

Symposium Introduction

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I am honored to write an introduction to the Symposium on Professor Amanda Tyler's brilliant historical study, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay*. Professor Tyler has unearthed and examined the details of an important but only partially understood aspect of the British and American experience. She scrupulously traces the evolution of the writ of habeas corpus from the English Habeas Corpus Act of 1679 (the "second magna carta") under Charles II, in the wake of the English Civil War and on the eve of the Glorious Revolution; through the American Revolutionary War, on both the English and American sides; through our Civil War under President Lincoln; through the Second World War under President Roosevelt; and to our current "war on terror" under Presidents Bush and Obama.

Professor Tyler's book has stimulated three excellent and quite different commentaries. First, Professor James Pfander provides a very thoughtful essay on the role of precedent, examining the "largely unresolved" problem of "how to translate the lessons of history into modern constitutional law."¹ Second, Professor Stephen Vladeck, in the course of arguing for an increased role of judge-made law in our habeas jurisprudence, gives us an intriguing insight into the sequelae of the English Habeas Corpus Act of 1679.² Finally, Professor Saikrishna Prakash, in an interesting counterpoint to Professor Tyler, argues that military tribunals have historically played a large wartime role in the United States as fora for the trial of "soldiers, spies, and civilians."³

In the brief space I have, I will use Professor Vladeck's essay as a point of departure. Professor Vladeck points out that after 1679, the English Habeas

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1. James E. Pfander, *Constructive Constitutional History and the Puzzle of Habeas Corpus*, 107 CALIF. L. REV. 737 (2019).

2. Stephen I. Vladeck, *Constitutional Remedies in Federalism's Forgotten Shadow*, 107 CALIF. L. REV. 1043 (2019).

3. Saikrishna Bangalore Prakash, *The Constitutionality of the Military Trial of Soldiers, Civilians, and the Enemy*, 107 CALIF. L. REV. 1021, 1027 (2019).

Corpus Act and subsequent Acts of Parliament came to be seen as the primary sources of habeas law in England.⁴ He writes, “The statutory remedy not only crowded out its common law counterpart in context, but it also came to obscure the common law practice in retrospect—such that later generations erroneously came to understand the statutory remedy as being all but exhaustive.”⁵ Something roughly analogous has happened in domestic criminal cases in the United States.

The American analogue begins with two sea changes under the Warren Court. First, the Supreme Court decided *Brown v. Board of Education*⁶ and later cases, revolutionizing its approach to race under the Equal Protection Clause.⁷ Second, the Court decided *Mapp v. Ohio*,⁸ *Gideon v. Wainwright*,⁹ *Miranda v. Arizona*,¹⁰ and other cases, revolutionizing its approach to criminal procedure under the Due Process Clause.¹¹

These two changes converged in the American criminal justice system. At the time, state criminal justice systems—particularly in, but not limited to, the South—had deeply embedded racial bias, as well as procedural unfairness.¹² Not surprisingly, the state courts—again, particularly, but not only, in the South—resisted the Court’s changes.¹³

The Court’s response to the States’ resistance was a third change, this time in the law of federal habeas corpus.¹⁴ Federal habeas in the 1960s was essentially

4. Vladeck, *supra* note 2, at 1048-1050.

5. *Id.* at 1049.

6. 347 U.S. 483 (1954).

7. See generally Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (describing the impact of segregation decisions); Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (describing the trend towards a narrower definition of equal protection); J. Harvie Wilkinson, III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975) (describing the concept of constitutional equality as political equality, equality of opportunity, and economic equality).

8. 367 U.S. 643 (1961).

9. 372 U.S. 335 (1963).

10. 384 U.S. 436 (1966).

11. See generally Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518 (1975) (describing the Court’s changing approach to criminal procedure under the Due Process Clause); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995) (reflecting on the development of criminal procedure under the Warren Court); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968) (providing a background of the Warren Court’s approach to criminal procedure).

12. Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1063, 1066 (2002).

13. Allen, *supra* note 11, at 524; Sumi Cho, *From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from Brown to Grutter*, 7 U. PA. J. CONST. L. 809, 814–18 (2005).

14. See generally, Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977) (describing the remedial strategy of the Warren Court in criminal procedure); David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the*

a common law enterprise. It was nominally governed by statute, but the statutory language was vague.¹⁵ The Court took advantage of the freedom afforded by the vague language to dramatically expand the availability of federal habeas corpus for state prisoners. The foundation for the expansion had been laid at the end of the Vinson Court in *Brown v. Allen*,¹⁶ where the Court had clearly held for the first time that federal constitutional issues already litigated in state criminal proceedings could be relitigated on federal habeas. Relitigation in federal district court of the newly found federal criminal procedural rights provided a mechanism for retail-level, case-by-case enforcement of those rights. The Court decided a number of cases expanding the availability of habeas. I cite as emblematic *Fay v. Noia*,¹⁷ in which the Court allowed habeas petitioners to present to federal district courts constitutional claims that had been procedurally defaulted in state court.

During the next quarter century, however, the Burger and Rehnquist Courts substantially cut back federal habeas for state prisoners.¹⁸ In *Stone v. Powell*,¹⁹ the Court carved out an exception for Fourth Amendment search and seizures, holding that they cannot be relitigated on federal habeas if there has been an “opportunity for full and fair” litigation of the issue in state court. In *Teague v. Lane*,²⁰ the Court held, subject to narrow exceptions, that new law could be neither announced nor enforced in federal habeas proceedings. In *Wainwright v. Sykes*²¹ and *Coleman v. Thompson*,²² the Court overruled *Fay*, holding that federal courts can excuse a state-court procedural default only if the habeas petitioner shows “cause” for the default and resulting “prejudice.”

There were two complementary reasons for the erosion of federal habeas in the decades after the Warren Court. First, the Court had become politically more conservative,²³ with less sympathy for criminal defendants whose procedural rights had not been fully protected in state court.²⁴ Second, state courts had generally come to accept and enforce the procedural rules of the Warren Court,²⁵ and, in the view of the Burger and Rehnquist Courts, no longer required the

Expansion of Federal Judicial Power, 1954–1968, 82 ST. JOHN’S L. REV. 1 (2008) (explaining the impact of the Warren Court on federal habeas corpus).

15. See 28 U.S.C. §§ 2241–55 (1966).

16. 344 U.S. 443, 460–65 (1953).

17. 372 U.S. 391, 398–99 (1963).

18. See generally James S. Liebman, *More than “Slightly Retro:” The Rehnquist Court’s Rout of Habeas Corpus Jurisdiction in Teague v. Lane*, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337 (2002); Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978).

19. 428 U.S. 465, 494 (1976).

20. 489 U.S. 288, 310 (1989).

21. 433 U.S. 72, 87–91 (1977).

22. 501 U.S. 722, 747 (1991).

23. Smith, *Activism as Restraint*, *supra* note 12, at 1069–70.

24. Smith, *The Rehnquist Court and Criminal Procedure*, *supra* note 18, at 1347.

25. Allen, *supra* note 11, at 525–26.

degree of retail supervision that had been provided by federal district courts under the Warren Court's habeas regime.²⁶

The purpose of this narrative is not to assess the relative merits of the two approaches to federal habeas. Rather, it is to point out that the Court made changes in the availability of federal habeas without benefit of statute. That is, even as the Court transformed federal habeas, and then transformed it again, the statutory provisions governing federal habeas were largely unchanged.²⁷ Through judge-made law, the Justices expanded and then contracted the availability of federal habeas as they thought best, given their views of the law and the manner of its enforcement in the state courts. I agree with most of the decisions of the Warren Court and disagree with most of those of the Burger and Rehnquist Courts, but that is largely beside the point. The important point is that all three Courts had the flexibility to adjust the availability of habeas in response to changing law and circumstances.

All that ended in 1996, when Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").²⁸ AEDPA codified, and then some, the restrictions on habeas that the Burger and Rehnquist Courts had decreed, and it did so in detailed and precise statutory language. AEDPA imposes, for the first time in the history of federal habeas petitions by state prisoners, a statute of limitations;²⁹ it imposes, also for the first time, strict limitations on the ability of a habeas petitioner to file second or successive petitions;³⁰ and it leaves intact the "cause and prejudice" procedural default rule of *Wainwright* and *Coleman*.³¹

Most important, in entirely new provisions, AEDPA requires extreme deference to the decisions of state courts. Under AEDPA, a state-court ruling cannot be set aside unless it "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."³² Deference to state-court factfinding in habeas is not new, although the degree of required deference is now somewhat greater.³³ What is truly new is that AEDPA forbids federal district courts to hold evidentiary hearings and then use newly learned information to grant habeas.³⁴ Further, a state-court ruling cannot be set aside unless it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established

26. Smith, *Activism as Restraint*, *supra* note 12, at 1064 n.31.

27. Jennifer L. Case, *Text Me: A Text-Based Interpretation of 28 U.S.C. § 2255(e)*, 103 KY. L.J. 169, 178 (2014).

28. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8-50 U.S.C.).

29. 28 U.S.C. § 2244(d).

30. 28 U.S.C. § 2244(b).

31. *Wainwright v. Sykes*, 433 U.S. 72, 85 (1977); *see Coleman v. Thompson*, 501 U.S. 722, 747 (1991).

32. 28 U.S.C. § 2254(d)(2).

33. *See Spritzer*, *supra* note 18, 499-500.

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

Federal law, as determined by the Supreme Court of the United States.”³⁵ This provision requires that the relevant federal law be “clearly established”; it requires that the Supreme Court itself have established that law; and it requires, as a precondition to federal habeas, that the state court has unreasonably applied the law.³⁶

AEDPA is a terrible statute.³⁷ It protects from federal judicial scrutiny a wide range of decisions in which state courts have erroneously determined a factual issue; in which the factual record was not properly developed in state court because of the state’s failure to authorize sufficient investigatory funds; and in which the state court has made an error of federal constitutional law. I have been a federal appellate judge for twenty years. I have lost count of the number of erroneous state court convictions I have been required to let stand because of the deference required by AEDPA.

My central objection, however, is not to AEDPA’s restrictions on the availability of federal habeas. It is that the restrictions are imposed by a detailed statute. There may come a time—indeed, in my view, the time has already come in some states—when the misapplication of federal constitutional requirements by state courts in criminal cases is so great that the balance between the state and federal courts will cry out for adjustment. Under the pre-AEDPA regime, the Supreme Court felt free to expand, and then to contract, the availability of habeas as it thought justified by the circumstances. Under AEDPA, the Court no longer has that freedom. Future changes in federal habeas will have to be statutory. Given the difficulty of statutory amendment, we are likely to have to live with, and suffer under, AEDPA for many years.

Which brings us back to Professor Tyler’s wonderful historical study. The American detentions she recounts are unlike those affected by AEDPA. Rather than post-judgment detentions in ordinary criminal cases, those studied by Professor Tyler are pre-trial executive-branch wartime detentions. But they are similar in an important respect: the Court’s decisions explored by Professor Tyler are, like the Court’s criminal habeas decisions in the pre-AEDPA era, based on judge-made law. Some of these decisions have required fine-grained distinctions, as when the Court in *Ex parte Quirin*³⁸ distinguished *Ex parte Milligan*.³⁹ But the cases are few, and controlling statutory provisions are almost non-existent. As a result, the Court has been relatively free to decide the cases as

35. 28 U.S.C. § 2254(d)(1).

36. *Id.*

37. See Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court’s Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015) (describing AEDPA as “misconceived at its inception and born of misguided political ambition”).

38. 317 U.S. 1 (1942).

39. 71 U.S. 2 (1866).

it has seen fit, based on a loose mixture of general principles, past cases, and perceived necessity.

AEDPA is a cautionary tale. Much as we might disagree with some of the Court's national security habeas decisions, statute-based instead of common law decisions almost certainly would have been, and would be, worse. In national security cases, we are best off with a Court that can, in common law fashion, apply to current circumstances the wisdom provided by its own past decisions and by those of its British predecessors. A key component of that enterprise is that the Court must understand, in an educated and nuanced way, those past decisions. Professor Tyler's welcome book will be an indispensable tool in that enterprise.