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Beyond a Reasonable Disagreement: Judging Habeas Corpus

Cover Page Footnote

Law Clerk to the Hon. Gerard E. Lynch, United States Court of Appeals for the Second Circuit. The author was formerly a Fellow at the Equal Justice Initiative in Montgomery, Alabama, litigating state and federal postconviction appeals in death penalty and juvenile life-without-parole cases. Deep gratitude is owed to Anthony G. Amsterdam, Margaret Graham, J. Benton Heath, Randy Hertz, Zachary Katznelson, Sarah Knuckey, Shalev Roisman, Erin Adele Scharff, Jennifer Rae Taylor, and the members of the Lawyering Scholarship Colloquium at N.Y.U. School of Law for helpful comments, probing questions, and abiding encouragement.

BEYOND A REASONABLE DISAGREEMENT: JUDGING HABEAS CORPUS

*Noam Biale**

This Article addresses ongoing confusion in federal habeas corpus doctrine about one of the most elemental concepts in law: reasonableness. The Supreme Court recently announced a new standard of reasonableness review for habeas cases, intended to raise the bar state prisoners must overcome to obtain federal relief. This new standard demands that errors in state court decisions be so profound that “no fairminded jurist could disagree” that the result is incorrect. Scholars have decried the rigid and exacting nature of this standard, but very little interpretive work has yet been done to theorize what it means and how it should work. This Article develops a theoretical framework for understanding the new habeas standard and shows that the assumptions lower courts are making about its meaning are wrong. It concludes that federal courts need more data beyond the mere possibility of fairminded disagreement to find that a decision is reasonable. The Article draws on scholarship and jurisprudence in other areas of law that employ reasonableness standards, and argues that the missing data should be supplied by examining the state adjudicative process. The case for focusing on state process in federal habeas cases is not new, but this Article represents the first argument that the new habeas standard not only permits such a focus but, in fact, requires it.

I. INTRODUCTION

Here is a story that has become almost commonplace in the news media: A horrific crime occurs: let’s say a murder. Police arrest a suspect and the evidence against him seems overwhelming. Perhaps he has confessed, or an eye-witness identifies him, or his co-defendants implicate him as the trigger-man. The suspect is tried in state court and convicted. He is sent to prison; perhaps he is sentenced to death. The case is closed. Years later, cracks begin to appear in what previously

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looked like a solid conviction. Witnesses recant their statements; the co-defendants are revealed as perjurers; the defendant's lawyer failed to conduct an adequate investigation of the crime; or the prosecution withheld exculpatory evidence.¹ The defendant presents this new evidence to the state courts, but they refuse to reopen the case. He files a last-ditch, hail-Mary petition to the federal court, seeking a writ of habeas corpus. The federal court faults the state for ignoring the defendant's legal claim. It reviews the evidence anew and finds that a grave injustice occurred. The federal court grants the defendant's habeas petition and vacates the conviction or sentence. Though many years have passed, a wrong is righted.²

Here is a story that is seldom told but, in fact, is much more commonplace: Another crime; and a different suspect is convicted. She challenges her conviction and sentence on the same grounds as the defendant above. The state courts deny relief. The defendant files a petition for habeas corpus in federal court. The federal court reviews the state court decision and finds compelling reasons to doubt the reliability of the defendant's conviction. However, the federal court says that the result in the state court is at least debatable, and fairminded judges could disagree about whether it is correct. The federal court presumes that the state judges who denied relief were all fairminded. Therefore, the federal court rules that their decision is not unreasonable, and denies the defendant's habeas petition. She remains in prison or, perhaps, is executed.³

The difference between these two stories is the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Supreme Court's

1. In the sentencing context, correspondingly, discovery of the defendant's intellectual disability might render him ineligible for the death penalty.

2. See, e.g., *Death Row Stories: Joe D'Ambrosio* (CNN television broadcast Mar. 23, 2014); Mosi Secret, *His Conviction Overturned, Man is Let Out of Prison After 23 Years*, N.Y. TIMES (Jan. 23, 2013), http://www.nytimes.com/2013/01/24/nyregion/his-conviction-overturned-man-is-let-out-of-prison-after-23-years.html?_r=0; Paul House, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/cases-false-imprisonment/paul-house> (last visited May 30, 2015); see generally THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited May 30, 2015).

3. See, e.g., *Hawthorne v. Schneiderman*, 695 F.3d 192, 199 (2d Cir. 2012) (Calabresi, J., concurring) ("This is one of the rare cases in which a habeas petition may well be innocent. . . . The question of Hawthorne's innocence, however, is not the one we are encouraged—or, at times, even allowed—to ask in habeas cases such as this."); *Hill v. Humphrey*, 662 F.3d 1335, 1360 (11th Cir. 2011) (en banc) (declining to decide whether state burden of proof for intellectual disability violates intellectually disabled petitioner's Eighth Amendment rights where petitioner "failed to show that no fairminded jurist could agree with the Georgia Supreme Court's decision about the burden of proof, and thus this Court is without authority to overturn the reasoned judgment of the State's highest court." (internal quotation marks omitted)); *Montgomery v. Bobby*, 654 F.3d 668, 676–83 (6th Cir. 2011) (en banc) (state court did not unreasonably apply *Brady v. Maryland* where prosecution withheld witness statement from defense that asserted that witness had seen victim alive four days after prosecution alleged defendant killed her).

interpretation of it. AEDPA restricts state prisoners' ability to obtain a writ of habeas corpus in federal court by limiting relief to only those cases that were "contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court" or that involved "an unreasonable determination of the facts" by the state court.⁴ Over the last fifteen years, the Supreme Court has interpreted AEDPA to make "the Great Writ" harder and harder to obtain, despite the fact that habeas petitions remain the primary vehicle for establishing claims of actual innocence, prosecutorial misconduct, and other issues with serious implications for justice.⁵ The Court has repeatedly admonished that only objectively unreasonable state court decisions will permit federal habeas relief. Some lower courts, however, have resisted the high deference that the Supreme Court has interpreted the statute to demand. Fed up with a repeat offender, the Ninth Circuit, the Court recently raised the burden on establishing an "unreasonable application" under AEDPA, requiring a legal error so extreme that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with th[e] Court's precedents."⁶

This shift in the standard of review appears to raise the bar considerably for habeas petitioners. Scholars have decried the new standard as making habeas relief "virtually unattainable."⁷ Little interpretive work has yet been done, however, to theorize what the standard could mean and how it should operate. Such theorizing is necessary and urgent because of troubling interpretations of the standard occurring in lower courts.

First, some circuit judges have read the Supreme Court's new gloss on the statute, announced in the 2011 case, *Harrington v. Richter*,⁸ as shifting the federal court's focus from the reasonableness of the state

4. 28 U.S.C. § 2254(d) (2014).

5. Andrea Keilen & Maurie Levin, *Moving Forward: A Map for Meaningful Habeas Reform in Texas Capital Cases*, 34 AM. J. CRIM. L. 207, 214 (2007) ("Most exonerations have come during habeas corpus proceedings, when lawyers have uncovered evidence of innocence, prosecutorial misconduct, ineffective representation, mistaken identifications, perjured testimony by state witnesses, or unreliable scientific evidence.").

6. *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

7. Judith L. Ritter, *The Voice of Reason—Why Recent Judicial Interpretations of the Antiterrorism and Effective Death Penalty Act Are Wrong*, 37 SEATTLE U. L. REV. 55, 56 (2013) [hereinafter Ritter, *Voice of Reason*]; accord Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1220 (2015) ("[A]ny participant in our habeas regime would have to agree that it resembles a twisted labyrinth of deliberately crafted legal obstacles that make it as difficult for habeas petitioners to succeed in pursuing the Writ as it would be for a Supreme Court Justice to strike out Babe Ruth, Joe DiMaggio, and Mickey Mantle in succession—even with the Chief Justice calling balls and strikes.") [hereinafter Reinhardt, *Demise of Habeas*].

8. 562 U.S. at 86.

decision to the reasonableness of the decision-*maker*. This subjective test requires federal acquiescence when a presumably fairminded state judge has already decided that the petitioner's claims have no merit. That is problematic, to say the least, because no habeas case will reach the federal courts unless a state court has already ruled against the petitioner.

A second reading of the standard treats it as an objective test that may be conceptualized as follows: in cases where general legal standards are applied to specific factual scenarios and several possible results may be correct, the existence of a range of possible results is sufficient to render the state court decision reasonable. This standard has some intuitive congruence with objective reasonableness, since a result that is arguably correct might be said to be *ipso facto* reasonable. Under this reading of the standard, federal courts need not look at what the state court actually did, so long as the ultimate result it reached is at least debatable.

Both of these interpretations are wrong.

An examination of the doctrinal roots of the "fairminded disagreement" test shows why the subjective reading of the standard is misguided. *Richter*⁹ was the first case in over a decade in which the Court devoted significant attention to interpreting AEDPA's "unreasonable application" clause. It did so with reference to disagreement among fairminded jurists, a previously-used, though dormant, articulation of the statutory standard. This interpretation was already known to habeas law and had a dubious pedigree. Following the statute's enactment, the circuit courts split on whether AEDPA required a focus on the reasonableness of state court decisions, or of decision-makers, with some ruling that a mere disagreement among "fairminded jurists" precluded habeas relief. The Supreme Court rejected that interpretation of the statute in *Williams v. Taylor*,¹⁰ a 2000 case holding that the state court decision should be assessed based on its "objective reasonableness," not whether "all fairminded jurists" would agree with its result. The Court's aim was to prevent subjectivism from creeping into the standard. In *Richter*, the Court gave no indication that it was overruling that part of *Williams* and instead relied on its prior precedent.¹¹ The subjectivism now creeping into the habeas opinions of numerous circuit judges applying *Richter* cannot be squared with a proper understanding of the Supreme Court's habeas jurisprudence. Yet numerous eminent jurists in the Courts of Appeals have, at least

9. I adhere to the convention of referring to habeas cases by the name of the habeas petitioner even when that party is the respondent in the Supreme Court (as often happens when the case arises from the Ninth Circuit).

10. 529 U.S. 362, 409 (2000).

11. *Richter*, 562 U.S. at 101.

rhetorically, endorsed this subjective version of the standard. As its first order of business, this Article will put these subjective arguments to rest.

The second reading of the habeas standard, focusing on whether the state court's ultimate result is debatable, though more compelling, is also problematic. Identifying that a range of possible results may exist does not offer any guidance for determining which of those results is reasonable. This Article argues that this approach to reasonableness should be jettisoned in the habeas context for several reasons: First, treating fairminded disagreement about the merits of a claim as a sufficient condition for finding the adjudication of that claim reasonable is, in fact, equivalent to a demand for universal consensus—the requirement rejected in *Williams*. Second, the notion that fairminded disagreement is sufficient to preclude federal habeas relief conflicts with the purposes of habeas and the structure of AEDPA. Third, this interpretation of the standard scrambles the elements identified by the statute, introducing conceptual confusion to the doctrine. Finally, the Supreme Court's attempts to limit this standard to legal rules of “general” application provides hardly any limitation at all given the types of claims usually raised in habeas. Therefore, contrary to what *Richter* suggests, fairminded disagreement, without more, is an inadequate standard for determining what is reasonable in habeas law.

What more, then, is needed? What additional data do courts need to determine whether a state decision is reasonable? To answer those questions, this Article will bring to bear existing scholarship and jurisprudence from other areas of law that employ objective reasonableness standards. Constitutional tort law, such as civil rights suits brought under 42 U.S.C. § 1983, is especially informative for habeas jurisprudence because its use of an objective reasonableness standard mirrors AEDPA's.¹² Of course, § 1983 and habeas law serve different purposes, and § 1983 jurisprudence is itself far from ideal. But it provides a useful illustration of this Article's thesis: federal courts need more data than simply the result of a state court decision (sometimes unaccompanied by an opinion) to determine whether that decision was reasonable. The Supreme Court's § 1983 cases provide examples of the additional data that the Court considers in addition to “fairminded disagreement.” Namely, the Court looks to the process that government decision-makers go through, including the “step[s] that

12. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Other scholars have noted that this area of law is “perceived as contiguous to habeas, and hence [is] ripe for doctrinal transplantation.” Aziz Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 590 (2014) [hereinafter Huq, *Habeas & Roberts*]; see also Stephen I. Vladeck, *AEDPA, Saucier, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 SEATTLE U. L. REV. 595 (2009).

could reasonably be expected of them”¹³ and the “division of functions”¹⁴ between them and other institutional actors, in order to determine whether these decision-makers acted reasonably or not. Although the Court has not been explicit about what it is doing in the constitutional tort context, an examination of its cases reveals these principles at work.

These principles provide a framework for thinking about what additional data the federal habeas court reviewing a state decision should examine beyond whether the ultimate result is debatable. Similar to constitutional tort defendants, state courts similarly go through a process in adjudicating a habeas petitioner’s federal claims, which variously may involve appointing an attorney to represent the petitioner in postconviction proceedings; holding an evidentiary hearing; and issuing a reasoned opinion explaining why relief is denied. They also have their own “division of functions” between trial and appellate courts. Depending on what the state court does, its decision may be more or less reliable and protective of the petitioner’s federal constitutional rights. In order to determine whether the state court adjudication led to a decision that involves a reasonable application of federal law, therefore, the federal court should look broadly to the state adjudicative process.

The prescription that federal courts consider state procedures in their determination whether to grant or deny federal habeas relief is not new. It has been discussed and supported by scholars with profoundly divergent views on the desirability of federal review of state criminal proceedings.¹⁵ But this Article is the first to argue that a correct reading of the new AEDPA standard of review actually *requires* that the federal court pay attention to state procedures. It may be unrealistic to anticipate that the Supreme Court will adopt such an approach with its

13. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1249 (2012) (internal quotation marks omitted).

14. *Malley*, 475 U.S. at 352–53 (Powell, J., concurring in part and dissenting in part).

15. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456 (1963) (“When should state determinations, subject to direct Supreme Court review, not be final? I suggest that one answer, at least, fits into the very category we have been discussing: cases where the state has, in effect, failed itself to provide process. It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case: the state must provide a reasoned method of inquiry into relevant questions of fact and law”) [hereinafter Bator, *Finality*]; see also Justin F. Marceau, *Don’t Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 54–56 (2010) (arguing that focus on process in state court is “common denominator” between pre-AEDPA critiques of habeas review like Bator’s and modern commentary critiquing AEDPA’s limitations on habeas review) [hereinafter Marceau, *Due Process*]; Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. 1, 26–33 (2010) (discussing use of habeas law to make systematic, structural reform to state criminal processes) [hereinafter Primus, *Structural Habeas*].

current ethos of federalism trumping fairness in individual criminal cases. But the hope is that this Article will provide the groundwork for a rethinking of habeas for state prisoners, while providing practitioners with some arguments to use in the meantime when faced with the fairminded disagreement standard.

This Article therefore has two projects: one descriptive and one prescriptive. The descriptive project looks at the evolution of habeas jurisprudence to evaluate the two primary readings of *Richter* and finds them both lacking in doctrinal consistency and logical coherence. The prescriptive portion looks to other areas of law for guidance on what other factors federal courts should consider in deciding whether a state court decision is reasonable under AEDPA, and suggests several ways that guidance ought to bear on habeas adjudication. This Article argues that the state court process is not only a desirable matter for federal court consideration, but also a necessary one. That does not mean, however, that the fairminded disagreement standard stated in *Richter* is wrong and can be rejected by habeas petitioners and the lawyers who represent them. As the standard becomes a fixture in habeas jurisprudence, petitioners and practitioners ignore it at their peril. Accordingly, this Article provides a theoretical assessment of the standard, and argues that there is more leeway inherent in it than scholars and the courts have so far recognized. This is not an endorsement, but rather an attempt to reckon with a troublesome reality of habeas practice.

The Article continues in four parts: Part II will introduce *Richter* and then provide background to establish what is at stake and how the Supreme Court arrived at the fairminded disagreement standard. Part III will describe the problems that *Richter* has wrought: the subjective interpretation of the standard that is appearing in circuit court opinions and the more plausible, but still flawed, objective interpretation of the standard. This Part will conclude that federal courts need more than the mere existence or possibility of fairminded disagreement about a case's result to determine whether the state court's adjudication was reasonable. Part IV will therefore ask what "more" is needed, and will argue that federal courts should take additional data from the state adjudicative process. A focus on process is appropriate because: (1) it is a background assumption of habeas law in our federal system, (2) it is consistent with, and in fact, contemplated by AEDPA, and (3) it is how other areas of law assess reasonableness. This Part will draw lessons from existing scholarship and jurisprudence in some of these other areas of law, focusing especially on the use of an objective reasonableness standard in constitutional tort law. A careful reading of the Supreme Court's jurisprudence in that area reveals a process-based framework for

assessing reasonableness at work. Part V will then apply that framework to habeas law and suggest some state court procedures and structures that federal courts should consider in determining whether the adjudication of a habeas petitioner's claim is objectively reasonable.

Before plunging into the discussion, a word about terminology: the cases I will be discussing make reference to agreement among "all reasonable jurists," matters about which "fairminded jurists could disagree," issues "beyond fairminded disagreement," and so forth. I treat these as different expressions of the same standard, though I recognize that fairmindedness and reasonableness do not necessarily have the same natural meaning.

II. RICHTER IN CONTEXT: THE RISE AND FALL AND RISE OF THE FAIRMINDED JURISTS

A. *The "Great Writ" and AEDPA: A Brief Background*

The "Great Writ" of habeas corpus predates the founding of the United States and harks back to the principle articulated in the Magna Carta that "No free man shall be taken or imprisoned . . . except by the legal judgment of his peers or by the law of the land."¹⁶ The writ developed in English common law as "a mechanism for securing compliance with the King's laws."¹⁷ The Framers incorporated the writ into the Constitution by supplying limited circumstances for its suspension (only Congress may do it, and only "when in Cases of Rebellion or Invasion the public Safety may require it").¹⁸ In our federal system, habeas has acted as a check on both state and federal sovereign power, and since 1867 has permitted prisoners to petition a federal court for relief if *either* sovereign imprisons them in violation of the Constitution and laws of the United States.¹⁹ To its proponents, therefore, robust federal habeas review of state criminal convictions and sentences represents "a double security" against government overreach, an example of "the federal system . . . working as it should."²⁰

16. Art. 39, in SOURCES OF OUR LIBERTIES 17 (R. Perry & J. Cooper eds. 1959).

17. *Boumediene v. Bush*, 553 U.S. 723, 740 (2008) (citing Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 585 (2008)).

18. U.S. CONST. art. I, § 9.

19. 28 U.S.C. § 2241 (2012); Act of February 5, 1867 ("Habeas Corpus Act of 1867"), § 1, ch 28, 39th Cong., 14 Stat 385, 385–86 (1867).

20. Eric M. Freedman, *State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between the State and Federal Governments Can Improve the Criminal Justice System Nationally*, 24 FED. SENT'G REP. 298, 299 (2012) (quoting THE FEDERALIST NO. 51, at 295 (James Madison) (1788))

All that past is prologue to a seismic change in habeas corpus law that occurred late in the 20th Century. Prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),²¹ a prisoner in state custody could petition for a writ of habeas corpus in federal court and receive *de novo* review of his federal claims.²² That standard of review drew vigorous critiques from some of the most distinguished scholars and jurists in the country, including Professors Paul Bator and Paul Mishkin, Judge Henry Friendly, and Justice John Marshall Harlan II, who argued that the criminal justice system's interest in finality should trump the prisoner's interest in endlessly relitigating claims already passed on by the state court.²³ These calls for a greater emphasis on finality gained widespread scholarly and judicial acceptance, and achieved ultimate success with the passage of AEDPA.²⁴

Although the impetus for AEDPA was a perception in Congress that the *federal* death penalty proceeded at too glacial a pace, the statute as enacted had the greatest significance for *state* prisoners appealing both capital and non-capital convictions.²⁵ The statute created procedural

[hereinafter Freedman, *Post-Conviction Remedies*].

21. S. 735, 104th Cong., 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 15, 18, 22, 28, 49 U.S.C.).

22. See *Brown v. Allen*, 344 U.S. 443, 458 (1953).

23. See Bator, *Finality*, *supra* note 15, at 453 (“Somehow, somewhere, we must accept the fact that human institutions are short of infallible; there is reason for a policy which leaves well enough alone and which channels our limited resources of concern toward more productive ends.”); Paul J. Mishkin, *Foreword: the High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79–80 (1965) (“Even the broadest view of the writ’s functions would not deny that a proper sentence of a competent court imposed after an unquestionably fair trial is an acceptable justification for continued imprisonment; the mere possibility, however real, that a new trial might produce a different result is not a sufficient basis for habeas corpus.”); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 155 (1970) (“I perceive no general principle mandating a second round of attacks simply because the alleged error is a ‘constitutional’ one.”); *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) (“No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.”).

24. See Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071, 2086 (2014) (“History has been kind to Friendly’s proposals.”); *accord Teague v. Lane*, 489 U.S. 288, 309–10 (1989) (finding criticisms of Bator and Mishkin to be persuasive, and adopting Justice Harlan’s view of retroactivity for cases on collateral review); see also Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 548–49 (1999) (discussing Supreme Court’s pre-AEDPA restrictions on habeas relief).

25. The legislative history of AEDPA has been covered thoroughly in other articles. See, e.g., Lee Kovarsky, *AEDPA’s Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) [hereinafter Kovarsky, *AEDPA’s Wrecks*]; Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(D)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677 (2003) [hereinafter Ides, *Standards*]; Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 701 (2002) (noting

obstacles to federal habeas review, requiring exhaustion of all federal claims in the state court,²⁶ a strict one-year time limit on filing a federal petition after the conviction becomes final,²⁷ harsh limitations on filing successive petitions,²⁸ and onerous requirements for obtaining a certificate of appealability in order to appeal an adverse decision from a federal district court.²⁹

In addition to these procedural hurdles, AEDPA amended the substantive standard of review for the merits of state court decisions, eliminating *de novo* review. Section 2254(d) of the statute barred the federal court from granting the writ unless the petitioner could demonstrate that the state courts' adjudication of the merits of his claim either

(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.³⁰

The combination of these procedural and substantive barriers to habeas relief was met with what Justin Marceau has described as “a vast expression of fear and loathing.”³¹ Numerous commentators argued that various of AEDPA's provisions were unconstitutional.³² The Supreme Court disagreed explicitly about the Act's provisions regarding successive petitions³³ and has applied the substantive provisions without

AEDPA was passed “in an atmosphere of anger and fear” in reaction to Oklahoma City Bombing).

26. 28 U.S.C. § 2254(b)(2) (2012).

27. *Id.* § 2244(d)(1) (2012).

28. *Id.* § 2244(b)(1).

29. *Id.* § 2253(c)(3) (2012).

30. *Id.* § 2254(d).

31. Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 94 (2012) (citing Professor James Liebman's remark, “Dwarfed among the many unspeakable evils that [Timothy] McVeigh wrought is a speakable one . . . , namely, the so-called [AEDPA]” (alterations in original)) [hereinafter Marceau, *Challenging Habeas Process*]. Professor Marceau describes the “fear among scholars and practitioners that AEDPA was effecting a *sub rosa*, procedural evisceration of the critical constitutional protections of the Bill of Rights incorporated against the state by the Warren Court.” *Id.* at 94–95.

32. 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, 873–76 (1998) (arguing that an interpretation of § 2254(d)(1) that would require federal courts to defer to state court determinations of mixed questions of law and fact would “raise[] at least a serious doubt about the provision's constitutionality”); see also Kimberly Woolley, Note, *Constitutional Interpretations of the Antiterrorism Act's Habeas Corpus Provisions*, 66 GEO. WASH. L. REV. 414, 437 (1998).

33. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (holding that added restrictions which AEDPA places on successive habeas petitions do not amount to a “suspension” of the writ contrary to Article I,

expressing any doubt as to their constitutionality.³⁴ Nonetheless, criticism of the statute has remained constant,³⁵ especially in the capital context, where both judges and commentators have argued that potentially meritorious claims are either barred from review by the onerous procedural provisions or subject to such an obsequious level of deference under the substantive standard of review that the Act perpetuates major miscarriages of justice, including the execution of the innocent.³⁶ For example, in his 2014 Madison Lecture, Judge William A. Fletcher of the Ninth Circuit described in detail the case of Kevin Cooper, a man on California's death row who, in Judge Fletcher's view, was likely framed by the San Bernardino Sheriff's Department.³⁷ After recounting the wrongdoing of the State in the case, which included tampering with witnesses, destroying evidence that implicated suspects other than Cooper, withholding exculpatory evidence from the defense, and bungling the DNA testing that could have cleared Cooper's name,

§ 9).

34. See *Crater v. Galaza*, 491 F.3d 1119, 1129 (9th Cir. 2007) ("We consider the Court's longstanding application of the rules set forth in AEDPA to be strong evidence of the Act's constitutionality.").

35. Besides the justice implications discussed *infra*, scholars have called the current system of adjudicating habeas petitions under AEDPA "'chaos,' an 'intellectual disaster area,' 'a charade,' and 'so unworkable and perverse that reformers should feel no hesitation about scrapping large chunks of it.'" Primus, *Structural Habeas*, *supra* note 15, at 1 (quoting Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 542, 553 (2006); Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 816 (2009); Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 42 (2002)). Criticism of the statute has even broken through to the mainstream (if highbrow) media. See Lincoln Caplan, *The Destruction of Defendants' Rights*, THE NEW YORKER, June 21, 2015, available at <http://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights> ("[AEDPA] is surely one of the worst statutes ever passed by Congress and signed into law by a President.").

36. See *Hawthorne v. Schneiderman*, 695 F.3d 192, 199 (2d Cir. 2012) (Calabresi, J., concurring) ("This is one of the rare cases in which a habeas petitioner may well be innocent. . . . The question of Hawthorne's innocence, however, is not the one we are encouraged—or, at times, even allowed—to ask in habeas cases such as this [T]he Supreme Court and Congress have shaped habeas review so that technical errors—typically by prisoners and their counsel—often preclude genuine inquiry into guilt and innocence."); accord Stephen R. Reinhardt, *Life to Death: Our Constitution and How It Grows*, 44 U.C. DAVIS L. REV. 391, 408–09 (2010) ("[Under AEDPA,] even if the conviction or sentence is unconstitutional under clearly established Supreme Court law, a state court ruling to the contrary will not be overturned and the petitioner will remain incarcerated or may be executed, unless the ruling of the state court was not only wrong, but unreasonably so. Can this really be the law? Is AEDPA constitutional? Does its limitation of access to the writ of habeas corpus by persons unconstitutionally sentenced or convicted, including capital defendants, conform with the Framers['] purpose of 'establishing justice'? It would hardly appear to do so."); Dan Poulson, Note, *Suspension for Beginners: Ex Parte Bollman and the Unconstitutionality of the 1996 Antiterrorism and Effective Death Penalty Act*, 35 HASTINGS CONST. L.Q. 373, 399 (2008) (arguing that under proper understanding of Suspension Clause, "AEDPA's qualitative restrictions on federal habeas review for state prisoners are plainly unconstitutional").

37. See *Cooper v. Brown*, 565 F.3d 581, 581–635 (9th Cir. 2009) (Fletcher, J., dissenting from denial of petition for rehearing en banc).

Judge Fletcher stated, “If you have been wondering why Kevin Cooper is still on death row, the answer is AEDPA.”³⁸

B. *Harrington v. Richter*

Against this backdrop, the Supreme Court decided *Richter* in 2011 after a decade of repeatedly reversing grants of habeas corpus based, in the Court’s view, on insufficient deference to the state courts.³⁹ *Richter* reflected the Supreme Court’s frustration with lower courts’ (specifically the Ninth Circuit’s) refusal to “respect the limited role”⁴⁰ of the federal court in AEDPA cases.⁴¹

In *Richter*, a prisoner sentenced to life without parole filed a state habeas petition to the California Supreme Court alleging ineffective assistance of counsel.⁴² The state court denied the petition in a one-sentence summary order.⁴³ After the federal district court and a panel of the Ninth Circuit denied the federal habeas petition, the *en banc* Ninth Circuit reversed, questioning whether § 2254(d) applied at all to a summary denial, but holding that the California Supreme Court’s decision was “unreasonable in any event.”⁴⁴

Writing for seven justices (Justice Ginsburg concurred in the judgment and Justice Kagan took no part in the consideration), Justice Kennedy first considered whether § 2254(d) applied when a state court’s order was unaccompanied by an opinion stating its reasoning. Justice Kennedy pointed out that the text of the statute did not require a statement of reasons; it referred only to a “decision.”⁴⁵ He added that every Court of Appeals to consider the issue had held that a written opinion was not necessary to determining whether the state court’s

38. William A. Fletcher, *Our Broken Death Penalty*, 89 N.Y.U L. REV. 805, 824 (2014).

39. See Diarmuid F. O’Scannlain, *A Decade of Reversal: The Ninth Circuit’s Record in the Supreme Court Through October Term 2010*, 87 NOTRE DAME L. REV. 2165, 2165–68 (2012) (describing Ninth Circuit’s “strikingly poor” record of reversals before Supreme Court and noting that its record in cases involving the proper standard of review under AEDPA is “especially troubling”); *but see* Reinhardt, *Demise of Habeas*, *supra* note 7, at 1223 (“To be clear, we [the Ninth Circuit] follow Supreme Court precedent when we decide habeas cases. What we do not do is attempt to anticipate the extreme rules that the Court often devises to deny habeas relief to persons who may have been convicted or sentenced unconstitutionally; nor do we adopt those rules before the Court tells us that we must do so.”).

40. *Uttecht v. Brown*, 551 U.S. 1, 10 (2007).

41. *Harrington v. Richter*, 562 U.S. 86, 92 (2011) (citing “judicial disregard for the sound and established principles that inform” proper issuance of writ “inherent in the opinion of the Court of Appeals for the Ninth Circuit”).

42. *Id.* at 96.

43. *Id.* (citing *In re Richter*, No. S082167, 2001 Cal. LEXIS 1946 (Mar. 28, 2001)).

44. *Id.* at 97 (citing *Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009) (*en banc*)).

45. *Id.* at 98.

decision was unreasonable.⁴⁶ The Court therefore held, “Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden still must be met by showing there was no reasonable basis for the state court to deny relief.”⁴⁷

The Supreme Court’s decision on summary denials was the main holding of *Richter* and garnered the most attention.⁴⁸ But the Court went further. In explaining how the Ninth Circuit erred in its adjudication of AEDPA question, the Court cited prior precedent establishing that § 2254(d)’s “unreasonable application” standard is “different from an *incorrect* application.”⁴⁹ Justice Kennedy then offered a highly exacting articulation of the standard, saying: “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as *fairminded jurists could disagree* on the correctness of the state court’s decision.”⁵⁰ In case there was any question about the burden habeas petitioners faced, Justice Kennedy added, “If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.”⁵¹ He noted that AEDPA “preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents[.]” but, he said, “It goes no further.”⁵² Later, Justice Kennedy reiterated, “As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”⁵³

The reference to disagreement among fairminded jurists appeared to be a reformulation of AEDPA standard by the Supreme Court, though as we will see in the next sub-part, that interpretation of the unreasonable application clause was not entirely new to habeas jurisprudence. To understand how the unreasonable application clause in the statute came to be defined in terms of fairminded disagreement, it

46. *Id.* (collecting cases). *But see* Matthew Seligman, Note, *Harrington’s Wake: Unanswered Questions on AEDPA’s Application to Summary Dispositions*, 64 STAN. L. REV. 469, 478–83 (2012) (noting this issue was contentiously debated in the circuit courts until a majority reached similar conclusion) [hereinafter Seligman, *Harrington’s Wake*].

47. *Richter*, 562 U.S. at 98.

48. *See generally* Seligman, *Harrington’s Wake*, *supra* note 46.

49. *Richter*, 562 U.S. at 101.

50. *Id.* (emphasis added) (internal quotation marks omitted).

51. *Id.* at 102.

52. *Id.*

53. *Id.* at 103.

is necessary first to consider the reasonableness standard in the law generally, and then to examine how it was incorporated into the habeas context.

C. Reasonableness: The “Familiar” Standard

Standards of reasonableness pervade the law. Reasonableness is hard to define in the abstract, yet it is commonly used in nearly every legal arena, from negligence suits in torts, to claims of self-defense in criminal prosecutions, to the assessment of searches and seizures under the Fourth Amendment, the determination of whether a suspect is in custody under the Fifth Amendment, the efficacy of counsel under the Sixth Amendment—the list goes on. Reasonableness can, of course, be either subjective or objective, focusing respectively on either the particular characteristics of a person and whether she is reasonable (as Allan Ides has discussed, this really translates to a question of whether the person is “rational”⁵⁴); or what a fictitious, anonymous everyman would do in the same situation.

The latter, objective test has proved much more useful and has been the touchstone of the common law since the early 19th Century.⁵⁵ The objective test is highly flexible: it can be applied to an endless array of people in an endless array of situations.⁵⁶ It is also administrable, allowing judges and juries to assess a defendant’s behavior without having to peer into her mind. Finally, it is prospective-looking, protecting defendants from having their actions viewed through the harsh glare of hindsight. But, as Richard Epstein has pointed out in the torts context, it is a somewhat “‘higher’ or more demanding” standard than subjective good faith; “With an objective standard the risk of [defendant’s] poor intelligence or discretion falls on [the defendant], while the subjective standard places the risk of [defendant’s] failings on [the plaintiff.]”⁵⁷ So the objective standard strikes a balance between competing interests in backward-looking litigation. That balance is

54. Ides, *Standards*, *supra* note 25, at 689.

55. The rejection of the subjective standard in favor of the objective standard has been black letter law since the 1830’s English decision *Vaughan v. Menlove*, 132 Eng. Rep. 490, 493 (1837) (arguing subjective standard “would be as variable as the length of the foot of each individual”).

56. See W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 32, at 173–74 (5th ed. 1984) (“The whole theory of negligence presupposes some uniform standard of behavior. Yet the infinite variety of situations which may arise makes it impossible to fix definite rules in advance for all conceivable human conduct. The utmost that can be done is to devise something in the nature of a formula, the application of which in each particular case must be left to the jury, or to the court. The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites.”).

57. RICHARD EPSTEIN, TORTS § 5.3, at 122 (10th Ed., 2012).

apparently a savory one, since we continue to apply the objective standard wherever we encounter a thorny legal problem.

In addition, although the objective standard is grounded in the fiction of a single “reasonable person,” who may stand in for anyone, it does permit some consideration of personal characteristics as they impact what a reasonable person would do in the particular circumstances. In assessing objective reasonableness, “courts . . . may make ‘allowance not only for external facts, but sometimes for certain characteristics of the actor himself,’ including physical disability, youth, or advanced age.”⁵⁸ In addition to such disabilities, the court may account for expertise; for example, in a medical malpractice suit, the defendant’s actions are evaluated based on a standard of what a reasonable doctor would do when faced with a medical issue,⁵⁹ not what a reasonable person would do (presumably, call a doctor). Similarly, for determining ineffective assistance of counsel claims, an attorney’s decisions are judged to be reasonable or unreasonable with reference to prevailing professional norms of legal practice.⁶⁰ And, as relevant here, a reasonableness standard that evaluates judicial actions would be a reasonable jurist test—or, in Professor Ides’s words, a standard of “a prudent and careful jurist applying professional standards of craft and competence.”⁶¹

D. Objective Reasonableness in Habeas

It is no surprise then, given the ubiquity and flexibility of the objective reasonableness test, that the Supreme Court would cite the “familiar” understanding of the standard to interpret the meaning of “unreasonable application” in AEDPA.⁶² As we will see, in its first interpretation of the statute, the Court faced a choice between two standards—objective reasonableness and error beyond fairminded disagreement—and opted for the former.

1. Early Interpretations of AEDPA in the Circuits

Following the passage of AEDPA, interpretation of the meaning of “unreasonable application” quickly produced a circuit split. The

58. *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting) (quoting KEETON, ET AL., *supra* note 56, § 32, T 174–179).

59. *See, e.g., Nestorowich v. Ricotta*, 767 N.E.2d 125, 128 (N.Y. 2002) (“A doctor is charged with the duty to exercise due care, as measured against the conduct of his or her own peers—the reasonably prudent doctor standard.”).

60. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

61. Ides, *Standards*, *supra* note 25, at 688–89.

62. *Williams v. Taylor*, 529 U.S. 362, 409–10 (2010).

Fourth,⁶³ Fifth,⁶⁴ and Eleventh⁶⁵ Circuits interpreted “unreasonable application” to mean a decision that all reasonable jurists would agree is incorrect.⁶⁶ In the Fifth Circuit case, *Drinkard v. Johnson*,⁶⁷ one member of the panel dissented from the majority’s holding that the state court decided the merits of the constitutional claim correctly. The Fifth Circuit majority noted this disagreement as a basis for concluding that the state court’s application of the law was not unreasonable.⁶⁸ As the court put it, “[A]n application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect.”⁶⁹ In other words, the mere fact of a split among fairminded judges in the Fifth Circuit panel was held to support the decision to deny habeas relief.

The Third Circuit took a different approach, arguing that the all-reasonable-jurists definition “unduly discourage[d] the granting of relief insofar as it require[d] the federal habeas court to hold that the state court judges acted in a way that no reasonable jurist would under the circumstances.”⁷⁰ The problem with that definition, according to the Third Circuit, was that it had “a tendency to focus attention on the reasonableness of the jurists rather than the merits of the decision

63. *Green v. French*, 143 F.3d 865, 873 (4th Cir. 1998) (“If no reasonable jurist would disagree over the applicability of the principle to the new context, then the petitioner will have shown not only that the decision was ‘contrary to’ clearly established precedent on an understanding of section 2254(d)(1) that analyzes extensions of principle to new contexts under the ‘contrary to’ clause of the section; he also will have shown that the decision was an ‘unreasonable application of’ clearly established law on an understanding of the section that analyzes such extension under the ‘unreasonable application of’ clause. And the writ will issue.”).

64. *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996) (“[W]e can grant habeas relief only if a state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.”).

65. *Neeley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998) (adopting Fifth Circuit’s standard).

66. Although not employing the “all reasonable jurists” language, the Seventh Circuit held that AEDPA greatly increased the amount of deference owed to state courts under the “unreasonable application” clause. *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (en banc) (“[AEDPA] tells federal courts: Hands off, unless the judgment in place is based on an error grave enough to be called ‘unreasonable.’”).

67. *Drinkard*, 97 F.3d at 770.

68. *Id.* at 769 (“It follows that when the jurists considering the state court ruling disagree in this manner, the application of the law by the state court is not unreasonable. The AEDPA therefore bars us from granting relief to *Drinkard* on this claim.”).

69. *Id.*; see also *Green v. French*, 142 F.3d 865, 870 (4th Cir. 1998) (quoting *Drinkard*, 97 F.3d at 751).

70. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 889 (3d Cir. 1999) (en banc). The First Circuit, by the way, developed yet a third standard, holding that habeas corpus could be granted only if the state court decision was “so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.” *O’Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998). The Eighth Circuit also twice found an unreasonable application before *Williams*, but did not articulate what rendered the state court decision unreasonable, as opposed to just erroneous. See *Atley v. Ault*, 191 F.3d 865, 871-73 (8th Cir. 1999); *Long v. Humphrey*, 184 F.3d 758, 761 (8th Cir. 1999).

itself.”⁷¹ To avoid this problem, the Third Circuit held that the appropriate question was whether the state court’s decision was “objectively reasonable.”⁷² The court acknowledged that this standard would not dictate an obvious result in every case, but argued, “Notions of reasonableness abound in the law and are not ordinarily considered problematic, despite their imprecision.”⁷³

2. The Supreme Court Interprets § 2254(d)(1) in *Williams*

The Supreme Court resolved this circuit split in 2000, when it decided *Williams v. Taylor*.⁷⁴ Petitioner Terry Williams asserted that his trial counsel was ineffective at the penalty phase of his capital trial for failing to investigate and present mitigating evidence.⁷⁵ The federal district court granted Williams’s petition, finding that the state court’s rejection of his claim amounted to an unreasonable application of *Strickland v. Washington*, the Supreme Court case establishing that deficient performance of counsel combined with prejudice to the defendant constitutes a violation of the Sixth Amendment right to counsel.⁷⁶ The Fourth Circuit reversed, holding that it could not say that the state court “decided the question by interpreting or applying the relevant precedent in a manner that *reasonable jurists would all agree* is unreasonable.”⁷⁷

The Supreme Court produced a fractured opinion reversing the Fourth Circuit. Justice Stevens delivered the opinion of the Court as to the merits, holding that Williams’s trial counsel was ineffective.⁷⁸ However, Justice O’Connor delivered the opinion of the Court as to the interpretation of AEDPA’s substantive provision, 28 U.S.C. § 2254(d)(1).⁷⁹ Justice O’Connor’s opinion first attempted to delineate the respective meanings of § 2254(d)(1)’s “contrary to” and “unreasonable application” clauses.⁸⁰ According to Justice O’Connor, the “contrary to” clause came into play when either (a) the state court

71. *Matteo*, 171 F.3d at 889.

72. *Id.* at 889-90.

73. *Id.* at 891 (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979) (observing, in Fourth Amendment context, that “the test of reasonableness . . . is not capable of precise definition or mechanical application”).

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

75. *Id.* at 370.

76. *See* 466 U.S. 668 (1984).

77. *Williams*, 529 U.S. at 374 (quoting *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998)) (emphasis added) (internal quotation marks omitted).

78. *Id.* at 390-99 (Op. of Stevens, J.).

79. *Id.* at 402-13 (Op. of O’Connor, J.).

80. *Id.* at 404. She criticized Justice Stevens for failing to give the two clauses independent meaning.

arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or (b) if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to the Court.⁸¹ By contrast, Congress's inclusion of the "unreasonable application" language suggested that when a state court correctly identifies the governing legal rule and then applies it to the facts of a particular prisoner's case, the task of the federal court under AEDPA is to determine whether that application was "unreasonable."⁸²

Justice O'Connor then turned to the meaning of "unreasonable" under the statute. She noted the Fourth Circuit's holding that a state court decision involves an unreasonable application of clearly established federal law "only if the state court has applied federal law 'in a manner that reasonable jurists would agree is unreasonable,'"⁸³ but she held, "The placement of this additional overlay on the 'unreasonable application' clause was erroneous."⁸⁴ Instead, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established law was *objectively unreasonable*."⁸⁵ Responding to the "all reasonable jurists" test, Justice O'Connor added:

The federal habeas court should not transform the inquiry into a subjective one by resting its determination . . . on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case. The "all reasonable jurists" standard would tend to mislead federal habeas courts by focusing their attention on a subjective inquiry rather than an objective one.⁸⁶

As an example of a federal habeas court so misled, Justice O'Connor

81. *Id.* at 405.

82. *Id.* at 407–08. In this respect, Justice O'Connor held that the Fourth Circuit's interpretation of the "unreasonable application" clause was correct. *Id.*

83. *Id.* at 409 (quoting *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998)).

84. *Id.*

85. *Id.* (emphasis added).

86. *Id.* at 409–10. Justice Stevens agreed with Justice O'Connor that the "all reasonable jurists" test was an erroneous interpretation of the unreasonable application clause, and his opinion provided further explanation of the problems with such a test. *See id.* at 377–78 (Op. of Stevens, J.) ("[T]he statute says nothing about 'reasonable judges,' presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as 'unreasonable.' Indeed, it is most unlikely that Congress would deliberately impose such a requirement of unanimity on federal judges. As Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.").

disapprovingly cited the Fifth Circuit's holding in *Drinkard* that a state court's application of federal law could not be unreasonable because the Court of Appeals panel split 2–1 on the underlying constitutional question.⁸⁷ Justice O'Connor acknowledged that "[t]he term 'unreasonable' is no doubt difficult to define," but she said, "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning."⁸⁸ Justice O'Connor then defined what an unreasonable application of federal law is *not*: merely an incorrect application of federal law.⁸⁹

Williams left the increment of incorrectness beyond error necessary to overcome AEDPA's bar to relief unexplained, however. This prompted head-scratching from judges attempting to apply AEDPA's substantive provisions in light of *Williams*. Judge Jon O. Newman of the Second Circuit remarked that Justice O'Connor's formulation of the unreasonable application clause was "virtually tautological," directing courts to grant the writ where the state court decision was not merely erroneous but also unreasonable.⁹⁰ He added that "the increment [of incorrectness beyond error] need not be great; otherwise, habeas relief would be limited to state court decisions so off the mark as to suggest judicial incompetence."⁹¹

Despite the "common," "familiar" understanding of objective reasonableness, the rule of *Williams* proved easy to state but hard to apply. In *Andrade v. Attorney General of the State of California*, for example, the Ninth Circuit determined that the state court committed "clear error,"⁹² a standard that, according to its own precedent, occupied a middle ground between the poles suggested by Judge Newman.⁹³ The Supreme Court rejected the "clear error" formulation as "not the same" as objective unreasonableness.⁹⁴ As a semantic matter, that was of course true, but the Court provided virtually no analysis to explain what the substantive difference between the two standards was, instead repeating that *Williams* required a denial of the writ unless the state court's application of law was objectively unreasonable (and finding the

87. *Id.* at 410.

88. *Id.*

89. *Id.*

90. *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000).

91. *Id.* (internal quotation marks omitted).

92. 270 F.3d 743, 753 (9th Cir. 2001), *rev'd sub nom.* *Lockyer v. Andrade*, 538 U.S. 63 (2003).

93. *See Van Tran v. Lindsey*, 212 F.3d 1143, 1153 (9th Cir. 2000) ("We believe that the clear error standard occupies the middle ground that the *Williams* Court marked out when it rejected the arguments of those who contended that an independent determination of prejudicial error by a federal court was sufficient and of those who argued for the overly deferential 'reasonable jurists' standard.").

94. *Lockyer*, 538 U.S. at 75.

state courts' decision not so).⁹⁵

Scholars and courts were therefore left to muddle through how to apply the objective reasonableness standard. The leading habeas treatise noted that all three opinions in *Williams*, including Chief Justice Rehnquist's dissent, established that under both clauses of § 2254(d)(1), the federal court must review not only the ultimate judgment of the state court but also its reasoning.⁹⁶ Moreover, it added, "In sharp contrast to some of the preexisting lower court caselaw, which had read section 2254(d)(1) to require virtually abject 'deference' to state court judgments, Justice O'Connor's majority opinion . . . noticeably steered clear of any use of the term 'deference.'"⁹⁷

Although the Court did not further elucidate the AEDPA standard explicitly, it did apply it in a manner consistent with the approach taken in *Williams* in subsequent ineffective assistance of counsel cases. In *Wiggins v. Smith*, the Court faulted the state court for assuming that the petitioner's trial attorneys' mitigation investigation was adequate instead of considering whether their decision to cease investigating after receiving a presentence report and social services records demonstrated reasonable professional judgment.⁹⁸ In *Rompilla v. Beard*, the defense attorneys failed to examine the defendant's prior conviction file, which would have informed them about a wealth of mitigation evidence and also prepared them to defend against the State's use of the prior conviction as aggravation. The Court went through that evidence, painstakingly explaining why it mattered to Rompilla's ineffective assistance claim, and held that "the conclusion of the state court fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion."⁹⁹ And, in *Porter v. McCollum*, the Court held that the state court's finding that the petitioner could not establish the prejudice prong of an ineffective assistance of counsel claim was unreasonable because the state court "either did not consider or unreasonably discounted the mitigation evidence adduced in the postconviction hearing."¹⁰⁰ In all these cases, the Supreme Court looked at what the state court actually did in adjudicating the case, faulted it for overlooking some material fact or element of applicable law, and found that omission to be unreasonable.¹⁰¹

95. *Id.* at 76–77. See also Ides, *Standards*, *supra* note 25, at 741–48 (criticizing the Court for making "absolutely no effort to get beneath the skin of the Ninth Circuit standard").

96. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 32.3, at 1809 (6th ed. 2011).

97. *Id.* at 1832.

98. 539 U.S. 510, 527 (2003).

99. *Rompilla v. Beard*, 545 U.S. 374, 389 (2005).

100. 558 U.S. 30, 42–43 (2009).

101. See also *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012) (analyzing, post-*Richter*, state

The assumption following *Williams*, therefore, was that while the Supreme Court had raised the standard from *de novo* review, the new “unreasonable application” standard was by no means insurmountable and simply required an analysis of what the state court had actually done, to determine whether the steps it took were objectively reasonable or not.¹⁰²

3. Interregnum: *Yarborough v. Alvarado*

Although the fairminded jurists appeared to be banished to the netherworld of rejected standards in *Williams*, they reemerged briefly in a 2004 case in which Justice Kennedy wrote for the Court in a 5–4 opinion¹⁰³ reversing the Ninth Circuit’s grant of the writ. In *Yarborough v. Alvarado*, Alvarado was a seventeen-year-old accused of helping a co-defendant steal a truck, a scheme that led to the murder of the truck’s owner (by the co-defendant). Alvarado was taken in for questioning and confessed.¹⁰⁴ The issue before the state courts was whether he was in custody at the time of the confession. The California courts concluded that, under the circumstances, a reasonable person in Alvarado’s situation would have felt free to leave. On federal habeas, the Ninth Circuit held that the state courts were unreasonable to ignore Alvarado’s youth in determining the custody question, and that this amounted to an unreasonable application of clearly established federal law as determined by the Supreme Court because “the relevance of juvenile status in Supreme Court caselaw as a whole compelled the ‘extension of the principle that juvenile status is relevant’ to . . . custody determinations.”¹⁰⁵

The Ninth Circuit’s ruling was questionable on the “clearly established law” prong of the § 2254(d)(1) analysis since the Supreme Court at that time had not held that age was relevant to the custody inquiry.¹⁰⁶ The Circuit seemed to recognize as much when it

court’s adjudication of ineffective assistance of counsel claim and finding that state court’s failure to apply the correct test was contrary to clearly established law).

102. Some scholars argued that after *Williams*, the AEDPA standard really made no difference in the rate of success for habeas petitioners at all, and that the statute was all “hype” and no “bite.” John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259 (2006). *But see* Marceau, *Challenging Habeas Process*, *supra* note 31, at 100–05 (results of empirical analysis showing that, reviewing a broader sample of Supreme Court cases, evidence now suggests, contrary to Professor Blume, that “AEDPA’s bite has become severe”).

103. Justice O’Connor joined the opinion, but wrote separately to express an additional reason that the writ should not be granted. *Yarborough v. Alvarado*, 541 U.S. 652, 669 (2004) (O’Connor, J., concurring).

104. *Id.* at 658.

105. *Id.* at 660 (quoting *Alvarado v. Hickman*, 316 F.3d 841, 853 (9th Cir. 2002)).

106. It later did in *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011).

characterized the rule as an “extension” of the Supreme Court’s caselaw. The Supreme Court reversed, holding that “if a habeas court must extend a rationale before it can apply to the facts at hand,” then it likely was not “clearly established at the time of the state-court decision,”¹⁰⁷ and, in this case, the Court’s precedent had not established that age was a mandatory consideration.¹⁰⁸

On the “unreasonable application” question, the Court repeated the refrain from *Williams* that “‘unreasonable’ is ‘a common term in the legal world and, accordingly, federal judges are familiar with its meaning.’”¹⁰⁹ Justice Kennedy then added, without citation to any controlling habeas precedent,¹¹⁰ “At the same time, the range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow.”¹¹¹ By contrast, he stated, “[o]ther rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment.”¹¹² Justice Kennedy then stated, “Ignoring the deferential standard of § 2254(d)(1) for the moment, it can be said that fairminded jurists could disagree over whether Alvarado was in custody.”¹¹³ This statement seems abstruse in the context of a discussion of the unreasonable application clause. Why ignore the standard when you are applying it? Nevertheless, Justice Kennedy concluded that there were facts supporting both sides of the custody question, and therefore stated for the Court, “These differing indications lead us to hold that the state court’s application of our custody standard was reasonable.”¹¹⁴

Judith Ritter has argued that the use of the “fairminded jurists could disagree” formulation in *Alvarado* was dictum because (a) there was no need to apply the unreasonable application bar because the Court

107. The Court left some ambiguity in this rule, noting that “the difference between applying a rule and extending it is not always clear.” *Alvarado*, 541 U.S. at 666. *But see* *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) (“[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then *by definition* the rationale was not ‘clearly established at the time of the state-court decision.’” (quoting *Alvarado*, 541 U.S. at 666) (emphasis added)).

108. *Alvarado*, 541 U.S. at 666–67.

109. *Id.* at 663–65.

110. Justice Kennedy cited his own concurrence in a pre-AEDPA habeas case, *Wright v. West*, explaining that in the *Teague* context, “[w]hether the prisoner seeks the application of an old rule in a novel setting depends in large part on the nature of the rule. If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.” 505 U.S. 277, 308–09 (1992) (Kennedy, J., concurring) (internal citation omitted).

111. *Alvarado*, 541 U.S. at 664.

112. *Id.*

113. *Id.*

114. *Id.* at 665.

essentially said the state court's decision was correct even under *de novo* review; and (b) the Court's remark that it was "[i]gnoring the deferential standard of § 2254(d)(1)" suggests that it "disassociated its reference to fair-minded jurists from the unreasonable application clause."¹¹⁵ Justice Kennedy's phrase is "puzzling,"¹¹⁶ for at least two other reasons: First, as just mentioned, the Court in *Alvarado* also ruled that there was not clearly established law as determined by the Supreme Court on the relevance of Alvarado's youth. Therefore, the entire unreasonable application analysis may be said to be dicta. Second, as Ritter also notes,¹¹⁷ *Alvarado* did not suggest that it was overturning that part of *Williams* that rejected the fairminded disagreement standard, or that fairminded disagreement was in any way the new test courts should use to assess the unreasonable application clause.¹¹⁸ Instead, it cited *Williams* as the controlling standard.

Alvarado's use of the fairminded disagreement standard accordingly might have faded into juridical oblivion. But, as will be seen, dicta in Supreme Court opinions often operate by the Chekovian rule of drama that pistols left hanging on walls must eventually be fired.¹¹⁹

4. *Alvarado* Redux in *Richter*

In *Richter*, Justice Kennedy cited *Alvarado* to reconfigure the habeas standard, stating: "A state court's determination that a claim lacks merit precludes federal habeas relief so long as '*fairminded jurists could disagree*' on the correctness of the state court's decision."¹²⁰ The internal quotes signaled the Court's citation to *Alvarado*'s statement, "Ignoring the deferential standard of § 2254(d)(1) for the moment, it can be said that fairminded jurists could disagree over whether Alvarado was in custody." Of course, the Court had dropped the "[i]gnoring the deferential standard" portion of the sentence. The Court went on to describe § 2254(d)'s barrier to relief as involving a "no fairminded jurist could disagree" test several more times in the opinion, saying, "[AEDPA] preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's

115. Ritter, *Voice of Reason*, *supra* note 7, at 66–67.

116. *Id.*

117. *Id.* at 67.

118. Justice O'Connor apparently did not see any inconsistency with her opinion in *Williams* as she joined Justice Kennedy's plurality opinion.

119. DONALD RAYFIELD, ANTON CHEKOV: A LIFE 203 (1998) ("If in Act I you have a pistol hanging on the wall, then it must fire in the last act.").

120. 562 U.S. at 101 (emphasis added) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

decision conflicts with this Court's precedents. It goes no farther,"¹²¹ and, "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."¹²² Again, the Supreme Court did not suggest that it was overruling *Williams*—it relied on it. But Justice Kennedy's statement of the standard worked a metamorphosis on the caselaw, reviving the fairminded jurists test from its doctrinal torpor. The *Alvarado* pistol had been fired.

III. WHAT *RICHTER* HAS WROUGHT: CONFUSION AND CONSTERNATION IN THE COURTS AND SCHOLARSHIP

Following the passage of AEDPA and the Supreme Court's decision in *Williams*, scholars debated how the "unreasonable application" clause should be interpreted and struggled to develop a workable standard for adjudicating habeas cases.¹²³ Following *Richter*, however, scholars have not yet grappled with the meaning of the fairminded disagreement standard, beyond a forming consensus that the new standard makes habeas relief harder to obtain—perhaps catastrophically so. Professor Ritter has described the *Richter* standard as "dangerous and improper" and has argued, "Far more than deference, this test requires acquiescence."¹²⁴ Professor Marceau has called it "one of the most uncharitable standards of review known to law."¹²⁵ Others have described it as "super-deferential,"¹²⁶ "completely untethered from Supreme Court precedent,"¹²⁷ and, even more dramatically, "an unworkable . . . standard that fundamentally contradicts American common law decision-making."¹²⁸

121. *Id.*

122. *Id.* at 102; *see also id.* ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.").

123. *See, e.g.,* Ides, *Standards*, *supra* note 25; Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal*, 63 OHIO ST. L.J. 731, 792–93 (2002); Liebman & Ryan, *supra* note 32; Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

124. Ritter, *Voice of Reason*, *supra* note 7, at 77, 86.

125. Marceau, *Challenging Habeas Process*, *supra* note 31, at 97.

126. Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G. REP. 110, 115 (2012).

127. Reinhardt, *Demise of Habeas*, *supra* note 7, at 1228.

128. Ruth A. Moyer, *Disagreement About Disagreement: The Effect of a Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831, 857 (2014) [hereinafter Moyer, *Circuit Splits*].

The impact of the new standard in the Supreme Court appears to bear out these fears. Since *Richter*, the Court has cited the fairminded jurists test in numerous cases as the standard a petitioner must meet to surmount § 2254(d)'s barriers to relief.¹²⁹ As of this writing, habeas petitioners have lost every one of those cases. That is not a particularly persuasive piece of evidence, however, since the Court has rarely sided with the habeas petitioner since *Williams*,¹³⁰ and, due to AEDPA's procedural barriers, a prisoner has many ways to lose.

A more informative and nuanced picture of the standard emerges upon examination of the reactions in the lower courts. Because habeas decisions make up such a substantial proportion of federal dockets, I limit my exploration to circuit decisions. Such decisions are rarer—and the calls are generally closer—because of the barriers AEDPA erected to obtaining a certificate of appealability.¹³¹ The two primary responses to *Richter* in the circuit courts have been a recapitulation of the subjective standard rejected in *Williams*, and an objective standard that focuses solely on the ultimate result of the state court decision. This Article now turns to these two interpretations.

A. *The Subjective View*

The subjective view, expressed in some circuit court opinions, reads *Richter* as not just elevating AEDPA standard, but as changing it fundamentally to something that looks remarkably unlike *objective* reasonableness. Take, for example, the Sixth Circuit's decision in a 2012 case, *Peak v. Webb*. The two judges in the majority, Danny Boggs and Gilbert Merritt, each issued opinions explaining their view that

129. *Davis v. Ayala*, No. 13-1428, slip op. at 12 (U.S. June 18, 2015); *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam); *White v. Woodall*, 134 C. St. 1697, 1702–03 (2014); *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (applied in § 2254(d)(2) context); *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013) (per curiam); *Metrish v. Lancaster*, 133 S. Ct. 1781, 1787 (2013); *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam); *Wetzel v. Lambert*, 132 S. Ct. 1195, 1198 (2012) (per curiam); *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011) (per curiam); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1402 (2011). Ironically, a case decided the same day as *Richter*, also reversing a habeas grant on an ineffective assistance of counsel claim (and also written by Justice Kennedy), did not mention the fairminded disagreement standard. *Premo v. Moore*, 562 U.S. 115 (2011).

130. *But see Brumfield v. Cain*, No. 13-1433 (U.S. June 18, 2015); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). Notably, in both *Brumfield* and *Lafler*, the only of these cases decided after *Richter*, the Court did not cite the fairminded disagreement test, though that may be because neither case was decided on the “unreasonable application” clause of § 2254(d)(1). The dissents in both cases, however, emphasized the *Richter* standard. *See Brumfield*, slip op. at 20-21 (Thomas, J., dissenting); *Lafler*, 132 S. Ct. at 1396 (Scalia, J., dissenting). For a full scorecard of post-AEDPA Supreme Court habeas decisions, see Marceau, *Challenging Habeas Process*, *supra* note 31.

131. *See infra* notes 174–76.

Richter raised the bar to habeas relief higher than the plain language of AEDPA or its prior interpretation in *Williams*.¹³² Judge Boggs further held that “[t]hrough the trial court may well have violated Peak’s constitutional rights . . . we cannot say, as the Supreme Court now requires, that fairminded jurists could not disagree with our opinion In fact, four such fairminded justices of the Kentucky Supreme Court did disagree. Therefore, we are compelled to affirm.”¹³³ In other words, the mere existence of disagreement—among presumably fairminded judges—was dispositive. In dissent, Judge Eric Clay argued that by deferring to the sum of state court judges who agreed with the trial court, “[t]he majority erroneously defers to the Kentucky Supreme Court justices’ status as state court judges, rather than their legal analysis.”¹³⁴

In other cases, where panels have decided to grant the writ, judges have dissented by pointing, like Judge Boggs, to the number of state court judges who denied relief to a habeas petitioner. Tallying these state court judges, they have stated, as Judge Richard Tallman of the Ninth Circuit did (with sarcastic understatement), “Presumably at least some of them were ‘fairminded jurists.’”¹³⁵ Likewise, in a recent dissent from a panel’s grant of habeas relief on an ineffective assistance of counsel claim, Judge J. Harvey Wilkinson III of the Fourth Circuit wrote: “[T]he majority’s decision runs up against the striking fact that before today, no court had ever found that the conduct of [petitioner]’s counsel resulted in constitutional prejudice. . . . [T]he majority has reached the remarkable conclusion that every single judge to have previously considered this issue has been unreasonable.”¹³⁶ The Ninth Circuit majority in the case involving Judge Tallman responded like Judge Clay, arguing that under AEDPA, “The emphasis is clearly on application of law rather than on counting noses.”¹³⁷

132. 673 F.3d 465, 473–74 n.12 (6th Cir. 2012); *id.* at 474 (Merritt, J., concurring).

133. *Id.* at 467 (Op. of Boggs., J.); *accord id.* at 473–74 (“It is not unreasonable to believe, as did at least three justices on the Kentucky Supreme Court, as well as the trial-court judge, that confrontation only requires that a declarant be made available in the courtroom for a criminal defendant to call during his own case.”).

134. *Id.* at 487 (Clay, J., dissenting). Judge Clay also argued that no case before or after *Richter* suggested that the Supreme Court was doing away with or otherwise amending the “objective reasonableness” standard from *Williams*, and, accordingly, the “fairminded jurists” test should be treated as equivalent to the *Williams* standard. *Id.* (Clay, J., dissenting). “[G]iven the number of AEDPA cases decided by the Supreme Court in recent years,” Judge Clay argued, “it is safe to assume that had the Supreme Court sought to raise the *Williams* level of deference to be given to state court judgments, it would have said so.” *Id.* at 486–87 (Clay, J., dissenting).

135. *Doody v. Ryan*, 649 F.3d 986, 1049 (9th Cir. 2011) (Tallman, J., dissenting); *accord Amado v. Gonzalez*, 734 F.3d 936, 955 (9th Cir. 2013) *withdrawn and superseded on denial of reh’g en banc*, 758 F.3d 1119 (9th Cir. 2014) (Rawlinson J., dissenting) (“I agree with the presumably fairminded district court that the state court did not unreasonably apply *Brady*.”).

136. *Elmore v. Ozmint*, 661 F.3d 783, 876–77 (4th Cir. 2011) (Wilkinson, J., dissenting).

137. *Doody*, 649 F.3d at 1007 n.6 (internal citation omitted). Just before the publication of this

Similarly, circuit judges have begun to cite the agreement of federal judges with the state courts as proof-positive that the state decision cannot be deemed unreasonable. In *Young v. Conway*, a recent (unsuccessful) effort at *en banc* review of a panel decision granting the writ, Judge Reena Raggi of the Second Circuit pointed to the split among state court judges on the issue, tallying ten state court judges—six New York Court of Appeals judges, three Appellate Division judges, and the trial judge—who voted against the petitioner versus three who voted in his favor.¹³⁸ “In such circumstances,” she wrote, “the fact that the panel shares the minority view is not enough to denominate the majority view ‘unreasonable.’”¹³⁹ Moreover, Judge Raggi added, she and the two other circuit judges who joined her dissent *agreed* with the state courts—a fact that, in her view, should compel a finding that their decision was within the range of reasonable disagreement.¹⁴⁰ Echoing Judge Raggi’s reliance on a split among federal judges, Judge Thomas Hardiman of the Third Circuit recently wrote:

The existence of a circuit split demonstrates that it is wrong to conclude that fairminded jurists could [not] disagree on the correctness of the state court’s decision in this case. . . . The mere fact of a difference of opinion among courts of appeals leads ineluctably to the conclusion that a state court cannot run afoul of AEDPA regardless of which of these two paths it chooses.¹⁴¹

What is apparent from these opinions is that federal judges have begun to cite the reasonableness of the decision-*makers*, as opposed to the decision, as grounds to deny habeas relief.¹⁴² Of course, these

Article, the Supreme Court decided *Davis v. Ayala*, reversing yet another Ninth Circuit habeas grant, involving the application of *Batson v. Kentucky*, 476 U.S. 79 (1986). In the Court’s opinion, Justice Alito engaged in the very rhetorical practice of nose-counting described here, stating: “In this case, the conscientious trial judge determined that the strikes at issue were not based on race, and his judgment was entitled to great weight. On appeal, five justices of the California Supreme Court carefully evaluated the record and found no basis to reverse. A Federal District Judge denied habeas relief, but a divided panel of the Ninth Circuit reversed the District Court and found that the California Supreme Court had rendered a decision with which no fairminded jurist could agree.” *Ayala*, No. 13-1428, slip op. at 29 (June 18, 2015).

138. 715 F.3d 79, 95 (2d Cir. 2013) (Raggi, J., dissenting from denial of *en banc*).

139. *Id.*; *accord id.* at 102 (Cabranes, J., dissenting) (“Even though ten state court judges . . . concluded that the record satisfied *Wade*’s independent-source requirement, the panel inexplicably holds that such a conclusion is an unreasonable application of federal law and not one upon which ‘fairminded jurists could disagree.’” (internal citation omitted)).

140. *Id.* at 95–96 (Raggi, J., dissenting) (arguing that judge writing for majority “plainly disagrees with [*Richter*]’s strict standard of unreasonableness, concerned that few, if any, habeas cases will satisfy it”).

141. *Garrus v. Sec’y of Pa. Dep’t of Corr.*, 694 F.3d 394, 416 (3d Cir. 2012) (*en banc*) (Hardiman, J., dissenting).

142. The Supreme Court’s use of the word “fairminded” as opposed to “reasonable” in describing the jurists is significant here as it tends to invite an examination of the jurist’s mind, rather than what she

opinions do not rely exclusively on the fairmindedness of the state court judges—the federal judges quoted above make the case that their state court counterparts correctly adjudicated the merits. So the counting of noses may simply be overheated rhetoric. Moreover, the number of close cases in which such rhetoric might make a difference to the result will likely be small, since the *Williams* “objective reasonableness” threshold is already difficult to overcome.¹⁴³ But we can imagine a case where it would make a difference: where the state court’s decision involves an unreasonable application of clearly established federal law, yet the federal court denies relief based on a presumption that the state court judge herself was nonetheless fairminded. Further, even if these subjective arguments amount to a mere “linguistic shift,”¹⁴⁴ they are significant because they reinforce the notion that *Richter* made the habeas standard more exacting—and thereby made the writ harder to obtain. No one wants to accuse a fellow jurist of lacking a personal characteristic necessary for judging,¹⁴⁵ so judicial rhetoric may, in fact, matter in close cases. The *Richter* standard consequently increases the discursive stakes of finding a state court decision unreasonable, and concomitantly increases the discomfort of granting habeas relief. Far easier simply to say: some judges think one thing; others think something else; all are fairminded—petition denied.¹⁴⁶

But, as should be clear from the historical discussion above, the subjective view cannot be reconciled with the Supreme Court’s habeas doctrine. Like *Alvarado*, *Richter* nowhere suggested that it was overturning that part of *Williams* that rejected the Fourth Circuit’s “all fairminded jurists” test.¹⁴⁷ No justice remarked on the change to the

actually does to adjudicate the claim.

143. See generally NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* (2011) (reviewing meager success rate of non-capital habeas petitions post-AEDPA but prior to *Richter*).

144. Huq, *Habeas & Roberts*, *supra* note 12, at 539.

145. There are, of course, counterexamples but they reveal how charged the rhetoric sometimes becomes in these cases. In granting habeas relief to a prisoner he found to be actually innocent, Judge Nicholas Garaufis of the Eastern District of New York cited the “wrongdoing” committed by “the incomprehensible [state court judge], who so regrettably failed time and time again to give meaningful consideration to the host of powerful arguments [petitioner] presented to her.” *Lopez v. Miller*, 915 F. Supp. 2d 373, 431 (E.D.N.Y. 2013).

146. Similarly in the field of journalism, critics have contended that reporters may feel compelled simply to present both sides of story in order to achieve “balance,” rather than investigate who is telling the truth. See, e.g., Brent Cunningham, *Re-thinking Objectivity*, COLUM. JOURNALISM REV. (July-Aug 2003), http://www.cjr.org/feature/rethinking_objectivity.php?page=all. In this way, the quest for objectivity can actually lead to a form of relativism. The subjectivism that is creeping into some circuit opinions applying the fairminded disagreement test in habeas cases risks creating a similar form of judicial relativism, where the mere fact of differing opinions requires judges to throw up their hands, ignore the legal questions presented by the case, and simply rule against the petitioner.

147. To the contrary, it cited *Williams* twice as the governing standard. *Harrington v. Richter*, 562 U.S. 86, 100–01 (2011). See also Reinhardt, *Demise of Habeas*, *supra* note 7, at 1228 (noting that

standard a separate opinion (though Justice Ginsburg's concurrence in the judgment indicated that she found Richter's claim non-meritorious, suggesting that she disapproved of the Court's attempt to raise AEDPA's bar).¹⁴⁸ Accordingly, whatever the *Richter* standard means, it cannot be the subjective "all fairminded jurists" test that was rejected in *Williams*. The "subjective view"—applying deference to state court judges' status as judges—therefore does not square with habeas doctrine. The Supreme Court has firmly rejected that standard and has given no indication that it intended to overrule *Williams*. Accordingly, the practice of "counting noses" that some circuit judges have engaged in since *Richter* is wrong.

B. The Objective, "Ultimate Result" View

In rejecting the subjective view of the fairminded disagreement standard, some judges and scholars have argued that *Richter* did not alter the *Williams* standard at all, and that fairminded disagreement is just another way of saying objective reasonableness.¹⁴⁹ I think that this is an overly optimistic view of what the Court was doing in *Richter*. In both tone and substance, Justice Kennedy's opinion plainly meant to raise the threshold for obtaining habeas relief. The question therefore becomes: what does an objective fairminded disagreement standard mean, and when should it be applied?

First, it should be noted that, like objective reasonableness, the fairminded disagreement standard appears in multiple areas of law. "Beyond fairminded disagreement" or "beyond fairminded debate" is a standard sometimes used in plain error review,¹⁵⁰ Federal Rule of Civil

the tension with *Williams* "did not seem to bother the Court, as it acknowledged no shift in its approach to AEDPA review despite the fact that it adopted nearly the same test it had previously rejected").

148. *See id.* at 113-14 (Ginsburg, J., concurring) ("The strong force of the prosecution's case . . . was not significantly reduced by the affidavits offered in support of Richter's habeas petition. I would therefore not rank counsel's lapse so serious as to deprive [Richter] of a fair trial, a trial whose result is reliable. For that reason, I concur in the Court's judgment." (alteration in original) (internal citation and quotation marks omitted).

149. The argument that *Richter* did not alter the objective reasonableness standard from *Williams* has been made by judges and advocates alike. *See Peak v. Webb*, 673 F.3d 465, 486 (2012) (Clay, J., dissenting) (arguing that "fairminded jurists" test should be treated as equivalent to *Williams* standard); Br. for *Amicus Curiae Nat'l Ass'n of Crim. Def. Lawyers Supporting Respondent*, at 19-20, *White v. Woodal*, 134 S. Ct. 1697 (2014) (No. 12-794), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-794_resp_amcu_nacdl.authcheckdam.pdf (cert petition by Professors Marceau and Lee Kovarsky noting warden's reliance on split circuit panel to argue that reasonable jurists could disagree on merits issue, and arguing, "Whatever 'fair-minded disagreement' means, it cannot mean a return of the 'all-reasonable-jurists' scenario unless this Court meant to overrule, *sub silencio*, the statutory interpretation in *Williams*.").

150. *See, e.g., Puckett v. United States*, 556 U.S. 129, 135 (2009).

Procedure 50(b) motions for judgment notwithstanding a jury verdict,¹⁵¹ and patent infringement cases.¹⁵² As Professor Ides has discussed, it is really a standard of “rational” disagreement, insofar as “a court will uphold an actor’s choice so long as the choice remains within the permissible range of alternatives and can be deemed to have been a rational choice among those alternatives.”¹⁵³

Justice Kennedy’s opinions in *Alvarado* and *Richter* have similarly framed the application of the standard as depending on the range of permissible results. “The more general the rule,” he stated in both cases, “the more leeway courts have in reaching outcomes in case-by-case determinations.”¹⁵⁴ Both *Richter* and *Alvarado* involved such general rules, in Justice Kennedy’s view, because both of the underlying rules (ineffective assistance of counsel and custody) themselves turn on standards of reasonableness. Accordingly, courts might construe the standard as applying only when there is a general legal standard applied to the facts of a case, where multiple results could plausibly be correct.¹⁵⁵ In such a case, the existence of multiple plausibly correct results would be sufficient to render the state court’s decision reasonable and preclude habeas relief.¹⁵⁶

This formulation is intuitively congruent with objective reasonableness analysis: if two options are plausibly correct resolutions of the merits of a claim, then either one is *ipso facto* reasonable. It also supports a mode of adjudicating habeas petitions that some scholars have called an “ultimate result” approach,¹⁵⁷ whereby the federal court does not consider any of the actual steps the state court took in adjudicating the claim; instead it merely looks at the ultimate result of the state court’s decision and asks whether that result is at least arguably

151. See, e.g., *The Chedd-Angier Prod. Co. v. Omni Pub. Int’l, Inc.*, No. Civ.A. 81-1188-MA, 1984 WL 478431, at *2 (D. Mass. Jan. 5, 1985), *aff’d* 756 F.2d 930 (1st Cir. 1985).

152. See, e.g., *Fargo Elec., Inc. v. Iris Ltd., Inc.*, No. 04-1017 JRT/FLN, 2005 WL 3241851, at *4 (D. Minn. Nov. 30, 2005).

153. Ides, *Standards*, *supra* note 25, at 689.

154. *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

155. This limitation was endorsed in an early scholarly assessment of *Williams*. See Pettys, *supra* note 123, at 792-93 (arguing that reasonableness should be determined based on whether the applicable federal law “appears in the form” of a rule or standard).

156. Ironically, this is remarkably similar to the “clear error” standard. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) (“Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”). Recall, however, that the Court rejected that standard as insufficiently deferential in *Andrade*, see discussion at note 94, *supra*.

157. See Pet. for Writ of Cert., *Charles v. Stephens*, No. 13-9639 (U.S. Apr. 8, 2014) (petition by Professor Kovarsky arguing that the ultimate result approach misapplies *Richter*). The debate about whether AEDPA requires deference to state court *opinions* or state court *results* in fact predates *Richter*. See Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate After Williams v. Taylor?*, 2001 Wis. L. REV. 1493, 1511 (2001).

correct. Since *Richter*, some courts have adopted this approach and framed it as a two-step inquiry: First, the federal court must “determine what arguments or theories supported or . . . *could have supported*, the state court’s decision.”¹⁵⁸ Second, the court asks “whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.”¹⁵⁹ In other words, as Judge Guido Calabresi of the Second Circuit recently explained (derisively), the federal court is meant to “*imagine* what reasons the state court might have had for its conclusion[.]” and, if those “imagined reasons . . . are not *so* incorrect under Supreme Court holdings that [the court] could not imagine ‘fair-minded jurists’ would approve of them,” habeas relief must be denied.¹⁶⁰

Although the first step of the “ultimate result” approach contemplates looking at “what arguments or theories supported” the state court decision, this inquiry is unnecessary if the federal court can imagine a reasonable theory to support the result. Whether or not the state court mentions that reasonable theory is irrelevant. As the Eighth Circuit recently put it, “Just as there is more than one way to skin a cat, there often is more than one way to resolve an appeal, and not every possible approach makes it into an opinion.”¹⁶¹ So, to summarize the approach: where the state court applies a “general” legal rule, the possibility of reasonable disagreement on the correct ultimate result is sufficient to preclude a finding that the state court was unreasonable.

All of this sounds quite consistent with objective reasonableness, but closer examination reveals numerous flaws with the debatable ultimate result approach, including: (1) framing the test as a sufficient condition

158. *Eley v. Erickson*, 712 F.3d 837, 846 (3d Cir. 2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)) (alteration in original) (emphasis added). The omission of the original language in *Richter*, “or, as here, could have supported” removes what may be interpreted as a limitation on *Richter*’s reach, cabining the decision to apply only to state decisions issued without a reasoned opinion. See Pet. for Writ of Cert., *Charles v. Stephens*, No. 13-9639, at 18–19 (U.S. Apr. 8, 2014). Since *Richter*, however, the circuits have split on whether the opinion’s “could have supported” language for decisions unaccompanied by a reasoned opinion applies to decisions that *do* include a reasoned opinion. Compare *Trotter v. Stephens*, 720 F.3d 231, 241 (5th Cir. 2013) (“We review only the ultimate legal determination by the state court—not every link in its reasoning.”); *Williams v. Roper*, 695 F.3d 825, 832–33, 837 (8th Cir. 2012) (“As we understand *Richter* and *Moore*, the Court’s opinions were premised on the text of § 2254(d) and the meaning of ‘decision’ and ‘unreasonable application,’ not on speculation about whether the state court actually had in mind reasons that were ‘reasonable’ when it denied relief.”) with *Cannedy v. Adams*, 706 F.3d 1148, 1157–58 (9th Cir. 2013) (holding *Richter* is limited to summary denials and that the federal court may “look through” state high court’s summary denial to evaluate reasoning of a lower court in denying claim); *Johnson v. Sec’y, Dept. of Corr.*, 643 F.3d 907, 930 n.9 (11th Cir. 2011) (“The Court’s instruction from [*Richter*] does not apply here because the Florida Supreme Court did provide an explanation of its decision”); *Sussman v. Jenkins*, 642 F.3d 532, 534 (7th Cir. 2011) (same).

159. *Eley*, 712 F.3d at 846 (alteration in original) (internal quotation marks omitted).

160. *Hawthorne*, 695 F.3d at 199 (Calabresi, J., concurring).

161. *Williams v. Roper*, 695 F.3d at 837.

for the denial of habeas relief is actually equivalent to the standard rejected in *Williams*; (2) the test cannot be reconciled with the operation of habeas in a federal system because granting the writ will always require disagreement about the merits; (3) the test adds unnecessary confusion to the framework of AEDPA; (4) the test scrambles the elements of § 2254(d)(1); and (5) the purported limitation on the test's application is illusory.

1. The Fairminded Disagreement Test is Logically Equivalent to the Rejected All-Fairminded Jurists Test

In order for the fairminded disagreement test to be consistent with *Williams*, it must fall somewhere within the spectrum of standards that *Williams* permitted. We know that the lower end of the spectrum is a judgment that the state court decision is simply erroneous. That is not sufficient for habeas relief. On the high end, we know that *Williams* requires less than universal consensus among all fairminded jurists, since that was the rejected Fourth Circuit standard. *Richter's* fairminded jurists test must be somewhere in between these poles. As just discussed, Justice Kennedy's articulation of the standard in *Alvarado* and *Richter* supposes that fairminded disagreement about the merits of the claim is merely a sufficient condition for the state court decision to be reasonable, while not requiring universal consensus. Reduced to a logical proposition, the assumption is:

Possibility of fairminded disagreement → Reasonable result

(Or, If fairminded disagreement is possible, then the result is reasonable.)

The sufficient condition implies the necessary inverse: the reasonableness of the result is a necessary condition for fairminded jurists to disagree about it. No problems with this formulation so far.

However, if we assume the truth of the formulation above, then the contrapositive is also true:

¬ reasonable result → ¬ possibility of fairminded disagreement

(Or, if the result is *unreasonable*, then there is *no* possibility of fairminded disagreement.)

Again, the sufficient condition—here an unreasonable result—implies the necessary inverse: No possibility of fairminded disagreement is a necessary condition for an unreasonable result. But this is precisely the outcome that the *Williams* Court rejected: Universal consensus cannot be a necessary condition for the federal court to find an unreasonable

application of federal law.¹⁶² Although the *Richter* standard sounds much more modest—merely permitting fairminded disagreement as a sufficient condition for a reasonable decision—it is logically equivalent to the universal consensus standard forsworn in *Williams*. Accordingly, fairminded disagreement, without more, cannot be a sufficient condition for the state court decision to be reasonable.

2. The Fairminded Disagreement Test is Inconsistent with the Federal Structure of Habeas

The notion that fairminded disagreement about the result is sufficient to preclude habeas relief is also inconsistent with the structure of habeas review in our federal system. Although Justice O'Connor famously called a habeas decision announcing the Supreme Court's strict procedural default "a case about federalism,"¹⁶³ habeas doctrine has had a federalism component for only about 150 years (a relative blip in its eight-century history). As Eve Brensike Primus has detailed, the Reconstruction Congress passed the Habeas Corpus Act of 1867, in the same term that it passed the Fourteenth Amendment and created federal question and removal jurisdiction, in order to provide oversight for state courts thought to be systematically violating federal civil rights.¹⁶⁴ As Professor Primus explains, "federal habeas review of state court criminal convictions was not only about emancipating wrongly convicted individuals; it was also about coercing reluctant states to enforce federal rights."¹⁶⁵ Thus, federal review of state courts' failures to protect liberty is an underlying assumption of habeas corpus in our federal system, an assumption AEDPA left unchanged.¹⁶⁶

162. One way of distinguishing these two tests is that Justice O'Connor criticized the Fourth Circuit's *Green* test as permitting granting the writ only when the state court applied federal law "in a manner that reasonable jurists would all agree is *unreasonable*," *Williams v. Taylor*, 529 U.S. 362, 409 (2000) (emphasis added), as opposed to the *Richter* test that the writ could not be granted if "fairminded jurists could disagree on the *correctness* of the state court's decision," *Richter*, 562 U.S. at 101 (emphasis added) (internal quotation marks omitted). There could be a difference in this distinction, as Justice O'Connor pointed out, the *Green* formulation requires an "additional overlay" of reasonableness review. *Williams*, 529 U.S. at 409. But *Green* and the case it cited, the now-familiar *Drinkard*, both made clear that "an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect." *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996)). Thus, as a doctrinal matter, the two tests have not been distinguished on the basis of correctness vs. reasonableness.

163. *Coleman v. Thompson*, 501 U.S. 722, 726 (1991).

164. Primus, *Structural Habeas*, *supra* note 15, at 13-14; *see also generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988).

165. Primus, *Structural Habeas*, *supra* note 15, at 14.

166. *See* 28 U.S.C. § 2241(a), (c)(3) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective

Nevertheless, the Supreme Court has long recognized, and AEDPA codified, an exhaustion requirement, whereby state prisoners must pass through “one complete round” of the state’s appellate procedure in order for the federal court to consider the merits of their claims.¹⁶⁷ Although exhaustion is not jurisdictional (and can be waived by the State), according to Lee Kovarsky, courts often treat it as though it is.¹⁶⁸ Consequently, except under certain narrow circumstances,¹⁶⁹ no prisoner will have the merits of his federal claims considered by a federal court until a state court has already reviewed them. And the prisoner will have no need to petition the federal court for review of those claims unless the state court has already rejected them.

This means that no habeas petitioner comes to federal court without the prior existence of disagreement about the merits of his constitutional claims. Such disagreement, on its own, cannot be sufficient for the denial of habeas relief, or habeas would become a nullity in a federal system. As Judge Clay put it in his dissent in *Peak*, the fairminded disagreement standard threatens to make AEDPA’s threshold for relief “impossible to meet, as no habeas claim would reach our Court unless a jurist presumed to be fairminded had not already once decided the issue against the defendant.”¹⁷⁰ Judge Barrington Parker of the Second Circuit sounded a similar alarm responding to Judge Raggi’s dissent from denial of *en banc* in *Young v. Conway*, writing, “If [Judge Raggi’s view] is correct, then habeas relief would never be available since the writ, by its nature, requires federal courts to, in the appropriate case, disagree with state judges on matters of federal law.”¹⁷¹ This is not

jurisdictions . . . [if a state prisoner] is in custody in violation of the Constitution or laws or treaties of the United States.”).

167. *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); see 28 U.S.C. § 2254(b)(1)(A). Exhaustion was a Court-created requirement long before the enactment of AEDPA. See *Darr v. Burford*, 339 U.S. 200, 210 n.30 (1950); see also *O’Shea v. Littleton*, 414 U.S. 488, 499-500 (1974) (federal courts restrained in issuing injunctions that would interrupt ongoing state criminal prosecutions); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971). But see Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 804 (1965) (arguing for removal of state prosecutions for conduct protected by federal constitutional guarantees of civil rights under federal removal jurisdiction and habeas corpus jurisdiction).

168. Kovarsky, *AEDPA’s Wrecks*, *supra* note 25, at 452.

169. Scholars have noted a possible opening in the Supreme Court’s recent cases that would permit *de novo* review of federal claims when a claim is procedurally defaulted, but that default is occasioned by ineffective assistance of postconviction counsel. See Marceau, *supra* note 24, at 2143 (“Specifically, when, because of the errors of postconviction counsel, a claim is not fully developed in state court proceedings, *Martinez* permits the prisoner to: (a) overcome the procedural default; and (b) avoid the strictures of § 2254(d) and, therefore, *Richter* and *Pinholster*.”).

170. *Peak v. Webb*, 673 F.3d 465, 487 (6th Cir. 2012).

171. *Young v. Conway*, 715 F.3d 79, 85 (2d Cir. 2013) (Parker, J., concurring in the denial of *en banc*). Judge Reinhardt makes the same point in his recent article, *The Demise of Habeas Corpus*, *supra* note 7, at 1229.

simply a *reductio ad absurdum* argument that the Supreme Court cannot have intended to eliminate federal habeas relief altogether.¹⁷² The Court, in fact, does not have the power to do so—only Congress has the constitutional authority to suspend the writ.¹⁷³ The federal structure of habeas corpus review therefore suggests that more is needed beyond the possibility of disagreement on the merits for the federal court to determine that the state court’s adjudication of the claim was reasonable.

3. The Fairminded Disagreement Test Adds Confusion to the AEDPA Framework

The notion that fairminded disagreement on the merits is sufficient for denial of the writ also adds confusion to AEDPA framework because it duplicates a similar standard meant to create a low threshold for appellate review of habeas decisions. AEDPA requires that habeas petitioners obtain a “certificate of appealability” before appealing an adverse decision from the federal district court to the Court of Appeals.¹⁷⁴ The Supreme Court has held that the required showing for a certificate of appealability to issue is whether the petitioner can “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.”¹⁷⁵ But debate among reasonable jurists about the merits of the claim also requires dismissal of the petition under the fairminded disagreement standard. The granting of a certificate of appealability therefore presupposes an affirmance of the denial of habeas relief on the merits. District Judge Brian Cogan of the Eastern District of New York has written about this tension, calling the certificate of appealability standard and the *Richter* standard “hard to reconcile,” and adding, “The only possible means of reconciliation requires the conclusion that there must be some space between a district court’s review of a state court decision and the notional review of that district court’s decision by ‘jurists of reason,’ however slight that space may be.”¹⁷⁶

Arguably these standards can be reconciled, since disagreement

172. Though the Court also made clear in *Richter* that it was not doing so. See *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (“As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents.” (emphases added)).

173. See *supra* notes 31–36 and accompanying text.

174. 28 U.S.C. § 2253(c)(1)-(2).

175. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (internal quotation marks omitted).

176. *Anthoulis v. New York*, No. 12 Civ. 6253(BMC), 2013 WL 5726154, at *8 n.3 (E.D.N.Y. Oct. 21, 2013), *aff’d* 586 F. App’x 790 (2d Cir. 2014); see also *Samuel v. LaValley*, No. 12 Civ. 2372(BMC), 2013 WL 550688, at *12 n.5 (E.D.N.Y. Feb. 12, 2013) (using the same language).

about whether a state court decision is *correct* might preclude habeas, but debate about whether that disagreement is *reasonable* could be grounds for a certificate of appealability. In other words, the “space” between the two standards is the extent to which an issue may be debatably debatable. While this reconciliation of the standards is (perhaps) theoretically coherent, however, courts will likely face increasing difficulty in applying these multiple layers of abstraction. Thus, the fairminded disagreement standard adds further confusion to an already complex statutory framework.

4. The Test Scrambles the Elements of § 2254(d)(1)

A further problem with Justice Kennedy’s articulation of the objective fairminded disagreement test is that it scrambles the “unreasonable application” and “clearly established Federal law” clauses of § 2254(d)(1). The Supreme Court has suggested, and at least one scholar has urged, that the existence of judicial disagreement about a point of law may be relevant to the question of whether that point of law is clearly established for AEDPA purposes.¹⁷⁷ If the legal rule invoked is highly general, then its impact on a specific, new factual scenario may not be clearly established.¹⁷⁸ Justice Kennedy’s characterizations of “general standard[s]” in *Richter* and *Alvarado*, which can only be unreasonably applied if the application is beyond fairminded disagreement, imports this requirement of specificity from the “clearly established Federal law” clause into the “unreasonable application” clause. Importantly, this makes a factor that may be *relevant* in the former *dispositive* in the latter.¹⁷⁹

Moreover, if only prior cases with highly specific factual similarity to the habeas petitioner’s case can provide grounds for relief, the “unreasonable application” clause starts to collapse into the “contrary to” clause, permitting relief only when “the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Supreme] Court and nevertheless arrives at a result different from [its] precedent.”¹⁸⁰ The collapsing of these two distinct avenues to habeas relief under AEDPA is something that Justice O’Connor’s opinion in

177. See *Carey v. Musladin*, 549 U.S. 70, 76 (2006); Moyer, *Circuit Splits*, *supra* note 128, at 857–58 (noting that invocation of “reasonable jurists” test has created confusion about whether a circuit split determines that there is no clearly established Federal law on point).

178. *But see* Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 759 (2010) (inveighing against this point).

179. See Moyer, *Circuit Splits*, *supra* note 128, at 866–67 (arguing reasonable jurist test should be scrapped, but that existence of circuit split should be relevant to “unreasonable application” analysis).

180. *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

Williams attempted to prevent.¹⁸¹ Justice Kennedy’s opinions thus create substantial conceptual confusion that the Court has already taken pains to clear up.

5. Cabining the Test to “General” Legal Rules is Illusory

Finally, Justice Kennedy placed a purported limitation on the application of the objective fairminded disagreement test: only applying when the legal rule in question is a general standard. But within the context of the typical merits claims in habeas cases, this is virtually no limitation at all. The kinds of claims that are usually brought in habeas, especially ineffective assistance of counsel, involve multiple layers of reasonableness review and prejudice inquiries that make them highly fact-specific.¹⁸² The materiality component of prosecutorial misconduct claims similarly is a general standard that requires a fact-specific inquiry in case-by-case determinations.¹⁸³ Even most trial error that involves the application of more formalistic legal rules is by and large subject to harmless error analysis that makes these legal rules operate like general standards.¹⁸⁴ With very few exceptions, state appellate courts will be applying general standards to the facts of a case, so the leeway Justice Kennedy imagines in these cases—and the attendant problems just described—will feature across the board.¹⁸⁵

IV. THE “MORE” THAT UNREASONABLENESS REQUIRES: RETURNING PROCESS TO THE AEDPA ANALYSIS

For all the reasons described so far—doctrinal reasons, reasons of logic, reasons of federalism, and reasons of practicability—disagreement among fairminded jurists, without more, is insufficient to find a state court decision reasonable under AEDPA. The question, then, is what more is needed? What additional data should federal courts examine to determine whether a decision is reasonable or not? This Article will now argue that the process of adjudication in the state court provides that additional data. By “process of adjudication,” I

181. *Id.* at 407.

182. *See generally* Wood v. Strickland, 420 U.S. 308 (1975).

183. *Montgomery v. Bobby*, 654 F.3d 668, 678–79 (6th Cir. 2011) (en banc).

184. *See* Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman As the Maurice A. Deane Distinguished Professor of Constitutional Law, November 22, 2004*, 33 HOFSTRA L. REV. 403, 405–06 (Winter 2004) (noting these and other rules that have adopted results-oriented prejudice inquiry that “often boils down to whether the appellate judges think that the prosecution’s evidence of guilt was potent and the sentence well deserved”).

185. Habeas law also has its own built-in harmless analysis after one surmounts the substantive barriers of § 2254(d). *See* *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

mean everything including the funding and appointment of defense counsel, the structure of state appellate review, the decision whether to hold an evidentiary hearing, the explanation of a decision in a reasoned opinion, and more. The next Part will discuss the possible applications of a process-oriented framework. But first, it is necessary to defend the focus on process. I do so on several grounds: the scholarly consensus that such a focus is warranted; the consistency between a focus on process with habeas law and, perhaps surprisingly, AEDPA itself; and, finally, coherence with other areas of law, especially the law of constitutional torts.

A. *Process as an Underlying Theoretical Assumption to Habeas Debates*

The notion that state adjudicative processes should be considered as part of federal habeas review is not new. Arguments for doing so have extended back to early critiques of the *de novo* standard in federal habeas cases. Professor Bator's famous broadside against the Warren Court's habeas jurisprudence assumed that the states must provide fair process in order for their decisions to be respected on federal habeas.¹⁸⁶ This idea is enjoying a resurgence among scholars who, though vehemently disagreeing with Bator on the favorability of federal review, point to the state postconviction process as the best opportunity for habeas petitioners to develop their federal constitutional claims.¹⁸⁷ Indeed, as Professor Marceau has discussed, a requirement of "full and fair" state procedures is the common denominator between arguments against expansive habeas jurisdiction and contemporary critiques of AEDPA.¹⁸⁸ So the idea of robust, fair state procedures is an underlying theoretical assumption of multiple views supporting a greater or lesser role for federal courts in collateral proceedings.

B. *Consistency with Habeas Law and AEDPA*

Further, although the idea that federal courts may scrutinize state

186. Bator, *Finality*, *supra* note 15, at 456–57.

187. See, e.g., Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473 (2013); Marceau, *Challenging Habeas Process*, *supra* note 31; Lee Kovarsky, *Maples and Martinez: Gideon for State Postconviction*, PRAWFSBLAWG (Oct. 2, 2011), <http://prawfsblawg.blogs.com/prawfsblawg/2011/10/maples-v-thomas-and-martinez-v-ryan-gideon-in-the-state-post-conviction-era.html>; Seligman, *Harrington's Wake*, *supra* note 46, at 499–500. Notably, as Professor Kovarsky has pointed out elsewhere, a standard of review that assessed arbitrary process rather than unreasonable application of federal law was promoted (and ultimately rejected) for years prior to the passage of AEDPA. Kovarsky, *AEDPA's Wrecks*, *supra* note 25, at 459–65.

188. Marceau, *Due Process*, *supra* note 15, at 54–56.

procedures may seem anachronistic in the contemporary AEDPA era of federalism and comity, there is nothing inherently inconsistent about deferring to state court decisions while still encouraging particular procedures through the application of deference when states follow those procedures. The Supreme Court in fact endorsed such a view in *Teague v. Lane*, recognizing that one of the purposes of federal habeas corpus review is to incentivize state courts to “conduct their proceedings in a manner consistent with established constitutional standards.”¹⁸⁹

AEDPA itself also contemplates the federal courts creating such incentives for the states by permitting an expedited federal habeas deadline for states that could establish that they had provided qualified, competent, adequately resourced, and adequately compensated post-conviction counsel in capital cases.¹⁹⁰ The statute also permits petitioners to circumvent the exhaustion requirements when “there is an absence of available State corrective process” or “circumstances exist that render such process ineffective to protect the rights” of the petitioner.¹⁹¹ The inclusion of these provisions in AEDPA reveals a system where federal courts can incentivize more robust state process to protect the rights of defendants consistently with the Act’s federalism and comity purposes.¹⁹²

Moreover, the Supreme Court has recognized, in applying AEDPA, that state adjudicative process affects the outcome of claims. In *Panetti v. Quarterman*, the Court canvassed the procedural history of petitioner’s claim that his mental illness prohibited the State from carrying out the death penalty.¹⁹³ Citing numerous irregularities in the state court’s adjudication of

189. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality op.) (quoting *Desist v. U.S.*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)) (internal quotation marks omitted). While *Teague* was decided prior to the enactment of AEDPA, § 2254(d)(1)’s “clearly established law” requirement has been thought to have codified *Teague*. See *Williams v. Taylor*, 529 U.S. 362, 380 (2000) (pl. op. of Stevens, J.); but see *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011) (rejecting analogy between AEDPA and *Teague* and noting that retroactivity rules that govern federal habeas review on the merits are “quite separate from the relitigation bar imposed under AEDPA”).

190. See 28 U.S.C. §§ 2261–2265 (2012). AEDPA confers responsibility for determining whether the states were eligible for such expedited procedures to the federal courts. However, the USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 2261, 120 Stat. 192, 250 (2006), amended the statute to shift the eligibility determination from the courts to the Attorney General. This expedited deadline is not without controversy. Habeas litigators in California have challenged (as of this writing successfully) a rule shifting the ability to provide an expedited deadline from the federal courts to the Attorney General. See *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. C 13-4517 CW, 2014 WL 3908220 (N.D. Cal. Aug. 7, 2014).

191. 28 U.S.C. § 2254(b)(1)(B)(i)-(ii).

192. I ascribe these purposes to AEDPA cavalierly, acknowledging that doing so has been thoroughly questioned by Professor Kovarsky. See generally Kovarsky, *AEDPA’s Wrecks*, *supra* note 25.

193. 551 U.S. 930, 938–42 (2007).

petitioner's claim, the Court held that the state court failed to provide procedures adequate to ensure that an execution could be carried out consistently with *Ford v. Wainwright*, which held that the Eighth Amendment bars the execution of the insane.¹⁹⁴ The Court stated:

The state court's failure to provide the procedures mandated by Ford constituted an unreasonable application of clearly established law as determined by this Court. It is uncontested that petitioner made a substantial showing of incompetency. This showing entitled him to, among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court. And it is clear from the record that the state court reached its competency determination after failing to provide petitioner with this process, notwithstanding counsel's sustained effort, diligence, and compliance with court orders. As a result of this error, our review of petitioner's underlying incompetency claim is unencumbered by the deference AEDPA normally requires.¹⁹⁵

Consequently, the Court concluded that the state court's process itself abrogated the deferential structure of AEDPA, and it proceeded to analyze petitioner's mental illness claim *de novo*.¹⁹⁶ An examination of state process is thus fully consistent with existing habeas jurisprudence.

C. Coherence with Other Areas of Law

Finally, a focus on state adjudicative process in federal habeas is consistent with the reasonableness analysis that courts undertake in other areas of law. I do not think there is anything inherently controversial about looking to other areas of law for the meaning of ambiguous terms, but if the project needs further support, habeas doctrine provides it: *Williams*' citation to the "common," "familiar" nature of the objective reasonableness standard suggests that it is entirely appropriate to look to other areas of law for the meaning of the standard in the habeas context.

In tort law, fact-finders look at how a particular decision was reached, whether reasonable precautions were taken, or whether any risks of error

194. *Id.* at 948 (internal citation omitted).

195. *Id.*

196. The Court also noted that the fact that the *Ford* standard was stated in general terms did not make its application reasonable, since AEDPA "recognizes . . . that even a general standard may be applied in an unreasonable manner." *Id.* at 953.

were unreasonable.¹⁹⁷ Jurists and scholars have long debated *how* to undertake this analysis,¹⁹⁸ the most famous suggestion being the Hand Formula¹⁹⁹, but the reasonableness of a particular act or decision is not usually analyzed in a factual vacuum. To the contrary, the process of arriving at that act or decision provides the context in which the objective reasonableness of the actor's behavior can be assessed.

Another example (frequently seen in habeas cases) is the law governing ineffective assistance of counsel. Since there are myriad ways to try a case, the Supreme Court has declined to create any substantive checklist for what constitutes effective representation.²⁰⁰ Instead, as in the torts context, the Court has repeatedly looked to what counsel actually did to determine whether a reasonable attorney in counsel's position would have done the same—whether counsel terminated an investigation at a reasonable point,²⁰¹ failed to examine evidence that was available and likely to be used in the prosecution's case,²⁰² or failed to request funds to which the defendant was entitled in order to hire an expert.²⁰³ These are all examples of looking at the steps an actor took (and did not take) to determine the reasonableness of his or her decisions; a procedural solution to a substantive quandary.

Perhaps the most informative area of law that employs an objective reasonableness test is the law of constitutional torts. This is because, first, constitutional tort law has also historically used a standard of objective reasonableness that refers to the range of judgment that would govern the decisions of a reasonably competent decision-maker; and, second, its structure—involving reasonable or

197. See EPSTEIN, *supra* note 57, § 5.16 (“The fundamental postulate of the law of negligence is that [a defendant] is responsible only for the unreasonable risks created by his conduct.”); Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1695 (1995) (discussing requirement that people take reasonable precautions to prevent accidents, even when they are not proximate cause). The reasonable precaution/risk of error balancing test bears similarities with the *Mathews v. Eldridge* balancing test for due process. 424 U.S. 319 (1976).

198. See, e.g., Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012); Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 FLA. L. REV. 667, 668 (2010); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813 (2001); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996); Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139 (1996); Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677 (1985); see generally RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

199. *U.S. v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.).

200. *Strickland v. Washington*, 466 U.S. 668, 688 (“More specific guidelines are not appropriate. The Sixth Amendment refers simply to ‘counsel,’ not specifying particular requirements of effective assistance.”).

201. *Wiggins v. Smith*, 539 U.S. 510, 525 (2003).

202. *Rompilla v. Beard*, 545 U.S. 374, 384 (2005).

203. *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014).

unreasonable applications of clearly established law—parallels AEDPA’s. I do not mean to suggest that the law of constitutional torts should be imported into habeas doctrine wholesale or that these two doctrines are equivalent. Habeas and constitutional tort law serve significantly different purposes. Also, efforts to interpret AEDPA standard by reference to constitutional tort law have been met with skepticism from courts.²⁰⁴ Nor do I mean to hold up constitutional tort law as ideal—civil rights scholars would likely shudder at the suggestion that the Supreme Court’s doctrine in this area is a model of clarity or fairness.²⁰⁵ But even if not exemplary, constitutional tort law can be informative for our purposes, so I will briefly describe its focus on process for assessing reasonableness.

D. Process as Reasonableness: Constitutional Torts

The Civil Rights Act of 1861, codified at 42 U.S.C. § 1983, permits civil actions for deprivation of rights by officials acting “under color of” law. The Supreme Court has long recognized a qualified immunity defense for those officials who violate rights, but act in good faith.²⁰⁶ The purpose of qualified immunity is to balance the vindication and protection of citizens’ constitutional rights on the one hand, with the need to have law enforcement officials perform their duties without excessive fear of personal liability on the other.²⁰⁷ While the good faith test for qualified immunity initially employed by the Court contained both subjective and objective elements, in *Harlow v. Fitzgerald*,²⁰⁸ the Court limited the availability of qualified immunity to an objective

204. See *Williams v. Taylor*, 529 U.S. 362, 380 n.12 (Op. of Stevens, J.) (rejecting notion that Court should treat “clearly established law” as meaning the same thing under AEDPA and constitutional tort law, since the two areas are “doctrinally distinct”). See also *Van Tran v. Lindsey*, 212 F.3d 1143, 1152 (9th Cir. 2000) (rejecting comparison between reasonableness in habeas and qualified immunity law as a “faux analogue[]” because, unlike a court’s review of government officers’ actions under § 1983, “our review of state court decisions under AEDPA is not constrained because the state courts’ functions are somehow more discretionary than ours, or because they must be more vigorous in the discharge of their duties”); *Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (noting different purposes).

205. For a small sampling of the vast literature criticizing qualified immunity doctrine, see Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much Hope Left for Plaintiffs*, 29 *TOURO L. REV.* 633 (2013); Diana Hassel, *Excessive Reasonableness*, 43 *IND. L. REV.* 117 (2009); Mark R. Brown, *The Fall and Rise of Qualified Immunity: From Hope to Harris*, 9 *NEV. L.J.* 185 (2008); Diana Hassel, *Living A Lie: The Cost of Qualified Immunity*, 64 *MO. L. REV.* 123 (1999); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 *AM. U. L. REV.* 1 (1997); Karen M. Blum, *Qualified Immunity: A User’s Manual*, 26 *IND. L. REV.* 187 (1993).

206. See *Wood v. Strickland*, 420 U.S. 308, 319-20 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974).

207. *Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992).

208. 457 U.S. 800 (1982).

inquiry: “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”²⁰⁹ *Harlow* and subsequent cases²¹⁰ established a two part test for analyzing qualified immunity: (1) was a constitutional right violated? and (2) was the right clearly established such that a reasonable officer would know he was violating it?

The *Harlow* test has remained the standard for qualified immunity since that decision. However, in some cases, the Court has put a “reasonably competent officer” gloss on the standard, akin to the fairminded jurists test. In *Malley v. Briggs*,²¹¹ for example, the Court faced a claim for qualified immunity where a police officer had presented arrest warrants to a magistrate, had the warrants signed, and then relied on the warrants in conducting an arrest.²¹² The warrants were found to be unsupported by probable cause. Nevertheless, the officer claimed entitlement to absolute immunity or, in the alternative, to qualified immunity on the basis that seeking a warrant from a neutral magistrate was *per se* objectively reasonable.²¹³ The Court rejected the notion that absolute immunity was required to protect officers stating, “As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”²¹⁴ The Court then articulated what the qualified immunity standard was that would be applied in that case: “Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; *but if officers of reasonable competence could disagree on this issue*, immunity should be recognized.”²¹⁵ The Court elaborated on

209. *Id.* at 818 (emphasis added).

210. *E.g.* *Saucier v. Katz*, 533 U.S. 194, 194 (2001), *overruled on other grounds by* *Pearson v. Callahan*, 555 U.S. 223 (2009); *Anderson v. Creighton*, 483 U.S. 635 (1987).

211. 475 U.S. 335 (1986).

212. *Id.* at 338.

213. *Id.* at 339, 345.

214. *Id.* at 341.

215. *Id.* (emphasis added). The Court confusingly did not stick to its modified standard even within the *Malley* decision: when it actually applied the qualified immunity test, it reverted back to the familiar *Harlow* standard. The Court first rejected the officer’s argument that seeking the warrants was *per se* objectively reasonable. Then the Court stated the qualified immunity question to be “whether a reasonably well-trained officer in petitioner’s position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.” *Id.* at 345 (footnote omitted). More confusing still, the actual question of whether the officer in *Malley* was entitled to qualified immunity under the *Harlow* standard was not before the Court, and it declined to answer it. *See id.* at 345 n.8 (“The question is not presented to us, nor do we decide, whether petitioner’s conduct in this case was in fact objectively reasonable. That issue must be resolved on remand.”).

why it was applying a seemingly more deferential, “reasonably competent officer” standard, based on the respective roles of the police officer and magistrate who approved the warrant:

[I]t goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable. But it is different if no officer of reasonable competence would have requested the warrant, i.e., his request is outside the range of the professional competence expected of an officer. If the magistrate issues the warrant in such a case, his action is not just a reasonable mistake, but an unacceptable error indicating gross incompetence or neglect of duty. The officer then cannot excuse his own default by pointing to the greater incompetence of the magistrate.²¹⁶

Because the magistrate has greater expertise in law, an officer might be excused for relying on the magistrate’s mistake—unless the error was so obvious that no reasonably competent officer would think there was probable cause to support the warrant application.

That was a theme picked up on by Justice Powell in his partial concurrence/partial dissent. Justice Powell noted that the majority’s opinion did not foreclose some consideration of the fact that a neutral magistrate had approved the warrant, despite the “little evidentiary weight” the Court seemed to afford it.²¹⁷ He was concerned that the majority opinion “denigrate[d] the relevance of the judge’s determination of probable cause and his role in the issuance of the warrant” and in so doing, misconstrued the respective roles of the police officer and the magistrate or judicial officer.²¹⁸ Justice Powell cited longstanding precedent recognizing the “division of functions” between police and magistrate, and argued that the police should be encouraged to submit affidavits to judicial officers.²¹⁹ Therefore, he would have held that where an officer goes through “the essential checkpoint between the Government and the citizen,”²²⁰ and applies to a neutral magistrate for a warrant, that fact should be given substantial evidentiary weight.

Although Justice Powell’s opinion did not carry the day, it has fared better with time. In recent years, the Court has given substantial weight to officers’ passing through “the essential checkpoint” of a neutral

216. *Id.* at 346 n.9.

217. *Id.* at 350–51 (Powell, J., concurring in part and dissenting in part).

218. *Id.* at 351.

219. *Id.* at 352–53.

220. *Id.* at 352 (internal quotation marks omitted).

magistrate. In *Messerschmidt v. Millender*,²²¹ a 2012 case involving a warrant that was approved but turned out to be overbroad, the defendant officers' process in applying for the warrant and the division of functions between themselves and other actors played significant roles in the Court's finding their conduct reasonable. The Court cited the fact that the officers had obtained approval of superiors, an assistant district attorney, and the neutral magistrate in obtaining the warrant. Therefore, the Court held (quoting *Malley*), it could not be said that "no officer of reasonable competence would have requested the warrant," because that would mean not only that the defendant officers were plainly incompetent, "but that their supervisor, the deputy district attorney, and the magistrate were as well."²²² Instead, by going through the process of applying for and obtaining the warrant, the officers "took every reasonable step that could be expected of them."²²³ As a result, the Court concluded that the defendant officers' actions were not "entirely unreasonable"²²⁴ (the qualifier suggesting a higher threshold for overcoming qualified immunity than run-of-the-mill objective unreasonableness).

These cases show that, within its objective reasonableness analysis, the Court has been willing to apply a more exacting "reasonably competent officer" test in cases where defendant officers go through the steps of obtaining a warrant from a neutral magistrate—even where the warrant turns out to be defective. Central to these cases is the officers' process and the division of functions between the executive official and the neutral judicial actor.

A few theories might support the application of a higher standard in these cases. First, taking these steps protects citizens' constitutional rights *ex ante*, so the balance that qualified immunity seeks to strike is already weighted in favor of constitutional protection (hence the rebuttable presumption that a search conducted pursuant to a warrant

221. 132 S. Ct. 1235 (2012).

222. *Id.* at 1249–50 (internal quotation marks omitted).

223. *Id.* at 1249. This holding was roundly criticized by both the partial concurrence (Justice Kagan) and dissent (Justice Sotomayor) as inconsistent with *Malley*'s requirement that the officers not simply rely on the approval of the magistrate, but instead exercise their own independent judgment about the lawfulness of the warrant. *Id.* at 1252 (Kagan, J., concurring in part and dissenting in part); *Id.* at 1259–60 (Sotomayor, J., dissenting). The majority dismissed this criticism, saying, "by holding in *Malley* that a magistrate's approval does not automatically render an officer's conduct reasonable, we did not suggest that approval by a magistrate or review by others is irrelevant to the objective reasonableness of the officers' determination that the warrant was valid." *Id.* at 1249–50. This reading of *Malley* channels Justice Powell's point in his partial concurrence that the Court did not *exclude* the fact that the officer sought a warrant from consideration.

224. *Id.* at 1246, 1249 (emphasis added) (internal quotation marks omitted). This standard, taken from the exclusionary rule context, see *U.S. v. Leon*, 460 U.S. 897, 923 (1984), was, before *Messerschmidt*, entirely unprecedented in Supreme Court § 1983 caselaw.

complies with the Fourth Amendment). Second, applying greater deference to practices that are not constitutionally required in all cases, yet are preferred, incentivizes those practices. Third, a heightened standard of review in such cases does not upset the balance qualified immunity is intended to achieve because the Court has created a backstop for especially egregious or obvious errors.²²⁵

I do not want to oversell the utility of the Supreme Court's qualified immunity jurisprudence for our purposes. The Court itself has not always been explicit or consistent about when it is applying a "reasonably competent officer" standard.²²⁶ Further, its use of this language has caused significant confusion in the lower courts, leading several circuits to adopt a version of this standard, dubbed "arguable probable cause," not just in cases where officers take extra precautions, but across the board.²²⁷ Several circuit judges have criticized the standard, including then-judge Sonia Sotomayor, who described it as giving government defendants a "second bite at the immunity apple" and for taking "courts outside their traditional domain, asking them to speculate as to the range of views that reasonable law enforcement officers might hold, rather than engaging them in the objective reasonableness determination that courts are well-equipped to make."²²⁸

225. In *Groh v. Ramirez*, the defendant officers obtained a search warrant, but the places to be searched and the items to be seized were conspicuously absent from the warrant. 540 U.S. 551, 554 (2004). The Supreme Court held that such a warrant was plainly invalid. It rejected the defendant agent's argument that, despite its invalidity, the search was nevertheless reasonable because the magistrate had authorized the search on the basis of adequate probable cause contained in the application. The Court held that "the warrant was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." *Id.* at 558. The Court went on to deny qualified immunity because "even a cursory reading of the warrant in this case—perhaps just a simple glance—would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." *Id.* at 564. Thus, the Court has set a limit on what should be considered "reasonable competence" in the qualified immunity context.

226. In fact, no Supreme Court majority opinion has repeated *Malley's* specific invocation of reasonable disagreement.

227. See Tal J. Lifshitz, Note, "Arguable Probable Cause": An Unwarranted Approach to Qualified Immunity, 65 U. MIAMI L. REV. 1159, 1178 (2011) (citing cases from the First, Second, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits employing an "arguable probable cause" standard). Other scholars have noted that the Eleventh Circuit has been especially aggressive in applying the "arguable probable cause" standard to render officials immune from suit, calling it "the circuit of 'unqualified immunity.'" Brown, *supra* note 205, at 207 n.196 (quoting Elizabeth J. Norman et al., *Statutory Civil Rights*, 53 MERCER L. REV. 1499, 1556 (2002)).

228. *Walczyk v. Rio*, 496 F.3d 139, 169–70 (2d Cir. 2007) (Sotomayor, J., concurring); *accord McColley v. Cnty of Rensselaer*, 740 F.3d 817, 830–31 (2d Cir. 2014) (Calabresi, J., concurring) (criticizing arguable probable cause standard for creating "a nimbus of protection around probable cause, which allows officers to make objectively unreasonable probable cause determinations so long as the officer themselves are reasonably competent"); see also *Taravella v. Town of Wolcott*, 599 F.3d 129, 136–37 (2d Cir. 2010) (Straub J., dissenting) (noting confusion about which standards is proper). One district judge has also criticized the use of this standard in qualified immunity cases. *Peterson v. Bernardi*, 719 F. Supp. 2d 419, 429 n.9 (D.N.J. 2010) ("'Arguable probable cause' is a confusing

In making this argument, then-judge Sotomayor noted that the Supreme Court had “specifically criticized the conflation of an objective reasonableness standard with a requirement of unanimous consensus” in *Williams*.²²⁹

Moreover, like in the habeas context, the Supreme Court has often elided the reasonableness prong of the qualified immunity inquiry with the “clearly established law” prong. In several cases in which the Court has found that the law was *not* clearly established, it has articulated the reasonableness standard with the “all but the plainly incompetent” officer formulation.²³⁰ The Court has similarly spoken of “general” and “specific” legal rules in the constitutional tort context that might impact the range of reasonable responses by defendant officers.²³¹ In both areas, it seems, the Court may squeeze the deference balloon on either the application prong or the clearly established law prong, and achieve the same result while muddying the standard. In the constitutional torts context, however, there is at least one rationale for applying greater deference when the correct application to the law is not obvious that does not exist in habeas, namely, we do not expect police officers to have the same expertise with applying the law that judges do.²³²

These reservations aside, the constitutional tort cases that apply a

construct, because it suggests that qualified immunity is available whenever fairminded officers may disagree on the presence of probable cause.”). The issue of whether arguable probable cause comported with the Supreme Court’s caselaw was squarely raised in a cert petition in the October 2013 term. Pet. for Writ of Cert., *Tolan v. Cotton*, 134 S.Ct. 1861 (2014) (No. 13-551) 2013 WL 5864010 (U.S.). The Court ultimately reversed a finding of qualified immunity, but did not address the lower court’s analysis of reasonableness. *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 n.3 (2014) (per curiam).

229. *Walczyk*, 496 F.3d at 170 (Sotomayor, J., concurring).

230. *Saucier v. Katz*, 533 U.S. 194, 202 (2001); *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); see also *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right.” (emphasis added) (alterations in original) (internal quotation marks omitted)); accord *id.* (“[E]xisting precedent must have placed the statutory or constitutional question beyond debate.”). Judge Reinhardt has criticized the Court’s recent jurisprudence, especially *al-Kidd* as erecting insurmountable barriers for plaintiffs in the constitutional torts context similar to the barriers it has erected for petitioners in the habeas context. See Reinhardt, *Demise of Habeas*, *supra* note 7, at 1244-50.

231. See *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that “general statements of the law are not inherently incapable of giving fair and clear warning,” in “obvious” cases). Professor Stephen Vladeck has written thoughtfully about the parallel between the application prong and the clearly established law prong in habeas and constitutional tort law, and the “order of battle” in which courts address the two elements. See Vladeck, *supra* note 12.

232. Because the qualification in AEDPA that clearly established law can only come from the Supreme Court, however, police officers are ironically required to apply a great deal more law than state courts in habeas cases, including circuit court decisions and even legal rules that have developed through the consensus of district courts. See *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (noting clearly established law in qualified immunity context can derive from “cases of controlling authority in the [officers’] jurisdiction” or a “consensus of cases of persuasive authority”).

reasonably competent officer standard suggest a framework where a heightened reasonableness standard might be appropriate: where the officers' process and the division of functions between them and other institutional actors, specifically a neutral magistrate, protect constitutional rights *ex ante*. Our next and final task is to apply that framework to habeas corpus law.

V. APPLICATION: A PROCESS-BASED FRAMEWORK FOR ASSESSING STATE COURT DECISIONS IN FEDERAL HABEAS PROCEEDINGS

Habeas law stands to benefit tremendously from a process-based framework, in terms of both administrative ease and fairness (without sacrificing comity). The ongoing problem of systemic violations of state criminal defendants' constitutional rights has been well documented.²³³ I will not attempt an exhaustive review of these deficiencies, nor will I attempt to prove their pervasiveness. Neither is necessary in the framework this Article proposes. Instead, in a process-based habeas framework, the federal court can presume that the state is co-equally committed to protecting constitutional rights, and may consider its process for doing so in assessing whether the state's adjudication of the case is ultimately reasonable. I am not suggesting that federal courts maintain a checklist of mandatory procedures, or that the existence of any single procedure might outweigh the absence of others. For example, as previously mentioned, AEDPA already provides expedited timelines where states can establish that they furnish capital defendants with adequate post-conviction counsel.²³⁴ But the benefits of counsel would diminish drastically if counsel has insufficient time or resources to investigate the case.²³⁵ How federal courts should weigh these different procedures against one another in their holistic assessment of the state process is a subject that warrants greater attention, but it suffices now to put forward the following aspects of state process as candidates for consideration:

A. *The Provision of Post-conviction Counsel*

At first glance, there would seem to be no analogue in habeas law to a

233. See, e.g., Primus, *Structural Habeas*, *supra* note 15, at 16–23; see generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2171 (2013)..

234. See *supra* note 189 and accompanying text.

235. See Sean D. O'Brien, *When Life Depends on It: Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 693, 759 (2008) (“Representing a capital client is a labor-intensive, time-consuming undertaking; there are no shortcuts.”).

police officer's application for a warrant to a neutral magistrate and the benefits that "division of functions" creates. There is, however, an additional player in the habeas context who serves a different but perhaps comparable role in the adjudication of a prisoner's constitutional claims: post-conviction counsel. Counsel is guaranteed to a defendant at trial and during the direct appeal,²³⁶ but not in post-conviction proceedings. Many states provide post-conviction counsel in capital cases, though some states leave this decision up to the discretion of the trial court.²³⁷ Scholars and advocates have long argued that the complex procedural rules in state courts that determine what issues are reviewable on federal habeas should require the states to provide an attorney to indigent prisoners during post-conviction proceedings.²³⁸ While the Supreme Court has yet to recognize any such right to post-conviction counsel emanating from the Constitution, it has recently acknowledged that for some claims, such as ineffective assistance of trial counsel, "a prisoner likely needs an attorney."²³⁹

Let's assume, however, that the Supreme Court will remain reluctant to mandate the provision of counsel, or, may mandate it only in capital cases. Federal courts could still incentivize state courts to appoint counsel by considering whether counsel has been provided in its reasonableness review. Like the addition of the magistrate's independent judgment in the warrant context, post-conviction counsel can assist the state court in fleshing out the constitutional issues through investigation of the prisoner's claims, adding specificity to the post-conviction petition, and litigating issues in the trial and appellate courts. A decision arrived at with the benefit of the assistance of counsel therefore could be considered more reliable by the federal habeas court.²⁴⁰

236. See *Evitts v. Lucey*, 469 U.S. 387 (1985).

237. Alabama, for example, leaves the appointment of counsel up to the state post-conviction trial court. Ala. Code § 15-12-23(a) (2014). See also Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WIS. L. REV. 31, 63–66 (2003) (reviewing states at time of publication that provided postconviction counsel in capital cases).

238. See, e.g., Shay, *supra* note 187, at 488; Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 101 (2013); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R. & C.L. L. REV. 339, 353–56 (2006); see generally Am. Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 79–92 (1990); see also Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1866 (1994) (noting ability to present postconviction claims depended on "sheer luck" of having pro bono counsel take on capital cases).

239. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). See also *Maples v. Thomas*, 132 S. Ct. 912 (2012).

240. Adequate counsel might also reduce the caseload in federal courts by persuading the state court to grant habeas relief.

To be clear, I do not mean to suggest that my proposal mandates the appointment of counsel if states wish to have their decisions upheld on federal habeas review. Any such mandate, while perhaps advisable, would likely need to derive from the Constitution. Nor would the provision of an attorney render the result of state court proceedings *per se* objectively reasonable.²⁴¹ Including the appointment of counsel as a “reasonable step” a state court could take to obtain more deference from the federal court instead charts a middle path: still limiting federal review only to objectively unreasonable state court decisions, but considering the division of functions between defense counsel and judge as relevant to whether the adjudication is reasonable.

B. Access to an Evidentiary Hearing

Similar to the provision of counsel, state courts are often derelict in providing evidentiary hearings to develop the factual basis for postconviction petitioners’ claims.²⁴² Such hearings have taken on greater significance in the federal habeas context recently, however, because of a decision of the Supreme Court issued the same day as *Richter*. In *Cullen v. Pinholster*,²⁴³ the Court held that any facts that the federal court considers in the § 2254(d) analysis must first be presented to the state court.²⁴⁴ In other words, a federal court could not hold an evidentiary hearing and then grant habeas relief based on new facts adduced at that hearing—the facts are, in effect, frozen by the time the case reaches federal court. Accordingly, state post-conviction proceedings are the last opportunity for habeas petitioners to develop their claims. As Professor Kovarsky puts it, “the state habeas proceeding is now the ball game.”²⁴⁵

Of course, whether to hold a hearing can be a complex question of state law that requires an assessment of whether the state post-conviction petition presents disputed issues of material fact.²⁴⁶ Importantly, under *Pinholster*, the federal court cannot consider what evidence the petitioner would have put forward in the non-existent hearing to determine whether the state court’s denial of a hearing was

241. Failure to provide adequate funding for counsel to present a case, for example, would render the assistance of counsel illusory. See generally *Ake v. Oklahoma*, 470 U.S. 68 (1985).

242. See Freedman, *supra* note 238, at 597. Longstanding Supreme Court precedent arguably requires state courts to hold evidentiary hearings in order to give petitioners an opportunity to develop such facts. See, e.g., *Coleman v. Alabama*, 377 U.S. 129 (1964); *McNeal v. Culver*, 365 U.S. 109 (1961).

243. 131 S.Ct. 1388 (2011).

244. *Id.* at 1398.

245. Kovarsky, *supra* note 187.

246. See, e.g., ALA. R. CRIM. P. 32.9(a) (2014); cf. FED. R. CIV. P. 56(a) (2014).

unreasonable. Nevertheless, the decision whether to hold a hearing can be relevant to the federal court's determination that the adjudication involved a reasonable application of the law to the facts, since the state court will have gone through the process of determining what the facts are.²⁴⁷ Indeed, it makes good sense to defer to the state court's decision when, for example, it has conducted a fact-finding that includes credibility determinations.²⁴⁸ Holding a hearing is plainly one of the "reasonable steps" a state court can take in adjudicating a claim, and therefore should be relevant to the objective reasonableness of its decision.

C. Robust Review

Another important "division of functions" in the state courts is the structure of its review of post-conviction claims. While all states have a vertical appellate structure, it does not always mean robust review of a petitioner's claims at each level. In Alabama, for example, the trial judge often simply signs the prosecutor's proposed order denying post-conviction relief, a practice disapproved by the appellate courts but not heavily policed.²⁴⁹ An intermediate Court of Criminal Appeals then reviews post-conviction appeals from the trial courts, but the Alabama Supreme Court provides only discretionary review of a limited subset of cases.²⁵⁰ While its review is somewhat more expansive in death penalty cases,²⁵¹ in practice it grants certiorari in very few, making fulsome review in only one court the norm. In Oklahoma, a unitary appeal structure requires defendants to challenge the effectiveness of their trial attorneys on direct appeal.²⁵² This presents two problems for petitioners alleging this claim: they have little time or opportunity to conduct an adequate investigation of their attorney's deficiencies and, because Oklahoma does not require new counsel on appeal, many defense attorneys are left, as Professor Primus has noted, "in the untenable position of having to raise their own ineffectiveness on appeal."²⁵³ In

247. Failure to hold an evidentiary hearing or permit some other opportunity for a petitioner to develop evidence may also be said to result in an unreasonable determination of the facts under § 2254(d)(2), see *Hurles v. Ryan*, 752 F.3d 765, 790-91 (9th Cir. 2014), or may indicate an "absence of available State corrective process," 28 U.S.C. § 2254(b)(1)(B)(i).

248. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985).

249. See, e.g., *Ex parte Jenkins*, 105 So. 3d 1250, 1258-59 (Ala. 2012) (Petitioner failed to show that trial court's order denying petition for postconviction relief was not product of trial court's independent judgment, and thus petitioner was not entitled to reversal of order within hours of receiving it).

250. ALA. R. APP. P. 39(a)(1) (2014).

251. ALA. R. APP. P. 39(a)(2).

252. OKLA. STAT. tit. 22, ch. 18, APP. R. 3.11(B)(3)(b) (2003).

253. Primus, *Structural Habeas*, *supra* note 15, at 19.

California, funding for state habeas counsel is conditioned on filing habeas petitions directly in the California Supreme Court, which can summarily deny relief without a hearing and with no further appellate review of the prisoner's post-conviction claims.²⁵⁴ Federal courts can rightly look to the division of functions between the state trial courts and appellate courts in determining whether the adjudication of the petitioner's constitutional claims was reasonable.

D. Reasoned Statements

Finally, the reasoning of a state court decision is part of the process the court goes through in adjudicating the claims, and therefore is a proper subject for scrutiny by the federal court. This suggestion of course runs into the major holding of *Richter*, which applies AEDPA deference to summary denials.²⁵⁵ Even before *Richter*, some federal courts were resistant to analyzing the reasoning of state court decisions, with some derisively referring to this type of review as “grading papers”²⁵⁶ (though even these courts acknowledged that “sound reasoning will enhance the likelihood that a state court's ruling will be determined to be a ‘reasonable application’ of Supreme Court law”²⁵⁷). As described above, federal courts have split post-*Richter* on whether they must concoct their own plausible reasons for a state court's decision when the state court does provide its own reasoning.²⁵⁸

The process-based framework to objective reasonableness charts a middle path between ignoring the state court's reasoning on the one hand, and the insufficiently deferential “grading papers” approach on the other. Whether or not the state court states its reasons, the federal court still must uphold its decision if it is objectively reasonable, as *Richter* hammers home. But the state court's reasoning should be seen as a step in that court's process of adjudicating the federal claim, relevant to the objective reasonableness analysis. It is a step that federal courts may incentivize, if not mandate, consistently with AEDPA's structure and purpose. Indeed, where a state court provides sound reasoning for its decision, it *respects* the state courts to rely on such reasoning rather than to “impute a view to [the state] courts that they have never in fact

254. See SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENT OF DEATH, Policy 3, 2-1, at 5-6 (2012), available at <http://www.courts.ca.gov/documents/PoliciesMar2012.pdf>.

255. *Harrington v. Richter*, 562 U.S. 86, 99-100 (2011).

256. See, e.g., *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (“[W]e are determining the reasonableness of the state courts' ‘decision,’ not grading their papers.” (internal citation omitted); see also Kovarsky, *AEDPA's Wrecks*, *supra* note 25, at 494-47 (discussing pre-*Richter* cases forswearing scrutiny of state court's reasoning).

257. *Cruz*, 255 F.3d at 86.

258. See *supra* notes 155-58 and accompanying discussion.

espoused,” as Judge Calabresi has put it.²⁵⁹ The explication of the state court’s reasoning could prompt the federal court to apply a more deferential standard of review in assessing objective reasonableness, even while disagreeing with the ultimate result.

These are just a few aspects of state adjudicative process that a federal court could examine to determine whether the results of that process are reasonable. Courts could look to other factors as well. The adequacy of funding of defense counsel at trial unquestionably affects outcomes. It also may be worth considering whether the state’s process for appointing or electing judges promotes judicial independence,²⁶⁰ though these broader proposals cannot be fully explored here.

E. Coda: Richter Under the Process-Based Framework

This Article has attempted to articulate a framework for judging the reasonableness of state court decisions in habeas cases that takes into account the state’s adjudicative process. It may seem somewhat pie-in-the-sky to suggest that federal courts adopt this framework given the Supreme Court’s current jurisprudence. Indeed, *Richter* itself stands as a stark counterexample to the framework advocated here. Richter filed his state post-conviction petition directly in the California Supreme Court.²⁶¹ Because the state supreme court issued a summary denial, no evidentiary hearing was ever held so that Richter could develop his claim.²⁶² All the state court did was to issue its one-sentence summary denial, and there was no further review.

Under the process-based framework, this decision should not have been held to be reasonable based solely on the possibility of fairminded disagreement. Admittedly, the Supreme Court found “ample basis” for

259. Hawthorne v. Schneiderman, 695 F.3d 192, 199 (2d Cir. 2012) (Calabresi, J., concurring).

260. Cf. James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727 (2011) (arguing that guarantee of due process in state courts creates a compelling government interest in regulating spending in judicial elections); Derek Willis, ‘Soft on Crime’ TV Ads Affect Judges’ Decisions, Not Just Elections, N.Y. TIMES (Oct. 21, 2014), http://www.nytimes.com/2014/10/22/upshot/soft-on-crime-tv-ads-affect-judges-decisions-not-just-elections.html?_r=0&abt=0002&abg=1; *see also* OATH, https://www.youtube.com/watch?v=nDxs_Qt4Gyg (last visited Aug. 14, 2014) (TV ad supporting retention of three justices of Tennessee Supreme Court, stating that they faithfully followed their oath to uphold state constitution because they affirmed “nearly 90% of death sentences”); *see also* Fletcher, *supra* note 38, at 820-21 (describing 1986 election for California Supreme Court, in which challengers ran on platform of increasing use of death penalty, and noting that before election, 40% of cases were reversed due to constitutional error, while after election, 3.8% were reversed).

261. *In re Joshua Richter on Habeas Corpus*, 2001 Cal. LEXIS 1946 (Cal. Mar. 28 2001).

262. *See* Seligman, *Harrington’s Wake*, *supra* note 46, at 487.

the state court's decision in *Richter*,²⁶³ suggesting that it was not a close case in which the existence of fairminded disagreement would be a necessary tie-breaker in favor of the respondent. In such a case, it is likely that the state court decision would not rise to the level of objective unreasonableness under *Williams*, making any alterations to AEDPA standard in *Richter* dicta. Still, under the process-based framework, *Richter* should not have applied a heightened standard.

Despite the inappropriateness of applying a fairminded disagreement standard in a case like *Richter*, however, the standard has now been repeated in numerous Supreme Court opinions and is, for better or worse, part of habeas doctrine. Therefore, we must reconcile it with the fact that the Court has never indicated a desire to overturn *Williams* or otherwise supplant objective reasonableness as the touchstone for all habeas cases. This Article proposes reconciliation under a framework that takes state adjudicative process into account. In the absence of such a framework, we will continue to see confusion around the fairminded disagreement standard in the federal courts, and habeas corpus relief will become increasingly difficult to obtain, including in cases where justice demands it.

VI. CONCLUSION

Like other creatures that rise from the dead, the return of the fairminded disagreement standard to habeas law is an unwelcome development. This Article has attempted to clear up the confusion occasioned by its revivification. The new standard cannot mean that subjectivism has returned to habeas review. Nor can fairminded disagreement on its own suffice to deny habeas relief. Instead, courts should adopt a framework for analyzing reasonableness that takes into account the state courts' adjudicative process. This framework is consistent with the "common," "familiar" understanding of reasonableness from other areas of law. It also provides flexibility and calibrates the level of federal deference to the steps the state court takes. The process-based framework leaves room for the states to develop their own procedures, thereby advancing the federalism and comity principles underlying AEDPA, while not abdicating the federal courts' obligation to protect against "extreme malfunctions" in individual cases.²⁶⁴ And it incentivizes state courts to "conduct their proceedings in a manner consistent with established constitutional standards,"²⁶⁵ thereby enhancing the role of both state and federal courts as guardians of

263. *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

264. *Id.* at 102 (internal quotation marks omitted).

265. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (internal quotation marks omitted).

constitutional rights. Such a framework is especially needed now, as some states have begun to consider measures that would speed up their capital appeals, and thereby *reduce* state process in cases where the petitioner faces the death penalty.²⁶⁶ If federal courts must simply ignore these reductions in due process in cases where it is most needed because fairminded jurists could disagree about the results, then the “double security” provided by the Great Writ has diminished indeed.²⁶⁷

Critics of AEDPA may object to any attempt to build a model for federal review that includes a standard that, in their view, is overly deferential to state courts, overly hostile to claims of prisoners, and ultimately unjust.²⁶⁸ Other commentators may object on the ground that the standard for federal habeas relief *should* be essentially insurmountable.²⁶⁹ On these political questions, reasonable people can surely disagree. But habeas doctrine now includes two standards that, as I have shown, are in troubling tension with one another. This Article has tried to break through that tension and propose a way forward. By looking to other areas of law that employ standards of objective reasonableness, courts can take process into account in habeas law and get back to the familiar business of deciding what’s reasonable, rather than who’s reasonable.

266. In the 2013-2014 legislative term, Alabama and Kansas considered bills that would have significantly reduced the time allotted for filing a state postconviction petition in such cases and imposed time limits on state courts to decide postconviction cases. Stephanie Taylor, *Legislators, Defense Attorneys at Odds Over Proposed Changes to Alabama's Death Penalty Laws*, TUSCALOOSA NEWS, (Jan. 25, 2014), <http://www.tuscaloosaneews.com/article/20140125/NEWS/140129834?tc=ar#gsc.tab=0>; *Bill Would Limit Death Penalty Appeal Time*, KAKE (Mar. 5, 2014), <http://www.kake.com/home/headlines/Bill-would-limit-death-penalty-appeal-time-248538041.html>. Florida passed the “Timely Justice Act” in 2013, which fast-tracks cases where appeals have run out toward execution. *See* Capital Punishment – Timely Justice Act, 2013 Fla. Sess. Law Serv. ch. 2013-216, §12 (West). Habeas practitioners have argued this law severely curtails the possibility of bringing meritorious successive habeas petitions. *See* Abdool v. Bondi, 141 So. 3d 529, 538–42 (Fla. 2014) (disagreeing that any such curtailment rises to the level of a constitutional violation).

267. Freedman, *Post-Conviction Remedies*, *supra* note 20, at 298.

268. *See, e.g.*, Ritter, *Voice of Reason*, *supra* note 7, at 86 (“Legal standards are mere words, and applying them is never a simple matter. Nonetheless, that is no excuse for choosing a standard like the fair-minded jurist test that virtually guarantees the denial of even the most legitimate claims.”).

269. *See, e.g.*, Daniel J. O’Brien, *Heeding Congress’s Message: The United States Supreme Court Bars Federal Courthouse Doors to Habeas Relief Against All but Irrational State Court Decisions, and Oftentimes Doubly So*, 24 FED. SENT’G. REP. 319, 320, 322 (2002) (arguing that *Richter* properly emphasized that federal habeas courts should rarely, if ever, overturn state convictions).