

HABEAS CORPUS FOR THE INNOCENT

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INTRODUCTION	2
I. Evolution of Federal Habeas Corpus Review Since AEDPA	4
A. The Passage of the Anti-Terrorism and Effective Death Penalty Act [“AEDPA”]	4
B. Criticisms of AEDPA	6
1. Statute of Limitations	7
2. Undue Deference to State Court Decisions	9
3. Inherently Contradictory Provisions	10
4. Limits on Second or Successive Petitions	11
5. High Standard of Proof to Establish Innocence	12
C. Judicial Treatment of AEDPA	13
1. Blume Study	14
2. Marceau Study	15
D. The Debate Regarding the Role of Federal Habeas Review in Modern Jurisprudence	16
1. Argument for Limiting Federal Habeas Review of State Convictions	16
2. Argument for Expanding Federal Habeas Review of State Convictions	17
3. The Primacy of Innocence in the Federal Habeas Debate	18
II. The Impact of the Innocence Movement: How the Exoneration Data Shifts the Balance in the Federal Habeas Policy Debate	18
A. The Innocence Movement: An Overview	20
B. Pre-trial Reforms in Criminal Justice System	21
1. Eyewitness Identification	22
2. Police Interrogation Procedures	22
3. Unreliable Forensic Evidence	23
C. Recalibrating the Policy Equation: Finality vs. Fairness in the Age of Innocence	24
III. Pre-trial Innocence Tracks: The Proposal and the Critique	25
A. The Pretrial Innocence Track Proposal	25
B. Criticism of Pretrial Innocence Tracks	26
IV. The Case for a Federal Post-Conviction Innocence Track	28
A. Historical Support for a Federal Post-Conviction Innocence Track	29
1. Friendly Article	29
2. Hoffmann & Stuntz Article: The Original “Innocence Track” Proposal	30
B. The Inability of State Post-Conviction Procedures to Adequately Address Actual	

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Innocence Claims	32
C. Need for Continued Federal Oversight of State Court Convictions	34
D. Need to Correct AEDPA's Disproportionate Impact on Petitioners Raising Claims of Actual Innocence	34
V. Federal Post-Conviction Innocence Track: A Proposed Conceptual Framework	35
A. Threshold Showing of Innocence	36
B. Exemption to Procedural Bars	37
1. One-Year Limitations Period.....	38
2. Prohibition on Second and Successive Petitions.....	38
C. Application of De Novo Review	39
VI. CONCLUSION	39

“The lesson is clear: we do not solve this problem merely by identifying it.”¹

INTRODUCTION

The year 2015 marks the twenty-fifth anniversary of the first DNA exoneration in the United States. In the last twenty-five years, the Innocence Movement has succeeded in achieving thousands of additional exonerations while bringing about significant reform in the criminal justice system. These reforms have sought to address the primary causes of wrongful convictions, including eyewitness misidentification, false confessions, and flawed forensic science. However, while pre-trial and investigatory policy changes have begun to take hold, very few comparable systemic procedural reforms have been implemented in the post-conviction context. In fact, in 1996, on the eve of the Innocent Movement, Congress passed the Anti-Terrorism and Effective Death Penalty Act [“AEDPA”]. Rather than seeking to alter post-conviction procedure to more effectively address viable claims of innocence, AEDPA operated to radically restrict federal habeas review for state prisoners. Nowhere is AEDPA’s impact more devastating than in the context of factually innocence prisoners seeking review of their wrongful convictions.

Under AEDPA’s provisions, prisoners are subject to an unyielding one-year filing period widely regarded as unreasonable, and the standard for establishing innocence is onerous to the point of being virtually insurmountable. Indeed, of the first 250 DNA exonerations stemming from the Innocence Movement, not a single prisoner succeeded in raising a post-conviction claim of innocence via federal habeas corpus.² Although federal habeas corpus review was historically designed to perform the fundamental function of correcting wrongful convictions of the innocent, under AEDPA, federal habeas review no longer adequately achieves that goal.

Notably, the overhaul of federal habeas procedure under AEDPA occurred before the Innocence Movement was in full swing. Thus, the debate leading up to the enactment of AEDPA did not benefit from the exoneration data available today. Now that the number of exonerations

¹ Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y.L. SCH. L. REV. 837, 841 (2011/2012) (quoting Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 463 (2001)).

² BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 185 (2011) (noting that not a single DNA exoneration in the study was successful in raising a post-conviction claim based on new evidence of actual innocence).

has risen to over 1,700³—a figure widely recognized as the mere tip of the iceberg—the moment to revisit federal review of criminal convictions is long overdue.⁴ This Article proposes a federal post-conviction innocence track as a viable, systemic response to the wrongful conviction crisis. As the Innocence Movement turns twenty-five—and as it continues to expose the depths of the wrongful conviction crisis in the American criminal justice system—the time has come for more widespread systemic reform.

The post-conviction innocence track proposal presented in this Article revives a comparable recommendation made by prominent habeas scholars Joseph C. Hoffmann and William J. Stuntz, over twenty-five years ago. In 1993, prior to the passage of AEDPA, Professors Hoffmann and Stuntz proposed a separate procedural track for prisoners raising claims of actual innocence via federal habeas corpus.⁵ This idea did not gain traction in the decades after it was proposed; to the contrary, the passage of AEDPA just three years later had precisely the opposite impact, imposing additional procedural barriers on prisoners raising post-conviction claims of innocence.⁶ Yet the rationale behind the Hoffmann and Stuntz proposal applies with even greater force today, now that the Innocence Movement has exposed the depths of the wrongful conviction crisis.

A federal post-conviction innocence track is attractive because it offers a universal avenue of relief for all state and federal prisoners, regardless of the jurisdiction of the underlying conviction. This approach offers a venue where the assessment of innocence claims could offer meaningful protection for all prisoners. Further, at the post-conviction stage, participation in an innocence track would not require a waiver of constitutional rights. Finally, this approach would align with the purpose of federal habeas corpus review—to remedy wrongful convictions of the innocent.⁷ Given the limited judicial resources available for reviewing and litigating federal habeas corpus petitions, it is wise to devote the lion's share to the most deserving applicants.

Part I of this Article discusses the evolution of federal habeas corpus review since the passage of AEDPA in 1996. Part II examines the impact of the Innocence Movement on the operation of federal post-conviction review. Part III critiques previous proposals to establish a

³ See National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx> (last visited Nov. 17, 2015) (listing 1,702 known exonerations in the United States as of Nov. 17, 2015).

⁴ John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259, 297 (2006) (arguing that "[g]iven the number of exonerations in recent years, the scope of the writ—if it is to retain its historical function as a safeguard of freedom in our criminal justice system—should be expanded, not contracted . . .").

⁵ Joseph C. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 95 (1993) (proposing a "reasonable probability of innocence" standard in federal habeas corpus procedure).

⁶ See, e.g., Lyn Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 87 (2005) ("[T]he AEDPA . . . created significant restrictions on a federal prisoner's ability to actually move a federal court for . . . relief."); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 919-20 (2001) (asserting that AEDPA has made it "more difficult for claims of innocence to be heard by federal courts"); Amy Knight Burns, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 228 (2013) ("Habeas is not an exercise in protecting states' autonomy at all costs. Indeed, if that were the goal, there would be no habeas review at all. Instead, courts must balance federalism interests with defendants' constitutional rights.").

⁷ Hoffmann & Stuntz, *supra* note 5, at 85 (noting that "nowhere is the remedial role of habeas so important as in the case of a . . . [wrongfully convicted] innocent person").

pre-trial innocence track. Part IV discusses the historical support for a federal post-conviction innocence track, including the Hoffmann and Stuntz proposal from 1993. Finally, Part V advocates for a federal post-conviction innocence track, and suggests a conceptual framework for this proposal.

I. EVOLUTION OF FEDERAL HABEAS CORPUS REVIEW SINCE AEDPA

The purpose of the writ of federal habeas corpus, or “the Great Writ” has historically been to provide a remedy for wrongful convictions.⁸ Indeed, the “protection of innocent defendants” is widely recognized as the primary concern in the context of federal habeas review of criminal convictions.⁹ While AEDPA ostensibly sought to balance that historical purpose with the countervailing interests of federalism, comity and finality, many conclude that Congress failed to achieve this balance.¹⁰

In fact, AEDPA is a statute that likely never would have passed without the fortuitous exploitation of the Oklahoma City bombings and the prosecution of Timothy McVeigh.¹¹ As one legal scholar has noted, “AEDPA’s antiterrorism and habeas provisions were a legislative pairing occasioned by a national tragedy . . . [that] few legislators dared oppose.”¹²

A. *The Passage of the Anti-Terrorism and Effective Death Penalty Act [“AEDPA”]*

In spite of AEDPA’s name, the undisputed impact of the legislation was to overhaul federal habeas corpus review for all prisoners—not merely those charged with terrorism or death penalty offenses.¹³ AEDPA was enacted to vindicate the principles of “comity, finality and federalism”, all of which militate against relief for the petitioner regardless of the nature of the claim.¹⁴ The authors of AEDPA sought to address the rampant “abuse of the writ,” the notion that prisoners were filing repeated specious petitions which operated to overwhelm the federal courts.¹⁵

⁸ See, e.g., Hoffmann & Stuntz, *supra* note 5, at 69 (“The statutory writ of federal habeas corpus for state prisoners can be categorized as one example of the general class of federal court remedies that have been created or recognized for the purpose of redressing violations of federal constitutional rights.”).

⁹ *Id.* at 85 (discussing the notion of “the primacy of innocence” in federal habeas corpus jurisprudence).

¹⁰ See, e.g., Entzerth, *supra* note 6, at 87 (arguing that AEDPA imposed undue restrictions on federal habeas procedure); Williams, *supra* note 6, at 919-20 (asserting that AEDPA has made it “more difficult for claims of innocence to be heard by federal courts”).

¹¹ Blume, *supra* note 4, at 265-70 (discussing political climate during the debate and enactment of AEDPA).

¹² Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 447 (2007) (discussing political climate at time of AEDPA’s passage).

¹³ Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act’s Restrictions on Habeas Corpus are Wrong*, 37 SEATTLE U.L. REV. 55, 58-59 (2013) (noting provisions that “struck . . . deeply at the heart of the spirit and history of habeas corpus. . .”).

¹⁴ See Kovarsky, *supra* note 12, at 444-45 (discussing the motivating principles behind the passage of AEDPA).

¹⁵ See generally Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and*

AEDPA passed in 1996, in the wake of the Oklahoma City bombings, after “decades of failed legislative attempts to . . . limit federal review”¹⁶ of state convictions. The measure passed in remarkably short order, with little legislative discussion or debate as to the post-conviction review procedures.¹⁷ However, some members of Congress argued that habeas corpus reform measures did not belong in an anti-terrorism bill.¹⁸ As Congress debated the merits of the new statutory scheme, there was a robust discussion of the provisions relating to terrorism, wiretapping and immigration.¹⁹ Yet very little comparable discussion or debate occurred regarding the overhauled post-conviction review procedures.²⁰ Further, in signing the bill, President Clinton did little more than pay “lip service” to the provisions relating to federal review of state court convictions.²¹

However, while the underlying purpose of AEDPA’s federal habeas review procedures clearly was to promote efficiency and finality of criminal convictions, the proponents of the legislation argued that federal habeas review would remain “alive and meaningful.”²² In fact, nothing in the express language of AEDPA suggests a purpose at odds with the history and purpose of the Great Writ, i.e., to redress injustices and provide a defense against violations of personal freedom.²³ Instead, AEDPA’s proponents sought to respond to prosecutors who complained that federal courts “too often undid hard-won convictions or death sentences” via federal habeas corpus review.²⁴

At its core, the argument in support of AEDPA centered on the notion that federal review of state court convictions amounts to undue interference, given that crime prevention, prosecution and punishment fall squarely within the purview of state power.²⁵ On the other hand, AEDPA

the Piecemeal Problem in Actual Innocence Cases, 10 STAN. J. C.R. & C.L. 55, 64-69 (2014) (providing a more complete discussion of the history of AEDPA’s passage).

¹⁶ Justin Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 93 (2012); *See also* Larry Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 545-46 (2006) (discussing history of AEDPA’s passage and commenting that “It was clear that some ‘antiterrorism’ bill was going to pass and that anything wedged in to that bill would pass with it.”).

¹⁷ Yackle, *supra* note 16, at 546 (noting that AEDPA was drafted by staff attorneys serving the Senate Judiciary Committee without the benefit of discussions with minority counsel or others over policy or wording, and no committee hearings or markup sessions, and concluding that the “bill shot through committee . . . and went to the floor without an explanatory report”).

¹⁸ Ritter, *supra* note 13, at 58 n.27 (discussing legislative debate leading up to the passage of AEDPA).

¹⁹ *Id.* at 73-74 (discussing history and purpose of AEDPA).

²⁰ *Id.* at 73-74, 82 (discussing history and purpose of AEDPA, and noting that the legislative history of AEDPA does not suggest that Congress intended any “watering down” of the Great Writ’s historical function).

²¹ *See* Blume, *supra* note 4, at 259 (noting that while Clinton’s “presidential signing statement paid lip service to meaningful federal court review of state court convictions,” AEDPA’s focus was clearly the anti-terrorism and death penalty procedure reform measures).

²² Ritter, *supra* note 13, at 82 (arguing that “nothing in AEDPA or its legislative history suggests intent to diminish the protective promise of the Great Writ”).

²³ *Id.* at 73-74, 82.

²⁴ *Id.* at 75.

²⁵ Blume, *supra* note 4, at 263-64 (noting that habeas opponents point to crime punishment and control as a “quintessential state function”).

opponents argued that federal habeas review of state convictions is necessary to preserve the sanctity and uniformity of federal law.²⁶ Ultimately, AEDPA's supporters won the day and AEDPA became law.

B. Criticisms of AEDPA

Since its passage in 1996, AEDPA has been widely critiqued both in legal scholarship and in the media generally.²⁷ For example, AEDPA has been criticized as a "poorly drafted" piece of legislation that was hastily enacted with little insight into Congress' true intent.²⁸ This poor drafting has led to ambiguity resulting in circuit splits on various issues.²⁹ Additionally, courts have been left to interpret AEDPA's often confusing and self-contradictory provisions, with little guidance. In short, legal scholars have argued that AEDPA has operated to catapult the federal habeas system into a state of chaos.³⁰

Further, the substantive impact of AEDPA on federal habeas review of state convictions cannot be overstated. Legal scholars have frequently commented on AEDPA's role in gutting federal habeas review, and indeed, the substantive and procedural barriers imposed by AEDPA have been characterized as "insurmountable."³¹ Some of AEDPA's provisions have been targets for particularized critique as well, including the strict one-year filing limitation.³²

Widespread critique of AEDPA's other provisions has been forthcoming as well,

²⁶ *Id.* ("Proponents of broad habeas review extolled (and extol) the need for every inmate that so desires to have a federal forum to entertain the merits of her federal constitutional challenges to the underlying conviction and sentence.").

²⁷ See Marceau, *supra* note 16, at 94 (noting that AEDPA's passage was greeted by the legal academy with "vast fear and loathing"); see also Nat Hentoff, *Clinton Screws the Bill of Rights: The Worst Civil Liberties President Since Nixon*, VILLAGE VOICE, Nov. 5, 1996, at 12 (arguing that AEDPA contains "the most draconian restrictions on habeas corpus since Lincoln suspended the Great Writ . . . during the Civil War.").

²⁸ See, e.g., Blume, *supra* note 4, at 261 (arguing that "the speed with which Congress enacted AEDPA left the Supreme Court, and lower federal courts, with little guidance regarding Congress' intent"); Burns, *supra* note 6, at 206-07 (noting that "AEDPA is a complex, poorly drafted statute that is impossible to interpret logically and consistently" and that "its text . . . is irresolvably ambiguous"); Kovarsky, *supra* note 12, at 447 (commenting that "AEDPA imposed or fortified several obstacles to habeas relief, although hastily ratified and poorly cohered."); Yackle, *supra* note 16, at 548 ("The manner in which AEDPA was cobbled together suggests that no one thought . . . [the impact of the statute's provisions] through at a conceptual level.").

²⁹ Blume, *supra* note 4, at 290 (discussing role of the Supreme Court in resolving circuit splits stemming from unclear drafting in various AEDPA provisions).

³⁰ Yackle, *supra* note 16, at 542 (arguing that the passage of AEDPA has left the state of federal habeas review procedures "in chaos").

³¹ See, e.g., Marceau, *supra* note 16, at 166 (commenting that "AEDPA poses procedural and substantive barriers that are often insurmountable").

³² See, e.g., Blume, *supra* note 4, at 289 ("[AEDPA's] new statute of limitations has deprived thousands of potential habeas petitioners of any federal review of their convictions, and in some cases, their death sentences."); see also Limin Zheng, *Actual Innocence as a Gateway Through the Statute-of-Limitations Bar on the Filing of Federal Habeas Corpus Petitions*, 90 CAL. L. REV. 2101, 2103-07 (2002) (discussing AEDPA's statute of limitations provision as a radical departure from historical federal habeas jurisprudence).

particularly for the impact on actually innocent prisoners seeking review of their convictions.³³ For example, the wrongful conviction scholarship has criticized AEDPA's bars on substantive relief, including restrictions on second and successive petitions.³⁴ Additionally, several of AEDPA's provisions have effectively abolished federal de novo review of state criminal convictions, in favor of a high degree of deference to state court decisions.³⁵ At least one legal scholar has argued, "AEDPA has stripped substantive federal habeas review to the bone."³⁶ Further, the substantive standards a prisoner is required to meet under AEDPA have been characterized as "very nearly impossible to satisfy."³⁷ Each of these criticisms is discussed in more detail below.

1. Statute of Limitations

One of the primary criticisms of AEDPA focuses on its strict one-year limitations period. AEDPA's passage demonstrated a marked departure from well-established common law, by imposing for the first time a one-year statute of limitations for filing federal habeas petitions.³⁸ Section 2244(d)(1) provides that a "1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."³⁹ This section of the statute further specifies that the limitations period begins to run on the date of final judgment or relevant change in the law, whichever is later, and tolls with the interim filing of a state habeas petition.⁴⁰ While the statute does not expressly allow an exception for actual innocence, the Supreme Court has recognized that a cognizable claim of factual innocence could overcome procedural bars—at least in theory.⁴¹

³³ Throughout this Article, the terms "factually innocent" and "actually innocent" are used interchangeably to refer to cases in which the charged party either did not commit the crimes in question, or no crime was committed at all. This category does not include the scenario in which a conviction was obtained in violation of the Constitution, i.e., based on illegally obtained evidence or ineffective assistance of counsel. Nor does it include convictions in which a legal defense could be raised, such as self-defense or failure to form the requisite intent.

³⁴ See, e.g., Kovarsky, *supra* note 12, at 448-53 (discussing primary restrictions imposed on federal habeas petitioners under AEDPA).

³⁵ Marceau, *supra* note 16, at 89-90 (arguing that in the wake of AEDPA, "the era of exhaustive de novo federal habeas review has passed").

³⁶ *Id.* at 126 (discussing impact of AEDPA on federal habeas review).

³⁷ Yackle, *supra* note 16, at 570.

³⁸ 28 U.S.C. § 2244(d)(1)-(2) (2012); see also Zheng, *supra* note 32, at 2105-07 (discussing AEDPA's statute of limitations provision as a radical departure from historical federal habeas jurisprudence).

³⁹ 28 U.S.C. § 2244(d)(1).

⁴⁰ 28 U.S.C. § 2244(d)(1)-(2).

⁴¹ See *Schlup v. Delo*, 513 U.S. 298, 316 (1995) (recognizing actual innocence as a gateway through which a petitioner may pass a procedural bar); cf. *House v. Bell*, 547 U.S. 518, 539 (2006) (suggesting actual innocence as a catalyst to equitable tolling of AEDPA's statute of limitations in limited circumstances); *McQuiggen v. Perkins*, 133 S. Ct. 1924, 1928 (2013) (holding that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar. . . or. . . expiration of the statute of limitations" and reasoning that unjustifiable delay in filing is not an absolute barrier to relief, but is instead a factor in determining whether innocence has been reliably shown).

Legal scholars have been particularly critical of the statute of limitations provision based on its lack of support by any clear policy justification.⁴² For example, although AEDPA was ostensibly passed in order to curb abuses in the filing of federal habeas petitions, there is no support for the notion that prisoners intentionally delayed their filings prior to the passage of AEDPA.⁴³ Nor is there a persuasive argument that convicted prisoners or their counsel would have any motivation to do so. To the contrary, it would be irrational for capital litigants or their counsel to intentionally withhold a petition until execution is imminent.⁴⁴ Similarly, non-capital petitioners would gain nothing from intentional delay, which could operate to extend the prisoner's sentence.⁴⁵

Additionally, the statute of limitations provision has been criticized as especially burdensome to pro se litigants, who must undertake the considerable task of compiling a habeas petition while incarcerated and without the benefit of legal counsel.⁴⁶ Indeed, it is difficult to comprehend the congressional purpose behind this provision, given that prisoners are often uneducated and ill equipped to advance a complex legal argument.⁴⁷ Prisoners often have limited access to law libraries and frequently are transferred from one facility to another without notice.⁴⁸ This can result in significant delay in notification of state court decisions.⁴⁹ Thus, a prisoner may not learn of the denial of his state habeas petition until months after the fact.⁵⁰ This provision arguably has a virtually preclusive effect on pro se litigants seeking to raise claims of innocence via federal habeas corpus.

⁴² Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 360 (2001) ("Reading the legislative history surrounding AEDPA's passage, one gets the sense that the idea of an innocent prisoner failing to file a federal habeas corpus petition within the limitations period was simply unthinkable."); Zheng, *supra* note 32, at 2131 (noting that AEDPA's one-year statute of limitations "neither curbs abuse nor addresses the problem of delay").

⁴³ Zheng, *supra* note 32, at 2131 (noting the absence of indication that federal habeas petitioners intentionally delay their claims and arguing that there is no motivation to do so).

⁴⁴ *Id.* (asserting that death row inmates have no motivation to delay filing of federal habeas petitions).

⁴⁵ *Id.* (noting that a non-capital habeas litigant "has nothing to gain but everything to lose by delaying the filing of his federal claim: If his claim is denied, he serves the same length of time in prison whether the filing was delayed or not . . . if he succeeds in establishing his constitutional claim, the delay in filing would have brought him no benefit but a longer period of unnecessary imprisonment.").

⁴⁶ *Id.* at 2131-32 (discussing the difficulty facing pro se litigants seeking to compile a federal habeas petition while incarcerated).

⁴⁷ See, e.g., Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1409 (1999) (arguing that the right to counsel should extend to some post-conviction proceedings); see also Hartung, *supra* note 15, at 88-89 (arguing that the increasingly complex nature of post-AEDPA federal habeas litigation supports a greater need for the right to counsel).

⁴⁸ See Zheng, *supra* note 32, at 2130 (explaining that "inmates are often transferred from one prison to another and may not be able to learn about a state court's final denial [of a habeas petition] until much later").

⁴⁹ *Id.*

⁵⁰ *Id.*

2. Undue Deference to State Court Decisions

An additional criticism of AEDPA is that it has operated to obliterate federal de novo review of state convictions.⁵¹ Specifically, 28 U.S.C. § 2254(d)⁵² provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; 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 provision has been characterized as “the centerpiece of AEDPA” and is notable for its lack of support in either the common law or the legal scholarship preceding the passage of AEDPA.⁵³

Professor Judith Ritter argues that since the passage of AEDPA, the Supreme Court’s decision in *Williams v. Taylor*⁵⁴ seems to do away with de novo review, under 28 U.S.C. § 2254(d)(1).⁵⁵ Further, the Supreme Court has recently interpreted this provision of AEDPA to mean that a state court conclusion is “contrary to clearly established federal law” under § 2254(d)(1) only if “no fair-minded jurist could agree” with this interpretation.⁵⁶ Since *Williams* was decided, some federal district courts have lamented the lack of clear guidance as to what renders a state court determination “unreasonable.” Indeed, the Circuit Courts of Appeal remain split as to how this term should be applied.⁵⁷ At one extreme, the Second Circuit has interpreted “unreasonable” to mean “so off the mark as to suggest judicial incompetence.”⁵⁸ At the other, the Seventh Circuit has interpreted it to mean “well outside the boundaries of permissible differences of opinion.”⁵⁹ And the Ninth Circuit has offered still another interpretation, applying a “clear

⁵¹ Ritter, *supra* note 13, at 59 (noting that the most critical impact of AEDPA was the movement away from de novo review).

⁵² 28 U.S.C. § 2254(d) (2012).

⁵³ Blume, *supra* note 4, at 272-73 (noting that § 2254(d)(1) has “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 or a habeas scholar.”).

⁵⁴ *Williams v. Taylor*, 529 U.S. 362 (2000).

⁵⁵ Ritter, *supra* note 13, at 56-57 (discussing *Williams v. Taylor* opinion).

⁵⁶ *Id.* at 57 (arguing that the “no fair-minded jurist” standard is unreasonable and results in injustice in the post-conviction context).

⁵⁷ *Id.* at 64-65 (discussing split in circuits regarding interpretation of “unreasonable” in § 2254(d)(1)).

⁵⁸ *Id.* at 64.

error” standard.⁶⁰

Under any of these interpretations, the “unreasonable” standard is a difficult one. Indeed, state court prisoners seeking redress from federal courts face what Professor Justin Marceau calls “one of the most uncharitable standards of review known to law.”⁶¹ The impact of this provision has been criticized as effectively relegating the role of federal constitutional arbiter to the state, rather than the federal courts.⁶²

3. Inherently Contradictory Provisions

Additionally, the underlying policy interests that ostensibly motivated Congress in enacting AEDPA have been criticized as self-contradictory in at least two respects.⁶³ First, there arguably is an inherent conflict between the interests of comity and finality when interpreting the provisions of AEDPA. While the exhaustion doctrine promotes comity, i.e., the notion that state court judgments should be respected, the statute of limitations provision promotes finality, i.e., the preservation of the court’s original judgment at all costs. Second, there arguably is an inherent conflict between the underlying principles of the exhaustion doctrine and the statute of limitations provisions, both codified in AEDPA.⁶⁴ The exhaustion doctrine is based on the premise that federal habeas petitions should move more slowly, to ensure that all claims are raised in the state courts before they can be reviewed in the federal courts.⁶⁵ By contrast, the statute of limitations provisions militate toward the speedy and efficient filing of federal habeas petitions.⁶⁶ These two provisions are not easily reconciled, and prisoners seeking federal habeas relief must navigate these inherently contradictory demands.⁶⁷

⁵⁹ *Id.* at 65.

⁶⁰ *Id.* at 65.

⁶¹ *Id.* at 81 (discussing split in circuits regarding interpretation of “unreasonable” in § 2254(d)(1)); *see also* Hartung, *supra* note 15, at 78 (arguing that “state courts have become final arbiters of federal constitutional law, as opposed to federal courts, which are presumably in a better position to play this role”).

⁶² Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 ME. L. REV. 425, 429 (2012) (“The current deferential standard of review reflects the concern that federal courts, if entrusted with the power of de novo review of federal constitutional claims, will too frequently and improperly overturn state convictions on federal law grounds.”).

⁶³ Kovarsky, *supra* note 12, at 457-58 (discussing competing interests of comity and finality in the context of federal habeas review under AEDPA); Yackle, *supra* note 16, at 551 (discussing internal conflict present among several of AEDPA’s provisions).

⁶⁴ Yackle, *supra* note 16, at 551 (discussing internal conflict present among several of AEDPA’s provisions).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act*, 47 DUKE L.J. 1, 29 (1997) (noting that AEDPA’s “filing deadline encourages prisoners to file early, while the exhaustion doctrine demands that they postpone federal habeas petitions until state court opportunities for litigation have been tried”); *see also* Hartung, *supra* note 15, at 82 (discussing the inherent tension created by conflicting goals of exhaustion doctrine and statute of limitations).

4. Limits on Second or Successive Petitions

The opportunity to file second or successive petitions has essentially been foreclosed by AEDPA.⁶⁸ First, AEDPA substantially altered how federal courts address second and successive habeas petitions. Specifically, 28 U.S.C. § 2244(b)(1) operates to universally prohibit successive claims, i.e., those raised in previous petitions.⁶⁹ A related provision, § 2244(b)(2), bars abusive claims, i.e., those not previously raised in previous petitions, with exceptions where (1) the claim relies on a new constitutional rule, or (2) the claim relies on newly discovered evidence not discoverable with due diligence.⁷⁰ However, given that the Supreme Court has yet to recognize the wrongful conviction of an actually innocent defendant as a constitutional violation, a freestanding claim of innocence is apparently insufficient under 2244(b)(2).⁷¹

Additionally, the procedural framework that AEDPA erected creates other barriers to prisoners seeking federal post-conviction review of their cases. Section 2244(b)(3) requires that any successive petition must first be presented to a panel of appellate court judges in order to determine whether the petitioner has made a prima facie case under the provisions of § 2244(b).⁷²

⁶⁸ Yackle, *supra* note 16, at 571 (commenting that “AEDPA is so skeptical of second or successive petitions that it requires prisoners to obtain circuit court permission to file them at the district level”).

⁶⁹ 28 U.S.C. § 2244(b)(1) (“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.”).

⁷⁰ 28 U.S.C. § 2244(b)(2) provides:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

§ 2244(b)(2). *See also* Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 91 (2011) (discussing exceptions to AEDPA’s general bar on abusive petitions).

⁷¹ Joshua Lott, *The End of Innocence? Federal Habeas Corpus Law After In Re Davis*, 27 GA. ST. U. L. REV. 443, 453 (2011) (noting that in *Herrera v. Collins*, 506 U.S. 390 (1993), the Supreme Court held that “a substantive claim of actual innocence based on newly discovered post-trial evidence is not cognizable; federal habeas relief can only be granted when an independent constitutional violation occurred at the state criminal proceeding.”).

⁷² 28 U.S.C. § 2244(b)(3) provides in full:

(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals. (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection. (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion. (E) The grant or denial of an authorization by a court of appeals to file a second

This gatekeeping provision imposes an extremely onerous burden on the petitioner. It has been criticized as effectively allowing dismissal of petitions raising actual innocence claims that were not available at the time of the original petition.⁷³

These provisions, limiting—if not outright foreclosing—the opportunity to file second or successive federal habeas petitions under AEDPA, have a particularly acute impact on prisoners raising claims of actual innocence. Typically evidence supporting factual innocence tends to arise in an ad hoc fashion, while the petitioner is incarcerated and acting pro se.⁷⁴ Therefore, successive petitions are not uncommon.⁷⁵ Further, prisoners are motivated to file their petitions expeditiously in order to comply with the strict one-year limitations period.⁷⁶ The combination of these two factors—ad hoc and inconsistent access to information, along with the need to comply with a strict filing period—results in the de facto filing of multiple petitions when seeking to establish innocence.⁷⁷

5. High Standard of Proof to Establish Innocence

Finally, AEDPA has substantially raised the standard of proof imposed on prisoners seeking habeas relief based on actual innocence. Before AEDPA was enacted, the Supreme Court held in *Schlup v. Delo* that a claim of actual innocence should be considered under the fundamental miscarriage of justice exception to the procedural default doctrine in federal habeas litigation.⁷⁸ Notably, *Schlup* required that a petitioner establish actual innocence by a mere preponderance of the evidence.⁷⁹

AEDPA has significantly altered the *Schlup* standard by imposing a higher standard on

or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

§ 2244(b)(3).

⁷³ See, e.g., Kyle Reynolds, “Second or Successive” Habeas Petitions and Late-Ripening Claims after *Panetti v. Quarterman*, 74 U. CHI. L. REV. 1475, 1475 (2007) (noting that “AEDPA’s ‘gatekeeping’ provisions . . . have the potential to foreclose review of meritorious constitutional claims”); Williams, *supra* note 6, at 942 (commenting that 28 U.S.C. § 2244(b)(2) “creates barriers that even an innocent individual is not likely to overcome”).

⁷⁴ Hartung, *supra* note 15, at 90 (arguing that, given the realities of post-conviction litigation, and claims of innocence in particular, “it is no surprise that when a pro se prisoner seeks federal habeas corpus review, the process is likely to occur via multiple successive petitions, each raising a new ground for relief,” since “new information may present itself once the petition has been filed”).

⁷⁵ *Id.*

⁷⁶ *Id.* (noting that a prisoner typically has “limited access to information and faces a one-year limitations period”).

⁷⁷ *Id.*

⁷⁸ 513 U.S. at 326-27; see also Lott, *supra* note 71, at 454-55 (discussing the *Schlup* holding and its impact on actual innocence claims in federal habeas petitions).

⁷⁹ Lott, *supra* note 71, at 455 (“The *Schlup* test balances the innocence evidence against the reliability of the state’s verdict to determine ‘whether it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.’” (citation omitted)).

federal habeas petitioners claiming innocence.⁸⁰ While the *Schlup* Court had required only a showing that new evidence was “more likely than not” to raise reasonable doubt regarding the petitioner’s guilt, under AEDPA, a petitioner seeking relief must establish actual innocence by “clear and convincing evidence.”⁸¹ This standard has resulted in virtual foreclosure of relief for petitioners raising claims of innocence.⁸²

C. Judicial Treatment of AEDPA

Although AEDPA’s impact has been indisputably profound, in the decades preceding its passage, the Rehnquist Court had already definitively limited federal habeas review of state criminal convictions.⁸³ In the absence of legislative reform, the prevailing judicial interpretation of federal habeas review operated to significantly curtail federal review of state convictions.⁸⁴

Since AEDPA’s passage, legal scholars have criticized the Supreme Court’s interpretation of its provisions as unduly restrictive to petitioners.⁸⁵ While initially, the Supreme Court’s treatment of AEDPA was widely regarded as cautious, in recent years many legal scholars have reached the opposite conclusion.⁸⁶ For example, Professor Ritter has argued that, following an initial grace period on the heels of AEDPA’s passage, recent Supreme Court decisions have created the possibility of “habeas corpus relief . . . becom[ing] virtually unattainable.”⁸⁷ Under either view, the standard required to convince a federal court to undermine a state court determination is formidable.

There is little room for disagreement that the Supreme Court has only rarely granted federal habeas relief in recent years. However, there has been some debate in the legal academy as

⁸⁰ *Id.* at 456 (commenting that AEDPA’s provisions were “[i]n direct contrast to *Schlup*’s probab[ility] standard” and instead required proof of innocence by “clear and convincing evidence”).

⁸¹ *Id.*

⁸² *See, e.g.,* Zheng, *supra* note 32, at 2139-40 (arguing that courts should apply the old *Schlup* probability standard rather than AEDPA’s “clear and convincing” standard when assessing claims of actual innocence); *see also* Krystal Moore, *Is Saving an Innocent Man a “Fool’s Errand”? The Limitations of the Antiterrorism and Effective Death Penalty Act on an Original Writ of Habeas Corpus Petition*, 36 DAYTON L. REV. 197, 213 (“The unreasonable standard required by section 2254(d)(1) is a rigid standard that bars relief for potentially innocent men.”).

⁸³ Ritter, *supra* note 13, at 58 (discussing history of Supreme Court’s treatment of federal habeas review in the years leading up to AEDPA, and noting that AEDPA operated to “dramatically curtail[] the availability of federal habeas relief”).

⁸⁴ *Id.*

⁸⁵ *See, e.g.,* Burns, *supra* note 6, at 207 (arguing that the Supreme Court’s unwillingness to engage in counterfactual reasoning—i.e., to meaningfully address how the state court would have ruled with the benefit of newly discovered information—has resulted in injustice for federal habeas petitioners).

⁸⁶ *See generally* Blume, *supra* note 4 (discussing results of study of Supreme Court treatment of pre- and post-AEDPA habeas petitions and concluding that AEDPA’s “hype” is worse than its “bite”); *see also* Marceau, *supra* note 16, at 96 (contradicting Blume’s conclusion that AEDPA’s “hype” is worse than its “bite” and arguing that “AEDPA’s bite, though perhaps slow to manifest symptoms, has gradually and systemically infected and undermined the federal habeas infrastructure”).

⁸⁷ Ritter, *supra* note 13, at 56 (discussing impact of Supreme Court’s interpretation of AEDPA on federal habeas review procedures and noting the barriers imposed to obtaining relief).

to whether, and to what degree, the Supreme Court's treatment of federal habeas petitions has been substantially altered since the passage of AEDPA in 1996.⁸⁸ This debate has been fueled by the recent studies of two prominent habeas scholars, Professors John Blume and Justin Marceau.

1. Blume Study

Professor John Blume published the results of an empirical study comparing pre- and post-AEDPA Supreme Court decisions in his 2006 article, *AEDPA: The "Hype" and the "Bite."*⁸⁹ In this study, Professor Blume reviewed all federal habeas cases decided by the Supreme Court during a sixteen-year period from 1990-2006, both before and after AEDPA was enacted.⁹⁰ This study ultimately concluded that the success rate of petitioners seeking federal habeas relief before the Supreme Court essentially remained the same before and after the passage of AEDPA.⁹¹ Specifically, Blume's study revealed that of the 63 pre-AEDPA cases decided by the Supreme Court, the petitioner was successful 33% of the time.⁹² Comparably, of the 41 cases decided after AEDPA's passage in 1996, 34% were successful.⁹³

Professor Blume opines that the reason the Supreme Court was not more definitively impacted by the passage of AEDPA is that the Court had already started to apply federal habeas review more narrowly during the decades before Congress passed legislation on this front.⁹⁴ The results of Blume's study are unaltered when federal circuit court results are reviewed, as well.⁹⁵ Furthermore, Blume's study reports that the overall success rate in all federal habeas non-capital cases—both before and after the passage of AEDPA—is decidedly low, at less than 1%,⁹⁶ and the overall success rate in capital cases is just 8%.⁹⁷

Finally, Blume's study shows that federal habeas cases are increasingly decided on procedural grounds and more petitioners are precluded from filing.⁹⁸ Specifically, in 1997, 52% of

⁸⁸ *Supra* note 86.

⁸⁹ *Supra* note 86.

⁹⁰ Blume, *supra* note 4, at 276-77 (discussing methodology and results of survey of Supreme Court treatment of federal habeas cases before and after AEDPA).

⁹¹ *Id.* at 277 (concluding that "a habeas petitioner's overall success rate did not significantly change after AEDPA came into effect").

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 280 (noting that when "Congress failed to act in the 1960s, 1970s, and 1980s, a majority of the Supreme Court set about to 'reform' habeas corpus through the creation and refinement of various common law habeas doctrines such as procedural default, abuse of the writ, and *Teague* nonretroactivity").

⁹⁵ *Id.* at 283 (noting that "the available data from the federal courts of appeals do not reveal that AEDPA has had a tremendous impact on the ability of a habeas petitioner to ultimately secure a writ of habeas corpus").

⁹⁶ *Id.* at 284-85 (noting that "[l]ess than 1% of state prisoners who file federal habeas petitions ultimately prevail" and that "[b]oth before and after AEDPA, it is the rare state prisoner who obtains the great writ").

⁹⁷ *Id.* at 285 (noting that "[f]rom 1997 to 2004, only 8% of death-sentenced inmates were successful" in petitioning for habeas relief).

⁹⁸ *Id.* at 286 (noting that "the total percentage of habeas corpus cases in the federal courts of appeals that are disposed of on procedural grounds, as opposed to on the merits, has risen since 1997").

petitioners were denied permission to appeal from federal courts.⁹⁹ By 2004, eight years after AEDPA's passage, that figure had risen to 61%.¹⁰⁰

2. Marceau Study

In rebuttal to Professor Blume's study, Professor Justin Marceau conducted a more expansive review of federal habeas jurisprudence six years later. This study ultimately supports a contrary conclusion that the passage of AEDPA has indeed significantly impacted the Supreme Court's treatment of federal habeas review.¹⁰¹ In his 2012 article, *Challenging the Habeas Process Rather Than the Result*, Professor Marceau looks at the shift in law and data regarding federal habeas corpus relief.¹⁰² Marceau argues that the Supreme Court has entered the "third phase" of federal habeas corpus review.¹⁰³ Now that the initial criticism of AEDPA has subsided, the Supreme Court has begun to interpret AEDPA more harshly, frequently overturning federal courts that grant habeas relief against state court convictions.¹⁰⁴

Marceau's study undermines Blume's conclusion that AEDPA's "hype is worse than its bite"—or at least suggests that it is no longer true.¹⁰⁵ Marceau sought to update Blume's study by expanding the data pool to include a review of cases from 1985-2011.¹⁰⁶ Marceau's study revealed that the relief rate in federal habeas petitions filed post-AEDPA dropped by 10 percentage points from the pre-AEDPA relief rates.

Specifically, while the relief rate in pre-AEDPA cases filed between 1985 and 1995 was 37%, the post-AEDPA relief rate in cases filed from 1996-2011 dropped to 27%.¹⁰⁷ However, Marceau notes that the disparity between pre- and post-AEDPA relief rates is even more pronounced when an initial grace period is taken into account. Marceau argues that the "suddenness with which Congress enacted AEDPA" may have caught the Court off guard.¹⁰⁸

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Marceau, *supra* note 16, at 96-97 (contradicting Blume's conclusion that AEDPA's "hype is worse than its bite" and arguing that "AEDPA's bite, though perhaps show to manifest symptoms, has gradually and systemically infected and undermined the federal habeas infrastructure").

¹⁰² *Id.* at 98-99 (discussing empirical evidence in support of the conclusion that the Supreme Court has more narrowly granted federal habeas review under AEDPA).

¹⁰³ *Id.* at 97 (arguing that "the Court has entered a third phase in which the application of AEDPA has evolved so as to become increasingly harsh and the reversal of federal courts who disturb state court convictions increasingly brazen").

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 98 ("By updating Blume's data and expanding the range of years studied, one is left with the impression that, as an empirical matter, Blume's conclusion no longer holds true.").

¹⁰⁶ *Id.* at 98-99 (noting that study expands Blume's data "so that it now runs from 1985 through 2011 (as compared to 1990 through 2006)").

¹⁰⁷ *Id.* at 101-02 (discussing methodology and results of study of Supreme Court treatment of pre- and post-AEDPA cases).

¹⁰⁸ *Id.* at 104 (arguing that the impact of AEDPA's restrictions on federal habeas jurisprudence were slowed by an initial "grace period").

Thus, when an initial grace period is discounted from the analysis and the data from 2010-2011 is reviewed exclusively, the federal habeas review rate drops even more dramatically to 14%.¹⁰⁹ These findings suggest that AEDPA has had a more extreme impact on the Supreme Court's approach to federal habeas review than what was initially believed.

D. *The Debate Regarding the Role of Federal Habeas Review in Modern Jurisprudence*

In recent years, the age-old debate regarding the appropriate role of federal habeas review of state criminal judgments has resurfaced, with legal scholars disagreeing about the degree to which this final layer of review is necessary.¹¹⁰ On the one hand, some legal scholars have argued that federal habeas review in non-death penalty cases is superfluous.¹¹¹ By contrast, others have argued that the dearth of successful federal habeas petitions supports the argument that federal review is even more critical. These scholars argue that this minute success-rate in modern, post-AEDPA jurisprudence illustrates a failure of the federal courts to perform the post-conviction review necessary to protect the uniformity of federal law.¹¹²

In his recent article, *Challenging the Habeas Process Rather than the Result*, Professor Marceau notes that “federal habeas law has reached a critical crossroads” in part as a result of “doctrinal shifts and empirical data” showing that federal habeas petitions are virtually never successful.¹¹³ Indeed, some legal scholars have advocated for an end to federal habeas review of criminal convictions, arguing that the need for such measures has passed, and characterizing federal habeas corpus review as “futile,” “worthless” and “illusory.”¹¹⁴

1. Argument for Limiting Federal Habeas Review of State Convictions

Specifically, Professors Nancy King and Joseph Hoffmann—along with other proponents of this approach—argue that federal habeas review arose in a political and cultural framework of 1960's America that no longer exists today.¹¹⁵ During that period, the courts' interpretation of the Writ of Habeas Corpus was expanded in order to accommodate for the lack

¹⁰⁹ *Id.* at 106 (“In the past five years, the procedures and standards governing federal habeas review have substantially evolved so as to reduce the power of federal courts to reverse unconstitutional state convictions.”).

¹¹⁰ *See generally* Marceau, *supra* note 16, at 86 (discussing recent scholarly trends regarding the role of federal habeas review of state criminal convictions).

¹¹¹ *See generally* NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT*, 146-49 (2011) (arguing that federal habeas review is an impractical and unnecessary remedy in non-death penalty cases).

¹¹² Marceau, *supra* note 16, at 86 (arguing that “the paucity of success by habeas petitioners does not naturally or necessarily justify the abandonment of federal oversight” and asserting that instead, “legal scholars and courts should recognize the critical role federal courts play in ensuring that the state court process is fundamentally fair”).

¹¹³ *Id.* at 92 (discussing modern debate over role of federal habeas review of state criminal convictions).

¹¹⁴ *Id.* at 131 (discussing role of federal habeas review in contemporary jurisprudence).

¹¹⁵ Joseph L. Hoffman & Nancy J. King, *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, http://www.nytimes.com/2011/04/17/opinion/17hoffmann.html?_r=0 (arguing that “the federal courts remain in a 1960's-style habeas rut [and] continue to receive tens of thousands of habeas petitions from convicted state prisoners,” and asserting that federal habeas review of state court convictions is no longer necessary).

of adequate state court protections.¹¹⁶ Thus, as the argument goes, federal review has appropriately retreated in the modern era, with the understanding that states have been more effective at establishing post-conviction review procedures.¹¹⁷

Professors King and Hoffman go on to argue that a “crisis of federalism” no longer exists as it did in the 1960’s.¹¹⁸ They further cite to the miniscule rate of federal habeas corpus relief as evidence that such federal review is now unnecessary,¹¹⁹ and argue that federal habeas review wastes precious judicial resources that could better be deployed for programs such as state funding of public defense counsel.¹²⁰ Central to the King and Hoffman argument is the fact that very few federal habeas petitions are successful, particularly those filed in non-capital cases.¹²¹ Indeed, less than 1% of federal habeas petitions are granted in non-capital cases, and over 40% of those claims are dismissed on procedural grounds, without any review of the petitioner’s claims on the merits.¹²² However, even advocates for the elimination or severe curtailing of federal habeas review carve out an exception where a viable claim of actual innocence is raised.¹²³

2. Argument for Expanding Federal Habeas Review of State Convictions

On the other hand, Professor Marceau and other legal scholars have argued that federal review is still necessary to ensure the adequacy of state process.¹²⁴ Specifically, Professor Marceau vigorously disagrees with the proposal to abolish federal habeas review, and argues that the “Constitution is already severely under-enforced through post-AEDPA habeas corpus litigation.”¹²⁵ Further, Marceau argues that the minimal—arguably nonexistent—substantive review that exists under AEDPA mandates that process-based review be “more frequent and capacious.”¹²⁶

¹¹⁶ Marceau, *supra* note 16, at 90 (discussing the original rationale for expanding the Writ in the 1960’s).

¹¹⁷ *Id.* at 90-91 (arguing that federal oversight of state court convictions is necessary in modern jurisprudence “to ensure the adequacy of the state processes”).

¹¹⁸ *Id.* at 128.

¹¹⁹ *Id.* (discussing the argument in favor of abolishing federal habeas corpus review of state criminal convictions).

¹²⁰ *Id.*

¹²¹ *Id.* at 138 (discussing the low success rate of federal habeas petitions).

¹²² *Id.* (discussing the realities of the AEDPA regime and noting the low success rate of non-capital federal habeas petitions).

¹²³ *Id.* at 128-29 (noting that King & Hoffman argue for the existence of non-capital federal habeas corpus where there is clear and convincing proof of actual innocence).

¹²⁴ *Id.* at 90-91 (arguing that federal review of state convictions is still necessary in the twenty-first century); *see also* Yackle, *supra* note 16, at 559 (identifying enduring need for federal review of state court convictions, and arguing that federal habeas system has completely broken down, requiring the creation of a new model “from scratch”).

¹²⁵ *See* Marceau, *supra* note 16, at 129 (arguing in favor of maintaining federal habeas review of state criminal convictions).

¹²⁶ *Id.* at 145 (advocating for a more expansive interpretation of AEDPA’s procedural protections).

3. The Primacy of Innocence in the Federal Habeas Debate

Even the proponents of abandoning—or radically restricting—federal habeas review under AEDPA, advocate for maintaining this extra layer of review in non-capital cases where credible claims of actual innocence are raised.¹²⁷ Indeed the primacy of innocence has remained at the heart of the debate regarding federal habeas review.¹²⁸ Given the original purpose of the Great Writ to provide a remedy for wrongful convictions of the innocent, both advocates and opponents of restricting federal habeas review agree that maintaining an effective mechanism for evaluating claims of factual innocence and remedying wrongful convictions, once they are identified, is critical.¹²⁹

Further, there is historic support for the idea that factually innocent prisoners seeking federal habeas relief should be treated differently than other petitioners. For example, in *Stone v. Powell*,¹³⁰ the United States Supreme Court determined that federal habeas relief is an inappropriate remedy for a prisoner raising Fourth Amendment exclusionary rule issues.¹³¹ The Court impliedly reasoned in *Stone* that, given the limited resources available to the federal courts, federal habeas review should be reserved for cases where factual innocence is raised, or at the very least the evidence is challenged as “inherently unreliable.”¹³²

II. THE IMPACT OF THE INNOCENCE MOVEMENT: HOW THE EXONERATION DATA SHIFTS THE BALANCE IN THE FEDERAL HABEAS POLICY DEBATE

Over the last two decades since AEDPA was enacted, the Innocence Movement has been instrumental in bringing about significant change in the criminal justice system. The knowledge that wrongful convictions of the innocent have occurred and continue to occur, at rates higher

¹²⁷ *Id.* at 128-29 (arguing for limited application of federal habeas corpus review in non-capital cases, restricted to cases in which petitioner can raise “clear and convincing proof of factual innocence”); *see also* Hoffmann & Stuntz, *supra* note 5, at 85 (discussing the notion of “the primacy of innocence” in federal habeas corpus jurisprudence); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack in Criminal Judgments*, 38 U. CHI. L. REV. 142, 142-43 (1970-71) (arguing that “with few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional pleas with a colorable claim of innocence”).

¹²⁸ Hoffmann & Stuntz, *supra* note 5, at 85 (discussing the notion of “the primacy of innocence” in federal habeas corpus jurisprudence); *see also* Friendly, *supra* note 127, at 144 (proposing that federal habeas review apply exclusively to petitioners raising claims of factual innocence).

¹²⁹ Hoffman & Stuntz, *supra* note 5, at 85 (noting that the remedial role of habeas is most important in cases of innocent persons).

¹³⁰ *Stone v. Powell*, 428 U.S. 465 (1976).

¹³¹ Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 347 (2006) (noting that *Stone v. Powell* represented the palpable moment when “the tide of mistrust of state courts had turned” in the Supreme Court’s view of federal habeas corpus jurisprudence).

¹³² *Stone v. Powell*, 428 U.S. 465, 479 (1976) quoting *Kaufman v. United States*, 394 U.S. 217, at 224 (1969) (“The primary rationale advanced in support of those decisions was that Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not ‘impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable; rather, the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers.’”).

than ever previously imagined, has led to a much-needed reexamination of our criminal justice system.¹³³ Specifically, the data from the first 300 DNA exonerations has suggested the recurrence of certain factors—such as eyewitness misidentification, coerced confession, prosecutorial misconduct and flawed forensic evidence—play a prominent role in wrongful convictions of the innocent.¹³⁴

The identification of these wrongful conviction factors has led to related reforms in the criminal justice system.¹³⁵ However, most of these reforms have occurred at the pretrial level, and have focused on individual changes in police and prosecutorial procedures, rather than on systemic reform.¹³⁶ Indeed, for all its successes, the Innocence Movement has been criticized for its failure to focus on larger-scale systemic change.¹³⁷

For example, Professor Tim Bakken has argued that the primary factors present in wrongful convictions have been well-known since Edwin Borchard published *Convicting the Innocent*,¹³⁸ over 75 years ago in 1932.¹³⁹ Professor Bakken further argues that the reforms brought to bear at the hands of the Innocence Movement in the modern era essentially mirror the suggestions for reform proffered nearly a century ago, in 1932.¹⁴⁰

¹³³ See GARRETT, *supra* note 2, at 6 (“DNA exonerations have changed the face of the criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system’s accuracy. This sea change came about because of the hard work of visionary lawyers, journalists, and students. . . [from the Innocence Project].”).

¹³⁴ See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 130 (2008) (“Analysis of data regarding known innocent convicts, from their trials through their appeals and DNA exoneration, does not provide reasons to be optimistic that our system effectively prevents serious factual miscarriages at trial, detects them during appeals or post-conviction proceedings, or remedies them through DNA testing.”).

¹³⁵ See generally Robert Norris et al., “*Than That One Innocent Suffer*”: *Evaluating State Safeguards Against Wrongful Convictions*, 74 ALA. L. REV. 1301 (2011) (discussing the legislative and policy reforms in the criminal justice system in the fifty states in the wake of the Innocence Movement); see also Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656 (2005) (citing the impact of DNA evidence in exposing wrongful convictions and leading to legal reforms in the criminal justice system).

¹³⁶ Bakken, *supra* note 1, at 838-39 (arguing that Innocence Movement reforms have fallen into three categories: “us[ing] social science research to make police interrogations and identification procedures better, hold[ing] police officers, prosecutors, defense lawyers, and judges to higher standards, and provid[ing] more resources to defendants.”).

¹³⁷ *Id.* at 866 (arguing that the modern Innocence Movement recommendations for reform are “similar to those made in 1932”).

¹³⁸ EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE* (1932).

¹³⁹ Bakken, *supra* note 1, at 840-41 (“In 1932, Professor Edwin Borchard published *CONVICTING THE INNOCENT*, a book in which he set out 65 cases of wrongful conviction and offered proposals for reform. The causes he identified for the wrongful convictions—mistaken identifications, inadequate lawyering, police or prosecutorial misconduct, false or coerced confessions, and perjury—are strikingly similar to those offered today by advocates for the wrongfully convicted. He also advocated the same kinds of relief as today’s advocates. Yet we find ourselves, seventy years late [in 2011], addressing the same problems and the same causes.”) (quoting Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 463 (2001)).

¹⁴⁰ *Id.* at 866 (arguing that the modern Innocence Movement recommendations for reform are “similar to

Professor Bakken's argument about the ongoing need for systemic reform in the criminal justice system applies with equal force in the federal post-conviction realm. While Congress passed AEDPA with an eye toward broad reform of federal habeas procedure, it did so without the benefit of the extensive exoneration data available today. Ostensibly, Congress sought to balance the interests of comity, federalism and finality against the countervailing interest in ensuring justice and fairness in criminal convictions.¹⁴¹ Today, given the newfound knowledge of the depths of the wrongful conviction crisis, the goal of promoting just convictions arguably weighs more heavily in the balance. The moment to reexamine federal habeas review is long overdue.

A. *The Innocence Movement: An Overview*

Since the dawn of forensic DNA testing in the early 1990's, the Innocence Project,¹⁴² along with a network of comparable legal organizations across the country, have begun to unmask the depth of the wrongful conviction crisis in the American criminal justice system.¹⁴³ The pioneering work of these organizations has given rise to an Innocence Movement over the last two decades.¹⁴⁴ Specifically, Innocence Network organizations ["the Network"] have been responsible for over 1500 exonerations.¹⁴⁵ Additionally, the Network has been responsible for identifying the central factors giving rise to wrongful convictions and bringing about an array of reforms in pretrial and investigatory procedures in our criminal justice system in response.¹⁴⁶ For example, there have been widespread calls for reform relating to police eyewitness identification procedures, police interrogations, and use of unverified forensic evidence since the dawn of the Innocence Movement.¹⁴⁷ However, success in achieving these reforms has been more gradual and fragmented, with some states and local jurisdictions taking action more quickly than others.¹⁴⁸

those made in 1932").

¹⁴¹ Tushnet & Yackle, *supra* note 67, at 4-22 (discussing the background of, and debate leading up to, the passage of AEDPA).

¹⁴² The Innocence Project was established by attorneys Barry Scheck and Peter Neufeld at Cardozo Law School in New York City in 1992. See The Innocent Project, www.innocenceproject.org/free-innocent (last visited Nov. 17, 2015).

¹⁴³ See The Innocence Project, www.innocenceproject.org/about-innocence-project/innocence-network (last visited Nov. 17, 2015).

¹⁴⁴ Hartung, *supra* note 15, at 69-72 (discussing the Innocence Movement and its impact on the American criminal justice system).

¹⁴⁵ See *supra* note 3 and accompanying text.

¹⁴⁶ See National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/mission.aspx> (last visited Nov. 17, 2015).

¹⁴⁷ *Id.*

¹⁴⁸ For example, to date, three state appellate courts—New Jersey, Oregon, and Massachusetts—have been instrumental in bringing about policy change regarding eyewitness identification procedures in their respective jurisdictions. See, e.g., *State v. Henderson*, 27 A.3d 872, 878-879, 915-927 (N.J. 2011) (applying more expansive scrutiny to police eyewitness identification procedures in response to social science research and Innocence Movement exoneration data); *State v. Lawson*, 291 P.3d 673, 690-691 (2012) (revising admissibility standards for eyewitness identification

The Innocence Movement has resulted in a greater focus on factual innocence in the courtroom, and in legal education as well.¹⁴⁹ Further, significant media attention has focused on wrongful convictions of the innocent in recent decades.¹⁵⁰ This emphasis on innocence issues—termed “innocentrism” by Professor Daniel Medwed¹⁵¹—and the continued efforts to free actually innocent, wrongfully convicted prisoners, have been characterized as “the new civil rights movement.”¹⁵² In response to critics who are wary of an overemphasis on factual innocence in criminal prosecutions,¹⁵³ Professor Medwed has argued that “innocentrism” is a “positive occurrence and one that ultimately can complement, rather than replace, the emphasis on substantive and procedural rights.”¹⁵⁴

B. Pre-trial Reforms in Criminal Justice System

Most of the reforms stemming from the Innocence Movement have been adopted in the pretrial context in response to factors identified as playing a significant role in wrongful convictions, i.e., eyewitness identifications, coerced confessions, flawed forensics, and prosecutorial misconduct.¹⁵⁵ While the calls for reform have been widespread in the last two decades, state courts and legislatures have been slow to respond. In fact, the success in bringing about policy change in the realm of investigation and pre-trial procedure has been somewhat ad hoc, and varies greatly from state to state.

evidence to reflect new understandings of unreliability in light of social science research trends); *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015) (significantly expanding the scope of eyewitness identification jury instructions to take into account new understandings of human memory based on social science research).

¹⁴⁹ Daniel Medwed, *Innocentrism*, U. ILL. L. REV. 1549, 1549-50 (2008) (noting that recent focus on issues of factual innocence in courtrooms, classrooms, and newsrooms “derives from the emergence of DNA testing and the subsequent use of that technology to exonerate innocent prisoners”); see also Stephanie Roberts Hartung, *Legal Education in the Age of Innocence: Integrating Wrongful Conviction Advocacy into the Legal Writing Curriculum*, 22 B.U. PUB. INT. L.J. 129 (2013) (discussing the critical role of wrongful conviction advocacy in legal education).

¹⁵⁰ See, e.g., Medwed, *supra* note 149, at 1551 (discussing the proliferation of wrongful conviction themes in media and pop culture).

¹⁵¹ *Id.*

¹⁵² See Press Release, Innocence Project, As 100th Innocent Prisoner is Freed by DNA Tests, Innocence Network Convenes to Map the Future of “New Civil Rights Movement” in Criminal Justice (Jan. 17, 2002), <http://www.deathpenaltyinfo.org/innocence-project-press-release-100th-innocent-prisoner-freed-dna-tests-innocence-network-convenes-m>.

¹⁵³ See, e.g., Abbe Smith, *In Praise of the Guilty Project*, 13 U. PA. J.L. & SOC. CHANGE 315, 316-18 (2010) (arguing that emphasis on factual innocence in the wake of the Innocence Movement has overshadowed the important work of defending the guilty).

¹⁵⁴ Medwed, *supra* note 149, at 1549.

¹⁵⁵ Bakken, *supra* note 1, at 838-39 (arguing that Innocence Movement reforms of criminal justice system have primarily focused on pretrial procedural issues relating to police eyewitness identification and interrogation procedures, and prosecutorial misconduct).

1. Eyewitness Identification

The exoneration data stemming from the Innocence Movement has identified eyewitness misidentification as the leading contributing factor present in wrongful convictions, with one or more such identifications playing a role in more than 75% of the over 250 DNA exonerations that have occurred.¹⁵⁶ In response to this realization, state courts and legislatures around the country have imposed new procedures.¹⁵⁷ Specifically, courts have gradually begun to apply more scrutiny to eyewitness identifications, and have imposed new procedures relating to eyewitness identification, such as favoring blind administration by police and avoiding oral feedback to witnesses.¹⁵⁸ Additionally, police departments increasingly favor video recording of all identification procedures, and the use of a single sequential photo lineup, rather than the presentation of a simultaneous photo array.¹⁵⁹ However, while reform of eyewitness identification procedures has begun to take hold in a handful of states, these reforms fall short of a universal change in the law.

2. Police Interrogation Procedures

The prevalence of coerced confessions among the DNA exoneration pool has led to comparable reforms of police procedures in this realm as well.¹⁶⁰ Of the first 300 DNA exonerations, 30% involved false confessions or guilty pleas.¹⁶¹ In light of the prevalence of false confessions in wrongful convictions of the innocent, courts increasingly favor videotaping of all interrogation procedures where possible.¹⁶² Additionally, in the wake of extensive social science

¹⁵⁶ See Innocence Project, www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification (last visited Nov. 17, 2015).

¹⁵⁷ See, e.g., *State v. Henderson*, 27 A.3d 872, 915-927 (NJ 2011) (applying more expansive scrutiny to police eyewitness identification procedures in response to social science research and Innocence Movement exoneration data); *Commonwealth v. Gomes*, 22 N.E.3d 897 (Mass. 2015) (relying on findings of Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence report, court issued new jury instruction template, taking into account social science research about the inherent unreliability of eyewitness identification accounts).

¹⁵⁸ See Innocence Project, www.innocenceproject.org/fix/Eyewitness-Identification.php (last visited Nov. 17, 2015) (recommending reforms to police eyewitness identification procedures, including blind administration of live and photo line-up procedures, instruction to witnesses that perpetrator may not be present in line-up, and video recording of all identification procedures).

¹⁵⁹ *State v. Henderson*, 27 A.3d 872 (NJ 2011) (applying more expansive scrutiny to police eyewitness identification procedures in response to social science research and Innocence Movement exoneration data).

¹⁶⁰ See Innocence Project, www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 17, 2015) (discussing prevalence of coerced confessions DNA exoneration cases and citing to legislative and judicial reforms).

¹⁶¹ See *id.* (“It seems unfathomable that someone would admit to committing a crime that they had nothing to do with. But in more than 25 percent of the exonerations proven by DNA, that is exactly what happened.”).

¹⁶² See, e.g., *Commonwealth v. DiGiambattista*, 442 Mass. 423 (2013) (articulating judicial preference for audio and/or video recording of police interrogations and entitling defense to a jury instruction explaining that a failure to record can be viewed as evidence of foul play and a potentially involuntary confession).

research on juvenile brain development and behavior, courts have continued to apply special scrutiny to juvenile confessions.¹⁶³ In particular, given the special susceptibility of juveniles to coercive police practices, along with the diminished ability to appreciate the long-term consequences of their decisions, courts have gradually begun to impose additional safeguards against coerced and false confessions among juveniles.¹⁶⁴

Again, reforms relating to interrogation procedures are beginning to gain favor among state courts and legislatures; yet these reforms have not had a universal impact on the criminal justice system as a whole.

3. Unreliable Forensic Evidence

Finally, certain types of forensic evidence, such as bite marks, ballistics, and hair comparisons, have been called into question as a result of the Innocence Movement's exoneration data.¹⁶⁵ Although historically relied upon by prosecutors and courts as scientific evidence, these types of comparisons yield unreliable results, given that the techniques have never been subjected to the rigors of scientific analysis.¹⁶⁶ The exoneration data has revealed that faulty forensic evidence—either unreliable methodology or deliberate falsification of results—has played a substantial role in wrongful convictions to date, as well.¹⁶⁷ Indeed, unreliable forensic science played a role in 52% of the first 250 DNA exonerations.¹⁶⁸ Specifically, in the wake of the Innocence Movement, the National Academy of Sciences has published a report concluding that an array of forensic methodologies historically relied upon to support criminal convictions, such as hair comparison, ballistics, bite mark and arson analysis, are unreliable, and unsupported by nationally-recognized scientific standards.¹⁶⁹

Additionally, the FBI has recently undertaken a comprehensive review of all federal

¹⁶³ See, e.g., Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. & CRIMINOLOGY 219 (2006-2007) (analyzing social science research and quantitative and qualitative data on juvenile brain development and discussing policy issues including video recording, length of interrogation, and use of false evidence during questioning); Jennifer Walters, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 515-21 (2002) (discussing Illinois' law requiring presence of counsel for all juvenile confessions).

¹⁶⁴ Feld, *supra* note 163, at 223-28 (discussing more lenient recent legal frameworks to provide increased safeguards for juveniles against self-incrimination).

¹⁶⁵ See Innocence Project, <http://www.innocenceproject.org/causes-wrongful-conviction/unvalidated-or-improper-forensic-science> (last visited Nov. 17, 2015) (identifying forensic techniques such as hair microscopy, bite mark comparisons, firearm tool mark analysis, and shoe print comparison as unreliable and untested by sufficient scientific evaluation).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Daniel Medwed, *Introduction: Path Forward or Road to Nowhere? Implications of the 2009 National Academy of Sciences Report on the Forensic Sciences*, 2010 UTAH L. REV. 221, 221 (2010) (discussing role of faulty forensic evidence in DNA exoneration data).

¹⁶⁹ *Id.* at 221-222 (discussing the significance of the 2009 Report of the National Academy of Sciences ["NAS Report"], and noting that the NAS Report supports a conclusion that "there are problems with the manner in which forensic science is (a) initially produced and (b) later presented as evidence in criminal trials.").

prosecutions in which hair comparison analysis was relied upon in securing the convictions. In doing so, the FBI and the U.S. Attorney's Office have collectively recognized the fundamental unreliability of—and lack of scientific support for—hair comparison evidence.¹⁷⁰

C. Recalibrating the Policy Equation: Finality vs. Fairness in the Age of Innocence

While the Innocence Movement has been the impetus for an array of pre-trial and investigatory reforms, discussed in Section IIB above, these measures have been adopted state by state, with no national uniformity. Additionally, very few comparable reforms have occurred in the post-conviction context, and even fewer in the federal realm. In fact, AEDPA, the legislation passed to overhaul federal habeas corpus review of state convictions, was enacted before the Innocence Movement was in full swing.¹⁷¹

Thus, the debate leading up to the passage of AEDPA in 1996 focused on balancing the competing interests of comity and finality on the one hand, and the interests of justice and fairness on the other.¹⁷² Yet the exoneration data stemming from the Innocence Movement over the last several decades warrants a recalibration of these underlying policy interests. At the time Congress debated the provisions of AEDPA, the American criminal justice system was still widely regarded as an error-free model for the world. Indeed, as of 1996, fewer than 30 known DNA exonerations had occurred.¹⁷³ Today, that number has expanded 50-fold, and it is widely understood that the current exonerations represent the mere “tip of the iceberg” with thousands, if not tens of thousands, of factually innocent prisoners remaining incarcerated.¹⁷⁴

Surely the undisputed knowledge that our criminal justice system was, and is, subject to a significant error rate, would have altered the congressional debate when AEDPA was enacted. It is eminently reasonable, in the interest of judicial economy, comity, and finality, for there to be a limit on the scope of review for a convicted prisoner. And in this vein, it is not surprising that Congress sought to curtail federal habeas review to conserve resources, demonstrate respect for state judgments, and curb what was widely regarded as rampant “abuse of the writ.”¹⁷⁵ Given that

¹⁷⁰ See *Scientists Applaud FBI's Decision to Review Reliability of Forensic Hair Analysis*, MINTPRESS NEWS, July 25, 2013, <http://www.mintpressnews.com/scientists-applaud-fbi-decision-to-review-reliability-of-forensic-hair-analysis/165917/> (“The FBI said that in more than 2,000 cases from 1985 to 2000, analysts may have exaggerated the significance of hair analyses or reported them inaccurately.”).

¹⁷¹ Hartung, *supra* note 15, at 69-70 (“While Congress sought to address the unrestricted filing of ‘frivolous’ federal habeas petitions by obviously guilty prisoners, the fact that significant numbers of these petitioners were wrongfully convicted and factually innocent was not yet widely known and did not seem to enter the debate.”) (citation omitted).

¹⁷² *Id.* at 68 (noting that AEDPA “ostensibly sought to balance the competing interests of finality and fairness, by limiting the seemingly endless review of criminal judgments while ensuring a just result for the convicted.”).

¹⁷³ See *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (last visited Nov. 17, 2015).

¹⁷⁴ Medwed, *supra* note 149, at 1564 (referencing Sam Gross’ conclusion that the number of wrongful convictions of the innocent is “unknown and frustratingly unknowable”); Rachel Pecker, Note, *Quasi-Judicial Prosecutors and Post-Conviction Claims of Innocence: Granting Recusals to Make Impartiality a Reality*, 34 CARDOZO L. REV. 1609, 1612-13 (2013) (discussing the impact of the Innocence Movement and characterizing the excess of 2,000 exonerations and 300 DNA exonerations as the “tip of the iceberg”).

¹⁷⁵ See Reynolds, *supra* note 73, at 1478-79 (discussing political climate at the time AEDPA was enacted,

conviction of the factually innocent was not explicitly discussed in the congressional hearings on AEDPA, it can be presumed that the existence of a significant rate of wrongful convictions of the innocent did not enter the debate.¹⁷⁶

Today, nearly two decades after AEDPA's passage, the crisis of wrongful convictions in the United States cannot be ignored. In this era, with full knowledge of the exoneration data stemming from the Innocence Movement, it is difficult to imagine how Congress would pass legislation that operates to virtually foreclose claims of innocence. While viable innocence claims were once considered an anomaly, they are now known to occur far more frequently than was ever imagined. In light of this new reality, the appropriate scope of federal review must be revisited. Further, given the inability of pretrial procedural reforms to fully address and correct the wrongful convictions crisis, a systemic reform of federal habeas review is warranted.

III. PRE-TRIAL INNOCENCE TRACKS: THE PROPOSAL AND THE CRITIQUE

While no legal scholar has proposed a federal post-conviction innocence track since the passage of AEDPA, some have proffered a comparable innocence track in the pretrial context.¹⁷⁷ The pretrial innocence track model laudably seeks to provide well-deserved protections for actually innocent defendants; yet this model raises practical concerns and has failed to gain traction.¹⁷⁸

A. *The Pretrial Innocence Track Proposal*

Although not yet implemented in any jurisdiction, several legal scholars have proposed the establishment of an optional "innocence track" or "innocence bureau" which would present an alternative to the traditional trial track.¹⁷⁹ This model is premised on the notion that factually innocent criminal defendants require procedures specifically designed to separate them from the large majority of defendants who are factually guilty.¹⁸⁰ While the specifics of this model vary

with national security at the forefront of the congressional agenda, along with concerns about federal courts "besieged by" habeas petitions); Hartung, *supra* note 15, at 69 (noting that, in passing AEDPA, "Congress sought to address the unrestricted filing of 'frivolous' federal habeas petitions by obviously guilty prisoners.").

¹⁷⁶ See Ritter, *supra* note 13, at 72 (noting that most congressional debate leading up to the passage of AEDPA focused on provisions relating to terrorism, wiretapping, and immigration, with very little discussion of the post-conviction measures).

¹⁷⁷ See, e.g., D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 893-94 (2011) (advocating for pre-trial innocence track as a measure to protect against wrongful convictions).

¹⁷⁸ *Id.* at 871 (noting that "the defense bar may fear that some reforms will bring new disadvantages to the majority of their clients (the factually guilty ones) for the benefit of the innocent minority.").

¹⁷⁹ See, e.g., Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 920-23 (2011) (discussing "innocence procedures" proposed by legal scholars, including Tim Bakken, Lewis Steel and Michael and Lesley Risinger); see also Risinger & Risinger, *supra* note 177, at 893-94 (advancing a proposal allowing for a defendant to "elect between two tracks [, the factual innocence track and the traditional track] which would determine both the structure of further pretrial proceedings and the rules by which the trial itself would be conducted.").

¹⁸⁰ Bakken, *supra* note 1, at 839 ("Innocent persons need procedures to separate themselves from the large

among the various legal scholars who have proposed it, the approach allows criminal defendants to opt into a pretrial “innocence track” in exchange for relinquishing fundamental constitutional protections, such as the Fifth Amendment privilege against self-incrimination.¹⁸¹

Specifically, those who opt into the innocence track would have the benefit of enhanced investigation procedures and a higher burden of proof imposed on the prosecution,¹⁸² and would be entitled to an acquittal upon evidence that the government acted in bad faith.¹⁸³ In exchange, the defendant would agree to testify at trial and be available for a formal pretrial deposition before the trial judge.¹⁸⁴ Under this proposed innocence track, the defense would also be entitled to full access to the prosecution’s files, pursuant to an open discovery provision.¹⁸⁵

This model further envisions a certain streamlining of the process. Specifically, prior to trial, the defendant would identify the “binary issues of fact upon which his factual guilt or innocence turns”¹⁸⁶—i.e., identity of the perpetrator—and would concede uncontested issues such as the perpetrator’s state of mind or intent.¹⁸⁷ Finally, under this model, the role of crime investigation would be shared and would not fall exclusively within the purview of the prosecution.¹⁸⁸ Presumably, this option would help separate the proverbial wheat from the chaff, in order to identify the truly innocent defendants.

B. Criticism of Pretrial Innocence Tracks

While the pretrial innocence track proposal holds a superficial appeal in that it seeks to

majority of guilty persons in the justice system.”).

¹⁸¹ See, e.g., Risinger & Risinger, *supra* note 177, at 894 (“The ‘factual innocence’ track would require the defendant to make a limited waiver of the privilege against self-incrimination, in that the defendant would commit himself to testify at trial, and also make himself available for a formal pretrial deposition in front of, and to be conducted primarily by, the judge.”).

¹⁸² Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J.L. REFORM 545, 549 (2008) (“The government would be required to prove guilt to a higher standard than beyond a reasonable doubt.”).

¹⁸³ *Id.* at 550 (“Jurors could acquit the defendant upon finding that the government acted in bad faith.”).

¹⁸⁴ Risinger & Risinger, *supra* note 177, at 894 (“The ‘factual innocence’ track would require the defendant to make a limited waiver of the privilege against self-incrimination, in that the defendant would commit himself to testify at trial, and also make himself available for a formal pretrial deposition in front of, and to be conducted primarily by, the judge.”).

¹⁸⁵ *Id.* at 887 (2011) (calling for “at the very least . . . discovery reform, including the adoption of reciprocal so-called ‘open file’ discovery.”) (emphasis in original).

¹⁸⁶ *Id.* at 894.

¹⁸⁷ *Id.* (“The point of such a trial would be to try the one or two issues identified by the defendant as the binary issues of fact upon which his factual guilt or innocence turns. The election would therefore operate as an admission that the state of mind of the perpetrator was such as to qualify for conviction under the top count of the indictment.”).

¹⁸⁸ *Id.* (“[A factual innocence track] would . . . , by eliminating the prosecution’s virtual monopoly on investigation, foster a true adversary system in which the adversaries concentrate on their epistemically valuable functions of marshalling, explaining, and testing the implications of the facts, and not on producing, massaging, and malleating the facts.”).

apply necessary special scrutiny to claims of innocence, a closer examination reveals significant practical concerns. In fact, pretrial innocence track proposals have been met with criticism in the legal scholarship from all sides. For example, some legal scholars and prominent prosecutors have argued that such an approach would result in freeing the guilty with a slim possibility of doing much to aid the truly innocent.¹⁸⁹ Specifically, Professor Paul Cassell has argued that such special procedures are implausible and not necessary to protect the innocent.¹⁹⁰ For example, Cassell asserts that the prosecution could rarely meet a burden higher than the standard “beyond a reasonable doubt” applied in criminal trials.¹⁹¹ Cassell further argues that the innocence track model lacks an effective method of preventing factually guilty defendants from invoking the procedures.¹⁹² Professor Tim Bakken rebuts Cassell’s argument regarding false claims of innocence, and asserts that “[t]he last thing any guilty person wants to promote is the collection of all evidence.”¹⁹³

On the other side, detractors from the defense bar have argued that pretrial innocence tracks are not viable because participation necessarily depends on defendants relinquishing their constitutional rights.¹⁹⁴ For example, compelling a defendant to waive his or her Fifth Amendment right against self-incrimination would arguably result in a presumption that those defendants not choosing the innocence track declare their guilt by default.¹⁹⁵ This approach would run afoul of the presumption of innocence as well. Notably, if this procedure were to ever become widely administered, jurors would find themselves in the position of determining guilt beyond a reasonable doubt with the implicit knowledge that the defendant had opted not to declare factual innocence.¹⁹⁶ This approach seems irreconcilable with any meaningful interpretation of the presumption of innocence.¹⁹⁷

Additionally, some pretrial innocence track proposals require that defense counsel

¹⁸⁹ See, e.g., Bakken, *supra* note 1, at 847 (discussing Paul Cassell’s criticism of pretrial innocence track proposal).

¹⁹⁰ Paul G. Cassell, *Freeing the Guilty Without Protecting the Innocent: Some Skeptical Observations on Proposed New “Innocence” Procedures*, 56 N.Y.L. SCH. L. REV. 1063, 1064 (2011/12) (disputing the need for additional pretrial and trial measures to protect innocent defendants).

¹⁹¹ *Id.*

¹⁹² Bakken, *supra* note 1, at 848 (discussing Cassell’s opposition to the pretrial innocence proposal).

¹⁹³ *Id.*

¹⁹⁴ See, e.g., Risinger & Risinger, *supra* note 177, at 894 (noting that pre-trial innocence tracks necessarily require waiver of constitutional rights); see also Hartung, *supra* note 15, at 86 (noting likelihood of opposition from defense bar given that this approach “would have the de facto effect of dividing criminal defendants into two definitive camps: those who admit their guilt and those who do not.”).

¹⁹⁵ *Id.*

¹⁹⁶ Although there is a distinction to be made between a defendant claiming factual versus legal innocence—with the former eligible to opt into the innocence track, but not the latter—this distinction may be lost on a jury. For example, a defendant disputing the requisite intent in a murder case, but not the identity of the perpetrator, would be no less entitled to an acquittal in spite of being precluded from the innocence track. Nonetheless, a jury might conclude that such a defendant falls outside the “innocence track” and thus, reach an unsupported guilty verdict.

¹⁹⁷ See, e.g., Bakken, *supra* note 1, at 845-46 (noting that under innocence procedures “defendants could compel enhanced investigations by waiving the right to remain silent and agreeing to an interview.”).

submit an affidavit affirming a personal belief in her client's factual innocence.¹⁹⁸ Thus, the enhanced investigation and other innocence track protections would not take place until after such an affidavit was submitted.¹⁹⁹ This approach would seem to run counter to an array of Sixth Amendment right to counsel protections. Specifically, the requirement of an "innocence affirmation" would improperly place defense counsel in the simultaneous role of defense attorney, prosecutor, judge, and jury.

For example, requiring an attorney to publically state his or her opinion as to a client's innocence would flagrantly violate the attorney-client privilege, as presumably, such a declaration would depend at least in part on what the defendant reported to his or her attorney during their consultations. Further—and perhaps even more problematically—an attorney's failure to file such an affidavit would, by default, arguably amount to a public statement of belief in the client's factual guilt, or, at a minimum, a lack of confidence in the client's factual innocence. This approach would no doubt create conflict in the attorney-client relationship as well, particularly where the attorney is unwilling to file an affirmation of innocence.

For all these reasons, the pretrial innocence track model has yet to be implemented in any U.S. jurisdiction, and seems unlikely to be adopted any time in the near future.

IV. THE CASE FOR A FEDERAL POST-CONVICTION INNOCENCE TRACK

Unlike the proposed pre-trial innocence track discussed in Part III above, a federal post-conviction innocence track would more effectively achieve the goals of accuracy in criminal convictions and substantive justice, without running counter to fundamental constitutional rights. This approach would also further the original purpose of the Great Writ.²⁰⁰ In addition, a comprehensive reexamination of federal habeas review and imposition of a post-conviction innocence track would help bring about the systemic change absent from the Innocence Movement reforms achieved to date.

Federal habeas review, in the wake of AEDPA, is widely regarded as an unmitigated disaster.²⁰¹ Indeed, there is support for the argument that federal habeas procedure is well past due for an overhaul.²⁰² The pretrial procedural reforms stemming from the Innocence Movement, discussed in Part IIB above, are a promising step in the right direction, but lack uniformity among the states.²⁰³ Further, there is a decided lack of uniformity among state post-conviction procedures as well.²⁰⁴ Thus, a petitioner raising a post-conviction claim of actual innocence is likely to

¹⁹⁸ *Id.* at 848 (noting that, under the innocence track approach, "defense attorneys would have to affirm their clients' innocence by submitting an innocence affirmation.").

¹⁹⁹ *Id.*

²⁰⁰ Hoffmann & Stuntz, *supra* note 5, at 85 (noting that "nowhere is the remedial role of habeas so important as in the case of an innocent person.").

²⁰¹ Yackle, *supra* note 16, at 553 (commenting that federal habeas corpus review for state prisoners is an "intellectual disaster area").

²⁰² *Id.* (acknowledging that AEDPA has failed to effectively restructure federal habeas review, and advocating for the need to "start over").

²⁰³ See *supra* notes 155-70, and accompanying text.

²⁰⁴ See Medwed, *supra* note 135, at 681 (discussing the array of "current modes of collateral relief" in the state post-conviction realm).

receive disparate results depending on the jurisdiction where the underlying conviction occurred.²⁰⁵ For this reason, a larger scale reform of the federal habeas review process—universally available to all prisoners convicted in state courts—is a more effective way to bring about systemic change.

What’s more, to the extent that these pretrial reforms stemming from the Innocence Movement have been successfully implemented, they essentially operate as preventative measures to avoid wrongful convictions of the innocent in the future.²⁰⁶ On the other hand, reforming federal habeas procedures for petitioners raising claims of innocence would help solve a different problem: correcting wrongful convictions that have already occurred. Both kinds of reform are necessary to meaningfully address the wrongful convictions crisis.

A. *Historical Support for a Federal Post-Conviction Innocence Track*

In the decades leading up to the Due Process Revolution of the 1950’s and 60’s, federal habeas courts routinely failed to differentiate between innocence and non-innocence claims.²⁰⁷ This approach was logical at a time when the only viable habeas corpus claims were based on due process claims of an erroneous verdict.²⁰⁸ However, today, in the wake of the Supreme Court’s years of expansive interpretation of due process, an array of constitutional claims exist which are completely unrelated to factual guilt or innocence.²⁰⁹ Thus, in modern jurisprudence, actual innocence plays “only a small role” in adjudication of habeas corpus petitions.²¹⁰

Decades before AEDPA was enacted, a debate ensued among legal scholars as to the appropriate scope and focus of federal habeas review.²¹¹ In spite of the “small role” that innocence claims were recognized to play in federal review of state convictions, over the last several decades, legal scholars have continued to emphasize the “primacy of innocence” in habeas corpus jurisprudence.²¹²

1. Friendly Article

In 1970, Judge Henry Friendly wrote an influential article, arguing that the Great Writ

²⁰⁵ *Id.*

²⁰⁶ *See generally supra* notes 135-36 and accompanying text.

²⁰⁷ Hoffmann & Stuntz, *supra* note 5, at 87-88 (discussing how the types of constitutional challenges have greatly expanded in the decades following the “due process revolution” at the hands of the Warren Court).

²⁰⁸ *Id.* at 88.

²⁰⁹ KING & HOFFMANN, *supra* note 111, at 10 (“The Supreme Court, under the leadership of Chief Justice Earl Warren and Justice William J. Brennan, responded to recurring and serious injustices inflicted upon state criminal defendants—especially minorities and the poor—by interpreting the Due Process Clause of the Fourteenth Amendment to require the states to provide defendants with various new federal rights.”).

²¹⁰ Hoffmann & Stuntz, *supra* note 5, at 92.

²¹¹ *See generally supra* notes 111-26 and accompanying text.

²¹² *See, e.g.,* Friendly, *supra* note 127, at 142 (arguing that federal habeas review of state convictions should focus exclusively on innocence claims); Hoffmann & Stuntz, *supra* note 5 (proposing pre-AEDPA “innocence track” in federal post-conviction context).

had strayed from its original purpose and that federal habeas corpus review should focus exclusively on claims of actual innocence.²¹³ Judge Friendly's argument appeared to be premised on the notion that the number of federal habeas petitions filed each year had reached unmanageable levels, and a focus on exclusively innocence petitions would dramatically reduce the number of filings while devoting the courts' limited resources to the most deserving petitioners.²¹⁴

Although not explicitly stated, Judge Friendly's premise that actually innocent prisoners were exceedingly rare, if not virtually nonexistent, provided the undercurrent for his argument. Indeed, his proposal seemed to rely on notions of judicial economy—i.e., that restricting petitions to colorable claims of actual innocence would significantly limit the number of filings.²¹⁵ Yet, when Judge Friendly wrote this article, he could not have foreseen the depth of the wrongful conviction crisis to be revealed by the Innocence Movement in the decades to come.²¹⁶

2. Hoffmann & Stuntz Article: The Original "Innocence Track" Proposal

Subsequently, in 1993, Professors Joseph Hoffmann and William Stuntz advocated for an "innocence track" in federal habeas procedure, where review of such claims would be de novo and relief could be based solely on a "naked innocence claim," even if unaccompanied by a separate constitutional claim.²¹⁷ In their influential article, *Habeas After the Revolution*, Hoffmann and Stuntz argued that an innocence track would serve to promote the dual purposes of federal habeas review: 1) the protection of the innocent, and 2) deterrence of constitutional violations by police, prosecutors, and judges.²¹⁸

Hoffmann and Stuntz further discussed the notion that innocence claims should be treated differently than non-innocence claims in habeas proceedings.²¹⁹ Indeed the crux of their proposal was that habeas law should be premised, at least in part, "on the recognition that habeas can provide a valuable layer of protection against the unjust punishment of innocent defendants."²²⁰ In support of their argument, the authors cited *Stone v. Powell*, where the Supreme

²¹³ Friendly, *supra* note 127, at 142 (arguing that "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional pleas with a colorable claim of innocence.").

²¹⁴ *Id.* at 144 (arguing that the number of federal habeas petitions was overwhelming the courts as of 1970, "compris[ing] the largest single element in the civil caseload of the [federal] district courts"); *see also* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1038 (2010) (noting that Judge Friendly's proposal placed "greater emphasis on actual innocence over procedural violations," thus resulting in more "attention on the most deserving petitioners").

²¹⁵ Friendly, *supra* note 127, at 148 (commenting that the "most serious single evil with today's proliferation of . . . [federal habeas petitions] is its drain upon the resources of the community—judges, prosecutors, and attorneys appointed to aid the accused").

²¹⁶ *Id.* (characterizing federal habeas petitions as a "gigantic waste of effort").

²¹⁷ Hoffmann & Stuntz, *supra* note 5, at 96-97.

²¹⁸ *Id.* at 108 (discussing dual purpose of federal habeas review).

²¹⁹ *Id.* at 85 (citing to *Stone v. Powell* for support for the proposition that innocence claims should be differentiated from other constitutional claims).

²²⁰ *Id.* at 95.

Court determined that Fourth Amendment search and seizure issues were not appropriate claims under federal habeas corpus, partly given that they were unrelated to guilt or innocence.²²¹

Additionally, the authors argued that the historical focus on federalism in the habeas debate is outdated, and that instead, the debate should focus on how federal habeas procedures are part of the criminal justice system, rather than a separate entity.²²² Specifically, the authors argued that federal habeas review should be viewed as a critical part of the criminal justice system, rather than merely as an ancillary constitutional review, along of the lines of a § 1983 federal civil rights claim.²²³ Hoffmann and Stuntz asserted that, in furtherance of the goals of “protecting innocence, deterring unreasonable state court decision making, and providing sufficient opportunities for federal lawmaking,” federal habeas procedures should be reformed.²²⁴

Under Hoffmann and Stuntz’s proposal, eligibility for the innocence track would require a petitioner to make a threshold showing of a “reasonable probability of innocence.”²²⁵ Further, a petitioner filing any federal habeas claim would be eligible, regardless of whether the claim is otherwise subject to procedural default.²²⁶ Thus, the petitioner could obtain habeas review of the constitutionality of the convictions by demonstrating: (1) a “reasonable probability” of factual innocence, and (2) the occurrence of a “constitutional violation” caused the erroneous conviction.²²⁷

Hoffmann and Stuntz envisioned that this approach would lead to habeas review on the merits of all claims relating to the failure of the government to disclose material evidence, along with innocence-related claims of ineffective assistance of counsel and insufficiency of evidence.²²⁸ The authors reasoned that the “reasonable probability” standard essentially amounted to the same standard as those required for these constitution-based claims.²²⁹ This approach was designed to benefit habeas petitioners raising claims of actual innocence because it would operate to waive any potential procedural default.²³⁰ In their article, Hoffmann and Stuntz argued that the

²²¹ *Id.* at 92.

²²² *Id.* at 122 (referring to the federal habeas corpus debate as “sterile” and arguing that it is “time to change the terms of the discussion”).

²²³ *Id.* at 70 (“The categorization of habeas as a member of the class of federal remedies for constitutional violations by state and local officials is not wrong; on the contrary, it is both correct and important. But it is also misleading, for habeas is part of another system as well—the criminal justice system. And the criminal justice system is quite different, substantively and procedurally, from the other settings in which federal constitutional law is enforced against state and local actors.”).

²²⁴ *Id.* at 123.

²²⁵ *Id.* at 95.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 95-96 (“Our approach would lead to habeas review on the merits of all claims that the government failed to disclose material exculpatory evidence, since our proposed ‘reasonable probability of innocence’ standard is the same as that for showing ‘materiality’ under existing *Brady* doctrine. It would also mean habeas review of all innocence-related ineffective assistance of counsel claims: once again, the standard is the same. And it would mean habeas review of all *Jackson v. Virginia* claims, which go directly to the sufficiency of the evidence of the defendant’s guilt.”).

²²⁹ *Id.* at 95.

²³⁰ *Id.* at 96 (“The contrary rule in existence today rests on the notion that the state’s interests in finality and

existing approach under federal habeas law reflected an emphasis on finality of state judgments over the interest of correcting wrongful convictions of the innocent.²³¹ Finally, Hoffmann and Stuntz emphasize that their model is rooted in the fundamental purpose of habeas review—i.e., preventing injustice—rather than correcting state courts.²³²

While the Hoffmann and Stuntz innocence track proposal contemplates coupling an innocence claim with an allegation of a related constitutional violation, their approach also allows for a “‘naked’ innocence claim” of the type raised in *Herrera v. Collins*.²³³ The authors acknowledge that such a bare claim of innocence would potentially require a higher standard of proof.²³⁴ While the proposal does not definitively set a proposed standard of establishing innocence under these circumstances, the authors contemplate a “more likely than not” or “clear and convincing evidence” standard.²³⁵

However, in proposing a federal habeas innocence track in 1993, Hoffmann and Stuntz could not have foreseen the wreckage that AEDPA would bring to bear just three years after the publication of their article. While the authors recommended taking steps to ensure greater protection for petitioners raising claims of actual innocence, the passage of AEDPA in 1996 had exactly the opposite impact.²³⁶

B. *The Inability of State Post-Conviction Procedures to Adequately Address Actual Innocence Claims*

Given that AEDPA has operated to severely curtail federal habeas review of state convictions, state collateral review of a conviction now amounts to the only viable venue for constitutional review of one’s convictions.²³⁷ Indeed, some scholars have argued that federal review of state convictions is no longer warranted because state post-conviction review procedures are effective in addressing viable claims of actual innocence.²³⁸ However, no proof

the enforcements of procedural rules outweigh the interest of a potentially innocent defendant in avoiding punishment. This balance . . . reflects the current law’s preoccupation with federalism concerns, a preoccupation that is out of place with the wholly nationalized body of law that state courts apply to resolve criminal procedure disputes.”)

²³¹ *Id.* (commenting that “the goal of habeas relief on this ‘innocence track’ is not to send signals to the state courts but to prevent injustice to the defendant”).

²³² *Id.* at 95-96 (noting that the authors’ proposal would “provide a valuable layer of protection against the unjust punishment of innocent defendants” and “would justify habeas review of the merits of the defendant’s federal claims without regard to any possible procedural deficiencies”).

²³³ *Id.* at 97 (noting that “we would not preclude habeas relief even for a ‘naked’ innocence claim of the kind that was presented to the Court . . . in *Herrera v. Collins* [113 S Ct 853 (1993)]”).

²³⁴ *Id.* at 97-98 (recognizing that “there is much room for disagreement about what the proper standard for such ‘naked’ innocence claims ought to be”).

²³⁵ *Id.* at 98 (noting that “presumably it should be harder for a defendant to obtain habeas review by claiming innocence alone than by coupling an innocence claim with a claim of constitutional violation” and suggesting “more likely than not” innocence or “clear and convincing evidence” of innocence as possible standards).

²³⁶ See generally *supra* notes 27-82 and accompanying text.

²³⁷ See Medwed, *supra* note 135, at 681 (discussing “current modes of collateral relief” in the state post-conviction realm); see also Williams, *supra* note 6, at 920 (noting the failure among state courts to provide meaningful review of state convictions, especially in capital cases).

²³⁸ See Blume, *supra* note 4, at 263 (discussing views of “habeas detractors” who regard “punishing and

exists that this is the case.

Most states now provide for some procedure for collateral attack of a conviction, such as state habeas corpus or *coram nobis*.²³⁹ These procedures may be based on common law or, more frequently, codified in statute or court rule.²⁴⁰ However, the effectiveness of these state post-conviction procedures in identifying meritorious claims of actual innocence is not clear. Indeed, studies suggest that state habeas proceedings fail to adequately remedy constitutional errors occurring at the trial level.²⁴¹ For example, a Texas study concluded that state post-conviction decisions were primarily copied verbatim from government briefs in 83.7% of state habeas cases.²⁴²

Further, state habeas and other post-conviction procedures have been criticized as duplicative and unnecessarily complex.²⁴³ Particularly in jurisdictions where these measures coexist with motion for new trial procedures, the multiple layers of relief available can result in conflicting standards, and can ultimately cause confusion among litigants.²⁴⁴

These inefficiencies, and the apparent failure of state court collateral review of convictions to adequately identify and address viable claims of innocence, support the need to strengthen federal habeas procedures, rather than abandon them.²⁴⁵ While some legal scholars have argued that federal habeas review of state convictions is no longer necessary in the modern era, where states are well-equipped to handle their own post-conviction review processes,²⁴⁶ it is difficult to gauge how successful state courts actually are in undertaking these review measures on their own.

For example, under AEDPA, § 2254(d)(2) provides a mechanism for litigating procedural unfairness in state post-conviction procedures when a state court decision is “based on an unreasonable determination of the facts.”²⁴⁷ Yet given that many states, such as California,

controlling crime as . . . a quintessential state function”).

²³⁹ See Medwed, *supra* note 135, at 681 (discussing “current modes of collateral relief” in the state post-conviction realm).

²⁴⁰ *Id.* (noting this “shift from common law systems of state post-conviction relief in favor of statute- and rule-based regimes”).

²⁴¹ See, e.g., Sussman, *supra* note 42, at 366 (discussing high error rates in state capital cases, and noting that errors often go uncorrected in state post-conviction procedures).

²⁴² Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty*, Chapter 8, 127, available at: <http://texasdefender.org/tds-publications/>.

²⁴³ Medwed, *supra* note 135, at 696 (“While the presence of multiple remedies at the state court level may seem desirable or at least better than the alternatives, a single option or no remedy at all, the interrelationship between these devices within any given jurisdiction can be perplexing.”).

²⁴⁴ *Id.* (discussing Tennessee state post-conviction procedures in particular, and identifying conflict between requirements for introducing new evidence via motion for new trial versus post-conviction relief).

²⁴⁵ Marceau, *supra* note 16, at 198 (arguing that rather than abandoning federal oversight of state convictions, federal oversight should be reoriented “so that it serves, at the very least, the critical function of ensuring the fairness of the state process”).

²⁴⁶ See *supra* notes 114-22 and accompanying text.

²⁴⁷ See *supra* notes 51-63 and accompanying text.

deny thousands of habeas petitions per year through summary dispositions, it is impossible to determine how often state courts determine the facts or interpret the law in an unreasonable manner.²⁴⁸

C. Need for Continued Federal Oversight of State Court Convictions

While federal habeas review is controversial, there is broad support for the notion that review and enforcement of federal constitutional rights should not be left exclusively to the state courts.²⁴⁹ The original rationale for federal habeas review—i.e., the notion that federal courts are better equipped to interpret federal constitutional rights—applies with equal force today.²⁵⁰

One prominent federal habeas scholar, Professor Larry Yackle, has argued in favor of the “enduring idea that federal rights implicated in criminal cases should not be left to state courts alone,” because these “courts may answer in ordinary civil litigation when federal issues emerge, but not when the safeguards drawn from the Bill of Rights are at stake.”²⁵¹ In support of his argument, Professor Yackle looks to the historic rationale for federal habeas corpus review: the notion that federal courts are uniquely situated to act as the unbiased arbiters of federal constitutional law.²⁵²

D. Need to Correct AEDPA’s Disproportionate Impact on Petitioners Raising Claims of Actual Innocence

As discussed in Part IB above, many of AEDPA’s provisions have had a disproportionate impact on prisoners raising claims of actual innocence. For example, AEDPA’s strict one-year filing period, in combination with its limitation on second and successive petitions, operates to foreclose petitions raising innocence claims.²⁵³ Indeed many such petitions are denied based on threshold procedural violations, without ever reaching the merits of the issues raised.²⁵⁴

Additionally, the exceedingly high standard required to show that newly discovered evidence supports a finding of actual innocence erects onerous barriers to federal habeas review, as well.²⁵⁵ Indeed, rather than establishing that new evidence supports a finding of innocence by a preponderance of the evidence, as was historically required under federal common law, AEDPA’s imposition of a gateway requirement of “clear and convincing evidence” of innocence has been

²⁴⁸ Marceau, *supra* note 16, at 154.

²⁴⁹ Yackle, *supra* note 16, at 553 (arguing that in modern society, the Supreme Court can no longer shoulder alone the burden of review of federal constitutional rights for the state courts).

²⁵⁰ *Id.* at 556 (arguing that, unlike state courts, “federal courts . . . can concentrate on federal rights unimpaired by any competing commitment to local criminal law”).

²⁵¹ *Id.* at 559.

²⁵² *Id.* at 556 (noting that, unlike state courts, “federal courts . . . can concentrate on federal rights unimpaired by any competing commitment to local criminal law”).

²⁵³ See *supra* notes 68-77 and accompanying text.

²⁵⁴ Blume, *supra* note 4, at 286 (noting that “the total percentage of habeas corpus cases in the federal courts of appeals that are disposed of on procedural grounds, as opposed to on the merits, has risen since 1997”).

²⁵⁵ See *supra* notes 78-82 and accompanying text.

criticized as insurmountable.²⁵⁶ This high standard is problematic standing alone, but even more so when viewed in light of AEDPA's provisions eviscerating federal de novo review of state court options.²⁵⁷ The combination of these provisions results in effectively foreclosing federal habeas relief based on actual innocence.²⁵⁸

The irony of this disparate impact of AEDPA's provisions is that the de facto victims—the prisoners raising claims of actual innocence—are the intended beneficiaries of federal habeas corpus review. Thus, in enacting AEDPA, rather than merely curing the perceived “abuse of the writ,” Congress restricted access to federal habeas review so as to effectively foreclose relief for the guilty and innocent alike. A radical restructuring of AEDPA is warranted to correct this problem. As a starting point, creating a separate track for prisoners raising claims of innocence would operate to focus the limited resources of the federal courts on the most deserving litigants.

V. FEDERAL POST-CONVICTION INNOCENCE TRACK: A PROPOSED CONCEPTUAL FRAMEWORK

The federal post-conviction innocence track proposed in this Article provides a means of addressing the shift away from the “primacy of innocence” in federal habeas jurisprudence since the passage of AEDPA. In some respects, this proposal revives the Hoffmann and Stuntz proposal discussed in Part IV above. Although their proposal was raised over twenty years ago, Hoffmann and Stuntz' argument in favor of reform applies with even greater force today. Indeed, the events of the last two decades since their proposal—the passage of AEDPA in 1996 and the Innocence Movement's impact on the criminal justice system in the years since—support the need for more comprehensive and systemic federal habeas reform.

A federal post-conviction innocence track would operate to restore federal habeas corpus to its historic purpose, by focusing judicial resources on petitioners raising viable claims of actual innocence.²⁵⁹ The establishment of an innocence track in this context would restore the “primacy of innocence” in federal habeas review,²⁶⁰ and would strike a more measured balance between the completing interests of finality and fairness than the one achieved by the enactment of AEDPA.²⁶¹ Finally, in contrast to the pretrial innocence track proposals, discussed in Part III above,²⁶² the federal post-conviction innocence track proposed in this Article would not require waiver of fundamental constitutional rights.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See Hoffmann & Stuntz, *supra* note 5, at 85 (discussing the notion of “the primacy of innocence” in federal habeas corpus jurisprudence).

²⁶⁰ *Id.*

²⁶¹ See Lott, *supra* note 71, at 456-57 (noting that critics characterize justice and fairness as “secondary considerations” under the AEDPA).

²⁶² See *supra* notes 193-196 and accompanying text.

A. Threshold Showing of Innocence

Participation in the federal post-conviction innocence track would involve a two-part process. First, a petitioner would be required satisfy a threshold showing of innocence by a preponderance of evidence in order to obtain a hearing. Next, once a hearing is ordered, a petitioner would be required to satisfy a more onerous standard to obtain post-conviction relief. This Article proposes that the “preponderance of the evidence” standard historically imposed by common law,²⁶³ prior to the passage of AEDPA, is the appropriate threshold standard for establishing factual innocence. Thus, in order to obtain a hearing, a petitioner seeking to opt into the federal post-conviction innocence track would be required to show that new evidence supports a finding that the petitioner was “probably factually innocent of the crime.” As Hoffmann and Stuntz proposed in 1993,²⁶⁴ the innocence track proposed here contemplates either a “naked” claim of innocence, or an innocence claim raised in conjunction with an allegation of a related constitutional violation, such as ineffective assistance of counsel or a *Brady* claim.

While this new proposed standard represents a departure from the “clear and convincing” standard imposed under AEDPA, the lower standard is warranted as a threshold showing in light of the exoneration data from the Innocence Movement over the last twenty-five years. However, under this proposal, once a hearing is ordered based on a showing of innocence by a preponderance of evidence, the petitioner would then be required to establish innocence by the more onerous “clear and convincing evidence” standard at the hearing. The two-part process of review under the proposed federal post-conviction innocence track would help prevent foreclosure of innocence claims on the merits, while at the same time limiting relief to the rare occurrence where innocence is definitively established.

Had Congress been aware of the depth of the wrongful conviction crisis known today, it arguably would have imposed a less onerous threshold standard for establishing innocence. Prior to the enactment of AEDPA, the Supreme Court established a standard for raising claims of innocence based on newly discovered evidence in *Schlup v. Delo*.²⁶⁵ This standard is consistent with the *Schlup* standard, where the Court noted that “habeas corpus, at its core, is an equitable remedy.”²⁶⁶ The *Schlup* court found that allowing federal habeas relief upon a petitioner’s showing that “a constitutional violation has probably resulted in the conviction of one who is innocent” is consistent with the purpose of federal habeas review of state court convictions.²⁶⁷

Since its enactment, AEDPA has imposed a more onerous standard for raising claims of innocence in the post-conviction context. Specifically, under 28 U.S.C. § 2254(d)(1), a petitioner’s claim for relief must be based on new evidence supporting the prisoner’s innocence by “clear and convincing evidence.”²⁶⁸ Restoring the *Schlup* “preponderance of evidence” standard as the threshold showing for a claim of innocence helps to achieve the desired balance between the competing interests of finality and fairness. This standard also recognizes that

²⁶³ *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (recognizing actual innocence as a gateway through which a petitioner may pass a procedural bar and requiring a “more likely than not” standard to support a claim of innocence).

²⁶⁴ See *supra* notes 233-34 and accompanying text.

²⁶⁵ See *supra* note 263.

²⁶⁶ *Id.* at 320.

²⁶⁷ *Id.* at 328.

²⁶⁸ *Supra* note 70 and accompanying text.

wrongful convictions of the innocent occur at more significant rates than was known prior to the Innocence Movement.

While this proposed standard is also lower than the one contemplated by Hoffmann and Stuntz in their 1993 proposal, a lesser burden in establishing innocence is warranted in light of the Innocence Movement and its impact on the criminal justice system. The Hoffmann and Stuntz proposal was raised at a time when wrongful convictions of the innocent were believed to be virtually non-existent. In that context, requiring such a high standard seemed appropriate, as the contemplated remedy was only rarely imposed. Today, wrongful convictions of the innocent are recognized as far more commonplace than what was believed in the early 1990s; thus, a less onerous standard is warranted.

Even so, the preponderance standard is a difficult one for petitioners to meet, as it would require prisoners to preliminarily demonstrate to the court that new evidence more likely than not supports a finding of innocence. This standard is sufficiently onerous to prevent abuse by guilty prisoners seeking to unjustly benefit from the innocence track. For example, a prisoner claiming that a single witness had recanted his or her testimony would be insufficient to meet this standard in most cases. As would a claim where the credibility of a prosecution witness had been challenged by new evidence. The preponderance standard would require the reviewing court to evaluate the new evidence in light of the strength of the evidence relied upon to convict the defendant at trial.

Further, the imposition of the more onerous “clear and convincing” standard at the second phase of the process would help address concerns about unduly expanding post-conviction relief. Thus, federal review of a conviction would only be warranted where, as a whole, the weight of the new evidence of innocence outweighs the evidence presented in support of the underlying conviction. And post-conviction relief following a hearing would be granted even more rarely, only in cases where the evidence of innocence is definitive.

B. *Exemption to Procedural Bars*

The federal post-conviction innocence track proposed in this Article also contemplates a blanket exemption to procedural bars. Exempting prisoners from AEDPA’s procedural bars under this model is consistent with the historic purpose of federal habeas corpus and the Supreme Court’s jurisprudence.²⁶⁹ Further, this approach is consistent with Hoffmann and Stuntz’s innocence track proposal from 1993²⁷⁰—particularly in light of the subsequent passage of AEDPA, and the considerable additional procedural barriers it imposed on federal habeas petitioners.²⁷¹ While Hoffmann and Stuntz envisioned a comparable waiver of procedural bars, their proposal was raised in the pre-AEDPA era, when few such barriers were in place in the federal realm. Indeed, the Hoffmann and Stuntz proposal contemplated that prisoners raising viable claims of factual innocence would not be subject to having their claims barred by state procedural requirements or failure to fully exhaust their claims in state court.²⁷²

²⁶⁹ *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (recognizing actual innocence as a gateway through which a petitioner may pass a procedural bar and requiring a “more likely than not” standard to support a claim of innocence).

²⁷⁰ *See supra* notes 217-35 and accompanying text.

²⁷¹ *See supra* notes 27-37 and accompanying text.

²⁷² Hoffmann & Stuntz, *supra* note 5 at 96 (asserting that, under the authors’ proposed innocence track, a prisoner who successfully raises a threshold claim of innocence would be entitled to review “without regard to any

1. One-Year Limitations Period

The federal post-conviction innocence track would exempt participants from AEDPA's one-year limitations period. Since the passage of AEDPA, legal scholars have advocated for an actual innocence exception to the one-year limitations period imposed under § 2244(d)(1).²⁷³ This approach recognizes the inherent challenges of post-conviction litigation, particularly where actual innocence is raised. For example, federal habeas petitioners are incarcerated, and are overwhelmingly acting in a pro se status, and there is a tendency for evidence of innocence to emerge in an ad hoc fashion, bit by bit over time.²⁷⁴

Thus, a prisoner could petition for federal habeas corpus review under the innocence track whenever the new evidence of innocence presented itself, regardless of whether it occurred within AEDPA's one-year restriction. This approach would allow review of petitions on the merits, based on actual innocence.

2. Prohibition on Second and Successive Petitions

Under the federal post-conviction innocence track model, petitioners who satisfy the gateway actual innocence requirement would also be exempt from the prohibition against second and successive petitions imposed under AEDPA. Specifically, the "piecemeal problem" discussed in Part VB1 above, supports an exemption from this procedural bar.²⁷⁵ Prisoners acting in a pro se status lack the training and experience of assigned counsel and face the uphill battle of piecing together proof of innocence while incarcerated.²⁷⁶ Given these realities, each attempt by a prisoner to access new information—whether to re-interview witnesses, locate physical evidence for biological testing, or gain access to documents—is likely to be delayed, if not foreclosed.²⁷⁷

To further complicate matters, once a prisoner finally succeeds in gaining access to potentially exonerating new evidence, AEDPA's strict limitations period requires immediate filing. The combination of these influences results in the need to file successive petitions in order to get all the relevant information before the reviewing court.²⁷⁸ Again, exempting petitioners from this procedural bar under the innocence track would result in greater numbers of viable innocence claims being heard on the merits.

possible procedural deficiencies").

²⁷³ See, e.g., Sussman, note 42, at 363 (criticizing AEDPA's one-year limitations period as unreasonable, particularly vis a vis petitions raising claims of actual innocence); see also Zheng, *supra* note 32, at 2103-07 (discussing AEDPA's statute of limitations provision as a radical departure from historical federal habeas jurisprudence and noting its impact on petitioners raising claims of actual innocence).

²⁷⁴ See *supra* notes 72-77 and accompanying text.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ See Hartung, *supra* note 15, at 89-90 (identifying the "piecemeal problem" as a reality in federal habeas litigation, and noting that "it is no surprise that when a pro se prisoner seeks federal habeas corpus review, the process is likely to occur via multiple successive petitions, each raising a new ground for relief").

²⁷⁸ See *id.* at 90 (noting that filing multiple federal habeas petitions "is not a tactic, or an abuse of the system, but rather a necessity for a person acting alone to pursue a legal remedy while incarcerated").

C. Application of De Novo Review

Once the threshold is met, demonstrating that new evidence supports the petitioner's probable factual innocence, a petitioner seeking to opt into the federal post-conviction innocence track would be entitled to de novo review of the underlying state conviction. Again, this approach strikes a balance between the recalibrated policy interests of finality and fairness underlying the AEDPA debate in the mid-1990's. Specifically, allowing de novo review in this limited context would provide for a more comprehensive (and admittedly more expensive) scrutiny in cases where a legitimate issue of actual innocence has been raised.

And while de novo review is undoubtedly costly, and would impose significant demands on limited judicial resources, it is difficult to argue that these financial concerns warrant keeping innocent prisoners behind bars. Aside from the moral imperative supporting this approach, there is a practical argument in favor of addressing wrongful convictions systemically and efficiently. Finding a procedure that effectively brings wrongful convictions of the innocent to light will prevent the imposition of astronomical civil settlements for wrongful conviction under state compensation statutes.

The reality of post-conviction litigation is that, without counsel, incarcerated federal habeas petitioners have the deck stacked against them and are unlikely to secure relief.²⁷⁹ Over twenty years ago, when Hoffmann and Stuntz proposed a federal habeas track in the pre-AEDPA era, they argued that their approach would "greatly simplify habeas doctrine" and ultimately would "protect many values, of which innocence is the most important."²⁸⁰ The federal post-conviction innocence track proposed in this Article would promote these values in a comparable way, and at a time when they are under attack.

VI. CONCLUSION

The primacy of innocence in federal habeas jurisprudence is a concept that significantly pre-dates AEDPA. Yet the passage of AEDPA has operated to eviscerate federal habeas review of state court convictions for the innocent and guilty alike. This legislation was debated and enacted before the Innocence Movement began in earnest, and has not been meaningfully re-examined since. Now that the twenty-sixth anniversary of the first DNA exoneration is upon us, the time has come to revisit federal habeas procedures. With the benefit of the exoneration data stemming from the Innocence Movement, and a better understanding of the depths of the wrongful conviction crisis in our criminal justice system, the competing interests animating the original AEDPA debate must be recalibrated. Indeed, the interests of accuracy and substantive justice weigh more heavily today against the competing interest of finality of criminal judgments. The federal post-conviction innocence track proposed in this Article would achieve a more measured balance of these interests and would help bring about the systemic change historically absent from the array of previous Innocence Movement reforms.

²⁷⁹ Hoffman & King, Opinion, *supra* note 115 (noting that "only a tiny fraction" of the 17,000 habeas petitioners obtain any form of relief).

²⁸⁰ Hoffmann & Stuntz, *supra* note 5, at 99.