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by LeRoy Pernell*

INTRODUCTION

It is the purpose of this Article not to simply document the influence of race on our criminal system and its role in the current racial crisis of overrepresentation of minorities in our prisons, but rather to focus on the future and importance of a key tool in the struggle for racial equity—federal habeas corpus as a postconviction remedy. By looking first at the racial context of several "landmark" criminal justice reform decisions, this Article considers how race serves as the root of the procedural due process reform that began in earnest during the Warren Court. This Article then notes the important role played by federal habeas corpus as a postconviction remedy as well as the unique nature and suitability of this "extraordinary writ" to bring about transformative change.

On July 14, 2015, President Barack Obama, in a historic and unique statement for a United States President, declared that the American criminal justice system is particularly skewed by race. In a speech to the National Association for the Advancement of Colored People (NAACP)

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Annual Convention, President Obama noted a "long history of inequity in the criminal justice system in America."[1] Although the United States is home to only 5% of the world's population, it accounts for 25% of the world's prisoners. Incredibly, of those 2.2 million prisoners, 60% are African-American or Latino men. This translates to the incarceration of 1 in 35 African-American men and 1 in 88 Latino men—as opposed to 1 in 214 white American men.[2] The sheer number and percentage of African-Americans—men in particular—in prison represent a social and political epidemic and pose what may be the most significant question regarding the state of civil rights faced in the twenty-first century. Professor Michelle Alexander refers to this level of incarceration as the "New Jim Crow."[3]

President Obama's speech set forth three areas of particular concern motivating the President to propose federal action. He generally described these areas as the community, the courtroom, and the cell block. Part of the President's concern, outlined in his address, focused on what he termed as "change in the courtroom."[4] In this context, he focused almost exclusively on the outcome of the adjudicatory process—namely, sentencing. Like Professor Alexander, President Obama placed the root cause of the disproportionate presence of African-Americans in prisons largely on non-violent drug offences. The President's suggested remedy consisted of encouraging better use of prosecutorial discretion, treatment-oriented alternatives to prison, and legislative sentencing reform.[5]

Additionally, the President's address concerned itself with institutional conditions and the function of penal institutions. The level of prison overcrowding, overuse of solitary confinement, and the lack of rehabilitative programs, combined with lengths of sentences that are the longest in western societies, serve much more destructive purposes than rehabilitation. The President also suggested that attention be paid to barriers to successful reintegration of convicted felons into society after incarceration. Citing Montgomery County, Maryland, which provides job training and eliminated unnecessary reporting of prior convictions on job

1. Office of the Press Secretary, *Remarks by the President at the NAACP Conference*, THE WHITE HOUSE (July 14, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/07/14/remarks-president-naacp-conference [hereinafter *Remarks by the President*].

2. *Id.*

3. *See* MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

4. *See Remarks by the President*, *supra* note 1.

5. *See id.* The first of these concerns, community, centers largely on the perception and treatment of children in African-American communities. *Id.* Much of this concern is expressed in the current parlance of the "school-to-jail" pipeline. *Id.*

applications, the President raised old and new ideas of institutional reform.[6] Alexander and the President's remarks focused on the devastating and disproportionate impact conviction and incarceration have had on the African-American community. The generations of African-Americans adjudicated as felons who are ostracized and disenfranchised—both politically and economically—have often deprived an entire community of its best and brightest. Notwithstanding the significance of Alexander's and President Obama's positions, attention should be paid to the equal, if not greater, extent that the process of adjudication and law enforcement ensnares one out of thirty-five African-American men. The existence of racism and the impact of disparate perception and treatment because of race, in a system of selective law enforcement and guilt determination, raises fundamental questions of societal and legal legitimacy.

This historic and profound corruption of justice in the court plaguing our legal system has not gone entirely unnoticed. A. Leon Higginbotham, Jr., perhaps one of the greatest African-American jurists of our time,[7] commented on the interaction between law and racism present in our judicial system. In *Shades of Freedom*,[8] Higginbotham states, "Acts of racism in the courts are symptomatic of the society's cultural racism. They trigger other racist assumptions in the minds of [the] courtroom participants and symbolize to society the legitimacy of the ideology of racism."[9] Higginbotham describes how the culture of racism impacts even the setting for a supposedly fair trial.[10] In the 1948 decision in *Murray v. State*,[11] the Mississippi Supreme Court upheld segregation by not allowing African-Americans to observe the African-American defendant's "public" trial except from the balcony of the courtroom.[12] It was not until fifteen years later that the Supreme Court of the United States recognized that such segregation not only denied the right of African-

6. *Id.*

7. Judge Higginbotham was the chief judge of the United States Court of Appeals for the Third Circuit and the Public Service Professor of Jurisprudence at the John F. Kennedy School of Government, Harvard University. He was a recipient of the Presidential Medal of Freedom, the author of IN THE MATTER OF COLOR, and the winner of several awards including the American Bar Association's Silver Gavel Award and the National Bar Association's Literary Award.

8. *See* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM (1996).

9. *Id.* at 132.

10. *Id.* at 132–34.

11. 33 So. 2d 291 (Miss. 1948).

12. *Id.* at 292–93.

Americans to be part of the public at a public trial but also denied the defendant equal protection.[13]

From courtroom "apartheid"[14] and the debasing and devaluing of witnesses and evidence because of race[15] to the undisguised appeal to racial fear,[16] American legal history has been replete with the denial of fair and equal justice because of race. In *Moulton v. State*,[17] this distortion of justice often reflects the impact of fear based on stereotypes of the African-American people.[18]

There is perhaps no more vivid demonstration than *Brown v. Mississippi*[19] of racism destroying any semblance of due process. On March 30, 1934, someone murdered a prominent local planter named Raymond Stewart. The crime was particularly brutal in that Stewart was substantially disfigured with an axe.[20] The local sheriff was unable to obtain a solid lead on the crime—particularly after bloodhounds were unable to track a scent. The sheriff and his deputies concluded that the crime must have been committed by African-Americans. This notion particularly took hold when a local African-American, Arthur Ellington, having heard about the murder, visited the Stewart estate to pay his respects.[21]

With no physical evidence or leads, Sheriff Adcock remembered that, on Stewart's large property holdings, there lived a thirty-year-old African-American tenant by the name of Ed Brown. Within a span of forty-eight hours, Ellington, Brown, and another local African-American resident, Henry Shields, became the objects of suspicion, terror, and torture. On the afternoon of March 30, Deputy Sherriff Dials and others

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13. Johnson v. Virginia, 373 U.S. 61, 62 (1963).

14. *See* HIGGINBOTHAM, *supra* note 8, at 132–34.

15. In *Ex parte* Mary Hamilton, 156 So. 2d 926, 926–27 (Ala. 1963), *rev'd*, 376 U.S. 650 (1964), African-American witnesses were refused the respect and the implied credibility from being addressed on the stand by more than just their first name.

16. Moulton v. State, 74 So. 454, 454 (Ala. 1917) ("Unless you hang this negro, our white people living out in the country won't be safe; to let such crimes go unpunished will cause riots in our land.").

17. 74 So. 454 (Ala. 1917).

18. Former New York City Mayor Edward Koch has stated, "[F]or many whites, crime has a black face." Edward I. Koch, *Crime, Race, Prejudice, Fear*, N.Y. TIMES (Jan. 19, 1987), http://www.nytimes.com/1987/01/19/opinion/crime-race-prejudice-fear.html. Regarding the 1989 alleged rape of a Central Park jogger, then-financier Donald Trump publicly called for the death penalty. Rick Perlstein, *New York Republicans: Before You Vote Today, Read This*, NEWSWEEK (Apr. 19, 2016), http://www.newsweek.com/new-york-republicans-vote-read-449301. *See Remarks by the President*, *supra* note 1.

19. 297 U.S. 278 (1936).

20. Brown v. State, 158 So. 339, 339–40 (Miss. 1935), *rev'd*, 297 U.S. 278 (1936).

21. *Brown*, 297 U.S. at 282.

visited Ellington's home. After requesting that Ellington accompany Dial to the deceased's home, Ellington was then subjected to accusation by a mob of white men demanding Ellington's confession. Ellington maintained his innocence and was thereafter hanged from the limb of a nearby tree. This was done twice; still Ellington would not confess. He was thereafter beaten severely, but then released to return home, still maintaining his innocence. Ellington's ordeal continued when the sheriff's deputy and his gang of whites returned sometime during the next two days under the pretext of arresting Ellington, but the deputy transported him to Alabama where he was severely beaten and told that the beating would continue until he confessed. Alone and presented with no alternative, Ellington "agreed" to confess. Brown and Shields fared no better. Both were arrested on April 1, stripped, beaten, and informed that the beatings would continue until they confessed—which they did. Ellington's injuries were so bad that the marks of the beating and hanging were plainly visible at trial.[22]

Particularly significant for discussion in this Article is the façade of "due process" provided to the defendants. A "hearing" was conducted to determine the voluntariness of the confessions twenty-four hours after the defendants' arrest. This was conducted by the same sheriff's department responsible for the torture. Unsurprisingly, the confessions were found to be voluntary.[23] Legal counsel was appointed, as this was a capital case. The defendants were indicted just twenty-four hours before the trial. Aside from cross-examining the sheriff's officers, who freely admitted their conduct in coercing the confessions, and objecting generally to the admission of the statements, no real effort was made by appointed counsel to suppress the confessions.[24] The Supreme Court found a violation of the Due Process Clause of the Fourteenth

22. *Id.* at 281–83.

23. *Id.* at 282–83. We know about the charade of this proceeding only because the tormentors of these African-American men were so brazen as to detail their efforts and the consequences for the defendants fully on the record at trial. The tormentors told the defendants that if they changed or denied their statements at trial they would be beaten and tortured again. In an infamous statement at trial, Deputy Dial, when asked about whether he observed that the defendants were severely beaten, testified, "Not too much for a negro; not as much as I would have done if it were left to me." *Id.* at 284.

24. *Id.* at 279–80, 283–85. It is relevant to note for this Article that defense counsel's failure to move to suppress may well have constituted a procedural default pursuant to *Wainwright v. Sykes*, 433 U.S. 72 (1977), had this matter been one of Federal Habeas Corpus under 28 U.S.C. § 2254 (2017), or this claim might have otherwise been barred in habeas by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

Amendment of the United States Constitution[25] in light of the extraordinary record.[26]

Brown demonstrates that Michele Alexander's "New Jim Crow" is more than just disproportionate numbers in prison but includes the product of racial fear infecting our criminal justice system—not just at sentencing, but in the very determination of who is subjected to criminal justice and what type of justice the African-American defendant receives. Race's role as an impermissible part of criminal adjudication was often a large (although mostly unspoken) part of the criminal justice reforms of the 1960s and 1970s. Racism has been fought as the antithesis of due process and equal protection. While few deny significant progress was obtained through these reforms, it is somewhat Pollyannaish to suppose this negative legacy does not still provide a major source of concern.

Federal judicial review has been the principal tool for addressing the impermissible unfairness of race consideration in the criminal adjudication. Federal review has historically been proven as necessary not just because state courts were "distrusted" or "suspect" but because the core principles of due process and equal protection for insular populations are of national importance and significance. As such, the uniformity, clarity, and hoped-for finality of federal pronouncement has provided, and continues to provide, national guidance.

The process of change has been slowed by retrenchment in the years following the Warren Court. Yet, despite contrary assessment from some scholars, the full achievement of racial adjudicatory justice, even under the guise of due process expansion of defendant-rights, was never fully realized. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[27] and the ratification of the act by the Court, appears to remove needed federal habeas corpus determination from the fight. This Article looks at those barriers, as well as opportunities for bringing the extraordinary writ back to the forefront. If "Black Lives Matter" is to be the twenty-first century rallying cry for justice in the criminal justice system, that cry must be heard at the adjudication stage and not just concerning the dispositional impact.

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25. U.S. CONST. amend. XIV, § 1.

26. *Brown*, 297 U.S. at 287.

27. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

I. THE MYTH OF COLOR-BLIND PROCEDURAL JUSTICE

A. The Sixth Amendment Right to Counsel

Cases such as *Brown* show that the basic tenets of due process were not always available for African-American defendants. This was no truer than in the events that occurred in the year prior to *Brown*, in Scottsboro, Alabama. In the battle for civil rights, which particularly consumed the nation for the remainder of the twentieth century, the case of the "Scottsboro Boys"[28] was a major social and legal battleground. Out of these events, the Supreme Court ultimately issued three significant decisions.[29] The first, *Powell v. Alabama*,[30] was perhaps the most important for criminal procedure reform.[31] Although not a habeas corpus case, its progeny expanded into the Sixth Amendment of the United States Constitution[32] through the use of federal habeas corpus.

The basic facts, riveting as any in *Brown*, have fueled books, movies, and documentaries.[33] On March 25, 1931, following an altercation on a train bound from Chattanooga to Memphis, Tennessee, several hoboing white men were ejected from a train by what was described as several black youths. The station master in Stevenson, Alabama discovered these white males and, after hearing of their ejection from the train by the black youths, telephoned ahead for the train to be stopped in Scottsboro, Alabama. The train, having already passed through Scottsboro, was halted in Paint Rock, Alabama by a sheriff's posse, which discovered not only the nine black youths but two white women as well.[34] The two women, Ruby Bates and Victoria Price, alleged they had been raped,[35] although a later dispassionate review of the evidence showed no rape had

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28. Although the use of the term "Boys" is rightly often considered pejorative when applied to African-American men given its place in American race-based tradition, it was accurate when describing these defendants. These eight young men were all teenagers ranging from age thirteen to twenty. *Scottsboro Trials*, ENCYCLOPEDIA OF ALA., http://www.encyclopediaofalabama.org/article/h-1456 (last visited Mar. 14, 2018).

29. Patterson v. Alabama, 294 U.S. 600 (1935); Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

30. 287 U.S. 45 (1932).

31. *See generally id.*

32. U.S. CONST. amend. VI.

33. *See* HAYWOOD PATTERSON & EARL CONRAD, SCOTTSBORO BOYS (1950); CAST RECORDING, THE SCOTTSBORO BOYS (Jay Records 2010) (composed by John Kander & Fred Ebb); DVD: AMERICAN EXPERIENCE: SCOTTSBORO: AN AMERICAN TRAGEDY (PBS 2001).

34. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 3–5 (rev. ed. 1979).

35. *See* Michael J. Klarman, Powell v. Alabama: *The Supreme Court Confronts "Legal Lynchings," in* CRIMINAL PROCEDURE STORIES 1–2 (Carol S. Steiker ed., 2006).

occurred.[36] However, the accusation was enough to stir a lynch mob so set on hanging these black teenagers that the local sheriff sought and received the assistance of the Alabama National Guard.[37] Against this backdrop, the defendants were indicted, arraigned, and brought to trial within twelve days of the alleged offense. An additional defendant was added for a total of nine, and the defendants were divided into three groups for trial.[38] Each trial was what could most charitably be referred to as a mockery of justice.

At arraignment, the Scottsboro defendants appeared without counsel.[39] At the trial itself, a mere six days after indictment, no one answered for the defendants or appeared to represent them except for the curious appearance of a "Mr. Roddy." Roddy, a Tennessee lawyer, was not a member of the local bar, but was there because "people who were interested had spoken to him about the case."[40] Roddy was very careful not to agree to representation of the defendants and suggested that he would be willing to assist if local counsel appeared.[41] A "Mr. Moody," who later commentators suggested may have lacked the competency to handle this capital case,[42] referred vaguely to the trial court's prior appointment of the "entire bar" and suggested that all had been done that could be done to prepare for trial.[43] As stated by the Court, "[a]nd in this casual fashion the matter of counsel in a capital case was disposed of."[44]

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36. J. MICHAEL MARTINEZ, THE GREATEST CRIMINAL CASES: CHANGING THE COURSE OF AMERICAN LAW 43 (2014).

37. *See* Klarman, *supra* note 35, at 2.

38. *Powell*, 287 U.S. at 49, 53, 74.

39. *Id.* at 49. The Court noted that, despite a bizarre claim from the State that the trial court appointed counsel at arraignment, there effectively was no such appointment. There was a colloquy referred to by the trial judge shortly before trial in which the trial judge allegedly appointed "all seven members of the Scottsboro bar to represent the [defendants]." *Id.*; CARTER, *supra* note 34, at 17. This "appointment" would allegedly have included the prosecution as well. With no one identified as responsible counsel, the defendants were called upon, in a case in which their lives were at stake, to enter a plea without the benefit of effective assistance of counsel. *Powell*, 287 U.S. at 49–50.

40. *Powell*, 287 U.S. at 53. The headlines about the case had attracted the interest of out-of-state socialist and communist movements. *See* CARTER, *supra* note 34, at 68–69.

41. *Powell*, 287 U.S. at 53–56.

42. J. Michael Martinez described Moody and Roddy as follows: "Milo Moody was a befuddled septuagenarian who had not represented clients in court for decades and Stephen Roddy was an alcoholic real estate attorney from Chattanooga, Tennessee." MARTINEZ, *supra* note 36, at 43. Milo Moody was nearly seventy years old and described as a "doddering, extremely unreliable, senile individual who is losing whatever ability he once had." *Id.* at 18.

43. *Powell*, 287 U.S. at 54–56.

44. *Id.* at 56.

The issue of race dominated the setting and the issues in this case. Adding to the racially-hostile climate was the fact that the Scottsboro defendants were tried before juries from which qualified African-Americans were systematically excluded because of race. This was one of the denials of due process and equal protection complained of before the Court in *Powell*.[45] However, the only issue that the Court chose to address was that of denial of counsel.[46] Rather than addressing directly what mistreatment the Scottsboro defendants suffered constitutionally because of race, the Court turned instead to the basic tenets of procedural due process under the Fourteenth Amendment.[47]

The landmark decision in *Powell* is the fountainhead for much of what we know today as procedural due process in criminal procedure. It is certainly the beginning of what ultimately became the Sixth Amendment right to appointed counsel as well as the Sixth Amendment concept of effective assistance of counsel. Basing its analysis on the Due Process Clause of the Fourteenth Amendment, the Court determined that procedural Due Process at a minimum always requires reasonable notice and an opportunity to be heard prior to judgment.[48]

Regarding the "opportunity to be heard," the Court linked such a right to the need to be effectively heard through counsel.[49] Although tempted, the Court, through its discussion, avoided directly holding that appointed counsel is necessary for those who cannot afford counsel, and avoided applying the Sixth Amendment to the states via the Fourteenth Amendment.[50] Instead, the Court stressed that the right to be heard "would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[51]

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45. *Id.* at 50.

46. *Id.* The systematic exclusion of African-American jurors in the Scottsboro case was addressed directly in *Norris*. *See Norris*, 294 U.S. at 588–89. In *Norris*, the Court concluded that the systematic and arbitrary exclusion of "negroes" from grand and petit jury lists, solely because of their race or color, is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Id.* at 589.

47. *Powell*, 287 U.S. at 50.

48. *Id.* at 68.

49. *Id.*

50. That would come later in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

51. *Powell*, 287 U.S. at 68–69. The Court also stated:

> It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions.

Id. at 68.

For counsel to be effective it must be more than in name only. Appointed counsel must be assigned "at such a time or under such circumstances as to [not] preclude the giving of effective aid in the preparation and trial of the case."[52] This bedrock principle of due process was stated in terms many perceived to have universal application for indigents facing criminal prosecution without counsel.[53] As such, it appeared to take on a meaning devoid of its racial justice history. This perception was drastically altered by the habeas corpus decision in *Betts v. Brady*[54] ten years later.[55]

Betts concerned an unemployed forty-three-year-old white farmhand accused of robbery.[56] Unemployed and minimally educated, Betts sought appointed counsel. His request was denied, and he was found guilty at trial and sentenced to eight years. Relying on the Court's holding in *Powell*, Betts asserted that due process required the appointment of counsel for an indigent accused of crime as a fundamental protective right.[57] The Court in *Betts* both declined to recognize a right to appointed counsel as an "incorporated" right of the Sixth Amendment made applicable to the State via the Due Process Clause of the Fourteenth

52. *Id.* at 71.

53. Optimistically, a note in the *Maryland Law Review* following *Palko v. Connecticut*, 302 U.S. 319 (1937), opined that state abridgement of the Sixth Amendment right to counsel was prohibited by the Fourteenth Amendment under *Powell* because such a right was part of the fundamental principles of liberty and justice. *Extent to Which Rights Secured by the First Eight Amendments to the Federal Constitution are Protected Against State Action by the Fourteenth Amendment*, 2 MD. L. REV. 174, 175–76 (1937–1938). This interpretation was specifically rejected by *Betts v. Brady*, 316 U.S. 455 (1942).

54. 316 U.S. 455 (1942).

55. *See generally* Yale Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962–1963). Professor Kamisar argued, prior to the landmark decision of *Gideon*, that the Court was wrong to reject the concept of incorporation of the Sixth Amendment right to counsel under the Fourteenth Amendment and as independently consistent with Due Process values of fundamental fairness. *Id.* at 219–20.

56. *See* Peter W. Fenton & Michael B. Shapiro, *Looking Back on* Gideon v. Wainwright: *"Lawyers in Criminal Courts Are Necessities, Not Luxuries,"* 36 CHAMPION 24, 24 (June 2012).

57. Brief for Petitioner at 7, 16, *Betts v. Brady*, 316 U.S. 455 (1942) (No. 837).

Amendment[58] and declined to hold that Due Process directly required appointed counsel for indigents as a result of its opinion in *Powell*.[59]

Finding that *Powell* required "special circumstances" to be decided on a case-by-case basis in order for a defendant to be constitutionally entitled to appointed counsel, the Court noted that the racial tension, poverty, and perceived intellect of the Scottsboro defendants were key to the finding of a due process violation.[60] Although Betts was also indigent and possessed a limited education, his situation did not have the climate of racial injustice present in *Powell*.[61] The Court's path of expansion of "circumstances" beyond the racially charged climate of *Powell* and towards a generalized concept of appointed counsel via the Sixth Amendment ran through a growing list of key situations dependent less on correcting racial injustice and more on the significance of counsel to the trustworthiness of the adjudication system.[62]

Gideon v. Wainwright,[63] a federal habeas corpus original action, firmly resolved the right to appointed counsel for indigent defendants. Under the incorporated Sixth Amendment, a "flat" right applies to all indigents regardless of special circumstances.[64] However, while Clarence Earl Gideon was not a poor African-American, the significance of this decision should be considered in the context of both the emerging national struggle over civil rights for African-Americans and in the specific context of the Court's own activity incorporating Bill of Rights protections for criminal defendants.

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58. *Betts*, 316 U.S. at 461–62. The Court recognized that the Sixth Amendment forbade the federal government from denying appointed counsel for indigents facing criminal prosecution. Johnson v. Zerbst, 304 U.S. 458 (1938). However, the Court in *Powell*, and subsequently prior to *Betts*, declined to find such a protection was part of an "Ordered Scheme of Liberty" for incorporation through the Due Process Clause of the Fourteenth Amendment. *See Powell*, 287 U.S. at 71–72.

59. *Betts*, 316 U.S. at 473.

60. *See id.* at 463–64. The Court noted:

> In *Powell v. Alabama*, 287 U.S. 45, ignorant and friendless negro youths, strangers in the community, without friends or means to obtain counsel, were hurried to trial for a capital offense without effective appointment of counsel on whom the burden of preparation and trial would rest, and without adequate opportunity to consult even the counsel casually appointed to represent them.

Id. at 463.

61. *Id.* at 474 (Black, J., dissenting).

62. Chewning v. Cunningham, 368 U.S. 443, 447 (1962) (noting habitual offender statutes are so complex as to satisfy the special circumstances test); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (noting arraignments by their nature satisfy the special circumstances test); Bute v. Illinois, 333 U.S. 640, 648 (1948) (noting capital cases by their nature satisfied the special circumstances test).

63. 372 U.S. 335 (1963).

64. *Id.* at 343–44.

The Court agreed to hear the handwritten petition of *Gideon* on June 4, 1962.[65] That year marked a key point in the Civil Rights movement timeline. James Meredith became the first African-American student to enroll at the University of Mississippi.[66] Just a few months earlier, during the spring and summer of 1961, "Freedom Rides"[67] to end segregation in transportation and travel began throughout the South. By the time of the Court's decision in 1963, Dr. Martin Luther King's *Letters from Birmingham Jail*[68] was just weeks away, and Medgar Evers would be murdered in approximately ninety days.[69] Most importantly, perhaps, the historic March on Washington, D.C., was already announced to take place in August.

Despite the seminal role that *Gideon* played in establishing rights for all criminal defendants, it was, at its heart, a case concerned with racial justice. Professor Chin states, "*Gideon* was a race case, in that *Gideon* and the Court's other criminal procedure cases of the era were concerned with institutional racism."[70] Citing back to *Powell*, Chin sees *Gideon* as an "outgrowth of Jim Crow ideology" where the Court resolved injustice against African-Americans by accepting racial stereotypes of African-Americans as ignorant, incompetent, and requiring special scrutiny by providing the "guiding hand of counsel" throughout adjudication.[71]

The connection between the right to appointed counsel and race is at least as strong as the connection between the right to counsel and poverty.[72] The challenge for the Warren Court in *Gideon*, however, was

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65. Order Granting Writ of Certiorari, 370 U.S. 908 (1962).

66. *UM History of Integration*, UNIV. OF MISS., https://50years.olemiss.edu/ (last visited Mar. 14, 2018).

67. *Freedom Rides (1961)*, BLACKPAST.ORG, https://www.blackpast.org/aah/freedom-rides-1961 (last visited Mar. 14, 2018).

68. *Martin Luther King Jr.'s 'Letter From Birmingham Jail'*, ATLANTIC, https://www.theatlantic.com/politics/archive/1963/08/martin-luther-kings-letter-from-birmingham-jail/274668/ (last visited Mar. 14, 2018).

69. *Medgar Evers Biography*, BIOGRAPHY.COM, https://www.biography.com/people/medgar-evers-9542324 (last visited Mar. 14, 2018).

70. Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2239 (2013).

71. *Id.* at 2239, 2247. Note how the Court in *Powell*, particularly as interpreted through *Betts*, spoke first of the Scottsboro defendants as "ignorant and friendless negro youths." *Betts*, 316 U.S. at 463; *see Powell*, 287 U.S. at 71. This perception of African-Americans in the context of defendant rights was rampant in its racial vision prior to the Warren Court's refocusing on less overtly race-driven views. *See* Chambers v. Florida, 309 U.S. 227, 238 (1940) (describing interrogation of "ignorant young colored tenant farmers"); Moore v. Dempsey, 261 U.S. 86, 102 (1923) (McReynolds, J., dissenting) ("The fact that petitioners are poor and ignorant and [B]lack naturally arouses sympathy.").

72. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 8 n.56 (2011) ("[F]ailure to provide

to move away from the race-oriented conception of the importance of a right to appointed counsel and towards a right with broad and uniform application through incorporation of the Sixth Amendment.

The goal of a broader application, less dependent on race, as a special circumstance, was aided by the fact that the NAACP Legal Defense and Education Fund did not file an *amicus* brief as it did in two other cases.[73] Two *amici* mention race only in passing, though in the context of the aforementioned questionable link of being black to ignorance.[74]

Perhaps the most significant link of the right to counsel to race—African-Americans in particular—can be found in recognizing the importance of counsel to the African-American prisoner. The African-American prisoner, greatly overrepresented in the prison population,[75] has particular need for the guiding hand of counsel. The need for counsel to challenge unjust convictions and sentences has been a source for challenging the extent of *Gideon*'s application.

It was in the federal habeas corpus case of *Mempa v. Rhay*[76] that the Court first addressed whether *Gideon* applied to post-adjudication of guilt. The Court in *Mempa* concluded that *Gideon* applied to sentencing, even where that sentencing is on a date separate from adjudication of guilt.[77] Applying its "critical stage" rationale, which dates back to *Powell*, the Court found that appointment of counsel for an indigent defendant is required at every stage of the criminal proceeding where substantial rights of a criminal accused may be won or lost.[78]

This critical issue of legal representation for prisoners who, after imprisonment, have even fewer resources for hiring counsel is important to any sense of justice for the incarcerated. In *Johnson v. Avery*,[79] the Court addressed this issue. Once again, habeas corpus was the tool of

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adequate assistance of counsel to accused indigents draws a line not only between rich and poor, but also between white and black.") (quoting Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 L. & CONTEMP. PROBS. 81, 83 (1995)).

73. Chin, *supra* note 70, at 2246–47, 2246 n.45.

74. *See* Brief for the State Government Amici Curiae at 6, *Gideon*, 372 U.S. 335 (1962) (No. 155) (mentioning race only when citing cases where the Supreme Court found denial of the right to counsel to an "ignorant Indian," Rice v. Olson, 324 U.S. 786, 786–87 (1945), and an "ignorant, inexperienced Negro," McNeal v. Culver, 365 U.S. 109, 110 (1961), among others); Brief of the American Civil Liberties Union and the Florida Civil Liberties Union, Amici Curiae at 9, *Gideon*, 372 U.S. 335 (1962) (No. 155) (mentioning a particular race only when discussing *Moore v. Michigan*, 355 U.S. 155 (1957), which involved "a 17 year old Negro with a 7th grade education and possible mental defects").

75. *See Remarks by the President*, *supra* note 1.

76. 389 U.S. 128 (1967).

77. *Id.* at 134, 137.

78. *Id.* at 134.

79. 393 U.S. 483 (1969).

choice.[80] The Court considered whether practical access to assistance from a "jailhouse lawyer" could be barred where such a bar meant the realistic denial of an illiterate and poor-access inmate to federal habeas corpus relief.[81] Significantly, and perhaps ironically, the opinion in *Johnson* is authored by Abe Fortas, the then lawyer who successfully argued *Gideon* just seven years earlier.[82] While declining *sub silentio* to extend *Gideon* to postconviction relief attempts,[83] Justice Fortas wrote, presumably as a matter of Due Process: "[U]nless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for postconviction relief, it may not validly enforce a

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80. *Id.* at 485. Johnson, after being placed in solitary confinement, initially sought relief by way of the Civil Rights Act of 1964. Brief for the Petitioner at 5, *Johnson*, 393 U.S. 483 (1969) (No. 40). The district court, viewing the request liberally, treated the complaint as a petition for federal habeas corpus. *Id.* at 484. The Court, in addressing the allowance of consideration for habeas corpus relief, said, in terms that would be rather surprising in today's climate: "This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" *Id.* at 485 (quoting Bowen v. Johnston, 306 U.S. 19, 26 (1939)).

Because the purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that prisoners' access to the courts, for the purpose of presenting their complaints, is not denied or obstructed. For example, a state may not make the writ available only to prisoners who could pay a $4 filing fee. Smith v. Bennett, 365 U.S. 708, 712–14 (1961). The Court has insisted that, for the indigent as well as the affluent prisoner, postconviction proceedings must be more than a formality. For instance, the state is obligated to furnish a transcript or equivalent recording of prior habeas corpus hearings to prisoners not otherwise able to obtain it for use in further proceedings. Long v. Dist. Ct. of Iowa, 385 U.S. 192, 194–95 (1966). *Cf.* Griffin v. Illinois, 351 U.S. 12 (1956).

81. *Johnson*, 393 U.S. at 487.

82. *Id.* at 484; *Gideon*, 372 U.S. at 335–36.

83. *See Johnson*, 393 U.S. at 483. The Court in *Mempa* ruled in favor of applying *Gideon* to sentencing only because it viewed sentencing as a continuation of the trial process. 389 U.S. at 134–37. The application of the Sixth Amendment right to counsel has consistently been determined to be limited to the critical stages of the trial process. That process ends with sentencing. *Id.* at 133–34. The issue of appointed counsel for an indigent defendant once the trial process has ended, based on considerations other than the Sixth Amendment, was addressed in *Douglas v. California*, 372 U.S. 353 (1963), where it was determined that, where the State guarantees a defendant a right to appeal following conviction, it cannot, consistent with equal protection and due process, deny appointed counsel for an indigent appellant. *Id.* at 357–58. The non-application of an absolute right for appointed counsel in discretionary appeals or postconviction relief challenging the conviction or sentence was determined by the Court in *Ross v. Moffit*, 417 U.S. 600, 610 (1974) (regarding discretionary appeals), and *Murray v. Giarratano*, 492 U.S. 1, 26 (1989) (Stevens, J., dissenting). *See also* United States v. Maccollom, 426 U.S. 317, 328 (1976) (regarding postconviction relief sought pursuant to 28 U.S.C. §§ 2254 and 2255).

regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners."[84]

In *Bounds v. Smith*,[85] the court again considered the need of poor and often illiterate prisoners for assistance in perfecting postconviction claims absent a right to appointed counsel. In *Bounds*, North Carolina inmates sought, via a civil action, to require the state to provide adequate libraries or adequate persons trained in the law to help provide inmates meaningful access to the courts to pursue federal habeas corpus or postconviction relief.[86]

Absent the availability of a Sixth Amendment rationale for requiring appointed counsel in a post-sentencing context, the Court, relying on *Avery*, nonetheless recognized some of the same values associated with effective assistance of counsel.[87] The Court, relying on *Avery* and *Griffin v. Illinois*,[88] recognized that a constitutional right to access to the courts for habeas corpus review requires that access be meaningful.[89] Consistent with the Court's past application of the *Griffin* analysis,[90] the Court in *Bounds* held that the Constitution mandated prisoners be provided access to an adequate law library or adequate assistance from persons trained in the law.[91]

B. Protection Against Unreasonable Search and Seizure

Today, many of us would immediately associate the name of Don King with his role as a professional boxing promoter with a unique hair style.[92] However, his connection to a landmark case at the foundation of racial justice and expansion of individual rights for all Americans under the Fourth Amendment of the United States Constitution,[93] as incorporated through the Fourteenth Amendment, is just as interesting and significant. In 1957, Donald "the Kid" King, then twenty-five years old,

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84. *Johnson*, 393 U.S. at 490.

85. 430 U.S. 817 (1977).

86. *See id.* at 818.

87. *Id.* at 831.

88. 351 U.S. 12 (1955).

89. *Bounds*, 430 U.S. at 828.

90. *Cf.* Mayer v. City of Chicago, 404 U.S. 189, 193–94 (1971) (recognizing that the state, consistent with due process and equal protection requirements, may meet its constitutional obligation of providing court access via a free transcript for appeal as-of-right purposes or by employing an adequate substitute, such as use of codefendant or prosecution transcripts).

91. *Bounds*, 430 U.S. at 830–31.

92. *See Don King*, BIOGRAPHY.COM, http://www.biography.com/people/don-king-40721 (last visited Sept. 16, 2017).

93. U.S. CONST. amend. IV.

had already had several run-ins with the law, several of which were connected to allegations of gambling. On May 20th of that year, a bomb was detonated at King's home in Cleveland, Ohio. King, suspecting that the bombing was connected to the activities of another suspected gambling "boss," contacted the Cleveland Police Department.[94]

As a result of the investigation, attention soon focused on the residence of Dollree Mapp, a reputed "numbers runner." An anonymous tipster reported to the police that Virgil Ogletree, one of the suspected bombers, could be found at Mapp's address.[95] Dollree Mapp, an African-American woman who passed away in December 2014, has been referred to as "[t]he Rosa Parks of the Fourth Amendment."[96] She was long believed by Cleveland law enforcement to have extended involvement in "numbers" gambling in the African-American community. As described by Carolyn Long, "numbers" or "policy" were forms of a daily lottery prominent in many large cities, particularly in African-American communities.[97] These communities largely considered the enforcement of gambling laws against numbers participants to be racially motivated.[98]

The May 23, 1957, confrontation between Mapp and the Cleveland police[99] was destined to change the State's responsibility to respect reasonable expectations of privacy and the consequences of any violation of that responsibility for criminal prosecutions. The confrontation began when Officer Delau of the Cleveland Police arrived at Mapp's address on the same afternoon he received the anonymous tip regarding Ogletree. Without a warrant, Delau rang Mapp's doorbell. When Mapp responded by coming to an upstairs window, the officer indicated that he wanted to "come in and look around." Mapp, an assertive woman not accustomed to backing down, immediately contacted her lawyer's office while Delau repeatedly pounded on the door demanding entrance. A lawyer at her attorney's firm advised Mapp to ask for a warrant. Officer Delau

94. MARTINEZ, *supra* note 36, at 75, 77–78.

95. JOHN S. DEMPSEY & LINDA S. FORST, AN INTRODUCTION TO POLICING 384 (2011); MARTINEZ, *supra* note 36, at 77.

96. Ken Armstrong, *Dollree Mapp, 1923-2014: The Rosa Parks of the Fourth Amendment*, MARSHALL PROJECT (Dec. 8, 2014), https://www.themarshallproject.org/print-post/2014/12/08/dollree-mapp-1923-2014-the-rosa-parks-of-the-fourth-amendment.

97. CAROLYN N. LONG, *MAPP V. OHIO*: GUARDING AGAINST UNREASONABLE SEARCHES AND SEIZURES 10 (2006).

98. *Id.* One observer is quoted as saying, "The white police officers who invaded Dollree Mapp's home did so with confidence that they would not be called to task for violating her fundamental rights by entering her home without a warrant." *Id.* at 11.

99. Mapp v. Ohio, 367 U.S. 643, 644 (1961).

admitted that he did not have a warrant. Mapp refused to admit the officers.[100]

Three hours later, the Cleveland police again sought entrance after consulting with police headquarters. This time, police forced open the door and refused to allow Mapp's attorney, who had since arrived, access to the house. Again, Mapp demanded a warrant.[101] The officers pretended to have a warrant by waiving about a piece of paper,[102] although police later admitted that it was not a warrant. Mapp seized the paper and stuffed it into her bosom.[103] Officer Delau struggled with Mapp and violated her personal dignity by reaching into her clothes to retrieve the fake warrant despite Mapp's objections.[104] Offended by Mapp's "attitude," which Officer Delau described as belligerent, police arrested Mapp and searched her apartment and basement, including areas where no fugitive suspected bomber could possibly hide, such as drawers and a chest.[105] In fact, Ogletree was in another apartment of the building.[106]

Determined to find something incriminating, police ultimately discovered a trunk filled with what was later claimed to be obscene material.[107] This material was deemed enough to serve as pretext for arrest. Initially, Mapp was charged with possession of obscene material.[108] In conference,[109] the Justices decided that rather than reviewing the conviction on the issue of obscenity, this case presented the opportunity to overrule its ruling in *Wolf v. Colorado*[110] by incorporating the Fourth Amendment to the states[111] and extending the federal system's exclusionary rule.[112]

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100. MARTINEZ, *supra* note 36, at 77–78.

101. *Mapp*, 367 U.S. at 644.

102. MARTINEZ, *supra* note 36, at 80.

103. *Mapp*, 367 U.S. at 644–45.

104. MARTINEZ, *supra* note 36, at 80.

105. *Id.*; *Mapp*, 367 U.S. at 645.

106. MARTINEZ, *supra* note 36, at 80.

107. *Mapp*, 367 U.S. at 645.

108. Lewis R. Katz, *Mapp after Forty Years: Its Impact on Race in America*, 52 CASE W. RES. L. REV. 471, 471 (Winter 2001).

109. The Court in *Mapp* recognized that the appellant "chose to urge what may have appeared to be the surer ground [(First Amendment)]" and that it was the amicus curiae that urged the Court to overrule *Wolf v. Colorado*, 338 U.S. 25 (1949) (holding that the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914), was not binding on the states). *Mapp*, 367 U.S. at 646 n.3.

110. 338 U.S. 25 (1949).

111. *Id.* at 33.

112. *Weeks*, 232 U.S. at 398.

As profound an influence as *Mapp* has had on administering criminal justice for all, the significance of the case as part of the ongoing struggle for racial justice cannot be ignored. Professor Katz pointed out that *Mapp* is one of three hallmark cases, along with *Brown v. Board of Education*[113] and *Baker v. Carr*,[114] defining the Warren Court, and that all three deal, directly or indirectly, with race.[115] Katz succinctly states the proposition regarding *Mapp*'s racial justice significance:

> The impact of *Mapp* was naturally greatest in the African-American community where Fourth Amendment violations were the most common. Whatever limited effect *Mapp* would have, it would be felt most where police conduct was the least restrained. It was this community which the Warren Court intended to benefit by the due process revolution, because wherever injustice existed in America, its worst impact was felt in the black community.[116]

Professor Ogletree explained the racial justice impact of *Mapp* and cases like it in terms used by W.E.B. DuBois, speaking to the duality of African-American life and consciousness in America.[117] This "twoness," which grows from the racial divide in America, manifests itself in the racial insult borne by both the individual and the African-American community. Thus, "[w]hen Dolly [sic] Mapp, an African-American woman, suffered the indignity of police officers illegally entering her home, claiming to have a non-existing search warrant, . . . the indignity was both personal to her and an affront to the African-American community."[118]

The issue of race and its relationship to permissible Fourth Amendment activity was squarely brought to the attention of the Court seven years later in a case that would once again profoundly shape

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113. 347 U.S. 483 (1954).

114. 369 U.S. 186 (1962).

115. Katz, *supra* note 108, at 475.

116. *Id.* at 482.

117. DuBois wrote:

> [T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness . . . . One never feels the twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

Charles J. Ogletree, Jr., *The Conference on Critical Race Theory: When the Rainbow is Not Enough*, 31 NEW ENG. L. REV. 705 (1997) (emphasis omitted) (quoting W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 5 (1996)).

118. *Id.* at 707.

individual rights for all Americans. This time, a changed Court did not use the opportunity presented in *Terry v. Ohio*[119] to expand protection to restrict individual privacy. The essence of reasonableness under the Fourth Amendment is that any invasion of a protected privacy interest must be based on sufficient individualized suspicion.[120] While the Court indicated that the requisite suspicion may be less than probable cause under some circumstances, the Court has never completely done away with the need for some level of suspicion.[121] The issue in *Terry* was whether that suspicion base must always be individualized or whether constitutionally-required suspicion may be based on suspicion of an entire class of persons to which an individual belongs.[122] When suspicion is based on race, it fails to be individualized.

On October 31, 1963, Officer Martin McFadden was on patrol and in plainclothes in Cleveland, Ohio. Officer McFadden approached several individuals standing in front of a department store in the middle of the afternoon. Initially, the African-American individuals drew the officer's attention because, as the officer stated, "[something] didn't look right to me at the time."[123] Then, and in the decades since *Terry*, only vague explanations have been offered as to what "didn't look right" other than that the officer had a hunch that criminal activity was afoot based on his experience. McFadden did not act until a white male joined the two African-American men in conversation. This concerned the officer enough to approach the trio, identify himself as a police officer, and ask for names. The mumbled responses of the trio allegedly made the officer both suspicious and concerned for his safety.[124] McFadden thereafter conducted a pat-down search of the trio which revealed that the two African-Americans had handguns on their person.[125] No threat or attempted reach for the weapons was reported. Neither did any individual say or do anything to suggest an intent to commit a criminal act.[126]

These types of confrontations have long been the focus of much concern in the African-American community to the extent they suggest that

119. 392 U.S. 1 (1968).
120. *See id.* at 20–22.
121. *See, e.g., id.* at 27.
122. *See id.* at 9–10.
123. *Id.* at 5.
124. MARTINEZ, *supra* note 36, at 156–57.
125. *Terry*, 392 U.S. at 7.
126. *See id.*

suspicion is based less on individuals' behavior and more on their race.[127] In its *amicus* brief, the NAACP Legal Defense Fund noted that "stop and frisk" is used by law enforcement most frequently against the poor and persons of color.[128] The concern was dramatically stated in the testimony of Marilyn Fullwood, from Los Angeles, who stated: "I am married to Raymond Fullwood, a Negro. Because I am Caucasian, in the five years of our marriage, we have been stopped no less than twenty times by Los Angeles police officers. . . . I am certain that the reason they chose to stop us is because we are a mixed couple."[129]

The Legal Defense Fund (Fund) urged the Court to consider the issue of racial injustice in addressing *Terry* as a matter of Fourth Amendment doctrine rather than an obscenity case.[130] The Fund believed "that Amendment protects the unpopular, the Negro, and all our citizens alike, from *subjection* to the oppressive police discretion which stop and frisk embodies."[131] In this context, the Fund pointed out that the parties affected by stop-and-frisk go beyond the typical appellant or petitioner concerned with overcoming their own admittedly guilty conduct.[132] The issue was of vital concern not only to criminal defendants but to the "thousands of our citizens who have been . . . stopped and frisked yearly, only to be released when the police find them innocent of any crime."[133]

Nonetheless, the Court's opinion focused on whether an officer can have a reasonable, even if somewhat abstract, hypothesis of crime.[134] The

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127. The issue of the race of the individuals playing a part in the officer's suspicion was raised to McFadden, but dismissed simply because he said race was not a factor. Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L. REV. 429 (2004).

128. Brief for the N.A.A.C.P. Legal Defense and Education Fund, Inc., as amicus curiae at 4, *Terry*, 392 U.S. 1 (1968) (Nos. 63, 74, 67) [hereinafter Brief for the N.A.A.C.P.].

129. CRAY, THE BIG BLUE LINE 31 (1967) (quoting *Report: Police Malpractice and the Watts Riot*, American Civil Liberties Union of Southern California 15–16 (1965)). Cray documents the prevalence of the police practice of accosting interracial couples for other cities as well. *See generally id.*; *see also* Rexroth, *The Fuzz*, 14 PLAYBOY 76 (July 1967).

130. Brief for the N.A.A.C.P., *supra* note 128, at *3–4.

131. *Id.* at *4 (emphasis added).

132. *Id.* at *4–7.

133. *Id.* at *4–5.

134. *Terry*, 392 U.S. at 10–13. The Court considered and decided on the same day the companion case, *Sibron v. New York*, 392 U.S. 40 (1968). In *Sibron*, the Court drew a distinction between two defendants convicted in New York. One defendant, Sibron, was followed over an extended period of time by a patrol officer, who observed Sibron talking with known drug users. Without observing any conduct the officer could describe as "suspicious" or "criminal," Sibron was asked to go outside of a restaurant where, after being questioned, he reached into his pocket. The officer, suspicious but not testifying that he feared for his safety, also reached into the defendant's pocket, where drugs were recovered. *Id.* at 45. The Court determined that without probable cause for arrest, the search of Sibron could not be justified as incident to arrest; in addition, the search did not meet the frisk

racial justice challenge regarding Fourth Amendment activity and criminal justice reform was suggested but avoided in *Terry*, and later in *Whren v. United States*,[135] and remains an issue of interest and significance for the communities of color. This is particularly true considering current concern over racial profiling.[136]

Racial profiling has become a fact of everyday life for many Americans. Professor David A. Harris reported in 1999 that, in a study of motorists traveling along the New Jersey Turnpike, African-Americans made up approximately 35% of those stopped for traffic violations and 73.2% of those arrested. These statistics are even more significant considering that African-Americans made up only 13.5% of the turnpike motorists.[137]

The importance of federal habeas corpus as a safeguard against race-infused convictions and, perhaps, unwarranted prosecutions resulting from Fourth Amendment abuses, such as racial profiling, was missed by the Court when it severely limited the cognizability of such claims under section 2254[138] of title twenty-eight of the United States Code.[139] In *Stone v. Powell*,[140] the Court considered one defendant's claim that testimony concerning a murder weapon found on his person at the time of arrest should be suppressed under the Fourth Amendment

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doctrine of *Terry*. *Id.* at 63–64. Almost thirty years later, in *Whren v. United States*, 517 U.S. 806 (1996), the issue of the role that racial perception might play in justifying a stop was hinted at, but not completely resolved. *See id.* at 813.

135. 517 U.S. 806 (1996).

136. Although racial profiling is a term that is fast becoming a substitute for a wide range of racist conduct and policies, the concept is more properly described as the establishment of policy, usually governmental and most often law enforcement, based on the assignment of behavioral characteristics or conduct expectations to individuals because of perceived statistical correlations or stereotypes based on race. *Racial Profiling: Definition*, ACLU, https://www.aclu.org/other/racial-profiling-definition (last visited Mar. 14, 2018). While racial profiling pretends to be based on social science, it is, in fact, more often a reflection of America's basic racial fears. The black and brown male in particular is often stereotyped as drug dependent (or dealing), bedecked in gold chains, dark glasses, and amoral.

137. David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 279 (1999). Professor Harris details the shortcomings concerning the statistical justifications for racial profiling:

> As appealing as this argument[, targeting Blacks on the basis of supposed higher crime involvement,] may sound, it is fraught with problems because its underlying premise is dubious at best. Government statistics on drug offenses, which are the basis for the great majority of pretext traffic stops, tell us virtually nothing about the racial breakdown of those involved in drug crime.

Id. at 294.

138. 28 U.S.C. § 2254 (2017).

139. *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976).

140. 428 U.S. 465 (1976).

because the officer lacked probable cause to arrest.[141] In the companion case, the Court considered the defendant's claim that evidence admitted against him violated the Fourth Amendment because of an invalid search warrant.[142] In both cases, the Court held that the lower court's determination upholding the admissibility of the evidence provided a "full and fair" litigation of the issue.[143] The Court further held that Fourth Amendment claims of improper application of the exclusionary rule were not cognizable in federal habeas corpus where the claim had been fully and fairly litigated in the state court.[144] The Court rested its opinion on two premises. First, Fourth Amendment claims do not address the central concern of habeas corpus, which is the actual guilt or innocence of the defendant. Second, the exclusionary rule's purpose of deterring unwanted police conduct is not served by § 2254 determination, which may occur long after the alleged wrongful conduct and the subsequent state review of such conduct.[145]

Professors Hoffmann and Stuntz criticize the Court's conclusions. The authors point out that constitutional principles of criminal procedure, long protected by the Court both on appeal and in postconviction review, include a mixture of values beyond the reliability of guilt determination.[146] Additionally, they can find no "deterrence-based argument for treating Fourth Amendment claims differently from anything else in constitutional criminal procedure."[147]

The Court has subsequently recognized the importance of not extending *Stone* beyond its limitation of Fourth Amendment claims. In

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141. *Id.* at 469.

142. *Id.* at 472–73.

143. *Id.* at 481–82.

144. *Id.*

145. *See generally* Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65 (1993).

146. *Id.* at 110.

147. *Id.* at 111. The authors propose that rather than the current system of procedural default and *Stone* cognizability limitations:

> . . . [T]wo "tracks" of habeas relief—one focused on the protection of innocents, the other focused on deterrence. On the first track, petitioners who can demonstrate a reasonable probability of innocence would receive de novo review of their federal claims, free of the restrictions currently imposed by the habeas doctrines of procedural default and retroactivity. On the second track, petitioners who cannot make a sufficient showing of innocence would have their federal claims (whether legal, factual, or mixed, and including those Fourth Amendment claims now barred in habeas under *Stone v. Powell*) reviewed solely to determine if the state court acted reasonably in denying them; such deferential review is all that is needed for habeas to fulfill its deterrence role.

Id. at 69. The proposal of the authors would be in keeping with recognizing the importance of deterring the wrongful influence of race on the criminal justice system.

Kimmelman v. Morrison,[148] the Court declined to extend *Stone* to Sixth Amendment claims of ineffective assistance of counsel.[149] In *Withrow v. Williams*,[150] the Court likewise found that Fifth Amendment claims under *Miranda v. Arizona*[151] were still justiciable in federal habeas corpus despite state court review.[152]

C. Race and Confession

There is no more iconic case of the Warren Court's constitutionalized-criminal-procedure revolution than *Miranda*.[153] Its place is sealed not only in our legal lexicon but in our social and political milieu by symbolizing the tension between the individual and the state through the litany of "Miranda Rights." The concept of Miranda Rights is that, in the incommunicado setting of police station interrogation, a person may shield themselves with certain rights grafted onto our legal and cultural reality. Like the right to counsel and Fourth Amendment protections, the expanded protection against often-abusive police overreaching in interrogation settings articulated by the Court spoke to the agenda of racial justice.[154]

Dating back at least to the late nineteenth century, police tactics in interrogating suspects have a long history of reliance on coercion and out-right torture.[155] The infamous "third degree,"[156] associated with the infliction of physical and psychological pain to obtain confessions, became

148. 477 U.S. 365 (1986).

149. *Id.* at 382–83.

150. 507 U.S. 680 (1993).

151. 384 U.S. 436 (1966).

152. *Withrow*, 507 U.S. at 682–83.

153. 384 U.S. 436 (1966).

154.

> Similarly, *Miranda* grew out of a painful history of cases addressing gross police over-reaching in the interrogation of suspects, many of whom were minorities. Indeed, police abuses against minority suspects, especially in the former slave states, often involved staggering and unabashed racism and injustice. One early example is *Moore v. Dempsey*, where [B]lack suspects were tortured until they confessed. Later cases included *Brown v. Mississippi*, where the Court overturned convictions because the suspects were whipped and beaten (though, according to state officials, "not too much for a Negro") . . . .

John H. Blume, Sheri Lynn Johnson & Ross Feldmann, *Education and Interrogation: Comparing Brown and Miranda*, 90 CORNELL L. REV. 321, 328 (2005).

155. Tracey Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at Miranda v. Arizona*, 95 B. U. L. REV. 1387, 1391 (2015).

156. "The process of extracting a confession or information from a suspect or prisoner by prolonged questioning, the use of threats, or physical torture." *Third Degree*, BLACK'S LAW DICTIONARY (10th ed. 2014).

part of American culture and its perception of law enforcement.[157] Media coverage in the closing decades of the 1800s, through at least the 1930s, recognized that police regularly engaged in tactics such as the sweat box, hanging suspects by the neck, and use of incommunicado detention.[158]

Less prominent in the public acknowledgement of police torture was the connection between the use of torture and race. Police abuse of African-Americans was particularly prominent in southern, former slave states.[159] The first example of such to reach the Court was *Brown*.[160] Yet *Brown* was hardly alone in the Court's reporting or consideration of torture tactics used against African-American suspects. As noted by Professor Maclin, "In the eight years following *Brown*, the Court heard six more confession cases coming from southern state courts where [African-American] defendants alleged their confessions had been coerced."[161]

This trail of cases involving confessions resulting from brutality ultimately led to official disavowal of the third degree as a sanctioned method of interrogation. The "Wickersham Report," commissioned by President Herbert Hoover, condemned the use of physical coercion and called for the adoption of alternative methods of interrogation.[162]

Judicial response, keying in on the lack of reliability of confessions obtained from brutality, developed an "involuntary" or "coerced confessions" rule. Building on its handling of *Brown*, the Court, through a series of cases, crafted an approach to confessions derived from torture, depending less on disapproval of race-inspired violence and more on the probative value of statements gained through such mechanisms. Building on the common-law proscription against coerced confessions as unreliable,[163] the Court developed a complex due process-based matrix to determine the constitutional permissibility of admission of statements

157. *See* RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 66–74 (2008).

158. *Id.* at 67–68.

159. Blume et al., *Education and Interrogation*, *supra* note 154, at 328.

160. *See Brown*, 297 U.S. at 278.

161. Maclin, *supra* note 155, at 1392. *See, e.g.*, Ward v. Texas, 316 U.S. 547 (1942); Chambers v. Florida, 309 U.S. 227 (1940); Vernon v. State, 200 So. 560 (Ala. 1941), *rev'd per curiam*, 313 U.S. 547 (1941); Lomax v. State, 144 S.W.2d 555 (Tex. Crim. App. 1940), *rev'd per curiam*, 313 U.S. 544 (1941); White v. State, 128 S.W.2d 51 (Tex. Crim. App. 1939), *rev'd per curiam*, 309 U.S. 631 (1940); Canty v. Alabama, 191 So. 260 (Ala. 1939), *rev'd per curiam*, 309 U.S. 629 (1940).

162. Hoover, concerned about the administration of criminal justice as well as the growth of organized crime, appointed an eleven-member commission to review the shortcomings of criminal justice. The eleven reports ultimately issued, though important, had little immediate impact on the use of torture. *See* LEO, *supra* note 157, at 44–45 n.2.

163. *See* OTIS STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 17 (1973); LEO, *supra* note 157. *See also, e.g.*, 3 WIGMORE EVIDENCE §§ 816, 817 & 821 (3d ed. 1940).

derived from coercion on a case-by-case basis. Based on the totality of the circumstances, the Court weighed the probative value of such statements, along with whether the confession was the product of free will.[164]

Concern regarding the effectiveness of torture-like tactics in producing usable confessions, growing judicial concern over reliability and voluntariness, and growing public distaste over reported brutal acts caused reform of the training and approach of police officers. Recognizing the recommendation for change in the Wickersham Report, police developed new techniques, using behavioral science and psychology, as an alternative to physical violence.[165] Psychological manipulation became a cornerstone of modern interrogation.[166] The police training manual became central to developing psychological manipulation skills.[167]

In 1962, Professor Fred Inbau of Northwestern University, along with John E. Reid, published the first edition of what would become the standard text for police training.[168] Professor Inbau, who was once the director of the Scientific Crime Detection Laboratory in Chicago, developed and taught interrogation techniques relying on deceit, deception, and tricks to produce incriminating statements. His method also relied on presenting the suspect with large amounts of damaging facts in order to persuade confession. The use of these psychological techniques was touted as a reform and replacement for the third degree. It was the coercive nature of these techniques in incommunicado interrogation settings that formed a large part of the concern expressed by the Warren Court in *Miranda*.

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164. In *Chambers v. Florida*, 309 U.S. 227 (1940), the Court overturned the convictions of four African-Americans sentenced to death. *Id.* at 242. Although Justice Black's opinion clearly recognizes the strong racial animosity present in the treatment of these defendants, who were subjected to continuous day and night interrogation without food or access to family (and, according to conflicting testimony, most likely physical abuse), it emphasizes the untrustworthiness and involuntariness of the resulting statements as contrary to due process. *Id.* at 230–31. The extreme presence and reliance on racism permeated the action of law enforcement throughout this case. Following the discovery of the murder victim, local authorities conducted a race-based sweep of the Fort Lauderdale community and seized twenty-five to forty African-Americans living in the area. It was from this group that the petitioners were selected for questioning. *Id.* at 229. A grueling, non-stop, two-day interrogation, that produced a confession was also the fact pattern of *Ashcraft v. Tennessee*, 322 U.S. 143, 149 (1944).

165. LEO, *supra* note 157, at 106.

166. *Id.*

167. *Id.* at 107.

168. *See generally* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001).

Miranda is seen as a statement on the relative balance of the position between the police and a criminal suspect in an in-custody interrogation setting. The Court found that the somewhat amorphous totality-of-the-circumstances approach, of the coerced or involuntary confession test, under due process failed to give adequate guidance and control regarding police infringement of the Fifth Amendment right against self-incrimination in the coercive environment of the interrogation room.[169] Less discussed, but nonetheless present, are the racial justice imperatives still present in police interrogation despite the Inbau-inspired use of psychological manipulation. Various scholars have noted that race and *Miranda* are "inextricably intertwined."[170]

Ernesto Arturo Miranda, of Hispanic descent, was convicted of rape in 1963. "Miranda, by [many] accounts, was a disturbed young man."[171] He was taken into custody for questioning after a vehicle identified in the investigation of the rape and two prior attempted rapes was linked to a residence where he lived with the vehicle's owner. Following a somewhat unreliable line-up identification by the rape victim, Miranda was tricked into giving a confession by the investigating officer using the ploy of telling a "half-truth"—a tactic consistent with the Inbau-developed psychological manipulation technique described earlier.[172]

At no time was Miranda advised of a right to remain silent or to have counsel present during interrogation.[173] The Court had previously determined, in *Escobedo v. Illinois*,[174] that a suspect cannot be denied access to counsel during interrogation once the investigation has "narrowed" its focus on the accused.[175] The Court then considered questions unanswered in *Escobedo*, such as what affirmative duty police had to inform the suspect of his or her right to remain silent and to have counsel present in a custodial interrogation setting regardless of whether the investigation has "focused" on the suspect.[176]

The interest in the Court's inquiry went beyond the question of the rights of suspects in general and included racial justice—a matter of

169. *Miranda*, 384 U.S. at 467–68.

170. Blume et al., *Education and Interrogation*, *supra* note 154, at 332. "As previously noted, most of the notorious examples of forced confessions through beatings and torture occurred in the heavily segregated South. As police interrogation became more sophisticated, the victims were still largely minorities and the offenders were mainly white police officers." *Id.*

171. *Miranda*, 384 U.S. at 492; MARTINEZ, *supra* note 36, at 117.

172. MARTINEZ, *supra* note 36, at 118–21.

173. *Miranda*, 384 U.S. at 492.

174. 378 U.S. 478 (1964).

175. *Id.* at 492.

176. *Miranda*, 384 U.S. at 439–40.

great concern in the 1960s. The "reforms" of psychological manipulation, while moderating somewhat the rampant use of physical torture, had not significantly lessened the coercive and racially disproportionate experience of forced confessions. Indeed, Chief Justice Warren, in an early draft of his *Miranda* majority opinion, stated: "In a series of cases decided by this Court . . . Negro defendants were subjected to physical brutality—beatings, hangings, whippings—employed to extort confessions. In 1947, the President's Committee on Civil Rights probed further into police violence upon minority groups."[177] Although this draft language was modified by removing race-specific references, Chief Justice Warren continued to rely on the history of racial injustice and the third degree as support for the landmark reforms announced by the majority.[178] Indeed, the majority opinion concluded that psychological coercion can be mental "torture," even without blood.[179]

The reason for the change from the earlier draft was linked to the need to hold a majority vote together in what was ultimately a 5–4 decision. Justice Brennan objected to turning police tactics in interrogation into a "race problem," as opposed to a broader emphasis on the relative disempowerment of poverty.[180] Warren omitted this passage in a subsequent draft of the opinion in deference to Justice Clark, although Justice Clark ultimately dissented.[181]

The racial-justice significance of *Miranda* is also borne out considering the broader context of the Civil Rights movement and its recognition of the perceived strong link between crime and race.[182] Although the

177. BERNARD SCHWARTZ, SUPERCHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 591 (1983).

178. *Miranda*, 384 U.S. at 447–48.

179. *Id.* at 448. In *Haynes v. Washington*, 373 U.S. 503 (1963), the Court had previously found that even so mild a "whip" as withholding access to contact with a spouse could be as impermissibly coercive as physical beating for purposes of the coercive confession rule under Due Process. *Id.* at 513–14.

180. *See* Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 751 n.254 (1992).

181. *Miranda*, 384 U.S. at 436.

182. Professor Neuborne states:

> Perhaps the clearest evidence of the gravitational pull of race on Warren Court constitutional doctrine was in the areas of criminal law and procedure. It is hard to overstate the sense of urgency driving the Court's concern over racial discrimination in the enforcement of the criminal law. . . . The Warren Court's most dramatic responses to law enforcement's interaction with the [B]lack population were the Court's efforts in *Mapp v Ohio* to prevent the use of illegally obtained evidence in criminal proceedings, and in *Miranda v Arizona* to impose prophylactic rules on police interrogations.

Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 85–86 (2010).

NAACP Legal Defense Fund did not file an amicus brief in *Miranda*—perhaps because Thurgood Marshall, the Solicitor General for the United States, had to argue the government's position—its activities in 1968 were well in line with supporting the need for reform of the criminal justice system when it came to interrogations.[183]

Gideon, *Mapp*, and *Miranda* were the foundations of not only the criminal justice reform of the Warren Court but also a part of its conscious address of the civil rights struggle. For these cases to have the intended impact, a vehicle needed to exist for addressing decades of injustice that had disproportionately filled the American prison system with persons of color. The prison cell was as much a battle ground for civil rights as a lunch counter, bus, or schoolhouse. The critical tool in this endeavor was habeas corpus, with its ability to go beyond the cold record and provide redress for those victimized by procedural inequality and the politics of race. The Court's opinions in *Townsend v. Sain*,[184] *Sanders v. United States*,[185] and *Fay v. Noia*[186] were essential to meeting this challenge.

II. HABEAS CORPUS AS A POSTCONVICTION RELIEF TOOL FOR ADDRESSING RACIAL INJUSTICE IN THE CRIMINAL JUSTICE SYSTEM

To understand the significance of federal habeas corpus as a postconviction relief tool for the racial justice reform efforts of the Warren Court, it is first necessary to consider the historic context and development of the extraordinary writ. From its relatively humble beginnings[187] in England through most of its history within the United

183. *See* Seidman, *supra* note 180, at 748; Blume et al., *Education and Interrogation*, *supra* note 154, at 332.

184. 372 U.S. 293 (1963).

185. 373 U.S. 1 (1963).

186. 372 U.S. 391 (1963).

187. William Duker suggests that, despite the popular trend of linking the origins of habeas corpus to the Magna Carta as an engine to "defeat the king's own orders" as in the celebrated 1604 King's Bench writ to the jailer regarding the confinement of Walter Witherley, who was held for disobedience of the King's commands, the actual origin might be traced back to the humbler purpose of discouraging individuals using "self-help" to redress neighborhood feudal spats.

> In the laws of King Ine (688-725 A.D.), the general principle of the new order was laid down: "If anyone exacts redress, before he pleads for justice, he shall give up what he has taken, and pay as much again, and 30 shillings compensation." The aim of the Anglo-Saxon code in general was to restrain private vengeance. . . . Implementation of the new order required that a mechanism be developed to ensure appearance before the "courts of law" and to guarantee the payment of *wergeld*.

WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 14 (1980).

States, habeas corpus has served as a window by which the "justness" of government and society was exposed. Halliday proclaims that, for more than four centuries, habeas corpus has been the device through which we hear the workings of justice as it pertains to ultimate right and wrong.[188] Prisoners of conscience, political prisoners, and those whose confinement represented more than just the technical issue of guilt or innocence of a specific offense, have throughout history used habeas corpus to plead their case. Thus, it was that the political prisoner John Lilburne wrote that human judges, like God, should hear the sighs and moans of his poor, oppressed, and distressed prisoners.[189]

Habeas corpus ad subjiciendum, the form of habeas corpus most associated with the postconviction relief explored in this Article,[190] was designated by Blackstone as "the great and efficacious writ, in all manner of illegal confinement . . . directed to the person detaining another, and commanding him to produce the body of the prisoner."[191] As a result of the ongoing struggle between the Crown and Parliament, and in light of the growing concern regarding infamous examples of deprivations of liberty, Parliament enacted the Habeas Corpus Act of 1679,[192] which required habeas corpus relief be available.[193] The Act specifically provided that prisoners had the right to challenge their detention by demanding judicial review from the justices of the King's Bench.[194]

By the time of the American Revolution, the English Writ of Habeas Corpus was firmly established in the soon-to-be United States. The Writ

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Anthony Gregory links the origin of habeas corpus to the somewhat later milestone of Henry II's Assize of Clarendon in 1166. The Assize, also associated with the origin of the Grand Jury, "included an early version of the command 'have the body.' This order operated to bring accused robbers, murderers, thieves, or receivers before the judge." ANTHONY GREGORY, THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR 14 (2013).

188. PAUL D. HALLIDAY, HABEAS CORPUS 1 (2010).

189. JOHN LILBURNE, THE PRISONERS MOURNFULL CRY, AGAINST THE JUDGES OF THE KINGS BENCH; AN EPISTLE WRIT BY LIEUT. COL. JOHN LILBURNE, PRISONER IN THE TOWER OF LONDON (1648).

190. *Habeas corpus ad subjiciendum* is defined literally as "you should have the body for submitting." Halliday points out that though various other forms of habeas corpus (such as *cum causa* and *ad respondendum*) might seem to resemble *subjiciendum* from the thirteenth century on, "generally these medieval writs did not display any impulse to make a vigorous review of the circumstances underlying an imprisonment order made by other magistrates. HALLIDAY, *supra* note 188, at 16.

191. WILLIAM C. SPRAGUE, BLACKSTONE'S COMMENTARIES, ABRIDGED 329 (1985).

192. Habeas Corpus Act 1679, 31 Char. 2 c. 2 (Eng.).

193. 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 767 (Joshua Dressler ed., 2d ed. 2002).

194. 2 THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA 729 (Wilbur R. Miller ed., 2012).

played an essential role in developing the radical ideology at the root of the American revolutionary spirit.[195] The Revolution and its principles served to usher in habeas corpus as a statutory guarantee throughout the new states.[196] Yet, of particular interest is the relation of race to the history of the use of the concept of "producing the body" and justifying its captivity. It is, ironically, the use of habeas corpus in England that documents one of the earliest associations of the extraordinary writ with racial justice.

In 1749, under the laws of Virginia, James Somerset was made a slave to Charles Stewart. Somerset was born in Africa and violently removed from his home there in his early teens.[197] While accompanying Stewart to England in 1771, he sought to escape by fleeing his "master." Recaptured by Stewart, Somerset was placed on a ship bound for Jamaica where, presumably as his punishment, he was to be sold on the open slave market.[198] Abolitionist Francis Hargrave, made aware of Somerset's plight, sought habeas corpus on Somerset's behalf to bring him before the King's Bench.[199] The Court, finding that enslavement was an insufficient cause for Somerset's confinement, ordered him released.[200] It is significant that using habeas corpus to seek freedom from slavery in Somerset's case became the basis for the much more widely-known use of habeas corpus in the case of Dred Scott to fight the racial injustice of slavery.

Dred Scott, a St. Louis, Missouri slave, sued in habeas seeking the freedom of his wife, two children, and himself.[201] In one of the most infamous decisions of the Court, Scott's claim was rejected.[202]

Following the rationale in *Somerset*, slaves who were taken to non-slavery jurisdictions were deemed to revert to their natural status as free persons in several states, including Missouri.[203] The key to the success of *Somerset* and those American cases until *Scott* was habeas's ability to assert that Africans, no matter where displaced, were human beings by nature—enjoying the natural rights of human beings—at least

195. GREGORY, *supra* note 187, at 44.

196. *Id.* at 55. In 1777, habeas corpus was specifically added as a guaranteed protection in the constitution of Georgia. Likewise, in 1789, New York adopted provisions modeled after the English Habeas Corpus Act of 1679, with New Jersey doing so in 1795. *Id.*

197. HALLIDAY, *supra* note 188, at 192.

198. *Id.*

199. Somerset v. Stewart, 98 Eng. Rep. 499, 499 (K.B. 1772).

200. *Id.* at 510.

201. Scott v. Sanford, 60 U.S. 393, 400 (1856).

202. *Id.* at 454.

203. Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 17 (1996).

in jurisdictions not bound by the acceptance of slavery within their borders.[204] Habeas had the ability to cut through oppressive definitions created by other jurisdictions through its inherent nature as a collateral attack. Collateral attack—the essence of habeas corpus—allowed an independent jurisdiction to speak to the wrongs of another jurisdiction while not being bound by *stare decisis*.[205] This concept later became the heart of federal habeas corpus postconviction relief via 28 U.S.C. § 2254.[206] Unfortunately, history also showed an oppressive side of habeas corpus when it came to racial justice.

In the earlier 1800s, the role of federal habeas corpus in the administration of federalism was the opposite of what is reflected today in § 2254.[207] Federal courts had the power to review federal detentions and state courts had the power to issue habeas corpus as to both state and federal detentions.[208] Events in 1816 and 1817 involving the threat of arrest of federal tax collectors by state officials threatened the enforcement of federal law. This long struggle over federalism led to the detention, in 1833, of federal officials by South Carolina under the Nullification Acts.[209] Congress thereafter passed the Force Act,[210] which granted power to the Court, or any federal district court, to grant habeas corpus relief to anyone held in custody by, *inter alia*, any state for any act done in furtherance of federal law.[211] The Act was never used to protect federal tax collectors, but was used to support slavery. "[I]t was used to rescue slave catchers who were arrested and held by state governments."[212]

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204. *See* Paul Finkelman, Scott v. Sandford: *The Court's Most Dreadful Case and How It Changed History*, 82 Chi.-Kent L. Rev. 3, 14 (2007).

205. *Collateral Attack*, BLACK'S LAW DICTIONARY (10th ed. 2014).

206. 28 U.S.C. § 2254.

207. The Judiciary Act of 1789, 1 Stat. 81 (1789), did not empower federal courts to issue writs of habeas corpus in instances of persons held pursuant to a state order except for the purpose of producing such persons to testify. *See Jurisdiction of Federal Courts to Issue Writ of Habeas Corpus to Relieve Commitment by State Court*, 21 HARV. L. REV. 204 (1908).

208. GREGORY, *supra* note 187, at 84.

209. In protest and to counter what was seen as high tariffs imposed during the Andrew Jackson administration, South Carolina passed the "nullification act in November 1832 that declared that the tariff acts of 1832 and 1828 were unconstitutional and therefore null and void in the state." Douglas A. Irwin, *Antebellum Tariff Politics: Regional Coalitions and Shifting Economic Interests*, 51 J.L. & ECON. 715, 730 (2008).

210. 4 Stat. 632 (1833).

211. *Id.* at 634–35.

212. GREGORY, *supra* note 187, at 85; *Ex Parte* Jenkins, 13 Fed. Cas. 445 (1853); *Ex Parte* Sifford, 22 Fed. Cas. 105 (1857).

The Compromise of 1850 solidified the federal government's ability to enforce the Fugitive Slave Act.[213] The Fugitive Slave Act penalized officials who did not arrest suspected runaway slaves, who were to be arrested without any right to trial or, ironically, habeas corpus.[214]

Ableman v. Booth[215] epitomized the role and use of habeas corpus in relationship to the divisive question of slavery. This case not only established the supremacy of federal power over state habeas corpus, but also became the cornerstone for the later recognition of the supremacy of federal habeas corpus over state law.[216] In *Ableman*, Joshua Glover was a runaway slave.[217] His escape from jail was alleged to have been aided by Sherman Booth in violation of the Fugitive Slave Act of 1850. Booth, detained under the Act, successfully petitioned the Wisconsin Supreme Court for a writ of habeas corpus. Nonetheless, Booth was later tried and convicted in the United States District Court for the District of Wisconsin for violating the Fugitive Slave Act and was detained again. Another writ of habeas corpus was sought from the state court and granted. This time, the Wisconsin Supreme Court declared the Fugitive Slave Act unconstitutional and that the federal district court lacked jurisdiction over Booth.[218]

Writing for a unanimous court, Chief Justice Taney upheld the supremacy of federal courts on the issue of federal law.[219] In so doing, Taney stated, "[A]s regards the decision of the District Court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court."[220] Given the views expressed by Taney in *Scott* regarding federal court supremacy over state law, the Court became embroiled in the post-civil-war reconstruction of federal habeas corpus power—particularly pertaining to racial justice.[221]

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213. 9 Stat. 462 (1850).

214. GREGORY, *supra* note 187, at 86.

215. 62 U.S. 506 (1859).

216. Wert writes, "During the Taney Court, however, federal habeas power for state prisoners became an increasing reality for federal courts, as it was used to frustrate cases prosecuted by northern states under their personal liberty laws." JUSTIN J. WERT, HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS 80 (2011).

217. *See Ableman*, 62 U.S. at 507.

218. *Id.* at 507–08.

219. *Id.* at 515–16.

220. *Id.* at 526.

221. Habeas corpus and Justice Taney again became a focal point regarding the issues (including slavery) of the nation as it entered the Civil War in regard to President Abraham Lincoln's suspension of the Writ of Habeas Corpus and its impact in *Ex Parte* Merryman, 17 F. Cas. 144 (D. Md. 1861) (No. 9487). Lincoln, fearing that a threatened secession of

At its roots, the Habeas Corpus Act of 1867[222] was designed to "secure the writ of habeas corpus to persons held in slavery or involuntary servitude contrary to the Constitution of the United States."[223] Specifically, the law provided that federal courts "shall have [the] power to grant [the] writ of habeas corpus in all cases where any person may be restrained of his . . . liberty in violation of the constitution, or . . . any treaty or law of the United States."[224] Of particular note is the reference to "any person" restrained of liberty as opposed to "prisoners in jail," as was previously referenced in legislation.[225]

The Warren Court turned to the Habeas Corpus Act of 1867 to justify using habeas corpus as a postconviction review tool to address the multitude of black and brown state prisoners whose incarceration was as much a civil rights issue as school desegregation. The Warren Court, faced with the perceived reluctance of states—particularly in the South—to "deal fairly with racially charged issues,"[226] turned to expanding access to federal habeas corpus.

Townsend and *Fay* became vehicles for both overcoming the barrier of federalism and the implementation of the goals of the 1867 Habeas

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Maryland, following the secession of Virginia, would literally starve Washington D.C. out of existence, ordered General Winfield Scott to counter any effort to arm Maryland citizens by use of "the most prompt, and efficient means . . . including in the extreme necessity, the suspension of the writ of habeas corpus." *Abraham Lincoln: "Executive Order," April 12, 1861*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=70145 (last visited Mar. 13, 2018). Merryman filed for a writ of habeas corpus following his arrest by federal troops for possession of arms with intent to use them against the United States. *Merryman*, 17 F. Cas. at 147. Chief Justice Taney, took extraordinary steps to attempt to hold a hearing on this request for federal habeas relief. Taney's actions were such that many did not view him as impartial on the matter—particularly considering his association with the decision in *Scott*. Relying on President Lincoln's statement, General George Cadwalader refused to appear in response to Taney's granting of the writ on the grounds that Lincoln had authorized the suspension of habeas corpus. *Id.* at 147–48. Ultimately Taney backed down from seeking further to enforce the writ upon realizing that the Court independently had no power to enforce it. *Id.* at 153.

222. 14 Stat. 385 (1867).

223. Cong. Globe, 39th Cong., 1st Sess. 135 (1865).

224. 14 Stat. 385.

225. The Judiciary Act of 1789, ch. 20 § 14, 1 Stat. 81 (1789); Act of Mar. 2, 1833, ch. 57 § 7, 4 Stat. 634 (1833); Act of Aug. 29, 1842, ch. 257, 5 Stat. 539 (1842); *see also* Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 33–35 (1965).

226. Neuborne, *supra* note 182, at 67.

Corpus Act. The majority opinions in neither *Townsend*[227] nor *Noia*[228] specifically mentioned the race of the defendants, but they were presumably white.[229] The racial justice issues were never far from the Court's mind. Indeed, in *Noia*, the Court addressed how its previous habeas corpus ruling in *Brown v. Allen*[230] drew upon the Judiciary Act of 1867, which was passed in large part to vindicate the rights of those recently freed from slavery.[231] Recognizing the federal court's obligation to provide a forum for addressing "intolerable" imprisonments derived

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227. In *Townsend*, the defendant challenged the determination by the Illinois state courts that his drug-induced confession was voluntary. Defense counsel objected to the introduction of such a statement asserting that it was the product of coercion. The trial court rejected the challenge without any indication as to what standard was applied by the trial judge in reaching that decision. At no time in the subsequent appeal and state postconviction review was evidence taken or findings made as to the impact of self-administered drugs, associated with the defendant's heroin addiction, on voluntariness. *Townsend*, 372 U.S. at 295–97. This issue, which relies heavily on information outside the court record, required, in the Court's view, an evidentiary hearing as part of the defendant–petitioner's federal habeas corpus review, and not simply reliance on the state determination of fact. *Id.* at 306. Although Townsend was not African-American, the issue of coercion in interrogation settings has been a core concern in cases alleging racial injustice during custodial questioning.

228. Like *Townsend*, *Noia* had, at its substantive root, the issue of whether a defendant's conviction was based on a coerced confession. *Noia*, 372 U.S. at 394. As indicated earlier, coerced confessions not only involve the increased possibility of conviction of persons actually innocent, but also have been the infamous hallmark of racial injustice in the criminal justice system. While *Townsend* spoke to the value of the habeas corpus evidentiary hearing to explore truths outside the trial record, *Noia* presented the conundrum of how the non-trial record can be pursued in habeas where the defendant has not appealed in the state court from his conviction for murder. *Id.* Although Noia's codefendants Bonino and Caminato successfully appealed their convictions alleging their confessions, taken in concert with Noia's, were coerced in violation of the Due Process Clause of the Fourteenth Amendment, Noia did not separately appeal because of poverty. *Id.* at 394–95. As the district court noted: "The relator did not at all deny that he knew of his rights to appeal. He, however, testified that he did not appeal because he had no funds to retain an attorney to prosecute the appeal and did not wish to put his family further into debt." United States *ex. rel.* Noia v. Fay, 183 F. Supp. 222, 225 (S.D.N.Y. 1960).

229. Neuborne, *supra* note 182, at 68.

230. 344 U.S. 443 (1953).

231. *Noia*, 372 U.S. at 414, 416–17. As Neuborne says of *Noia* and *Townsend*:

> [I]t is telling that Justice Brennan's decision relaxing the waiver rules relied on the fact that one of the major aims of the 1867 habeas corpus statute was to protect the constitutional rights of newly freed slaves against hostile state judiciaries. Similarly, after Townsend's apparently drug-induced confession was found voluntary by the Illinois state courts, Chief Justice Warren's opinion opened the door to widespread federal oversight over state court fact-finding in constitutional contexts.

Neuborne, *supra* note 182, at 69 (footnotes omitted).

from coerced confessions,[232] Justice Brennan, for the majority in *Noia,* detailed a laundry list of significant criminal procedure issues that had been held cognizable in habeas corpus prior to *Noia.*[233] Many of these issues represented major civil rights concerns.[234]

The civil rights implications of the Warren Court habeas corpus decisions are probably best understood in the context of the major efforts of the Court to expand federal court jurisdiction to achieve racial justice at the state level. In *Thompson v. City of Louisville,*[235] the Court had granted relief to a Louisville African-American man convicted despite an indication of actual innocence, a ground for later claims for habeas corpus relief that persists today.[236] The conviction of Thompson, rather than simply being challenged as against the manifest weight of the evidence, a claim that is not normally cognizable in federal review of a state court conviction, was deemed by the Court to be "so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment."[237]

Thompson was quickly followed by *Monroe v. Pape,*[238] which involved the unlawful police entry into the home of an African-American couple where the married couple was forced to stand naked before the police while Mr. Monroe was referred to as "n—r" and "black boy."[239] The Court allowed federal jurisdiction to be extended via 42 U.S.C. § 1983[240] by concluding that the alleged conduct of the officers, if proven, was state

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232. The Court in *Noia* cites back to the seminal racial justice and coerced confession case of *Brown v. Mississippi. Noia,* 372 U.S. at 414.

233. *Id.* at 413–14.

234. Among those listed: Callan v. Wilson, 127 U.S. 540, 557 (1888) (right to jury trial in federal criminal cases); Arndstein v. McCarthy, 254 U.S. 71 (1920) (self-incrimination); Morgan v. Devine, 237 U.S. 632 (1915) (double jeopardy); Andersen v. Treat, 172 U.S. 24 (1898) (right to counsel).

235. 362 U.S. 199 (1960). As noted by Neuborne:

> You can scour the unanimous opinion in *Thompson* in vain for any mention of Sam Thompson's race, but Louis Lusky's elegant Supreme Court brief notes that the incident begins with Thompson's decision to contest two earlier unjustified arrests, including a warrantless arrest for vagrancy and loitering in the "colored" waiting room of a Louisville bus station.

Neuborne, *supra* note 182, at 67 n.49.

236. *Thompson,* 362 U.S. at 206.

237. *Id.* at 199 (italics omitted).

238. 365 U.S. 167 (1961).

239. Neuborne, *supra* note 182, at 68. As in *Thompson,* and typical in Warren Court decisions that in actuality were race-intensive, no mention was made in the majority opinion of the race of the plaintiffs in this civil action. However, Justice Frankfurter, in his dissent, points out the graphic details found in the briefs. *Id.*

240. 42 U.S.C. § 1983 (2017).

action entitling the plaintiff to seek federal court relief.[241] The combination of *Thompson, Pape, Sain*, and *Townsend* set the stage for intensive federal intervention in the state criminal justice system, particularly through habeas corpus, to further civil rights reform regarding the treatment of black America.[242]

III. RESTRICTING THE USE OF FEDERAL HABEAS CORPUS AS A TOOL FOR RACIAL JUSTICE REFORM OF THE CRIMINAL JUSTICE SYSTEM

The activist role of the Warren Court in expanding the availability of federal habeas corpus to address civil rights reform came to a screeching halt with *Wainwright v. Sykes*[243] in 1977. In *Sykes*, a badly-divided Court plurality (4–3–2) determined that the *Noia* deliberate-bypass rule was an insufficient basis for allowing a petitioner in federal habeas corpus to challenge his state court conviction because of the use of statements the petitioner alleged were involuntary because, under the circumstances, he did not understand the *Miranda* warnings read to him by police.[244] Based upon *Jackson v. Denno*,[245] the United States District Court for the Middle District of Florida ordered an evidentiary hearing on petitioner's claim despite the petitioner not raising his claim by objection at trial.[246] The State maintained that failure to adhere to its "contemporaneous-objection rule," which waives any claim of inadmissible evidence not raised at trial, barred the petitioner's federal habeas corpus review postconviction.[247] A plurality of the Supreme Court, along with three concurrent votes, agreed with Florida and held that a failure to adhere to a state procedural rule bars federal habeas corpus review absent the

241. *Monroe*, 365 U.S. at 172.

242. Neuborne states,

> The Warren Court's most dramatic responses to law enforcement's interaction with the black population were the Court's efforts in *Mapp v Ohio* to prevent the use of illegally obtained evidence in criminal proceedings, and in *Miranda v Arizona* to impose prophylactic rules on police interrogations. Race was not far from the surface of either case. In *Terry v Ohio*, the Court sought to split the difference between the loitering and vagrancy decisions and the strict Fourth Amendment probable-cause test by authorizing the police to make investigatory street stops on less than probable cause, but only if they can demonstrate an "articulable suspicion" of unlawful activity. Finally, the right to counsel cases from *Gideon* to *Argersinger* were driven, in part, by concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics.

See Neuborne, *supra* note 182, at 86 (footnotes omitted).

243. 433 U.S. 72 (1977).

244. *Id.* at 85.

245. 378 U.S. 368 (1964).

246. *Sykes*, 433 U.S. at 75–76.

247. *Id.* at 85–86.

petitioner establishing "cause and prejudice" regarding such failure.[248] The Court cited *Francis v. Henderson*[249] to support its holding.

In *Francis*, the defendant-petitioner failed to adhere to a state procedural rule requiring challenges to an indicting grand jury's composition be raised before trial.[250] Relying on principles of "comity and concerns for the orderly administration of criminal justice,"[251] the Court held that a petitioner must show cause for failing to adhere to the state procedural bar, actual prejudice, and that a failure to make that showing bars federal collateral review.[252]

The opinion in *Sykes* does not elaborate on the meaning of *cause* or *prejudice* for determining when a state procedural default bars federal habeas corpus. However, Justice Brennan, in his dissent, opined that *cause* in this context "is [the] requirement that habeas applicants bear an undefined burden of explanation for the failure to obey the state rule," and that "prejudice . . . appears to bear a strong resemblance to harmless-error doctrine."[253]

The *Sykes* cause-and-prejudice test, regarding failure to adhere to a state procedural rule, was a direct repudiation and reversal of the *Noia* deliberate-bypass rule. Whereas *Noia* barred deliberate—that is, conscious, with strategic reasons, and presumably after discussion with the client—attempts by a defendant's trial counsel to bypass consideration of a constitutional claim by the state trial court, *Sykes* placed the inadvertent, and perhaps incompetent, failure of the attorney upon the defendant. The burden, whose quantum of proof is yet undefined by the Court, is particularly difficult, if not impossible, for the indigent (and disproportionately black or brown) petitioner when one considers that appointed trial counsel is guaranteed only through

248. *Id.* at 90–91.

249. 425 U.S. 536 (1976).

250. *Id.* at 547–48.

251. *Id.* at 539.

252. *Id.* at 540.

253. *Sykes*, 433 U.S. at 116–17 (Brennan, J., dissenting). As to *cause*, Justice Brennan drew upon *Davis v. United States*, 411 U.S. 233 (1973), which was favorably cited by the plurality opinion. Brennan added the concern at the heart of his dissent that *cause* is a thinly masked embodiment of ineffective assistance of counsel and "[l]eft unresolved is whether a habeas petitioner like Sykes can adequately discharge this burden by offering the commonplace and truthful explanation for his default; attorney ignorance or error beyond the client's control." *Sykes*, 433 U.S. at 116–17. *Prejudice*, as referred to by Brennan, is defined by the *Chapman v. California*, 386 U.S. 18 (1967), "harmless beyond a reasonable doubt" test for constitutional error. *Sykes*, 433 U.S. at 117. Brennan stated that federal courts could easily dispose of this issue by simply being permitted to reach the merits of the petition. *Id.*

sentencing—the last critical stage under the Sixth Amendment.[254] This effectively means that the habeas petitioner is extremely unlikely to have the same attorney and, therefore, perhaps no access to trial counsel's strategic thinking habeas.[255]

Five years later, in *Engle v. Isaac*,[256] the Court doubled down on its *Sykes* position. Three defendants—Hughes, Bell, and Isaac—were separately tried and convicted prior to the decision in *State v. Robinson*[257] by the Ohio Supreme Court.

The court in *Robinson* decided that once a defendant introduces some evidence of self-defense, the prosecutor then has the burden to disprove self-defense beyond a reasonable doubt.[258] This holding radically reversed a century of law in Ohio by placing the burden of proof for self-defense totally on the defendant.[259]

The Ohio legislature adopted a provision in 1974[260] bifurcating the burden of proof for self-defense. It established a "general" burden of proof on the prosecution to disprove self-defense[261] and a burden on the defendant of going forward with the evidence of self-defense as an affirmative defense.[262] For at least two years following that enactment, Ohio courts "assumed that this section worked no change in Ohio's traditional burden-of-proof rules."[263]

In December 1974, defendant Hughes was indicted for aggravated murder. At trial, the jury was instructed that Hughes bore the burden of proving self-defense by a preponderance of the evidence. Hughes did object to the instructions in general, although Justice O'Connor, writing for the majority in *Engle*, dismissed this objection as one that was focused on other issues.[264] Hughes was convicted of the lesser offense of voluntary

254. *See Mempa*, 389 U.S. at 134; Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973).

255. With no constitutional right to appointed counsel on collateral review petitions, the habeas petitioner has little ability to meaningfully analyze trial counsel's actions. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (no federal right to appointed counsel collateral postconviction proceedings even though state provided for right to appointed counsel in state postconviction proceedings); *Murray*, 492 U.S. at 10 (no constitutional right to appointed counsel in capital postconviction cases).

256. 456 U.S. 107 (1982).

257. 351 N.E.2d 88 (Ohio 1976).

258. *Id.* at 108.

259. *See* State v. Seliskar, 298 N.E.2d 582 (Ohio 1973); Szalkai v. State, 117 N.E. 12 (Ohio 1917); Silvus v. State, 22 Ohio St. 90 (1872).

260. OHIO REV. CODE ANN. § 2901.05 (LexisNexis 2017).

261. *Id.*

262. *Id.*

263. *Engle*, 456 U.S at 111.

264. *Id.* at 112–13, 112 n.6.

manslaughter and subsequently did not raise the issue of the jury instruction on burden-of-proof regarding self-defense on appeal to either the intermediate state court of appeals or to the state supreme court. He did seek federal habeas corpus relief after the effective date of *Robinson*, but that petition was dismissed by the district court because, in large part, Hughes failed to satisfy the cause-and-prejudice test of *Sykes* in that he did not show *cause* for failure to assert a claim that had not legitimately existed for over 100 years.[265] Likewise, defendant Bell was convicted of murder in 1975.[266] He also did not challenge the 100-year-old rule on burden of proof at trial or before the state supreme court.[267]

Isaac was convicted of felony assault in 1975 and also claimed self-defense. Ten months after Isaac's conviction, the state supreme court decided *Robinson*. Isaac thereafter relied on *Robinson* in his appeal to the United States Court of Appeals for the Sixth Circuit. Isaac's appeal was rejected because he failed to adhere to the Ohio requirement of objecting to jury instructions during trial. The state supreme court dismissed the subsequent appeal for "lack of a substantial question," while quixotically deciding the same day *State v. Humphries*.[268] In *Humphries*, the Ohio Supreme Court ruled that every criminal trial held after January 1, 1974, which would have included Isaac, had to be conducted according to the then-recently enacted statutory provisions shifting the burden of proof for self-defense to the prosecution.[269]

The evidence of self-defense in all three cases was important and substantial. Significantly, after the presentation of self-defense evidence, all three defendants were not convicted of the indicted charges but of lesser included offenses.[270] All three Ohio defendants were unsuccessful in their federal habeas corpus petitions before the United States District Court for the Southern District for Ohio.[271]

The Supreme Court concluded in *Isaac* that all three habeas petitioners failed to demonstrate cause-and-prejudice, pursuant to *Sykes*, regarding the failure to raise the issue of burden of proof at or before trial

265. *Id.*at 113, 116.

266. *Id.* at 113–14.

267. Although Bell did seek leave to appeal two months after *Robinson* was decided, the supreme court overruled that motion. *Id.* at 114.

268. 364 N.E.2d 1354 (Ohio 1977).

269. *Id.* at 1356.

270. *Engle*, 456 U.S. at 113–14. Hughes was convicted of voluntary manslaughter, a lesser included offense of aggravated murder. Bell was convicted of simple murder, a lesser included offense of aggravated murder. Isaac was convicted of aggravated assault, a lesser included offense of felonious assault. *Id.*

271. Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980); Hughes v. Engle, 642 F.2d 451 (6th Cir. 1980); Bell v. Perini, 635 F.2d 575 (6th Cir. 1980).

as required by Ohio law.[272] Remarkably, the Court did not find *cause* for the trial counsel's failure to object even though at the time of trial the Ohio legal system had ruled against the defendants' position for over 100 years.[273]

The habeas petitioners asserted that the *cause* requirement of *Sykes* was met in two ways. First, it was contended that the petitioners could not have reasonably known that the issue of whether the prosecutor had the burden of proof regarding negating self-defense, once raised, was of constitutional Due Process significance.[274] Though in the 100 years prior to *Robinson* the constitutional claim had never been accepted, Justice O'Connor nonetheless claimed that a "colorable" claim could have been extrapolated from *In re Winship*[275] and its holding that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt."[276] The Court concluded that while the Constitution "does not insure that defense counsel will recognize and raise every conceivable . . . claim," an attorney's failure to have an expansive, imaginative mind regarding constitutional theory is insufficient cause for failure to contemporaneously object to the jury instructions as unconstitutional.[277]

Second, and much more difficult to understand, is Justice O'Connor's rejection of the trial counsel's reliance on the futility of raising an objection as sufficient cause under *Sykes*.[278] O'Conner concluded that defense counsel should have simply assumed that Ohio would change its century-old position.[279] One aspect of this latter position the Court never addressed is that legal counsel in Ohio, as with all jurisdictions, were bound by the then-Canons of Ethics, the Rules of Professional Responsibility, and the rules of court not to raise frivolous claims. Nothing in Ohio law suggested that, at the time of trial, claiming that the prosecution had the burden of disproving self-defense once the defendant raised the claim would be anything but frivolous. More importantly, nothing in the Supreme Court's prior statements on *cause* suggested that it can only be established where counsel is correct in assessing that such a claim would be frivolous.

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272. *Engle*, 456 U.S. at 110.
273. *Id.* at 131.
274. *Id.* at 130.
275. 397 U.S. 358 (1970).
276. *Id.* at 364.
277. *Engle*, 456 U.S. at 133–34.
278. *Id.* at 130.
279. *See id.*

The majority's somewhat dismissive treatment of whether cause has been met[280] resulted in one of the most dramatic dissents in Justice Brennan's career. He wrote: "The Court still refuses to say what 'cause' is: And I predict that on the Court's present view it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause.'"[281]

The Court's opinion in *Engle* regarding cause-and-prejudice is troublesome in aspects central to the concerns of this Article. First, the opinion ignores the importance and usefulness of habeas corpus as postconviction relief for the poor, and particularly for the over-represented African-American and Latino prison population. The importance of having a right and an avenue to address unjust treatment to largely disenfranchised criminal defendants of color has been a fundamental part of articulated Due Process as early as *Powell* and received recognition as a "special circumstance" of criminal justice in the subsequent decision in *Betts*.[282] As the Court later expanded *Powell*'s application through incorporation of the Sixth Amendment,[283] it kept in mind the dilemma facing poor and disenfranchised defendants by guaranteeing counsel at every critical stage in the proceedings against them.[284]

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280. There can be little doubt that *prejudice* is met regarding an issue of the prosecution's burden of proof in this case as is evident from the Court's own reliance on *In re Winship*, and the apparent significance to the jury of evidence of self-defense in acquitting as to the greater charge and convicting on the lesser included offense, even in the face of an improper jury instruction.

281. *Id.* at 144 (Brennan, J., dissenting).

282. Rather than applying *Powell*'s Due Process-based right to counsel to a broad spectrum of criminal defendants, the opinion limited the application of *Powell* to "special circumstances." In particular, such circumstances existed where,

> [I]gnorant and friendless *negro* youths, strangers in the community, without friends or means to obtain counsel, were hurried to trial for a capital offense without effective appointment of counsel on whom the burden of preparation and trial would rest, and without adequate opportunity to consult even the counsel casually appointed to represent them.

Betts, 316 U.S. at 463 (emphasis added).

283. *Gideon*, 372 U.S. at 342–43.

284. Drawing upon the famous line from *Powell*—"[the indigent defendant] requires the guiding hand of counsel at every step in the proceedings against him," 287 U.S. at 69—the Court has protected the disproportionately non-white population's right to be heard through counsel at such stages as: arraignments, *Hamilton*, 368 U.S. at 52; preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970); post-formal charge corporeal identification confrontations, *Moore v. Illinois*, 408 U.S. 786 (1972); and at every stage of the trial proceedings where important rights of the defendant may be won or lost. *Mempa*, 389 U.S. at 128. *Cf.* Rothgery v. Gillespie Cty., 554 U.S. 191 (2008).

The modicum of protection and ability to address injustice by Sixth Amendment-appointed counsel abruptly ends after sentencing. *Gagnon v. Scarpelli*[285] made it clear that there is no Sixth Amendment right to appointed counsel after the sentencing stage.[286] Convicted defendants seeking to speak effectively regarding trial injustice through appointed counsel may do so only through an appeal if granted by the state.[287] The Court has made clear that appointed counsel in collateral review, such as federal habeas corpus, is not a constitutional right.[288] Habeas corpus, without the assistance of appointed counsel, thus becomes the only avenue for access to the courts for thousands of convicted persons.

Curiously, having meaningful access to the courts had previously received constitutional blessing from the Court. In *Avery,* the Court held that "the basic purpose of the writ [of habeas corpus] is to enable those unlawfully incarcerated to obtain their freedom."[289] The Court indicated that it had steadfastly insisted that there is no higher duty than to maintain the right of access to the courts through habeas corpus.[290] Striking down a Tennessee provision forbidding the use of prisoner "writ writers" by other inmates, the Court held that "Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively . . . forbid[s] illiterate or poorly educated prisoners [the ability] to file habeas corpus petitions."[291]

In *Bounds,* the Court reinforced its earlier *per curiam* opinion in *Younger v. Gilmore*,[292] where the Court held that the fundamental constitutional right of access to the courts required that prison authorities provide prisoners with adequate law libraries or assistance from persons trained in the law.[293]

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285. 411 U.S. 778 (1973).

286. *Id.* at 790–91.

287. *Douglas*, 372 U.S. at 356–58.

288. In *Finley*, the Court held that, even where a state provides for appointed counsel in state postconviction, federal courts will not recognize that the counsel performance criteria from *Anders v. California*, 386 U.S. 738 (1967), mandated in federal constitution-based right to appointed counsel under either the Sixth Amendment or Due Process, will apply. *Finley*, 481 U.S. at 554–55. Noting that the Court has "never held that prisoners have a constitutional right to counsel when mounting collateral attacks [to] their convictions . . . [the Court] declined to [do so in this case]." *Id.* at 555. The Court further made clear its opposition to constitution-based appointed counsel in postconviction cases like *MacCollum*, 426 U.S. 317 (28 U.S.C. § 2255). *Finley*, 481 U.S. at 556–57.

289. *Avery,* 393 U.S. at 485.

290. *Id.*

291. *Id.* at 487.

292. 404 U.S. 15 (1971).

293. *Bounds*, 430 U.S. at 817.

Perhaps more significant in trying to understand the Court's position in *Engle* is the Court's position in *Ex Parte Hull*,[294] which the Court relied on in *Bounds*.[295] Hull, a prisoner in Michigan, prepared a petition to send directly to the Supreme Court to invoke original habeas corpus jurisdiction. Michigan prison officials intervened based on a state regulation requiring all legal documents, including petitions for habeas corpus, to first be presented to prison officials for review and approval.[296] The Court invalidated the state regulations as a means of denying meaningful access to the court, declaring that state officials "may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."[297]

That a state's procedural requirement may not prevent a potentially unconstitutionally confined person's access to federal courts through habeas corpus seems lost in *Engle*'s willingness to let the non-legally educated, unrepresented, and incarcerated be denied access because of their attorneys' nonadherence to state procedural requirements. To the extent that the cause-and-prejudice standard of *Engle* prevents access to the courts, it works a particular hardship on the overrepresented black and brown prison population.

This is nowhere more evident than when one considers the racial demographic of persons who have managed to have their convictions vacated through postconviction relief sought by the volunteer work of the Innocence Project. The Innocence Project, which provides postconviction assistance in only a fraction of the cases of persons convicted of serious felonies, reported that since 1989, it has successfully obtained postconviction exoneration in 351 cases. In 243 (69%) of those cases, black or brown petitioners were exonerated using DNA alone.[298]

The injustice of the *Engle* cause-and-prejudice approach is even greater when one considers that the sin of noncompliance with state procedure is committed by the attorney but visited upon the perhaps wrongly-convicted defendant. The Court has hidden this sin of attorney failure behind what has become a nearly insurmountable wall of seeking redress for ineffective assistance of counsel. The implied alternative for defendants wrongly convicted is to seek relief via *Strickland v.*

294. 312 U.S. 546 (1941).

295. *Bounds*, 430 U.S. at 821–22.

296. *Hull*, 312 U.S. at 547–49.

297. *Id.* at 549.

298. *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Nov. 12, 2017).

Washington[299] when the defendant was otherwise denied access to federal habeas corpus relief because of state procedural default.

The challenge for any convicted individual forced to turn to ineffective assistance of counsel claims in order to successfully follow the twisted path to federal habeas corpus relief is nothing short of Kafkaesque. Like poor Surveyor K's need to seek entry into the castle in order to obtain a pass to enter the castle,[300] the uncounseled and often uneducated would-be habeas petitioners will effectively need counsel in order to articulate their claims to comply with *Strickland*. Justice Brennan probably addressed this best in his *Sykes* dissent when he said "[A]NY realistic system of federal habeas corpus jurisdiction must be premised on the reality that the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of *trial counsel*."[301]

Adding to the bewilderment is the majority's failure to recognize that a petitioner seeking habeas corpus relief is hardly ever represented by the same attorney in the collateral action as at trial. More often than not, a habeas petitioner is left to seek such relief without counsel at all.[302] The strong likelihood that trial counsel will not be around to benefit from avoiding state court determination of constitutional issues casts substantial doubt on the majority's fear of attorney "sandbagging."[303] For

299. 466 U.S. 668 (1984). Interestingly, the worlds of race and ineffective assistance of counsel have recently collided once again in *Buck v. Davis*, 137 S. Ct. 759 (2017). The Court found that defense counsel's performance during the penalty phase of a capital case fell below the *Strickland* standard of competent counsel where the black defendant's own lawyer presented expert testimony indicating that African-Americans were disproportionately predisposed to violent conduct. *Id.* at 775.

300. *See* FRANZ KAFKA, THE CASTLE (1926).

301. 433 U.S. at 104 (Brennan, J., dissenting) (emphasis added).

302. *See Murray*, 492 U.S. at 10.

303. *Sykes*, 433 U.S. at 89. In *Maples v. Thomas*, 565 U.S. 266 (2012), the Court addressed whether the unanticipated abandonment of counsel prior to compliance with state procedural rules was sufficient cause. *Id.* at 271. The petitioner, convicted of murder in a capital case, failed to timely appeal from denial of state postconviction relief based on allegations of ineffective assistance of trial counsel after his *pro bono* attorneys, who had prepared the state postconviction relief petition, abandoned the petitioner without warning and without filing a notice of appeal to join another law firm. *Id.* at 270–71. The Court found that adequate cause was shown and "a client cannot be charged with the acts or omissions of an attorney who has abandoned him." *Id.* at 283. Implicit in that statement and explicit in the opinion is the Court's remarkable reaffirmation of its position in *Coleman v. Thompson*, 501 U.S. 722 (1991), that a defendant otherwise victimized by the negligence of a postconviction relief attorney cannot show cause in the absence of complete abandonment because such an attorney is an agent under principles of agency law and the principal must endure the consequences of the negligence of an agent. *Id.* at 753–54. The application of this aspect of agency law to poor, disenfranchised, and disproportionately of

the indigent African-American defendant, it is even more unlikely that the defendant will have a public defender with the time or resources to plot such circumnavigation.[304]

Cause-and-prejudice restrictions frustrate the Warren Court's core value of habeas corpus as a venue for addressing issues of racial injustice broadly impacting societal civil rights. Strict application of cause-and-prejudice places the Court in the unconscionable position of allowing procedural default to obstruct addressing outrages of broad impact. It is this broad impact that also is of concern in perhaps the most significant matter raised by the *Engle* majority opinion—the wholesale attack on the availability of federal habeas corpus as a form of postconviction relief.

Rather than recognize the role of federal habeas corpus the Court earlier emphasized as a point of access to courts[305] —particularly for the poor and the unrepresented—Justice O'Conner's opinion emphasized the perceived burden on the federal system by the writ.[306] O'Conner asserts that "[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused."[307] She further stated that "liberal" allowance of the writ is detrimental to the trial process because the state expends significant resources in bringing individuals to trial and the "availability of habeas corpus may diminish [state trial] sanctity by suggesting to the trial participants that there may be no need to adhere to [protections for the accused] during the trial itself."[308]

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color postconviction relief seekers is that such individuals lack virtually any bargaining power or true free-market status in the selection of postconviction counsel and more often than not, like the petitioner in *Maples*, are lucky to get *pro bono* or court-appointed help. Poor and minority petitioners are in no position to "choose" counsel but apparently must suffer the consequences of their poverty without relief or consideration of the substantive justice of their case.

304. *See* Rebecca Marcus, *Racism in Our Courts: The Underfunding of Public Defenders and Its Disproportionate Impact Upon Racial Minorities*, 22 HASTINGS CONST. L.Q. 219 (1994).

305. In *Avery*, the Court stated: "This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme, and the Congress has demonstrated its solicitude for the vigor of the Great Writ. The Court has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" 393 U.S. at 485 (quoting *Bowen*, 306 U.S. at 26). "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.*

306. The majority pays passing homage to the writ by stating "habeas corpus indisputably holds an honored position in our jurisprudence," *Engle*, 456 U.S. at 126, but like all revered museum pieces, the honor is apparently in observing its existence but never using it.

307. *Id.* at 126–27.

308. *Id.* at 127.

Perhaps recognizing that it had backed itself into a corner by drifting away from habeas' core values, the Court has given itself some room regarding actual innocence claims. Turning a procedurally deaf ear, under cause-and-prejudice, to the pleas of persons who may be factually innocent runs contrary to the very foundation of habeas corpus.

In *Schlup v. Delo*,[309] the Court considered applying cause-and-prejudice to another procedural bar to federal habeas corpus the Court has developed over the years—successive petitions.[310] Citing the expansion of habeas corpus beyond its original, jurisdiction-oriented purpose, the Court noted that, consistent with prior congressional action over concerns regarding the burden that successive petitions place on the federal judicial system,[311] the cause-and-prejudice standard articulated in *Sykes* and *Engle* is applied to "successive" or "abusive petitions."[312] In *Schlup*, the Court considered whether, and under what circumstances, the assertion of actual innocence satisfies this standard.[313]

Lloyd Schlup, who is white, was sentenced to death following a conviction for the murder of another Missouri prison inmate, who was black.[314] The murder was alleged to have been a race-motivated killing.[315] Schlup asserted an alibi defense and that both the institution's videotape and alibi witnesses indicated that Schlup was the victim of a wrongful identification. Despite his claims, Schlup was convicted and sentenced to death. Following unsuccessful appeals, Schlup filed for federal habeas corpus relief alleging, among other things, that he received ineffective assistance of counsel because of his attorney's failure to call an alleged alibi witness. His petition was denied without an evidentiary hearing. Schlup thereafter filed a second petition for federal habeas corpus relief

309. 513 U.S. 298 (1995).

310. The issue of successive petitions originally arose because of a recognition that the civil procedure doctrine of res judicata was inapplicable, regarding constitutional claims, to a "hybrid" collateral attack, such as habeas corpus. *See* Salinger v. Loisel, 265 U.S. 224, 230 (1924). Although the nonapplication of res judicata to state postconviction has now been largely rethought, a common law doctrine of successive petitions was developed "as a kind of substitute." RONALD P. SOKOL, FEDERAL HABEAS CORPUS § 25.1, 187–90 (2d ed. 1969). In *Sanders*, the Court recognized that the then-standard for federal postconviction relief under 28 U.S.C. § 2255 was equally applicabile to 28 U.S.C. § 2244 proceedings. 373 U.S. at 14. Under this standard, a successive petition could only be dismissed on the same ground asserted if the successive petition was previously determined on the merits adversely against the applicant and the interest of justice would not be served by reaching the merits in the subsequent petition. *Id.* at 16–17.

311. *See* Kuhlmann v. Wilson, 477 U.S. 436, 450–51 (1986).

312. *See* Murray v. Carrier, 477 U.S. 478 (1986).

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

314. *Id.* at 301–02, 305.

315. *Id.* at 316.

alleging three claims: first, he asserted that he was actually innocent of the murder and that the execution of an actually-innocent person would violate the Eighth[316] and Fourteenth Amendments of the United States Constitution; second, he reasserted his claim of ineffective assistance of counsel and; third, he asserted that the State had failed to disclose exculpatory evidence.[317] Because Schlup failed to satisfy the cause-and-prejudice standard, his second petition was dismissed. The United States District Court for the Eastern District of Missouri also based its dismissal on Schlup's failure to satisfy the standard in *Sawyer v. Whitley*[318] regarding claims of actual innocence—that the Eighth Amendment is only violated upon the defendant showing by clear and convincing evidence that no reasonable juror would have convicted.[319]

The Court, granting relief to Schlup and steering away from its restrictive application of cause-and-prejudice, divided the claim of actual innocence into two categories.[320] First, a petitioner alleging that procedural trial error resulted in the conviction of an actually innocent person may, consistent with the earlier decision in *Murray v. Carrier*,[321] establish cause by demonstrating that a constitutional violation probably resulted in a conviction of someone who is actually innocent. The second category, in contrast, involves cases where one asserts actual innocence despite a trial with no procedural error.[322] In opening this closing door to federal postconviction relief, the Court recognized that habeas corpus is an equitable relief demanded by justice despite the "societal interest in finality, comity, and conservation of scarce judicial resources."[323] This more expansive view of habeas intent is consistent with the reformative vision of federal habeas corpus espoused by the Warren Court three decades earlier but hard to reconcile with the limitations of *Sykes* and *Engle*.

The Court's attack on federal habeas corpus postconviction relief both mirrored and fueled a national "law and order" focus that swept the nation during the 1980s. Not long after *Engle* was decided, Congress took the opportunity to consider legislation to severely restrict the postconviction remedy. In 1982, The Criminal Code Revision Act (CCRA)

316. U.S. CONST. amend. VIII.
317. *Schlup*, 513 U.S. at 303–07.
318. 505 U.S. 333 (1992).
319. *Schlup*, 513 U.S. at 309.
320. *Id.* at 313–14.
321. 477 U.S. 478 (1986).
322. *Schlup*, 513 U.S. at 324–26.
323. *Id.* at 324.

of 1981[324] was introduced into the Ninety-Seventh Congress. This Bill sought change across the federal criminal process reflecting the national anti-crime emphasis.[325]

Drawing particular attention were the Act's provisions regarding federal habeas corpus review of state convictions. In an attempt to embody the *Sykes* and *Engle* cause-and-prejudice standard, Subtitle II of the CCRA required: (1) that a state prisoner show prejudice resulting from the non-application of a federal right alleged to be violated; (2) that the federal right alleged to be violated did not previously exist; (3) that state action precluded assertion of the right; or (4) that the factual basis of the claim could not have been previously discovered by reasonable diligence.[326] The Bill also created a three-year statute of limitations for state prisoners seeking habeas corpus relief and prohibited federal court evidentiary hearings, with limited exceptions, when the state court record showed that the factual issue had been litigated.[327]

The Bill was referred to the House Judiciary Subcommittee on Criminal Justice where it attracted attention from critics for this attempt to substantially limit access to federal habeas corpus. Among other critics, this Author appeared before the Subcommittee on May 12, 1982, on behalf of the National Conference of Black Lawyers, in order to address, *inter alia*, the potential impact of these proposed changes on African-Americans if adopted.[328] The Author raised the following four

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324. H.R. 5679, 97th Cong. (1981).

325. In Subtitle II, the Act sought broad revisions, including: repeal of the Bail Reform Act of 1966, Pub. L. No. 89–465, 80 Stat. 214–17 (1966) (largely credited as the model for state bail reform throughout the country); repeal of the Smith Act, 18 U.S.C. § 2385 (2017); repeal of the Mann Act, 18 U.S.C. § 2421–24 (2017); and removal of selected affirmative defenses to the Hobbs Act, 18 U.S.C. § 1951 (2017). Subtitle III also would have abolished both parole and "Good Time" credit for federal prisoners in addition to its attempts at major reform of federal habeas corpus. H.R. 5679.

326. H.R. 5679.

327. *Id.*

328. *Hearing on H.R. 1647, H.R. 4492, H.R. 4711, H.R. 5679, and H.R. 5703: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 97th Cong. 1965–66 (1982) [hereinafter *Criminal Justice Hearings*] (testimony of LeRoy Pernell, Ohio State University School of Law, on Behalf of the National Conference of Black Lawyers). This Author stated:

> Americans have a keener interest and greater stake in the availability of this writ than perhaps other persons.
>
> In that regard, let me state first that the writ of habeas corpus has traditionally been a primary tool for those who wish to challenge the unconstitutionality of their conviction. For black prisoners it has been used to challenge racial discrimination in jury determinations, pretrial detention, and problems involving the right to counsel.
>
> This is because black Americans very often have been unable to afford the type of representation that would present these issues in some other forum other than

main points with the committee: (1) habeas corpus is a remedy of the poor and non-white; (2) the restrictions on the availability of federal habeas corpus contained in the CCRA are not justified by claims of excessive drain on court resources; (3) that attempts to codify *Sykes* and *Sumner v. Mata*[329] via the CCRA unduly interfered with the role of the Court in shaping judicial policy; and, (4) the Court's direction in limiting the availability of federal habeas corpus was wrong and should not be supported by legislative action.[330]

Other commentators raised concerns regarding the CCRA. Professor Stephen Gillers of New York University School of Law and Phylis Skoot Bamberger of the Federal Defender Unit of the Legal Aid Society of New York's Appeals Division addressed the often-repeated claim also relied on by the Court in both *Sykes* and *Engle* that restricting habeas corpus access to the federal court is justified by the resource strain occasioned by such petitions.[331] Both pointed out that it is filings and delays associated with the civil docket that delay civil justice.[332]

The CCRA subsequently died in subcommittee. However, the restrictions sought that would have the effect of severely limiting federal habeas corpus access, particularly to the poor and non-white state

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habeas corpus. There is no question in my mind that if black Americans had the resources of say, Claus von Bulow, we would not have to be concerned with whether or not we had the ability to raise issues in a postconviction forum.

I have no doubt in my mind that where the defendant has sufficient resources, those issues will be raised at trial and on appeal. That is not the case for the poor and that is not the case for the minorities in the prison system.

329. 449 U.S. 539 (1981). In *Sumner*, the Court held that pursuant to 28 U.S.C. § 2254(d) (2017), a factual issue determined by a prior state court of competent jurisdiction shall be presumed correct and cannot be redetermined by a federal court in a habeas corpus proceeding unless at least one of the seven enumerated exceptions contained in § 2254(d) are found to be present. *Sumner*, 449 U.S. at 551–52.

330. *See Criminal Justice Hearings*, *supra* note 328, at 1972–77.

331. *Id.* at 1640–83 (testimony of Professor Stephen Gillers, New York University School of Law); *Id.* at 1683–1765 (testimony of Phylis Skoot Bamberger, Attorney in charge, appellate section of Federal Defender Office of New York Legal Aid Society, on behalf of the National Legal Aid and Defenders Association).

332. *Id.* at 1653–54, 1683–84. Specifically, Bamberger stated:

> The argument that habeas uses up too much time of the Federal courts simply doesn't hold water. The real problem with a lot of these cases [is] that the petitioner is pro se and because of his custody cannot collect the documents necessary. The State attorneys general or district attorneys, whoever is responsible for defending against the petitioner do not, despite the requirement of the statute, do the job of putting together the papers which are necessary for the district court judge or the magistrate to make a determination in the case. I know from experience that in many instances judges and magistrates must issue orders to the States to respond with the appropriate documents necessary to resolve the matter.

Id. at 1683–84.

prisoner, would see new life fourteen years later in the form of the AEDPA. Following the failed effort to restrict habeas corpus through the CCRA and before the later successful legislative effort of the AEDPA, the Court continued its barrage of restrictions—some of which have had a particularly onerous impact on the vindication of racial injustice.[333]

In *Rose v. Lundy*,[334] the Court considered whether the exhaustion of available state remedies required by 28 U.S.C. §§ 2254(b) and (c) required dismissal of a habeas corpus petition where some, but not all, issues satisfied the exhaustion requirement.[335] The Sixth Circuit held that the United States District Court for the Middle District of Tennessee acted properly in granting the petition, finding that the petitioner-defendant had been denied his right of confrontation because the trial court limited defense counsel's cross-examination of the victim and that the petitioner had been denied a fair trial because of a least ten instances of serious prosecutorial misconduct.[336] Both issues were exhausted at the state level by the defendant's unsuccessful petition for state postconviction relief. The district court declined to rule on the petitioner's additional two claims alleging improper prosecutorial comments to the jury and improper instructions to the jury because those two issues had not been exhausted at the state level.[337]

Writing the plurality opinion for the Court, Justice O'Connor reversed the Sixth Circuit and the district court, finding that principles of "comity" required that such mixed petitions be dismissed.[338] Justice O'Connor further reasoned that a petitioner could always refile upon the exhaustion of all of the petitioner's claims or, alternatively, could amend the petition to eliminate the unexhausted claims.[339] The Court's rationale was drawn largely from the significance it placed on the district court's observation regarding exhausted and unexhausted claims in the case before it; that "there is such mixture of violations that one cannot be

333. The Court's restriction of habeas corpus certainly did not begin with the failure of the CCRA. The Court's efforts throughout the 1980s and 1990s, exemplified in *Sykes, Engle,* and *Sumner*, reflected the independent consensus of the Court that habeas corpus relief, readily available to the poor and unrepresented, was a source of unwanted delay and undue consumption of federal court resources. *See* John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 CORNELL L. REV. 259 (2006).

334. 455 U.S. 509 (1982).

335. *Id.* at 510.

336. *See id.* at 511–13.

337. *Id.* at 510–11.

338. *Id.* at 522.

339. *Id.* The realistic ability to refile either the entire petition or dismissed claims is put somewhat in doubt by the Court's stance on what it terms as "abusive" petitions. *Id.* at 536–38.

separated from and considered independently of the others."[340] Yet, the rationale of the plurality does not limit itself to those exhausted and unexhausted issues that are so comingled that they prevent independent consideration. The Court seemed to hold out the possibility of going forward regarding exhausted claims if such can be clearly distinguished from the unexhausted claims, but noted that a petitioner does so at the peril of a federal court dismissing the deleted, unexhausted claims if subsequently pursued in habeas after exhaustion.[341] Stated differently, if a petitioner moves forward with an amended petition that eliminates unexhausted claims, such deleted claims may never be heard.[342]

The Court subsequently sought to mollify the "damned if you do, damned if you don't" concerns by holding, twenty-seven years later in *Rhines v. Weber*,[343] that a district court has the discretion to stay a "mixed" petition in order to allow a petitioner to exhaust the unexhausted claims before returning to federal court.[344] However, in the context of having a forum to address racial injustice, the restriction on mixed petitions has relevance. The Court in *Rose*, perhaps mindful of the criticism concerning yet another procedural roadblock to habeas relief—from Justice Stevens, particularly—noted that the Court's holding sets a trap for the unwary *pro se* petitioner.[345] The Court further stated that *pro se* petitioners, a category in which many, if not most, non-white petitioners find themselves, should be able to "manage" "this straightforward exhaustion requirement."[346] More importantly and perhaps more troubling for issues typical in racial justice claims is the fate of the mixed petition in *Lundy* itself. Despite the Court's recognition that comity's necessity requirement gives way "in rare cases where exceptional circumstances of peculiar urgency are shown,"[347] the unexhausted issues of prosecutorial misconduct and improper

340. *Id.* at 512.

341. *Id.* at 518–20.

342. The Court stated:

> By invoking this procedure, however, the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. Under 28 U.S.C. § 2254 Rule 9(b), a district court may dismiss subsequent petitions if it finds that "the failure of the petitioner to assert those [new] grounds in a prior petition constituted an abuse of the writ."

Id. at 520–21.

343. 544 U.S. 269 (2005).

344. *Id.* at 277.

345. 455 U.S. at 520.

346. *Id.* It is hard to see how this or any other interpretation of 28 U.S.C. § 2254(b) and (c) or its impact with then existing Habeas Rule 9(b)—both requiring Advisory Committee notes—would be "manageable" by a *pro se* petitioner.

347. 455 U.S. at 515.

comments—claims at the heart of many racial injustice claims—were found to be so intertwined in the mixed petition as to require dismissal as opposed to redaction.[348]

Other procedural roadblocks were pursued by the Court prior to the advent of the AEDPA.[349] However, no case decided during this period had a more direct and profound impact than *Teague v. Lane*[350] on limiting federal habeas corpus as a postconviction tool for addressing racial injustice.

The challenge of whether and how state prisoners could use Court decisions decided after state conviction has long plagued the Court hearing § 2254 petitions.[351] The doctrine of retroactivity as it impacted postconviction relief had, at its center, posed the difficult question of whether new Court pronouncements merely proclaimed law as it should have originally been determined or whether the new principle broke unanticipated new ground that should inure prospectively.[352] The issue has been complicated by concerns that retroactive application regarding convictions long thought as "final" would result in an uncontrollable "floodgate of litigation" that would both overload judicial resources and undermine confidence in the criminal justice system.[353]

As far back as *Linkletter v. Walker*,[354] the Court struggled with the purpose of the Court's pronouncement and its effects on the state as critical to retroactivity analysis.[355] Considering the focus of this Article and the earlier discussion of the civil rights importance of *Mapp*, the

348. *Id.* at 519.

349. In *Barefoot v. Estelle*, 463 U.S. 880 (1983), the Court found that death-sentenced inmates must show substantial denial of a federal right in order to pursue an expedited appeal from a denial of federal habeas corpus relief. *Id.* at 892–93. Successive petitions, often used by indigent and unrepresented petitioners, were severely limited in *McCleskey v. Zant*, 499 U.S. 467, 502 (1991). Additionally, *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), limited the availability of evidentiary hearings. *Id.* at 11–12. The concept of the "the poor man's pleading," often associated with *pro se* habeas corpus petitions and relaxed pleading expectations, was challenged to a large extent by the tightening and more strict requirements of *Duncan v. Henry*, 513 U.S. 364 (1995), prompting Justice Stevens to say in dissent that the Court's opinion "creates an exacting pleading requirement that serves no legitimate purpose in our habeas corpus jurisprudence." *Id.* at 367 (Stevens, J., dissenting). *Brecht v. Abrahamson*, 507 U.S. 619 (1993), made federal habeas corpus review of a state conviction more difficult by imposing a more stringent constitutional harmless error test for postconviction relief. *Id.* at 637.

350. 489 U.S. 288 (1989).

351. *See* Linkletter v. Walker, 381 U.S. 618 (1965).

352. *See id.*

353. *See id.*

354. 381 U.S. 618 (1965).

355. *Id.* at 619–20.

Court in *Linkletter* questioned whether *Mapp* would have applied to a conviction that became final by way of affirmation of conviction by the Louisiana Supreme Court one year prior to the decision in *Mapp*.[356] The Court nonetheless determined, in light of the existing precedent of *Wolf*, that rejecting application of the federal exclusionary rule to the states—a decision on which the states heavily relied—*Mapp* would not be applied retroactively.[357] In addition to the significant level of state reliance on the decision in *Wolf*, the Court in *Linkletter* found that the purposes articulated in *Mapp* would not be served by retroactive application, particularly in light of the conclusion that "[r]ejection of the [illegally seized] evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant [and] does nothing to protect innocent persons who are the victims of illegal but fruitless searches."[358]

Two years later, the Court further clarified its application of retroactivity to § 2254 proceedings. In declining to retroactively apply the holdings of *United States v. Wade*[359] and *Gilbert v. California*,[360] regarding the Sixth Amendment right to counsel, to pretrial identification procedures, the Court in *Stovall v. Denno*[361] stated that the criteria for determining retroactivity were three-fold: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[362] The Court in *Stovall* emphasized, yet again, the singular importance of purpose. Pronouncements of the Court impacting the reliability of the fact-finding process, namely its ability to determine actual guilt, are preferred for retroactive application. Yet, the Court was reluctant to declare automatic retroactivity based on the violation of those Constitutional protections most identified with fair trial, such as the Sixth Amendment right to counsel, and instead adopted an approach of considering the "degree" of impact on the determination of truth.[363]

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356. *Id.*

357. *Id.* at 633–34, 639–40.

358. *Id.* at 632.

359. 388 U.S. 218 (1967).

360. 388 U.S. 263 (1967).

361. 388 U.S. 293 (1967).

362. *Id.* at 297–98.

363. *Id.* at 298. The Court went on to state:

> Although the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at

It is ironic that the Warren Court, long the champion of combatting racism in criminal justice, chose this case to invoke a "nuanced" approach regarding the impact of a Sixth Amendment violation. Stovall was a black man who was displayed to a white crime victim in a one-on-one display, a highly suggestive procedure conducive to wrongful identification.[364] Despite the significant role that counsel can play in both identifying and challenging the wrongful identification of persons of color, the Court opted not to apply this protection under the Sixth Amendment to all who may have been falsely imprisoned prior to 1967 as a result of counsel not being present at the post-formal-charge pretrial identification.[365] Instead, the Court created a Due Process test placing the burden on the defendant to show the pretrial identification procedure was unnecessarily suggestive and conducive to irreparable misidentification.[366]

Teague presented the question of whether those who were tried by juries where persons of color had been wrongfully excluded could use the Court's decision in *Batson v. Kentucky*[367] retroactively.[368] This keystone issue of racial justice—the right to a jury of "peers" not limited by race—is as old as the presence of blacks in America. This issue is at the very fountainhead of the application of constitutional oversight and civil rights reform in the criminal justice system as discussed earlier regarding the challenge facing the Scottsboro defendants, where this most prominent form of racism was first tackled.[369]

When a black or brown defendant faces a jury on which jurors are not allowed to sit because of race, as in *Patterson*, any finding of guilt has questionable reliability. Is the finding based on facts presented or predetermined by race? Is the defendant's own testimony immediately accorded less credibility because of race—particularly where it is contrary to the testimony of white witnesses?[370] The Court thought this

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> trial is necessarily a matter of degree." The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a "question of probabilities." Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice.

Id. (citations omitted) (quoting Johnson v. New Jersey, 384 U.S. 719, 728–29 (1966)).

364. *Id.* at 295.

365. *Id.* at 298–99.

366. *See id.* at 301–02.

367. 476 U.S. 79 (1986).

368. *Teague*, 489 U.S. at 292.

369. *See Patterson*, 294 U.S. at 600; *Norris*, 294 U.S. at 587; *Powell*, 287 U.S. at 45.

370. In Maryland, pre-civil war law provided that "negroes and mulattoes, free or slave, [were] not competent witnesses, in any case [in which] a Christian white person [was] concerned." United States v. Dow, 25 F. Cas. 901, 902 (Cir. Ct. Md. 1840).

issue was serious enough that in *Batson* it stated: "Selection procedures that purposely exclude black persons from juries undermine public confidence in the fairness of our system of justice."[371] Nonetheless, the Court in *Teague*, per Justice O'Connor, chose not to extend *Batson* to those who sought postconviction relief in instances where their convictions had become "finalized" prior to the *Batson* decision.[372]

The petitioner in *Teague*, a black man, was convicted by an all-white jury of attempted murder. During jury selection, the prosecution used all of its ten peremptory challenges to exclude African-Americans from the petit jury. The prosecutor, in response to a defense challenge, claimed that he excluded African-American jurors in an attempt to obtain a balance of men and women. After failing to obtain relief on direct appeal, Teague sought relief under § 2254 on three grounds.[373] First, he claimed that he had been denied equal protection in light of the Court's decision in *Batson*.[374] In *Batson*, the Court held that the defendant's burden of proof regarding the State's purposeful and deliberate denial of jury service because of race, outlawed by *Swain v. Alabama*,[375] is met upon a showing of a prima facie case of discrimination, as demonstrated by evidence that the defendant is a member of a cognizable racial group and that the prosecution has exercised peremptory challenges to remove from the venire members of the defendant's race.[376]

Second, Teague claimed that, regardless of whether the 1986 *Batson* decision applied retroactively to his conviction, which became finalized in 1983, he was denied equal protection pursuant to the decision in *Swain*

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371. *Batson*, 476 U.S. at 87. Additionally, the Court stated that "[t]he petit jury has occupied a central position in our [legal] system of justice by safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge." *Id.* at 86. Though ostensibly relying on equal protection, the strong undertone and linkage to due process via fundamental fairness, as suggested in the above quoted language, is extended to both gender discrimination and the trial and conviction of defendants who are not members of the "protected" class. *See* Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). In *Taylor*, the Court stated:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. . . . Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case."

Id. at 530.

372. *Teague*, 489 U.S. at 296.

373. *Id.* at 292–94.

374. *Id.* at 294.

375. 380 U.S. 202 (1965).

376. *Batson*, 476 U.S. at 96.

because the prosecutor's explanation for his exercise of peremptory challenges to exclude African-American jurors satisfied the *Swain* requirement of proof that the peremptory challenge system had been perverted because of racial animus.[377]

Third, the petitioner claimed a violation of the Sixth Amendment fair-cross-section requirement of *Taylor*, which held that a venire—the pool from which petit jurors are selected—must, consistent with the jury trial provision of the Sixth Amendment, represent a fair cross-section of the community.[378] However, the Court's opinion in *Taylor* specifically withheld determining whether it applied to the petit jury itself.[379]

In a plurality opinion that in many ways re-conceptualizes retroactivity in postconviction cases, the Court declined to apply *Batson* or *Taylor* to cases that had become finalized prior to the date of the *Batson* decision.[380] To do this, the O'Connor opinion adopted and modified Justice Harlan's previous view on retroactivity in § 2254 proceedings.[381] Justice Harlan had previously asserted that criminal procedure rulings should not be applied retroactively to cases on collateral review unless the case met one of the following two exceptions: (1) if the new ruling places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) if the new ruling requires observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'"[382]

Recognizing that part one of the Harlan test was not in play, the Court focused on the "implicit in the concept of ordered liberty" exception announced by Harlan.[383] The consideration of what is included and "implicit in the concept of ordered liberty" has a history that is tied to the Court's view of its doctrine on selective incorporation. As far back as at least 1937, the Court wrestled with the concept of "ordered liberty" mandating procedural safeguards at the state level consistent with federal practice.[384] In that context and at that time, a scheme of ordered liberty was thought to include those procedural concepts that were "fundamental to the American scheme of justice."[385] Before the 1960s, the Court applied what it considered to be a practical test for selective

377. *Teague*, 489 U.S. at 297.
378. *Taylor*, 419 U.S. at 530.
379. *Id.* at 538.
380. *Teague*, 489 U.S. at 295–96.
381. *Id.* at 292.
382. Mackey v. United States, 401 U.S. 667, 692–93 (1971) (Harlan, J., concurring).
383. *Teague*, 489 U.S. at 311.
384. *See Palko*, 302 U.S. at 328.
385. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

incorporation: a protection was fundamental to justice and an ordered scheme of liberty when a civilized system of justice could not be imagined without that protection.[386]

The criminal procedure revolution conducted by the Warren Court took a more reality-based view of state criminal procedure that recognized the unwanted roles that race played and that ordered scheme of liberty should be measured by whether the procedural safeguard had a historic and cultural value presence in our Anglo-American concept of justice. Consequently, the Warren Court found that the protections of the Fourth, Fifth, and Sixth Amendments were largely applicable to the states as a matter of the Due Process Clause of the Fourteenth Amendment.

For the purposes of better understanding Justice Harlan's approach to retroactivity in § 2254 cases, it should be noted that he disagreed with the Court majority's approach regarding fundamental fairness as it pertained to incorporation and as the same concept applied to retroactivity.[387] Justice Harlan was concerned that incorporation meant destruction of the state systems' ability to construct a unique procedure tailored to its own needs and history and that necessity meant a "jot-for-jot" and "case-for-case" uniformity dictated by adherence to federal precedent.[388]

Justice Harlan's view on retroactivity in postconviction cases, which formed the basis for Justice O'Connor's reformulation, mirrors his thinking regarding incorporation.[389] Systemic change in state criminal procedure, brought about through federal court determination arising from cases that in all other ways have reached finality, should only occur when the change involves rights that are part of an ordered scheme of liberty or otherwise dictated by fundamental fairness. Contrary to Justice O'Connor's interpretation, Justice Harlan emphasized that fundamental fairness issues, sufficient for retroactivity in habeas, concern themselves more with the proper pronouncements regarding the essential principles of our Anglo-American system of justice than simply whether the accuracy of the fact-finding process is enhanced.[390] In

386. *See Palko*, 302 U.S. at 328.

387. *See generally Duncan*, 391 U.S. at 171–93 (Harlan, J., dissenting); Malloy v. Hogan, 378 U.S. 1, 14–33 (1964) (Harlan, J., dissenting).

388. *See generally* Williams v. Florida, 399 U.S. 78, 117 (1970) (Harlan, J., concurring in part and dissenting in part).

389. *See Mackey*, 401 U.S. at 693 (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256–69 (1969) (Harlan, J., dissenting).

390. Justice Harlan stated:

> Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to

denying relief to Teague, Justice O'Connor interpreted Justice Harlan's position of permitting retroactive application of procedural determinations that establish rules that are implicit in an ordered scheme of liberty to mean holdings that address instances where the accuracy of the fact-finding process is undermined.[391] This position was both specifically rejected by Harlan and fell short of understanding the significance of eliminating racism in jury selection.

What Justice O'Connor failed to realize in her opinion, and what the Warren Court did recognize, was that the influence of racism, like poverty,[392] in the process of guilt determination, is anathema to the "bedrock" Anglo-American legal tradition and, in fact, undermines the truth determination process. Juries that have been racially "scrubbed" are devoid of the cross-cultural and racial perspective for determining truth and credibility—particularly where multiple racial witnesses are among the presenters of evidence. The Court emphasized, in *Rose v. Mitchell*,[393] the former point regarding the bedrock nature of combatting racism particularly in the context of federal habeas corpus relief.

The limitation of habeas corpus through a suppressive retroactivity policy did much to hide the sins of past racism, as it may have impacted many black and brown prisoners serving the long sentences now associated with mass incarceration. The efforts to restrict habeas further were not over. Congress succumbed to the strident cries and fears

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> have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.

Mackey, 401 U.S. at 693.

391. *Teague*, 489 U.S. at 314–15.

392. Justice Harlan went to particular lengths to reaffirm his support for the retroactive application of *Gideon,* which is fully entwined with addressing both poverty and the principles of *Powell.* Justice Harlan stated in *Mackey*,

> For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction for a serious crime. See my separate opinion in [*Gideon*], where I concurred in conferring this right on a state prisoner, seeking state habeas corpus, on the grounds that this "new" rule was mandated by *Palko*. Hence, I would continue to apply *Gideon* itself on habeas, even to convictions made final before that decision was rendered.

401 U.S. at 694.

393. 443 U.S. 545 (1979). In *Rose*, African-American defendants challenged their conviction via a § 2254 petition based on claims of racial discrimination in the selection of the grand jury foreman. *Id.* at 547. The Court concluded that racial discrimination in the selection of a grand jury foreman is cognizable in federal habeas corpus even though there was no allegation of impropriety in the selection of the petit jury and the defendants had been found guilty beyond a reasonable doubt. *Id.* at 564–65.

prevalent particularly in the 1980s and 1990s. Under the guise of the "war on terrorism," the AEDPA was born.

IV. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND RACIAL JUSTICE

In the wake of the 1993 World Trade Center and the 1995 Oklahoma City bombings, the AEDPA was introduced in 1995 and passed in 1996 with broad bipartisan support. On April 24, 1996, the AEDPA was signed into law. Although purporting to be an act aimed at terrorism,[394] death penalty reform, [395] and victim rights,[396] the heart of the law was its attempt to severely restrict access to federal habeas corpus for postconviction relief purposes. The AEDPA provided for severe restrictions on successive petitions,[397] a statute of limitations for habeas corpus cases,[398] and circumstances under which a federal district court may be permitted to hold an evidentiary hearing.[399] The most significant restriction on habeas corpus access contained within the AEDPA is the so-called "deference provision" contained in 28 U.S.C. § 2254(d).[400] Under this provision, federal habeas corpus postconviction relief for a state defendant can only be provided if there is a determination made that the state court decision is "contrary to" or an "unreasonable application" of Supreme Court precedent.[401]

Before looking more closely at these provisions, it is significant to note that the cumulative impact on African-American prisoners and their ability to raise issues of racial justice did not go unnoticed in the debate of the AEDPA. Congresswoman Nydia Margarita Velázquez, then Representative of the Twelfth District of New York, testified in the House floor debate on the AEDPA:

> My colleagues, the Constitution says we are all entitled to equal protection under the law, but in today's society some of us are more equal than others. The reality is, if you have the money to hire a good lawyer, you can make it through our legal system. But, if you are a poor minority, lacking those resources, you will lose and not have the opportunity to prove you are innocent. By severely limiting this ultimate right to appeal more innocent Americans will unfairly die.

394. AEDPA tits. III, VII, VIII.
395. 28 U.S.C. § 2266 (2017).
396. AEDPA tit. II.
397. 28 U.S.C. § 2244(b)(1) (2017).
398. 28 U.S.C. § 2244(d)(1) (2017).
399. 28 U.S.C. § 2254(e)(2) (2017).
400. 28 U.S.C. § 2254(d) (2017).
401. *See* Blume, *AEDPA*, *supra* note 333, at 260.

> Their blood will be on your hands. I encourage a "no" vote on this conference report.[402]

Representative Howard Lawrence Berman of California's Twenty-Eighth Congressional District stated during those same debates:

> Indeed, the Habeas Corpus Act of 1867 was the first civil rights law enacted after the Civil War, intended to flesh out the habeas clause of the Constitution and thereby protect the rights of the newly freed slaves by giving Federal judges the power to hear "all cases where any person may be restrained of his or her liberty in violation of the Constitution." . . . But I cannot in good conscience vote for a bill which guts the historic means by which Americans enforce the Bill of Rights. That is why I will vote against the conference report.[403]

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402. 142 CONG. REC. H3583, H3612 (1996).

403. *Id.* at H3610. The fears of Rep. Berman and Rep. Velázquez were both emphasized and renewed when, nine years after the passage of the AEDPA, Congress again sought to restrict federal habeas corpus as a postconviction remedy by way of The Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005). In testifying against that proposal Theodore M. Shaw, the Director-Counsel of the NAACP Legal Defense Fund stated:

> The NAACP Legal Defense and Educational Fund, Inc. (LDF) has been involved in the litigation of both capital and non-capital cases in both state and federal courts since our formation more than half a century ago. Our involvement began with pleas for help from family members of African-American men charged with or convicted of capital offenses, mostly in the Old South. Those cases often revealed shameful truths about the way the state criminal justice systems functioned—the insidious role that race played, the inability of poor people to find competent lawyers to mount a defense for them, the ease with which prosecutors could present false testimony against defendants, and the blatant disregard for the most basic constitutional guarantees of fairness and objectivity in prosecutions.
>
> . . . .
>
> As the Committee well knows, federal *habeas corpus* is *the* mechanism by which the federal courts are able to insure that a conviction and sentence were not obtained in violation of the United States constitution. Nine years ago, after long study and debate. Congress undertook an extensive revision of federal *habeas corpus*, resulting in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Among other things, AEDPA shortened the amount of time within which a prisoner could file for habeas corpus review, limited the ability of a federal court to disregard a state court's finding that there was no reversible federal constitutional error in the case, eliminated the prisoner's ability to file multiple habeas corpus challenges to his conviction or sentence, and made appeals in the federal system more difficult to obtain. What S. 1088 seeks to do is to close the small window that AEDPA left open for prisoners to redress fundamental wrongs, even in death penalty cases.

Habeas Corpus Proceedings and Issues of Actual Innocence: Hearings Before the S. Comm. on the Judiciary, 109th Cong. 299–300 (2005) (written testimony of Theodore M. Shaw, Director-Counsel, NAACP Legal Defense Fund).

Despite opposition, the AEDPA was passed and enacted. Its most pertinent parts, for purpose of this discussion, provided the following four principles.

Limitations on Successive Petitions: In order for a would-be petitioner to seek a successive petition, a showing must be made to the court of appeals demonstrating a prima facie case that either the successive petition relies on a new rule of constitutional law that is retroactively applied, or that the factual basis for the new application could not, through due diligence, have been previously discovered.[404]

Statute of Limitations: In one of its most controversial provisions, the AEDPA[405] requires that a state petitioner apply for federal habeas corpus relief for direct review within one year from the date of the state court's final judgment.[406]

Deference Provisions: No provision has caused greater concern—particularly in light of the traditional role of the courts in overseeing racial justice at the state level, as espoused by the Warren court—than the language of § 2254(d), which prohibits the granting of habeas corpus relief regarding any claim adjudicated at the state level, unless that determination

> (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.[407]

Such a concept had no judicial history and received little attention during floor debate. Yet this provision effectively allows the state to determine federal law, including United States Constitutional law, without any ability of federal courts, through habeas corpus, to monitor

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404. 28 U.S.C. § 2244(b) (2017).

405. *See* 28 U.S.C. § 2244(d)(1). Tolling of the statute of limitations may occur following the latest of:

> (1) the date upon which the State removes an unconstitutional or federally illegal impediment to filing and application; (2) the date on which the Supreme Court recognizes a new constitutional right asserted by the petitioner; or (3) the date on which the factual predicate of the claim could have been exercised through the exercise of due diligence.

Andrea A. Kochan, *The Antiterrorism and Effective Death Penalty Act of 1996: Habeas Corpus Reform?*, 52 WASH. U. J. URB. & CONTEMP. L. 399, 410 (1997).

406. The definition of direct review is unclear. It has been suggested that the Court's definition should include certiorari proceedings. *See* Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

407. Blume, *AEDPA*, *supra* note 333, at 272.

unjust imprisonments absent a finding that the state determination was unreasonable.

State Opt-in Provisions in Capital Cases: Initially, concern existed regarding the AEDPA's provisions allowing states funding and facilitating appointment of competent counsel for state postconviction review in capital cases, to "opt-in" to an expedited time-line for federal habeas corpus review, the treatment of "untimely filed" petitions as successive petitions, and the prevention of habeas review for petitions found by the state court to be procedurally defaulted. This concern has become largely muted by the fact that, since enactment, only Arizona has qualified for application of this provision.[408]

In *Felker v. Turpin*,[409] the constitutionality of the AEDPA was challenged the year after its enactment. At issue were the provisions limiting successive petitions.[410] The petitioner, sentenced to death, had exhausted both direct appeal and state postconviction relief. Following the denial of state postconviction relief, the petitioner first unsuccessfully sought federal habeas corpus relief and appealed that denial to the United States Court of Appeals for the Eleventh Circuit. Following denial of relief by the court of appeals, the petitioner both sought a stay of execution and filed a second application for habeas corpus relief. Again, the court of appeals denied relief.[411]

The AEDPA was signed into law prior to Felker's second § 2254 petition for habeas corpus relief.[412] Under the then new language of 28 U.S.C. § 2244(b)(1),[413] dismissal of a successive petition is compelled as to any claims not presented in the first petition.[414] Such dismissal can only be avoided by the granting of a motion for leave to be filed in the court of appeals.[415] The motion may only be granted if a three-judge panel determines that there is a prima facie showing that the conditions

408. Because of a failure to follow its own procedures, Arizona did not qualify to "Opt-In" until 2005. *See* Spears v. Stewart, 283 F.3d 992 (9th Cir. 2002).

409. 518 U.S. 651 (1996).

410. *Id.* at 658.

411. *Id.* at 655–58.

412. *Id.* at 656–57.

413. 28 U.S.C. § 2244(b)(1).

414. *Felker*, 518 U.S. at 656. Felker attempted to raise two claims in his second petition for federal habeas corpus. First, he claimed a violation of Due Process because the state trial court equates "beyond a reasonable doubt" with "moral certainty" in its *voir dire* and jury instructions. Second, he claimed irregularities in the forensic evidence due to qualifications of the state's experts and the conflict with the position of his own experts established alibi and thus he had a claim of actual innocence. *Id.* at 657–58.

415. 28 U.S.C. § 2244(b)(3) (2017).

outlined in that subsection had been met.[416] Section 2244(b)(3)(E)[417] also provides that the decision of the three-judge panel is neither appealable nor the proper subject for a writ of certiorari to the Court.[418] Following denial of his motion for leave by the court of appeals, the petitioner sought relief in the Court by a combined petition to invoke the original habeas jurisdiction of the Court or, in the alternative, for certiorari review of the denial by the court of appeals of his motion for leave to file a second petition.[419]

The Court, in this first test of the AEDPA, found that the new Act did not alter the Court's original habeas corpus jurisdiction but that the act provides "guidance" regarding its consideration of original actions.[420] In this regard, the opinion is somewhat vague. While alluding to "[s]everal sections of the Act impos[ing] new requirements for granting relief [as informing the Court's] authority to grant such relief as well,"[421] the Court did not state what information it gets from this section. Instead, the Court concluded that its own rule for disposition[422] is the basis for

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416. 28 U.S.C. § 2244(b) provides:

> (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.
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> (2) 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 fact-finder would have found the applicant guilty of the underlying offense.

417. 28 U.S.C. § 2244(b)(3)(E) (2017).

418. *Id.*

419. *Felker*, 518 U.S. at 658.

420. *Id.*

421. *Id.* at 662.

422. United Supreme Court Rule 20.4(a) states:

> A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

concluding that the petitioner's request for original habeas corpus consideration should not be granted because the claims did not "materially differ from numerous claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court."[423]

The Court went on to uphold the constitutionality of the AEDPA by declaring that it does not violate the Constitution's Suspension Clause[424] by suspending the writ of habeas corpus.[425] The Court found that the restrictions of the AEDPA regarding successive petitions were a modification of res judicata and "well within the compass of the evolutionary process" of restrictions designed to curb abuse of the writ.[426]

Although the Court has not considered the constitutionality of the AEDPA since *Felker*, the Act's most controversial provision has been addressed by the Court on several occasions. The new language of § 2254(d)(1) requires federal courts considering applications for habeas corpus relief to determine first if a claim has previously been adjudicated at the state level and whether such adjudication was contrary to or an unreasonable application of established federal law.[427] In *Williams v. Taylor*,[428] the Court considered what and how much constraint this provision places on the ability to consider claims of ineffective assistance of counsel.[429] Ineffective assistance of counsel claims depend largely on federal habeas corpus and state postconviction relief for vindication, largely because the need to develop facts outside the transcript makes the claim unavailable for direct appellate review. It is also a claim that is often pursued by non-white defendants concerned that race may have impacted the quality of representation that they received.

In *Williams*, the Court considered the United States Court of Appeals for the Fourth Circuit's reversal of the federal district court's grant of habeas corpus post-implementation of the AEDPA.[430] The petitioner, Williams, sought relief regarding his conviction for capital murder and imposition of the death penalty. Williams asserted that he was denied the effective assistance of counsel during the sentencing phase because of his attorneys' failure to investigate and present substantial mitigating

423. *Felker*, 518 U.S. at 665.

424. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended.").

425. *Felker*, 518 U.S. at 663.

426. *Id.* at 664.

427. 28 U.S.C. § 2254(d)(1) (2017).

428. 529 U.S. 362 (2000).

429. *Id.* at 367.

430. *Id.* at 374.

evidence. Although the Virginia Supreme Court affirmed both the conviction and sentence, the state trial judge, upon considering a subsequent state postconviction petition, found after holding an evidentiary hearing that Williams' counsel failed to discover and present significant mitigation material and thus violated the ineffective assistance of counsel standard set forth in *Strickland*.[431] Based on its interpretation of *Lockhart v. Fretwell*,[432] the Virginia Supreme Court disagreed, holding Williams had not suffered sufficient prejudice to warrant relief.[433] The United States District Court for the Eastern District of Virginia disagreed with the Virginia Supreme Court and found that its interpretation of *Strickland* and *Fretwell* was "contrary to, or involved an unreasonable application of Federal law" per § 2254(d)(1).[434]

The Court, responding to the Fourth Circuit's overturning of the district court decision, considered to what extent § 2254(d)(1) restrained federal courts in general, and the Court in particular, from granting relief.[435] The congressional imposition of a "contrary to" or "an unreasonable application" threshold before which federal courts must cross in order to review a state's interpretation of United States constitutional law was without precedent.[436] The Court seemed perplexed by such an intrusion into traditional federal court doctrine and decision making. In *Williams*, Justice O'Connor, who wrote Part II of the opinion, stated regarding the legislative intent:

> The message that Congress intended to convey by using the phrases, "contrary to" and "unreasonable application of" is not entirely clear. The prevailing view in the Circuits is that the former phrase requires *de novo* review of "pure" questions of law and the latter requires some sort of "reasonability" review of so-called mixed questions of law and fact. We are not persuaded that the phrases define two mutually exclusive categories of questions.[437]

Additionally, Justice O'Connor said,

> When federal judges exercise their federal question jurisdiction under the "judicial Power" of Article III of the Constitution, it is "emphatically the province and duty" of those judges to "say what the law is." At the core of this power is the federal courts' independent

431. *Id.* at 370–71.
432. 506 U.S. 364 (1993).
433. *Williams*, 529 U.S. at 371.
434. *Id.* at 373–74.
435. *Id.* at 379.
436. *See id.* at 367.
437. *Id.* at 384 (citations omitted).

> responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If Congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA.[438]

The Court determined that the Virginia Supreme Court decision was contrary to the established law of *Strickland* and a misinterpretation of *Fretwell*.[439] The Court spoke primarily of the Virginia Supreme Court's error without saying that its finding was unreasonable.[440] The Court treated the language of § 2254(d)(1) as disjunctive in that federal courts sitting in habeas may reconsider a state court's interpretation of federal law if it is either contrary to established Court decisions or unreasonable.[441] If the Court's reaction to review restrictions of the amended § 2254(d)(1) suggests concern over the writ becoming too inaccessible, that concern became more manifest as the Court considered the plight of those who are imprisoned but maintain actual innocence.

V. ACTUAL INNOCENCE—AN ISSUE OF SIGNIFICANCE TO RACIAL JUSTICE IN THE ERA OF THE AEDPA

The fear of criminal conviction of the innocent is an image that has haunted African-Americans since the days of slavery. The images of Ed Brown, Arthur Ellington, and Henry Shield, beaten and tortured so badly that the rope marks of hanging were still on the neck during trial,[442] still burn brightly, as do those of the Scottsboro defendants. Actual innocence is as much an issue of racial justice today as it was in the 1930s. It is

438. *Id.* at 378–79 (citations omitted).

439. *Id.* at 391.

440. *See generally id.* at 391–98.

441. *Id.* at 385–86. Justice O'Connor returned to the issue of the ability of federal courts, consistent with § 2254(d)(1), to reconsider a state court's determination regarding claims of ineffective assistance of counsel in *Wiggins v. Smith*, 539 U.S. 510 (2003). With facts very similar to *Williams*, but where the Maryland Court of Appeals made a determination before *Williams* was decided, the Court in *Wiggins* held that, while the state court had correctly identified the established federal law, its application was objectively unreasonable. 539 U.S. at 527. Additionally, the Court considered the amended § 2254(d)(1) in *Renico v. Lett*, 559 U.S. 766 (2010), *Greene v. Fisher*, 565 U.S. 34 (2011), *Cullen v. Pinholster*, 563 U.S. 170 (2011), and, most recently, in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015).

442. *Brown*, 297 U.S. at 281.

conservatively estimated that as many as 10,000 persons may be wrongfully convicted of serious crimes each year.[443] A 2007 study indicated that 3–5% of the persons convicted of capital crimes in the 1980s were probably innocent.[444] Exonerations after the advent of DNA testing in 1989 show that, of the limited number of cases that have had the opportunity for DNA review, 69% of those exonerated were non-white.[445] The National Registry of Exonerations reports that over 58% of exonerations for all crime are non-white.[446]

The reasons for wrongful convictions, and the roles that race play, vary. The "most common cause . . . is eyewitness misidentification."[447] Forty percent or more of wrongful eyewitness identifications involve attempts at cross-racial identification.[448] False and coerced confessions also play a significant role.[449] The Fifth, Sixth, and Fourteenth Amendment issues associated with wrongful identification and false confessions, along with the other significant causes of wrongful convictions, often cannot find judicial relief in appellate review. The Court, faced with the closing-door of its own policy on habeas corpus and the enactment of the AEDPA, has carved out an approach regarding exceptions to procedural defaults based on claims of actual innocence.

The Court has never clearly declared actual innocence to be an issue cognizable under § 2254 except as it pertains to the imposition of a death penalty.[450] Instead, the Court has considered whether an assertion of actual innocence should allow the consideration of other claims of constitutional or federal law violation despite the presumed bar of procedural default fashioned from both the Court's doctrine on restriction of habeas access and the AEDPA.[451]

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443. *See* C. RONALD HUFF, CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY (1996).

444. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 775–77, 780 (2007).

445. *See DNA Exoneration*, *supra* note 298.

446. *Exonerations by Race and Crime*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx (last visited Sept. 27, 2017); *see also* Emily Homrok, *SpeakOut: How Often Do Wrongful Convictions Involve Black Defendants?*, TRUTH OUT (Aug. 27, 2014), http://www.truth-out.org/speakout/item/25848-how-often-do-wrongful-convictions-involve-Black-defendants.

447. Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005).

448. Innocence Project, *Leading Causes of Wrongful Convictions*, NAACP, http://www.naacp.org/wp-content/uploads/2016/04/IP%20Wrongful%20Convictions%20Facts%20and%20Causes.pdf (last visited Sept. 27, 2017).

449. Gross et al., *supra* note 447, at 544.

450. *See generally Murray*, 477 U.S. at 478.

451. *See generally Schlup*, 513 U.S. at 298.

The issue of actual innocence, as a gateway to consideration of otherwise procedurally defaulted claims, as set forth in *Schlup*, was revisited in *House v. Bell*[452] after enactment of the AEDPA. In *House*, the petitioner's claim for federal habeas corpus relief was denied at the district court level because of procedural default regarding his assertion of ineffective assistance of counsel and prosecutorial misconduct. Summary judgment against House was granted despite the fact that the petitioner presented significant new evidence, not presented at trial, of forensic evidence showing unreliability of the state's blood analysis and scientific evidence showing that House was not the source of the DNA samples used in trial against him.[453]

The Court re-affirmed the *Schlup* exception to procedural bar, which indicated that when a petitioner establishes that it is more likely than not, in light of new evidence, "that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt,"[454] then he is entitled to pass through procedural default "gateway" and to have his otherwise uncognizable habeas corpus claims heard on the merits.[455] The Court concluded that the AEDPA is not a bar to the consideration of a protection against a miscarriage of justice.[456] The Act's provisions, which allow consideration of what would, under the Act, be considered successive, abusive, or defaulted sentence-related claims, only if such claims met the stricter standard and only if the petitioner "shows by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law,"[457] were inapplicable to the consideration of defaulted claims in a first petition.[458]

In *McQuiggin v. Perkins*,[459] the Court had the occasion to broaden the concept of actual innocence as a basis for a petitioner to present claims for determination on the merits, despite the restricting language of the AEDPA.[460] *McQuiggin* addressed the question of whether the 28 U.S.C. § 2244(d)(1)(D)[461] one-year statute of limitations will prevent a petitioner from seeking habeas relief based on ineffective assistance of counsel

452. 547 U.S. 518 (2006).
453. *Id.* at 534–35.
454. *Id.* at 536–37.
455. *Id.*
456. *Id.* at 539.
457. *Id.*
458. *Id.*
459. 133 S. Ct. 1924 (2013).
460. *Id.* at 1928.
461. 28 U.S.C. § 2244(d)(1)(D) (2017).

where the petitioner also asserts actual innocence.[462] Perkins filed for federal habeas corpus relief more than eleven years after his conviction became final.[463] Although it is unclear if the petitioner offered any rationale for failing to file within one year of his conviction becoming final as required by § 2244(d)(1)(D), it may well be supposed that he, like many imprisoned, poor, and disproportionately minority defendants, did not have access beyond his "appeal as of right" to the advice of appointed counsel—particularly counsel willing to examine the handling of his case not reflected in the trial record. Such issues and circumstances are the backbone of postconviction relief and are particularly suitable for determination in settings that allow an evidentiary hearing. Inmates, without the resources and education to understand the finer points and requirements of the AEDPA, must often rely on the assistance and "jailhouse lawyer" advice of other inmates.[464]

Perkins presented three affidavits with his petition for habeas corpus relief, the most recent of which was obtained in 2002 and the earliest of which was from 1997, but after the date of his trial, all tended to show that the State's chief witness, Jones, was the actual killer. Presumably, the petitioner alleges ineffective assistance of counsel as a result of his trial counsel failing to fully investigate or present this evidence of actual innocence at trial.[465] This case presented an issue of the impact of actual innocence evidence on procedural default that went beyond the Court's previous consideration in *Holland v. Florida*,[466] of the AEDPA statute of limitations.[467] In *Holland*, the Court determined that the doctrine of "equitable tolling" allows a petitioner to avoid the restriction of the one-year statute of limitation if the petitioner could show that the petitioner had diligently pursued his or her rights and that some extraordinary circumstance stood in the way of timely filing.[468] Perkins met neither of the two prongs of *Holland*'s equitable-tolling test.[469] Instead, the Court, relying on the principle of avoiding a "fundamental miscarriage of justice," recognized not a "tolling," but an "equitable exception" that allows, in the presence of evidence of actual innocence, for timeliness in filing to be treated not as an absolute barrier, but as a factor to be

462. *McQuiggin*, 133 S. Ct. at 1928.
463. *Id.* at 1929.
464. *See generally Johnson*, 393 U.S. at 483.
465. *McQuiggin*, 133 S. Ct. at 1929.
466. 560 U.S. 631 (2010).
467. *McQuiggin*, 133 S. Ct. at 1928.
468. *Holland*, 560 U.S. at 649.
469. *McQuiggin*, 133 S. Ct. at 1936.

considered in determining whether actual innocence has reliably been shown sufficient to meet the high burden and standard of *Schlup*.[470]

Despite the modifications of *House*, *Holland,* and *McQuiggin*, the statute of limitations provision of the AEDPA still represents a major injustice for the wrongly convicted.[471] The sad irony for the disproportionately black and brown wrongly convicted is that the imposition of any statute of limitations on the right of any innocent person to seek redress in federal habeas corpus for their wrongful confinement flies in the face of the very origin of modern habeas corpus authority—created and enacted in response to racial injustice.[472]

The shortcomings of the Court's approach include barriers that are "too restrictive and fail to alleviate the injustice done to time-barred prisoners with valid claims of innocence."[473] Requiring that an innocent person's claim be "extraordinary" eliminates many prisoners' claims that, while not appearing extraordinary on paper, would be particularly compelling if the innocent, mostly *pro se* litigant could just have his or her day in court to present in-person evidence of their innocence. This is the truest meaning of the concept and purpose of "produce the body"—the literal translation of habeas corpus.

In order to take advantage of either the tolling or exemption doctrines, *pro se* petitioners must turn to "new reliable evidence" not presented at trial.[474] It is a particularly unrealistic expectation that many incarcerated, and mainly-*pro se*, wrongly convicted persons can

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470. *Id.* at 1933–34. Without deciding that such a standard was met, a sharply divided Court (5–4) vacated the Sixth Circuit's denial of relief and remanded the case for further consideration. *Id.* at 1928.

471. *See* Brandon Segal, *Habeas Corpus, Equitable Tolling, and AEDPA's Statute of Limitations: Why the* Schlup v. Delo *Gateway Standard for Claims of Actual Innocence Fails to Alleviate the Plight of Wrongfully Convicted Americans*, 31 U. HAW. L. REV. 225 (2008).

472. As Segal points out,

> After the Civil War, Congress enacted the Habeas Corpus Act of 1867, "which gave state prisoners the right to file habeas petitions in federal court." No statutes of limitations were imposed during this development of habeas corpus jurisprudence. A prisoner who was "restrained of his or her liberty in violation of the constitution" could seek redress in federal court, buttressed by the protection that except in very limited and unusual circumstances, the "Privilege of the Writ of Habeas Corpus shall not be suspended."

Id. at 229–30 (footnotes omitted).

473. *Id.* at 246.

474. Segal points out that as regards to *Schlup*, the lower courts were split as to whether this requirement meant "newly discovered" or merely "newly presented" evidence. *See* Wright v. Quarterman, 470 F.3d 581, 590–91 (5th Cir. 2006); Segal, *supra* note 471, at 248–49. The subsequent decisions through *McQuiggin* do not answer the question.

"satisfactorily perform investigations, secure post-conviction DNA [results], or analyze physical evidence."[475]

Considering, as evidenced by the cases before the Court discussed above, that a significant portion, if not the majority, of constitutional complaints seeking to go through the "gateway" involve claims of ineffective assistance of counsel, it is even more unlikely that an actually innocent person could effectively analyze the decision-making, preparation efforts, and other performances of the attorney in order to know or understand what evidence was not presented or discovered.

Professor Todd E. Pettys's conceptualization of the problem associated with the use of the "miscarriage of justice" requirement points out the disconnect between what the Court perceives as a miscarriage and the discomfort that a large part of society would feel if it realized that the innocent are without realistic access to habeas corpus.[476]

The net effect of the Court's approach to actual innocence is to leave the vast majority of actually innocent, disproportionately-minority prisoners without the opportunity to have their claims heard in federal habeas corpus because of the inability to pass through a procedural gateway; a gateway not created by the United States Constitution, but by legislative and judge-created fiat.[477]

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475. Segal, *supra* note 471, at 248.

476. Professor Pettys writes:

> Suppose that the best a death row prisoner can show with new evidence is that there is a fifty-fifty chance that no reasonable juror would have convicted him. A federal court applying the *Schlup* standard would refuse to forgive any procedural defects that had saddled the prisoner's efforts to secure habeas relief, and would refuse to adjudicate the merits of the prisoner's constitutional claims. Yet a large segment of the public undoubtedly would feel profoundly disquieted if they believed there was a fifty-fifty chance that a person whose constitutional rights may have been violated, and who was about to be executed, was actually innocent of any crime. Indeed, the constitutional requirement that a person's guilt be proven at trial beyond a reasonable doubt is based, in part, on the need to assure the public that those who have been convicted are deserving of punishment . . . .

Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2350 (2007).

477. The Amicus Brief of Former Prosecutors and Professors of Criminal Justice, filed in *House*, noted that a study of *Schlup* decisions between 1995 and 2005 shows that only 9.2% of the petitions successfully met the actual innocence standard. The Risinger study indicated that, in 2008, approximately 46,000 actually innocent persons were incarcerated. *See supra* note 444. This would suggest over 41,000 of the 46,000 actually innocent defendants, assuming procedural default, would be shut out of habeas corpus review under the AEDPA.

VI. CONCLUSION: RACIAL JUSTICE AND FEDERAL HABEAS CORPUS POST-CONVICTION RELIEF: NOW AND THE FUTURE

Nancy J. King and Joseph L. Hoffman have set forth a detailed review of the past, present, and what they argue to be the future of federal habeas corpus as a postconviction remedy for those convicted pursuant to state law.[478] King and Hoffman's central premise is that habeas corpus for the twenty-first century has radically changed from the days of the Warren Court.[479] The civil rights crisis, as reflected in criminal procedure, at the heart of the Warren Court's concern is one that King and Hoffman posit has "long since passed."[480] The authors contend that the Warren Court battle was largely fought over defining the source of rights protection and the concomitant role of the federal courts in setting the parameters of those rights.[481] They also contend that, despite some "disagreements" over scope, the debate is largely over.[482] The end has come about, so it is claimed, by virtue of states having adopted "modern appellate and post convictions remedies" that allow adequate access to state court review of claims of federal constitutional error.[483] By contrast, the low rate of success of post-AEDPA petitions is used to suggest that it is a less-effective remedy.[484]

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478. *See generally* NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT (2011).

479. *Id.* at 55. King and Hoffman write:

> The Warren Court's transformation of habeas corpus was deeply interwoven with the Court's extension to state criminal defendants of most of the constitutional protections already enjoyed by federal defendants under the Bill of Rights. From the late 1930s through the 1950s, the Court gradually became convinced that criminal "justice" was woefully lacking in many communities. Treatment of poor and minority defendants that would be considered appalling and illegal under federal standards was standard practice in many state courts.

Id.

480. *Id.* at 64–66.

481. *Id.* at 65. The authors assert that the Warren Court actually waged a second battle of federalism; citing to the late nineteenth century, and in particular to the Habeas Corpus Act of 1867, as the "first war," in which habeas is "an individual remedy for any prisoner whose federal rights were trampled was never truly realized." *Id.* at 50, 65.

482. *Id.* at 65–66.

483. *Id.* at 88.

484. *Id.* at 75. This is a curious argument considering the authors point out that the rate of success is severely impacted by the tremendous procedural obstacles discussed above and which follow the limiting intent of the AEDPA. As the authors state,

> For all but a very small proportion of the millions of those convicted of crime every year in the United States, the Great Writ is a pipe dream. It is available only to those prisoners whose prison sentences are so long that they are still in custody even after the state courts have finished reviewing, and rejecting, their constitutional claims.

King and Hoffman speculate that "[t]he microscopically low rate of habeas relief might also mean that there are hardly any meritorious claims left to grant after the prisoner has had his chance at state judicial review."[485] That interpretation presupposes that the states are actually adjudicating the claims and does not account for claims not raised by procedural default that are more the fault of trial counsel, stem from ignorance, or discovered only after the case is no longer pending on appeal of those forced to pursue claims *pro se*. It is also unclear whether there is data to support this conclusion.

King and Hoffman paint a very dim, even if realistic, future for habeas corpus as a postconviction remedy. They suggest that the remedy, in light of restrictions discussed earlier, should largely be available only in capital cases and cases for claims of actual innocence.[486] That view coincides with the approach that the Court has taken post-AEDPA, but does not answer whether the "Great Writ" should be so limited. In their work, King and Hoffman recognize the historic importance of remedying manifest injustice as a foundational goal of habeas corpus.[487] In that regard, there is hardly any conviction that can be more of a "miscarriage of justice" than one that is obtained from, and is tainted with, racial injustice.

The court recognized this in *Rose*. In *Rose*, the defendants were convicted in Tennessee of murder based on an indictment handed down by a grand jury where the defendants alleged an African-American was precluded from serving as the foreperson.[488] Although it is unclear

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Id.

485. *Id.* at 83.

486. *See id.* at 91–107.

487. *Id.* at 62–63. Regarding the limitations of *Sykes*, King and Hoffman note that the petitioners unable to meet the cause-and-prejudice standard might still overcome a procedural default if "the petitioner [can] demonstrate a 'fundamental miscarriage of justice' by proving that it was more likely than not that he was innocent of the crime and that he was convicted as a result of the alleged constitutional violation[s]." *Id.* at 63 (footnote omitted). Although the authors recognize the historical importance of a miscarriage of justice claim, the burden on the defendant is now much higher than "more likely than not." *Id.*

488. 443 U.S. at 547. Tennessee used the much discredited "key man" system for selection of the grand jury members. Under this system, grand jurors are selected by three jury commissioners. The judge then appointed the foreman. The importance of the foreman is demonstrated by the following:

> Included among the duties of the foreman are assisting and advising the district attorney in investigating crime, supplying the names of witnesses, issuing subpoenas, administering oaths to witnesses, and indorsing and signing indictments. Tenn. Code Ann. §§ 40-1510, 40-1706 (1975). The foreman serves as the thirteenth member of the grand jury "having equal power and authority in all matters coming before the grand jury with the other members thereof."

whether the system for selection of all grand jurors was challenged, the defendants unsuccessfully sought dismissal of the indictments, as regards to the selection of the foreman, based on the Equal Protection Clause. Subsequently, the Tennessee Court of Appeals denied relief and the Tennessee Supreme Court denied certiorari.[489]

The Court took up the matter of the defendants' *pro se* federal habeas corpus petition.[490] The Court examined the Sixth Circuit's reversal of the district court's dismissal of the petition.[491] The Court considered two issues critical to the role of habeas corpus in addressing issues of racial justice.[492] First, the Court considered whether a trial and conviction without alleged procedural error rendered a claim of racial discrimination in the grand jury indictment process moot or harmless.[493] Second, the Court analyzed whether the issue of racial discrimination in the selection of the grand jury foreman was cognizable in federal habeas corpus where there had arguably been a full and fair litigation of the issue in the state court.[494]

> As to the issue of harmless error, the Court had to consider the application of its longstanding principle that a conviction obtained by proof beyond a reasonable doubt cures any error that may have resulted from the determination of probable cause by the grand jury, so long as the indictment was valid on its face and the product of a legally constituted grand jury.[495] The Court's response was that the elimination of racial discrimination in our criminal justice system is a value that transcends issues of the procedural fairness of the trial itself or possible prejudice regarding the jury's determination.[496] The Court, in very strong terms, stated "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because

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Memorandum for the United States as Amicus Curiae, at 5, *Rose*, 443 U.S. 545 (No. 77-1701).

489. *Rose*, 443 U.S. at 549.

490. *Id.* at 550.

491. *Id.*

492. *Id.*

493. *Id.* at 550–51.

494. *Id.* at 551.

495. *Id.* at 552. Although the Court in *Rose* could have couched its discussion more sharply along the lines that racial discrimination in the selection of the foreman meant that the grand jury was not legally constituted, the Court instead went directly at the commitment to eliminating racism in the criminal justice system. *See id.* at 551. *Contra* Costello v. United States, 350 U.S. 359, 363–64 (1956).

496. *Rose*, 443 U.S. at 551.

> they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process."[497]

Particularly significant for purposes of this Article is the importance that the Court placed on the availability of § 2254 actions for addressing racial discrimination.[498] Even though there are systemic costs to making habeas corpus available to combat racism, the Court, just two years after *Sykes*, decided that those costs do not outweigh the "strong policy the Court consistently has recognized of combatting racial discrimination in the administration of justice."[499]

As to the second issue, the Court declined to extend *Stone* to allegations of racial discrimination despite the fact that there were fact-finding hearings at the state level.[500] As noted in *Rose*, the Court in *Stone* held that Fourth Amendment claims, raised by way of application of the exclusionary rule, were not justiciable in habeas corpus if such claims had already been fully and fairly litigated at the state level.[501] Claims of racial discrimination directed against the court system itself differ from application of an exclusionary rule which seeks to deter the out-of-court actions of police officers.[502] The Court cast doubt on the ability of state courts to fully and fairly litigate complaints as to its own behavior.[503] Using language reminiscent of the Warren Court's civil rights agenda for the criminal justice system, the Court in *Rose* declared, "There is strong

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497. *Id.* at 555–56. The Court stated,

> As this Court repeatedly has emphasized, such discrimination "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." . . . [D]iscrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole . . . .

Id.

498. The Court further stated,

> We think the better view is to leave open the route that over time has been the main one by which Fourteenth Amendment rights in the context of grand jury discrimination have been vindicated. For we also cannot deny that, 114 years after the close of the War Between the States and nearly 100 years after Strauder, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious. We therefore decline "to reverse a course of decisions of long standing directed against racial discrimination in the administration of justice . . . ."

Id. at 558–59 (emphasis omitted).

499. *Id.* at 558.

500. *Id.* at 564.

501. *Id.* at 560.

502. *Id.* at 561.

503. *Id.*

reason to believe that federal review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective."[504]

Although the petitioners in *Rose* were unable to convince the Court that discrimination in the selection of the grand jury foreman actually existed, the approach of the Court in recognizing the preeminent role that federal habeas corpus, as a postconviction relief, should play regarding claims of racism set perhaps a model for the future of habeas corpus in the post-AEDPA world. In recent years, both the Court and the AEDPA recognize that procedural barriers should not stand in the way of addressing manifest injustice. *Rose* is still good law and recognizes that racial injustice is manifest injustice.

The future of federal habeas corpus should recognize the issues of racial discrimination in the adjudicative process as issues going to the fundamental principles of our legal system, and should constitute a waiver of any procedural defaults that might prevent federal court examination in habeas corpus. This is, in essence, what the Court did in *Rose* when it did not let claims of harmless error or full and fair litigation deter it from meritorious determination of the fundamental issue.

Most recently, the future suggested above has become a present reality, if we can take guidance from the *per curiam* pronouncement of the Court, issued at the beginning of 2018, in *Tharpe v. Sellers*.[505] Racial justice is at the heart of the Court's decision to not let procedural default under the "cause and prejudice" standard to blind the Court to the odious imposition of a death penalty where a clear expression of racism was at the core of that decision.[506]

In *Tharpe*, the petitioner, who is black, was convicted by a Georgia jury and sentenced to death for the 1990 murder of his sister-in-law.[507] More than seven years following his conviction, lawyers for the Petitioner obtained an affidavit from a white trial juror named Gattie who swore the following regarding Tharpe:

> "[T]here are two types of black people: 1. Black folks and 2. Niggers"; that Tharpe, "who wasn't in the 'good' black folks category in my book,

504. *Id.* at 563.

505. 583 S. Ct. 545 (2018) (per curium).

506. While remaining unconvinced that the procedural default barriers in this case have been overcome, Justice Thomas, in dissent, nonetheless recognizes the significance that the majority places on racial justice: "In bending the rules here to show its concern for a black capital inmate, the Court must think it is showing its concern for racial justice." *Id.* at 547 (Thomas, J., dissenting).

507. *Id.*

> should get the electric chair for what he did"; that "[s]ome of the jurors voted for death because they felt Tharpe should be an example to other blacks who kill blacks, but that wasn't my reason"; and that, "[a]fter studying the Bible, I have wondered if black people even have souls." App. B to Pet. for Cert. 15–16 (internal quotation marks omitted).[508]

Gattie later claimed to have been drunk when he gave the statement, and in a state post-conviction hearing ten other jurors proclaimed that their decision was not influenced by race.[509] Nonetheless, the Supreme Court found error in the Eleventh Circuit denial of a Certificate of Appealability based on the conclusion that jurists of reason could not dispute that the District Court's procedural ruling was correct.[510]

The Court reasoned that the prior court determinations were essentially based on the existence or non-existence of prejudice.[511] The Court noted, however, that prejudice is not the only issue in determining whether a certificate of appealability from the District Court's ruling was proper.[512] The Court, clearly shocked by the racist vitriol of Gattie's statement, found that such presented "extraordinary circumstances"[513] entitling Tharpe to at least having an opportunity to show that jurist of reason could disagree whether the District Court abused its discretion in denying the motion to re-open the habeas corpus proceedings.[514]

The recognition of the need for a racial justice component to justiciable issues and procedural default exceptions stands as a direct counterpoint to the future of habeas corpus analysis of King and Hoffman. King and Hoffman see the future need of federal habeas corpus review of state convictions as limited largely because, in their view, the state judicial system provides an adequate forum for the protection of procedural rights. A case can be made, however, that there is less reason to believe

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508. *Id.* at 546 (majority opinion).

509. *Id.* at 548 (Thomas, J., dissenting).

510. *Id.* at 546 (majority opinion).

511. *Id.*

512. *Id.*

513. *See id.* (quoting Gonzales v. Crosby, 545 U.S. 524, 536 (2005)). The petitioner also asserts the presence of racism as an extraordinary circumstance by relying on the Court's earlier decision in *Buck*, which allowed consideration in habeas corpus of the petitioner's claim of ineffective assistance of counsel following his attorney's assertion that African-Americans were more likely to commit crime. 137 S. Ct. at 759; *Tharpe*, 138 S. Ct. at 549 (Thomas, J., dissenting).

514. *Tharpe*, 138 S. Ct. at 546 (majority opinion). The Court's majority admittedly states that Tharpe will have a high burden to meet in order to be successful regarding his motion to overturn the district court's determination. *Id.* Justice Thomas, in dissent (joined by Alito and Gorsuch), concludes that it is a waste of time given the testimony of ten jurors that race played no role in their decision and Gattie's later denial of his affidavit based on intoxication. *See id.* at 552–53 (Thomas, J., dissenting).

that states have or will be adequate for the procuring of racial justice with the presence of federal habeas corpus postconviction relief.

The King and Hoffman position that the role of federal habeas corpus as postconviction review, which has largely seen its day, depends on acceptance of the conclusion that state appellate and postconviction review procedures are serving as adequate protection for constitutionally protected rights. There may be room for serious doubt as to whether such state avenues serve as a bulwark against racial injustice.

We are now fifty years plus since the landmark habeas corpus decision in *Gideon*. Yet, the states' inability to provide meaningful counsel to poor and minority defendants may be making a mockery of that decision. In *Public Defender, Eleventh Judicial Circuit of Florida v. Florida*,[515] the Miami-Dade County public defender sought authority to be relieved of its statutory obligation to provide appointed counsel, in a wide range of non-capital cases, because inadequate public defender funding created case overloads and resulted in attorneys being inadequately prepared for trial. A Florida statute prohibited appointed counsel withdrawing on the ground of excessive caseload.[516] In a decision that is somewhat confusing, the Florida Supreme Court granted the motions to withdraw, but at the same time, denied the constitutionality challenge to the statute prohibiting withdrawal.[517] While this decision may let the public defender "off the hook," it does little to ensure that the defendant actually receives competent counsel.

The crisis of ineffective assistance of counsel, at the heart of virtually every case discussed above, is greater today than ever before.[518] The evidence would appear to be significant that the states are not adequately protecting the Sixth Amendment right to counsel. When the racial imbalance in our criminal justice system is factored in, the failure of the state to provide the resources for effective assistance of counsel becomes an issue of racial justice.[519]

Wrongful identification is both an issue of actual innocence and racial justice. Earlier it was noted that the most common cause of wrongful conviction is eyewitness misidentification.[520] Numerous studies have indicated that when it comes to matters of race, cross-racial identification

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515. 115 So. 3d 261 (Fla. 2013).

516. *Id.* at 264–65.

517. *Id.* at 265.

518. *See* David Rudovsky, Gideon *And The Effective Assistance of Counsel: The Rhetoric and The Reality*, 32 L. & INEQ.: J. THEORY & PRAC. 371 (2014); *see, e.g.*, National Right to Counsel Committee, *The Constitution Project, Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, CONSTITUTION PROJECT (2009).

519. *See* Marcus, *supra* note 304.

520. *See Exonerations by Race*, *supra* note 446.

is often unreliable and wrong.[521] It has principally been the federal habeas corpus decisions in cases such as *Manson v. Brathwaite*[522] and *Neil v. Biggers*[523] that have sought to provide some level of due process in challenging unreliable eyewitness identification but, as noted in the Connelly article,

> Not all state supreme courts have agreed that it is their role to reform eyewitness identifications. For example, the Washington Supreme Court held in *State v. Allen*[524] that a defendant's due process rights are not violated if the trial court refuses to instruct jurors on cross-racial eyewitness identifications. . . .
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> As of 2008, the only states that require or authorize a jury instruction on cross-racial identifications are California, Utah, Massachusetts, and New Jersey.[525]

This Article began by noting the concern of President Obama over racially-disproportionate mass incarceration. The most immediate road sign pointing to this imbalance concerns incarceration sentences. In relatively recent times, federal doctrine and delineation regarding constitutional responsibility in sentencing has led to a massive revision of constitutional considerations regarding the right to jury trial and proof of all elements beyond a reasonable doubt. The Court in *Apprendi v. New Jersey*[526] recognized a constitutional framework for sentencing considerations that had previously been left to the unfettered discretion of the trial judge. Considering that in the seventeen years since *Apprendi* racial disparity in state sentences has not appreciably improved, a continued strong presence of federal review through habeas corpus would appear to be warranted in the interest of racial justice.

The above suggests that the issue of racial injustice is still of such importance in our criminal justice system that we should be required to recognize that the work of the Warren Court in this area of the civil rights struggle is not finished. The future of postconviction relief through federal habeas corpus is still so important that continuing to provide access and the removal of barriers still needs to be a priority if we are to

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521. *See* John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001); Laura Connelly, *Cross-Racial Identifications: Solutions to the "They All Look Alike" Effect*, 21 MICH. J. RACE & L. 125 (2015).

522. 432 U.S. 98 (1977).

523. 409 U.S. 188 (1972).

524. 294 P.3d 679 (2013).

525. Connelly, *supra* note 521, at 135–36 (footnotes omitted).

526. 530 U.S. 466 (2000).

effectively do anything about what President Obama called a "long history of inequity in the criminal justice system of America."[527]

527. *Remarks by the President*, *supra* note 1.