at 376–79. See also Woolley, *supra* note 20, at 432 (stating that a “deference standard that requires federal courts to defer to reasonable state decisions is problematic for two reasons. First, federal court deference eliminates the safeguard against state abuse. State judges are elected in a majority of states with the death penalty. Often, a federal judge is in a better position to reverse an improper death sentence because the judge does not have the pressures of running for reelection. Second, if the AEDPA’s terms are interpreted strictly, federal courts will be forced to affirm mistaken state decisions regarding federal and constitutional law.”).

204. *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2002).

205. *Id.*

206. See Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remark on Super-Predators’ After Encounter with Activist*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/>; Michelle Alexander, *Why Hillary Clinton Doesn’t Deserve the Black Vote*, NATION (Feb. 10, 2016), <https://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes/>.

207. *Williams v. Taylor*, 529 U.S. 362, 367, 398–99, 410–11 (2000).

208. *Id.*

209. *Williams*, 529 U.S. at 384–90.

considering a habeas petition.<sup>210</sup> Established precedent since the passage of AEDPA is part of an ethos wherein habeas apparently “frustrates ‘both the States sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.’”<sup>211</sup> Efficiency, finality, and comity are all values that undergird AEDPA, and that concomitantly undermine the liberty-enhancing capacity of habeas to serve those that most need due process and fair representation.<sup>212</sup> AEDPA is a legal regime that, to some degree, contributes “to the cycle of mass incarceration, exacerbate[s] the distrust of the criminal justice system in poor communities, and increase[s] the likelihood of imprisoning innocent people for crimes they did not commit.”<sup>213</sup> Streamlining habeas review is part of a deferential posture to state police power, and is a key factor that grounds AEDPA.<sup>214</sup> The state courts’ determination of a factual

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210. Drew N. Goodwin, *Refusing to “Kiss the Great Writ Good-Bye”: The Ninth Circuit, in Doody v. Ryan, Ignores the Supreme Court’s Cues Regarding Federal Habeas Relief*, 53 B.C. L. REV. 31, 31–32 (2012); Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2449–50 (1998) (asserting that Congress enacted AEDPA to limit federal authority for granting prisoners relief in response to “the populist sentiment that courts are mollicoddling prisoners”); William J. Meade, Case & Statute Comment, *The Demise of De Novo Review in Federal Habeas Corpus Practice*, 85 MASS. L. REV. 127, 132 (2001) (explaining that AEDPA “marks a great shift” to a system of federal review which more properly respects state courts’ decisions). Under AEDPA (§ 2254(d)(1)), Congress limited the authority of federal courts to grant habeas review by enacting changes to “further principles of comity, finality, and federalism, to encourage exhaustion of state remedies, and to reduce delays in the execution of state and federal criminal sentences – particularly in capital cases.” Kurtis A. Kemper, Annotation, *Construction and Application of Antiterrorism and Effective Death Penalty Act (AEDPA) – U.S. Supreme Court Cases*, 26 A.L.R. Fed. 2d 1, Art. 1 (2008).
211. *Calderon v. Thompson*, 523 U.S. 538, 555–56 (1998) (quoting *Murray v. Carrier*, 477 U.S. 478, 487 (1986)).
212. Stevenson, *supra* note 202, at 339–45 (explaining that the AEDPA exacerbates the United States’ incarceration rate, which is already the highest in the world, as well as the perception that the criminal justice system is “unfair, corrupt, biased, and error-plagued”).
213. Nasrallah, *supra* note 81, at 1153.
214. See Abigail Kite, Note, *Fact-Finding Process Review Model: Remediating Fact-Based Constitutional Challenges on Federal Habeas Corpus Review*, 31 T. JEFFERSON L. REV. 351, 376–79 (2009). AEDPA requires petitioner to show that a State court’s ruling was so lacking in justification that there was an error “‘beyond any possibility for fair-minded disagreement’ . . . ‘[i]f this standard is difficult to meet’—and—‘that is because it was meant to be.’” *Burt v. Titlow*, 571 U.S. 12, 19–20 (2013); 28 U.S.C. § 2254(d)(1). A decision is “contrary to clearly established law,” for purposes of AEDPA, under which “a federal court may not grant a petition for a writ of habeas corpus unless the state court’s adjudication on the merits was contrary to, or involved

issue when considering habeas review is presumed correct and may be rebutted only by clear and convincing evidence.<sup>215</sup> The Court has, in general, presumed that state courts' factual findings—in the absence of plainly unreasonable or egregious error—to be correct regarding issues of juror exclusion for cause,<sup>216</sup> juror partiality,<sup>217</sup>

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an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . if the state court 'applies a rule that contradicts the governing law set forth in [Supreme Court] cases.'" *Lafler v. Cooper*, 566 U.S. 156, 172–73 (2012) (citations omitted); *see, e.g.*, 28 U.S.C. § 2254(d)(1); 39 AM. JUR. 2D *Trials* § 7, Westlaw (database updated Sept. 2018). In *Marshall v. Lonberger*, the Court found that the State court's factual determinations regarding the voluntariness of a defendant's guilty plea in a prior proceeding were entitled to a presumption of correctness because the findings were based on the state court's determination of the defendant's credibility, which is a question of fact. *Marshall v. Lonberger*, 459 U.S. 422, 432–37 (1983).

215. *See* 28 U.S.C. § 2254(e)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003) (overcoming a presumption of correctness because district court "accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial"); *Moore v. Hardee*, 723 F.3d 488, 499–500 (4th Cir. 2013) (failing to overcome a presumption of correctness in state court's rejection of an ineffective assistance of counsel claim because fair-minded jurists, after considering all relevant evidence could have disagreed as to whether counsel's failure to object to admission of certain evidence was prejudicial to defendant's case); *Eley v. Erickson*, 712 F.3d 837, 853–54 (3d Cir. 2013) (failing to overcome a presumption of correctness because the court's finding that the defendant "acted together with" his co-defendants was objectively reasonable); *Companionio v. O'Brien*, 672 F.3d 101, 111–12 (1st Cir. 2012) (failing to overcome a presumption of correctness because the court's finding of petitioner's competency was not unreasonable); *Murden v. Artuz*, 497 F.3d 178, 198 (2d Cir. 2007) (failing to overcome a presumption of correctness because petitioner presented evidence of a troubled relationship with the victim as a basis of extreme emotional disturbance defense that the state court had already found to be insufficient).
216. *See, e.g.*, *Wainwright v. Witt*, 469 U.S. 412, 426–30 (1985) (granting a presumption of correctness because of juror credibility); *Jackson v. Houk*, 687 F.3d 723, 738–39 (6th Cir. 2012) (granting a presumption of correctness because a juror would not vote for the death penalty); *Edwards v. Roper*, 688 F.3d 449, 454–56 (8th Cir. 2012) (granting a presumption of correctness because the prosecutor removed jurors for non-discriminatory reasons); *Moody v. Quarterman*, 476 F.3d 260, 271–72 (5th Cir. 2007) (granting a presumption of correctness because the state court determined that the prosecutor removed a juror for nondiscriminatory reasons); *Martini v. Hendricks*, 348 F.3d 360, 362 (3d Cir. 2003) (granting a presumption of correctness because a juror was unwilling to impose death penalty); *Galarza v. Keane*, 252 F.3d 630, 639 (2d Cir. 2001) (granting a presumption of correctness because the state court determined that prosecutors removed jurors for non-discriminatory reasons).
217. *See* *Mu'Min v. Virginia*, 500 U.S. 415, 428 (1991) ("A trial court's findings of juror impartiality may 'be overturned only for "manifest error."") (quoting *Patton v. Yount*, 467 U.S. 1025, 1031 (1984)); *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (*per curiam*) (granting a presumption of correctness to the state court's finding that a juror

witness identification,<sup>218</sup> competency to stand trial,<sup>219</sup> competency to waive post-conviction proceedings,<sup>220</sup> culpability,<sup>221</sup> and validity of peremptory challenges.<sup>222</sup>

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was not biased by *ex parte* communications with a trial judge because such a finding is a question of historical fact).

218. *See* *Sumner v. Mata* (Sumner II), 455 U.S. 591, 597 (1982) (per curiam) (finding that, although the constitutionality of pretrial identification procedures is a mixed question of law and fact, a presumption of correctness must be accorded to state court factual findings regarding the circumstances of identification procedures, with questions of fact to include “whether the witnesses . . . had an opportunity to observe the crime or were too distracted; whether the witnesses gave a detailed, accurate description; and whether the witnesses were under pressure from prison officials or others”).
219. *See* *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam) (granting a presumption of correctness to a state court’s determination of competency to stand trial because it was “fairly supported by the record”); *Rosenthal v. O’Brien*, 714 F.3d 676, 648–85 (1st Cir. 2013) (granting a presumption of correctness to the state court’s finding of competency although a competency hearing was not ever held); *Harris v. Kuhlmann*, 346 F.3d 330, 350, 356 (2d Cir. 2003) (granting a presumption of correctness to a state court’s finding of competency despite defendant’s low I.Q., gunshot wound to the head, and poor verbal communication); *Taylor v. Horn*, 504 F.3d 416, 435, 437–38 (3d Cir. 2007) (presumption of correctness accorded to state court’s finding of competency because it relied on expert testimony and interaction with the petitioner, which took full account of evidence that spoke to incompetency); *Wolfe v. Weisner*, 488 F.3d 234, 239 (4th Cir. 2007) (granting a presumption of correctness to a state court’s finding of competency despite denial of continuance to allow defense counsel to review the competency report).
220. *See* *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (per curiam) (granting a presumption of correctness to a state court’s determination of competency to waive post-conviction relief because it was “fairly supported by the record”); *Hamilton v. Collins*, 905 F.2d 825, 828 (5th Cir. 1990) (granting a presumption of correctness to a state court’s finding of prisoner competence which waived post-conviction proceedings because the defendant was twice examined by a psychologist and psychiatrist who both determined him to be competent); *Alston v. Dep’t of Corr., Fla.*, 610 F.3d 1318, 1326–28 (11th Cir. 2010) (granting a presumption of correctness to a state court’s finding of competence in defendant’s waiver of further legal proceedings where hearing previously established competence). *But see* *O’Rourke v. Endell*, 153 F.3d 560, 569 (8th Cir. 1998) (failing to grant a presumption of correctness to a state court’s finding of competence because a capital defendant was not represented by an attorney at a competency hearing, and therefore the defendant was not afforded due process).
221. *See* *Cabana v. Bullock*, 474 U.S. 376, 389–90 (1986), *overruled in part on other grounds* by *Pope v. Illinois*, 481 U.S. 497, 500 (1987). In *Cabana*, the Court held that although the federal court had correctly concluded that the jury did not find petitioner intended lethal force, it had improperly ordered a new sentencing hearing without determining whether the state trial or appellate court had made such a finding of intent. *See Cabana*, 474 U.S. at 383, 387.
222. *See* *Batson v. Kentucky*, 476 U.S. 79, 97, 100 (1986) (“We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor’s use of peremptory challenges creates a

## IV. LOCALIZING BENEFIT IN STATE OPT-IN

AEDPA was enacted with the ostensible purpose of streamlining the capital review process, making it more efficient for *all* of the parties involved.<sup>223</sup> As noted above, in practice, opt-in disproportionately benefits the states.<sup>224</sup> Efficiency and deference, the two main pillars of AEDPA, are liberty-restrictive, and in actuality dilute petitioners' right to substantive due process by limiting the availability of judicial review.<sup>225</sup> Efficiency, coupled

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prima facie case of discrimination against black jurors.”); *see also* Purkett v. Elem, 514 U.S. 765, 769 (1995) (granting a presumption of correctness to a state court’s finding that prosecutor was motivated by assessed juror credibility, not race, in the state’s use of peremptory strikes); Scott v. Gelb, 810 F.3d 94, 96–97, 99 (1st Cir. 2016) (granting a presumption of correctness to a state court’s determination that the prosecutor did not intend to discriminate on basis of race when the prosecutor struck two African-Americans and one Latina as prospective jurors); Williams v. Beard, 637 F.3d 195, 204, 219–20 (3d Cir. 2011) (granting a presumption of correctness to state the court’s determination that the prosecutor did not intend to discriminate on the basis of race when the prosecutor exercised fourteen of sixteen strikes to remove prospective African-American jurors from venire); Majid v. Portuondo, 428 F.3d 112, 130–31 (2d Cir. 2005) (granting a presumption of correctness to a state court’s determination that prosecutors did not intend to discriminate on basis of race when they struck twelve of sixteen prospective African-American jurors); Evans v. Smith, 220 F.3d 306, 314 (4th Cir. 2000) (granting a presumption of correctness to the state court’s determination that the prosecutor did not intend to discriminate on the basis of race when the prosecutor struck eight of ten prospective African-American jurors).

223. *Cf.* Greene v. Fisher, 556 U.S. 34, 38 (2011) (noting that the AEDPA standard found at 28 U.S.C.A. § 2254(d)(1) allows a federal habeas court to grant relief on a state prisoner’s claim, adjudicated on the merits in state-court proceedings, if the adjudication of the claim results in a decision that is “contrary to, or involving an unreasonable application of, clearly established Federal law” as determined by the court, and is “‘difficult to meet’ because the purpose of the AEDPA is to ensure that federal habeas relief functions as ‘a guard against extreme malfunctions in state criminal justice systems,’ and not as a means of error correction.”); B. JOHN BURNS, CRIMINAL PROCEDURE § 34:3 (4A Iowa Practice Series, 2018 ed. 2018), Westlaw (database updated Apr. 2018).

224. *See supra* note 171 and accompanying text.

225. *See* Dan Poulson, *Suspension for Beginners: Ex Parte Bollman and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act*, 35 HASTINGS CONST. L.Q. 373, 374 (2008). Proposition 66 declares that, “[b]ureaucratic regulations have needlessly delayed enforcement of death penalty verdicts. Eliminating wasteful spending on repetitive challenges to these regulations will result in the fair and effective implementation of justice . . . . The California Constitution gives crime victims the right to timely justice. A capital case can be fully and fairly reviewed by both the state and federal courts within ten years. By adopting state rules and procedures, victims will receive timely justice and taxpayers will save hundreds of millions of dollars.” Death Penalty Reform & Savings Act, §§ 2(9)–(10). “The fiscal impact was estimated to be ‘near-term increases in state court costs—potentially

with deference to the states' police power and the integrity of state capital punishment processes, are state benefits that come at the expense of ensuring and protecting petitioners' liberty interest, grounded in due process and fair representation.<sup>226</sup>

A prisoner's opportunity to have his claims heard through a full and fair process is an important part of habeas corpus. At the very least, habeas corpus should serve as a 'backstop' because 'it is . . . the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case.'<sup>227</sup>

Yet the lower federal courts are directed by the Court's interpretation of AEDPA to weigh the interest of comity, finality, and integrity of state police power over that of due process, fair representation, and even innocence.<sup>228</sup> In *Hawthorne v. Schneiderman*,<sup>229</sup> for instance, the court noted that, "[t]his is one of the rare cases in which a habeas petition may well be innocent . . . . The question of Hawthorne's innocence, however, is not the one we are encouraged—or, at times, even allowed—to ask in habeas cases such as this."<sup>230</sup> Thus, the Court has made it more and more difficult for petitioner's to obtain habeas review and relief under its interpretation of AEDPA, "despite the fact that habeas petitions remain the primary vehicle for establishing claims of actual

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in tens of millions of dollars annually—due to an acceleration of spending to address new time lines on legal challenges to death sentences' and '[s]avings of similar amounts in future years.' Further, 'potential state prison savings [could be] in the tens of millions of dollars annually.'" Marla D. Tortorice, Comment, *Costs versus Benefits: The Fiscal Realities of the Death Penalty in Pennsylvania*, 78 U. PITT. L. REV. 519, 535 (2017). "California's death penalty system is ineffective because of waste, delays, and inefficiencies. Fixing it will save California taxpayers millions of dollars every year. These wasted taxpayer dollars would be better used for crime prevention, education, and services for the elderly and disabled." Death Penalty Reform & Savings Act, § 2(1).

226. See Nasrallah, *supra* note 81, at 1152–53.

227. *Id.* at 1162 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963)).

228. *Hawthorn v. Schneiderman*, 695 F.3d 192, 199 (2d Cir. 2012) (Calabresi, J., concurring).

229. *Id.*

230. *Id.*

innocence, prosecutorial misconduct, and other issues with serious implications for justice.”<sup>231</sup>

While AEDPA may acknowledge the need for petitioners to have “qualified, competent, adequately resourced and adequately compensated counsel to death-sentenced prisoners,”<sup>232</sup> this is very difficult to obtain in actuality given the Court’s restrictive habeas jurisprudence, the labyrinthine procedural process of capital punishment review, and scarce resources, to include actual properly compensated and learned counsel available for the post-conviction process.<sup>233</sup> “The impetus for AEDPA was a perception in Congress that the federal death penalty proceeded at too glacial a pace.”<sup>234</sup> The attempt to incorporate petitioners’ liberty interest in AEDPA while streamlining the review process was to set up a

*quid pro quo* arrangement between the states and federal habeas courts: in exchange for the states providing a mechanism to appoint competent, compensated counsel during state post-conviction proceedings, the federal habeas court will conduct an accelerated review of state prisoners’

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231. Noam Biale, *Beyond a Reasonable Disagreement: Judging Habeas Corpus*, 83 U. CIN. L. REV. 1337, 1339 (2015); see also Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 214 (2007) (“Most exonerations have come during habeas corpus proceedings, when lawyers have uncovered evidence of innocence, prosecutorial misconduct, ineffective representation, mistaken identifications, perjured testimony by state witnesses, or unreliable scientific evidence.”).

232. Habeas Corpus Res. Ctr. v. United States Dep’t of Justice, No. C 13-4517 CW, 2013 WL 6326618, at \*1 (N.D. Cal. Dec. 4, 2013).

233. See Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. CONTEMP. L. 399, 400, 408–09 (1997); Alexander Rundlet, Comment, *Opting for Death: State Responses to the AEDPA’s Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 665–66, 718 (1999) (asserting a constitutional right to post-conviction counsel); Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1220 (2015) (“[A]ny participant in our habeas regime would have to agree that it resembles a twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the Writ as it would be for a Supreme Court Justice to strike out Babe Ruth, Joe DiMaggio, and Mickey Mantle in succession—even with the Chief Justice calling balls and strikes.”).

234. Biale, *supra* note 231, at 1345–46.

federal habeas claims. A state that has adopted such a mechanism is said to have ‘opted in.’<sup>235</sup>

Presently, no state has qualified for opt-in because states have failed, amongst other things, to provide the requisite competent and properly compensated counsel.<sup>236</sup> If a state is successful in opting in, then it is able to take full advantage of “the benefit of section 2261(e), which provides that ‘[t]he ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief in a proceeding arising under section 2554.’”<sup>237</sup> AEDPA opt-in shields the states from claims of ineffective/incompetent of counsel.<sup>238</sup>

#### A. *Opt-In: Assessing Substantive & Procedural Benefits*

It seems that AEDPA tries to reconcile two aims that are somewhat at odds with one another by providing states with efficiency incentives to opt-in that respect their sovereignty and dominance in

235. Kannenberg, *supra* note 129, at 108; *see also* JOSEPH A. MELUSKY & KEITH A. PESTO, CRUEL AND UNUSUAL PUNISHMENT: RIGHTS AND LIBERTIES UNDER THE LAW 144–45 (2003); *Spears v. Stewart*, 267 F.3d 1026, 1039, 1041–42 (9th Cir. 2001) (holding that even though the Ninth Circuit concluded that Arizona qualified for opt-in status, that Chapter 154 would not apply to the petitioner because the State failed to appoint counsel in a timely fashion).

In *Spears v. Stewart*, the Ninth Circuit held that Arizona now qualifies to ‘opt in’ to an accelerated federal review process in death penalty cases under [AEDPA]. Arizona has opted in by enacting procedures for appointing qualified, experienced attorneys to represent indigent death-row inmates in state post-conviction relief (PCR) proceedings. Ultimately, the Ninth Circuit declined to apply the accelerated review provisions to the *Spears* case because there was a lengthy delay in appointing that defendant's PCR attorney. But the case is significant because it is the first in which a federal circuit court has approved a state's efforts to opt in under the AEDPA.

Kent E. Cattani & Monica B. Klapper, *Representing the Indigent: Spears v. Stewart in Capital Cases*, 28 ARIZ. ATT'Y 36, 36 (2002), [https://www.myazbar.org/AZAttorney/PDF\\_Articles/AZAT0202Indigentp36-43.pdf](https://www.myazbar.org/AZAttorney/PDF_Articles/AZAT0202Indigentp36-43.pdf).

236. *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Post-Conviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 35–36 (2003); *Duvall v. Reynolds*, 139 F.3d 768, 776 (10th Cir. 1998); *Noel v. Norris*, 194 F. Supp. 2d 893, 923 (E.D. Ark. 2002); *Johnson v. Nagle*, 58 F. Supp. 2d 1303, 1335 n.26 (N.D. Ala. 1999); *Mincey v. Head*, 206 F.3d 1106, 1131 n.58 (11th Cir. 2000); *Leavitt v. Arave*, 927 F. Supp. 394, 396 (D. Idaho 1996).

237. Kannenberg, *supra* note 129, at 120.

238. *See id.*

the realm of criminal law, and concomitantly providing for fairness, due process, and adequate, learned representation for petitioners seeking habeas review.<sup>239</sup> Upon signing AEDPA into law, President Clinton stated, “I have signed this bill because I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary.”<sup>240</sup> Preserving independent habeas review seems in line with ensuring due process and fair representation for poor people of color in capital sentencing.<sup>241</sup> Opt-in, theoretically, provides a benefit for the petitioner because the state must provide “qualified, competent, adequately resourced and adequately compensated counsel to death-sentenced prisoners”<sup>242</sup> at the on-set of post-conviction proceedings. On its face, AEDPA appears to ensure that a state’s imposition of capital punishment is based on a fair and reliable process that assuages the effects of seemingly perpetual delays associated with repetitious habeas litigation.<sup>243</sup> States may thus opt-in if they comply with the mandates of 28 U.S.C. § 2261 post-conviction procedures, which include provision for competent counsel and reasonable litigation funding to indigent capital prisoners in the post-conviction process.<sup>244</sup>

The importance of providing competent counsel to indigent petitioners is stated in 28 U.S.C. § 2261(e), which precludes petitioners from claiming ineffectiveness of counsel as a basis for review.<sup>245</sup> It is through this mandate that AEDPA attempts to establish an incentive for states to provide competent counsel throughout state collateral review, recognizing that such counsel is “crucial to ensuring fairness and protecting the constitutional rights of capital litigants.”<sup>246</sup>

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239. See *infra* notes 240–71 and accompanying text.

240. Statement, William J. Clinton, President, XLII U.S. 1993-2001, *Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996*, THE AM. PRESIDENCY PROJECT (Apr. 24, 1996), <http://www.presidency.ucsb.edu/ws/?pid=52713>.

241. See Goldfarb, *supra* note 51, at 1395–96.

242. Habeas Corpus Res. Ctr. v. United States Dep’t of Justice, No. C 13-4517 CW, 2013 WL 6326618, at \*1 (N.D. Cal. Dec. 4, 2013).

243. Stummer, *supra* note 62, at 619–22.

244. See 28 U.S.C. § 2261 (2012).

245. § 2261(e).

246. *Ashmus v. Calderon*, 935 F. Supp. 1048, 1056 (N.D. Cal. 1996) (quoting the Judicial Conference of the United States Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. 3239, 3240 (1989)); Stummer, *supra* note 62, at 619–20; Patrick J. Fuster, Comment, *Taming Cerberus: The Beast at AEDPA’s Gates*, 84 U. CHI. L. REV. 1325, 1375 (2017).

Yet, by denying access to ineffective assistance of counsel claims, as well as inaugurating strict time limits, substantial restrictions on re-raising claims, curbing successive petitions, and deferring to state capital sentencing,<sup>247</sup> the liberty-enhancing potential of habeas is severely constrained.<sup>248</sup>

States can, and often do, abuse the criminal process and ignore individual rights . . . . State criminal justice systems often let constitutional violations such as prosecutorial misconduct—tampering with witnesses, withholding exculpatory evidence, and even destroying evidence—go unnoticed. Further, a good deal of academic evidence shows that some states even “systematically violate criminal defendants’ rights.” For example, many states use a “bait-and-switch” technique to “prevent[] defendants from ever having their federal claims considered.”<sup>249</sup>

By curbing access to habeas, the poor and people of color are further removed from due process and fairness in representation.<sup>250</sup> Habeas as a liberty-enhancing mechanism is important to maintain because of the sub-set of the overall population that relies upon it to attain access to a degree of due process and representative fairness that is lacking at the state level in capital punishment process and sentencing.<sup>251</sup> Habeas as a liberty-enhancing mechanism helps to prevent the effects that flow from a state-centric interpretation of habeas that obscure the

most important truth about the capital punishment system in this country:

while . . . innocent men and women are on death row, a much larger number are there because there is no adversarial system of justice for the majority of people who

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247. See Biale, *supra* note 231, at 1346.

248. *Id.* at 1346–47.

249. Nasrallah, *supra* note 81, at 1165.

250. Bergman, *supra* note 133, at 42.

251. See Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 759–60 (1987) (discussing Supreme Court habeas cases arising from state courts); see also Primus, *supra* note 59, at 2, 17–22 (discussing multiple scenarios in which due process and/or representative fairness are lacking at the state level).

face the death penalty—who are all poor . . . and a majority of whom are men and women of color.<sup>252</sup>

The Federal courts are vested with the power to determine whether a State’s quid pro quo arrangement complies with Chapter 154.<sup>253</sup> An opt-in state’s failure to comply prevents it from taking advantage of expedited post-conviction federal habeas review.<sup>254</sup> Overall, with some exceptions, the lower federal courts have interpreted AEDPA to require states to comply by enacting specific competency standards to ensure the appointment of adequate, competent and learned capital counsel.<sup>255</sup> Because Chapter 154 restricts petitioners’ access to habeas, states’ compliance in providing a mechanism by which to provide proper counsel to petitioners is a prerequisite for state access to obtaining deference.<sup>256</sup> When a petitioner challenges the adequacy of an appointment mechanism, the state must demonstrate compliance with 28 U.S.C. § 2261(b) and (c); state mechanisms must not suffer from incoherence or incompleteness.<sup>257</sup>

[P]rocedures must be ‘mandatory and carry the force of law.’ Unfettered discretion in a decision-maker to permit or deny appointment of counsel will not suffice. Moreover, post-hoc rationalizations that guidelines or non-binding procedure constitutes a ‘mechanism’ or a ‘piecemeal attempt to pull together the various provisions . . . will fail. Instead, such procedures must foreclose differing

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252. Bergman, *supra* note 133, at 42. “Former California Governor Pat Brown [has said] ‘[i]n fact the most glaring weakness is that no matter how efficient and fair the death penalty may seem in theory, in actual practice it is primarily inflicted upon the weak, the poor, the ignorant and against racial minorities.’ He wrote that nearly 50 years ago; that has still not changed.” *Id.*

253. 28 U.S.C. § 2264(c) (2012).

254. *See* Kannenberg, *supra* note 129, at 120–22.

255. *See* Mata v. Johnson, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997); Andrew Hammel, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 348–49, 353–64 (2003) (discussing the problem of ineffective assistance of habeas counsel and conducting a survey of state mechanisms enacted to ensure adequate representation); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 902–03 (1996) (stating that capital defendants represented by appointed counsel are often no better off in federal habeas proceedings than pro se defendants).

256. Stummer, *supra* note 62, at 621–22.

257. *Id.* at 622–23.

interpretations of how the mechanism is to operate and ‘must be put down in a concrete fashion where it can be seen and relied upon.’ Thus traditional court practices or subjective determinations by State courts will not suffice as a ‘mechanism.’ The state’s mechanism should reflect ‘an affirmative, institutionalized, formal commitment’ to appointing competent counsel during post-conviction proceedings.<sup>258</sup>

Fair representation of a petitioner, at its core, is derived from learned counsel who ensure or better facilitates fundamental notions of fairness, due process, and the legitimacy of a state capital conviction and review process.<sup>259</sup> Learned counsel is key given the intricate technical complexity that characterizes capital punishment schema and federal habeas review.<sup>260</sup> The Court has stated that, the “complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.”<sup>261</sup> Being “learned in the law” is a key part of effectuating genuine representation in the context of habeas review.<sup>262</sup> Yet, “after years of attempted reform, beginning with Chapter 154 of the [AEDPA], many of the same issues that triggered reform efforts still plague the federal habeas system.”<sup>263</sup> One of the major stumbling blocks has been the provision of adequate and competent counsel that is learned in the law.<sup>264</sup> Interestingly, the fact that no state which has sought opt-in has actually qualified for it is indicative of the deep systemic problem of the paucity of substantive due process and fairness in the capital punishment schemes of said states.<sup>265</sup>

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258. *Id.* at 623; *see also* Hammel, *supra* note 255, at 348, 353–54, 360–61, 364–65 (discussing the problem of ineffective assistance of habeas counsel and conducting a survey of state mechanisms enacted to ensure adequate representation); Howard, Jr., *supra* note 255, at 902–03 (stating that capital defendants represented by appointed counsel are often no better off in federal habeas proceedings than pro se defendants).

259. *See* Stummer, *supra* note 62, at 632.

260. *See id.* at 606–07.

261. *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring). “[T]his Court’s death penalty jurisprudence unquestionably is difficult even for a trained lawyer to master.” *Id.* at 28 (Stevens, J., dissenting).

262. *See* Stummer, *supra* note 62, at 631–32.

263. Kannenberg, *supra* note 129, at 107; *see* Hon. William A. Fletcher, *Madison Lecture: Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805, 824 (2014).

264. *See* Hammel, *supra* note 255, at 348; Howard, Jr., *supra* note 255, at 892; Stummer, *supra* note 62, at 611–12.

265. *See* Stummer, *supra* note 62, at 608–09.

The appointment of less-than-qualified or clearly under-qualified counsel has a detrimental affect and effect on petitioners' liberty interest.<sup>266</sup> Failure, for instance, of counsel to effectively manage the complex technical dimensions of the habeas review process, such as timeliness of appointment, are indicative of counsel that is unable to provide adequate and learned representation<sup>267</sup> which, in turn, exacerbates the representational deficiency of opt-in under AEDPA.<sup>268</sup> Because "AEDPA forecloses claims of ineffectiveness of post-conviction counsel, and demands explicit post-conviction competency standards, the Chapter 154 provisions essentially raise the standard of counsel's performance . . . ."<sup>269</sup> Competent counsel must be highly learned in the complexity of capital litigation, doctrinally and experientially.<sup>270</sup> Lack of an in-depth and comprehensive understanding of the intricacies of capital punishment will negatively impact counsel's ability to provide fair and competent representation.<sup>271</sup>

#### *B. Factors that Impact Due Process & Fair Representation*

To qualify for opt-in, states must: (1) Establish by statute or rule a mechanism for appointment of counsel for post-conviction proceedings; (2) ensure that counsel are competent; (3) provide counsel reasonable litigation expenses; and (4) offer counsel to all capital prisoners seeking post-conviction relief, with actual appointment occurring upon a determination that a petitioner is indigent and has accepted the offer.<sup>272</sup> The following is a brief

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266. See, e.g., Hammel, *supra* note 255, at 373–74.

267. See Stummer, *supra* note 62, at 615–17.

268. *Id.* at 609.

269. *Id.* at 630–32 (“[A]ppointed counsel must have explicit experience with preparing state habeas petitions and representing capital appellants during motions or hearings. . . . Counsel needs to be learned, trained, and properly seasoned. Only such counsel will cure the problems of delay and repetitive filings while fully comprehending the capital process from start to finish.”).

270. See *id.* at 630.

271. See *id.* at 615–17.

272. 28 U.S.C. § 2261, 2265 (2012); see Hill v. Butterworth, 941 F. Supp. 1129, 1141 (N.D. Fla. 1996) (clarifying that states must satisfy all four requirements in order to opt-in), *rev'd on other grounds*, 147 F.3d 1333 (11th Cir. 1998). Additionally, courts have read a fifth element into the statute: that a State must actually comply with the mechanism it has established. See Bennett v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996) (“the Act establishes a quid-pro-quo relationship: A [sic] state seeking greater federal deference to its habeas decisions in capital cases must, by appointing competent counsel to represent indigent petitioners, further ensure that its own habeas proceedings are meaningful”); see also Tucker v. Moore, 56 F. Supp. 2d 611, 614

exposition of select issues that the states have had in procuring “qualified, competent, adequately resourced and adequately compensated counsel to death-sentenced prisoners.”<sup>273</sup>

### 1. Standards of Competency

Overall, the courts have experienced four major problems with respect to standards of competency in the realm of habeas review in capital punishment: “(1) the lack of a post-conviction experience requirement; (2) nonmandatory or nonbinding competency requirements; (3) de minimis competency requirements; or (4) no competency standards at all.”<sup>274</sup> Over-worked, inexperienced, and underfunded counsel is a recurring issue in meeting the requirement for the provision of counsel.<sup>275</sup> Capital pre- and post-conviction processes are

plagued with inexperienced counsel or overworked public defenders and chronic underfunding. These problems potentially cause investigation, research, and expert work necessary for a meaningful defense to go undone. Because the majority of death-penalty states fail to adequately fund death-penalty litigation, public defender offices are understaffed and overworked. Public defenders are often required to represent multiple capital defendants or carry a heavy felony caseload while representing one capital defendant.<sup>276</sup>

Furthermore, despite the fact that capital cases involve highly complex technical principles and procedures, insufficient

funding and lack of specific appointment standards tend to attract inexperienced court appointed criminal lawyers . . . ‘attorneys defending death penalty cases, as a class, are less

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(D.S.C. 1999) (“If the Respondents did not follow their own procedures . . . when appointing counsel for the Petitioner during the state [Public Defender Commission] proceedings, then the Respondents cannot invoke [§ 2263] against the Petitioner in this federal habeas action.”).

273. *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. C 13-4517 CW, 2013 WL 6326618, at \*1 (N.D. Cal. Dec. 4, 2013). *Cf. Mills v. Anderson*, 961 F. Supp. 198, 201 (S.D. Ohio 1997) (“The provisions of [the Antiterrorism and Effective Death Penalty Act (AEDPA)] are drafted with mandatory language, and neither substantial compliance nor de facto compliance is sufficient.”).

274. Kannenberg, *supra* note 129, at 130.

275. Stummer, *supra* note 62, at 611.

276. *Id.*

experienced and far more likely to be disciplined for unprofessional conduct than the bar as a whole . . . . In litigation that requires proficiency in many areas of study, capital defendants are typically represented by lawyers who simply cannot afford to acquire that base of knowledge.<sup>277</sup>

Competent counsel is better able to comprehend and navigate the complexities of capital punishment procedures such as exhaustion requirements and retroactivity, the prevention of procedural default, and if default does occur, strategies on how to better argue cause and prejudice.<sup>278</sup> In *Mata v. Johnson*,<sup>279</sup> for instance, the court found that § 2261(b) required “explicit standards of competency,”<sup>280</sup> specifically “mandatory standards”<sup>281</sup> to ensure that competent counsel is in fact being appointed. “Without the affirmative establishment of a mechanism for competency standards, states can reap the benefits of stronger finality rules, while supplying an indigent capital defendant with” less experienced counsel.<sup>282</sup>

## 2. Compensation Mechanism

Several states’ appointment mechanisms have been found inadequate because of deficient compensation schemes to ensure adequate and competent counsel.<sup>283</sup> In *Ashmus v. Calderon*,<sup>284</sup> the District Court found that the state’s mechanism expressly precluded

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277. *Id.* at 613; *see, e.g.*, *Ashmus v. Woodford*, 202 F.3d 1160, 1167–70 (9th Cir. 2000) (evaluating the sufficiency of California’s competency standards); *Wright v. Angelone*, 944 F. Supp. 460, 467–68 (E.D. Va. 1996) (finding that standards for counsel competency must be set forth explicitly in the initial mechanism authorizing the appointment of counsel, and that competency requirements must limit appointment of counsel to those attorneys with experience in capital cases); *Hill v. Butterworth*, 941 F. Supp. 1129, 1141–44 (N.D. Fla. 1996) (reviewing the state’s competent-counsel requirement).

278. Stummer, *supra* note 62, at 626.

279. *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997).

280. *Id.* at 1267.

281. *Id.*

282. Stummer, *supra* note 62, at 629; *see also* *Ashmus v. Calderon*, 31 F. Supp. 2d 1175, 1180 (“Unless a state affirmatively establishes that each condition described in Chapter 154 has been met, it may not claim the chapter’s benefits. This is the price of stronger finality rules and greater deference to state habeas proceedings.”) (citation omitted).

283. Kannenberg, *supra* note 129, at 138.

284. *Ashmus v. Calderon*, 935 F. Supp. 1048, 1070 (N.D. Cal. 1996), *rev’d on other grounds*, 523 U.S. 740 (1998).

compensation for raising certain collateral claims.<sup>285</sup> The court found that, in order for a state to opt-in, that state must have a mechanism for the payment of reasonable litigation expenses to appointed counsel.<sup>286</sup> Many states have failed to satisfy this requirement for a variety of reasons,<sup>287</sup> such as setting limits on compensation well below a standard that is considered proper or necessary to ensure that a petitioner is receiving adequate, competent counsel.<sup>288</sup>

### 3. Reasonable Compensation

In *Booth v. Maryland*,<sup>289</sup> the court found that Maryland's "mechanism" for paying and reimbursing attorneys assisting capital defendants with post-conviction proceedings was unreasonable because the attorneys were paid "at a rate \$41 less than the rate necessary . . . to pay . . . overhead [costs]" and that amount was disparate to federal attorneys appointed to represent capital defendants in federal habeas corpus actions, who were routinely "paid up to \$125 per hour and fee awards in six figures" under the Federal Criminal Justice Act.<sup>290</sup> As a result, the court concluded that the state's amount of compensation for capital counsel was unreasonably low.<sup>291</sup> The reasoning in *Booth* aligns with the court's reasoning in *Baker v. Corcoran*, wherein the court lamented that "we cannot conclude that Maryland adequately compensates state post-conviction counsel . . . [because] [a] compensation system that results in substantial losses to the appointed attorney or his firm simply cannot be deemed adequate."<sup>292</sup>

### 4. Litigation Expenses

In *Satcher v. Netherland*,<sup>293</sup> the court found that the state failed to provide reasonable litigation expenses, notwithstanding the fact that budget legislation allowed for general court expenditures.<sup>294</sup>

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285. Kannenberg, *supra* note 129, at 138.

286. *Ashmus*, 31 F. Supp. 2d at 1179.

287. *See* Kannenberg, *supra* note 129, at 138–39.

288. *See* *Baker v. Corcoran*, 220 F.3d 276, 286 (4th Cir. 2000).

289. *Booth v. Maryland*, 940 F. Supp. 849, 854 (D. Md. 1996), *vacated*, 112 F.3d 139 (4th Cir. 1997).

290. *Id.* at 854–55.

291. *Id.*

292. *Baker*, 220 F.3d at 285–86.

293. *Satcher v. Netherland*, 944 F. Supp. 1222, 1241 (E.D. Va. 1996).

294. *See id.* at 1241.

[T]he Act requires that the mechanism to appoint counsel, to pay counsel, and to pay counsel's litigation expenses be established by a state statute, a rule of the state's highest court or of an authorized state agency. In so doing, the Act requires a formal, institutionalized commitment to the payment of counsel and litigation expenses. The institutionalized and statutorily predicated condition set by Congress cannot be met unless the mechanism for these purposes is established by the State in the fashion prescribed by Congress.<sup>295</sup>

Furthermore, the court found that

Congress has determined that competent counsel who will be reasonably compensated and who has the availability of funds for reasonable litigation expenses is essential to full and fair state habeas proceedings. *If any one of the safeguards of Section 2261 is not met, but the state is nonetheless provided with the 'benefits' of opt-in status anyway, prisoners will be subjected to less than full and fair state habeas review and then truncated federal court review without having the guarantees thought by Congress to warrant the truncated review.*<sup>296</sup>

##### 5. Actual Compliance

Several courts have held that state mechanisms have failed under Chapter 154 because the states do not actually comply with the mechanism.<sup>297</sup> "A state seeking greater federal deference to its habeas decisions in capital cases must, by appointing competent counsel to represent indigent petitioners, further ensure that its own habeas proceedings are meaningful."<sup>298</sup> A state must identify and apply the procedural criteria.<sup>299</sup> "[W]here a state has set forth procedures for appointing counsel, the state must actually follow those procedures in order to opt-in under § 2261."<sup>300</sup>

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295. *Id.* at 1242.

296. *Id.* at 1245.

297. Kannenberg, *supra* note 129, at 143.

298. Bennett v. Angelone, 92 F.3d 1336, 1342 (4th Cir. 1996) (citations omitted).

299. Baker v. Corcoran, 220 F.3d 276, 286 (4th Cir. 2000).

300. Parker, *supra* note 97, at 1994; *see also* Tucker v. Moore, 56 F. Supp. 2d 611, 614 (S.C. 1999) (finding that South Carolina was barred from opting into § 2263 because the state failed to follow its own statutory mechanism), *aff'd sub nom.* Tucker v. Catoe, 221 F.3d 600, 604–05 (4th Cir. 2000) ("[A] state must not only enact a

## 6. Entry of Order

To opt-in, a state “must offer counsel to all State prisoners under capital sentence and must provide for the entry of an order by a court of record— (1) appointing one or more counsels to represent the prisoner . . . .”<sup>301</sup> It is important that the appointment is timely “because the 180-day limitation period on filing the habeas action begins to run ‘immediately upon the conclusion of direct review.’”<sup>302</sup> In *Baker*, the court found the following state interpretation flawed:

[T]he State argues cursorily that it has done all that is necessary to comply with § 2261(c), which requires that any mechanism for the appointment and compensation of state post-conviction counsel ‘must provide for the entry of an order by a court of record’ appointing counsel, finding that the petitioner has rejected the offer of counsel, or finding that the petitioner is not indigent and thus not entitled to counsel . . . .

To reject this argument, we need look no further than the plain language of § 2261(c), which by its terms requires that a mechanism for the appointment and compensation of state post-conviction counsel provide for the entry of an order regarding the appointment, refusal, or denial of counsel. At present, no provision of Maryland law comports with this requirement.<sup>303</sup>

## 7. Appointment Mechanism

To opt-in under § 2261(b), a state must establish a mechanism through legislative statute, rule of court, or agency regulation.<sup>304</sup> Courts have interpreted this portion of the statute to provide

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‘mechanism’ and standards for post-conviction review counsel, but those mechanisms and standards must in fact be complied with before the state may invoke the time limitations of 28 U.S.C. § 2263.”); *Grayson v. Epps*, 338 F. Supp.2d 699, 704 (S.D. Miss. 2004) (“The state of Mississippi should have offered proof of some kind that it actually complied with § 2261(a), (b) & (c). It did not. Accordingly, the Court finds that the State of Mississippi has not carried its burden to prove that it is qualified to avail itself of the opt-in structure of the AEDPA, and Respondents request for such must be denied.”).

301. 28 U.S.C. § 2261(c) (2012); *see also* *Hall v. Luebbbers*, 341 F.3d 706, 712 (8th Cir. 2003) (stating that a rule providing for the appointment of counsel to less than all indigent defendants does not satisfy the requirements of § 2261).

302. *Parker*, *supra* note 97, at 1991 (quoting *Brown v. Puckett*, No. 3:01CV197-D, 2003 WL 21018627, at \*3 (N.D. Miss. Mar. 12, 2003)).

303. *Baker*, 220 F.3d at 287.

304. *See supra* note 295 and accompanying text.

procedural protection for habeas petitioners.<sup>305</sup> For example, a state may enforce expedited habeas review under [AEDPA] only if it affirmatively establishes that it has satisfied its obligation to provide a comprehensive mechanism for competent representation of indigent capital prisoners.<sup>306</sup>

*Ashmus* “is just one example of the courts’ demands for literal statutory compliance. It recognizes the significance of both the substantive and procedural safeguards required by § 2261 . . . [and] suggests that defects in the procedural enactment of the mechanism would be fatal even if the appointment mechanism were substantively sound.”<sup>307</sup>

### C. Liberty-Restrictive Habeas

The failure of states to qualify for opt-in under AEDPA sheds light on the larger interpretive context within which it is situated, e.g., federalism, finality, comity, due process, fairness, and the politics of death.<sup>308</sup> The Court’s relatively recent jurisprudence pertaining to habeas generally, as well in conjunction with its interpretation of AEDPA over the last 28 years, further points out the representational deficiency that permeates the post-conviction review of state death sentences.<sup>309</sup> As the Court notes in *Lockyer v. Andrade*,<sup>310</sup> the “gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. It is not enough that a federal habeas court, in its ‘independent review of the legal question’ is left with a ‘firm conviction’ that the state court was ‘erroneous.’”<sup>311</sup> The Court’s opinions in *Harrington v. Richter*<sup>312</sup>

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305. See *supra* note 296 and accompanying text.

306. See *Ashmus v. Woodford*, 202 F.3d 1160, 1165 (9th Cir. 2000) (“California can opt-in to Chapter 154’s expedited procedures, however, only if its mechanism for the appointment, compensation and payment of reasonable litigation expenses of collateral counsel is ‘established.’”) (citation omitted).

307. Parker, *supra* note 97, at 1982–83.

308. See Marceau, *supra* note 156, at 106–16; Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 591, 592–602 (2013).

309. See generally Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 977–93 (2012); Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J. L. & SOC. CHANGE 1, 1–4 (2016) (referencing the Court’s interpretation of AEDPA over the last twenty-eight years).

310. *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).

311. *Id.*

312. See generally *Harrington v. Richter*, 562 U.S. 86, 104–13 (2011) (referencing the court’s interpretation of AEDPA and its habeas jurisprudence).

and *Cullen v. Pinholster*<sup>313</sup> are exemplary of the Court's liberty-restrictive interpretation of AEDPA and its habeas jurisprudence.<sup>314</sup>

In *Richter*, the Court found that "§ 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'"<sup>315</sup> States do not have to provide reasons for why relief has been denied.<sup>316</sup> This practice is in line with a liberty-restrictive interpretation of habeas.<sup>317</sup> In support of this approach to habeas review, the Court sets forth the nebulous requirement that to review and find error with or overturn a state court's proceedings or judgment, it must be the case that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision."<sup>318</sup> In *Pinholster*, the Court held "that evidence later introduced in federal court is irrelevant to § 2254(d)(1) review."<sup>319</sup> The effect of the Court's holding is that

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313. *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

314. *See Coleman v. Thompson*, 501 U.S. 722, 754 (1991) (finding that in "the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation" in the context of a claim of ineffective assistance of counsel). *But see Martinez v. Ryan*, 566 U.S. 1, 132 (2012) (holding that AEDPA did not bar petitioner from using his post-conviction attorney's ineffectiveness to establish "cause" for his procedural default).

The *Martinez* Court presented its ruling as a narrow one. For one thing, it said that its holding was equitable rather than constitutional, noting that states would therefore have the flexibility to choose between appointing initial state postconviction counsel or defending cases on the merits in federal habeas review. Moreover, the Court said that its ruling was limited to cases in which (a) state law required ineffective assistance of trial counsel claims to be raised in initial-review collateral proceedings; (b) there was no initial postconviction attorney, or the initial postconviction attorney's performance rose to the level of a *Strickland* violation; (c) the underlying defaulted claim was an ineffective assistance of trial counsel claim; and (d) the ineffective assistance of trial counsel claim was substantial.

Eve B. Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L. J. 2611–13 (2013); *see also* Freedman, *supra* note 308, at 592–602.

315. *Harrington v. Richter*, 562 U.S. 86, 100 (2011); *see* Matthew Seligman, *Harrington's Wake: Unanswered Questions on AEDPA's Application to Summary Dispositions*, 64 STAN. L. REV. 469, 469–75 (2012) (discussing the nuances that attach when assessing the differences between written opinions and summary dispositions).

316. *See Richter*, 562 U.S. at 98.

317. *Id.*

318. *Id.* at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

319. *Cullen v. Pinholster*, 563 U.S. 170, 184 (2011).

petitioners cannot introduce new evidence of their federal claims in federal courts if those claims had already been adjudicated on the merits in state court. Each of these [interpretations therefore] add their own layers of deference that federal courts must apply before asking whether the state court unreasonably applied federal law.<sup>320</sup>

The Court's opinions thus interpret § 2254(d), the modern centerpiece of federal habeas practice, so as to substantially curtail state prisoners' access to habeas review.<sup>321</sup> *Pinholster* accomplishes this aim by holding that new evidence, not originally part of the state court record generally, "has no bearing" on the federal court's review of the state court decision.<sup>322</sup> *Richter*, by contrast, limits the functional work or substantive merits review of a federal habeas court; i.e., it elaborates on the narrow set of circumstances in which a federal court may disturb a state conviction.<sup>323</sup>

The Court's interpretation of § 2254(d)(1) has the effect of ensuring that most petitioners are not eligible for relief despite the fact that their convictions may rest on unconstitutional procedures, since "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."<sup>324</sup> Unless an error is so egregious as to amount to an intentional disregard for the supremacy of federal law, then an unconstitutional conviction should apparently not be reversed by a federal court, "lest 'intrusive post-trial inquiry' the integrity of the very adversary process the right to counsel is meant to serve."<sup>325</sup> This reasoning has the effect of also protecting "the autonomy of the states and the comity interests at issue in our

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320. Nasrallah, *supra* note 81, at 1169.

321. See Marceau, *supra* note 156, at 107; 28 U.S.C. § 2254(d) (2012).

322. *Pinholster*, 563 U.S. at 185; Freedman, *supra* note 308, at 597–98.

323. Wiseman, *supra* note 309, at 987–88; *Richter*, 562 U.S. at 103 (finding that "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement" in order to obtain a writ of habeas corpus from a federal court).

324. *Richter*, 562 U.S. at 101 (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)); § 2254(d)(1); Larry W. Yackle, *The Figure in the Carpet*, 79 TEX. L. REV. 1731, 1754 (2000) ("[T]his understanding keeps faith with the Court's insistence that federal courts must sometimes withhold habeas relief even if they think that a state court reached an erroneous determination of a mixed question. The test is not whether the state court reached the correct decision, but whether that court reached a decision that was reasonable.").

325. *Premo v. Moore*, 562 U.S. 115, 122 (2011); see Fletcher, *supra* note 263, at 824 (discussing habeas relief in the context of AEDPA).

criminal justice system.”<sup>326</sup> *Richter* suggests that AEDPA has brought about significant changes on the role that federal courts play in reviewing state convictions.<sup>327</sup> Indeed, as other legal scholars have stated:

Federal constitutional errors by state courts present an ever-shrinking target for federal habeas courts. Only the clearest state court errors – indeed, only those errors that border on outright defiance or rejection of federal supremacy – will warrant federal intervention to cure an unjust conviction or sentence. And even state court judgments that do not contain any reasoning are entitled to the full scope of AEDPA shielding deference.<sup>328</sup>

AEDPA contains various limitations on the courts’ authority to grant habeas, including 28 U.S.C. § 2254(d)(1), which states that “with respect to any claim that was adjudicated on the merits in state court proceedings” the writ shall not be granted unless adjudication “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.”<sup>329</sup> Construing this provision as a threshold barrier to fact-finding by the district court, the Court in *Pinholster* held that in determining whether petitioner has met the standard the federal habeas court must confine itself to a consideration of the record that the state courts had before them.<sup>330</sup> When performing this task, the federal district courts are required under § 2254(e)(1) “to presume the truth of the facts found by the state courts.”<sup>331</sup>

## V. CONCLUSION

As the foregoing discussion has demonstrated, modern habeas has been reconfigured to restrict federal overview of state capital processes.<sup>332</sup> The AEDPA regime reflects, in part, a larger structural problem wherein race and class have an adverse and disproportionate effect on petitioners seeking review of their convictions in a federal

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326. Marceau, *supra* note 156, at 110; *Premo*, 562 U.S. at 122.

327. Biale, *supra* note 231, at 1347–48; *Richter*, 562 U.S. at 91–92.

328. Marceau, *supra* note 156, at 116.

329. § 2254(d)(1).

330. *Id.*; *Pinholster*, 563 U.S. at 181 (holding that judicial “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits”).

331. Freedman, *supra* note 308, at 598; § 2254(e)(1).

332. *See* discussion *supra* Section I.A.

forum.<sup>333</sup> Race especially factors into a negative-impact calculus vis-à-vis substantive due process and fair representation of petitioner's liberty interest because of the disproportionate amount of people of color that are charged with and convicted of capital crimes.<sup>334</sup> Habeas, as a liberty-enhancing mechanism, is important because it provides a modicum of due process and fairness.<sup>335</sup> As the Connecticut Supreme Court notes, the

eighth amendment is offended not only by the random or arbitrary imposition of the death penalty, but also by the greater evils of racial discrimination and other forms of pernicious bias in the selection of who will be executed. . . . The eighth amendment, then, requires that any capital sentencing scheme determine which defendants will be *eligible* for the death penalty on the basis of legitimate, rational, nondiscriminatory factors.<sup>336</sup>

Combine race with the deleterious effects of poverty, and you have an entire class of people that begin their odyssey through the criminal justice system at a severe detrimental representational deficit.<sup>337</sup> Habeas litigation is highly technical, complex, and constantly in flux, presenting profound challenges to ensuring that petitioners are accorded adequate and learned counsel to navigate the maze of habeas litigation.<sup>338</sup> “Simply navigating through the procedural maze of habeas practice . . . is a formidable task for inmates proceeding *pro se* and prisoners represented by counsel. Tragically, those who have had a fundamentally unfair trial, and even those who are innocent, may easily stumble.”<sup>339</sup>

Prisoners almost always lack the legal training to identify constitutional problems, and, worse, they have every reason to file a federal petition—the possibility of release—and very little reason not to. The result is a ‘lottery’ in which the federal courts are tasked with working through thousands of

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333. See ROSICH, *supra* note 173, at 20.

334. *Id.* at 2–3.

335. Stevenson, *supra* note 202, at 365.

336. *State v. Santiago*, 122 A.3d 1, 19 (Conn. 2015).

337. See ROSICH, *supra* note 173, at 8.

338. John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 272–73 (1996).

339. *Id.* at 272–73; see also Stummer, *supra* note 62, at 606–07; Tran, *supra* note 90, at 167.

poorly drafted or documented and often frivolous petitions in search of a few winners.<sup>340</sup>

Judges themselves have found that “potentially meritorious claims are either barred from review by the onerous procedural provisions or subject to such an obsequious level of deference under the substantive standard of review that [AEDPA] perpetuates major miscarriages of justice, including the execution of the innocent.”<sup>341</sup>

Therefore, in the realm of capital punishment and federal overview of state capital punishment, habeas, as a liberty-enhancing legal mechanism, may provide petitioners with a means of obtaining a degree of adequate, learned representation to facilitate their rights to due process and equal justice under the U.S. Constitution.<sup>342</sup> Thus, it may be time for policy makers, including the federal courts, to seriously reconsider whether AEDPA should be reconfigured or replaced to endow habeas with a better balance between the liberty-enhancing and liberty-restrictive capacity.<sup>343</sup> Properly balancing the interests of petitioners with those of the states would result in more effective and substantive habeas review<sup>344</sup> and reconfigure habeas to accomplish its aim of substantively protecting petitioners’ constitutional liberty interests via due process and fair representation.<sup>345</sup>

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340. Wiseman, *supra* note 195, at 1159; *see also* Freedman, *supra* note 308, at 595–96; Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM & MARY L. REV. 2071, 2100 (2014).

341. Biale, *supra* note 231, at 1347–48; *see also* Fletcher, *supra* note 263, at 822–23.

342. *See* Woolley, *supra* note 20, at 442.

343. *See id.*

344. *See* Freedman, *supra* note 308, at 600–02.

345. *See id.* at 601–02.