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STATE CONVICTS AND FEDERAL COURTS: REOPENING THE HABEAS CORPUS DEBATE

Larry W. Yacklet†

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INTRODUCTION

I know what you are thinking. Of all the things that can conceivably happen in this field, the least likely (the *very* least likely) is that Congress will take a fresh look at federal habeas corpus for state prisoners. It was only in 1996 that Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA),¹ which ostensibly “reformed” the scheme by which prisoners employ federal habeas to challenge state criminal convictions or sentences.² Passing a bill of this magnitude is no small feat. Once such legislation receives approval from both houses of Congress and the President, no one has any appetite to resume a political battle that, for good or ill, the enacted statute has resolved. Realistically, the habeas law we currently have is the habeas law we are going to have for the foreseeable future.³ Nevertheless, in this academic setting I have a certain warrant,

† Professor of Law, Boston University School of Law. I would like to thank John Blume, Winston Bowman, Krikor Dekermenjian, Eric Freedman, William Kaleva, Ramon Tabtiang, and my second-year seminar students at the University of Hawaii for their help with this Article.

¹ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

² See, e.g., *Aparicio v. Artuz*, 269 F.3d 78, 89 (2d Cir. 2001) (noting that “[t]he enactment of the Antiterrorism and Effective Death Penalty Act of 1996 . . . created a tumultuous sea change in federal habeas review, especially affecting the petitions of state prisoners” (citation omitted)). I mean in this Article to deal exclusively with federal adjudication of claims that were or might have been litigated previously in the course of state criminal proceedings.

³ I do not overlook bills pending in this Congress that would amend AEDPA in various ways. See, e.g., Streamlined Procedures Act of 2005, S. 1088, H.R. 3035, 109th Cong. (2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_

even a responsibility, to set political realism aside. That is what I mean to do.

In Part I, I contend that the ordinary reasons for letting new legislation lie do not apply where AEDPA is concerned. The circumstances in which this statute was adopted defy any serious expectation that it may yet work if given the chance. The federal habeas system is in chaos; this is not an occasion for deferred maintenance.

In Part II, I argue that we (or most of us) agree that inferior federal courts should have authority to entertain challenges to state criminal judgments. We should both acknowledge this consensus and understand why it exists. I offer two explanations: We think federal jurisdiction is needed largely because state courts are not institutionally positioned to enforce federal procedural safeguards in criminal cases and also because states make a poor fist of providing competent legal representation to indigent defendants. Consequently, we agree (or ought to agree) that federal adjudication should serve two functions. First, if state courts *do* determine the merits of federal claims at trial or on direct review, inferior federal courts should ensure that their judgments come reasonably close to the mark. Second, if state courts do *not* determine the merits of federal claims, federal courts should ensure that they have sufficient reasons for failing to do so.

In Part III, I describe how we might set about establishing a better system to achieve the ends of federal adjudication. In that connection, I propose that we can revisit these problems with profit only if we disentangle our analysis from related quarrels over capital punishment. I know this proposal seems unrealistic, but I insist (in this indulgent setting) that the death penalty skews sound thinking about the basic structural arrangements that should be put in place. With capital punishment cases out of the picture, we can think clearly about the form that a revised framework should take.

I propose adopting a scheme that sits halfway between the collateral review model we have and the appellate model others have suggested. Within this hybrid system, federal courts would have jurisdiction to review state court judgments regarding federal claims, but they would be authorized to overturn only state determinations that are unreasonable, not merely erroneous. State convicts would be required to seek direct review in state court before approaching the federal courts, but they would no longer be asked to exhaust state postconviction avenues before advancing their federal claims. Federal

cong_bills&docid=f:s1088is.txt.pdf. However, those initiatives reflect no serious rethinking of fundamentals. They would eliminate habeas corpus jurisdiction in many instances, subject to extremely narrow exceptions of little practical significance. Where they would allow federal courts to operate, they would perpetuate and aggravate complex procedural arrangements that frustrate efficiency or anything like efficiency.

courts would not reinforce state procedural bar regimes. Existing doctrine for default cases would be abandoned in favor of more flexible arrangements drawn from older federal practice. Indigent prisoners who wish to proceed in federal court would have access to lawyers to prepare their claims. But they would not be allowed more than one chance to appear in federal court. Under the hybrid model, multiple actions by a single prisoner would come to an end, subject to certain exceptional circumstances in which habeas corpus would remain available.

I

BEEN THERE, DONE THAT

There usually are perfectly sound reasons for leaving recently established arrangements alone. New legislation may be no better than the sausage factory that produced it. Regardless, we dare hope it embodies the considered policy choices of the prevailing majority. Where that is true, we should scarcely be surprised if the vanquished minority is displeased; political losers, after all, are not supposed to like the innovations they resisted in the first instance. Sometimes, we may be so ambitious as to hope that the provisions of an elaborate new statute may fit together in a coherent plan that would be compromised if any of its component parts were adjusted. Perhaps more often (or so we like to think), complex legislation is not simply rammed down the throats of minority members, but rather represents a compromise or set of compromises between contending policies. The legislative language in a recent enactment has been vetted in drafting and mark-up sessions in which participants with varying points of view worked together toward a sensible, politically acceptable conclusion. The resulting package may not be perfect, or even close to perfect. It may, in fact, be very far from perfect. Yet for the moment it is the best we can do in our untidy democracy, and there is no reason to think we can do any better by trying again any time soon. Certainly, if a complex statutory package genuinely reflects a constellation of political deals, we should not expect that it will operate with the efficiency that an ideologically pure enactment might achieve.

In this instance, however, there is no basis for any of these commonplace explanations for leaving well enough alone. The story is familiar, so I will only sketch the outlines.⁴ For years, many Republicans and some Democrats supported bills to restrict federal habeas.⁵ The point of their efforts was to keep death row prisoners from using

⁴ See Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *BUFF. L. REV.* 381 (1996) [hereinafter Yackle, *Primer*]; Larry W. Yackle, *The Habeas Hagscope*, 66 *S. CAL. L. REV.* 2331 (1993) [hereinafter Yackle, *Hagscope*].

⁵ See Yackle, *Primer*, *supra* note 4, at 422–43.

the writ to avoid or postpone execution.⁶ Most Republican bills would have established new procedural requirements for all state prisoners to meet in order to put the merits of their claims before federal courts.⁷ When those bills foundered, the Supreme Court took matters into its own hands without benefit of any change in the habeas statutes.⁸ In the main, the Court also established procedural hurdles for prisoners to clear, ostensibly keeping federal habeas from frustrating competing state interests in law enforcement and the finality of judgments.⁹ The result was time-consuming and expensive federal litigation over satellite matters that had little or nothing to do either with enforcing federal rights or with accommodating legitimate state concerns.¹⁰ In point of fact, finality became a more elusive goal than it had been before the Court tried to hasten its coming.

The best illustrations are the Court's adjustments to the exhaustion doctrine and the related rules regarding procedural default in state court. Previously, prisoners were asked to defer federal habeas petitions in order to keep federal courts from interfering with ongoing state criminal proceedings.¹¹ By dint of Rehnquist Court decisions, however, prisoners are obliged to exhaust all available state avenues for litigating federal claims in order to allow state courts the opportunity to correct their own errors.¹² In consequence, prisoners not only must press their claims at trial and on direct review, but often must engage in state postconviction proceedings—some of the most

⁶ See Yackle, *Hagioscope*, *supra* note 4, at 2352.

⁷ See Yackle, *Primer*, *supra* note 4, at 423–26.

⁸ See Yackle, *Hagioscope*, *supra* note 4, at 2353, 2367–68.

⁹ See *id.* at 2368.

¹⁰ See *infra* notes 11–15.

¹¹ See *Ex parte Royall*, 117 U.S. 241, 250–51, 254 (1886) (disallowing a habeas petition that would have disrupted an upcoming trial in state court).

¹² My personal favorites are *Murray v. Carrier*, 477 U.S. 478 (1986), and *Edwards v. Carpenter*, 529 U.S. 446 (2000). In *Carrier*, the Court explained that a prisoner who wants to press a claim that state courts declined to consider because of procedural default usually must demonstrate “cause” for the failure to comply with state procedural rules. See *Carrier*, 477 U.S. at 485. The Court allowed that defense counsel mistakes can constitute cause but only if counsel’s behavior was ineffective in the constitutional sense. See *id.* at 488. But since an argument that counsel’s conduct was ineffective counts as a constitutional claim, the prisoner is obliged by the exhaustion doctrine to present that independent Sixth Amendment claim to the state courts in order to put himself in a position to argue in federal court that counsel’s service was constitutionally flawed—not as a claim for federal habeas relief, but as the basis for finding cause for procedural default with respect to the underlying claim the prisoner wishes to pursue. See *id.* at 488–89. Then, in *Carpenter*, the Court held that if there is no remaining state avenue by which to present the ineffective-assistance claim to the state courts, the prisoner must establish cause for failing to raise that claim in state court, thus to put himself in position to ask the federal court to find counsel’s performance ineffective, and thus finally to put himself in position to litigate the underlying claim. See *Carpenter*, 529 U.S. at 452–53.

obscure and Byzantine processes known to American law.¹³ If at any point along the way a prisoner fails to advance a claim in the manner specified by state law, he very likely forfeits not only the opportunity to litigate the merits in state court, but also the chance for federal habeas adjudication.¹⁴ The Court's doctrine for procedural default cases is demonstrably problematic for reasons I examine later.¹⁵

In time, the Justices sought bigger game on two fronts. First, Chief Justice Rehnquist formed a committee of the Judicial Conference, chaired by former Justice Powell, to propose legislation for death penalty cases.¹⁶ The Powell Committee, in turn, recommended especially state-friendly procedures in capital cases on the condition that the states provide indigent prisoners with effective counsel in state postconviction proceedings.¹⁷ Second, the Court adopted the *Teague* doctrine¹⁸ (another matter that I will defer for the moment). Meanwhile, Republican legislative initiatives also went beyond procedural restrictions to the substance of federal court authority.¹⁹ In particular, some bills contained provisions that would have barred federal courts from entertaining claims that had been fully and fairly adjudicated in state court.²⁰ Democratic leaders resisted procedural restrictions as onerous and viewed the "full and fair" plan as an effort to abrogate habeas corpus for state convicts altogether.²¹ In time, Democrats countered with their own bills meant to make federal habeas more accessible to state convicts, including prisoners facing death.²² At that point, the legislative battle over habeas corpus was more clearly than ever a fight about capital punishment.²³

The stalemate was broken by a confluence of events, two in particular. In 1994, Republicans achieved working majorities in both houses of Congress, and in 1995 the Oklahoma City bombing excited calls for congressional action to combat "terrorism."²⁴ The stage was

¹³ See Michael Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U. L. REV. 513, 530–53 (1988); Yackle, *Hagioscope*, *supra* note 4, at 2366.

¹⁴ See *infra* text accompanying notes 101–04.

¹⁵ See *infra* Part III.C.

¹⁶ See Yackle, *Hagioscope*, *supra* note 4, at 2367.

¹⁷ See AD HOC COMM. ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT AND PROPOSAL (1989), reprinted in HABEAS CORPUS LEGISLATION: HEARINGS ON H.R. 4737, H.R. 1090, H.R. 1953 & H.R. 3584 BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMMITTEE ON THE JUDICIARY, 101ST CONGRESS 45–68 (1990).

¹⁸ See *Teague v. Lane*, 489 U.S. 288, 300–01 (1989).

¹⁹ See Yackle, *Primer*, *supra* note 4, at 426–27.

²⁰ See, e.g., S. 2216, 97th Cong. § 5 (1982).

²¹ See Yackle, *Hagioscope*, *supra* note 4, at 2362–64.

²² See, e.g., H.R. 5269, 101st Cong. (1990).

²³ See Yackle, *Hagioscope*, *supra* note 4, at 2357–76, 2416–23.

²⁴ See Terrell J. Iandiorio, *Federal Postconviction Relief and 28 U.S.C. § 2255(4): Are State Court Decisions "Facts"?*, 71 U. CHI. L. REV. 1141, 1147 (2004).

set for a common legislative drama. It was clear that some “antiterrorism” bill was going to pass and that anything wedged into that bill would pass with it. Republican leaders seized the opportunity finally to limit the federal courts’ authority in habeas corpus—not, of course, exclusively in cases in which petitioners are charged with acts of “terrorism,” but in ordinary cases in which prisoners use habeas to challenge criminal convictions or sentences.²⁵

The drafting work fell to staff lawyers serving the Senate Judiciary Committee. Those drafters did not simply select a prior bill as their model. Nor did they start afresh. The occasion was ripe for anything, and they emptied the committee files of virtually all the restrictive proposals that came to hand. That included many of the procedural requirements that Republicans had tried to impose on all convicts, as well as the bargain the Powell Committee had proposed to offer states with respect to prisoners under sentence of death: even tighter procedural restrictions on federal habeas in exchange for appointed counsel at the postconviction stage of state proceedings. The drafters chose not to revive the “full-and-fair” proposal. That would have provoked members who had voted against it in the past.²⁶ Instead, they drew up a new provision, the now-familiar § 2254(d), by which they hoped to accomplish much the same thing and, into the bargain, capture the essence of *Teague*.²⁷

The drafters and their masters kept their own counsel. They conducted no significant discussions with minority counsel or others over policy, far less over particular language. They submitted to no committee hearings, mark-up sessions, or similar opportunities for testing ideas. Instead, they collected all these disparate elements, framed them in language they considered to be effective, and attached them to the fast-moving vehicle the antiterrorism bill supplied. In the end, habeas accounted for two titles—one containing cut-and-paste amendments to existing habeas provisions in Chapter 153 of Title 28, the other containing a new Chapter 154 housing adaptations of the Powell Committee’s program. The bill shot through committee in both bodies and went to the floor without an explanatory report. The floor debates were extensive, but scarcely rigorous. The bill was adopted by main force, and President Clinton signed it into law (though perhaps *dubitante*).²⁸

²⁵ See DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 114 (2002).

²⁶ See Yackle, *Primer*, *supra* note 4, at 435–36.

²⁷ See *id.* at 382–83.

²⁸ See *id.* at 438–43.

Mark Tushnet and I once argued that AEDPA essentially endorsed what the Court itself had already set in train.²⁹ At least, the Court might have used the occasion provided by new legislation to shape things into a more sensible form—integrating new statutory provisions into existing decisional law, identifying and reconciling discernible rationales, and blending everything together into a more coherent system. That has not happened. As construed by the Court, AEDPA not only failed to reduce the procedural complications the Court's decisions had introduced, but perpetuated the problems the Court had created and even manufactured more. The reason, in part, is that AEDPA is replete with tensions that defy resolution through pragmatic judicial construction.

Consider, for example, that the procedural rules established for all cases, capital and noncapital alike, frustrate the Powell Committee's scheme to give states incentives for supplying indigent death row prisoners with postconviction counsel. Nearly ten years later, not a single state has established a program for appointing counsel sufficient to bring Chapter 154 into play.³⁰ The explanation is plain enough: Lawyers are expensive. Given that the amended provisions in Chapter 153 already give states much of what they might get by invoking Chapter 154, states are not inclined to spend significant public treasure to gain a little more. The best example is § 2244(d)(1) of the Act, which establishes a one-year filing period for all prisoners.³¹ With that filing deadline in place, states are not willing to pony up fees for counsel in state postconviction proceedings merely to trigger the 180-day filing period in § 2263(a) of Chapter 154.³² We are left with an entire chapter of the United States Code, all dressed up with nowhere to go.

There is also tension between the numerous procedural provisions in AEDPA, on the one hand, and § 2254(d), on the other. The procedural rules suggest that Congress is content that state convicts should be able to present federal claims to the federal courts, but concerned that some petitioners are not in earnest and might file federal petitions simply to harass state authorities or, in the case of death row inmates, to postpone execution.³³ Congress's objective, then, is to

²⁹ See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997). I still think, by the way, that we would be better off now if the Court had taken that view of the matter. Then again, it is not as though knowledgeable congressional leaders fully appreciated the bandwagon they were climbing aboard.

³⁰ *But see* Spears v. Stewart, 283 F.3d 992 (9th Cir. 2001) (stating in dicta that Arizona's scheme measures up), *cert. denied*, 537 U.S. 977 (2002).

³¹ See 28 U.S.C. § 2244(d)(1) (2000).

³² See *id.* § 2263(a).

³³ The Conference Committee Report explains AEDPA's purposes as follows: "This title incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to

bring discipline to the system—to make habeas petitioners litigate quickly and efficiently. By contrast, § 2254(d) signifies that Congress's concerns go not to the inefficiency of habeas litigation, but to the substance of federal court authority. The objective, then, is to prevent federal courts from awarding relief even when petitioners press their claims assiduously. Of course, Congress may want both to make prisoners turn square procedural corners and to circumscribe the relief they ultimately stand to win. Still, two quite different conceptions of habeas—and the problems habeas presents—appear to be at work. The manner in which AEDPA was cobbled together suggests that no one thought any of this through at a conceptual level.

The explanation may be, again, that the drafters meant to codify doctrinal innovations the Court had already adopted, and § 2254(d) was their way of capturing the *Teague* doctrine.³⁴ Mark Tushnet and I predicted that the Court would read § 2254(d) essentially to track the explanation of *Teague* that Justice O'Connor and Justice Kennedy offered in their concurring opinions in *Wright v. West*.³⁵ Justice Stevens took that position, more or less, in *Williams v. Taylor*.³⁶ But Justice O'Connor's controlling account of § 2254(d) signaled a different approach.³⁷ More recently, the Court has explained that *Teague* and § 2254(d) are separate ideas and, in cases in which both are engaged, must be implemented seriatim.³⁸ Initially, a habeas court must determine whether *Teague* allows a claim to be entertained at all.³⁹ If so (and the claim is meritorious), the court must decide independently whether § 2254(d) allows the award of federal habeas relief.

This treatment of § 2254(d) illustrates another factor in the curious mix that is now federal habeas corpus law. The Supreme Court will not countenance the idea that any part of AEDPA incorporates prior law. The Justices apparently think that if they read anything in AEDPA in that way, they will be charged with denying the new Act any operative effect and thus frustrating congressional will. There may be something to the familiar canard that every statute must have *some* meaning. But Congress often enacts legislation for the straightforward purpose of codifying or lightly modifying extant judge-made

address the acute problems of unnecessary delay and abuse in capital cases." H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.).

³⁴ See *Teague v. Lane*, 489 U.S. 288, 300–01 (1989).

³⁵ See 505 U.S. 277, 303–04 (1992) (O'Connor, J., concurring) (stating that "the standard for determining when a case establishes a new rule is 'objective,' and the mere existence of conflicting authority does not necessarily mean a rule is new"); *id.* at 306–08 (Kennedy, J., concurring) (arguing that "*Teague* did not establish a deferential standard of review of state-court decisions of federal law"); Tushnet & Yackle, *supra* note 29, at 42.

³⁶ 529 U.S. 362, 381 (2000) (Stevens, J., dissenting on this point).

³⁷ See *id.* at 399 (O'Connor, J., majority opinion on this point).

³⁸ See *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam).

³⁹ See *id.*

doctrine rather than forging some significant change. It is far from clear that each and every provision in AEDPA must alter the state of affairs *ex ante*. In this instance, it makes little sense to insist that § 2254(d) and *Teague* are distinct and must operate independently in the same case, the one following the other.

Recall that *Teague* usually bars federal habeas courts from considering claims that depend on new rules of federal law.⁴⁰ The ostensible idea at work is equity.⁴¹ When the Supreme Court announces a novel proposition of law, fairness requires that the new rule should benefit not only the individual in the case at hand, but also others similarly situated. If the immediate case is in an appellate posture, the new rule should apply to all other petitioners or potential petitioners whose convictions are not yet final because they are still subject to direct review. If the immediate case is in a collateral posture (e.g., it reaches the Court by means of a habeas corpus petition), the new rule should benefit the (much larger) number of prisoners whose convictions are already final in the sense they are *not* open to direct review. The Court is content that new rules should benefit everyone still in the direct-review pipeline, but usually is unwilling to extend novel rules to convicts who are not.⁴² Accordingly, the Court typically bars new-rule claims from habeas corpus in order to avoid creating new rules in that posture and, concomitantly, upsetting numerous previous convictions.⁴³

The *Teague* doctrine addresses the threshold question whether a claim can be entertained in a federal habeas petition at all.⁴⁴ As the Court tends to put it, a claim is not cognizable if it rests on a “new” rule of law.⁴⁵ Or to put it the other way, only a claim based on an “old” rule need apply. A rule is old in the necessary sense only if, at the time the petitioner’s conviction became final on direct review, the rule already existed in a form that “dictated” a result favorable to the prisoner, such that a state court judgment against him was or would have been “patently unreasonable.”⁴⁶ Understand, then, that the defi-

40 See *Teague v. Lane*, 489 U.S. 288, 316 (1989).

41 See *id.* at 304, 316.

42 See *id.* at 304–05.

43 See *id.* at 310.

44 See *id.* at 300.

45 See *id.* at 310.

46 See *Butler v. McKellar*, 494 U.S. 407, 422 (1990) (Brennan J., dissenting); *Teague*, 489 U.S. at 301. Even as the Court’s general definitions of new and old rules for *Teague* purposes are fact-sensitive, there are instances in which the Justices take more abstractly articulated doctrine as the baseline. In cases in which prisoners argue that they were denied effective representation in state court, for example, the Court routinely assumes without discussion that the doctrine announced in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), counts as an old rule, apart from the application of that doctrine to the circumstances. See, e.g., *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). It may be that the Court treats *Strickland* in that way because ineffective assistance claims characteristically are con-

dition of an old rule on which a habeas petitioner can rely embodies a “reasonableness” test. A claim can be considered only if it rests on a rule of law that admitted only one reasonable result when the prisoner was still in the direct review channel—namely, a decision in the prisoner’s favor. Once a prisoner advances such a claim, § 2254(d) governs the federal court’s authority to provide a remedy. If a state court previously rejected a claim on the merits, § 2254(d) usually permits federal relief only if the state court’s decision reflects an “unreasonable” application of an old rule.⁴⁷

You see where this is going. By the time § 2254(d) comes into play, the federal court has already decided, for *Teague* purposes, that a state court acted or would have acted unreasonably in reaching a judgment against the prisoner when the case was still subject to direct review. If that were not true, the claim would not depend on an old rule, and it would never have made it through the door. It makes no sense, then, to read § 2254(d) to permit an award of habeas relief only if a state court unreasonably applied an old rule. That construction makes federal relief available only if a state court performed unreasonably on two independent levels. On one level, the state court must have acted unreasonably by rejecting a claim in the teeth of a rule of law that compelled a judgment for the prisoner. That’s *Teague*. On another level, the state court must have acted unreasonably, again, by unreasonably applying that very rule of law (from which, by hypothesis, the court unreasonably departed in the first place). That’s § 2254(d).⁴⁸ To put it yet another way, the Court’s account of *Teague* and § 2254(d) renders the latter unintelligible. The *Teague* doctrine makes a claim cognizable only if a state court acted unreasonably in rejecting it, thus eliminating the possibility that § 2254(d) might bar habeas relief on the ground that a state court determined a cognizable claim reasonably.⁴⁹

sidered only in a collateral posture. Cf. *Massaro v. United States*, 538 U.S. 500, 504–05 (2003) (holding that federal convicts should press claims of this kind in postconviction proceedings). It wouldn’t do, then, to limit habeas to *Strickland* claims that state courts unreasonably rejected in light of the peculiar facts of each case in turn. Since *Strickland* claims typically don’t reach the Court in a direct review posture, there is no other occasion on which to enforce *Strickland* forthrightly or perhaps to adjust the doctrine that *Strickland* originally created.

⁴⁷ 28 U.S.C. § 2254(d)(1) (2000).

⁴⁸ I should say this makes no sense to me. Nor can I be made to understand it. Readers should know that I contended against this account of *Teague* and § 2254(d) in an amicus brief for the ACLU in *Beard v. Banks*, 542 U.S. 406 (2004). See Brief Amici Curiae of the American Civil Liberties Union et al., *Beard*, 542 U.S. 406 (No. 02-1603).

⁴⁹ I emphasize that this is true only in cases in which both *Teague* and § 2254(d) are implicated—the former because the respondent asserts that a claim is *Teague*-barred, the latter because a state court previously adjudicated the claim on the merits. The same intellectual difficulty does not arise if only one of the two, *Teague* or § 2254(d), is in play.

There are occasions when AEDPA itself acknowledges related or competing policies and attempts to reconcile them. Still, the results have not been pretty. I frankly think the drafters failed to understand the ideas they were charged to accommodate and then compounded their substantive errors with poor craftsmanship. I don't mean to be unkind here. In all fairness, the drafters faced monumental difficulties and worked in isolation. I'm glad I wasn't asked to sit alone at my desk and come up with language to capture and own this body of interlocking material. But even allowing for a fair measure of humility, the work product here is not just bad. It is demonstrably, unquestionably, and unforgivably bad. Illustrations abound.

Consider the balance that must be struck between two familiar desiderata. On the one hand, we want to discourage prisoners from rushing into federal court before state courts have had an opportunity to correct their own federal mistakes.⁵⁰ To that end, the exhaustion doctrine requires prisoners to pursue available state avenues for litigating federal claims in advance of federal habeas litigation.⁵¹ On the other hand, we want to encourage prisoners to initiate federal actions as soon as they can to ensure that issues are adjudicated before the record becomes colder than it already is and, into the bargain, compress the time required to bring matters to a conclusion.⁵² These two policies run into each other. The one contemplates slowing things down, the other speeding things up.⁵³

Everyone recognized this problem prior to AEDPA. In 1977, the Judicial Conference proposed and Congress approved Rule 9(a) of the Rules Governing § 2254 Proceedings,⁵⁴ which authorized a federal habeas court to dismiss a petition if, because of undue delay, a respondent's ability to respond was prejudiced.⁵⁵ I suspect the Judicial Conference doubted that fixed filing deadlines were needed. After all, convicts serving terms of imprisonment have no reason to put off a process that might open their cell doors. Certainly, the Conference recognized that precise filing periods are hard to formulate and harder to implement.⁵⁶ The procedural vehicles for pressing federal claims in state court are notoriously complex. So it's difficult to say when, in the circumstances of a particular case, a firm filing period should begin and how, once it begins, its duration should be calcu-

⁵⁰ See Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1735 (2000) [hereinafter Yackle, *Figure*].

⁵¹ See 28 U.S.C. § 2254(b)(1)(A); Yackle, *Figure*, *supra* note 50, at 1735.

⁵² See Yackle, *Figure*, *supra* note 50, at 1736.

⁵³ See *id.* at 1735-36.

⁵⁴ 28 U.S.C. § 2254 Rule 9(a) (2000).

⁵⁵ See Yackle, *Figure*, *supra* note 50, at 1736.

⁵⁶ See *id.*

lated.⁵⁷ Accordingly, the Conference chose instead a comparatively flexible approach akin to laches.⁵⁸

The proponents of AEDPA plainly thought Rule 9(a) was inadequate to discourage late filings. So they substituted a hard-and-fast filing period, running from variously specified dates and tolled while prisoners pursue state postconviction relief.⁵⁹ Yet the basic provisions do not specify with sufficient clarity when the clock starts ticking even in ordinary cases, far less when it must be restarted in light of some contingency (like newly discovered evidence or a newly hatched rule of law).⁶⁰ The tolling provision, in its turn, fails to appreciate the hosts of questions that arise with respect to the timing, duration, and completion of state postconviction proceedings. In consequence, the federal courts have been swamped with cases in which the sole or primary issue is neither more nor less than whether convicts got to the church on time. Turn to the reports and you will be amazed at the effort federal courts expend calculating habeas filing periods. The Supreme Court has had to resolve conflicts among the circuits on nine separate occasions,⁶¹ and more problems are boiling up from the circuit level.⁶² This is an appalling state of affairs. Lots of business competes for the attention of our federal courts, especially the Supreme Court. Meanwhile, the judges and justices are spending their time not on the great constitutional questions of the day nor yet on the merits of the claims advanced in habeas petitions, but rather on

⁵⁷ See *id.* at 1738.

⁵⁸ See 28 U.S.C. § 2254 Rule 9(a) (authorizing dismissal “if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition”), *quoted in* *Davis v. Adult Parole Auth.*, 610 F.2d 410, 413 (6th Cir. 1979).

⁵⁹ I suspect they had in mind death row prisoners who might deliberately postpone federal litigation simply to defer the inevitable. I also suspect they distrusted federal judges to exercise the authority granted by Rule 9(a) to dismiss tardy petitions in capital cases. Both factual assumptions are contestable. If death row prisoners do not file federal petitions as soon as some might like, it is usually because they lack counsel to marshal their claims for effective presentation. I know of no empirical evidence suggesting that federal judges failed to implement Rule 9(a).

⁶⁰ See LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS 167–80* (2003) (surveying the ambiguities regarding starting dates for the filing period).

⁶¹ *Mayle v. Felix*, 545 U.S. ___, ___, 125 S. Ct. 2562, 2566 (2005); *Dodd v. United States*, 545 U.S. ___, ___, 125 S. Ct. 2478, 2481–82 (2005); *Pace v. DiGuglielmo*, 544 U.S. ___, ___, 125 S. Ct. 1807, 1811 (2005); *Johnson v. United States*, 544 U.S. ___, ___, 125 S. Ct. 1571, 1577 (2005); *Rhines v. Weber*, 544 U.S. ___, ___, 125 S. Ct. 1528, 1533–34 (2005); *Clay v. United States*, 537 U.S. 522, 526 (2003); *Carey v. Saffold*, 536 U.S. 214, 223–24 (2002); *Duncan v. Walker*, 533 U.S. 167, 171–72 (2001); *cf. Pliier v. Ford*, 542 U.S. 225, 230–32 (2004) (discussing yet another filing deadline problem).

⁶² *E.g.*, *Souter v. Jones*, 395 F.3d 577, 589 (6th Cir. 2005) (discussing the debate among inferior court judges over whether there is an “actual innocence” exception to the filing period); *Day v. Crosby*, 391 F.3d 1192, 1194–95 (11th Cir. 2004) (identifying a division among the circuits over whether the respondent forfeits a filing deadline argument by failing to advance it in the answer), *cert. granted*, 126 S. Ct. 34 (2005) (No. 04-1324).

the mechanics of procedural rules ostensibly meant to expedite federal litigation.

At this point, it is not enough to say (as I have) that federal habeas corpus for state prisoners is an “intellectual disaster area.”⁶³ Everybody knows that. Nor is it helpful to insist (as I have) that we should abandon everything that has been done regarding habeas since Richard Nixon was elected and resurrect the Warren Court’s approach.⁶⁴ Nobody thinks that is going to happen. Instead, we need to take a deep breath, recognize the mess we have made of things, and start over.

II

COMMON GROUND

No question, federal habeas corpus is intensely controversial. Nevertheless, most observers share certain basic attitudes on which we can build. First among these is the view that the enforcement of federal constitutional rights should not be left entirely to state courts. These days, everyone endorses the Supreme Court’s longstanding appellate jurisdiction to review state court judgments.⁶⁵ Concomitantly, everyone recognizes that the Court is no longer a conventional court of error with the duty and responsibility to catch and correct mistakes of federal law made by courts below.⁶⁶ In part, the Court’s modern role is a product of the growth and development of American society. There is too much federal legal business to do and too little time in which to do it. This single tribunal sitting atop the judicial system cannot manage the load.⁶⁷ More fundamentally, the Supreme Court’s mission has changed. We no longer expect the Court to exercise ordinary appellate jurisdiction to do justice to the litigants, but rather to use particular cases as vehicles for elaborating federal law according to the needs of society at large.⁶⁸ We allow the justices plenary discretion to select the disputes they can best use to perform their function, and we recruit inferior federal courts to see that the federal law the Court articulates is followed in the run of ordinary cases.⁶⁹

⁶³ Yackle, *Figure*, *supra* note 50, at 1756.

⁶⁴ *Id.* at 1769–70.

⁶⁵ See 28 U.S.C. § 1257(a) (2000).

⁶⁶ See generally Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643 (2000) (reviewing the history of the Court’s discretionary docket).

⁶⁷ See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1219–1220 (2004).

⁶⁸ See Guido Calabresi, Madison Lecture, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1303 (2003) (explaining this evolution in judicial roles).

⁶⁹ See *id.*

Of course, the arrangements under which inferior federal courts take up their duties are complex. Those courts have original jurisdiction to resolve most civil disputes genuinely arising under federal law.⁷⁰ Yet state courts ordinarily have concurrent jurisdiction in the same cases.⁷¹ By tradition, state courts and inferior federal courts are coordinate equals operating in a single judicial system. Inferior federal courts have no appellate jurisdiction to review state court judgments for error,⁷² and the Full Faith and Credit Statute typically prevents them from considering issues that were or might have been adjudicated previously in civil proceedings in state court.⁷³ We have developed a host of other quasi-constitutional norms, statutes, rules, and common law doctrines to mitigate competition and friction between the two sets of courts contending, after a fashion, for the same business.⁷⁴ In all these ways, we prevent inferior federal courts from routinely superintending the work of their state counterparts in civil cases implicating federal law.⁷⁵

The arrangements for criminal cases ending in "custody" are different. Inasmuch as the Supreme Court neither can nor should review state criminal judgments routinely, the inferior federal courts take up the slack. This is the framework that Justice Frankfurter described in *Brown v. Allen*⁷⁶ more than a half century ago. At the time, the only apparent statutory basis for inferior federal court jurisdiction was habeas corpus.⁷⁷ So we massaged the writ into a general mechanism for entertaining attacks on state criminal convictions and sentences. This story, too, is familiar. We finessed the appellate flavor of the inferior federal courts' role by insisting that habeas jurisdiction is formally original in character,⁷⁸ and we insisted that Congress had exempted original jurisdiction in habeas from the Full Faith and Credit Statute.⁷⁹ The result was a generally available inferior federal court jurisdiction to entertain collateral attacks on state criminal judgments.

⁷⁰ See 28 U.S.C. § 1331. The Federal Courts Study Committee reported widespread agreement that this jurisdiction is appropriate. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 14 (1990) [hereinafter FEDERAL COURTS STUDY COMMITTEE REPORT].

⁷¹ See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

⁷² See *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415-16 (1923).

⁷³ See 28 U.S.C. § 1738; *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984).

⁷⁴ See LARRY W. YACKLE, FEDERAL COURTS 435-84 (2d ed. 2003).

⁷⁵ See *id.* (surveying the abstention doctrines).

⁷⁶ 344 U.S. 443, 496-97 (1953) (Frankfurter, J., concurring).

⁷⁷ See *id.* at 491.

⁷⁸ See *Fay v. Noia*, 372 U.S. 391, 407 (1963).

⁷⁹ See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 n.27 (1982).

You will say this framework is familiar, but hardly congenial to everyone. You will say it was concocted by Justice Frankfurter in service of his own vision for the Supreme Court's mission and that it was exploited by the Warren Court in pursuit of a revolutionary agenda for constitutional criminal procedure. You will say it confounded principles of federalism, undermined crime control, and ultimately produced the very backlash the Rehnquist Court's decisions and AEDPA represent. You will say these things, but you will be right only in part. Despite occasional academic and judicial critiques along these lines, the basic *Brown* arrangements enjoy enduring and widespread support.⁸⁰ Justice Frankfurter purported to be implementing the statutes then in place,⁸¹ and nobody has thought this familiar framework defies congressional will.

In all the debates over the years, including those regarding AEDPA, scarcely anyone has argued that inferior federal courts should be denied the jurisdictional power they have enjoyed for so long. Senator Hatch, the Republican floor leader during the AEDPA debates, explicitly disclaimed any intention to eliminate habeas corpus for state prisoners and marshaled the votes to defeat an amendment that might have had that effect.⁸² Hatch insisted he was committed to retaining habeas as a means of attacking state judgments collaterally and wanted only to streamline and expedite the processing of claims.⁸³ He acknowledged that § 2254(d) would limit federal court authority to displace state court decisions. Yet he maintained that his purpose was only to address cases in which the question on the merits is close and, in those instances, to keep federal judges from substituting their own judgment for that of state courts.⁸⁴

If we are agreed that inferior federal court jurisdiction is warranted, we should be able to explain why. It is no answer that we think federal courts are systematically better at enforcing federal rights. Some of us think that is true, but there is no consensus about it. The Supreme Court endorses the capacity of state courts at every opportunity, subject to occasional exceptions that only serve to prove the rule.⁸⁵ But there is more to this than the old debate over "par-

⁸⁰ See Yackle, *Primer*, *supra* note 4, at 427, 429.

⁸¹ *Brown*, 344 U.S. at 508.

⁸² 141 CONG. REC. S7835-01 (daily ed. June 7, 1995) (statement of Sen. Hatch); see Yackle, *Primer*, *supra* note 4, at 398-401.

⁸³ See 141 CONG. REC. S7835-01 (daily ed. June 7, 1995) (statement of Sen. Hatch).

⁸⁴ See *id.*; Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 62 (2002).

⁸⁵ Compare *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976) (insisting that state courts are perfectly competent to handle federal question business), with *Miller-El v. Dretke*, 545 U.S. ___, ___, 125 S. Ct. 2317, 2340 (2005) (concluding that a state court had failed to appreciate overwhelming evidence of race discrimination during voir dire in a capital case).

ity.”⁸⁶ I can think of two related explanations for federal court jurisdiction that have general appeal: We recognize that federal safeguards are hard to enforce in the immediate context of criminal prosecutions, and we acknowledge that state schemes for supplying counsel to indigents are typically dissatisfying.

It is sometimes said that one purpose of criminal process is to enforce procedural safeguards meant to ensure fairness.⁸⁷ That claim is misleading. The purpose of criminal process is to implement substantive criminal law policy by bringing that policy to bear on violators.⁸⁸ Of course, violators have to be identified. Since most procedural safeguards are linked to accurate fact-finding, there is a way in which enforcing procedural rights is a necessary aspect of the enterprise. But the purpose, the *raison d'être*, of the criminal process is to punish the guilty. Releasing the innocent is only a byproduct. State judges charged to preside at criminal trials or to review judgments are perforce participants in the project. They are also charged to see that federal procedural safeguards are respected. Yet their ability to do so is compromised by the overriding mission to vindicate state criminal law. This is an exaggeration, and I should qualify it in obvious ways. But the general point is sound and telling. We generally think federal rights should not be left entirely to state courts because those courts have other plainly contradictory responsibilities. Federal courts, by contrast, can concentrate on federal rights unimpaired by any competing commitment to local criminal law. This is the sentiment that moves us. We reserve the Supreme Court for the formulation of abstract doctrine and rely on inferior federal courts to supply the kind of independent second look we know in our collective heart-of-hearts is required in run-of-the-mill cases.

We also know, at an equally deep level, that we have not been faithful to *Gideon v. Wainwright*.⁸⁹ States do not genuinely provide effective assistance of counsel or anything like it. The horror stories are all too familiar. They do not depict isolated incidents, dreadful in themselves but unrepresentative. Instead, they signal a general pattern that is revealed with academic rigor when systematic studies are conducted.⁹⁰ Nor is the pattern limited to the southern reaches of

⁸⁶ See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (coining the phrase).

⁸⁷ See, e.g., Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 91–92.

⁸⁸ See Yackle, *Figure*, *supra* note 50, at 1757–58.

⁸⁹ See 372 U.S. 335, 344 (1963) (“[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”).

⁹⁰ See ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004) [hereinafter *GIDEON'S BROKEN PROMISE*] (reporting a comprehensive study of the indigent defense sys-

the country. Specialists decry the inadequate representation provided to the poor,⁹¹ the Supreme Court laments it,⁹² the ABA condemns it,⁹³ and we all acknowledge it as an inescapable fact of legal life. The most glaring deficiency is our failure to supply counsel willing and able to investigate cases thoroughly, thus to uncover not only evidence casting doubt on a defendant's guilt or mitigating the appropriate sentence, but also circumstances supporting federal procedural arguments. The extent of these problems is little abated by the knowledge that even the legions of excellent lawyers doing criminal defense work occasionally mishandle federal issues.

Our efforts to account for poor lawyering have failed. The Supreme Court has recognized that counsel error can constitute ineffective assistance in violation of the incorporated Sixth Amendment.⁹⁴ Yet the Court has set the bar extremely low.⁹⁵ Under the two-pronged *Strickland* test, a prisoner must demonstrate both that counsel's performance was beneath the level expected of professionals and that counsel's mistakes were prejudicial.⁹⁶ The reason the standard is so forgiving is plain enough. We depend on defense lawyers both to press their clients' rights and to make tactical decisions in their clients' interest, thus occasionally forgoing arguments or claims in an effort to produce the best result. What may appear after the fact to have been an oversight or mistake may actually have been part of a plausible defense.⁹⁷ It's hard to tell. The *Strickland* standard gives lawyers the benefit of the doubt.⁹⁸ Many of us would be less indulgent, but none of us really wants a system that first tries criminal defendants and then routinely tries their lawyers.

Moreover, the Court is convinced that we have to assume that defense attorneys are on top of their game in order to justify enforcing state procedural rules governing criminal cases.⁹⁹ Those rules typ-

tem forty years after *Gideon* and concluding that "[c]learly, America has a long way to go to deliver on *Gideon's* promise of effective legal representation for the poor," *id.* at ii), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; cf. Yale Kamisar et al., *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135 (2004) (providing a retrospective discussion among Yale Kamisar, Abe Krash, Anthony Lewis, and Ellen S. Podgor).

⁹¹ See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

⁹² See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003) (expressing dismay at counsel's failure to prepare any evidence in mitigation of a death sentence).

⁹³ See, e.g., GIDEON'S BROKEN PROMISE, *supra* note 90, at v-vii.

⁹⁴ *United States v. Cronin*, 466 U.S. 648, 654 & n.11 (1984).

⁹⁵ See U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 693-96 (1984); *Cronin*, 466 U.S. at 658.

⁹⁶ See *Strickland*, 466 U.S. at 687.

⁹⁷ See *id.* at 689.

⁹⁸ See *id.* at 687-89.

⁹⁹ See *id.* at 689-90.

ically ask defendants (which is to say, their lawyers) to raise claims at a specified time and in a specified manner on pain of forfeiture for default. The Court insists that federal courts must usually respond in the same way, or else defense counsel will sandbag the state courts and reserve federal claims for federal habeas later.¹⁰⁰ This, of course, is where federal default doctrine in habeas cases comes into play. Under the Court's decisions, a petitioner whose attorney failed to advance a claim seasonably in state court faces an uphill battle.¹⁰¹ If counsel's default establishes an adequate and independent state procedural ground of decision that would foreclose direct review in the Supreme Court, the prisoner can get a federal habeas court to look at the claim only by demonstrating his probable innocence or by establishing both that the default should be excused for "cause" and that he suffered "prejudice."¹⁰²

Within this framework, the Court will not hear prisoners complain that their lawyers committed default out of ignorance or neglect. Attorney error does not ordinarily count as cause; something "external to the defense" must have interfered with counsel's ability to comply with state procedural rules.¹⁰³ Of course, if counsel's error amounts to ineffective assistance in the constitutional sense, it can be the basis for finding cause and thus (perhaps) reaching the merits of the claim that counsel failed to raise.¹⁰⁴ Herein, another reason for making the *Strickland* standard so generous to lawyers. Were the constitutional standard more demanding of defense counsel, prisoners would find it easier to establish a constitutional violation and thus to avoid the usual consequences of procedural default.

All this brings us to a troubling pass. Defense lawyers often fail to advance federal claims as they should in state court, and, for that reason, state courts refuse to consider them. We hesitate to allow federal habeas courts to entertain claims that state courts declined to address, but we know that we should permit them to do so in some circumstances. Otherwise, poor legal representation will combine with state procedural rules to keep any court, federal or state, from reaching the merits of potentially valid federal claims. So we put federal rules regarding the effect of default in state court together with *Strickland* and hope the mix will produce acceptable results without too much bother.

But it doesn't. Turn again to the reports and you will find extensive opinions taken up with default questions. Typically, a federal

¹⁰⁰ See *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977).

¹⁰¹ See, e.g., *Strickland*, 466 U.S. at 693-96; *Wainwright*, 433 U.S. at 86-87.

¹⁰² *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986).

¹⁰³ *Id.* at 488.

¹⁰⁴ See *id.*

habeas court must determine whether a state actually had a procedural rule requiring a federal claim to be raised in a particular way or at a particular time, whether the prisoner violated such a rule, and whether, if he did, the state courts did or would impose forfeiture of the claim as a sanction.¹⁰⁵ Then there is the question whether a purported state ground of decision is adequate and independent, such that it would cut off direct review in the Supreme Court.¹⁰⁶ If so, there is a further question: whether the prisoner can establish cause and prejudice or demonstrate that he is probably innocent. Along the way, in many cases, the court must decide whether the default in issue amounts to ineffective assistance of counsel within the meaning of *Strickland*, thus establishing both cause and an independent claim for relief. All these tests are demanding for the reasons I just went through. But enough prisoners manage to satisfy them to encourage many more to make the attempt.

I know this brief account is cryptic, even cynical, and probably unfair. But we're in a mess that we can't ignore. All I want to argue is that these painful facts underlie the enduring idea that federal rights implicated in criminal cases should not be left to state courts alone. Those courts may answer in ordinary civil litigation when federal issues emerge, but not when the safeguards drawn from the Bill of Rights are at stake. In criminal cases, we need federal courts in the wings, superintending state courts both when they determine the merits of claims and when they refuse to reach the merits on procedural grounds. The task, then, is to devise a better framework for getting federal courts into the act where they can render effective service.

III STARTING OVER

Once we resolve to try again, I want to suggest that we should not assume that capital punishment will always be with us. You will say this is a fool's errand. Federal habeas attacks on state criminal judgments are inextricably linked with the death penalty. In many minds, support for the one necessarily entails opposition to the other. It is largely because that is so that AEDPA exists as it does, and we can't very well fix something by disregarding the reason it came to be broken. Nevertheless, I insist that we can set about establishing a better

¹⁰⁵ See generally John H. Blume & Pamela A. Wilkins, *Death by Default: State Procedural Default Doctrine in Capital Cases*, 50 S.C. L. REV. 1 (1998) (explaining how difficult it is to avoid procedural default in state court).

¹⁰⁶ That question, too, can be extraordinarily difficult. See generally Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243 (2003) (describing the need to undertake fact-sensitive adjudication when it is necessary to decide whether the application of a state procedural rule in state court resulted in an inadequate ground of decision).

framework for allowing state convicts access to federal court only if we forget for the moment that some of them are death row prisoners hoping to evade execution. And if we set death penalty cases aside, current concerns about granting significant power to individual federal judges should be reduced.

Consider three things. First, the death penalty is unlike the institutional characteristics of state court process or even the chronic failure to ensure competent lawyering in state court; it's not merely another condition that demands accommodation. Capital punishment is a corrupting force. It engenders resolute ideology where we need flexible pragmatism, distrust where we need cooperation. And it skews the criminal justice system in all manner of ways described in the literature.¹⁰⁷ Second, the death penalty is a temporary distraction. It need not influence a revised framework that will have real staying power, because it has no staying power of its own. State-sponsored homicide is a throwback, fighting the current of history. We came ever so close to discarding it a half century ago, and there are signs aplenty that we are about to finish the job.¹⁰⁸ Third, if we put the death penalty out of our minds long enough to fashion a new framework, we may find (and I think we will find) that we can develop arrangements that make sense for noncapital and capital cases alike.

To begin, we should be willing to reconceptualize the structural model in which federal adjudication fits. The "collateral" model we have rests on the inferior federal courts' jurisdiction to entertain original petitions for habeas corpus relief. Some academics, Barry Friedman and Jim Liebman among them, argue that it is more accurate to regard habeas as an ersatz form of appellate review.¹⁰⁹ Dan Meador once proposed that we should legislate an appellate model into existence, and Jordan Steiker has taken up that position as well (at least

¹⁰⁷ See Hammel, *supra* note 84, at 17–32 (illustrating the many systemic problems that petitioners face in capital cases); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2078–2136 (2000) (similarly detailing the institutional problems that interfere with justice in capital cases); see also Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209 (2004) (reporting that more than half of the death sentences imposed between 1973 and 1995 were dislodged for error on review in state or federal court).

¹⁰⁸ See Anna Badkhen, *Pendulum Begins Swing Away from Death Penalty: "Culture of Life" Agenda Pushes Advocates of Capital Punishment To Rethink Positions*, S.F. CHRON., Apr. 10, 2005, at A1; Hal Dardick, *Death Penalty Flaws Remain: Blagojevich, Panel in No Apparent Hurry*, CHI. TRIB., Feb. 17, 2005, at 1; Marc Humbert, *N.Y. Legislators Kill Death Penalty Bill*, ASSOCIATED PRESS, Apr. 12, 2005, available at <http://www.phillyburbs.com/pb-dyn/news/278-04122005-475124.html>.

¹⁰⁹ See Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992).

for some cases).¹¹⁰ The appellate model is attractive, both as a description of what is and as a prescription for what might be. If inferior federal courts were given authority to review state judgments directly, it would follow naturally enough that they would entertain federal claims that were or might have been adjudicated in state court. Moreover, since the inferior federal courts would be located in the appellate conduit to the Supreme Court, they would be empowered to consider claims grounded in new rules of law—claims foreclosed by *Teague* under the current collateral model.¹¹¹

I have always objected to the appellate model, only partly because it would break the (admittedly weak) link to the Great Writ of Liberty. It would also depart from the quasi-constitutional conception that state courts and inferior federal courts are coequals forming the sides of an elegant, symmetrical triangle with the Supreme Court at the apex. Inferior federal courts would be elevated to a supervisory role not only with respect to state trial courts, but also with respect to the highest state appellate courts. Professor Meador hoped to defuse that problem by channeling (some) appeals directly to the regional courts of appeals rather than to federal district courts.¹¹² Professor Steiker again follows suit.¹¹³ But that answer is incomplete. Circuit courts, too, are by tradition coordinate with state appellate courts. At all events, simply shifting to a formal appellate model would not in itself answer the serious questions we face. We would still need to specify what deference federal courts should accord to state court determinations on the merits and what federal courts should do if state courts fail to adjudicate federal claims. Professor Meador answered those questions, as does Professor Steiker, not as logical implications of the appellate model, but rather as additional features of an appellate program.¹¹⁴

It's time for everyone to think again. I want to suggest that we lay the two conventional models aside and confer on inferior federal courts the functional authority they should have, *sans* any label and the trappings a label would imply. If we need a name for purposes of discussion, call this the hybrid model. Specifically, Congress should confer jurisdiction on federal district courts to review judgments of the highest state courts for errors of federal law—subject to review, in

¹¹⁰ See Daniel J. Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273, 275–76 (1983); 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, 320–21. Professor Steiker limits his argument to death penalty cases—the very cases I set aside.

¹¹¹ Meador, *supra* note 110, at 278; Steiker, *supra* note 110, at 321–22.

¹¹² Meador, *supra* note 110, at 278.

¹¹³ Steiker, *supra* note 110, at 321–22.

¹¹⁴ Meador, *supra* note 110, at 278; Steiker, *supra* note 110, at 321–22.

turn, by the circuit courts of appeals and, ultimately, by the Supreme Court on certiorari. To be sure, jurisdiction of this kind would be appellate in the sense that inferior federal courts would form a link in the direct review chain from the initial state trial court to the Supreme Court. But it need not bear the formal appellate designation, and it can and should be limited in ways that distinguish it from the traditional power of a court of error. I do not propose that inferior federal courts should oversee state courts in the orthodox sense of traditional appellate review, which assumes that the next court in the appellate line necessarily knows better than the last. I propose only that inferior courts should act while state court judgments remain subject to Supreme Court review and thus are not final within the meaning of *Teague*.¹¹⁵ I hasten to say that this innovation responds only to *Teague's* ostensible concern that similarly situated petitioners be treated in the same way. Under this plan, they would be.

The hybrid model should generally be substituted for habeas corpus, which, in turn, should be foreclosed except in specially identified circumstances. Congress has done this sort of thing before. Federal convicts are obliged to employ motions to vacate sentence pursuant to 28 U.S.C. § 2255 and can rarely file habeas petitions to attack federal convictions.¹¹⁶ The federal courts' jurisdiction in habeas should be left in place, however, in order to be consulted on those occasions when the hybrid model fails to account for all the claims that may properly command federal adjudication.¹¹⁷

Hybrid federal jurisdiction need not be available to every state convict without regard to the gravity of his case. Under current law, only prisoners in custody can petition for federal habeas relief.¹¹⁸ The custody requirement does not formally screen out all minor offenders. Even misdemeanants can receive sentences to confinement, and some may still be detained after state avenues for testing their claims have been exhausted. In practice, however, the custody rule trims the field down to convicts sentenced to substantial terms (or death). In the past, I have argued that custody should not be a jurisdictional prerequisite to federal adjudication.¹¹⁹ I have to admit, though, that it seems unrealistic to establish no threshold at all. And the alternatives that come to mind are unattractive. If, for example, we were to specify that only prisoners sentenced to a term of some minimum duration could seek federal review, we would create incentives to impose sentences

¹¹⁵ See *supra* notes 42–43 and accompanying text.

¹¹⁶ See 28 U.S.C. § 2255 (2000).

¹¹⁷ Cf. *Triestman v. United States*, 124 F.3d 361, 380 (2d Cir. 1997) (holding that a federal prisoner was entitled to proceed via habeas corpus in a rare instance in which § 2255 proved inadequate to test the validity of his sentence).

¹¹⁸ See *Maleng v. Cook*, 490 U.S. 488, 490–91 (1989).

¹¹⁹ Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. Rev. 991, 1003–05 (1985).

just short of that mark in order to forestall the very federal adjudication we want to establish. For now, then, I will live with the custody doctrine as a tested, although imperfect, device for screening cases.

Hybrid jurisdiction should be conferred initially on the district courts, not on the circuit courts of appeals. We get no conceptual mileage out of bypassing the district courts; any scheme that gives circuit courts authority to review state judgments also departs from tradition. Relying on district courts in the first instance has practical advantages as well. There will be occasions when federal hearings are necessary and only district courts are equipped to conduct them. Professor Meador made this point,¹²⁰ as does Professor Steiker.¹²¹ Under Professor Steiker's plan, petitioners whose claims rest on facts outside the appellate record should continue to seek federal relief through habeas corpus petitions in the district courts.¹²² Professor Steiker thus contemplates two routes—one directly to the circuit courts for claims resting on the existing record and the other to district courts for claims depending on facts outside that record.¹²³ For my part, such a scheme would be needlessly complicated and inefficient. The circuit courts are already overflowing with cases and could not easily accommodate additional work moving directly from state courts.¹²⁴ If district courts are first in line, the burden on circuit courts should be significantly diminished (down, perhaps, to something approaching the demands of current habeas appellate practice). District courts are busy, too, but they already handle the run of entry-level habeas petitions. And, of course, they are needed anyway for any fact finding that needs to be done.

I don't mean to put this basic plan into precise statutory language. For one thing, I have already confessed that I don't trust myself to do any better than the AEDPA drafters. For another, we are more likely to reach agreement across ideological lines if the drafting is done by a respected professional organization, such as the American Law Institute. I also set aside any concern about Congress's constitutional power to orchestrate postconviction arrangements in this way.¹²⁵ But let me march (quickly) through the ways the hybrid

¹²⁰ Meador, *supra* note 110, at 283.

¹²¹ Steiker, *supra* note 110, at 320–21.

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 32 (1994) (explaining that circuit court docket loads are becoming “intolerable”); FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 70, at 109 (describing the overload as a “crisis”).

¹²⁵ For my own part, Congress's power to prescribe federal court jurisdiction should bear most of the weight. Where state court practices are implicated, Section 5 of the Fourteenth Amendment, the Commerce Clause, or the Spending Clause should answer. *See* U.S. CONST. amend. XIV, § 5; U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. I, § 8, cl. 1.

framework would deal with the most important issues and problems in view.

A. Review on the Merits

Take the most controversial issue first, that is, the deference inferior federal courts should extend to previous state court judgments on the merits of federal claims. Inasmuch as the federal courts would review state decisions before they are final, the considerations that gave rise to the *Teague* doctrine would be eliminated. All state prisoners would be treated alike. All would be free to advance whatever claims they like, including claims that demand some adjustment in federal law to be successful. On first blush, this may not sit well with anyone concerned about aggressive federal judges second-guessing state courts in marginal cases. Yet the only real departure from current arrangements is that we would drop the pretense that *Teague* attends to genuine changes in the content of federal rules of procedure. Specifically, we would have done away with *Teague's* definition of a new rule of federal procedural law—i.e., a result in a particular case that departs from any reasonable result available at the time a case was still in the direct review channel.¹²⁶ We ought to stop kidding ourselves about that; we all know that *Teague's* definition of new rules is a contrivance for curbing federal court consideration of the merits of ordinary claims. We should discard *Teague*, then, as a limit on the claims that federal courts can entertain.

This is not to say, however, that federal courts should ignore state court decisions on the merits and, in Justice Jackson's phrase, examine federal claims entirely *de novo*.¹²⁷ I have argued for that in the past.¹²⁸ Professor Meador, too, thought entirely independent adjudication was appropriate, albeit he constructed his scheme on the premise that federal courts were already expected to provide that kind of examination in habeas.¹²⁹ Here, for the sake of compromise, I suggest that federal courts should determine only whether state court decisions are reasonable. A federal court might conclude that a previous state court judgment regarding a federal claim was erroneous. Yet under the hybrid framework, the federal court would not be empowered to overturn that judgment unless the state court was not only wrong, but unreasonably wrong. This is the standard the Court has read into § 2254(d), which now governs the availability of federal habeas relief.¹³⁰ It would also be the standard for federal court deci-

¹²⁶ See *supra* text accompanying note 46.

¹²⁷ See *Brown v. Allen*, 344 U.S. 443, 546 (1953) (Jackson, J., concurring).

¹²⁸ See Yackle, *Figure*, *supra* note 50, at 1769–70.

¹²⁹ Meador, *supra* note 110, at 274.

¹³⁰ See 28 U.S.C. § 2254(d)(1) (2000); *Williams v. Taylor*, 529 U.S. 362, 404–05 (2000).

sions on the merits of claims under a revised hybrid scheme.¹³¹ The difference, again, is that *Teague* falls out of the picture and thus no longer interferes with an honest, straightforward directive to federal courts that they must not substitute their own judgment for that of state courts in close cases.

The position would be altered if the Supreme Court were to select a particular case for further review. Under the hybrid model I have in mind, the Court would not limit the scope of its own work in the way inferior federal courts are restricted, but rather would elaborate the law fully and accurately and thus sustain a state judgment only if it is correct, not merely reasonable. This would entail procedural moves that are unusual, but not really troubling. If a federal circuit court overturned a state judgment for being unreasonably off the mark, the state might seek Supreme Court review. The Supreme Court, in that instance, would not determine whether the circuit court reached the correct result regarding the question before it, but rather would cut through to the underlying state court judgment (by hypothesis against the prisoner) and determine whether that judgment was not just reasonable, but correct. If the state court judgment was erroneous, the state still would lose. If a circuit court sustained a state court judgment because it was reasonable (though perhaps not correct in the circuit court's eyes), the prisoner might seek Supreme Court review. There again, the Court would look through the circuit court decision and vindicate the correct result. Of course, in any case in which the Supreme Court upheld a single prisoner's claim, there might be other prisoners similarly situated whose cases should be reviewed in light of the new precedent. The Supreme Court would hold cases like that on its docket until the new decision is rendered, then vacate and remand to state court. GVR (grant, vacate, remand) practice is not fool proof, but it serves fairly well under the current system, and nothing in the revised scheme I am describing would make it more problematic.

B. The Exhaustion Doctrine

The hybrid model would largely secure the original purpose of the exhaustion doctrine—namely, to prevent premature federal adjudication that disrupts pending state proceedings.¹³² Federal court jurisdiction would not be triggered until a conviction is affirmed at the

¹³¹ I set aside the additional language in § 2254(d), allowing federal habeas relief if a previous state court decision on the merits was “contrary to . . . clearly established Federal law, as determined by the Supreme Court.” *Id.* § 2254(d)(1). That part of the statute has not done any work yet, and I am not sure what service it ever could provide. The drafters probably had something in mind, but nothing that genuinely promotes clear thinking.

¹³² See *supra* notes 50–51 and accompanying text.

highest state appellate level. Yet the framework I have in mind would discard the notion that prisoners should exhaust all available remedies for the different purpose of giving state courts the first chance to consider federal claims. To be concrete about it, prisoners would no longer be required to pursue state postconviction relief in the wake of appellate review. Small loss. State postconviction remedies have never been anything to write home about. They were developed on the theory that state courts might correct their own errors and thus make federal habeas unnecessary. But they have proved to be more trouble than they are worth, squandering everybody's time and effort.¹³³ Postconviction litigation, i.e., adjudication after the state appellate process is complete, largely should be a federal matter.¹³⁴ This is one way in which the hybrid model promises to make adjudication more efficient.

Carving out state postconviction practice would make it easier to write and enforce strict filing deadlines for federal proceedings. Nevertheless, fixed time periods would still be problematic, and we can do without them. Once we position inferior federal courts to immediately follow the highest state courts, we should be able to move cases along by directing the lawyers concerned to perform their duties expeditiously. If they don't, they (the lawyers) can be brought to heel. Their clients need not suffer.

C. Procedural Default

The hybrid model should also offer a better means of contending with procedural default in state court. Current doctrine forecloses potentially meritorious claims without sufficient justification and diverts resources into deciding why federal questions should not be entertained. To be sure, the states have legitimate reasons for asking counsel to raise issues at the proper time and in the proper manner, and it will not do to open the federal courts so widely that incentives to comply with local procedural rules disintegrate. But we have not managed to find defensible middle ground. The essential choice is clear. Either we should adjust default doctrine to make it easier for prisoners to avoid procedural bar on the basis of counsel error, or we should

¹³³ See generally Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359 (1987). While Andrew Hammel's reform program would improve state postconviction practice immensely (in death penalty cases) and, on that basis, would allow states to forestall federal adjudication thereafter, I have no faith in that possibility. See Hammel, *supra* note 84, at 62.

¹³⁴ I see no reason to bar states from making postconviction remedies available, either while federal review progresses or later. After all, postconviction proceedings offer the only means by which state courts can address federal claims that demand additional fact-finding—including many ineffective assistance claims. And some prisoners may have state law claims to advance. But the benefits of such state procedures are insufficient to warrant accounting for them explicitly in the tighter scheme I am trying to construct.

modify *Strickland* to make it easier for prisoners to demonstrate ineffective assistance (thus to establish both independent grounds for relief and justification for entertaining claims that counsel failed to pursue). Professor Steiker would moderate *Strickland*, but that would mean an unlikely alteration in constitutional meaning.¹³⁵ We would do better to set our sights on default doctrine—something Congress can affect through legislation.

We have two problems. One is that the states can be maddeningly rigid with respect to procedural bar rules. Federal courts then are forced to devote scarce resources to deciding whether a particular rule, or its application, establishes an adequate and independent state ground of decision and then, perhaps, actually to hold (to the state's embarrassment) that state courts had no sufficient justification for failing to reach the merits of a claim.¹³⁶ Moreover, state authorities sometimes interfere with defense counsel's ability to assert federal claims properly, thus forcing federal courts to find cause for default.¹³⁷ The other problem is that existing federal doctrine misconceives the typical reasons for default. Sandbagging is most unlikely. Federal claims are overlooked in state court not because skilled counsel (far less manipulative defendants) deliberately build error into cases in hopes of upsetting convictions later. Instead, default is almost always the product of counsel's poor investigation, ignorance, or oversight.¹³⁸

We need to strike a different balance. It is too late to revive the Warren Court's rule and cut off claims only if prisoners themselves deliberately fail to follow state procedural rules for strategic purposes.¹³⁹ But we can return to practices that prevailed (or at least were open) before the Rehnquist Court's decisions in the 1970s. At that time, Justice White suggested that we distinguish between an intentional decision by counsel to forgo the opportunity to advance a claim in state court, on the one hand, and an unintentional failure to

¹³⁵ See Steiker, *supra* note 110, at 319–21. Professor Steiker regards default doctrine as the place where we should curb our desire for merits review. See *id.* He would prefer that federal courts enforce state procedural default law as a tight, jurisdictional limitation on federal adjudication. See *id.* at 321. That, it seems to me, is to move entirely in the wrong direction. Current default doctrine needs to be more prisoner-friendly, not less.

¹³⁶ See, e.g., *Lee v. Kemna*, 534 U.S. 362, 381 (2002) (finding inadequate a state court's refusal to allow time to locate alibi witnesses because counsel had not complied with a local rule requiring motions for continuance to be in writing).

¹³⁷ See, e.g., *Strickler v. Greene*, 527 U.S. 263, 289 (1999) (finding cause for defense counsel's failure to request information from the prosecution because the state's attorney had led counsel to believe there was nothing to disclose).

¹³⁸ See generally Daniel Givelber, *Litigating State Capital Cases While Preserving Federal Questions: Can It Be Done Successfully?*, 29 ST. MARY'S L.J. 1009 (1998) (explaining common reasons for default).

¹³⁹ See *Fay v. Noia*, 372 U.S. 391, 439 (1963).

press a claim properly, on the other.¹⁴⁰ In his view, only deliberate actions should result in the forfeiture of a later chance to litigate the claim in federal court.¹⁴¹ Dan Meltzer once endorsed White's approach, albeit he (characteristically) explored a bevy of hard questions that would be implicated.¹⁴² It seems to me, though, that if we insist that only intentional defaults by counsel should count, we approach the Warren Court's "deliberate bypass" rule.¹⁴³ The only difference is that we would not demand that the prisoner himself personally participate in counsel's deliberate tactic.

I am inclined to suggest that we preserve the Court's current rule in the main, but make two changes. First, we should allow federal courts to overlook default on a showing of "cause" alone, without demanding an independent demonstration of "prejudice." This approach, too, was open when the Rehnquist Court began. And even today it is consistent with some of the language in Rule 12 of the Federal Rules of Criminal Procedure—from which Chief Justice Rehnquist worked in the turning-point case, *Davis v. United States*.¹⁴⁴ On its face, Rule 12(e) authorizes federal courts to relieve defendants of the consequences of default for "good cause."¹⁴⁵ There is no explicit mention of "prejudice," and none has to be incorporated.

Second, the cause that warrants disregarding default should be viewed from the federal court's perspective. This is to say, the court should determine whether it has "good cause" for reaching the merits, not whether the prisoner had cause for defaulting in the first place. This change from current law would allow federal courts to rest findings of cause on a range of considerations—including, but not limited to, something "external" to the defense that prevented counsel from offering claims in season. Certainly, good cause need not be entirely independent of defense counsel error. The idea is to establish serious incentives to advance claims in the proper manner, but then to allow federal courts to make exceptions in their reasonable (and reviewable) discretion. Equally, cause should be found if it appears that an innocent prisoner may have been convicted because he forfeited a

¹⁴⁰ See *Wainwright v. Sykes*, 433 U.S. 72, 98–99 (1977) (White, J., concurring).

¹⁴¹ See *id.*

¹⁴² See Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1215–20 (1986).

¹⁴³ *Noia*, 372 U.S. at 438.

¹⁴⁴ 411 U.S. 233, 234, 241–43 (1973). Federal Rule of Criminal Procedure 12(e) states explicitly that a party "waives" claims by failing to advance them within the prescribed time. FED. R. CRIM. P. 12(e). That's a poor way to put it. A waiver is characteristically a knowing, voluntary, and intelligent choice. Rule 12(e) actually contemplates that a party who defaults (intentionally or otherwise) will forfeit untimely claims. The hybrid framework I am sketching would not simply foreclose claims that a party actually waives, but would also exact forfeitures for default—subject always to the court's discretion to specify otherwise.

¹⁴⁵ *Id.*

claim on the basis of default. This kind of flexibility makes sense in many other contexts where federal courts are given a similar discretion, and it will serve admirably here as yet another aspect of the hybrid framework.

D. Counsel

I proceed from the premise that states will not provide effective legal representation to indigents any time soon. The practical question, then, is what can be done to compensate within the hybrid framework for federal adjudication. It may seem that by installing the federal courts in a kind of direct review channel, we must contemplate that indigents would have a constitutional right to effective representation in federal proceedings—the very thing they are denied within the current collateral model.¹⁴⁶ That is not what I suggest. Under the hybrid model, the opportunity for federal adjudication would not be discretionary, but rather a matter of entitlement. But it does not follow that a constitutional right to counsel would attach. I suggest only that the federal government should supply counsel to indigents in hybrid proceedings as a matter of policy. I can't very well outline a really good and workable new system without including professional representation in the mix.

Counsel services might be administered in various ways. I want to suggest that the lawyer who handled direct review in state court should set things in motion by notifying the client that review in federal court is available, ascertaining whether the prisoner wishes to press on, and, if so, filing an initial instrument in the appropriate federal district court. That instrument should set forth the federal claims counsel thinks merit attention, the basics of the legal arguments, and relevant portions of the record or other supporting materials. If counsel despairs of any bona fide claims, she should file an *Anders* brief.¹⁴⁷ The district court, in turn, should appoint new counsel both to develop the claims that state court counsel identified and to undertake an independent investigation of the case—thus to explore any other claims that may come to light. This last task is tricky. At a minimum, counsel in federal proceedings must interview the client and assess whether further field work is warranted. Yet there will be limits

¹⁴⁶ See *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

¹⁴⁷ In *Anders v. California*, 386 U.S. 738, 744 (1967), the Court recognized that an attorney appointed to represent an indigent on appeal may conclude that there are no viable arguments to advance. In that event, the attorney may ask to withdraw, but only within a procedural arrangement ensuring that the appellate court can determine that no nonfrivolous claims are available. See *id.* In *Anders* itself, the Court held that it suffices for counsel to file a brief identifying anything in the record that might form the basis for arguments on appeal. See *id.*; cf. *Smith v. Robbins*, 528 U.S. 259, 272–74 (2000) (permitting states to adopt alternative mechanisms for ensuring that nonfrivolous claims are not overlooked).

to the additional investigation we can afford at this stage, and it may be necessary for the court to monitor what counsel is about. Here, too, if a lawyer comes up empty, she may give the district court an *Anders* brief.

Of course, even if good lawyers are introduced to handle hybrid federal proceedings, there is still the possibility that they, too, may deliver ineffective service. Concomitantly, there is an argument that we will need some further mechanism to review their performance and perhaps to uncover claims that even this new system fails to identify. Yet in the interests of practicality, we should be satisfied with one counseled trip through the inferior federal courts. We need not permit disappointed prisoners to complain of ineffective assistance in hybrid proceedings. Under current law, we don't allow prisoners to complain that habeas counsel was ineffective, and it isn't essential that we should allow that kind of claim in a revised framework that is superior in so many other respects.¹⁴⁸

E. Multiple Federal Proceedings and New Rules

The matter of additional, second or successive, proceedings in federal court goes beyond worries about effective representation. However much we improve the quality of federal adjudication, there will be occasions when potentially meritorious claims are overlooked or inadequately developed—times, then, when even the most bitter critics of federal jurisdiction would be willing to give prisoners another bite at the apple. Notwithstanding the relentless criticism of multiple petitions when AEDPA was under consideration, the enacted statute still allows for second or successive habeas petitions.¹⁴⁹ Yet the standards for multiple applications are so demanding that the enterprise is no longer worth the candle. For one thing, AEDPA is so skeptical of second or successive petitions that it requires prisoners to obtain circuit court permission to file them at the district level.¹⁵⁰ Circuit screening, in turn, has become a boil on the system's backside, which was hurting enough already. For another, the substantive standards that prisoners must meet are very nearly impossible to satisfy. Truth is, we hold out the promise that circuit permission will be availa-

¹⁴⁸ In my view, the country should have a robust, national federal public defender program that employs, trains, and monitors career specialists and that routinely supplies indigents in the federal courts with quality representation in any kind of serious proceeding, including the proceedings I have in mind here. This is not the place to elaborate on that idea.

¹⁴⁹ See 28 U.S.C. § 2244(b) (2000).

¹⁵⁰ See *id.* § 2244(b)(3).

ble in some instances, but we really don't mean it.¹⁵¹ And then we squander ever more resources in litigation that always concludes in the same way: Prisoners are not allowed to return to the well. This is where we almost certainly should make yet another compromise with practicality. Once we ensure that prisoners have one (improved) opportunity to appear in federal court via the hybrid framework, we should not allow them another.

Constructed this way, the hybrid scheme would not provide prisoners with a vehicle for pressing claims that rest on novel procedural rules vital to the accurate determination of factual guilt. The Court explained in *Teague* that everyone should have the benefit of genuinely basic procedural innovations—including convicts who present their claims in habeas petitions.¹⁵² Congress reinforced that idea in AEDPA by specifying that some claims, defined in essentially the same way, can be advanced in additional applications.¹⁵³ In the event, however, no such innovations in procedure have emerged, and it frankly appears that none will. Good arguments have been available in several instances, but the conclusion has always been the same.¹⁵⁴ It appears, then, that if the hybrid model absolutely foreclosed claims grounded in novel rules so demonstrably crucial to accurate fact finding, it would be no more inflexible than the scheme now in place—only more honest.

Nor would the hybrid model allow for claims that are now successfully advanced in second or successive habeas applications—namely, claims that go to a state's constitutional authority to punish or, at least, to punish in a particular way. The Court allowed for these claims in *Teague*,¹⁵⁵ though the Justices have since explained that changes in substantive law are not properly understood to be of concern to the *Teague* doctrine at all.¹⁵⁶ If, for example, it turns out that the statute under which a prisoner was charged and convicted was itself constitutionally invalid, everyone would say that all prisoners affected should benefit. And, for that, convicts who have already employed the hybrid scheme to advance other claims require some

¹⁵¹ See generally Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002) (providing a bill of particulars).

¹⁵² *Teague v. Lane*, 489 U.S. 288, 311–13 (1989).

¹⁵³ 28 U.S.C. § 2244(b)(2).

¹⁵⁴ In *Beard v. Banks*, 542 U.S. 406, 416 (2004), for example, the Court held that *Mills v. Maryland*, 486 U.S. 367 (1988), announced a “new rule” that it is unconstitutional to prevent a jury from considering circumstances not found unanimously to mitigate against a death sentence. The Court allowed that the new *Mills* rule might be “laudable,” but concluded that it does not “fall within the second *Teague* exception.” *Beard*, 542 U.S. at 420.

¹⁵⁵ *Teague*, 489 U.S. at 311.

¹⁵⁶ See *Schriro v. Summerlin*, 542 U.S. 348, 351–52 & n.4 (2004).

means of returning to court. Moreover, we might need some additional avenue by which at least one prisoner could press such a claim as a sequel to review under the hybrid system in order to establish a precedent on which others might rely.¹⁵⁷ This judicial business is essential, but it need not have a place in the hybrid framework itself. In these important yet rare instances, we should allow prisoners to resort to the writ of habeas corpus.¹⁵⁸

¹⁵⁷ A relevant precedent might be established via the hybrid scheme, of course, but I would hesitate to depend entirely on cases in that posture for this purpose.

¹⁵⁸ It is more common that the Supreme Court gives a federal criminal statute an unexpected interpretation, which triggers arguments that many previously convicted prisoners could not properly be found guilty. The Court insists that when it construes a statute authoritatively, it does not change the statute's meaning, but only clarifies what it has always meant. Formalism aside, it is clear that something functionally new has occurred. In those cases, too, we already rely on habeas corpus to provide the necessary procedural vehicle. *Triestman v. United States*, 124 F.3d 361, 380 (2d Cir. 1997) (allowing a federal convict to use habeas corpus in special circumstances where a motion pursuant to § 2255 was unavailable).