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ESSAYS

RETHINKING THE FEDERAL ROLE IN STATE CRIMINAL JUSTICE

JOSEPH L. HOFFMANN† & NANCY J. KING‡

This Essay argues that federal habeas review of state criminal cases squanders resources that the federal government should be using to help states reform their systems of defense representation. A 2007 empirical study reveals that federal habeas review is inaccessible to most state prisoners who have been convicted of noncapital crimes and offers no realistic hope of relief for those who do reach federal court. As a means of correcting or deterring constitutional error in noncapital cases, habeas is failing and cannot be fixed. Drawing upon these findings as well as the Supreme Court's most recent decision applying the Suspension Clause, the authors propose that Congress eliminate federal habeas review of state criminal judgments except for certain claims of actual innocence, claims based on retroactively applicable new rules, or death sentences. The federal government should leave the review of all other state criminal judgments to the state courts and invest, instead, in a new federal initiative to encourage improved state defense services. This approach can deter and correct constitutional error more effectively than any amount of habeas litigation ever could.

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‡ Lee S. and Charles A. Speir Professor of Law, Vanderbilt University Law School. This Essay builds on and significantly revises ideas first explored, in much abbreviated form, in the 2008 James Otis Lecture at the University of Mississippi School of Law. See Nancy J. King & Joseph L. Hoffmann, *The 2008 James Otis Lecture: Envisioning Post-conviction Review for the Twenty-First Century*, 78 Miss. L.J. 433 (2008). We would like to thank the faculty at Vanderbilt Law School, as well as the participants at the Harvard Law School Criminal Justice Roundtable, where we presented earlier versions of this Essay: Professors Rachel Barkow, Paul Butler, Jeffrey Fagan, David Garland, Brandon Garrett, Bernard Harcourt, Dan Kahan, Maximo Langer, Tracey Meares, Daniel Meltzer, Erin Murphy, Daniel Richman, Stephen Schulhofer, David Sklansky, Christopher Slobogin, Carol Steiker, Jordan Steiker, and Marie-Eve Sylvestre. Thanks also to Professor Norman Lefstein, for providing insight into the history and current status of the American Bar Association's efforts to reform state defense services. Finally, special thanks to Professor William Stuntz, whose brilliant work over the years helped shape our thinking about such matters as resource tradeoffs, institutional relationships, and unintended consequences. Copyright © 2009 by Joseph L. Hoffmann & Nancy J. King.

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INTRODUCTION

For almost half a century the federal courts have sought to ensure that state criminal defendants are convicted and sentenced in accordance with the Constitution. As a means to this end, federal courts and Congress have opted for case-by-case review of individual state criminal judgments. State compliance with federal procedural standards is tested through a repetitive combination of certiorari petitions to the United States Supreme Court from state appellate and post-

conviction proceedings, followed by federal habeas corpus petitions in federal district courts after state court review has been completed.

It is time to rethink the federal role in state criminal justice. The present approach is a failure because it wastes federal resources, spending them in the wrong places, and because it does not effectively address the most serious constitutional deficiency in state criminal justice today—inadequate assistance of counsel. We need a new federal approach that focuses on avoiding constitutional errors instead of trying to fix them after they have occurred.

Postconviction litigation in the federal courts to enforce the Constitution may have made sense as a response to the particular structural and systemic problems that plagued state criminal justice in the 1960s and 1970s. But as a means of correcting or deterring routine, case-specific constitutional errors, habeas is completely ineffectual in all but capital cases.

A recently completed empirical study,¹ conducted by one of the co-authors of this Essay along with a team of researchers from the National Center for State Courts, has exposed the futility of habeas review. In 99.99% of all state felony cases—excluding those cases in which the defendant is sentenced to death²—the time, money, and energy spent on federal habeas litigation is wasted, generating virtually no benefit for anyone. Noncapital federal habeas is, in essence, a lottery, funded at great expense by taxpayers, open almost exclusively to the small group of state inmates who are sentenced to the longest prison terms, and producing almost no marginal increase in the enforcement of constitutional rights.

At the same time, state and local governments in fiscal crisis are struggling to provide minimal representation to indigent persons accused of crime. In the past two years alone, courts or government commissions have condemned underfunding of defense services in Michigan, Nevada, New York, Oklahoma, and Wisconsin.³ Defender

¹ NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS (2007) [hereinafter VANDERBILT-NCSC STUDY], available at <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>. The study was funded by Vanderbilt University Law School and the National Institute of Justice.

² Of the approximately 1.1 million people convicted and sentenced for felonies in state court in 2004, only 115 were sentenced to death. Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washington, D.C.), July 2007, at 2, 3 [hereinafter Durose & Langan 2004], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf>.

³ See Press Release, Mich. Coal. for Justice, Landmark Lawsuit Seeks Repairs to Michigan Justice System (Feb. 22, 2007), available at <http://www.micoalitionforjustice.org/pressrelease> (describing lawsuit seeking to compel state to provide representation consistent with national standards and constitutional norms in three counties where public

offices in Arizona, Florida, Kentucky, Maryland, Minnesota, Missouri, and Tennessee have taken the drastic step of refusing to take new cases, citing crushing caseloads, far in excess of the maximum set by the U.S. Department of Justice's National Advisory Commission on Criminal Justice Standards.⁴ The promise of *Gideon*,⁵ almost fifty years later, remains unfulfilled.

defenders are crippled by underfunding and overwhelming caseloads); Alan Maimon, *Officials Clash over Legal Aid Resources*, LAS VEGAS REV.-J., Dec. 15, 2007, at B1 (describing Nevada Supreme Court hearing to discuss proposals of indigent defense commission, based on eight-month study concluding that public defender systems in most of Nevada are in crisis); Alfonso A. Castillo, *Judge Raps Public Defender System*, NEWSDAY, Mar. 27, 2007, at A19 (reporting speech by New York's chief jurist Judith Kaye urging adoption of recommendation by state-level commission (Kaye Commission) for state takeover of indigent defense, which Commission deemed in crisis in New York state); Joel Stashenko, *Plan To Reform Indigent Defense Stalls In Albany*, N.Y. L.J., June 10, 2008, at 1 (indicating that New York has yet to respond to crisis); Nolan Clay & Randy Ellis, *National Panel Faults Oklahoma County System*, OKLAHOMAN (Oklahoma City), Apr. 27, 2008, at 1A (noting U.S. Department of Health and Human Services study finding that state assistant public defenders' caseloads exceeded 1000 at once, too many to meet ethical obligation to provide quality representation); *In re Commitment of Stokes*, No. 2004AP1555, 2007 WL 521243, at *23 (Wis. Ct. App. Feb. 21, 2007) (declaring facts in case to be "further indication of a systemic problem where the public defender's office is overburdened and where an experienced attorney becomes apparently incapable of handling the heavy caseload"); *id.* at *29 (Finè, J., concurring) (calling on Wisconsin Supreme Court to demand that legislature adequately fund defender services).

⁴ NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON COURTS 13.12, available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense (stating that maximum caseload limits for felonies should not exceed 150; for misdemeanors, 400); see Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (discussing declinations in Arizona, Florida, Kentucky, Maryland, Minnesota, Missouri, and Tennessee); see also Gary Blankenship, *Budget Woes Slow the Courts*, FLA. BAR NEWS, Aug. 15, 2008, at 1 (reporting that staff cuts in Florida public defender's office forced it to refuse new felony noncapital cases); Maridee Farnquist Edwards, *Commentary: Overwhelming Caseload May Prompt Ethics Violations*, MO. LAW. WKLY., Oct. 13, 2008 (reporting that crisis in Missouri public defense prompted Missouri State Public Defender Commission to allow local offices to refuse certain cases); Barbara L. Jones, *Public Defense Special Report: Staff Cuts Will Lead to Delays*, MINN. LAW., June 16, 2008, at 1, 13, available at <http://www.minnlawyer.com/article.cfm?recid=77958> (noting that after 2008 budget cuts, average full-time equivalent public defender caseload in Minnesota will be 812 files, double American Bar Association's standard of 400); Julie Kay, *Moonlighters Tackle Their Legal Debt*, NAT'L L.J., Sept. 22, 2008, at 1 (reporting that in Florida, Georgia, Kentucky, and Minnesota, severe public defense budget cuts have forced public defender offices to "lay off lawyers, freeze salaries and even turn away defendants due to exhaustive caseloads"); Donna Leinwand, *Public Defenders Refusing Cases; Offices Argue Cuts, Caseloads Threaten Rights of Defendants*, USA TODAY, Sept. 11, 2008, at A1 (reporting that "[p]ublic defenders are being hit so hard by budget cuts and growing caseloads that offices in several states are refusing to take on more cases because they say defendants' rights are being hurt" and citing examples in Florida, Kentucky, and Missouri); *Public Defender Rejects Some Cases; Budget Is Too Tight for Minor Crimes, the Pinellas-Pasco Office Says*, ST. PETERSBURG TIMES, June 4, 2008, at B5 (reporting that budget cuts have forced St. Petersburg public defender to refuse defense in misdemeanor cases); Georgia N.

These recent developments have made it possible for us to answer a question raised in 1993 by Professor Daniel Meltzer. At that time, noting the limits of federal habeas litigation in noncapital cases, Professor Meltzer posed the following query “as a stimulus for thought”:

Imagine that a management accounting firm has computed the total amount of resources devoted to habeas corpus litigation in noncapital cases. In our world of limited resources, would you prefer to abolish habeas in such cases and invest those resources in upgrading state criminal justice systems, focusing particularly on improving the quality of defense representation in the state courts?⁶

Fifteen years later, after more than a decade of experience with Congress’s most recent attempt to reform habeas review, after continuing failures in indigent defense, and with new guidance from the Supreme Court on the scope of the Suspension Clause, the answer to Professor Meltzer’s query is clear. Although there were important reasons to support a system of duplicative postconviction litigation during the incorporation controversies of the 1960s and 1970s, those justifications are no longer compelling. The need for habeas review to force defiant state courts to obey federal constitutional law has diminished. Moreover, since the 1960s, all states have developed appellate and collateral review procedures that provide defendants an opportunity to litigate their constitutional claims⁷ and that today result in the reversal of a significant percentage of convictions and sentences.⁸

Vagenas, *Indigent Defense: National Developments in 2007*, 22 CRIM. JUST. 58 (2008) (noting lawsuit challenging constitutionality of New York public defense system and motion by Knox County, Tennessee defender’s office to withdraw from all misdemeanor cases). For a collection of sources documenting deficiencies in defense representation, see *infra* notes 127–28.

⁵ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (incorporating Sixth Amendment right to counsel against states as “fundamental and essential to [a] fair trial[]”).

⁶ Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2526–27 (1993).

⁷ See *infra* notes 158, 185–87 and accompanying text (describing state adoption of postconviction remedies).

⁸ In California, for example, the state appellate courts reversed 6% of the nearly 5000 criminal appeals filed by defendants in FY 2006–2007. JUDICIAL COUNCIL OF CAL., 2008 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS 1997–1998 THROUGH 2006–2007, at 26 tbl.6 (2008), available at <http://www.courtinfo.ca.gov/reference/documents/csr2008.pdf>. Texas courts of appeals reversed 193 criminal cases in whole or in part in 2007, compared to 3383 affirmed. OFFICE OF COURT ADMIN., *Activity for the Fiscal Year Ended Aug. 31, 2007*, in FY 2007 TEX. JUDICIAL SYS. ANN. REP., available at <http://www.courts.state.tx.us/pubs/AR2007/toc.htm> (follow “Activity Detail” hyperlink under “Courts of Appeals,” “Courts of Appeals Activity”). An analysis by the New York Bar Association of criminal appeals in Manhattan and the Bronx from 2002 to 2006 reportedly showed reversal rates ranging from 7% to 12%. John Ennis, *Borough Bashing*, JUDICIAL REPORTS, Jan. 16, 2008, http://www.judicialreports.com/2008/01/borough_bashing.php. For

The particular structural and systemic problems in state criminal justice that led to widespread deprivations of federal rights and the Court's corresponding expansion of the scope of federal habeas in the 1960s have largely dissipated. In light of this fundamental change, we should no longer support a wasteful system that relies on duplicative posttrial litigation of individual state criminal cases, in both state and federal court, to pursue case-by-case compliance with the Constitution. Indeed, habeas review has never been capable—even during the Warren Court era—of effectively performing that kind of case-specific, error-correcting role.

Habeas is decidedly *not* the best place to invest federal resources today to ensure that individual state criminal cases comply with the Constitution. Most people convicted of crimes in state court never even get the chance to file a habeas petition, because they are not in custody long enough to reach that stage of the litigation process. Others waive their rights in plea proceedings. Finally, habeas is ill-suited to address the longstanding and fundamental problem of inadequate defense counsel, because the very nature of that inadequacy ensures that habeas courts usually will not have the ability to provide a meaningful remedy.

It is time for Congress to end this fifty-year experiment in post hoc federal court enforcement of constitutional criminal procedure. By clinging to habeas review while ignoring the continuing crisis in indigent defense, Congress is pouring tax dollars down the drain and overlooking a more effective way to enforce the Constitution: helping states to provide competent representation in criminal cases. Posttrial review of individual state criminal convictions and noncapital sentences for federal constitutional error should be left largely to the state courts. The federal role in criminal justice should focus instead on how best to help the states avoid constitutional error in the first place.

Lack of resources, lack of political will, or both deprive far too many state criminal defendants of the vigorous lawyering that is essential to the effective protection of their rights. Until now, Congress and the Court have responded to the problem of defense

serious crimes such as murder and rape, some assert the reversal rate on appeal is as high as 14%. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60–61 (2008). A recent study found a reversal rate of 48.1% for discretionary appeals in noncapital criminal cases accepted by state supreme courts. Theodore Eisenberg & Geoffrey P. Miller, *Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source* 22 tbl.4 (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Law & Econ. Research Paper Series, Paper No. 08-01, 2008), available at <http://ssrn.com/abstract=1080563>.

representation by creating and maintaining the opportunity for convicted defendants to complain in federal court, after the fact and case by case, that they received ineffective assistance of counsel in violation of the Sixth Amendment. Such claims are almost always unsuccessful. Even the very rare new trial or sentencing order does nothing to force a change in the local system of defense representation, nor does it prevent future defendants from suffering exactly the same fate, sometimes even with the same lawyer.⁹ As a society, we can, and should, do better.

If the federal government is serious about enforcing the Constitution in state criminal cases, including the right to counsel, using federal resources to spur serious reform of state and local defense representation systems is a better way to do it. This Essay discusses one viable option for implementing such a reform effort: reducing costly federal habeas review while simultaneously creating a new Federal Center for Defense Services.¹⁰ We should replace the doomed strategy of post hoc, case-by-case federal litigation with funding incentives already proven effective in prompting systemwide reforms at the local level.

In this way, Congress could direct federal dollars toward the benefit of all criminal defendants, not just the vanishingly small number of prisoners who manage to win the habeas lottery. In political terms, our proposal creates opportunities for coalition by offering the kind of tradeoff that has facilitated criminal justice reform in the past. In institutional terms, our proposal defines a new federal role that not only allocates resources more efficiently but is also more likely, over time, to protect the constitutional rights of state criminal defendants.

Part I of this Essay outlines the current system of federal oversight of state criminal justice and briefly explains how such a hopelessly inefficient and ineffective system came into existence. Part II summarizes the reality of present-day habeas litigation using findings from the Vanderbilt-NCSC Study. Part III presents our two-part proposal. First, we propose that Congress substantially reduce the scope of federal habeas in state criminal cases, restricting it to those cases in which case-by-case federal review is most valuable: the wrongful con-

⁹ See *infra* text accompanying notes 71–73 and note 128 and accompanying text (noting rarity and limited consequences of relief and collecting sources criticizing efficacy of *Strickland v. Washington*, 466 U.S. 668 (1984)).

¹⁰ Our proposal of a Federal Center is inspired by a recommendation made almost 30 years ago by the American Bar Association (ABA). See ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES (1979) [hereinafter 1979 ABA RESOLUTION], available at <http://www.abanet.org/legalservices/downloads/sclaid/121.pdf>.

viction of innocent persons, cases subject to the retroactive application of new federal rules, and capital cases. Second, we propose that Congress reallocate the resources saved by reducing the scope of federal habeas, as well as provide additional funds, to a new federal initiative designed to improve defense representation systems in the states. In recognition of the concern that states might curtail their own appellate and postconviction review systems if federal habeas were restricted, Part IV argues that, under the Suspension Clause, our proposal should be held constitutional *only so long as* states maintain reasonable appellate and postconviction remedies for federal constitutional deprivations.

I

HOW DID WE GET HERE, AND WHY?

Understanding the development of the present system for enforcing constitutional rules of criminal procedure requires us to turn the clock back fifty years. This Part provides an overview of the modern development of the federal habeas system, with an emphasis on its close relationship with the Warren Court's federalization of criminal procedure law.

A. *Beginnings: Limited Access and the Fundamental Fairness Doctrine*

In 1959, most criminal procedure law was state law. Almost all of the rules governing police, prosecutors, judges, and other criminal justice officials were written by state legislatures and state courts. State courts were responsible for determining whether any of those procedural rules had been violated in a particular criminal case. Then, as now, the federal role in criminal justice was rooted in the Fourteenth Amendment, which authorized the federal government to act to protect the due process rights of citizens against deprivations by their own states. In 1959, however, the Supreme Court had not yet interpreted the Due Process Clause to incorporate most of the specific criminal procedure protections in the Bill of Rights against the states.

Instead, the Court employed a case-by-case "fundamental fairness" approach to decide whether a state had deprived a particular criminal defendant of his federal right to due process.¹¹ "Fundamental fairness" tended to be defined rather loosely; only those deprivations that violated the "very essence of a scheme of ordered

¹¹ 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 2.4(e) (3d ed. 2007).

liberty”¹² or that contravened “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions”¹³ qualified for federal intervention.

Because due process as guaranteed by federal law was defined so narrowly, the list of potential federal constitutional errors in state prosecutions that could be raised on either direct appeal or habeas was short. Whether state prisoners did not seek review, sought review but did not raise federal questions, or raised federal questions but were turned away by the Court, the end result was that few state criminal cases reached the Court. During the October 1959 term, for example, only eight of the 121 cases decided upon full briefing and argument by the Court alleged federal constitutional violations in state criminal cases.¹⁴ Of those eight, four addressed constitutional challenges to the substantive basis of petitioners’ convictions.¹⁵ Only four of the cases addressed constitutional criminal procedure issues.¹⁶

The role that lower federal courts played in state criminal justice was equally minor. The lower federal courts, sitting in habeas, possessed the authority to review federal constitutional claims even if those claims had been previously rejected on their merits by the state courts.¹⁷ But petitioners could only raise the limited claims that were

¹² *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹³ *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

¹⁴ These figures are based upon a Lexis search of the “U.S. Supreme Court Cases, Lawyers’ Edition” source with the terms “decided & argued and date(geq (9/1/1959) and leq (8/31/1960))” (last performed Apr. 14, 2009). Cf. Gerhard Casper & Richard A. Posner, *A Study of the Supreme Court’s Caseload*, 3 J. LEGAL STUD. 339, 353 (1974) (noting that only 22% of Court’s caseload during 1959 term involved criminal cases).

¹⁵ *Wolfe v. North Carolina*, 364 U.S. 177 (1960) (denying jurisdiction to hear claim that state statute was used as tool of racial discrimination in violation of Supremacy Clause and Equal Protection Clause); *Thompson v. Louisville*, 362 U.S. 199 (1960) (holding that state convictions unsupported by evidence violated Due Process Clause); *Talley v. California*, 362 U.S. 60 (1960) (holding that city ordinance under which petitioner had been convicted violated First Amendment); *Smith v. California*, 361 U.S. 147 (1959) (same).

¹⁶ One case, on certiorari from the direct appeal, involved a successful due process challenge based on the denial of counsel, *Hudson v. North Carolina*, 363 U.S. 697 (1960), while another case involving a similar claim was dismissed because the petitioner had been released from prison, thus mooting his federal habeas petition, *Parker v. Ellis*, 362 U.S. 574 (1960). A third case, also on certiorari from the direct appeal, involved a successful due process challenge based on the prosecutor’s introduction of a coerced confession at trial, *Blackburn v. Alabama*, 361 U.S. 199 (1960). Last, in *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960) (per curiam), an evenly divided Court sustained the constitutionality of a local ordinance under which petitioner had been convicted against a Fourth Amendment challenge.

¹⁷ *Brown v. Allen*, 344 U.S. 443 (1953) (finding that there is no res judicata effect in habeas for prior state adjudications of federal constitutional claims).

then recognized as violations of the Fourteenth Amendment.¹⁸ Compared to today, few applications were filed and even fewer were granted.¹⁹

B. *The Warren Court and the Federalization of Criminal Procedure*

In the 1960s everything began to change. The American civil rights movement focused the nation's attention on myriad injustices, not the least of which was the mistreatment of poor people and people of color in state criminal justice systems. Utilizing federal powers located in either the Commerce Clause²⁰ or the Civil War amendments to the Constitution,²¹ Congress enacted important federal legislation to protect the rights of minority citizens in voting, housing, and employment contexts.²² The Civil War amendments might well have

¹⁸ See, e.g., *id.* at 465 (finding that petitioners' claims of jury discrimination and coerced confessions fell within Due Process and Equal Protection Clauses of Fourteenth Amendment).

¹⁹ In 1958, only 755 applications for habeas relief were filed in federal district courts; in 1962, only 1232. ADMIN. OFFICE OF THE U.S. COURTS, 1962 ANN. REP. OF THE DIRECTOR 130; ADMIN. OFFICE OF THE U.S. COURTS, 1959 ANN. REP. OF THE DIRECTOR 109. In 1960, the state prison population stood at 189,924. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 160 tbl.209 (1962). Assuming that about twelve hundred habeas petitions were filed in 1960 (as there were in 1962), that is a rate of roughly one petition for every 166 prisoners, even though federal habeas was the only meaningful postconviction remedy for most prisoners because most states had not yet adopted their own effective postconviction procedures. By 2004, this ratio had more than doubled, to about one federal petition for every sixty-seven state prisoners. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 43 tbl.C-2 (2004), available at <http://www.uscourts.gov/caseload2004/tables/C02Mar04.pdf> (reporting that 18,552 petitions were filed in federal district court in 2004); PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISONERS IN 2004, at 1, 2 tbl.1 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf> (reporting state prison population of 1,244,311 in 2004).

Rates of habeas relief were also low during the late 1950s. See, e.g., Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 53 (1956) (concluding that on average federal courts order release of only one habeas petitioner per year); Curtis R. Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 478 n.90, 479 (1960) (reporting that between 1949 and 1958 there were 6239 applications for habeas, but only 98 petitioners were successful in district courts from 1946 to 1957); Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 19 (1956) (reporting only five of 668 habeas applications—less than 1%—were granted in 1955).

²⁰ U.S. CONST. art. I, § 8, cl. 3.

²¹ U.S. CONST. amends. XIII, XIV, XV. *But see* Civil Rights Cases, 109 U.S. 3 (1883) (emphasizing limits to Congress's enforcement powers under Fourteenth Amendment).

²² See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2006)) (using federal power granted by Civil War Amendments); Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified as amended at 42 U.S.C. §§ 3601-3619 (2006)) (using Commerce Clause power); Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 251-66 (codified as amended at 42 U.S.C. § 2000e (2006)) (prohibiting discrimination in employment, using Commerce Clause power).

been construed to authorize Congress to enact a new federal code of criminal procedure for the states as well.²³ But a comprehensive federal legislative solution never emerged in the criminal justice area. Instead, the Supreme Court moved aggressively to fill the institutional void and address the problem.

Under the leadership of Chief Justice Earl Warren and Justice William Brennan, the Court employed two related strategies to force the states to bring their criminal justice systems into compliance with the fundamental ideals of equality and fairness guaranteed by the United States Constitution.²⁴ The first strategy was to incorporate, one by one, most of the specific constitutional provisions from the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, thus obligating states to honor those provisions in state criminal cases.²⁵ State defendants could seek relief in the Supreme Court for violations of those federal rights by applying for a writ of certiorari from their state judgments. The second strategy was to expand the availability and scope of federal habeas review. The Court enlisted the lower federal courts to supplement its certiorari review in order to ensure that these new constitutional rights—some of which provoked open hostility among state executives, legislatures, and courts—would be duly respected by the states.²⁶

²³ See CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 145–48* (1993) (arguing that Congress has power, under section 5 of Fourteenth Amendment, to draft federal code of criminal procedure applicable to state criminal cases).

²⁴ See William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 439–40 (1961) (predicting both need for Court to expand habeas as more new rights were incorporated through Due Process Clause and likelihood of state-court resistance to such new rights); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62–65 (1996) (tracing relationship between concerns about unequal treatment of poor and Warren Court's criminal procedure revolution); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 841 (1994) (concluding Court's Fourth Amendment doctrine was "a response to the problems of racial discrimination that it and the nation as a whole were forced to confront forthrightly in the middle of this century").

²⁵ See LAFAYE ET AL., *supra* note 11, § 2.5 (discussing rationale for adoption of selective incorporation in 1960s).

²⁶ See BRADLEY, *supra* note 23, at 20 ("The Supreme Court thus ensured that its new rulings would be enforced by giving the lower federal courts a ready-made body of law to apply to the states, and by greatly expanding the jurisdiction of those courts to review state convictions by means of federal writs of habeas corpus . . ." (footnote omitted)); Joseph L. Hoffmann, *Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence*, 78 TEX. L. REV. 1771, 1782 n.57 (2000) ("[I]n the 1960s, . . . the lower federal courts were essentially deputized by the Warren Court, by means of the Court's dramatic expansion of federal habeas, to enforce often-unpopular new federal constitutional rules . . ."); cf. James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2035–36 (2000) (citing 1963 habeas cases of *Fay v. Noia* and *Townsend v. Sain* as two of five cases that "made especially salient to the Court the

These changes were necessary. Without the federalization of criminal procedure law, and the corresponding expansion of federal habeas to supplement appellate review as a means of enforcing that federal law, it is possible that many of the modern reforms of state criminal justice systems would never have occurred. Rights that we all take for granted today, such as the right of indigent defendants to have counsel appointed to represent them at trial and on appeal,²⁷ the ban on unreasonable searches and seizures,²⁸ protection against coercion during interrogations,²⁹ the privilege to remain silent in the face of questions seeking incriminating answers,³⁰ the right to an unbiased judge and jury,³¹ the right to confront witnesses at trial,³² and protection against being placed in double jeopardy,³³ may never have

need not only for expanded procedural rights at state criminal trials but also to deputize the entire federal judiciary, on habeas, to assist the Court in enforcing those rights").

²⁷ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right of indigent defendants to counsel at trial); *Mempa v. Rhay*, 389 U.S. 128 (1967) (right to counsel at sentencing); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel for indigent misdemeanor defendants sentenced to incarceration); *Evitts v. Lucey*, 469 U.S. 387 (1985) (right to counsel on first appeal as of right, parallel to trial-level right established in *Gideon*).

²⁸ See, e.g., *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that magistrate determination of probable cause is required for extended detention of defendant after warrantless arrest).

²⁹ See, e.g., *Rogers v. Richmond*, 365 U.S. 534 (1961) (establishing that confession will be barred as coerced where defendant's will was overborne, regardless of probability that statement is truthful); *Townsend v. Sain*, 372 U.S. 293 (1963) (extending prohibition against coerced confessions to drug-induced confessions); *Jackson v. Denno*, 378 U.S. 368 (1964) (finding procedure by which voluntariness of confession was determined by jury, not judge, unconstitutional); *Brewer v. Williams*, 430 U.S. 387 (1977) (finding conversation during transport of defendant after arraignment amounted to interrogation, for which defendant had right to counsel); see also *Fay v. Noia*, 372 U.S. 391 (1963) (determining that coerced confession claim not raised on appeal had not been waived and could be asserted in habeas petition where appeal by defendant would have entailed risk of capital sentence).

³⁰ See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (incorporating privilege against self-incrimination against states); *Estelle v. Smith*, 451 U.S. 454 (1981) (holding that psychiatrist who examined defendant before trial without warning him that answers could be used against him in capital sentencing proceeding could not testify against him at such proceeding); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (declaring *Miranda* applicable to minor offenses).

³¹ See, e.g., *Irvin v. Dowd*, 366 U.S. 717 (1961) (holding that seating jurors biased by prejudicial publicity violated due process); *Sheppard v. Maxwell*, 384 U.S. 333, 358-63 (1966) (finding due process violation where judge failed to control media interference with trial, resulting in "carnival" atmosphere); *Parker v. Gladden*, 385 U.S. 363 (1966) (applying right to impartial jury to state proceedings); see also *Taylor v. Hayes*, 418 U.S. 488 (1974) (holding that judge's appearance of bias during criminal trial violated due process); *Turner v. Murray*, 476 U.S. 28 (1986) (establishing right of capital defendants accused of interracial crime to question jurors about racial bias).

³² See, e.g., *Specht v. Patterson*, 386 U.S. 605 (1967) (holding that due process required hearing and opportunity to confront witnesses before defendant could be sentenced as sex offender).

³³ See, e.g., *Ashe v. Swenson*, 397 U.S. 436 (1970) (interpreting protection from double jeopardy to include principle of collateral estoppel, barring retrial of fact rejected by ear-

been fully recognized by the states without the Court's aggressive stance.³⁴

The strategy of the Warren Court's criminal procedure revolution—declaring new rules for the states through judicial reinterpretation of existing constitutional provisions and then enforcing those rules through case-by-case postconviction litigation in the federal courts—hardly seems like the most logical, effective, or efficient way to achieve criminal justice reform in the states. The Warren Court adopted this approach not because it was necessarily the best one but because, in the absence of federal legislative action, the Court had no choice.³⁵

lier jury); *Crist v. Bretz*, 437 U.S. 28 (1978) (establishing that in jury trial jeopardy attaches when jury is sworn).

³⁴ See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 521 (1963) ("The existence, notorious and oft-exhibited, of grave inadequacies in the states' criminal procedures, both original and post-conviction, makes the federal habeas corpus jurisdiction a present necessity."); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 801 (1992) ("The criminal justice system of the early 1900s sanctioned racism, turned a blind eye upon physical and psychological torture of criminal defendants, and virtually ignored . . . the Fourth Amendment. No progress would have been made had the Court of 1950 adopted the attitude of the Court of 1990.").

Habeas cases were the vehicle for the establishment of many other criminal procedural rights. E.g., *Roberts v. LaVallee*, 389 U.S. 40 (1967) (holding statutory fee for preliminary hearing transcript unconstitutional as applied to indigent defendant); *Barker v. Wingo*, 407 U.S. 514 (1972) (rejecting rule that defendant's failure to demand timely trial waives Sixth Amendment right to speedy trial and adopting balancing test to determine whether right has been violated); *Blackledge v. Perry*, 417 U.S. 21 (1974) (holding that due process bars vindictive charging following defendant's exercise of right to trial de novo); *Estelle v. Williams*, 425 U.S. 501 (1976) (stating that compelling defendant to stand trial dressed in prison uniform would violate due process); *Henderson v. Morgan*, 426 U.S. 637 (1976) (holding due process to require that defendant be informed of critical elements of offense before guilty plea); *Castaneda v. Partida*, 430 U.S. 482 (1977) (ruling that statistical disparity between proportion of Mexican-Americans in population and in jury pools established prima facie case of equal protection violation).

³⁵ This is not to say that the Court could not have devised different, and potentially more effective, federal judicial remedies. For example, the Court could have looked to discrimination cases as a model for alternative remedies such as injunctions against state criminal justice officials, civil damages actions against state judges and prosecutors, or removal of state criminal cases to the federal courts. See Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1039–40 (1977) (discussing "Warren Court's failure to develop equitable relief for criminal justice reform"). One explanation for the Court's divergent approaches is that in the discrimination context the Court had to create an effective federal forum for litigating constitutional claims and often ended up with a collective solution. In the criminal justice context, where the existing combination of certiorari review in the Court and habeas review in the lower federal courts presented an obvious federal forum for single defendants' claims, the Court merely had to redesign an existing path to serve its ends. See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 389–410 (2007) (discussing reasons why criminal litigation, unlike civil litigation, tends not to be aggregated).

The problems that faced the Warren Court in the area of state criminal justice were structural and systemic in nature. In 1961, Justice Brennan, in a candid speech delivered at the University of Utah, highlighted two key problems.³⁶ The first was state judges' persistent resistance to enforcing recently incorporated federal criminal procedure rights, often accompanied by denial of the federal government's authority to declare those rights.³⁷ The second was the absence, in most states, of postconviction review processes that would allow the introduction of evidence that had not already been developed at trial.³⁸ Only a means of presenting such new, nonrecord evidence would allow defendants a reasonable opportunity to litigate newly recognized claims of constitutional error in jury selection, effectiveness of counsel, judicial bias, and prosecutorial misconduct.

In the face of such intractable and institutional problems, expanding habeas review was an appropriate response. From its earliest use on this side of the Atlantic, habeas has allowed the federal judiciary to protect the constitutional balance of powers in times of political or social crisis—both within the federal government (when Congress or the President pose an undue threat to individual liberty) and between the federal and state governments (when the states are the source of the threat).³⁹ The due process revolution of the 1960s and 1970s gave rise to precisely the kind of crisis—a crisis of federalism—that habeas could effectively address.⁴⁰ It is no coincidence

³⁶ Brennan, *supra* note 24.

³⁷ *Id.* at 440. Brennan speculated that “the sensitivity of state judges towards federal habeas corpus has been heightened as the Supreme Court has dealt increasingly with state administration of justice in constitutional terms.” *Id.* This “sensitivity” to the Warren Court’s constitutional pronouncements was expressed, in at least some cases, by resistance or even outright defiance on the part of state judges and other state officials. See Del Dickson, *State Court Defiance and the Limits of Supreme Court Authority: Williams v. Georgia Revisited*, 103 *YALE L.J.* 1423, 1425, 1465–79 (1994) (chronicling confrontation between Georgia Supreme Court and U.S. Supreme Court in context of “Southern intransigence” over Warren Court rulings); Robert G. McCloskey, *Reflections on the Warren Court*, 51 *VA. L. REV.* 1229, 1260 (1965) (alluding to “[f]lamboyant gestures of defiance” and “subtler forms of resistance” to Warren Court).

³⁸ Brennan, *supra* note 24, at 441 (“I have the personal conviction that if such [state postconviction] procedures were the rule and not the exception, redress by state judiciaries of violations of the Federal Constitution would ordinarily result, and intervention by any federal court including the United States Supreme Court would become unnecessary.”).

³⁹ We are in the process of writing a book that will develop this conception of the historic role of habeas corpus.

⁴⁰ Justice Brennan noted the key role of habeas in restoring the balance of federalism just two years before the famous “trilogy” of habeas cases—*Fay v. Noia*, 372 U.S. 391 (1963); *Sanders v. United States*, 373 U.S. 1 (1963); and *Townsend v. Sain*, 372 U.S. 293 (1963)—that expanded the scope of the writ:

We prize our federalism because of the proved contributions of our federal structure towards securing individual liberty. . . . [Federalism’s] goals are more

that the Warren Court turned, at that time, to the very same judicial remedy that had first been legislatively extended to state criminal defendants in the period immediately following the Civil War, when our nation experienced the most serious federalism crisis in its history.⁴¹

For the Warren Court, expanding federal habeas review of state criminal cases served two critical functions. It provided a powerful incentive for the states to improve their own postconviction review processes. And it sent clear notice to defiant state judges that they could not thumb their noses at, or deliberately ignore, federal law. In institutional terms, expanding habeas was the Court's shot across the bow of the states. Engaged in a war of federalism, and with limited capability to force structural and systemic change in the states through certiorari review, the Court needed to enlist the help of the lower federal courts. Expanding habeas allowed the Court to do exactly that.

Our current multilayered criminal justice system thus originated from a kind of historical accident, the result of institutional inactivity (by Congress) and institutional constraints (on the Court). Retaining that system might make sense today if the problems that gave rise to it persisted, but they do not. Retaining the current system might also make sense today if it represented an effective and efficient way of enforcing the Constitution's commands in individual cases, but it does not. The current system of habeas is failing and cannot be fixed.

II

THE COLD, HARD REALITY OF FEDERAL HABEAS LITIGATION TODAY

Even including the Warren Court's heyday, habeas relief has always been extremely rare outside of the capital context. Recent reforms have only hobbled it further. Two decades of legislative proposals to reverse the Warren Court's habeas expansions, based on criticisms that these expansions undermined finality in state criminal justice,⁴² culminated in the passage of the 1996 Antiterrorism and

surely approached through an administration of federal habeas corpus which puts the state courts on the path directed to securing state prisoners against invasion of the rights guaranteed them by the basic law of the land.

Brennan, *supra* note 24, at 442.

⁴¹ The writ was first extended to state prisoners under judgment of criminal conviction by the Habeas Corpus Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385-86.

⁴² See, e.g., S. 917, 90th Cong. § 702, 114 CONG. REC. 11,186, 11,189 (1968) (making prior state adjudications binding on federal habeas courts); H.R. 13722, 92d Cong. (1972) (limiting grounds on which federal courts can engage in habeas corpus review); S. 3833, 92d Cong. (1972) (same); 119 CONG. REC. 2220-26 (1973) (statement of Sen. Hruska) (discussing history of Department of Justice and National Association of Attorneys General

Effective Death Penalty Act (AEDPA).⁴³ AEDPA restricted habeas by creating a series of new procedural obstacles: a first-ever time limit for filing a first habeas petition; stricter barriers to review of second and successive petitions; and a new, tougher standard of review that precludes habeas courts from granting relief unless the state court's prior decision was "contrary to, or involved an unreasonable application of, clearly established federal law" as declared by the Court.⁴⁴

An empirical study of federal habeas litigation completed in 2007, the first comprehensive look at habeas since its substantial revision by AEDPA, found that between 1992 and 2006 both the average amount of time that elapses from conviction to filing and the median amount of time it takes federal courts to resolve habeas petitions once filed have *increased*, while by contrast the likelihood of obtaining habeas relief has *decreased*.⁴⁵ The study's findings suggest that federal habeas provides little meaningful relief for prisoners and little deterrence against constitutional violations in state criminal proceedings. Except in capital cases, where federal habeas continues to operate as a vital forum for litigation over the scope of the Constitution's commands, habeas is an expensive but almost completely ineffectual remedy that is no longer worth preserving in its current form.

A. *Federal Habeas Today Provides Little Meaningful Relief for Prisoners*

It is taking longer for habeas petitioners to reach federal court. The average period from conviction to habeas filing before AEDPA was about five years.⁴⁶ The same average for prisoners in the Vanderbilt-NCSC study sample was 6.3 years—an increase of over a

efforts to limit scope of federal habeas review); *Hearing Before the S. Comm. on the Judiciary on S. 2216: A Bill To Reform Habeas Corpus Procedures, and for Other Purposes*, 97th Cong. 13 (1982) (limiting habeas to claims that have not been "fully and fairly adjudicated" in state court).

⁴³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of U.S.C.).

⁴⁴ *Id.* at 1217, 1219–21.

⁴⁵ VANDERBILT-NCSC STUDY, *supra* note 1, at 54–60. The study examined a random sample of noncapital habeas petitions filed in federal district courts in 2003 and 2004. Information about each of these 2384 cases was collected from documents posted on PACER, the online filing system for federal courts. The study also collected information about capital habeas cases. The study sample consisted of 368 capital habeas cases commenced in 2000, 2001, and 2002 in the thirteen federal districts with the highest numbers of capital habeas filings. These 368 cases represented more than half of all the habeas cases filed by death row inmates nationally. Information about each of these cases was collected from courthouses and federal archives as well as PACER. *See id.* at 15–17 (describing methodology).

⁴⁶ *Id.* at 55 (noting earlier studies and comparison data).

year.⁴⁷ Even excluding cases dismissed as time-barred and cases that attacked administrative decisions made by prison officials rather than the conviction or sentence, the recent study shows that the lag time from sentence to federal filing is over five years.⁴⁸

Only a small portion of this five-year time lag could possibly be the result of delay by habeas-eligible prisoners. AEDPA imposes a one-year statute of limitations from the moment when the prisoner's conviction becomes "final" (meaning the end of the direct appeal process), with tolling during the pendency of "properly filed" state post-conviction proceedings.⁴⁹ Because these prisoners are filing within that statute of limitations, most of the five-year time lag consists of the time consumed during the pursuit of state appellate and postconviction remedies, which must be exhausted before seeking habeas review.⁵⁰

Given the time required for state court review, most state defendants convicted of felony offenses have no practical access to federal habeas review.⁵¹ For the latest year with available data (2004), 60% of all defendants who were convicted of felony crimes in state court

⁴⁷ *Id.* at 22 (basing figures on analysis of 57% of study sample (cases in which date of judgment was available); also noting that median time between prisoner's state judgment and federal habeas filing was 5.7 years).

⁴⁸ *See id.* ("[C]ases not barred [by the statute of limitations] averaged an interval of 5.6 years [between state judgment and federal filing.]"). The pre-AEDPA studies did not separate out filing periods for administrative challenges, Karen M. Allen et al., *Federal Habeas Corpus and Its Reform: An Empirical Analysis*, 13 *RUTGERS L.J.* 675, 679 nn. 6–9 (1982), ROBERT A. HANSON & HENRY W. K. DALEY, U.S. DEPT' OF JUST., *FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 6–9* (1995), available at <http://ojp.usdoj.gov/bjs/pub/pdf/fhcrccsc.pdf>, and there was no habeas filing deadline at the time.

⁴⁹ Antiterrorism and Effective Death Penalty Act of 1996 § 101. A state postconviction petition rejected by the state court as untimely is not "properly filed." *Pace v. DiGugliemo*, 544 U.S. 408, 417 (2005).

⁵⁰ Because under AEDPA no more than one year of delay in filing a habeas petition can be attributed to the prisoner, the average pre-filing delay that is attributable to the habeas exhaustion requirement is at least four years. This is unlikely to shrink significantly as long as posttrial litigation in the state courts continues to exist in its current form. Although we do not know what the average filing period was before AEDPA if cases challenging administrative decisions made after commitment to prison are excluded (earlier studies did not report filing periods for these cases separately), an unpublished analysis of the Vanderbilt-NCSC study data shows that even after removing all cases challenging only administrative decisions and all cases found to be time-barred, the average filing period for timely challenges to conviction or sentence is 1800 days, or just 24 days short of 5 years. Memorandum from Nancy J. King to the *New York University Law Review* (Mar. 30, 2009) (on file with the *New York University Law Review*).

⁵¹ Others have observed that relief for claims cognizable only on collateral review is inaccessible for all but those sentenced to relatively lengthy terms. *See, e.g.,* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 *CORNELL L. REV.* 679, 693–94, 706–10 (2007) (arguing that because direct appeals take "more than four or five years" in "many jurisdictions" only those state

did not receive any prison sentence at all,⁵² and the average prison sentence for the remaining 40% was less than five years.⁵³ According to 2002 data, a prisoner serving an average sentence is released in less than three years.⁵⁴ This means that the average habeas petition is filed after the vast majority of prisoners have already been released from custody.

It is also taking more time for federal courts to resolve the habeas petitions that are filed. Of the noncapital habeas cases filed in 2003 and 2004, almost one in ten were still pending as of October 2006.⁵⁵ Disposition time for cases that courts managed to terminate increased from a median of six months in the early 1990s to a median of 7.1 months for cases filed in 2003 and 2004.⁵⁶ On average, the slowest 25% of cases dragged on for more than 412 days.⁵⁷ When one includes cases filed in 2003 or 2004 and still pending as of December 1, 2006, habeas cases are averaging at least 11.5 months to complete.⁵⁸

The prolonged time required to satisfy the prerequisites for filing a habeas petition, and then to obtain a decision on that petition from a habeas court, dramatically skews the distribution of habeas cases among the overall population of state prison inmates. The Vanderbilt-NCSC Study found that almost 30% of all noncapital habeas petitions were filed by inmates serving life sentences,⁵⁹ even though only 1% of all prison sentences are for life.⁶⁰ On the other hand, only 12% of all

defendants with longest sentences will seek collateral relief and also that litigation of ineffective assistance claims must be shifted to direct appeal stage):

⁵² Durose & Langan 2004, *supra* note 2, at 1, 2 (reporting that of that 60%, half received a local jail sentence and half received no sentence of incarceration at all).

⁵³ *Id.* at 3 (reporting that average sentence for state felons sentenced to incarceration in 2004 was 37 months and average prison sentence was 57 months).

⁵⁴ Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washington, D.C.), Dec. 2004, at 5 tbl.4, 6 [hereinafter Durose & Langan 2002], available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf> (reporting that average prison sentence in 2002 was 53 months and average estimated time served until first release was 27 months); see also BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 511 tbl.6.44 (Ann L. Pastore & Kathleen Maguire eds., 2005) (reporting that between 1990 and 1999 average percentage of sentence that state prisoners served increased from 38.0% to 48.7%).

⁵⁵ VANDERBILT-NCSC STUDY, *supra* note 1, at 37.

⁵⁶ *Id.* at 41, 56.

⁵⁷ *Id.* at 56.

⁵⁸ *Id.* at 43.

⁵⁹ *Id.* at 20. Information about sentence type was available for 60% of the sampled noncapital cases, *id.*, and henceforth all sentence statistics cited from the Vanderbilt-NCSC Study will refer to this pool.

⁶⁰ Durose & Langan 2004, *supra* note 2, at 3; see also Durose & Langan 2002, *supra* note 54, at 4 (indicating that life sentences make up 1.1% of prison sentences but 24.1% of sentences for murder or nonnegligent manslaughter).

noncapital habeas petitions were filed by those serving sentences of five years or less,⁶¹ even though that group represents the majority of all those who are sent to prison.⁶² Because most federal habeas cases will not be resolved until years after the original conviction and sentencing, only inmates who receive life or other very long prison sentences will be in custody long enough even to file. For the vast majority of the more than two million people now incarcerated in America,⁶³ the Great Writ is a pipe dream.

Moreover, except in capital cases, those inmates who do manage to obtain federal habeas review can expect to lose. Although federal judges are taking longer to resolve petitions, they ultimately reject almost all of them. The chances that a petitioner will obtain any relief are even more miniscule now than they were before AEDPA. The grant rate for noncapital cases has dropped from 1% in the early 1990s to only 0.34% today.⁶⁴ Only eight of the 2384 noncapital habeas filings the study examined resulted in a grant of habeas relief, and one of those eight grants was later reversed on appeal.⁶⁵ At this rate, we estimate that fewer than sixty-five of the more than 18,000 petitions filed each year by noncapital petitioners⁶⁶ will eventually be granted

⁶¹ VANDERBILT-NCSC STUDY, *supra* note 1, at 20.

⁶² See *supra* notes 53–54 and accompanying text (noting average prison terms and time served).

⁶³ William J. Sabol & Heather Couture, *Prison Inmates at Midyear 2007*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washington, D.C.), June 2008, at 1 tbl.1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf> (noting that state prisons held 1,395,916 inmates in 2007); William J. Sabol & Todd D. Minton, *Jail Inmates at Midyear 2007*, BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washington, D.C.), June 2008, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/jim07.pdf> (noting that local jails held 780,581 inmates in 2007).

⁶⁴ VANDERBILT-NCSC STUDY, *supra* note 1, at 52, 58.

⁶⁵ *Id.* at 52, 58, 116.

⁶⁶ AEDPA has not slowed habeas filings by state prisoners. FRED L. CHEESMAN II ET AL., NAT'L CTR. FOR STATE COURTS, A TALE OF TWO LAWS REVISITED: INVESTIGATING THE IMPACT OF THE PRISONER LITIGATION REFORM ACT AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY E-9, at 64–81 (2004), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/criminal&CISOPTR=19>; JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>. Habeas petitions filed by noncapital state prisoners made up one of every fourteen civil cases filed in the United States district courts in 2006. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS app. at 162 tbl C-2 (2007), available at <http://www.uscourts.gov/judbus2006/contents.html>. In some districts with large prison populations, habeas corpus and civil rights cases constitute almost half of all cases filed by state prisoners. Pamela A. MacLean, *Inmate Petitions Swamp Judges: Emergency Call Issued For More Judges To Help Out*, NAT'L L.J., Aug. 4, 2008, at 4 (noting that prisoner civil rights and habeas corpus petitions made up 46% of all new filings in fiscal year 2007 in Eastern District of California).

by district courts. Efforts to improve the efficiency of habeas litigation only appear to have exacerbated this trend.⁶⁷

Today, the necessary prelude in the state courts to a first federal habeas filing is so lengthy, the habeas review process itself so prolonged, and habeas relief so unlikely that post-AEDPA federal habeas in noncapital cases is approaching a lottery for lifers.

B. Federal Habeas Today Provides Little Meaningful Deterrence of Constitutional Violations in State Court Proceedings

The Vanderbilt-NCSC study suggests that habeas review represents a substantial commitment of societal resources for very little practical gain. The study cannot tell us, of course, whether the incredibly low rate of habeas grants reflects a comparably low frequency of meritorious claims, or whether there are many more habeas petitioners who deserve relief but do not obtain it. But both possibilities ultimately lead to the same conclusion: Habeas review, at least as a means for case-by-case correction and deterrence of constitutional errors, is a failure, either because it is wasteful or because it is ineffectual.

Consider first the argument that the low habeas grant rate actually reflects the effective deterrence of constitutional violations by the threat of habeas review. According to this argument, it is the prospect of the writ that motivates the state courts to find and fix constitutional errors before they reach the federal courts. If habeas did not exist, constitutional errors would promptly increase.

This theory is implausible for several reasons. First, as noted above, the vast majority of state criminal defendants have no access to federal habeas because they will not be in custody long enough to exhaust their state remedies. In most such cases, the police, lawyers, and judges will be well aware of that fact from the outset of the case. This means that in most state criminal cases, the threat of habeas is no threat at all.

Second, the deterrent potential of case-by-case enforcement of criminal procedure rules is seriously undercut by plea bargaining. For the more than 90% of defendants whose convictions are resolved by settlement, prosecutors may willingly trade charge or sentencing concessions for a defendant's waiver of valid constitutional claims—including ineffective assistance of counsel—and judges will eagerly approve those bargains.⁶⁸

⁶⁷ VANDERBILT-NCSC STUDY, *supra* note 1, at 52, 58–59.

⁶⁸ See Nancy J. King, *Regulating Settlement: What Is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389, 389–90 (2007) (listing constitutional claims

Third, even in those cases where the defendant is likely to be in custody long enough to file a habeas petition and where he has not waived his rights via a plea bargain, one of the most important claims that such a defendant might wish to make—that his defense lawyer was deficient—is unlikely to be addressed in a meaningful way by a habeas court. The same failings that make a defense counsel deficient may produce an incomplete trial record that is inadequate to support the claim. And without a right to counsel in habeas, the trial record is unlikely to be supplemented later. Moreover, even supposing an adequate record, the threshold the Court set for ineffective assistance claims in *Strickland v. Washington* has made prevailing on these claims extremely difficult.⁶⁹

The Vanderbilt-NCSC study confirms that federal habeas is not deterring or correcting breakdowns in the delivery of defense representation in noncapital cases. A claim of ineffective assistance of counsel in trial or appellate proceedings was raised in about half of the 2384 noncapital cases the Vanderbilt-NCSC study assessed. Only one of those claims was granted; that grant was later reversed.⁷⁰

Fourth, because grants of habeas relief are so infrequent, and often occur long after the trial is over, they cannot possibly pose a meaningful deterrent for state actors in noncapital cases, even as a “spot check” on state compliance with constitutional rules.⁷¹ In the exceedingly rare case where relief is ordered due to a procedural violation, the state generally can repeat the flawed proceeding—trial,

defendants regularly waive in plea agreements); Sourcebook of Criminal Justice Statistics Online, <http://www.albany.edu/sourcebook/pdf/t5462004.pdf> (noting that in 2004 95% of state felony convictions followed guilty plea).

⁶⁹ See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding that to prevail on Sixth Amendment claim of ineffective assistance of counsel petitioner must demonstrate both deficient performance by attorney and “reasonable probability” that but for attorney’s errors, outcome of proceeding would have been different). For more on the failure of *Strickland* to ensure quality defense representation, see *infra* text accompanying notes 125–28.

⁷⁰ VANDERBILT-NCSC STUDY, *supra* note 1, at 28, 56. The study examined only decisions of the district courts; we do not know whether any of the decisions to deny relief were reversed on appeal.

⁷¹ 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, 882 (1998) (arguing that habeas must function, along with appellate jurisdiction of Supreme Court, as “spot-check” on state judicial compliance with federal law); see also *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting) (stating that writ of habeas corpus serves to “assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted” and “as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards”).

plea, sentencing, or appeal.⁷² The police officer, attorney, or judge who violated the prisoner's rights may be long gone, and even if they are not, they suffer no personal consequences if a writ is granted. Indeed, this was the main reason why, more than thirty years ago, the Court in *Stone v. Powell* eliminated all Fourth Amendment claims from the scope of habeas.⁷³

For all of these reasons, the argument that habeas serves as an effective deterrent to constitutional error in the state courts seems implausible. This means that even if the low grant rate in federal habeas actually reflects a correspondingly low number of state constitutional errors that require correcting, it cannot be the result of any significant deterrence produced by federal habeas review. And if the state courts are doing a good job on their own, independent of any habeas deterrence, then habeas is a colossal waste of resources.

Consider now the alternative argument: that the low habeas grant rate reflects the current failure of habeas courts to provide needed relief to deserving state prisoners. In the view of many academic commentators, the prisoners who win the habeas lottery are no more deserving of relief than the thousands of others whose claims are derailed by unjust barriers to habeas review.⁷⁴ The best way to fix habeas, they argue, would be for the Court to remove the restrictions

⁷² See Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 262 (1995) ("There seems to be a common misconception that when habeas petitions are granted, a petitioner is set free. In reality, granted petitions may mean that bail is reduced for a petitioner, that the petitioner can appeal his conviction, or the petitioner may be granted a new trial.").

⁷³ 428 U.S. 465, 493 (1976).

⁷⁴ A top ten list of targeted barriers would include at least five of AEDPA's innovations: (1) the standard of review that permits state decisions to stand even when they are wrong so long as they are reasonably wrong, 28 U.S.C. § 2254(d)(1) (2006); (2) the rigid filing deadline, which is difficult to navigate for pro se filers and lacks any exception for new evidence of innocence, § 2244(d); (3) the tighter restrictions on when a prisoner may file more than one habeas petition, § 2244(b)(1)-(2); (4) the stringent showing required in order to obtain an evidentiary hearing to establish facts not developed in state court, § 2254(e)(2); and (5) the green light to summary denial on the merits of a claim before the petitioner has developed it in state court, § 2254(b)(2). Critics have also blamed several key limitations enforced or imposed by the Burger and Rehnquist Courts, first among them the refusal to extend the right to counsel to discretionary appeals and collateral review. See *Ross v. Moffitt*, 417 U.S. 600 (1974) (denying right to counsel for discretionary appeals to state supreme court and U.S. Supreme Court); *Murray v. Giarratano*, 492 U.S. 1 (1989) (denying right to counsel on collateral review for all cases, capital and noncapital). Additional limitations were imposed in *Stone v. Powell*, 428 U.S. 465, barring federal habeas review of Fourth Amendment claims; in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Coleman v. Thompson*, 501 U.S. 722 (1991), banning review of almost all claims a petitioner or his lawyer failed to raise in a timely manner in state court; in *Teague v. Lane*, 489 U.S. 288 (1989), mandating with narrow exceptions the dismissal of claims based on a constitutional rule announced subsequent to the petitioner's state court conviction; and in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), permitting federal courts to deny relief for a

it has adopted,⁷⁵ for Congress to repeal AEDPA,⁷⁶ and for the federal government to provide lawyers and hearings to all habeas petitioners so that they can more effectively litigate their federal claims in a federal forum.⁷⁷

Such an approach would be one way to respond to a failed habeas system. But it is not a sensible response. The cost of providing lawyers to every habeas petitioner, increasing habeas litigation activity, and further slowing the more than 18,000 habeas cases filed every year in federal district courts would be steep. Doing so without providing some kind of corresponding tradeoff for the states would be a political nonstarter.

More fundamentally, however, even with a large investment of new resources in federal habeas review, grants will be too few to produce any meaningful additional reduction in constitutional error in state criminal cases. Removing the AEDPA- and Court-imposed restrictions on habeas would not address the inherent limitations discussed above: (1) that habeas can work, at best, only for state prisoners in custody long enough to make it to that stage of the process; (2) that habeas cannot work in most cases that involve plea bargains because those defendants will have waived their rights; (3) that habeas cannot remedy the fundamental problem of deficient defense counsel; and (4) that habeas cannot have much deterrent impact on the particular state actors who are to blame for the violations. Given these inherent problems, habeas will never be effective as a remedy for case-specific constitutional errors.

Relying on habeas to enforce the Constitution also ignores another problem inherent in federal habeas: There is no easy way to deter the filing of meritless habeas claims without also discouraging

proven constitutional violation even when there is a reasonable doubt that it may have influenced the decision to convict or sentence.

⁷⁵ E.g., Steven Semeraro, *Enforcing Fourth Amendment Rights Through Federal Habeas Corpus*, 58 RUTGERS L. REV. 983, 986 (2006) (calling for overruling of *Stone*); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2424–26 (1993) (describing current habeas approach as “jurisprudential morass”).

⁷⁶ Attacks on AEDPA are too numerous to catalogue. See, e.g., Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 360 (2006) (“Repeal or suspension of the AEDPA is now required to improve the quality and reliability of criminal justice in the United States.”); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What’s Wrong with It and How To Fix It*, 33 CONN. L. REV. 919, 920 (2001) (arguing that AEDPA “must be amended” to provide “meaningful habeas review”).

⁷⁷ E.g., Donald A. Dripps, *Ineffective Litigation of Ineffective Assistance Claims: Some Uncomfortable Reflections on Massaro v. United States*, 42 BRANDEIS L.J. 793, 801–02 (2004) (arguing that counsel should be provided for initial state postconviction proceeding); Stevenson, *supra* note 76, at 358–59 (arguing that counsel should at least be provided for capital prisoners and those sentenced to life in prison).

potentially valid claims. No matter how long the odds of habeas success may be, filing and losing is virtually cost-free for prisoners.⁷⁸ In many cases, the government even pays for the petitioner's "lottery ticket" by waiving the filing fee.⁷⁹ Alternatives, such as making prisoners pay if the courts reject their claims, may be acceptable for repeated frivolous filers, but not as applied to a single good faith attempt by an uncounseled prisoner to assert what he believes to be a fundamental right. This one-sided incentive structure increases the difficulty of separating the wheat from the chaff. Given the more than 18,000 habeas petitions filed each year, and the growing number of claims per petition, the danger that at least some deserving constitutional claims will be swept away by the overwhelming flood of meritless ones is substantial.⁸⁰

No matter what we do, habeas will continue to be inaccessible to the vast majority of state criminal defendants, who do not receive a sentence long enough to exhaust their state remedies or who waive their rights in a plea bargain. And even for the small group who do make it to habeas, providing counsel in federal court would likely be as futile as it is costly. Without adequate counsel to raise and develop claims in *state* court, the same number of valid constitutional claims lost to procedural default today will continue to be lost.⁸¹

For all of these reasons, beefing up habeas review will create at most a marginal increase in the number of grants requiring retrials or resentencings, a development that would be unlikely to affect decisions by state and local legislatures who control the funding and structure of defense services during the trial and appellate stages of prosecution.

⁷⁸ Casper & Posner, *supra* note 14, at 366 ("[T]he benefits to the applicant for review if he obtains a reversal of the lower court's judgment are so great, or the costs of applying for . . . review so small, that even a substantial decline in the probability of obtaining review will not deter the application.").

⁷⁹ See VANDERBILT-NCSC STUDY, *supra* note 1, at 22-23 (finding that 62% of in forma pauperis motions filed in noncapital cases were granted).

⁸⁰ As Justice Jackson pointed out, "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). The flood of meritless habeas claims also consumes federal judicial resources that could be deployed elsewhere, thus threatening the interests of not only deserving habeas petitioners but also all other federal litigants, such as federal criminal defendants and civil litigants.

⁸¹ See Primus, *supra* note 51, at 688-93 (arguing that ineffective assistance of counsel claims are practically limited by structural limitations). This is one of the reasons Professor Primus proposes litigating most ineffective assistance claims on direct appeal instead of postconviction. *Id.* at 695.

C. *Federal Habeas Squanders Federal and State Resources*

Despite the fact that federal habeas provides little meaningful relief to prisoners and little deterrence of constitutional violations by state courts, these cases entail a significant investment of resources by federal courts and states' attorneys. Today, one out of every fourteen civil cases filed in federal district court is a habeas challenge by a state prisoner.⁸² Most of these cases are not summarily dismissed. Instead, noncapital habeas cases average eighteen docket entries per case, more than a third of the average number of docket entries in the capital cases included in the study.⁸³ Almost six in ten noncapital cases included at least one responsive motion and brief by the state, and nearly seven in ten of those cases included a reply by petitioner.⁸⁴ On average, prisoners raised four claims per petition.⁸⁵ More than one of every eight cases included an amended petition,⁸⁶ and amended petitions generally require an additional responsive pleading.

In half of the cases, the judge did not decide the case on the petition and responsive pleading alone but first referred the petition to a magistrate judge for disposition.⁸⁷ A referral often generates a report and recommendation to the district judge, which affords the petitioner an opportunity to file a pleading objecting to the magistrate's report and often requires yet another response from the state. Not surprisingly, the study found that the presence of a report and recommendation lengthened the case.⁸⁸

In addition to the merits of these claims, courts and parties addressed many procedural issues along the way, including statute of limitations and procedural default, as well as substitution of counsel and motions for in forma pauperis status (filed in 56% of cases;

⁸² See *supra* note 66.

⁸³ *Id.* at 38. The study's capital-case sample consisted of every capital case filed during the years 2000, 2001, and 2002 in thirteen high-volume districts. *Id.* at 16–17. Docket entries for pending noncapital and capital cases were counted at the end of 2006. *Id.* at 18. Among noncapital cases filed in districts within the Ninth Circuit, there was more litigation activity, with twenty-three entries on average. *Id.* at 38.

⁸⁴ *Id.* at 34 (noting that 58.2% of noncapital cases included responsive motion and that 66.3% of those cases included petitioner's reply).

⁸⁵ *Id.* at 28.

⁸⁶ *Id.* at 34. This figure was 18% in the Ninth Circuit, and in some districts it was over 30%. *Id.*

⁸⁷ *Id.* at 36. United States magistrate judges issued nearly 9000 reports and recommendations in state habeas cases between October 1, 2006 and September 30, 2007. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR app. at 381 tbl.M-4B (2008), available at <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>.

⁸⁸ Nationwide, those noncapital cases including a magistrate judge's report and recommendation averaged twenty-one docket entries. VANDERBILT-NCSC STUDY, *supra* note 1, at 38.

granted 62% of the time).⁸⁹ Litigation in these cases often involved motions filed by the petitioner (with replies by the state) even after the initial final order of dismissal or denial had been entered, including motions for reconsideration or for a certificate of appealability.⁹⁰

Addressing the procedural and substantive questions raised in these petitions takes not only the time of the district and circuit judges and their clerks but in many districts the time of magistrate judges, their clerks, and pro se attorney staff as well. And unlike other civil and criminal cases in which documents are filed and distributed electronically, prisoner cases are exempted from e-government rules, requiring clerks to scan, print, copy, and mail documents by hand.⁹¹

To the states, these cases may appear to be less complex or demanding than other civil cases that states may litigate in federal court. Discovery and evidentiary hearings, for example, are rarely granted.⁹² But with more than 18,000 habeas petitions filed each year, the cost for the states adds up as well, particularly for those states with the largest prison populations. States can count on winning almost every one of these cases, but they can also count on a significant expenditure of state dollars to defend them.⁹³

Any system of justice that expends so much effort and produces so little benefit deserves reconsideration. Whatever we may think in theory about the importance of providing convicted state defendants an opportunity to vindicate their federal constitutional rights in a federal judicial forum, the opportunity provided today is a charade. For

⁸⁹ *Id.* at 23.

⁹⁰ *Id.* at 53 & n.90 (reporting rulings on certificates of appealability and noting rulings denying motions for reconsideration after final order was entered). As of December 2009, absent action by Congress, the rules governing habeas proceedings will require district judges to consider the certificate of appealability question at the time they dispose of the claim. See COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT OF THE JUDICIAL CONFERENCE app. E at 72–73 (2008), available at <http://www.uscourts.gov/rules/Reports/ST09-2008.pdf>; see also 28 U.S.C. § 2074 (2006) (Rules Enabling Act).

⁹¹ See, e.g., *Majority of Courts of Appeals Now Live with CM/ECF*, 40 THE THIRD BRANCH (Admin. Office of the U.S. Courts, Washington, D.C.), May 2008, available at <http://www.uscourts.gov/ttb/2008-05/article05.cfm> (stating that about 45% of court of appeals filings are pro se and will have to be scanned by hand).

⁹² VANDERBILT-NCSC STUDY, *supra* note 1, at 36 (noting that 0.3% of noncapital cases included deposition or examination; 0.4% included evidentiary hearing).

⁹³ See, e.g., *Hearing on Habeas Reform: The Streamlined Procedures Act of 2005: Hearing on S. 1088 Before S. Comm. on the Judiciary*, 109th Cong. 2–3 (2005), available at http://www.constitutionproject.org/pdf/eisenberg_11_16_05_testimony1.pdf (testimony of Ronald Eisenberg, Deputy District Att’y, Phila., Pa.) (“In the last decade, the number of [our] lawyers employed exclusively on habeas work has increased 400%. . . . The truth is that, whether or not they end up reversing a conviction, federal habeas courts drag out litigation for years of utterly unjustifiable delay, creating exorbitant costs for the state . . .”).

noncapital defendants, it may never have been much more. Ever since the Warren Court began its expansion of habeas, critics have condemned the result as a “debilitating, . . . court-clogging hydra.”⁹⁴ And as early as 1972, a Federal Judicial Center study group warned:

It is satisfying to believe that the most untutored and poorest prisoner can have his complaints or petitions considered by a federal judge, and ultimately by the Supreme Court of the United States. But we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk.⁹⁵

After four decades of habeas reform by the Court and Congress, prisoners today cannot claim access even to this. The new procedural barriers to review and relief imposed by Congress in AEDPA have failed to reduce either the number of filings or the time expended on each case, while the hope that habeas will correct, much less deter, any constitutional error that persists in state criminal proceedings has even less foundation than before.

In light of the empirical evidence, it is time for Congress to consider whether this multilayered system of postconviction review in criminal cases represents a justifiable use of societal resources. The

⁹⁴ John L. Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood?*, 6 CUMB. L. REV. 363, 364 & n.8 (1975) (characterizing claims in such prominent criticisms as Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970), and Shirley M. Hufstедler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841, 852–53 (1972)). Professor Bator’s influential 1963 article also criticized the Court’s new habeas review as an unjustified waste of resources. Bator, *supra* note 34, at 512.

⁹⁵ FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 14 (1972), reprinted in 57 F.R.D. 573, 587 (1972). Previous reports of grant rates by federal habeas petitioners in noncapital cases include those collected in note 19, *supra*. See also ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP’T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 6–7, 17 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrccsc.pdf> (reporting grant rate of 1% for more than 2000 habeas cases terminated in 1992); Allen et al., *supra* note 48, at 679 n.6, 683 (finding grant rate of 3.2% for 1899 cases from six districts filed from 1975 to 1977); Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 668, 677–80 tbl.2 (1991) (reporting grant rate of 3–4% for 585 cases filed from 1973–1975 and 1979–1981 in Southern District of New York); Flango & McKenna, *supra* note 72, at 241 tbl.1, 259 tbl.13 (1995) (analyzing more than 1600 cases terminated in 1990 and 1992 from eight districts in four states and finding grant rate of less than 1% for most claims); David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 321, 340 (1973) (finding grant rate of less than 4% in District of Massachusetts between 1970 and 1972); J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 899 n.16 (1966) (citing average petition grant rate of 3.5% in fiscal years 1963 (forty-two of 1662 granted), 1964 (125 of 3220) and 1965 (154 of 4186)).

unavoidable answer is that except in capital cases, federal habeas is not a judicial remedy worth preserving.

III

A NEW VISION FOR ENFORCING CONSTITUTIONAL RIGHTS IN STATE CRIMINAL CASES

Any attempt to preserve or improve the current version of federal habeas review of state criminal cases begs the fundamental question raised by Professor Meltzer: If we had the chance to start over again and design a new federal initiative to ensure that state criminal defendants receive what the Constitution guarantees them, how would we do it? Would we choose to rely on ad hoc, case-by-case litigation in federal court by largely uneducated prisoners with every incentive not only to litigate but to include questionable and even frivolous claims? Would we hold out the hope that these post hoc judicial decisions might deter future constitutional errors or prompt the states to engage in systemic reform to prevent them? Or would we prefer a proactive federal approach designed to encourage the states to avoid constitutional error in the first place?

When the Court adopted the post hoc habeas litigation approach fifty years ago, it did so under duress. There is a better approach. We should redirect the resources that are currently spent on ineffective federal habeas litigation to where they will have a chance to make a bigger difference—to the beginning, not the end, of the criminal justice process. Our primary goal should be to avoid problems before they arise, not to try to find and correct them afterwards. The resources now wasted on reviewing and rejecting claims of constitutional error in habeas litigation should be redeployed to help prevent constitutional violations from occurring in the first place: They should be invested in the reform of state systems of defense representation.

This new approach is better for two reasons. First, it is aimed directly at promoting systemic legislative reform in the states—a goal that will never be achieved merely through occasional grants of relief to those able to play the habeas lottery. Second, it is based on a tradeoff of sorts—a reduction of federal habeas review paired with an increase in federal funding to improve state defense services. By addressing two closely related failures (of federal habeas review and of state defense representation), our proposal is not only more sensible and more effective than addressing each problem on its own but more politically viable as well.

Our proposal, which is tentatively sketched out in the remainder of this Essay, has two components: (1) the limitation of federal

habeas review to cases where the remedial benefits of the Great Writ will be worth the costs; and (2) the creation and adequate funding of a new federal initiative to spur reform of defense representation systems in the states. The following Sections outline each of these components in turn.

A. *Abandon Futile Federal Habeas Review of Noncapital Cases*

We propose first that Congress amend the federal habeas statute so that habeas courts retain jurisdiction over only three categories of constitutional claims raised by state prisoners in custody pursuant to a state criminal judgment. The proposed amendment would provide that, subject to any limits the Suspension Clause may impose,⁹⁶ an application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of conviction entered by a state court shall not be granted unless the court finds that: (1) the petitioner is in custody in violation of the Constitution or laws or treaties of the United States and has established by clear and convincing new evidence, not previously discoverable through the exercise of due diligence, that no reasonable factfinder would have found him guilty of the underlying offense in light of the evidence as a whole; (2) the petitioner is in custody in violation of a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court; or (3) the petitioner is under a sentence of death, and either (a) his death sentence was imposed in violation of the Constitution or laws or treaties of the United States or (b) he is legally ineligible to be executed.

The proposed amendment would limit habeas review only for state criminal cases and would not affect habeas review for petitioners who challenge the constitutionality of detention by state authorities pursuant to a state court judgment other than a criminal conviction.⁹⁷

⁹⁶ See *infra* Part IV.B–D (discussing Suspension Clause).

⁹⁷ Allegations of unauthorized detention or imprisonment in the absence of any court judgment, which have been the subject of the common law habeas remedy as far back as the Magna Carta, would remain cognizable under 28 U.S.C. § 2241 (2006), as they are today. This type of challenge generally is associated with suits by federal detainees. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (ruling on habeas petition by aliens detained as enemy combatants at United States Naval Station at Guantanamo Bay, Cuba); see also *infra* text accompanying notes 170–84 (discussing *Boumediene*). A petitioner may also challenge detention by state authorities, as in a challenge to pretrial confinement. See, e.g., *Walck v. Edmondson*, 472 F.3d 1227, 1235 (10th Cir. 2007) (collecting authorities regarding state prisoner challenges to pretrial detention on ground of double jeopardy); *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998) (holding that state defendants challenging their pretrial detention should bring habeas petitions under § 2241).

A challenge to custody imposed after a judgment of civil commitment would be one example of such a claim.

The proposal would preserve habeas review of state criminal cases for three categories of claims. The first category would include those petitioners incarcerated in violation of federal law who can offer "clear and convincing" proof of factual innocence. This category would be limited to cases in which the petitioner is able to bring forward newly discovered evidence⁹⁸ to rebut either his conviction or the application of a sentence-enhancement factor treated as the functional equivalent of an element of the crime.⁹⁹ Without such new evidence, the original criminal conviction would serve as a legally sufficient answer to the petitioner's claim of factual innocence.¹⁰⁰ Our proposal preserves habeas review for those constitutional claims that have been rejected or refused in state court and are accompanied by a compelling showing of innocence. Since cases of wrongful conviction involve the most fundamental kind of unjust incarceration, they justify the extraordinary expenditure of resources to allow habeas courts to provide a last-chance remedy.¹⁰¹

The second category would allow for the postconviction enforcement of new constitutional rules that have been held to apply retroactively to cases already final on direct appeal. Under current law, as defined by the Court in *Teague v. Lane*,¹⁰² this would include only those new constitutional rules that (1) impose a substantive barrier to criminal conviction or punishment, such as the rule barring the crime of flag burning; or (2) recognize a "watershed" rule of criminal procedure, such as the *Gideon* right to appointed counsel.¹⁰³ Without

⁹⁸ Many convicted defendants will make claims of factual innocence because for most it will be the only possible avenue to obtain habeas relief, but very few will be in a position to make a facially plausible claim of innocence based on newly discovered evidence. Most such claims, therefore, should be resolved relatively quickly.

⁹⁹ Apart from prior convictions, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

¹⁰⁰ Under our proposal, this innocence gateway to federal review of constitutional error would be one of two opportunities for a defendant to raise his claim of innocence of the crime of conviction in states that provide similar review.

¹⁰¹ We leave it up to the Court to decide whether a sufficiently strong showing of factual innocence, standing alone, might serve as a constitutional claim warranting possible habeas relief. See *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming, *arguendo*, that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would . . . warrant federal habeas relief if there were no state avenue open to process such a claim").

¹⁰² 489 U.S. 288 (1989).

¹⁰³ *Id.* at 307, 311 (holding that new constitutional rules will not be retroactively applicable to cases on collateral review unless they prohibit criminalization of "certain kinds of primary, private individual conduct" or enforce the observance of procedures "implicit in

access to federal habeas review in such cases, a defendant whose direct appeal had concluded by the time the new constitutional rule was declared would be unable to benefit from the rule if the state courts provided no forum for the claim.

The third category would preserve habeas review in capital cases, allowing for the adjudication of any constitutional objection to the petitioner's capital sentence. This category also would include cases in which petitioners claim to be legally ineligible to receive a death sentence.¹⁰⁴ In effect, this means that federal habeas review would continue to exist, much the same as it does today, with respect to the sentences of death row inmates.

We defer to another forum a discussion of the proper scope of habeas in capital cases, including the appropriate standard of review and the application of doctrines such as procedural default that currently limit habeas relief.¹⁰⁵ These are difficult and controversial issues, but it is best to resolve them for capital cases alone rather than for habeas cases in general. The misguided effort to develop "one-size-fits-all" habeas rules has been a persistent problem with habeas law. Developing separate rules for noncapital and capital cases will enable better tailoring of the rules to these very different litigation contexts.¹⁰⁶

There are several justifications for preserving a broad role for federal habeas courts in reviewing state capital cases, even while eliminating most other habeas review. First, compared to the number of noncapital cases the number of capital habeas cases is tiny and getting smaller every year, making effective case-by-case habeas review more plausible.¹⁰⁷ Second, the constitutional law that regulates state capital

the concept of ordered liberty" (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) and *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

¹⁰⁴ A petitioner in this category might claim either that the state's evidence was insufficient to establish an aggravating circumstance that was relied upon at trial to justify the death sentence or that he cannot be legally executed under the Eighth Amendment. *E.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (holding that death penalty is unconstitutional for crime of rape of child who is not killed); *Panetti v. Quarterman*, 127 S. Ct. 2842, 2860–61 (2007) (noting that "insane" cannot be executed); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding death penalty unconstitutional for juveniles under age eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding death penalty unconstitutional for mentally retarded defendants); *Tison v. Arizona*, 481 U.S. 137 (1987) (holding death penalty unconstitutional for non-triggermen who do not exhibit reckless indifference to human life).

¹⁰⁵ We plan to address the appropriate role of habeas corpus in capital cases in a book we are now writing.

¹⁰⁶ See Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 118–22 (1994) (arguing for separate habeas policy for capital and noncapital cases).

¹⁰⁷ Numbers of capital and noncapital federal habeas petitions have remained relatively stable over the past several years. In 2007, there were 232 capital petitions and 18,907

cases, mostly derived from the Eighth Amendment, is particularly dynamic. So long as the Court continues to revise constitutional limits on the application of the death penalty, it needs the lower federal courts to work out the implementation of those limits.¹⁰⁸ Third, to the extent that state judges might be subject to political pressure to cut corners on constitutional rights in criminal cases, this pressure is likely most intense in death penalty cases.¹⁰⁹ While we have argued above that federal habeas review is generally ineffectual to correct constitutional violations in state court, capital cases would seem to be the exception that proves the rule, as habeas grant rates are far higher in capital than in noncapital cases.¹¹⁰ Finally, federal habeas review provides a valuable forum for the ongoing societal debate over the morality and legal viability of the death penalty itself; this unique role for federal habeas should not be diminished.

Our proposal would dramatically reduce the amount of noncapital habeas litigation by state prisoners. In effect, it would operate something like *Stone v. Powell*,¹¹¹ which barred federal habeas review

noncapital; in 2006, 236 and 18,959; in 2005, 229 and 18,961; in 2004, 214 and 18,431. DUFF, *supra* note 87, app. at 146 tbl.C-2; DUFF, *supra* note 66, app. at 163 tbl.M-4B; LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2005 app. at 159 tbl.C-2, available at <http://www.uscourts.gov/judbus2005/appendices/c2.pdf>; LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, 2004 JUDICIAL BUSINESS app. at 133 tbl.C-2, available at <http://www.uscourts.gov/judbus2004/appendices/c2.pdf>. And while the number of prisoners under sentence of death has been declining for six years, TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2006 - STATISTICAL TABLES, at tbl.4 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/cp06st.htm>, the number of those sentenced to incarceration continues to rise, Durose & Langan 2004, *supra* note 2, at 1 (noting 24% increase in number of annual felony convictions between 1994 and 2004); Durose & Langan 2002, *supra* note 54, at 9 (noting no significant change in proportion of felons sentenced to prison or incarceration between 1994 and 2002).

¹⁰⁸ Otherwise, the Court will have to devote even more of its finite docket to capital cases than it does now. For a critical assessment of the Supreme Court's so-called "death docket," noting that the Court averages six capital cases per term, see Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861 (2008).

¹⁰⁹ As Justice Stevens speculated in *Harris v. Alabama*,

[T]he "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting).

¹¹⁰ During the years prior to AEDPA, federal courts invalidated capital judgments in two of every five cases. After AEDPA, that rate appears to have declined, but remains much higher than in noncapital cases. VANDERBILT-NCSC STUDY, *supra* note 1, at 61 (noting grant rate of 12–13% among 267 terminated capital cases, with 95 cases still pending).

¹¹¹ 428 U.S. 465 (1976).

of Fourth Amendment claims where the petitioner had an “opportunity for full and fair litigation” in state court.¹¹² Our proposal would apply that rule more broadly, removing federal jurisdiction over *all* federal noncapital habeas petitions, absent either proof of innocence or retroactive application of new law.¹¹³

Like the no-full-and-fair-opportunity escape valve that the Court created in *Stone*, our proposal also has an escape valve to ensure adequate state judicial review of constitutional claims: the Suspension Clause authority of the Supreme Court, discussed in Part IV below.

The most dramatic effect of our proposal would be to almost completely eliminate federal habeas review of Sixth Amendment claims of ineffective assistance of counsel in noncapital cases. This means that state noncapital defendants who claim deficient representation and who do not meet the criteria for innocence or retroactivity would be limited to their state-court remedies plus the remote possibility of certiorari review in the United States Supreme Court. Habeas review of these claims currently squanders resources while failing to remedy defense-attorney deficiencies. Those resources should be redeployed where they have a more meaningful chance of preventing the deficiencies in the first place.

B. Start a New Federal Initiative To Improve State Defense Representation Systems

The point of reducing wasteful federal habeas litigation is not simply to conserve scarce resources. The point is to enable the reallocation of those resources in support of more effective means of ensuring compliance with constitutional rules. Whatever can be saved by cutting back on habeas review—and additional funds—should be

¹¹² *Id.* at 482. The Court’s decision in *Stone* was based in part on the nature of the exclusionary rule as an enforcement mechanism for search and seizure violations in particular. The Court later refused to extend *Stone*’s rationale to bar habeas review of other constitutional claims, namely grand jury discrimination, insufficient evidence to support conviction, violations of *Miranda*, and ineffective assistance of counsel where counsel failed to raise a meritorious search and seizure claim. See *Withrow v. Williams*, 507 U.S. 680, 687–88 (1993) (citing and discussing cases declining to extend *Stone*).

¹¹³ It is unlikely that these exceptions would frequently come into play. Currently, fewer than 4% of noncapital petitioners challenge their conviction or sentence based upon new evidence of innocence. VANDERBILT-NCSC STUDY, *supra* note 1, at 30. According to Professor Brandon Garrett’s empirical survey, even prisoners ultimately exonerated rarely raised claims of innocence in habeas. Garrett, *supra* note 8, at 128. Not only were very few “bare innocence” claims raised but also a showing of innocence never served as a basis for judicial rejection of a state’s claim of procedural default. VANDERBILT-NCSC STUDY, *supra* note 1, at 48–49. Regarding our second exception, the Supreme Court has never held retroactive any rule affecting noncapital petitioners, other than the rule in *Gideon*. *Whorton v. Bockting*, 549 U.S. 406, 419 (2007).

devoted to a new federal initiative aimed at helping the states prevent and correct constitutional violations in their own courts.

Over the past two decades, several proposals have been made to link reductions in the scope and availability of federal habeas review to various reforms of state indigent defense services. In 1989, a committee on habeas corpus reform chaired by Justice Lewis F. Powell, Jr. advocated cutbacks in federal habeas review of capital cases if the states agreed to supply qualified and experienced counsel in state capital postconviction proceedings.¹¹⁴ In 1993, Professor Meltzer posed his hypothetical about the possibility of replacing additional investment in habeas review with greater investment in defense representation.¹¹⁵ And in 2002, Professor James Liebman argued that if a state improved the quality of capital trials, primarily by providing higher quality defense representation, capital defendants in that state should be allowed to waive both state and federal postconviction review of ineffective assistance claims.¹¹⁶

We agree that what is sorely needed is a radical rethinking of the criminal justice system that recognizes the close relationship between the deficiencies of defense representation at the beginning of the criminal justice process and the failure of postconviction litigation at the end of the process.¹¹⁷ But this relationship is vital for all criminal cases, not only for capital cases. Moreover, the decision to shift

¹¹⁴ JUDICIAL CONFERENCE OF THE U.S., AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL 11 (1989), reprinted in *Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953, and H.R. 32584 Before the H. Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the H. Comm. on the Judiciary*, 101st Cong. 46, 56 (1990). A version of the Powell Commission's "opt-in" proposal eventually was enacted as part of AEDPA, see 28 U.S.C. §§ 2265(a), 2266(b)(1)(A) (2006), but no state thus far has been found to qualify for the more restrictive "opt-in" capital habeas rules.

¹¹⁵ See *supra* text accompanying note 6.

¹¹⁶ James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 333–40 (2002); see also Liebman, *supra* note 26, at 2073–78 (criticizing system that focuses on habeas litigation rather than trial litigation); cf. Andrew Hammell, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 69–72 (2002) (proposing abbreviated and highly deferential habeas review in capital cases where state can show it provided specified procedural safeguards).

¹¹⁷ Indeed, the fundamental concept of preferring preventive solutions over post hoc remedies for constitutional violations dates back at least as far as the 1960s. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court adopted a prophylactic approach, mandating warnings to suspects in lieu of case-by-case review of challenges to police interrogations. In the context of guilty pleas, Fed. R. Crim. P. 11 performs a similar prophylactic function: Once a defendant states in a hearing under the Rule that he knows the consequences of his plea and the terms of any bargain and that he is waiving his rights voluntarily, he cannot easily claim otherwise. See 5 LAFAYETTE ET AL., *supra* note 11, at 888–89 & n.104 (collecting authorities demonstrating courts' inclination to deny defendants' attempts to withdraw guilty pleas).

resources to where they would be most effective should not be left to individual states without federal leadership or federal financial support.

Our proposal—that Congress authorize a new federal initiative to help states provide competent defense representation—builds on the work of others. In 1979, the House of Delegates of the American Bar Association (ABA) adopted a resolution from the Standing Committee on Legal and Indigent Defendants calling for “the establishment of an independent federally funded Center for Defense Services for the purpose of assisting and strengthening state and local governments in carrying out their constitutional obligations to provide effective assistance of counsel for the defense of poor persons in state and local criminal proceedings.”¹¹⁸

Senators Dennis DeConcini (R-Ariz.) and Edward Kennedy (D-Mass.) subsequently introduced a bill that would have created such an institution.¹¹⁹ The proposed Center would have established “nationally recognized standards” for defense representation and would have awarded matching grants or contracts to states and localities.¹²⁰ The funding would have helped state and local governments support defense representation services, conduct research, provide training and technical assistance to defense lawyers, and design and implement model demonstration projects.¹²¹ Although the bill never passed, the ABA has not given up its vision. In 1998, and again in 2005, the ABA reiterated its support for the basic principles behind the proposed federal center, adopting new resolutions advocating federal funding and national standards to promote state reforms.¹²² Yet another resolution, along with a formal report, is due sometime in 2009.¹²³

¹¹⁸ 1979 ABA RESOLUTION, *supra* note 10. See generally Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 924–28 (2004) (discussing history and current status of ABA Resolution and proposal for Federal Center for Defense Services).

¹¹⁹ Center for Defense Services Act, S. 2170, 96th Cong. (1979) (summarized at <http://thomas.loc.gov> (follow “Try the Advanced Search” hyperlink; then follow “View 100-93” hyperlink; then follow “96” hyperlink; then type “Center for Defense Services” in “Enter Search” box; then follow “S. 2170” hyperlink)); see also Lefstein, *supra* note 118, at 926–27 (describing DeConcini/Kennedy bill).

¹²⁰ See Lefstein, *supra* note 118, at 927.

¹²¹ See *id.*

¹²² STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (1998), available at <http://www.abanet.org/legalservices/downloads/sclaid/115.pdf>; STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (2005), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/res107.pdf>; Lefstein, *supra* note 118, at 927.

¹²³ Conversation with Professor Norman Lefstein, Indiana University School of Law—Indianapolis, in Indianapolis, Ind. (July 1, 2008) (notes on file with the *New York*

We believe that the time has come for Congress to acknowledge not only that effective criminal defense at the trial and appellate levels is a far better means of guaranteeing constitutional rights in criminal cases than post hoc habeas litigation but also that state criminal defense systems are in crisis and require federal support. Our adversarial system relies on defense counsel to protect individual rights in criminal cases.¹²⁴ Yet case-by-case litigation under *Strickland v. Washington*¹²⁵ has failed, and will continue to fail, as a means of ensuring the right to counsel in noncapital cases. Systematic underfunding of criminal defense representation in the state courts persists,¹²⁶ resulting in repeated and widespread breakdowns in defense representation in many states.¹²⁷ As a chorus of commentators has observed, the scant postconviction reversals under *Strickland* have had little or no impact on the pervasive pressures on state and

University Law Review); see also THE 2009 CRIMINAL JUSTICE TRANSITION COAL., SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS (2008), available at http://brennan.3cdn.net/8b63a89d8e019025c3_60m6blijc.pdf (advocating, on behalf of more than twenty-five criminal justice organizations and experts, creation of federal center).

¹²⁴ See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 620–21 (2005) (noting vital importance of counsel to indigent defendants, 70% of whom “fall in the lowest two out of five levels of literacy—marked by an inability to do such basic tasks as write a brief letter to explain an error on a credit card bill, use a bus schedule, or state in writing an argument made in a lengthy newspaper article” (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting))); Bator, *supra* note 34, at 458 (“Many commentators agree that it is the problem of assistance of counsel which lies at the heart of the great issue of creating fair procedures in the states’ administration of criminal justice.”).

¹²⁵ 466 U.S. 668 (1984). For a discussion of the *Strickland* standard of review, see note 69, *supra*.

¹²⁶ See *supra* notes 3–4 and accompanying text (discussing struggle of various state and local governments to adequately provide defense services).

¹²⁷ For an updated account, discussing underfunding of state criminal defense representation and associated problems, see generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006). In 2004, the ABA noted some of the failures of defense representation systems:

Too often when attorneys are provided, crushing workloads make it impossible for them to devote sufficient time to their cases, leading to widespread breaches of professional obligations. To make matters worse, exceedingly modest compensation deters private attorneys from performing more than the bare minimum required for payment. Further, the structure of indigent defense systems often means that judges and/or state and county officials control the attorneys, thereby denying them the professional independence afforded to their prosecution counterparts and to their colleagues retained by paying clients.

ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 7 (2004) [hereinafter ABA, *GIDEON'S BROKEN PROMISE*], available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

county legislative bodies to limit funding for defense services.¹²⁸ This is a systemic problem that habeas is woefully inadequate to address.

Lawsuits seeking injunctive relief from these constitutional deficiencies, combined with political coalition-building and public awareness campaigns, have prompted some reform in a handful of states.¹²⁹ Faced with the prospect of a court order commanding compliance with the Sixth Amendment, policy makers in Connecticut, Georgia, Louisiana, Massachusetts, Montana, New York, Oklahoma, Oregon, Pennsylvania, and Washington have responded with reforms and increased resources.¹³⁰ These scattered efforts have produced a growing body of research into successful (and failed) practices in the

¹²⁸ See *supra* note 127; see also DEBORAH L. RHODE, ACCESS TO JUSTICE 122–37 (2004) (discussing problem of inadequate representation and “inadequate responses” to problem). Some have argued that legislatures and judges must take more active measures to provide competent counsel. See, e.g., Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 10 (“We may have no choice but to fix the front end of the system, as back-end review simply does not work.”); see also Dripps, *supra* note 77, at 804 (“If we balk at the implications [of Strickland’s presumption of effective assistance], then we should rethink the basic project of assessing effective assistance questions after the fact.”); William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 147–48 (1995) (noting that “seldom are the instances in which claimants prevail if their claims are analyzed in straight Strickland terms”); Primus, *supra* note 51, at 686–89 (agreeing that Strickland is too lax and collecting material documenting “[s]tructural ineffectiveness” of indigent defense representation due to lack of resources and financial incentives).

¹²⁹ See ABA, GIDEON’S BROKEN PROMISE, *supra* note 127, at 29–35 (discussing reform strategies in states including Georgia, New York, Texas, and Virginia); Vidhya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* (Wash. Univ. Sch. of Law in St. Louis Working Paper No. 1279185, 2008), available at <http://ssrn.com/abstract=1279185> (tracing development of litigation-based reform strategy and advocating increased use of class action suits for detailed injunctive relief); see also Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2063–65, 2068 (2000) (exhorting judiciary to employ same “intensive and comprehensive judicial oversight of public institutions to ensure compliance with” right to counsel as it has employed in other areas, in light of “the longevity and severity of [the] political process failure” of legislative inaction).

¹³⁰ See THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 13–16 (2006) [hereinafter INDIGENT DEFENSE COMMISSIONS], available at http://www.abanet.org/legalservices/sclaid/defender/downloads/state_indigentdefense_feb07.pdf (describing reforms following litigation in Louisiana, Massachusetts, Montana, and Oklahoma); Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1507 (2006) (describing change to statewide public defender system based on national guidelines); Reddy, *supra* note 129, at 19–32 (discussing consent orders and settlement agreements in state of Connecticut; Fulton County, Georgia; Allegheny County, Pennsylvania; and Grant County, Washington). But see Bibas, *supra* note 128, at 10 (“[W]hile judges can promote effective assistance of counsel via systemic reform, they are reluctant to flex their muscles. Most judges see this kind of policy making as inappropriate for courts.”).

provision of defender services.¹³¹ They have also promoted wider acceptance of minimum standards in areas such as caseload, case assignment, and client contact, and have contributed to a growing consensus that state-level funding and oversight is crucial in states that leave the administration of defense representation to the uneven fiscal capability of county authorities.¹³²

What is needed now is a comprehensive *national* plan to encourage state and local legislative bodies to provide adequate funding for representation services. Only the federal government possesses the power and the resources to provide the necessary encouragement.

We support the creation of a new Federal Center for Defense Services, along the lines of the one proposed by the ABA in 1979.¹³³ Organized as an independent nonprofit corporation similar in form to the Corporation for Public Broadcasting (CPB),¹³⁴ the Legal Services

¹³¹ The Spangenberg Group, the organization that has conducted much of this research for several states, was appointed by the court in the Allegheny County case as the consultant to assist with the administration of stipulated reforms and the filing of periodic reports. Reddy, *supra* note 129, at 28 & n.172. A list of states and counties for which the Group has prepared studies is available at http://www.spangenberggroup.com/work_indig.html. The Group has also prepared a series of reports for the ABA. See, e.g., THE SPANGENBERG GROUP, RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW (June 2007), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/2007FelonyCompRatesUpdate_Nonfelony.pdf; INDIGENT DEFENSE COMMISSIONS, *supra* note 130.

¹³² See INDIGENT DEFENSE COMMISSIONS, *supra* note 130, at 18 (recognizing “clear trend among the states toward the creation of a state body to be responsible for the delivery of indigent defense services throughout the state” in order to achieve “[a]ccountability; [o]versight; [u]niform policies and procedures; [u]niform standards; [r]eliable statistical information; [a]dministrative efficiency; [c]ost containment; [i]mproved quality of representation; and [a] central voice for indigent defense services”).

¹³³ 1979 ABA RESOLUTION, *supra* note 10; see also Lefstein, *supra* note 118, at 925–28 (discussing ABA proposal and change it might have wrought, if enacted). The federal initiative proposed in this Essay is not intended as a substitute for other efforts to systemically reform defense representation systems in the states. Such efforts include litigation, see, e.g., *State v. Peart*, 621 So. 2d 780, 783 (La. 1993) (finding that “the provision of indigent services in [New Orleans] is in many respects so lacking that defendants . . . are not likely to receive the . . . effective assistance of counsel the constitution guarantees” and remanding defendant’s case for judgment under presumption of *ineffective* counsel), and ethical challenges to public-defender caseloads, see Backus & Marcus, *supra* note 127, at 1080–90 (discussing potential ethics violation claims and possible state responses). For a comprehensive discussion of other reform alternatives, see generally Backus & Marcus, *supra* note 127.

¹³⁴ Congress created the Corporation for Public Broadcasting, a private, nonprofit corporation, in 1967. Corporation for Public Broadcasting, What Is the Corporation for Public Broadcasting?, <http://www.cpb.org/aboutcpb/whatis.html> (last visited Feb. 12, 2009). The President of the United States appoints each board member, who, upon Senate confirmation, serves a six-year term. Corporation for Public Broadcasting, Board of Directors, <http://www.cpb.org/aboutcpb/leadership/board> (last visited Feb. 12, 2009).

Corporation (LSC),¹³⁵ or the State Justice Institute (SJI),¹³⁶ such a Center could administer matching grants and other financial incentives for state and local governments to improve their efforts to provide defense representation.

Incentive grants and other conditional spending schemes are now frequently employed by Congress to stimulate state legislative and regulatory change¹³⁷ in sentencing policy¹³⁸ and other criminal justice matters.¹³⁹ By making the continued receipt of federal funding that

¹³⁵ The Legal Services Corporation was created by Congress in 1974. The group is managed by a “bipartisan, 11-member Board of Directors—appointed by the President of the United States with the advice and consent of the Senate—[that] oversees all aspects of LSC operations.” Legal Services Corporation, What Is LSC?, <http://www.lsc.gov/about/lsc.php> (last visited Feb. 12, 2009). The LSC’s mission is “[t]o promote equal access to justice in our Nation and to provide high quality civil legal assistance to low-income persons.” Legal Services Corporation, Mission Statement, <http://www.lsc.gov/about/mission.php> (last visited Feb. 12, 2009). LSC funds generally cannot be used in criminal proceedings. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536–39 (2001) (describing creation of organization, LSC grant programs, and limits placed on LSC funds by Congress).

¹³⁶ The State Justice Institute was established by Congress in 1984 to “award grants to improve the quality of justice in the State courts.” State Justice Institute, About SJI, <http://www.sji.gov/about.php> (last visited Feb. 12, 2009). SJI is a nonprofit corporation managed by an eleven-member, uncompensated board of directors appointed by the President and confirmed by the Senate. The President is required to appoint six state court judges and one state court administrator to the board. Of the remaining four “public” members of the board, no more than two may be of the same political party. Professional staff oversee operations, including grant management and government relations. *Id.*

¹³⁷ *Cf.* *United States v. Am. Library Ass’n*, 539 U.S. 194, 203 (2003) (“Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.” (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987))).

¹³⁸ In the 1990s, federal incentive grants coincided with changes in sentencing policy in twenty-one states. See WILLIAM J. SABOL ET AL., *THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES’ SENTENCING PRACTICES AND PRISON POPULATIONS* 23–29 (2002), available at http://www.urban.org/UploadedPDF/410470_FINALISrpt.pdf (examining effects of Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants Program in 1994 Crime Act, Pub. L. No. 103-322, 108 Stat. 1796). According to one major study, the federal program was a major factor in the enactment of the truth-in-sentencing law in five of these twenty-one states. *Id.* at 27. One such state was New York, which “specifically changed its laws in order to qualify for federal grant funds.” *Id.* at 24. In ten of the remaining states the funding was a factor, but not a major factor. *Id.* at 27; see also PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: TRUTH IN SENTENCING IN STATE PRISONS 3 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf> (noting that, in response to 1994 Act’s grant programs, four states enacted truth-in-sentencing guidelines in 1994 and another eleven states did so one year later); U.S. DEPT. OF JUSTICE, REPORT TO CONGRESS: VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING INCENTIVE FORMULA GRANT PROGRAM 1 (Feb. 2005), available at <http://www.ojp.usdoj.gov/BJA/pdf/VOITISreport.pdf> (reporting that of \$10 billion appropriated for program, \$2.7 billion was spent).

¹³⁹ See Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENT’G REP. 123, 127 (1998) (“In recent years Congress has increasingly attached incentive grants to federal crime legislation. Alternatively, it has passed bills mandating the forfeiture of federal funding if a state does not comply with federal standards.”). For example,

the states require contingent upon state compliance with a set of conditions, federal funds can foster policy reform in the states that would otherwise face much stiffer political opposition.

Congress adopted this approach in the Innocence Protection Act of 2004, part of the Justice for All Act of 2004,¹⁴⁰ where it authorized “capital representation improvement grants” to improve state defense representation systems in capital cases.¹⁴¹ These grants require states to implement and demonstrate an “effective” system of capital defense.¹⁴² An “effective” system must include a state program or entity that will establish qualifications and coordinate the assignment, training, and monitoring of capital defenders, as well as ensure that they are compensated at either the same rate as prosecutors or at a “reasonable hourly rate.”¹⁴³ Compliance is to be evaluated annually by the Attorney General, upon report of the Office of Inspector General.¹⁴⁴

Finally, at least some existing state-level commissions on defense representation have been successful in using matching grants and other financial incentives to encourage meaningful funding increases

the Justice for All Act of 2004, contains a provision entitled “Incentive Grants to States to Ensure Consideration of Claims of Actual Innocence,” which provides grants to states to implement “reasonable” measures to preserve biological evidence and provides for post-conviction access to testing. Pub. L. No. 108-405, § 413, 118 Stat. 2260, 2285 (codified at 42 U.S.C. § 14136 note (2006)). Similarly, federal funding has been the essential catalyst for the nearly 2200 new drug courts established in the United States since 1989. See C. WEST HUDDLESTON ET AL., DEPT. OF JUSTICE, PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 3 tbl.1 (2008), available at http://www.ojp.usdoj.gov/BJA/pdf/12902_PCP_fnl.pdf (providing data on prevalence of drug courts); *id.* at 16–18 (“For every federal dollar invested to start, implement, and expand drug courts, the states invest \$4.40. These state investments show how critical federal investments can be to starting and sustaining innovations in criminal justice.”). For a summary of the drug court grant program, as well as several other federal grant programs to facilitate state criminal justice initiatives, see NATHAN JAMES, CONG. RESEARCH SERV., AN OVERVIEW AND FUNDING HISTORY OF SELECT DEPARTMENT OF JUSTICE (DOJ) GRANT PROGRAMS (2006), available at <http://www.fas.org/spp/crs/misc/RL33489.pdf>.

¹⁴⁰ Innocence Protection Act of 2004, Pub. L. No. 108-405, §§ 401, 411–413, 421–426, 431–432, 118 Stat. 2278 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

¹⁴¹ *Id.* § 421.

¹⁴² *Id.* §§ 421, 424–425.

¹⁴³ *Id.* § 421(e). In a floor statement, Senator Patrick Leahy referred to programs in New York and North Carolina, two states that had established relatively independent state-wide entities for the purposes outlined in the Act, as models for the national program. Ronald Weich, *The Innocence Protection Act of 2004: A Small Step Forward and a Framework for Larger Reforms*, THE CHAMPION, Mar. 29, 2005, at 28, 30, available at <http://www.thejusticeproject.org/national-agenda/the-innocence-protection-act-of-2004-a-small-step-forward-and-a-framework-for-larger-reforms>.

¹⁴⁴ Innocence Protection Act of 2004 § 425.

at the local level.¹⁴⁵ This progress, along with recent successes in some jurisdictions in legislating standards for parity of resources for prosecution and defense attorneys,¹⁴⁶ suggests that the ABA Committee's proposal¹⁴⁷ can work on a larger scale. Adequate federal funding, however, will be essential. Appropriations must not only support the Center's day-to-day operation and activities but also allow the awarding of federal incentive grants large enough to affect the fiscal decisions of state and local governments that face ever-increasing budgetary pressures.

The new Federal Center would also be well situated to conduct comprehensive empirical research to identify the characteristics of effective defense representation on both a systemic and an individual level. Armed with the results of such research, the Center could encourage reform by publicizing exemplary efforts as well as by identifying those jurisdictions whose efforts are less successful.¹⁴⁸ A special Superfund-type grant program¹⁴⁹ specifically targeted at states and localities with egregious problems in defense representation could help to address those problems quickly and bring additional political pressure.

¹⁴⁵ See Lefstein, *supra* note 118, at 927 ("The report accompanying the [ABA] resolution noted that '[a]n approach linking funding to compliance with standards shows particular promise in fostering improvements in indigent defense systems.' To support its point, the report cited activities in Indiana and the work of the [Indiana Public Defender Commission]." (second alteration in original) (footnotes omitted)); see also John Gibeaut, *Declaring Independence*, A.B.A. J., Dec. 2001, at 41 (discussing Indiana's program); Lefstein, *supra* note 118, at 911 (describing Indiana Public Defender Commission); Karen Dorn Steele, *Public Defenders To Limit Cases: Spokane County Adopting National Standards*, SPOKESMAN-REV. (Spokane), Oct. 29, 2007, at A6 (reporting on proposed ordinance in Spokane County, Washington, setting limits on defender caseloads, implementation of which is condition for increased state funding for indigent defense).

¹⁴⁶ See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222, 224, 230-42 (2004) (describing resource parity legislation in various jurisdictions); see also Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 244 (1998) (arguing that compliance with ex ante parity standard, which could entail improved staffing, increased compensation, and expanded support services for indigent defense lawyers, is "promising" method for ensuring effective representation).

¹⁴⁷ 1979 ABA RESOLUTION, *supra* note 10.

¹⁴⁸ Similar efforts by existing private organizations devoted to the improvement of defense services, most notably The Spangenberg Group, have had some preliminary success in prompting state-level reforms. See, e.g., Press Release, The Spangenberg Group, The Spangenberg Group Releases Comprehensive Study of the Indigent Defense System in Virginia, Legislature Responds with Initial Reforms (Apr. 10, 2004), available at http://www.spangenberggroup.com/Virginia_Report.html (reporting Virginia's legislative response to critical report by The Spangenberg Group); see also 2007 VA. INDIGENT DEF. COMM'N ANN. REP. 6-13, available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD1582007/\\$file/RD158.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD1582007/$file/RD158.pdf) (detailing activity to improve quality of indigent defense in Virginia).

¹⁴⁹ See 42 U.S.C. § 9660a (2006) (establishing Superfund grant program).

Financial incentives for states and sustained evaluative research are the most pressing needs that a new federal program could help to meet. Yet a comprehensive federal initiative designed to reform state defense representation systems could include other components as well. For example, Congress could task the Center with drafting federal standards for defense representation based on “best practices” research, standards that would have to be satisfied for a state or locality to become eligible for broader federal criminal-justice funding. Standards could require the states to do some or all of the following:

- (1) *State agency.* Establish a state agency to ensure the quality of defense representation services throughout the state. The agency should have the power to adopt and enforce rules and policies concerning effective defense representation¹⁵⁰ and should be funded at the state rather than the county level. Statewide funding for defense services will be a political challenge in many states, but it may be the single most important step toward ensuring adequate counsel.¹⁵¹
- (2) *Qualification, training, and certification.* Establish minimum qualifications of training and experience for defense counsel, applicable to both appointed and retained defense counsel, and implement a certification system that incorporates data collection as well as a peer review system to evaluate claims of ineffective attorney performance.¹⁵² Authorize the decertification of any

¹⁵⁰ See, e.g., Justice for All Act, Pub. L. No. 108-405, § 421, 118 Stat. 2260, 2286 (codified at 42 U.S.C. § 14163 (2006)) (specifying features of effective system of legal representation).

¹⁵¹ See *supra* note 132 and accompanying text (discussing state systems); see also, e.g., Mike Blasky, *State Report: Bay County Public Defenders Have Excess Workloads*, BAY CITY TIMES (Bay City, Mich.), June 18, 2008, at A3 (reporting difficulties of Michigan system in which counties are responsible for public defender funding and assignment); North Dakota Commission on Legal Counsel for Indigents, <http://www.nd.gov/indigents/commission> (last visited Feb. 10, 2008) (describing creation of statewide authority for delivery of defense services).

¹⁵² Cf. ABA, *GIDEON'S BROKEN PROMISE*, *supra* note 127, at 11, 43 (noting need for “effective training, professional development, and continuing education” of indigent defenders, and recommending state-level oversight of “attorney qualifications and performance”). Each state could be required to create and maintain a database that collects information about client complaints, judicial admonitions or sanctions, and case outcomes for both appointed and retained defense counsel. Peer review could be based on the model of a state-level committee of leading defense lawyers, chosen for their experience and expertise, provided with sufficient investigative resources, and charged with the duty to evaluate the performance of individual defense lawyers whenever questions arise due to patterns of client complaints, repeated judicial admonitions or sanctions, or case outcomes falling substantially below prevailing norms.

defense lawyer, whether generally appointed or retained, whose overall record of performance is seriously deficient.

- (3) *Case appointment process.* Implement a process to ensure that defense counsel are selected for a particular case in a manner that is both impartial and not influenced by the goal of minimizing costs to the state.¹⁵³
- (4) *Caseload limits.* Establish caseload limits to ensure that appointed defense counsel will have time to provide adequate representation.¹⁵⁴
- (5) *Compensation.* Provide adequate compensation for appointed defense counsel.¹⁵⁵
- (6) *Support services.* Provide resources for investigative and expert services in cases with appointed counsel that are comparable to the resources available to the prosecution in similar cases.¹⁵⁶

These ideas are only some of the possible directions for a comprehensive federal initiative to promote better defense representation systems in the states. Indeed, the proposed Center for Defense Services could serve as the locus for development and implementation of such ideas. The details deserve careful consideration.

C. Political Viability

Providing and sustaining adequate federal funding levels for our proposal will require extraordinary political commitment, especially in recessionary times. To be sure, the proposed shift in the federal role will not succeed if Congress simply cuts the budget of the judicial branch by the amount that it projects to save by limiting the habeas jurisdiction of the federal courts and simultaneously offers those dollars to the states with a few strings attached. The *fiscal* tradeoff is but one aspect of the more comprehensive *political* shift in focus that is

¹⁵³ *But see* Kevin Krause, *Judges Rely on Costlier Lawyers: Dallas County Could Save Millions Using Public Defenders*, DALLAS MORNING NEWS, Apr. 3, 2007, at 1A (reporting study recommending limitation on county judges' ability to appoint private defense lawyers because practice costs Dallas County \$7.2 million per year more than using public defenders).

¹⁵⁴ *See supra* note 4 and accompanying text (collecting reports of public defender offices unable to take more cases due to caseloads); BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001) (prepared by The Spangenberg Group), available at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf> (describing importance of manageable caseloads in indigent defense and outlining standards for manageable caseloads).

¹⁵⁵ *See* ABA, *GIDEON'S BROKEN PROMISE*, *supra* note 127, at 9–10 (arguing that inadequate compensation makes recruitment and retention of experienced attorneys "extraordinarily difficult" and that "[n]ational standards recognize the importance of providing reasonable compensation to defense attorneys").

¹⁵⁶ *Id.* at 10 (describing endemic resource shortfalls in public defender offices).

required from the back end to the front end of the criminal justice system.

But two features of our proposal make it a realistic possibility. First, our proposal does not require Congress to mandate that every state change its defense representation systems overnight, nor does it mean that Congress should condition the curtailment of habeas review in noncapital cases on a particular state's current compliance with federal standards for improvement of defense representation. Instead, as the legislative history of the Innocence Protection Act illustrates, *voluntary* programs that offer the states the choice of whether or not to participate may be politically viable (even when those grants fund an activity as unpopular as the defense of capital defendants), while expressly tying habeas reform to representation reform may not be.¹⁵⁷

A voluntary renewable grant program would allow compliance standards to evolve gradually, as "best practices" develop based on innovations in individual states. Lasting systemic changes in state criminal justice cannot be legislated into existence overnight. Model alternatives could be allowed to emerge in a few states, then evaluated and modified for local conditions. At least when it comes to noncapital cases, so little benefit would be lost by cutting back on habeas review, and so much more could be gained by *any* shift of those resources toward encouraging and supporting improvements in state defense representation, that we need not adopt a quid pro quo arrangement that could pose an unwarranted political barrier to state reform efforts.

Second, all states currently endure the same wasteful habeas litigation in federal court, with the same predictable and meaningless outcomes, regardless of whether they now provide systematically deficient representation for defendants or first-class defense services. By packaging defense representation reforms with the elimination of this wasteful system, our proposal would provide Congress the opportunity to jump start meaningful change in state criminal justice.

IV

ENSURING THAT STATES MAINTAIN APPELLATE AND POSTCONVICTION REVIEW: A SUSPENSION CLAUSE ARGUMENT

So far, our answer to Professor Meltzer's question is clear. Except in capital cases, federal habeas is not worth preserving. It

¹⁵⁷ See Weich, *supra* note 143, at 29 (noting that earlier versions of Innocence Protection Act conditioned restricted habeas review of convictions on states' adoption of competent counsel standards but that, as compromise, bill sponsors "abandoned any linkage between counsel reforms and habeas corpus" so that "a state's failure to live up to the bill's requirements would not alter the scope of federal review of its death sentences").

should be cut back to a few limited categories where it fills a unique role that state court review cannot fill. The federal role in state criminal justice should be to focus instead on improving state systems of defense representation. Proposing such radical restrictions on federal habeas review does, however, raise a danger: States might also curtail their own systems of appellate and postconviction review, leaving state prisoners with no avenue to pursue relief for constitutional claims.

It was federal habeas review that first galvanized the states to develop their own appellate and postconviction review in criminal cases. The Warren Court's expansion of federal habeas in the 1960s prompted many states to adopt their current postconviction procedures—indeed, Justice Brennan advocated the expansion of federal habeas review on that ground explicitly in his Utah speech.¹⁵⁸ Without even the theoretical risk of an adverse federal habeas decision in most cases, some states might attempt to save money by reducing or eliminating their own postconviction review procedures.¹⁵⁹ Even if a state regards federal habeas not as a threat but as a model, cutbacks in federal habeas review might lead such a state to conclude that its own postconviction review process should be simi-

¹⁵⁸ Brennan, *supra* note 24, at 441 (“[A]s Chief Justice Schaefer of Illinois has said: ‘The existence of the federal [habeas] remedy has stimulated the state courts to devise post-conviction procedures. That stimulus should not now be removed.’” (alteration in original) (quoting Schaefer, *supra* note 19, at 24)); see also Mary C. Hutton, *Retroactivity in the States: The Impact of Teague v. Lane on State Postconviction Remedies*, 44 ALA. L. REV. 421, 438 (1993) (“[T]he federal courts virtually forced the states to expand their postconviction remedies by threatening to free state prisoners, if the states failed to correct constitutional errors.”); Reitz, *supra* note 19, at 467 n.32, 469 (discussing Illinois Post-Conviction Hearing Act, “adopted in 1949 under the severe pressure of a series of Supreme Court cases involving Illinois prisoners” and motivated by threat of federal habeas proceedings); Jordan Steiker, *Restructuring Post-conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 342 (arguing that new state postconviction procedures protected state convictions from federal review because federal courts would defer to state factfinding and because “additional opportunities to enforce state procedural rules [led] to increased forfeitures in federal court”).

¹⁵⁹ See Shapiro, *supra* note 95, at 370 (“The study [under discussion] does not indicate . . . whether state postconviction remedies would be as adequate as they are without the spur of a broad federal habeas remedy, or whether state courts would be less solicitous of federal constitutional rights in close cases.”).

larly reduced.¹⁶⁰ The Due Process Clause would not prevent such state action.¹⁶¹

Although we make no empirical claims about the effectiveness of present state appellate and postconviction review processes for addressing federal constitutional claims,¹⁶² we recognize that these state processes, together with certiorari review in the U.S. Supreme Court, would be the only remaining judicial fora for addressing constitutional claims if federal habeas review were curtailed. Our proposal, which is aimed at dramatically changing the federal government's role in state criminal cases, should not be understood as allowing states to abdicate their own responsibility for reviewing such claims.¹⁶³ Indeed, our argument against federal habeas is based at least in part on the fact that it is duplicative.

The viability of our proposal to largely dismantle federal habeas review in noncapital cases thus depends on the assumption that the states will continue to provide a reasonable level of posttrial or post-

¹⁶⁰ For example, after the Court in *Teague v. Lane*, 489 U.S. 288 (1989), adopted a more restrictive approach to retroactivity for federal habeas, a few states followed suit. See *Danforth v. Minnesota*, 128 S.Ct. 1029, 1042 & n.17 (2008) (noting that courts in three states had concluded they were bound by *Teague*); Hutton, *supra* note 158, at 460–62 (listing eight states in which courts followed *Teague*—in four, explicitly by choice). Also, after the Court held in *Stone v. Powell*, 428 U.S. 465, 481–82 (1976), that federal courts need not provide collateral review of search and seizure claims that have been fairly litigated in state court, the Georgia Supreme Court adopted the reasoning in *Stone* and restricted the availability of state habeas corpus review of such claims. *Jacobs v. Hopper*, 233 S.E.2d 169, 170 (Ga. 1977).

¹⁶¹ For more than a century, the U.S. Supreme Court has held that state direct appeals are not constitutionally mandated under the Due Process Clause. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (citing *McKane v. Durston*, 153 U.S. 684, 687 (1894)). Nor are state postconviction proceedings constitutionally protected as a matter of due process. See *Pennsylvania v. Finley*, 481 U.S. 551, 556–57 (1987) (“Postconviction relief is even further removed from the criminal trial than is discretionary direct review. . . . States have no obligation to provide this avenue of relief.”).

¹⁶² Certainly many of the arguments that we make about the inefficacy of federal habeas review would seem applicable to state appellate and postconviction review as well. This is particularly true of ineffective assistance claims. See, e.g., Primus, *supra* note 51, at 691–97 (detailing structural problems with relying on state collateral review to enforce right to effective counsel). The only available study of success rates in state postconviction proceedings found that state courts granted ineffective assistance of counsel claims at a rate of eight percent and other Sixth Amendment claims at a rate of only one percent. Flango & McKenna, *supra* note 72, at 259 tbl.12. Still, without more empirical research, and with so much variance in the scope of review provided by the different states, generalized conclusions are premature.

¹⁶³ Given the empirical uncertainties about existing state judicial review of criminal cases, as well as uncertainty about how quickly our proposal might lead to improvements in state defense representation systems, we do not foreclose future changes—including cut-backs—in the scope of postconviction review of criminal cases by state courts. The approaches discussed in this section should be flexible enough to allow for serious consideration of future changes, but any such changes must await further study and analysis.

plea judicial review of claims of constitutional error in those cases. This assumption is warranted for reasons both legal and practical.¹⁶⁴ Should the states fail to maintain robust postconviction review, however, we argue in the following Section that the Suspension Clause would prohibit our proposed cutback of federal habeas.

A. *The Suspension Clause Applies to Statutory Federal Habeas Review of State Criminal Cases*

The Suspension Clause, ratified in 1789 as part of the original Constitution, provides, “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁶⁵ In the eighteenth century, courts did not extend habeas relief to those in custody for a criminal judgment, and the Court has never squarely held that the Clause limits the suspension of federal habeas for state prisoners convicted of crime. Federal habeas review for convicted state prisoners was first guaranteed by a statute that Congress adopted in 1867.¹⁶⁶ The Fourteenth

¹⁶⁴ As a legal matter, although it may be convenient for states to model their own postconviction remedies after federal habeas corpus review, it may not always be appropriate to do so. The *Danforth* Court made clear that various judicially imposed restrictions on federal habeas derive from the unique nature of *federal* review and need not affect the scope of state court review. 128 S.Ct. at 1040 (“[C]ases [such as *Teague*] adjusting the scope of federal habeas relief . . . [are] based on statutory authority that extends only to federal courts applying a federal statute [and] cannot be read as imposing a binding obligation on state courts.”). Congressional restrictions on the writ also reflect specific concerns about federal court review of state court proceedings, not concerns about review of criminal convictions generally.

There are many practical and prudential reasons for states to maintain review procedures both more robust and more flexible than federal habeas review, including the need to efficiently address state and federal claims together, to exercise direct control over their own court systems, to respond to identified problems more quickly and creatively, and to adapt federal constitutional rules to local needs and conditions. See Hutton, *supra* note 158, at 443–46 (arguing that states have superior ability to provide postconviction review). Postconviction remedies, even if first adopted partly to avoid federal habeas review, have become generally accepted in many states. Consider one Texas judge’s analysis of potential state interests in broad postconviction review:

Although an emphasis on the initial trial might militate in favor of the states restricting the scope of collateral review, specific state concerns weigh on the other side of the balance. For example, a state constitution or statute may independently reflect a policy decision to afford broad postconviction review. . . . Another justification for broader state [than federal] review of final state convictions is the supervisory authority that the states’ highest courts possess over the entire state judicial system.

Charles F. Baird, *The Habeas Corpus Revolution: A New Role for State Courts?*, 27 ST. MARY’S L.J. 297, 342, 344 (1996).

¹⁶⁵ U.S. CONST. art. I, § 9, cl. 2.

¹⁶⁶ See *Felker v. Turpin*, 518 U.S. 651, 659–60 (1996) (“Before the Act of 1867, the only instances in which a federal court could issue the writ to produce a state prisoner were if the prisoner was ‘necessary to be brought into court to testify,’ was ‘committed . . . for any

Amendment, however, which broadened both the definition of federal citizenship and the reach of federal law, arguably extended the protection of the Suspension Clause to those incarcerated after conviction by the states.¹⁶⁷

Several habeas decisions of the Court lend indirect support to this conclusion, either by assuming it to be true for purposes of the case,¹⁶⁸ by alluding to it in dictum,¹⁶⁹ or, as in the recent case of *Boumediene v. Bush*,¹⁷⁰ by relying on habeas precedents involving both state and federal criminal defendants to interpret and apply the Suspension Clause to cases that it clearly covers.

Boumediene, which contains the Court's most extensive discussion of the Clause, involved a challenge to a statute barring habeas review for aliens alleged to be "enemy combatants" and held in federal custody at the U.S. naval base in Guantanamo Bay, Cuba.¹⁷¹ In holding that the Clause prohibits the elimination of habeas review unless there is an alternative form of federal adjudication that can serve as an "adequate substitute" for the Great Writ,¹⁷² the *Boumediene* Court relied upon habeas cases involving both the statu-

act done . . . in pursuance of a law of the United States,' or was a 'subject or citizen of a foreign State, and domiciled therein,' and held under state law." (alterations in original) (citations omitted)).

¹⁶⁷ See Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994) (arguing that Fourteenth Amendment constitutionalized federal habeas review of state criminal convictions to ensure supremacy of federal law); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221, 1244 (1973) (arguing that adoption of Fourteenth Amendment contributed to Supreme Court "extend[ing] the scope of the suspension clause").

¹⁶⁸ In *Felker v. Turpin*, the Court upheld AEDPA's restrictions on "second or successive" habeas petitions. 518 U.S. at 662–64. Although the Court noted that "[t]he writ of habeas corpus known to the Framers was quite different from that which exists today," the Court "assume[d] . . . that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789." *Id.* at 663–64. The Court held that the challenged aspects of AEDPA did not violate the Suspension Clause because they fell "well within the compass of th[e] evolutionary process" of equitable principles that regulate abuse of the writ of habeas. *Id.* at 664.

¹⁶⁹ In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court refused to find that Congress had statutorily withdrawn jurisdiction over federal habeas claims filed by detained immigrants absent a "clear, unambiguous, and express statement of congressional intent." *Id.* at 314. Justice Stevens, writing for the majority, explained that "regardless of whether the protection of the Suspension Clause encompasses all cases covered by the 1867 Amendment extending the protection of the writ to state prisoners, or by subsequent legal developments, at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *Id.* at 300–01 (citations omitted) (quoting *Felker*, 518 U.S. at 663–64).

¹⁷⁰ 128 S. Ct. 2229 (2008).

¹⁷¹ *Id.* at 2240.

¹⁷² *Id.* at 2271–74 (concluding that Detainee Treatment Act of 2005 failed to provide constitutionally "adequate substitute" for habeas).

tory version of the writ for state prisoners¹⁷³ and the analogous statute for persons convicted of federal crimes.¹⁷⁴ Based on this jurisprudence, we believe that when squarely presented with this issue, the Court will acknowledge that the Suspension Clause provides at least some level of constitutional protection for federal judicial review of the constitutional rights of persons serving state sentences.

B. So Long As State Appellate and Postconviction Review Remains Intact, Restricting Habeas Review Will Not Violate the Suspension Clause

Interpreting the Suspension Clause to limit suspension of the habeas review provided to state prisoners as of 1867 does not mean, of course, that any reduction in the scope of the writ is barred. For example, the Court has held that significant procedural restrictions, such as AEDPA's limits on successive petitions, can be imposed without violating the Suspension Clause.¹⁷⁵ But under *Boumediene* it is also clear that substantive restrictions on the scope of habeas can survive a Suspension Clause challenge only if an "adequate substitute" is available.¹⁷⁶ As interpreted in *Boumediene*, the Clause requires that any adequate substitute for habeas review must provide the prisoner with, at a minimum, "a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law" and must provide the reviewing court with "the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy."¹⁷⁷

In *Boumediene*, the statute challenged as an unconstitutional suspension of the writ had stripped the federal courts of jurisdiction over any habeas petition filed by those incarcerated at Guantanamo. The Department of Defense had instead created Combatant Status

¹⁷³ *Id.* at 2273 (citing *Williams v. Taylor*, 529 U.S. 420, 436–37 (2000) (involving state prisoner habeas petition under 28 U.S.C. § 2254 (2006))).

¹⁷⁴ *Id.* at 2263–66 (discussing cases involving federal prisoner habeas statute, 28 U.S.C. § 2255).

¹⁷⁵ *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (upholding AEDPA's restrictions on successive petitions). The Court itself curtailed federal habeas review in *Stone v. Powell*, barring federal habeas review of Fourth Amendment claims where petitioner had "opportunity for full and fair litigation" of claim in state court. 428 U.S. 465, 494 (1976). Justice Brennan's lead dissent argued, without mentioning the Suspension Clause, that the restriction should have been left to Congress, *id.* at 506 (Brennan J., dissenting), implying that the Suspension Clause would not preclude significant congressional reductions in the substantive scope of habeas.

¹⁷⁶ 128 S. Ct. at 2240, 2276 (holding that review procedures created by Detainee Treatment Act of 2005 "are not an adequate and effective substitute for habeas corpus").

¹⁷⁷ *Id.* at 2266 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

Review Tribunals (CSRTs) to adjudicate disputes over a detainee's status as an "enemy combatant," and Congress—in the Detainee Treatment Act of 2005 (DTA)—had provided limited judicial review in the Court of Appeals for the District of Columbia.¹⁷⁸ Because the statute failed to provide the opportunity to present new evidence to the federal court, and failed to authorize the court to order a detainee's release, the Supreme Court ultimately rejected the government's claim that such limited federal appellate review could be an adequate substitute for habeas.¹⁷⁹

The most important aspect of the *Boumediene* opinion for present purposes is its explanation that the "adequacy" of any alleged federal "substitute" for habeas must be evaluated in light of the context of prior litigation.¹⁸⁰ The defects in the DTA's judicial review process proved fatal to the statute in large part because the CSRTs themselves provided very limited procedural safeguards, thus creating a "considerable risk of error in the tribunal's findings of fact."¹⁸¹ The Court was careful, however, to distinguish the statutory scheme in *Boumediene* from judicial review of detention based on a criminal conviction. The Court emphasized that where the original detention proceedings themselves are more rigorous—"e.g., in post-trial habeas cases where the prisoner already has had a full and fair opportunity to develop the factual predicate of his claims"¹⁸²—substituting limited federal appellate review for broad access to habeas might be permissible.¹⁸³

If habeas were limited according to our proposal, only four narrow avenues of federal judicial review of noncapital state criminal cases would remain: (1) Supreme Court certiorari review on direct appeal; (2) Supreme Court certiorari review of any state postconviction proceedings; (3) statutory habeas review in the lower federal courts for those few cases that fall within the categories where habeas would be preserved; and (4) review pursuant to a petition for an original writ of habeas corpus filed in either the lower federal courts or the Supreme Court pursuant to 28 U.S.C. § 2241, which our proposal would not alter. For most state prisoners, the likelihood of meaningful review of constitutional claims through these channels would be

¹⁷⁸ *Id.* at 2241 (narrating genesis of CSRTs and Detainee Treatment Act of 2005).

¹⁷⁹ *Id.* at 2274–76.

¹⁸⁰ *Id.* at 2267–71 (asserting that "the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings" and developing examples).

¹⁸¹ *Id.* at 2270.

¹⁸² *Id.* at 2273.

¹⁸³ *Id.*

minute, and future habeas petitioners would surely challenge our proposal as a violation of the Suspension Clause.

Under *Boumediene*'s principle that the adequacy of any federal-court substitute for habeas depends on the prior proceedings mandating detention, however, our proposal will not violate the Suspension Clause *so long as* the states continue to provide *not only* a rigorous and Due Process-compliant initial adjudication of guilt *but also* reasonable levels of state appellate and postconviction review. Under *Boumediene*, state judicial proceedings cannot be an adequate substitute for habeas, but those proceedings can provide the necessary context in which even a severely limited federal judicial forum can nevertheless suffice as an adequate substitute for habeas.

As the *Boumediene* Court noted, criminal defendants generally enjoy an initial opportunity to develop the facts of their cases and seek relief for federal constitutional claims before an impartial judicial officer at trial.¹⁸⁴ Furthermore, although not required to do so as a matter of due process, all states today provide judicial review of criminal convictions. Since the 1960s and early 1970s, when criticisms of the adequacy of state appellate and postconviction remedies were common,¹⁸⁵ there has been a dramatic change in state court review of criminal judgments.¹⁸⁶ The adoption of modern postconviction remedies has redressed former systemic inadequacies of ancient writs of error.¹⁸⁷ Judicial review of criminal judgments in the states is far from

¹⁸⁴ *Id.* at 2268–69. All states today must provide criminal defendants with the right to a trial that complies fully with the Due Process Clause and includes the opportunity to raise constitutional claims concerning the investigation and adjudication of the case.

¹⁸⁵ See, e.g., Carroll, *supra* note 94, at 396 (writing in 1975 that “[p]resent state postconviction remedies are obsolete and resort to them is costly and uncertain”); Reitz, *supra* note 19, at 472 (noting that, with few exceptions, states in 1960 were not only “indifferen[t] to reform but outright hostil[e] towards development of postconviction remedies”). Reitz also reported that, as of 1959, a record was available in only 18% of the cases filed in the Supreme Court seeking review of state postconviction proceedings, as compared to 61% of petitions filed by federal prisoners. *Id.* at 475 & n.75; see also Michael F. Cole & Jeffrey Small, Note, *State Post-conviction Remedies and Federal Habeas Corpus*, 40 N.Y.U. L. REV. 154, 157–61 (1965) (noting traditional limitations of coram nobis and habeas in state court to correct constitutional error).

¹⁸⁶ See 1 DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS § 2:5, at 41–45 (2008) (listing, for each state, date postconviction remedy was adopted).

¹⁸⁷ See *id.* § 1:3, at 4–5 (noting that thirty-eight states use modern postconviction remedy created by statute or court rule); *id.* § 1:4, at 7 (noting that presently in all states remedy may be used to raise claims that conviction was obtained in violation of constitutional right); *id.* § 2:4, at 35–36 (noting that prior to modernization of state postconviction remedies, grounds for relief were limited to fundamental error). The National Conference of Commissioners on Uniform State Laws adopted a Uniform Post-Conviction Procedure Act in 1955 and revised it in 1966 and 1980. For the several versions, see 3 WILKES, *supra* note 186, at app. A. The federal statute, 12 U.S.C. § 2255 (2006), also served as a model

uniform,¹⁸⁸ and it is undoubtedly more protective of constitutional rights in some states than in others at any particular moment in time.¹⁸⁹ But in every state the combination of appellate and postconviction review provides at least a reasonable opportunity for convicted defendants to litigate both (1) claims of constitutional error based in the trial court record and (2) constitutional claims that require the development of facts outside of that record.¹⁹⁰ Therefore, as long as a particular state does not respond to our proposed cutback of federal habeas by abdicating its own commitment to vindicate federal rights in state court, our proposal will pass muster under *Boumediene* and the Suspension Clause.

*C. If State Appellate and Postconviction Review Is Unreasonably
Curtailed, the Court Should Invoke the Suspension Clause
To Restore Broader Habeas Review*

Conversely, if a particular state were to respond to our proposed cutback of federal habeas by eliminating or substantially curtailing its own appellate and postconviction review processes, Suspension Clause analysis of our proposal would lead to the opposite conclusion.

for some states. Professor Wilkes's treatise notes that for many states, the remedy is modeled after one version of the Uniform Act or the federal statute. *See, e.g.*, 1 WILKES, *supra* note 186, § 12:2, at 715–16 (noting that Florida's remedy is modeled after section 2255); 2 WILKES, *supra* note 186, § 17:2, at 4–5 (noting that Indiana's law is based on the 1966 version of the Uniform Act); *id.* § 20:2, at 283–89 (noting that Kentucky's law is based on section 2255); 3 WILKES, *supra* note 186, § 39:2, at 144 (noting that Oklahoma's law is based on 1966 version of Uniform Act).

¹⁸⁸ *See* DAVID B. ROTTMAN & SHAUNA M. STRICKLAND, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION, 2004, at tbl.22 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sco04.pdf> (charting scope of each state court's mandatory or discretionary review for criminal cases); LAFAYETTE ET AL., *supra* note 11, § 27.1(a) (reviewing state appellate procedures and noting that in handful of states, review of felony convictions remains at discretion of state's highest court). For a fifty-state survey of postconviction remedies for state prisoners, see WILKES, *supra* note 186.

¹⁸⁹ For criticisms of the fairness of current state postconviction remedies see, for example, Primus, *supra* note 51, at 710–13, criticizing state review of claims of ineffective assistance of counsel; Steiker, *supra* note 158, at 343–44, diagnosing state postconviction remedies that deny counsel and/or effective hearings as “continu[ing] primarily to frustrate rather than advance enforcement of federal rights”; Stevenson, *supra* note 76, at 360, arguing that states have not “provide[d] the kind of review that the AEDPA assumes when it requires federal judges to defer to state court rulings and findings or otherwise protects state court judgments”; and Williams, *supra* note 76, at 932, denouncing Texas postconviction processes for, inter alia, failure to provide competent counsel or resolve factual disputes with evidentiary hearings, allowing prosecutors to write findings of fact, and producing decisions “without oral arguments, written opinions or any meaningful substantive review of most of the petitions presented.”

¹⁹⁰ *See, e.g.*, 1 WILKES, *supra* note 186, § 3:19, at 60–61 (noting Alabama law regarding access to evidentiary hearings); *id.* § 5:18, at 167 (Arizona law); *id.* § 6:17, at 229–30 (Arkansas law); *id.* § 7:2, at 307 (California law).

Because the Clause not only provides the Supreme Court with the ability to monitor state judicial enforcement of federal rights on an ongoing basis but also affords it discretion to invalidate all or any part of our proposed statutory amendment, the Court may restore broader habeas review for criminal cases in a particular state if warranted.

The Supreme Court has yet to use its powers under the Suspension Clause in precisely this way. But Justice Brennan's 1961 Utah speech¹⁹¹ suggests the line of reasoning the Court should adopt. Justice Brennan articulated two different reasons for expanding federal habeas review for those serving state sentences: (1) defiance by state judges in the face of what they considered an unjustifiable incursion of federal law into the traditional domain of the states and (2) the lack of state postconviction proceedings and remedies adequate to adjudicate defendants' constitutional claims.¹⁹² If either or both of these two conditions were to recur in a particular state as a consequence of our proposal, the Court should find our proposed habeas restrictions to be a violation of the Clause *as applied to* criminal cases from that particular state. Such a ruling would effectively reinstate the existing, post-AEDPA version of habeas for state prisoners in that particular state, allowing habeas petitioners to raise any claims that would be cognizable in federal habeas today.¹⁹³

To put it another way, our proposal satisfies the Suspension Clause because of the existing context of state appellate and postconviction review of criminal cases. If that context changes in the future, in a manner that substantially diminishes the opportunity for enforcement of federal constitutional rights by state courts, then the Clause, as interpreted in *Boumediene*, requires that our proposed restrictions on habeas be lifted.

D. Additional Considerations

Two additional points are worth emphasizing about the operation of the Suspension Clause if federal habeas review for state prisoners is curtailed. First, as a general matter, a one-size-fits-all approach for state review of criminal judgments should not be required, nor should states be required to make significant changes to their existing review procedures. For example, the fact that some states make appellate

¹⁹¹ Brennan, *supra* note 24.

¹⁹² *Id.* at 439–41.

¹⁹³ Difficult issues of timing, retroactive effect, and application of AEDPA's rules (such as the statute of limitations) would arise in connection with such a decision, but are beyond the scope of this Essay to address.

review discretionary instead of providing an appeal of right¹⁹⁴ should not make a difference in assessing the constitutionality of the proposed restrictions under the Suspension Clause.

Second, because the Court's analysis under the Suspension Clause is inherently flexible, and because the risk of constitutional error may change as the procedures associated with detention change, a ruling upholding the proposed cutbacks in habeas review should neither freeze state review mechanisms in place nor stifle experimentation. In particular, as the benefits of federally supported reform of state defense representation services gradually accrue, it may be desirable to allow states to make a tradeoff similar to the one proposed here by redirecting resources they currently spend on appellate and postconviction litigation toward the effort to improve the quality of criminal justice at the front end.¹⁹⁵ But any such changes in state judicial review of criminal cases should be based on careful study and analysis. The Court, through the Suspension Clause, can ensure that those detained by the states will always have an adequate judicial forum in which to raise the constitutionality of their detention. If the risk of unlawful detention in a state with particularly weak procedural protections is too high, the Court can invalidate the restrictions on habeas and reinstate broader habeas review of criminal cases from that particular state.

We believe that this solution, which relies on the Supreme Court as the ultimate authority to decide whether criminal defendants have

¹⁹⁴ See *supra* note 188; Russell S. Cook, *In Pursuit of Justice: The Right To Appeal a Life Sentence or Its Equivalent in West Virginia*, W. VA. LAW., Oct. 2002, at 18, 18–19 (reporting that only New Hampshire and West Virginia do not provide intermediate appeal of right); see also MICH. COMP. LAWS ANN. § 770.3(d) (West 2006) (“All appeals from final orders and judgments based upon pleas of guilty or nolo contendere shall be by application for leave to appeal.”).

Under our approach, the states may also keep, or adopt, reasonable procedural rules for raising and preserving claims of error for review after conviction (for example, “plain error” and waiver rules, forfeiture of pretrial and guilt-related claims after a guilty plea, filing deadlines, filing fees, retroactivity rules, and limits on successive petitions). Review of nonrecord claims, as well as innocence claims, may be limited to defendants who are still in custody at the time of filing (a historic limitation on the habeas remedy), and those convicted of misdemeanors might not be afforded access to review at all. Evidentiary hearings may be granted at the discretion of the court, and counsel need not be required following direct appeal. Reasonable limitations on the review of innocence claims may be imposed, such as requirements of due diligence and probable materiality (for example, cases in which identity was contested at trial). None of these variations would so dramatically alter the basic attributes of state review proceedings that the Supreme Court would need to demand a more rigorous “substitute” under the Suspension Clause.

¹⁹⁵ Indeed, early in the process of thinking about some of these issues we explored this possibility, along with others that we have subsequently rejected. See Nancy J. King & Joseph L. Hoffmann, *The 2008 James Otis Lecture: Envisioning Post-conviction Review for the Twenty-First Century*, 78 Miss. L.J. 433 (2008).

a reasonable opportunity to litigate the constitutionality of their custody in state court, is consistent with both good policy and the long history of habeas. It is consistent with good policy because resources that would otherwise be spent on ineffectual case-by-case review that is not constitutionally mandated can instead be spent trying to avoid constitutional error in the first place. The constitutionally minimum level of postconviction review in the states is also best achieved by avoiding an explicit congressional quid pro quo that would make the proposed statutory restrictions of habeas contingent on the states meeting new federal standards for judicial review. If Congress tried to write minimum standards for state appellate and postconviction review, those standards would have to be at least as protective as the Suspension Clause requires. The result might be a requirement of more judicial review in the states than the Court would mandate under the Clause. Moreover, congressional standards for state review procedures would likely waste resources on litigation. Rather than dealing only with the constitutionality of the habeas statute as applied, courts would also have to determine the meaning of the statutory standards.

Our Suspension Clause analysis also comports with the history of habeas. The Supreme Court has long viewed the statutory version of habeas applicable to state prisoners as a special kind of statute, resting upon a foundation of common law dating back centuries, and therefore subject to the Court's interpretation and control to a greater extent than most other federal statutes. The Court has specifically noted, citing numerous examples, its "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."¹⁹⁶ The Court's longstanding practice of exercising control over the scope of the writ, including its frequent adjustments of that scope in response to changing conditions, strongly suggests that the Court, and not Congress, is the proper institution to decide when the conditions are appropriate for the curtailment or expansion of habeas review. The Suspension Clause, as construed in *Boumediene*, provides the constitutional authority for the Court to do exactly that.

We recognize that any statutory restriction of habeas review will prompt prisoners seeking habeas relief to challenge the new habeas statute under the Suspension Clause, as occurred when Congress adopted AEDPA. Those challenges will be decided initially in the dis-

¹⁹⁶ *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

strict courts.¹⁹⁷ Any Suspension Clause litigation generated by our proposal thus would initially impose a new and additional burden on the federal courts,—which might appear to undermine our goal of conserving resources. This burden, however, should diminish quickly as the Supreme Court decides whether the review processes in various states are such that the proposed new habeas restrictions comply with the Suspension Clause. After all, the Court expeditiously resolved the most fundamental constitutional challenges to AEDPA, allowing the lower federal courts to dispose of such claims summarily.

While the Court may have to evaluate the constitutionality of the proposed statute as applied in several different states with varying appellate and postconviction review, it could do so in one or two consolidated cases. The Court also would have to remain open to the possibility that subsequent developments in a particular state, such as a subsequent decision to abolish or curtail postconviction review, might require revisiting the Suspension Clause issue. For the lower federal courts, however, the burden of Suspension Clause litigation will be a temporary rather than a long-term problem.

One final observation is required. Suspension Clause jurisprudence is not well developed. The Supreme Court may not interpret the Clause as we lay out here but may instead conclude that its limits do not depend upon variation in state judicial review processes. Or the Court could decide, contrary to the arguments we have made, that the Suspension Clause simply does not apply to the modern statutory version of the writ for state prisoners. The Court might decide, as Chief Justice Burger once contended, that the Clause protects only the version of habeas that existed in 1789 and bars only suspensions of the writ for those in federal custody.¹⁹⁸ Or the Court might conclude that the Suspension Clause protects the post-Civil War statutory version

¹⁹⁷ For example, a district court might receive a habeas petition containing the following four claims: (1) a claim of factual innocence, supported by a proffer of newly discovered evidence; (2) a claim of a *Miranda* violation in connection with the police investigation; (3) a claim of ineffective assistance of counsel at trial; and (4) a claim that our proposed new habeas statute, which effectively bars the *Miranda* and ineffective assistance claims, violates the Suspension Clause. As a threshold jurisdictional matter, the district court would have to rule on the Suspension Clause claim. Resolution of that claim would require the court to apply *Boumediene's* context-specific analysis to the existing review provided for the federal constitutional claims in the petitioner's state. If the court rejected the Suspension Clause claim, it could quickly dispose of the *Miranda* and ineffective assistance claims as not cognizable under the new version of the writ. Finally, the court would have to consider whether the petitioner's proffer of new evidence might possibly meet the strict standard for innocence claims set out in the new statute.

¹⁹⁸ *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted.").

of habeas,¹⁹⁹ but not the expansions that originated with the Warren Court.

If the Court were to construe narrowly its constitutional authority to oversee restrictions on the writ, we would alter our proposal slightly. In that event, Congress should enact the same scaled-back version of habeas but make the application of those restrictions expressly contingent on a state's willingness to provide adequate levels of appellate and postconviction review of criminal cases. For example, Congress could require, as a quid pro quo for the new version of habeas, that the state provide appellate review, with counsel, of all record-based constitutional claims; some form of judicial review of nonrecord claims that includes a mechanism for developing the necessary facts; and some means of investigating and disposing of postconviction claims of factual innocence.²⁰⁰

As noted above, we consider statutory standards for state judicial review of criminal judgments less desirable than judicially created ones, primarily because they may lead to additional wasteful litigation. But if forced to choose between congressional standards for state appellate and postconviction review and no federal standards at all, we would choose the former.

CONCLUSION

This Essay addresses two problems: the federal government's failure to develop an alternative to wasteful federal habeas review as a way to enforce constitutional criminal procedure rights in state criminal cases, and the political and fiscal challenges facing elected state officials in providing adequate defense representation to their citizens. Our proposal goes to the root of each problem, eliminating ineffectual habeas review and presenting a new federal approach that directly addresses both of the challenges that have discouraged state and local efforts to comply with constitutional guarantees.

The proposal also addresses the political realities that make these two problems—the broken remedy and the unfulfilled right—so intractable. Many liberals do not trust state courts to adequately protect individual rights without robust habeas review. Many conservatives view any effort to improve defense representation as “soft on

¹⁹⁹ See Steiker, *supra* note 167, at 868 (noting that Reconstruction Congress expanded scope of habeas to state criminal proceedings).

²⁰⁰ Innocence commissions with fact-finding and investigatory power are a promising alternative. The idea of an “innocence commission” is relatively new in the United States, having been implemented in only six states. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1714 & n.412 (2008). This approach to handling posttrial innocence claims has been used with some success in Canada and Great Britain. *Id.* at 1714–15.

crime,” essentially electoral suicide. Reform stalls; as a result, neither the wastefulness of habeas nor defense underfunding is addressed.

Our proposal offers a solution that responds to concerns from both sides of the political spectrum. For those who would reject our proposed habeas restriction as a withdrawal of the only hope for state prisoners to escape the oversights and misdeeds of state courts, we cite empirical evidence of the utter futility of habeas review today. For those who would prefer to enhance federal court oversight of state noncapital cases through the Great Writ, we explain why that vision will never be more than a fairy tale. For those who would argue that cutting back habeas would lead to the concomitant erosion of state judicial review, we map out a Suspension Clause analysis that would ensure that state prisoners continue to receive adequate judicial review of their constitutional claims. For those wary of being associated with any effort to improve indigent defense, we offer a win-win for the states. The proposal allows states to better utilize the funds they would otherwise spend defending noncapital habeas cases in federal court, while providing incentive grants to help them improve defense delivery. The new federal center will identify and promote best practices in indigent defense nationwide but will leave to each state the autonomy to take or leave what the federal center has to offer.

In the end, we envision a transformed three-tiered system of state criminal justice in which (1) the states provide higher-quality trial-level proceedings by improving the quality of defense counsel through the support, encouragement, and financial incentives of the proposed new federal center; (2) the state courts, both on direct appeal and in state postconviction proceedings, continue to fulfill their obligation to provide reasonable levels of review of claims of constitutional error in individual state criminal cases; and (3) the federal courts undertake two subsidiary and supporting roles: (a) the lower habeas courts entertain only the three special categories of habeas claims identified above, in which case-by-case federal review would be most valuable, and (b) the Supreme Court, using its authority under the Suspension Clause, ensures that the states do not abdicate the responsibility to provide reasonable levels of posttrial and postplea judicial review.

This fresh look at federal oversight of state criminal justice suggests that it is time for a new kind of conversation, one that does not simply assume that the way we have been doing things for the past fifty years is the way that we should continue to do them in the future. It is time to start over and ask again: What is the best way—the most effective and most efficient way—for the federal government to ensure that federal constitutional rights are observed in state criminal

proceedings? In our view, the current system cannot possibly be the right answer. Instead, it is time to implement a new paradigm, one that relies on state courts to do the heavy lifting of case-by-case judicial review but uses the leadership and financial strength of the federal government to bring about a sea change in state systems of defense representation.