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AN "EFFECTIVE DEATH PENALTY"? AEDPA AND ERROR DETECTION IN CAPITAL CASES*

James S. Liebman†

INTRODUCTION

On June 11, 2001, the United States of America executed Timothy McVeigh.¹ Dwarfed among the many

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¹ See *Execution Was "Justice,"* USA TODAY, June 12, 2001, at D7 (reprinting President George Bush's statement on Timothy McVeigh's execution).

This Article is a revised version of a lecture delivered at the Brooklyn Law School Edward V. Sparer Public Interest Law Fellowship Symposium on April 5, 2001. At that point, McVeigh was forty days away from his scheduled execution on May 16, 2001. Five days before that execution, however, the FBI revealed that it had discovered thousands of pages of documents that the Government improperly had failed to turn over to McVeigh and his lawyers before trial. This "monumental foul-up," to quote Tom Brokaw on the evening news the night the FBI announced its discovery, led McVeigh's execution, which had been the subject of a monumental build-up by the media, to be postponed for close to a month. See *NBC News: Nightly News, Newscast: Justice Department Postpones Timothy McVeigh Execution* (NBC television broadcast, May 11, 2001), available at 2001 WL 24022866:

TOM BROKAW, anchor: In Terre Haute, Indiana tonight, Timothy McVeigh, the man who described the dead children of Oklahoma City as, quote, "collateral damage," that Timothy McVeigh has had his life extended. His execution as the Oklahoma City bomber has been postponed until June 11th as a result of a monumental foul-up by the FBI. McVeigh's defense lawyers failed to get thousands of pages of evidence from the FBI. And so Attorney General John Ashcroft ordered the postponement. McVeigh's lawyers also say their client might now fight execution.

Although up to that point, McVeigh had asked to waive all legal proceedings and be executed, the disclosure of the FBI documents led him to request a further stay of execution to give him time to litigate issues he claimed were presented by the documents. After a federal judge refused the request and a court of appeals panel affirmed the decision, McVeigh again decided to forgo all further legal challenges to his execution, see Jo Thomas, *McVeigh Prepares for Death and Awaits Move from Cell,*

unspeakable evils that Mr. McVeigh wrought is a speakable one I will address here, namely, the so-called Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").²

Abbreviated, AEDPA's political history is as follows: In November 1994, the "Gingrich Congress" was elected on its *Contract with America* platform. One of the planks of that platform—one of the few that actually ended up passing Congress—was the so-called "Effective Death Penalty Act." That proposal had little to do with the death penalty and, originally, nothing to do with terrorism. What it instead proposed were drastic cuts in federal habeas corpus review of capital and non-capital criminal convictions.

First introduced in January 1995, the bill was moving through Congress no more quickly than any other part of the *Contract* when, on April 19, 1995, Timothy McVeigh's bomb exploded in front of the Murrah Federal Building in Oklahoma City. The blast killed 168 people, including nineteen children in a day care center at ground zero. Within hours, McVeigh was spotted careening down an Oklahoma interstate highway without license plates, and arrested. Within days, the President (quite publicly and explicitly) and most other Americans (rather more quietly) had resolved that McVeigh's punishment must be death, and hunkered down to await the imposition and execution of that verdict. And within weeks, Republicans in both Houses of Congress had attached the Effective Death Penalty Act to a version of a Clinton administration proposal for an Antiterrorism Act, and renamed the resulting proposal the Antiterrorism and Effective Death Penalty Act.³ I discuss below the cynicism of that particular

N.Y. TIMES, June 9, 2001, at A7, which was carried out according to his wishes on June 11, 2001. See Rick Bragg, *McVeigh Dies for Oklahoma City Blast*, N.Y. TIMES, June 12, 2001, at A1.

² Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in amendments to 28 U.S.C. §§ 2244-2267 (1996)) [hereinafter AEDPA].

³ For a useful discussion of this and other aspects of AEDPA's legislative history, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 422-42 (1996). See also Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 4-22 (1997) (providing additional discussion of AEDPA's legislative history).

shotgun political marriage, but its effect was to set the legislative sled careening down the hill.

AEDPA's death penalty provisions were radical, and the bill quickly encountered opposition. The Senate scheduled the key vote on a bipartisan amendment to strike the worst aspects of the death penalty provisions for June 7, 1995. Those amendments were strongly supported by William Cohen, the Republican Senator from Maine, and they had enough Republican support to pass, if the Senate Democrats held firm.⁴ On the evening of June 6, 1995, however, President Clinton went on CNN talk show *Larry King Live* and announced that he was satisfied with the *un-amended* bill.⁵ The next day, five Democratic Senators defected, and the amendments were defeated by a four vote margin.⁶

When the bill encountered similar resistance in the House in the spring of 1996, President Clinton again came to its rescue, demanding its passage by the April 19 anniversary of McVeigh's bombing.⁷ Again, wavering Democrats obliged the President, though they missed his deadline by a week.

AEDPA, thus, was the product of the bizarre alignment of three ill-starred events: Timothy McVeigh's twisted patriotism and disdain for "collateral damage," the Gingrich Revolution in its heyday, and the Clinton Presidency at the furthest point of its most rightward triangulation.

⁴ See, e.g., 141 CONG. REC. S7838-S7839 (daily ed. June 7, 1995) (statement of Sen. Cohen).

⁵ See 141 CONG. REC. S7877 (daily ed. June 7, 1995) (statement of Sen. Bob Dole) (commending President Clinton, based on his statements on *Larry King Live*, "for finally coming around to the view that habeas reform is an essential ingredient of any serious anti-terrorism plan").

⁶ See 141 CONG. REC. S7850 (daily ed. June 7, 1995) (reporting Senate vote on key amendment to remove what became 28 U.S.C. § 2254(d)(1) from the bill, which was defeated by a 53-46 margin).

⁷ *Clinton Hits Congress for Inaction on Terrorism Bill*, AGENCE FRANCE-PRESSE, Apr. 13, 1996, 1996 WL 3837617 ("President Bill Clinton on Saturday used the approaching anniversary of the Oklahoma City bombing to slam the U.S. Congress for failing to pass anti-terrorism legislation.").

I. THE ACT

A. *An Irony*

Timothy McVeigh was, of course, a *federal* prisoner executed under the authority of the United States. Yet, the death penalty process that AEDPA undertakes to make more “effective” is, by and large, the one available for federal court review of *state* criminal convictions and sentences. Indeed, federal capital prisoner McVeigh was *twice* removed from the category of prisoners who suffer AEDPA’s most disastrous “collateral damage,” namely *state* prisoners serving *noncapital* sentences. Although AEDPA’s many complications and interpretive conundrums are, at times, a boon to relatively well-represented capital habeas corpus petitioners, they are a nightmarish obstacle course for unrepresented (*i.e.*, for the vast majority of) noncapital petitioners.⁸ Ironically, therefore, Congress sold AEDPA to the public on the ground that it would deprive Timothy McVeigh of the type of post-conviction review that, as a *federal capital* prisoner, he was never in a position to receive. Moreover, even if McVeigh had been granted that review, he had every intention of waiving it in his self-proclaimed quest for a swift and public martyrdom at the hands of his obliging government oppressors.

B. *Some Background*

So, what did AEDPA do to make the death penalty more “effective” in the thirty-eight states that use it?⁹ Here, again, some background is important.

⁸ Capital habeas prisoners represent a minuscule proportion of the federal habeas corpus petitions filed each year. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2043-44 n.64 (2000) (documenting that only about 200 (2%) of the approximately 10,000 federal habeas petitions filed each year involve prisoners sentenced to death).

⁹ The states with the death penalty are: Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

As long as there have been federally enforceable protections for state criminal defendants in the United States, its statutes have provided convicted defendants with a right, on demand, to plenary review on the merits in an Article III court of any claimed deprivation of those protections.¹⁰ I state the point categorically because, on the eve of AEDPA's adoption, it was a categorical legal fact. Since 1867 in many such cases, and since the second decade of the twentieth century in nearly all such cases, federal habeas corpus has been the mechanism for providing convicted prisoners with plenary review as of right of claimed deprivations of federal legal protections.¹¹

Since its inception in thirteenth century England, habeas corpus has been a principal mechanism for testing the legality of custody at the hands of the state. During most of that period, habeas corpus was defined by two fundamental principles: First, there were no time limits on a prisoner's capacity to test the legality of his incarceration. Second, *res judicata* did not apply. No matter how many prior petitions had failed, the prisoner could try, try again.¹²

By 1995, the U.S. Supreme Court had cut back on the *res judicata* principles when state prisoners sought successive *federal* court review of the legality of state convictions. Yet, until 1996 the Court held firm to two principles. First, there were no time limits on federal habeas review.¹³ Second, a *state* court's prior adjudication of the legality of a state prisoner's conviction or sentence had *no binding legal effect* on the federal court's obligation to independently assess the legality of state action leading to incarceration, and to grant relief if the action was inconsistent with federal law in effect when the action occurred.¹⁴

¹⁰ See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2055-94 (1992).

¹¹ See *id.* at 2063-81.

¹² On the history of habeas corpus in this regard, see 2 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 28.2(a)-(b) n.3 (3d ed. 1998) (discussing history of treatment of successive habeas corpus petitions in England and United States).

¹³ See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (reiterating that the filing of habeas corpus petitions was not subject to time limits).

¹⁴ See, e.g., *Wright v. West*, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring); *Miller v. Fenton*, 474 U.S. 104, 110-11 (1985); *Brown v. Allen*, 344 U.S. 443, 458 (1953).

This is not to say that, before 1996, the Supreme Court had placed no limits on habeas review. On the contrary, in addition to limits on successive federal challenges to state custody,¹⁵ the Court enforced a strict procedural default bar on claims and evidence not properly preserved in state court proceedings,¹⁶ and confined habeas appeals to substantial federal questions.¹⁷

C. *Some Provisions of AEDPA*

In 1996 came the Effective Death Penalty Act.¹⁸ It included the following five preclusive provisions, listed here from least to most significant:

First, AEDPA made it even harder for state prisoners to appeal district court denials of habeas relief.¹⁹ Second, the Act made the Supreme Court's already strict standard for filing second or successive federal petitions challenging a state criminal verdict nearly impossible to satisfy.²⁰ Third, the Act made it even harder for the prisoner to present facts in federal court that his or her lawyer had (even incompetently) failed to present in state court.²¹

Fourth—and here, I think, Congress' cleaver moved from flesh to bone—AEDPA imposed a one year statute of limitations on the filing of federal habeas corpus.²² As I have already mentioned, this time bar was unprecedented in the history of habeas corpus. Even worse, states can easily lure prisoners into missing the time bar simply by withholding lawyers from them at the state post-conviction stage of review. This is because of what may be called "Catch-22, AEDPA-style," which goes something like this:

¹⁵ See, e.g., *Schlup v. Delo*, 513 U.S. 298, 318-19 (1995); *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991).

¹⁶ See, e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Carrier*, 477 U.S. 478 (1986).

¹⁷ See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983).

¹⁸ AEDPA, *supra* note 2.

¹⁹ 28 U.S.C. § 2253(c) (West 1994 & Supp. 2001).

²⁰ *Id.* §§ 2244(a), 2244(b).

²¹ *Id.* § 2254(e)(2).

²² *Id.* § 2244(d).

Rule 22-A: You may not get habeas relief unless you take no more than one year after direct appeal to file a federal habeas petition. But there's a catch, 22-A: You cannot go directly and rapidly from state direct review to federal habeas review. Instead you must first file a state post-conviction petition in order to exhaust your state remedies.²³

Rule 22-B: Luckily, once you file a state post-conviction petition, that stops the one-year statute of limitations from running.²⁴ But there is a catch here, as well—in fact, there are four catches: *Catch 22-B-1:* The statute of limitations is not tolled until you actually file a state post-conviction petition.²⁵ *Catch 22-B-2:* To secure that tolling protection and to exhaust your state remedies, any state post-conviction petition you file must be “properly filed,” and it must raise all the claims you want reviewed on federal habeas.²⁶ *Catch 22-B-3:* Properly filing that petition, and raising all the necessary claims, requires a lawyer.²⁷ *Catch 22-B-4:* Neither AEDPA, nor the U.S. Constitution, nor state law in most states, gives you a right to the lawyer you need to navigate the other three catches—or even to understand that they exist in the tangled verbal thicket that is AEDPA.²⁸

This description of AEDPA is neither fanciful nor hypothetical. At this moment, there are more than thirty prisoners on death row in Alabama who have not yet received—and now may be time-barred from receiving—any *state* or *federal* post-conviction review of their death sentences due to the lack of any lawyers to represent them.²⁹

That's not all. There is, in addition, a fifth and yet more preclusive AEDPA provision: 28 U.S.C. § 2254(d)(1).³⁰ Section 2254(d) provides that a federal habeas judge (1) who has jurisdiction to determine the legality of a state court criminal verdict, and (2) who finds that the state court imposed that

²³ *Id.* §§ 2254(b), 2254(c).

²⁴ 28 U.S.C. § 2244(a)(2).

²⁵ *Id.*

²⁶ *Id.* See *Rose v. Lundy*, 455 U.S. 509 (1982).

²⁷ 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE § 7.2 (4th ed.) (forthcoming 2001).

²⁸ See, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989).

²⁹ *Death Row Inmates Lack Lawyers, Says Legal Agency*, BIRMINGHAM NEWS, Mar. 25, 2001, <http://www.bhamnews.com> (last visited Feb. 8, 2002).

³⁰ 28 U.S.C. § 2254(d)(1).

verdict in violation of the U.S. Constitution as interpreted at the time of the state court's ruling, nonetheless cannot deprive that unconstitutional state court decision of its legal force and effect—unless the federal court concludes that the state decision was not just wrong as a matter of federal law, but was *unreasonably* wrong.³¹ Sometimes, that is, a federal court will have jurisdiction to review a state court decision of law, will conclude that the decision violated supreme federal law, and yet will be required to give legal effect to that illegal decision, including where the effect is a human being's execution.

D. *The Last Provision's Unconstitutionality: An Example*

Suppose, for example, a retarded man, let's call him John Paul Penry, is on death row in Texas. When he was first tried capitally, his jury was told of his substantial retardation but was then given oral and written instructions to sentence him to die if the jurors answered three questions in the affirmative. None of the questions gave any mitigating effect to a capital defendant's retardation.³²

Suppose that in 1989, Mr. Penry's case reaches the U.S. Supreme Court. The Court holds that the Eighth Amendment's Cruel and Unusual Punishment Clause leaves states free to execute retarded people like Mr. Penry, but *only* if the jury that sentenced him to die was required to give some mitigating effect to his retardation. Because the jury instructions at the state criminal trial withheld that mitigating effect, Mr. Penry's death sentence had to be reversed.³³

Assume further that Mr. Penry gets a new trial at which he presents the *same* evidence of substantial retardation as at the first trial. And suppose the trial judge gives the *same* written instructions: "Sentence Penry to death if you, the jurors, answer three questions in the affirmative," none of which gives any mitigating effect to retardation. Assume as well that the judge gives the same oral instructions, but supplements them with two sentences that someone with twice

³¹ See *id.*, as interpreted in *Williams v. Taylor*, 529 U.S. 362, 403-05 (2000).

³² One of the questions did, however, give aggravating effect to his retardation, making it a good reason to sentence him to die.

³³ See *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Penry's I.Q., and with powers of textual interpretation worthy of Antonin Scalia, could understand as follows: "If you want to, jurors, you may rely upon the evidence of retardation as a reason to violate your oath and answer any one of the three questions 'no' even though in point of fact the truthful answer is 'yes.'" Suppose that—needless to say—the jury answers all three questions "yes," and again sentences Penry to die.

On appeal, the state courts affirm, prompting Penry to petition for a federal writ of habeas corpus, and the case eventually reaches the U.S. Supreme Court a second time. Citing the new § 2254(d), Texas responds that, "You may not exercise your habeas jurisdiction to overturn Mr. Penry's death sentence, even if you believe it was imposed in violation of the Eighth Amendment as you previously interpreted it in Penry's earlier case, unless you determine that in addition to being *wrong*, the state court decision was '*unreasonably wrong*.'"³⁴

At this point, a Supreme Court Justice, let's call him Breyer, peers down from the bench over his reading glasses, and asks Texas's attorney: "You mean to say that if we find that the trial judge violated the U.S. Constitution as we previously interpreted it in this very case, we cannot enforce the Constitution, or our own mandate, unless we find that the trial judge acted 'crazy,' as well as unconstitutionally? Can that be constitutional?" To which the state's attorney gives his slam dunk reply: "Yes, your honor, that is precisely what Congress provided when it adopted section 2254(d). And it surely is constitutional because that's just how this Court interpreted the provision last year in a case called *Williams v. Taylor*"³⁵

The *Penry* case is not my invention, of course, but a real case recently argued in the Supreme Court for the second time, under the circumstances as I described them.³⁶ And in a case decided last year called *Williams v. Taylor*,³⁷ the Supreme

³⁴ The quoted statement is a paraphrase of Transcript of Oral Argument, *Penry v. Johnson*, No. 00-6677, available at 2001 U.S. Trans. LEXIS 31, at *40-41 (Mar. 27, 2001).

³⁵ *Id.* (statement by Justice Breyer during oral argument that "I'm worried about the implications" for "the authority of this Court in criminal cases" if section 2254(d)(1) is interpreted and employed in a manner that results in the Supreme Court's "issu[ing] mandates and those mandates could be ignored by a state as long as the way in which the state ignores the mandate commends itself to some reasonable lawyer though most reasonable lawyers decide the contrary.").

³⁶ 532 U.S. 782 (2001).

³⁷ 529 U.S. 362 (2000).

Court indeed interpreted § 2254(d) to limit habeas corpus relief to only “unreasonable” constitutional violations—while declining to give Mr. Williams’ constitutional objection to that interpretation the time of day³⁸

But *Williams* notwithstanding, there is a serious constitutional problem with the Court’s interpretation of § 2254(d).³⁹ Let me briefly explain why that is so, based on a careful study of the drafting of the Constitution⁴⁰ and of the Court’s Article III jurisprudence since then.⁴¹

As the likes of James Madison, Alexander Hamilton, and James Wilson structured the Constitution, and as the Court’s classic separation of powers decisions have understood and maintained that structure ever since, the most fundamental role of Article III courts is to assure that state law, including state decisional law, does not contravene the U.S. Constitution and other federal law.⁴² As Hamilton wrote in *The Federalist No. 80*, Article III courts’ principal role is to exercise “some effectual power to restrain or correct” state court “infractions” of federal law and thereby to enforce the Supremacy Clause of the Constitution.⁴³ According to the Supremacy Clause: “This Constitution and the Laws of the United States and all Treaties...shall be the supreme Law of the Land, and the *Judges in every State shall be bound* thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.”⁴⁴

The Court has repeatedly construed these provisions in such landmark cases as *Marbury v. Madison*,⁴⁵ *Martin v. Hunters Lessee*,⁴⁶ *Cohens v. Virginia*,⁴⁷ *Abelman v. Booth*,⁴⁸

³⁸ *Id.* at 405-06.

³⁹ See James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998).

⁴⁰ See *id.* at 705-73.

⁴¹ See *id.* at 773-850.

⁴² *Id.* at 705-72.

⁴³ THE FEDERALIST No. 80, at 445 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁴⁴ U.S. CONST. art. VI, cl. 2 (emphasis added).

⁴⁵ 5 U.S. (1 Cranch) 137 (1803).

⁴⁶ 14 U.S. (1 Wheat.) 304 (1816).

⁴⁷ 19 U.S. (6 Wheat.) 264 (1821).

⁴⁸ 62 U.S. (21 How.) 506 (1859).

Crowell v. Benson,⁴⁹ and *Yakus v. United States*.⁵⁰ Together, these decisions define the core attribute of the federal-supremacy-inflected “judicial power” that Article III insulates from congressional control or limitation. That core attribute is a federal court’s “effectual power,” when granted jurisdiction over a matter, to deny force and effect to state decisional and other law of the land as of the time the state law was made.⁵¹ And yet, as Justice Breyer seemed to recognize at the *Penry* oral argument,⁵² it is precisely that “effectual power” that § 2254(d), as interpreted in *Williams*,⁵³ withholds from federal habeas courts.⁵⁴

II. THE PRACTICAL EFFECT: AEDPA AND ERROR DETECTION

I could say more about the impressive constitutional authority that lines up against the interpretation of § 2254(d) in *Williams*.⁵⁵ Instead, I want to use the results of a study of the death penalty in the United States, from 1973 to the eve of AEDPA’s adoption in 1995,⁵⁶ to assess the extent to which all five of AEDPA’s preclusive provisions contribute to the “effective death penalty” to which AEDPA aspires.

A. *Was the Death Penalty “Safe and Effective” Prior to AEDPA?*

“Effectiveness” conjures up images of productivity. So, for a moment, consider the death penalty as a system that generates a product—death verdicts—that, if made correctly, are a reliable and effective means of imposing that penalty on

⁴⁹ 285 U.S. 22 (1932).

⁵⁰ 321 U.S. 414 (1944).

⁵¹ See Lieberman & Ryan, *supra* note 39, at 773-850.

⁵² See *supra* note 36 (quoting Justice Breyer’s concern).

⁵³ *Williams*, 529 U.S. at 405-06.

⁵⁴ See Lieberman & Ryan, *supra* note 39, at 864-84.

⁵⁵ See *id.*

⁵⁶ James S. Lieberman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* (2000), [hereinafter *A Broken System*], available at http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf, abridged and reprinted in James S. Lieberman et al., *Capital Attrition: Error Rates in Capital Cases 1973-1995*, 78 TEX. L. REV. 1839 (2000) [hereinafter *Capital Attrition*].

only those offenders for whom state and federal law permit death as a punishment. One method used by enterprises to measure the reliability and effectiveness of their products is to track the results of their own quality-control inspections and their products' consequent success and scrap rates.

In June 2000, my colleagues and I published a study using this same method to gauge the reliability and effectiveness of the death penalty in the United States from 1973 to 1995.⁵⁷ During that period, nearly 6,000 death sentences rolled down the penological production lines of thirty-four states towards the three sets of quality control reviews mentioned earlier: direct appeal in state supreme courts, post-conviction review in state trial and appellate courts, then habeas corpus review in federal trial and appellate courts.⁵⁸

A painstaking count of the results of that three-stage inspection process revealed that forty-one percent of the nearly 4,600 death verdicts reviewed on direct review were sent back due to findings of reversible error. Of the fifty-nine percent of those verdicts that went on for a second inspection, at least ten percent more were sent back to be reworked or scrapped, leaving about fifty-three percent of the original death sentences available for the third and final inspection. Of these an additional forty percent were found to be too flawed to carry out.⁵⁹ Overall only thirty-two percent of the original capital judgments were approved for execution, while sixty-eight percent were reversed.⁶⁰ Error rates were high and persistent across time and space, surpassing fifty percent in all but three years and two states studied.⁶¹

Chronically high error or reversal rates might suggest two conclusions about our death penalty system. First, capital trials are not "safe" because they do not provide a reliable mechanism for identifying the murders for which death is a proper punishment. Second, our capital system is not "effective" because it is not a satisfactory deterrent or

⁵⁷ *Id.*

⁵⁸ See *A Broken System*, *supra* note 56, at 18-22, 29.

⁵⁹ See *id.* at 29-30.

⁶⁰ *Id.*

⁶¹ See *id.* at 8.

retributive mechanism for responding to those murders. We concluded that the capital system is "broken" in both these ways.

1. Not Safe

Answers to the following four questions led us to conclude that chronically high reversal rates in capital cases provide strong evidence of an excessive risk that capital verdicts condemn people for crimes they did not commit, or for crimes for which death is not a lawful penalty

First, can we trust the inspectors? Do their incentives dispose them to be generous or stingy with their findings of reversible error? That ninety percent of the thousands of reversals were by *elected* state judges,⁶² and that Republican appointees to the federal bench were a majority of the judges voting to overturn the death verdicts in over half of the remaining ten percent of cases,⁶³ suggest that the judges finding reversible error had no undue propensity to overturn trial verdicts absent serious problems.

Second, how serious are the *bases* for reversal? Here, we have data for the second and third inspection stages. At those two stages, seventy-five to eighty percent of the reversals arose from violations requiring the *prisoner* to prove either inherent prejudice or an actual probability that the violation led to the wrong outcome—tough standards that go directly to unreliability. Although we do not have comparable information about the first (state direct appeal) inspection stage, there is no reason to think that the errors it detects are substantially less serious. On the contrary, the first review stage probably screens out many of the most glaring errors.

Third, do outcomes in fact change when errors are cured on retrial? Here, our data are from the state post-conviction

⁶² See *id.* at 9.

⁶³ Our data show that appointees of Republican presidents were a majority of the judges at the last stage of review who voted to reverse capital verdicts in fifty-four percent of the federal habeas corpus proceedings in which death verdicts were overturned between 1973 and 1995. (data on file with author).

stage, and reveal that on retrial fully eighty-two percent of the reversals resulted in a sentence *less* than death, including seven percent ending in *acquittals*.⁶⁴

Finally, the persistence of error over time, across jurisdictions, and at all three stages of review, suggests serious deficiencies—as does the fact that even three inspections sometimes are not enough. Too often, all three sets of courts have approved men and women for execution whom film makers, reporters, undergraduate students or (in one case) a *burglar* have later shown to be innocent.⁶⁵

2. Not Effective

The results are no more encouraging from the perspective of the nation's two-third's majority of death penalty supporters, who look to that penalty for swift and sure retribution and deterrence. For, as a result of high error rates and the intensive review needed to catch and cure it, only thirty-two percent of capital verdicts getting full review during the study period were approved for execution.⁶⁶ Even that paltry figure vastly overstates the success rate because most cases at any given time are stuck in the system, awaiting review. During the twenty-three year study period, the average time from sentence to execution was *nine years*.⁶⁷ Taking into account the many cases awaiting review, only about six percent of the death sentences entering the review process during the twenty-three year study period were approved for execution by the courts.⁶⁸ And only five percent of the death sentences were actually carried out during the period.⁶⁹ Moreover, in any given year, including 1999 when the nation lethally injected or electrocuted ninety-eight men and women, the highest number since 1951, it still never executed more than three percent—

⁶⁴ See *A Broken System*, *supra* note 56, at 5.

⁶⁵ See Death Penalty Information Center, Innocence and the Death Penalty, at <http://www.deathpenaltyinfo.org/innoc.html> (last visited Aug. 30, 2001).

⁶⁶ See *A Broken System*, *supra* note 56, at 30.

⁶⁷ See *id.*

⁶⁸ Of the 5760 death sentences imposed during the study period, 362 (6.3%) were approved for execution by all three levels of reviewing courts. See *id.* at 29-30.

⁶⁹ See *id.* at 29.

and, in a typical year, it only executes about 1.3 percent—of the people on death row ⁷⁰

Presumably, the retributive or deterrent capacity of the death penalty requires something more than a one in twenty chance that any death sentence imposed within a twenty-three year span will actually be carried out during that period. If this is so, then the current system is achieving neither retribution nor deterrence.

B. *Has AEDPA Enhanced the Safety or Effectiveness of the Death Penalty Since 1996?*

These numbers show that on the eve of AEDPA's adoption, the modern American death penalty was neither safe, in the sense of being a reliable means of identifying the people for whom the law allows the death penalty, nor effective, in the sense of being administered with the swiftness and sureness needed to achieve its penological goals.

What, then, can we expect AEDPA's effect to be on the penalty's safety and effectiveness? I say "expect" because we do not have the data to establish that effect given our study's culmination in 1995, and given the many years it takes to identify cases and document their outcomes. But what we know about the pre-1995 situation and about the AEDPA's design permits a fair prediction of its effect.

Most crucially, as far as we can tell, there have been no systematic trial-level improvements that have coincided with AEDPA's adoption and implementation. On the contrary, in 1995, Congress *defunded* death penalty resource centers that theretofore had assisted capital defense lawyers in about twenty states.⁷¹ The net result of AEDPA, therefore, is to leave

⁷⁰ See Liebman, *supra* note 8, at 2063-65 & tbl. 4.

⁷¹ See, e.g., Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 84 ("In 1995, Congress weighed in on the need for speedier executions when it eliminated the \$20 million annual budget for Post-Conviction Defender Organization, which had provided some of the most sophisticated and effective counsel for death-row inmates in twenty death-penalty states"); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863 (1996). See also, e.g., Editorial, *Death Penalty Blunder*, WASH. POST, July 12, 2001 ("The Virginia Supreme Court has adopted guidelines that effectively slash the fees of court-appointed attorneys in death penalty cases. The move comes at a time when national attention has been focused on the low quality of counsel in capital

intact an already, and perhaps increasingly, flawed production process, while simultaneously complicating, and diminishing the error-detecting capacity of, the quality control process.

AEDPA complicates review, first, because of its poor drafting. AEDPA's opaque language has proliferated conflicting interpretations, requiring the Supreme Court to grant certiorari to resolve a conflict in interpretation at least fourteen times since AEDPA's adoption in 1996, nine of them in capital cases.⁷² Justice Souter certainly was right when he said for the Court that, in a world of "silk purse" and "sow's ear" drafting, AEDPA does not belong in the former category.⁷³

AEDPA further complicates matters by adding litigation steps, rather than cutting them. Because of AEDPA, virtually every step of a habeas case now proceeds in three steps, instead of the previous one or two. First, federal habeas courts must decide whether they can even reach the merits;⁷⁴ second, they must resolve the merits—whether the state courts violated the Constitution;⁷⁵ and third, federal courts must decide the § 2254(d) question—whether the violation was "unreasonable."⁷⁶

This proliferation of litigation explains why, since 1996, the average time from death sentence to execution has risen from about nine to over twelve years,⁷⁷ and why the only

cases."); *Death Row Takes a Toll on Lawyers: Money, Resources Are in Short Supply*, NEW ORLEANS TIMES-PICAYUNE, Aug. 20, 2001, <http://www.nola.com/t-p/> (last visited Feb. 8, 2001) ("After Congress pulled federal funding for post-conviction appeals in 1996, the number of capital cases in Louisiana kept climbing and defense lawyers working pro bono for death row inmates already were scarce. With urging by the Louisiana Supreme Court, which has put specific death penalty appeals on hold until the defendants had lawyers, the state responded in 1999 and enacted a law that gives those on death row the right to representation. But legislators didn't provide the \$1.3 million they themselves said was needed for the program.").

⁷² See HERTZ & LIEBMAN, *supra* note 27, at § 3.2 (collecting and discussing the relevant cases).

⁷³ *Lindh v. Murphy*, 521 U.S. 320, 336 (1997).

⁷⁴ See, e.g., 28 U.S.C. § 2244(d) (creating timing bar to reaching merits, depending upon complex set of rules governing the filing date of habeas petitions).

⁷⁵ See 28 U.S.C. §§ 2241(c)(3), 2254(d), as interpreted in *Williams v. Taylor*, 529 U.S. 362, 404, 412 (2000).

⁷⁶ 28 U.S.C. § 2254(d)(1), as interpreted in *Williams v. Taylor*, 529 U.S. 362, 404, 412 (2000).

⁷⁷ See Bureau of Justice Statistics, U.S. Department of Justice, Bulletin: Capital Punishment 1999, NCJ 184795, at <http://www.ojp.usdoj.gov/bjs/abstract/cp99.htm> (last visited June 12, 2001).

empirical study of the matter—by a think tank run by the National State Courts Association—found that AEDPA has exhibited an “almost complete lack of success” in moderating the burden habeas corpus petitions place on the states.⁷⁸ Existing evidence suggests, therefore, that as of yet AEDPA has not made the death penalty more “effective,” even in the narrow sense of enabling more death verdicts to clear judicial inspection and be carried out more quickly

In addition, and more critically, the five AEDPA provisions discussed above greatly diminish the reliability of the capital system’s review process and of the capital verdicts that the system produces. To see why this is so, suppose AEDPA *had* caused, or eventually *does* cause, a speed-up in executions. Would that by itself mean AEDPA has engendered a more “effective death penalty”? Suppose an airline company found itself plagued by delays due to its aircrafts’ frequent failure to pass its battery of pre-flight safety checks. Surely, the vice president in charge of operations would not be permitted to make those operations more “effective” by speeding up and truncating the airline’s inspections.

Yet, that is precisely the solution to which AEDPA aspires. Indeed, AEDPA now achieves the worst of all possible worlds: without improving, and probably worsening, the death penalty’s “on time” record, AEDPA’s reforms have made the system substantially less safe and reliable. How’s that as a plan for saving United Airlines, or Value Jet?

C. *A More Effective Solution*

Let me close by stating the nonobvious: Cutting back on post-trial quality control is not the wrong solution. It is simply the *wrong* half of the solution to implement *first*. Making our death penalty system safe, as well as effective, requires that we first improve the reliability of the trial process for producing death sentences, and only then—for the death sentences that emerge from improved trials—adopt the streamlined review that these improvements make possible.

⁷⁸ Fred Cheesman, II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POL’Y 89, 90, 95, 99, 105 (2000).

As far as I can tell, there is only one past or current death row inmate whose case approximates that rational solution: Timothy McVeigh. For all one can tell, he had a superb trial, at which he was represented by top-notch defense lawyers, prosecuted by highly professional government lawyers, and watched over by a careful and strong-willed trial judge.⁷⁹ Who, then, can doubt McVeigh's conclusion that there was little to be gained from the review process he chose to waive? But who, also, can doubt the supreme irony that Timothy McVeigh—alone among 3,700 *other* death row inmates⁸⁰—has gotten his wish for the swift, reliable, and effective death penalty that the U.S. Congress in his name has withheld from everyone else?

⁷⁹ For discussions of the trial, see, e.g., STEPHEN JONES & PETER ISRAEL, *OTHERS UNKNOWN: THE OKLAHOMA BOMBING CASE AND CONSPIRACY* (1998); LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING* (2001); Stephen Jones & Jennifer Gideon, *United States v. McVeigh, Defending "The Most Hated Man in America,"* 51 OKLA. L. REV. 617 (1998); Peter Amin & Tom Morgenthau, *The Verdict: Death*, NEWSWEEK, June 23, 1997, at 40; *We Did the Best We Could*, NAT'L L.J. June 30, 1997, at A6.

⁸⁰ NAACP Legal Defense and Educational Fund, Inc., *Death Row U.S.A.*, Spring 2001, at 7, available at <http://www.deathpenaltyinfo.org/DeathRowUSA1.html>.