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A Structural Vision of Habeas Corpus

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INTRODUCTION

Federal habeas corpus review of state criminal convictions is desperately in need of reform.[1] Experts have described the current system as "chaos,"[2] an "intellectual disaster area,"[3] "a charade,"[4] and "so unworkable and perverse that reformers should feel no hesitation about scrapping large chunks of it."[5] The problems are easy to identify. Federal judges expend enormous amounts of

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1. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009) (arguing that the system has failed); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 542, 553 (2006) (pronouncing the federal habeas corpus system a disaster); Marcia Coyle, *Congress Looks at More Limits on Habeas*, NAT'L L.J., July 25, 2005, at 18 (quoting Senator Jon Kyl's statement that "[t]en years [after the most recent habeas corpus legislation], things have gotten worse, not better"). Pursuant to 28 U.S.C. § 2254 (2006), state prisoners may file habeas corpus petitions in federal court challenging the constitutionality of their detentions and requesting release from confinement.

2. Yackle, *supra* note 1, at 542.

3. *Id.* at 553 (quoting Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1756 (2000)).

4. Hoffmann & King, *supra* note 1, at 816.

5. Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 42 (2002).

time reviewing habeas petitions from state prisoners, but much of that time is spent finding ways to dismiss the petitions on procedural grounds without ever addressing their merits.[6] Even when a federal court addresses the merits, deferential standards of review[7] all but ensure that the state conviction will stand. In the extremely rare case where a federal court grants relief, the judgment comes years after the petitioner was wrongly imprisoned.[8] By that point, the case has often been forgotten, and the state actors responsible for the underlying constitutional violation have often changed jobs.[9] As a result, the federal decision effectively has no deterrent or reform value.

The failure of federal habeas to help correct problems in state criminal justice systems is particularly regrettable given evidence that states systematically violate criminal defendants' rights. Michigan, for example, routinely denies indigent criminal defendants access to counsel, leaving them to represent themselves.[10] Capital defendants in Idaho who discover six weeks after sentencing that the state withheld impeachment evidence about prosecution witnesses are statutorily barred from challenging the state's misconduct in state court.[11] In New York, courts routinely violate defendants' due process rights by misconstruing state procedural rules to prevent defendants from raising substantive federal violations.[12] These are just a few examples.[13]

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6. *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 60–63 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [hereinafter "KING REPORT"] (documenting the long processing times and noting that over 40 percent of noncapital cases are disposed of without reaching the merits of any claim).

7. *See* 28 U.S.C. § 2254(d) (2006).

8. *See* KING REPORT, *supra* note 6, at 59, 62.

9. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 491 (1991) (discussing the "erosion of memory" that happens with the passage of time in habeas cases); Karen J. Mathis et al., *Public Service Deserves Public Support*, THE CHAMPION, June 2007, at 38 (discussing the high turnover rates in prosecutor and public defender offices).

10. *See* NAT'L LEGAL AID & DEFENDER ASS'N, "A RACE TO THE BOTTOM," EVALUATION OF THE TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN, EXECUTIVE SUMMARY, at ii (2008) [hereinafter RACE TO THE BOTTOM]. Minnesota, Kentucky, Florida, Georgia, and Louisiana also routinely deny indigent defendants access to adequate trial representation in violation of the Sixth Amendment right to counsel. *See* discussion *infra* Section II.B.1.

11. *See* IDAHO CODE ANN. § 19-2719(5)(b) (2008) (requiring any challenge to a capital conviction or sentence to be brought within forty-two days of the imposition of the capital sentence and not permitting a successive petition for any claim that "alleges matters that are . . . impeaching"). Alabama has similar rules. *See infra* Section II.B.3. As I explain *infra* Section II.B.3, these rules violate defendants' due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

12. Specifically, the appellate courts repeatedly default federal claims by holding that criminal defendants failed to lodge contemporaneous objections to impermissible evidence even though explicit, timely objections to the evidence are clear on the face of the trial record. *See* cases collected *infra* notes 116 & 117.

13. *See infra* Section II.B for further discussion of states' systemic violations of criminal defendants' rights.

At least some of these systemic state violations are well known,[14] as are the problems with federal habeas.[15] What has not been sufficiently appreciated, however, is that a reformed habeas system could address both sets of problems at the same time. As I describe below, the federal habeas system is broken largely because of its resolute focus on individual petitioners.[16] Reconfiguring federal habeas to focus on systemic state violations—those that recur in a pattern across multiple cases—could reduce waste and better protect defendants' rights while showing greater respect for autonomous state decision-making.

As scholars have recognized elsewhere in public law, there is no hermetic separation between individual rights and structural or systemic processes of governance.[17] To be sure, it is often helpful to focus on a question as primarily implicating one or the other of those categories. But a full appreciation of a structural rule includes an understanding of its relationship to individuals, and individual rights can both derive from and help shape larger systemic practices.[18] The separation of powers principle, for example, is clearly a matter of structure, but much of its virtue rests on its promise to help protect the rights and welfare of individuals.[19] Conversely, the right to vote belongs to individuals, but one of its most important functions is to prevent the systemic distortion of political power. The law assigns the individual voter a right partly to vindicate his individual interests, but the assertion of that right is also meant to prevent the more general abuses that might follow if whole groups of voters were excluded from the political process.[20]

This Article proposes that federal habeas could be profitably reimagined along parallel lines, with the rights of individual petitioners functioning as levers for prompting systemic criminal justice reforms. In so doing, the Article departs from a long tradition of understanding habeas review as a straightforward matter of individual rights, the aim of which is to remedy legal violations that occur in particular petitioners' cases. This individualist orientation dominates existing theories of habeas corpus, uniting those who would reform habeas by making it more broadly available with those who have proposed

14. *See, e.g.*, Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 401–04 (2007) (discussing systemic violations of some criminal procedure rights); Yackle, *supra* note 1, at 556–57 (recognizing the prevalence of right-to-counsel violations).

15. *See* sources collected *supra* notes 1–5.

16. *See infra* Part I.

17. *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998) (illustrating how the assignment of rights to individuals functions to limit and structure governmental processes).

18. *See id.*

19. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991).

20. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001); *see also* Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998) (showing how the assignment of rights to individual voters shapes election law at the collective or structural level).

narrowing or streamlining reforms. In the former camp, scholars such as Larry Yackle[21] and Gary Peller[22] have advocated eliminating many procedural barriers to federal habeas review.[23] In the latter camp, Henry Friendly,[24] John Jeffries, and William Stuntz[25] have recommended restricting habeas petitions that do not allege factual innocence; scholars building on Paul Bator's process theory[26] have focused on whether individuals had a fair opportunity to raise their claims in state court;[27] and still others have argued that federal habeas should be a forum for some constitutional criminal procedure claims (such as claims of judge or jury bias) but not for others (such as the unreasonableness of a police search).[28] On all sides, the literature is large. But from each perspective, these scholars share the assumption that the point of federal review of state convictions should be to correct errors in individual cases. They only differ as to which errors they think are worth correcting—process errors, guilt-innocence errors, or errors affecting certain favored federal rights.

In its individualist form, federal habeas review has become unworkable. At enormous expense, the system grants relief to almost nobody. The situation is so dire that Joseph Hoffmann and Nancy King recently declared that federal habeas review was beyond salvaging.[29] Based on a comprehensive empirical analysis of federal habeas courts,[30] they propose eliminating federal habeas entirely for most state prisoners[31] and reallocating the resources currently

21. *See, e.g.*, Yackle, *supra* note 3.

22. *See* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 690–91 (1982).

23. Others, who liken federal habeas corpus review to a form of appeal to the federal courts, would employ appellate standards of deference when reviewing a state court criminal conviction. *See, e.g.*, James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988).

24. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

25. *See* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691–92 (1990).

26. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

27. *See, e.g.*, Hammel, *supra* note 5, at 67 (arguing for a coercive quid-pro-quo model in which the state can obtain expedited, deferential federal habeas review if it shows that there was a full and adequate hearing in state court); Steven Semeraro, *A Reasoning-Process Review Model for Federal Habeas Corpus*, 94 J. CRIM. L. & CRIMINOLOGY 897, 927–28 (2004) (arguing for a reasoning-process review model in which the federal court considers only the state court decision-making process and asks whether the state court cited the relevant federal law and weighed the appropriate factors when issuing its decision).

28. *See, e.g.*, Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947 (2000).

29. *See* Hoffmann & King, *supra* note 1, at 793, 796–97.

30. KING REPORT, *supra* note 6.

31. Hoffmann & King, *supra* note 1, at 819. They exempt from their proposal those who have never been convicted, those who claim they are in custody in violation of a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, those who claim they are innocent, and those sentenced to death who want to challenge either the

expended on federal habeas to improve the quality of defense representation throughout the country.[32] Their proposal, like some others in the past, offers a trade-off: reduced habeas review in exchange for increased government funding to protect criminal defendants' rights earlier in the process.[33] At its best, their proposal would not only save resources currently wasted in federal habeas review but might also help redress some systemic constitutional violations that now occur in state criminal justice systems. But their proposal would leave many systemic violations unchecked.[34]

Rather than abandoning habeas review, I propose a reformed model of federal habeas designed to reach systemic state violations of defendants' constitutional rights. The key to that reform involves reimagining individual petitioners as vehicles for redressing systemic or structural problems in states' administration of criminal justice. Given limited resources, complete relitigation of state court criminal cases on federal habeas is not feasible.[35] If we must limit federal habeas review, we should do it on the basis of the prevalence of the constitutional violation at issue.

More specifically, federal habeas review of state criminal convictions should focus on whether there is a *systemic* state violation of criminal defendants' rights. A systemic violation exists when a state actor (or set of actors) violates defendants' rights repeatedly, such that there is a pattern of violations across multiple cases.[36] Repeated actions by a single judge or a single prosecutor can create systemic problems, because judges and prosecutors are repeat players whose customary errors affect large numbers of criminal defendants. However, there must be a pattern of violation across multiple cases to give rise

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constitutionality of the death sentence or their eligibility to receive a death sentence. *See id.* at 819–21.

32. *See id.* at 797, 823–33.

33. *See id.* at 797; *see also* PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 106 (1976); James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 333–42 (2002); Paul H. Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U. L. REV. 485, 499–500 (1974).

34. For example, routine misinterpretations of federal law by state court judges would no longer be cognizable on habeas. State procedural rules that routinely deprive criminal defendants of the opportunity to raise federal challenges would not be subject to challenge in habeas proceedings. And prosecutorial misconduct claims would not be cognizable absent a demonstration of actual innocence. *See infra* Section II.B. (explaining the prevalence of these systemic problems).

35. *See* Yackle, *supra* note 1, at 553 (acknowledging that "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"—in part because the Court "cannot manage the load").

36. The state's intent when it errs is irrelevant. States are often inattentive to federal constitutional rights for structural reasons related to their dockets and the limited resources available to them. *See* discussion *infra* Section II.B.1. As a result, many systemic state problems are created unintentionally. These routine violations are often the most pernicious and should not escape federal review merely because the state did not intend to engage in a practice that violates the federal constitutional rights of its defendants.

to a systemic violation. The number of errors necessary to establish such a pattern will depend on how many times the state actor has encountered an issue.[37] If a state judge has incorrectly interpreted the standard for effective assistance of trial counsel during a capital sentencing hearing six times, and that judge has only presided over six capital sentencing hearings in which the issue has been presented, there is a systemic problem. If that judge has presided over two hundred capital sentencing hearings in which the issue was presented and there have been six mistakes, there is not a systemic problem. Obviously, there is no magic number of times that a state official must err in order to establish a systemic problem. As with all standard-like inquiries, there is likely to be some disagreement about the contours of the definition. The critical distinction between a systemic violation and an isolated error is the frequency with which the state official errs relative to the number of times that the state official encounters the issue.[38]

Focusing on recurring errors that create a pattern across multiple cases would streamline habeas review in a way that would reduce redundancy, increase efficiency, and, if properly structured, give more autonomy to state institutions.[39] In the aggregate, such a system would also do more to reduce violations of individual defendants' rights.

This Article contains five Parts. Part I explains why federal habeas review of state convictions has become a waste of resources while providing almost no real relief, even to deserving petitioners. Part II attempts to recover a lost purpose of federal habeas review by explaining that the original Reconstruction-era extension of federal jurisdiction to review state convictions was aimed at a problem of *systemic* state resistance to constitutional rights. It then demonstrates that the problem of systemic violations is still prominent today—albeit with different substantive contours—and explains why habeas review cannot correct such problems if it retains its current focus on individual petitioners. Part III accordingly proposes a systemic model of federal habeas review. It explains how such a model would appropriately address questions of standing, procedural barriers to review, evidentiary burdens, remedies, and legal assistance, all while maintaining conformity with Suspension Clause principles. Part IV argues that the proposed reform should appeal both to those

37. *Cf.* Batson v. Kennedy, 476 U.S. 79, 96–97 (1985) (noting that the number of strikes that will lead to an inference of discrimination is going to depend on the number and type of people in the particular jury pool).

38. It does not matter whether the criminal procedure right at issue arises frequently or infrequently across the total number of criminal cases. If there is an issue that only arises in 10 percent of criminal cases, but every time it does, the state judge violates the defendants' constitutional rights, the state error is a systemic one.

Similarly, the magnitude of the particular error itself is irrelevant. It should not matter if a state routinely provides ineffective trial counsel or routinely denies counsel altogether to defendants who are entitled to counsel. Both are examples of systemic problems, regardless of which is perceived of as a "worse" violation of the Sixth Amendment right.

39. *See* discussion *infra* Part IV.

who want to make habeas a more effective tool for preventing constitutional violations and those who want to limit habeas review due to concerns about conservation of resources, finality, and federalism. Finally, Part V situates the proposed model in the literature on structural reform litigation in general, explaining why a systemic habeas model is better suited to redress systemic state violations than class action litigation under 42 U.S.C. § 1983, federal enforcement actions, habeas class actions, or other nonfederal or nonjudicial alternatives.

Although I fully develop the proposed reform in Part III, a few words about the core idea are in order here. Under the systemic habeas model, a petitioner would have to show that his individual rights were prejudicially violated and would *also* have to produce some evidence that the violation was systemic rather than an idiosyncratic error in his case. When trying to make this initial showing, the petitioner would often have the assistance of a Justice Department lawyer tasked to investigate systemic state violations or a civil rights attorney paid pursuant to a fee-shifting statute. Once the petitioner carried his initial burden, the federal district judge would have to decide whether a systemic problem existed. If the federal court found no systemic problem, it would dismiss the petition. But if the court found a systemic problem, it would order the form of relief that is traditional in habeas corpus: conditional release of the petitioner. Specifically, the federal judge would remand the petitioner's case to the state courts with an order documenting the systemic problem and giving the state two options: (1) fix the problem in whatever way the state sees fit and apply that fix to the instant petitioner's case, or (2) release the petitioner from custody. If the state chose to release the petitioner, all future habeas petitions from that state alleging prejudice from a similar systemic violation would be fast-tracked in federal court. Petitioners who could demonstrate individual prejudice in their cases as a result of the systemic violation would have their cases sent back to the state with similar orders until the state fixed the problem.

This model of habeas offers several important benefits, including limiting waste, respecting state autonomy, and improving protection for the rights of defendants. Because only claims of systemic error would be cognizable on habeas, federal courts would no longer entertain petitions seeking relief for individual violations. As a result, federal courts would no longer be charged with revisiting state court decisions in the large run of ordinary cases. And when federal courts did entertain habeas petitions, their focus would be on a question not typically addressed in the state courts—namely, whether a state is engaging in practices that *routinely* violate defendants' constitutional rights.

Although fewer claims would be cognizable under the proposed model, the shift in focus to systemic violations would help make habeas a better corrective for violations of defendants' rights. A model of habeas that uncovers and redresses systemic violations would, in the aggregate, greatly reduce the

incidence of individualized prejudicial error. And, as I explain in detail in Part III, systemic state violations are by definition circumstances under which the state process is ineffective, so the exhaustion requirement that currently causes excessive delay in federal habeas review would not be necessary under a systemic model. As a result, federal habeas adjudication would move more swiftly in those cases where it is warranted. That increased speed would improve the feedback mechanism to the states, thus increasing the corrective value of the federal decisions.

The nature of the remedy that federal courts would provide upon finding a systemic violation is key to this model's ability to spur reform, protect federalism, and maintain continuity with the traditional habeas process. Rather than directly ordering structural change in a state's criminal justice system (as might occur in a section 1983 or federal enforcement action), the proposed system would catalyze reform through the traditional habeas remedy of releasing prisoners, one by one. When a federal court finds a systemic violation and sends a petitioner's case back to the state courts, the state itself decides whether reform is in its interests and, if so, what shape that reform should take. If the state does nothing, or does too little, it faces the threat of future petitions being fast-tracked in the federal courts. The resulting wave of conditional release orders that might follow would substantially increase the state's incentive to reform. But the conditional release order allows the offending state to choose its own approach to solving the problem, thereby maintaining the proper balance—central to our federalist system—between state autonomy and federal oversight. Moreover, the fact that the relief is individualized (that is, that conditional orders of release come one by one) makes it more politically palatable for a federal judge to grant the writ. There is no requirement of immediate relief for all affected prisoners.

Two final notes about the scope of the proposed reform are in order. First, the proposed systemic habeas review model is designed to replace federal habeas review of state court criminal convictions—that is, the branch of habeas review that occurs under 28 U.S.C. § 2254.[40] I leave for another day what reforms should be made to the statutes that govern habeas review of federal convictions and executive detentions.[41] Those other forms of habeas review are obviously important.[42] That said, an overwhelming majority of the federal habeas docket is comprised of state prisoner petitions.[43] Second, although the

40. 28 U.S.C. § 2254 (2006).

41. *Id.* at §§ 2241, 2255.

42. *See, e.g.*, David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981 (2008); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008); Dimitri D. Portnoi, Note, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. REV. 293 (2008).

43. In 2003 and 2004, there were a total of 46,414 habeas petitions filed in noncapital cases and nearly 37,000 of them were filed by state prisoners. *See* Administrative Office of the Courts, Judicial Business of the U.S. Courts, 2004 Annual Report of the Director, tbl.C-2 (reporting that

proposed model of systemic review would replace individualized review in noncapital state cases, individualized habeas review should remain available to capital defendants. Full relitigation may not be feasible for all criminal convictions given limited resources, but it is certainly possible, and desirable, for the small handful of cases where the ultimate punishment is at stake.[44]

Systemic violations affect large groups of criminal defendants, but they are currently unaddressed by a system oriented toward individual errors. At the same time, the project of correcting individual errors has become a morass. This Article suggests that refocusing habeas review on systemic state practices could both repair the broken federal habeas system and redress practices by which states systematically violate defendants' federal rights.

I
THE BROKEN HABEAS SYSTEM

A prisoner in state custody who believes that he is being held in violation of federal law may petition for a writ of habeas corpus in federal court to request release.[45] Once referred to as the Great Writ of Liberty,[46] habeas corpus enjoyed its heyday in America during the Warren Court era.[47] As the Warren Court enforced constitutional criminal procedure rights against the states, more state prisoners petitioned the federal courts for release, alleging that their newly incorporated rights had been denied.[48] The federal courts considered these claims de novo and released deserving state prisoners.[49]

23,344 habeas petitions were filed in federal district courts in 2004 and 23,070 were filed in 2003); NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 2 (2007) (explaining that nearly 37,000 noncapital habeas cases were filed by state prisoners in federal district courts in 2003 and 2004).

44. In this respect, I agree with other scholars who have argued that capital and noncapital habeas corpus systems should be treated differently. *See, e.g.*, Hoffmann & King, *supra* note 1, at 821; Yackle, *supra* note 1, at 542.

45. *See* 28 U.S.C. § 2254 (2006).

46. *See, e.g.*, Prigg v. Pennsylvania, 41 U.S. 539, 619 (1842); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *137 (referring to the writ of habeas corpus as the "stable bulwark of our liberties").

47. *See* Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 67, 77 (discussing the criminal procedure revolution in the 1960s and 1970s and the ways in which it broadened the scope of federal habeas review of state criminal convictions).

48. *See* JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 96, 99 (1988) (noting that state prisoners filed 871 habeas corpus petitions in federal courts in 1960 whereas prisoners filed 9,063 such petitions in 1970).

49. *See, e.g.*, Daniels v. Allen, 344 U.S. 443, 446 (1953) (opinion of Frankfurter, J.) (noting that "State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding [because] it is precisely these questions that the federal judge is commanded to decide"); *see also* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2035–36 (2000) (explaining how the Supreme Court's decisions in the 1960s "deputize[d] the entire federal judiciary" to use habeas to enforce recently expanded criminal procedure rights).

In the 1960s, with the advent of the war on drugs, states expanded their criminal codes.[50] The resulting increase in convictions, against the background of newly incorporated criminal procedure rights, caused an explosion of federal habeas filings.[51] Unable to handle the volume of petitions, federal courts began erecting barriers to review. First, they held that most Fourth Amendment claims were not cognizable on habeas, thus eliminating a large category of claims.[52] They imposed exhaustion and procedural default requirements to ensure that habeas petitioners first presented their federal claims to their respective state courts in accordance with the relevant state procedures.[53] If a petitioner had not exhausted available state court remedies or had not complied with state procedures when raising federal claims, the federal courts would not address the claims.[54] The federal courts then held that there was no constitutional right to counsel for habeas proceedings,[55] thus leaving many petitioners unable to prepare and file meritorious petitions. They prohibited retroactive application of most new criminal procedure decisions, thus preventing petitioners from relying on new court decisions to reopen their petitions.[56] And they prohibited most prisoners from filing successive habeas petitions.[57]

Congress finished what the federal courts had started when it enacted the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[58] AEPDA codified many of the foregoing restrictions and added a few of its own, including a one-year statute of limitations for filing habeas petitions in federal

50. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 24–25 (1997).

51. *See* THOMAS, *supra* note 48, at 96, 99.

52. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 494 (1976) (holding that, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial" (footnotes omitted)).

53. *See, e.g.*, Rose v. Lundy, 455 U.S. 509, 510, 522 (1982) (requiring state prisoners to exhaust all claims for relief in the state courts before presenting those claims to the federal courts); Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (holding that a state prisoner whose federal claim is not heard in state court due to his failure to comply with an independent and adequate state procedural rule will not have that claim considered in federal court unless he can show cause and prejudice to bypass the procedural default).

54. *See* Hammel, *supra* note 5, at 2 (describing the Burger Court's "retrenchment in habeas review" and stating that "[t]he convergence between the doctrines of exhaustion and procedural default now permits states to render claims permanently unreviewable . . . .").

55. *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Murray v. Giarratano, 492 U.S. 1, 9–10 (1989).

56. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 295–96 (1989) (holding that a new rule will generally not apply retroactively to cases that were already final and on collateral review at the time the rule was adopted).

57. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 489–90 (1991) (explaining that federal courts should refuse to entertain successive petitions whenever the claims raised in them could have been raised earlier, regardless of whether the failure to raise them earlier was a deliberate choice).

58. 28 U.S.C. §§ 2241–2266 (2006).

court.[59] Perhaps most importantly, AEDPA changed the standard of review that the federal habeas courts employed. For the few petitioners able to maneuver through the procedural barriers and have their claims entertained on the merits, the federal courts could only grant relief if the underlying state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[60] Under AEDPA, it is not enough if a state court decision was wrong: it has to have been unreasonably wrong.[61]

Despite these judicial decisions and congressional enactments, the volume of federal habeas petitions has continued to rise.[62] As the habeas procedural maze has grown more complex, both the time required for petitioners to reach federal court and the time required for federal courts to resolve the average habeas petition have increased.[63] What the various obstacles to review have accomplished, however, has been to effect a shift in the subject matter of habeas review from the substantive merits of the prisoners' claims to the question of which procedural obstacle will be used to bounce each claim out of federal court.[64] Rather than separate the baseless claims from the valid ones, courts dispose of many claims on procedural grounds.[65] And after all this time is spent, federal judges grant relief to noncapital habeas petitioners in less than 1 percent of cases.[66]

Critically, the fact that federal judges ultimately deny almost all petitions for relief without considering their substantive merits means that the habeas system does not deter states from violating defendants' constitutional rights.[67] State judges know that, absent egregious errors, their decisions are insulated from federal attack. Thus, when faced with crushing caseloads,[68] the lack of real federal review gives state judges an incentive to cut corners, which has the effect of diluting federal constitutional rights.

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59. *Id.* § 2244(d)(1).

60. *Id.* § 2254(d)(1).

61. *See* Williams v. Taylor, 529 U.S. 362, 410–11 (2000) (emphasizing that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law" and holding that a federal habeas court may not issue a writ simply because it believes the state court erred; rather, the error has to be an unreasonable one).

62. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1638 (2003) (noting that, between 1996 and 2001, the number of federal habeas petitions that state inmates filed grew by 50 percent, even though the state prison population increased by only 20 percent).

63. Hoffmann & King, *supra* note 1, at 806.

64. *See* KING REPORT, *supra* note 6.

65. *See id.* at 60–63 (explaining that over 40 percent of habeas petitions are dismissed without considering any claim on the merits); *see also* Garrett, *supra* note 14, at 445–46 (noting that current habeas law does not effectively sift baseless claims from meritorious ones).

66. *See* Hoffmann & King, *supra* note 1, at 809.

67. *See id.* at 810–15.

68. *See* Wayne R. LaFave et al., 1 Criminal Procedure § 1.10(c) (3d ed. 2003) (describing the caseload problems in state courts).

The way in which federal courts grant habeas relief further diminishes any potential deterrent value. If a habeas petitioner successfully demonstrates that the state court failed to provide him with an adequate hearing on his federal claim, the federal court conducts its own hearing and decides the issue rather than sending the case back to the state court.[69] State court judges may be more inclined to refuse to grant evidentiary hearings if they know that the federal courts will hold hearings later and clean up the mess.[70] This procedure allows state judges to pass the buck to the federal courts and put the political burden of making a publicly unpopular decision in favor of a criminal defendant on the federal judge.[71]

For all of these reasons, many scholars, judges, legislators, and practitioners agree that the current system of federal habeas corpus review of state court criminal convictions is broken and desperately in need of reform.[72] The problem is figuring out a remedy.

II
RESTORING A SYSTEMIC PURPOSE

In this Article, I propose restructuring federal habeas review of state court convictions to focus on *systemic* violations of defendants' rights.[73] Such a restructuring would be consistent with one of Congress's original reasons for extending federal habeas jurisdiction to cover state prisoners' claims—namely, redressing the systemic and widespread violation of individual rights by states. Restoring a focus on systemic state practices—which many other habeas reform proposals fail to do—would greatly improve habeas as a deterrent to such violations.

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69. *See* Townsend v. Sain, 372 U.S. 293, 312 (1963) (holding that "the power of inquiry on federal habeas corpus is plenary" and that, "[t]herefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew"); 28 U.S.C. § 2254(e)(2) (2006) (setting forth conditions under which federal habeas courts may conduct an evidentiary hearing).

70. *Cf.* Steven Semeraro, *Two Theories of Habeas Corpus*, 71 BROOK. L. REV. 1233, 1248 (2006) ("Elected state judges may be more likely to deny constitutional challenges if they know that life-tenured federal judges are waiting to clean up the mess.").

71. *See* Semeraro, *supra* note 27, at 921.

72. *See* sources collected *supra* note 1; *see also* Brecht v. Abrahamson, 507 U.S. 619, 649 (1993) (White, J., dissenting) ("Our habeas jurisprudence is taking on the appearance of a confused patchwork. . . ."); Thanassis Cambanis, *Some Oppose Antiterror Law's Time Limit on Review*, BOSTON GLOBE, Nov. 29, 2002, at B1 (noting that many judges are criticizing current habeas legislation and further noting that Senator Edward Kennedy is in favor of reforms to restore full habeas corpus rights to state prisoners).

73. *Cf.* Philip Halpern, *Federal Habeas Corpus and the* Mapp *Exclusionary Rule After* Stone v. Powell, 82 COLUM. L. REV. 1, 31–33 (1982) (suggesting that federal courts consider whether state courts systematically err in Fourth Amendment cases when deciding whether the state courts have provided litigants with an opportunity for full and fair litigation of Fourth Amendment claims).

This Part begins by explaining why, at its inception, federal habeas review of state court criminal convictions was concerned not just with correcting violations of individual rights, but also with redressing systemic state practices. After describing how this systemic aspect of the Great Writ has been lost, I will explain why a systemic focus needs to be restored. Specifically, I will discuss the many ways in which states currently violate defendants' rights systematically. Finally, I will examine the leading proposals for habeas reform and explain how they fail to redress these systemic problems.

A. A Lost Purpose

Conventional wisdom views habeas corpus as designed to guarantee individual liberties, and in important ways it does.[74] Originally, however, "the writ arose from a theory of power rather than a theory of liberty."[75] In England, it was initially used as a device for compelling a person's appearance before the King's judiciary,[76] thus ensuring that local jailers respected the King's jurisdiction.[77] In this early form, the writ was more coercive than emancipatory.[78]

When Congress originally gave the federal courts jurisdiction over state prisoners' claims, it crafted legislation that gave meaning to both the emancipatory and coercive aspects of the Great Writ. The Habeas Corpus Act of 1867 gave federal courts the power to issue writs of habeas corpus in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[79] Before it was through, the Reconstruction Congress also proposed the Fourteenth Amendment and created both federal question and federal removal jurisdiction.[80] Through these measures, Congress gave the federal courts more power to oversee state action. Although these jurisdictional statutes allowed federal courts to hear individualized claims, they also empowered them to entertain systemic challenges to state action in federal court. After all, the problem that Congress faced was not just one of isolated violations of individual rights. Rather, it was a problem of rogue states refusing to enforce new federal rights

74. *See infra* Section II.C; *see also* sources collected *supra* notes 17–20.

75. Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 586 (2008).

76. *See* THOMAS, *supra* note 48, at 75.

77. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2244–45 (2008) ("[A]t the outset [habeas corpus] was used to protect not the rights of citizens but those of the King and his courts. . . . [T]he writ . . . was in its earliest use a mechanism for securing compliance with the King's laws. . . . [B]y issuing the writ of habeas corpus common-law courts sought to enforce the King's prerogative to inquire into the authority of a jailer to hold a prisoner.").

78. *See* THOMAS, *supra* note 48, at 75; Bator, *supra* note 26.

79. HABEAS CORPUS ACT OF 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2006)).

80. *See* U.S. CONST. amend. XIV, § 1; 28 U.S.C. § 1331 (2006); 28 U.S.C. § 1441 (2006); *see also* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 187 (2001).

systematically.[81]

For this reason, federal habeas review of state court criminal convictions was not only about emancipating wrongly convicted individuals; it was also about coercing reluctant states to enforce federal rights. As Senator Lyman Trumbull explained, the habeas legislation was designed "to meet a class of cases which was arising in the rebel States, where, under pretense of certain State laws, men made free by the Constitution of the United States were virtually being enslaved."[82] Senator Trumbull emphasized the desire to address a "class of cases" because the Habeas Corpus Act was designed, at least in part, to address the problem of systemic state resistance.[83]

Until relatively recently, the idea that one writ could be used to redress a problem affecting multiple state prisoners was a well-accepted part of habeas practice. Habeas *corpora* existed in England,[84] and early American statutory enactments spoke of the Great Writ as having collective, as well as individual, forms.[85] More recently, federal courts in the 1970s, 1980s, and early 1990s permitted petitioners to file habeas class actions that were binding on entire groups of prisoners.[86] The Supreme Court effectively eliminated these class

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81. *See, e.g.*, William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961) ("In 1867, Congress was anticipating Southern resistance to Reconstruction and to the implementation of the post-war constitutional Amendments."); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 752 (1987) (describing Congressional concern about Southern state policies). The Committee on Reconstruction issued an 800-page report early in 1866 detailing the many ways in which the state of Kentucky was engaging in systemic civil rights violations—including continuing to keep men, women, and children enslaved. *See* Clark D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1112 (1995) (citing and discussing REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, H.R. REP. NO. 39-30 (1866)). When Representative William Lawrence proposed the Habeas Corpus Act of 1867 in the House, he specifically mentioned the need to give Judge Ballard, a federal judge known for enforcing civil liberties, the power to enforce civil liberties in Kentucky. *See* CONG. GLOBE, 39th Cong., 1st Sess. 4151 (1866) (statement of Rep. Lawrence).

82. CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868); *see also id.* at 2095, 2115, 2127, 2165.

83. *See* David McCord, *Visions of Habeas*, 1994 BYU L. REV. 735, 739 ("[T]he Reconstruction Congress . . . authorized federal courts to issue writs of habeas corpus on behalf of state prisoners because of distrust of state criminal justice systems."); *see also* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 604–11 (1993) (explaining that nineteenth century constitutional litigation was focused on systemic rather than random individual illegality).

84. *See* Note, *Multiparty Federal Habeas Corpus*, 81 HARV. L. REV. 1482, 1491 n.64 (1968) [hereinafter *Multiparty Habeas*]. Courts often used one writ to establish jurisdiction over many people. For example, one writ was used to summon all of the members of a jury. *See* ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 15 & nn.38–40 (1960).

85. The Acts of Aug. 29, 1842 and March 2, 1833 both spoke in terms of "person or persons" or "prisoner or prisoners" obtaining "his or their writ." *See Multiparty Habeas*, *supra* note 84, at 1491 & n.63. This was changed from the plural to the singular, without comment, when several habeas acts, some of which had been plural and some of which had been singular, were consolidated for codification in 1873. *See id.* at 1491.

86. *See* RANDY HERTZ & JAMES S. LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.4(b) (5th ed. 2001) (collecting cases); Garrett, *supra* note 14, at 388 n.15 (noting

actions in 1998 when it prohibited any advance ruling on common issues in habeas class action petitions unless all of the class members had properly presented their individual claims to the state courts.[87] With the demise of the federal habeas class action, little remains of the coercive, structural model of federal habeas review. Vestiges of the structural aspect of the Great Writ, however, can still be found in the exceptions to the procedural barriers to federal habeas review.

Consider, for example, the procedural default doctrine and its exceptions. Before the federal courts will procedurally default a habeas petitioner's claim for failure to comply with a state procedural rule, the federal court will ask whether the state rule is an adequate one—meaning, among other things, that it is consistently applied in the state courts and does not unduly burden the exercise of a federal constitutional right.[88] Although federal courts can and do find procedural rules inadequate because of the way that they affect an individual case,[89] federal courts also declare state procedural rules inadequate when the rules reflect recurring state hostility to federal constitutional claims across cases.[90] Thus, adequacy review encourages federal courts, in some cases, to focus on state practices that violate individual rights systematically.

Similarly, the federal courts will not procedurally default a habeas petitioner's claim if the petitioner can show cause for failing to comply with the state procedural rule and prejudice to the outcome.[91] State actions that hinder compliance with a procedural rule or make compliance impracticable establish cause to excuse a procedural default.[92] Moreover, these state actions are often part of a pattern or practice that gets repeated across many cases. As a result, federal courts that refuse to honor state procedural defaults because the state has hindered the habeas petitioner's ability to comply with the rule are often addressing systemic state actions that have the effect of undermining

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that for two decades federal courts certified habeas class actions). For a discussion of why habeas class actions were not effective in remedying systemic state problems, see discussion *infra* Section V.C.3

87. *See* Calderon v. Ashmus, 523 U.S. 740 (1998); *see also* Garrett, *supra* note 14, at 408 (discussing how the Supreme Court's ruling in *Calderon* led to the demise of habeas class actions).

88. *See, e.g.*, Lee v. Kemna, 534 U.S. 362 (2002); James v. Kentucky, 466 U.S. 341 (1984).

89. *See, e.g.*, Lee v. Kemna, 534 U.S. 362 (2002).

90. *See, e.g.*, Catherine T. Struve, *Direct and Collateral Federal Court Review of The Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 262–63 (2003) (collecting cases that explain how the inconsistency branch of adequacy review typically results in facial invalidation of the state procedural rule and is motivated by a concern that the state is discriminating against the federal right); *see also id.* at 264–65 (collecting cases in which the undue burden branch of adequacy review has invalidated a state procedural rule across cases); *see also* Breechen v. Reynolds, 41 F.3d 1343, 1364 (1994) (10th Cir. 1994) (declaring an Oklahoma procedural rule inadequate because it requires defendants to raise trial attorney ineffectiveness challenges on direct appeal while simultaneously not giving them an opportunity for additional fact-finding at that stage).

91. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977).

92. *See* HERTZ & LIEBMAN, *supra* note 86, § 26.3(b) (collecting cases).

defendants' constitutional rights. Thus, even within the current individualized form of federal habeas review, there are several small ways in which federal courts address systemic state practices that violate defendants' constitutional rights. However, these procedural exceptions do not do enough work in the current habeas system to promote systemic reform in the states.[93]

This Article proposes a paradigm shift. Rather than relegate consideration of structural concerns about systemic state practices to the exceptions to a procedural default bar, we should recognize that systemic state practices that violate defendants' rights are themselves a central problem that needs to be redressed and restructure federal habeas review in ways that recover its coercive, systemic aspects.

Admittedly, a nonindividualized form of federal habeas corpus review may be controversial, but it is not foreign to our habeas system. On the contrary, it is consistent with one of the original reasons for extending federal habeas review to state criminal convictions and with historical applications of the Great Writ.

B. The Ongoing Problem of Systemic Violations

The problem that convinced Reconstruction Republicans of the need for federal judicial supervision of the states was, of course, a problem of sectionalism. They feared that Southern states would systematically flout the reconfigured Constitution.[94] In later generations, as the sectional divide became less salient, scholars articulated other reasons why federal court review was

93. In theory, adequacy determinations and findings of cause to excuse procedural defaults could put an end to many systemic state procedural violations by encouraging states to change offensive procedural rules. In practice, however, this does not happen. As an initial matter, there is the problem of time. The exhaustion and procedural default requirements entangle criminal defendants in years of state court review before they are permitted to file federal habeas petitions. *See* KING REPORT, *supra* note 6. Consequently, even if a federal judge ignores a state procedural default and grants habeas relief, it often comes so long after the original state violation that there is little deterrent effect on the offending state. *See* Stone v. Powell, 428 U.S. 465, 493 (1976) (discussing the "dubious assumption" that law enforcement authorities are deterred from committing Fourth Amendment violations out of fear that the conviction might be overturned in collateral proceedings); Hammel, *supra* note 5, at 79 ("Even when post-conviction lawyers win reversals of convictions, those reversals come so long after the original trial that any tendency they might have to deter wrongdoing by state officials is attenuated.").

Next, there is a problem of scale. Federal grants of habeas relief are too rare to provide the states with any incentive to change their offensive procedures. *See supra* notes 6–8 & accompanying text. There is little threat that the state's criminal convictions will be disrupted if the state does not change its ways. As a result, states often ignore federal habeas rulings that their procedural rules are inadequate and continue to apply the offending rules. *See, e.g.*, Richie v. Sirmons, No. 98-CV-482, 2008 U.S. Dist. LEXIS 41273 (N.D. Okla. May 21, 2008) (noting that the state courts still improperly default ineffective assistance of trial counsel claims even after federal courts have held that their defaults are inadequate); *see also infra* note 117 and accompanying text (noting that, despite several federal findings that the state is misapplying its contemporaneous objection rule, New York courts continue to engage in this practice).

94. *See* sources collected *supra* note 81.

necessary to ensure state compliance with the Constitution. The mainstream view today is that federal judges are more expert than their state counterparts, more solicitous of constitutional rights, more insulated from political pressure, and more able to apply uniform interpretations of federal law.[95] A growing number of scholars suggest, however, that the disparity between state and federal courts is now more myth than reality and that state judges are equally capable of enforcing federal constitutional rights.[96] Some have accordingly argued that habeas review is no longer needed "to force defiant state courts to obey federal constitutional law."[97]

That view, however, underestimates the degree to which state courts still routinely violate defendants' constitutional rights.[98] Some of these violations are clear on the face of state law.[99] More of them are endemic in state practice. Throughout Michigan, for example, state judges arraign defendants and ask them to plead guilty to misdemeanor offenses that carry jail sentences without ever informing them that they have a right to a lawyer.[100] It is so bad in one county that the days on which the district court arraigns people—typically without counsel present—are generally referred to as "McJustice Day[s]."[101]

In this subsection, I explain why there is a need for systemic habeas reform by describing three categories of systemic errors that currently go unchecked in state criminal justice systems: right-to-counsel violations, due process violations, and prosecutorial misconduct.[102] The categories are merely

95. *See, e.g.*, Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CALIF. L. REV. 1515, 1517 (2007) ("Only Article III judges, who unlike their state counterparts are always politically independent and experts in federal law, can be trusted ultimately to expound that law accurately and guarantee its supremacy and uniformity."); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1787 & n.104 (1992) (noting that federal judges should shape and enforce federal law because of their "presumed expertise . . . in interpreting federal law" and "sensitivity to the importance of federal rights").

96. *See, e.g.*, John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247 (2007); Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95 (2009).

97. *See* Hoffmann & King, *supra* note 1, at 795; *see also id.* at 796 (noting that the "structural and systemic problems in state criminal justice that led to widespread deprivations of federal rights . . . have largely dissipated.").

98. *See* Garrett, *supra* note 14, at 401–04; *see also* Yackle, *supra* note 1, at 556–57.

99. *See, e.g.*, People v. Brendlin, 136 P.3d 845 (Cal. 2006), *rev'd sub nom.* Brendlin v. California, 127 S. Ct. 2400 (2007). In that case, the California court held that, as a matter of law, car passengers have no standing to assert Fourth Amendment challenges when the vehicles in which they are riding get pulled over, because the passengers are not seized as a constitutional matter. 136 P.3d at 855. The United States Supreme Court reversed, emphasizing that the California court had ignored the governing federal test for determining when a person is seized under the Fourth Amendment and had introduced an element of subjectivity into the analysis that had been rejected by the Supreme Court. 127 S. Ct. at 2408. Thus, California's legal interpretation of the governing federal standard had improperly diluted defendants' Fourth Amendment rights.

100. RACE TO THE BOTTOM, *supra* note 10, at ii.

101. *Id.* at iii.

102. Readers may not agree that all of the examples I provide involve violations of federal

examples and are certainly not exhaustive. However, they do demonstrate the extent and scope of the systemic problems in state criminal justice systems and explain why restoring a coercive, structural model of federal habeas review is important.

1. Right-to-Counsel Errors

Many states routinely underfund their public defender offices, thus denying indigent defendants their constitutional right to effective trial counsel.[103] In Louisiana, for example, the primary means of funding indigent defense is through traffic ticket revenue.[104] When Hurricane Katrina hit, the police stopped writing traffic tickets, and New Orleans was forced to lay off almost all of its public defenders.[105] Many other states face similar budget constraints that prohibit them from appointing adequate counsel for indigent criminal defendants.[106] As an obvious consequence, these states systematically

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constitutional rights. Any right is subject to more and less expansive interpretations. These examples are not exhaustive. They are merely intended to illustrate the existence of a problem. The scope of the problem is something that the federal courts would address if federal habeas review were reconfigured to focus on systemic challenges.

103. *See supra* note 10; *see also* Strickland v. Washington, 466 U.S. 668, 686 (1984) (describing the constitutional right to effective trial counsel).

104. *See* Georgia N. Vagenas, *Review of National Indigent Defense Developments*, 11 DIALOGUE 17 (2007).

105. *See Louisiana Overhauls Public-Defender System* (NPR radio broadcast Sept. 14, 2007), transcript *available at* http://www.npr.org/templates/story/story.php?storyId=14412362.

106. Public Defenders in Minnesota, Kentucky, Florida, and Georgia are unable to handle all of their cases due to budget constraints. *See* Scott Michels, *Facing Budget "Crisis," Public Defenders May Refuse Cases*, ABC NEWS, June 13, 2008, http://abcnews.go.com/print?id=5049461. Georgia recently cut the hourly rate that it pays appointed counsel in capital cases, fired forty-one employees, and dismantled a number of offices. *See* Vagenas, *supra* note 104, at 19. Virginia places a $120 cap on the fee that it will pay to an attorney who handles a juvenile delinquency case, regardless of the severity of the charges. *See id.* at 17. As of 2007, attorneys can apply for a fee waiver to get additional money, but the fee waiver program has not been adequately funded. *See* VIRGINIA FAIR TRIAL PROJECT, PROGRESS REPORT: VIRGINIA'S PUBLIC DEFENSE SYSTEM (2007).

In other states, public defenders are routinely forced to handle more than a thousand criminal cases a year — almost three times the number that the American Bar Association has concluded one attorney can handle effectively. *See, e.g.*, BRUCE A. MYERS, OFFICE OF LEGISLATIVE AUDITS, DEP'T OF LEGISLATIVE SERVS., MD. GEN. ASSEMBLY, PERFORMANCE AUDIT REPORT: OFFICE OF THE PUBLIC DEFENDER 15 (2001), *available at* http://www.ola.state.md.us/Reports/Performance/PubDefen.pdf (noting that public defenders in Baltimore were handling 1,163 cases per year); Vagenas, *supra* note 104, at 19 (emphasizing that, in 2006, the Knox County Public Defender Office in Tennessee was appointed nearly 21,000 cases which were handled by only 23 attorneys); *see also* State v. Peart, 621 So.2d 780, 789 (La. 1993) (describing a Louisiana public defender with more than 700 open cases and noting that "[n]ot even a lawyer with an 'S' on his chest could effectively handle th[at] docket"); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686–87 (2007) (collecting caseload statistics for different jurisdictions); ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet .pdf

fail to provide effective assistance of counsel as required by the Sixth Amendment.

Many states also have procedural rules that systematically prevent defendants from asserting right-to-counsel claims. In Oklahoma, for example, a defendant who wants to challenge the effectiveness of his trial attorney must raise that claim on direct appeal.[107] If additional facts are needed to support the claim, the defendant must file a motion to remand the case to the trial court for an evidentiary hearing during which he can supplement the record with evidence of his trial attorney's incompetence.[108] If a defendant fails to raise an ineffectiveness challenge on direct appeal, the claim is waived and cannot be raised in state postconviction proceedings.[109] However, Oklahoma does not require separate, new counsel on appeal,[110] thus leaving many defense attorneys in the untenable position of having to raise their own ineffectiveness on appeal.[111] Even defendants who have new counsel often cannot raise trial attorney ineffectiveness claims on appeal, because the Oklahoma courts deny virtually all motions to remand cases for evidentiary development of ineffectiveness claims.[112] There is clear evidence that Oklahoma routinely provides ineffective trial counsel to indigent defendants,[113] so this pattern cannot simply reflect the absence of meritorious claims. Given that ineffective

(noting the figures of the National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, which provide for a maximum caseload per year of 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals).

107. *See* OKLA. STAT. tit. 22, ch. 18, App. R. 3.11 (2003).

108. *See id.*

109. *See, e.g.*, Hooks v. Ward, 184 F.3d 1206 (10th Cir. 1999).

110. *See, e.g.*, McCracken v. State, 946 P.2d 672, 676 (Okla. Crim. App. 1997) (defaulting defendant's ineffective assistance of counsel claim for failure to raise it on direct appeal even though appellate attorney was the same as trial attorney); Neill v. State, 943 P.2d 145, 148 (Okla. Crim. App. 1997) (same).

111. *See McCracken*, 946 P.2d at 676; *Neill*, 943 P.2d at 148. Sometimes, there can be systemic problems even when the trial and appellate counsel are different. *See, e.g.*, Cannon v. Mullin, 383 F.3d 1152, 1173–74 (10th Cir. 2004) (suggesting that the Oklahoma appellate defenders have a policy of not raising ineffectiveness challenges on direct appeal when the trial attorney was a public defender).

112. *See* English v. Cody, 146 F.3d 1257, 1264 n.7 (10th Cir. 1998) (noting that, in a seventeen-month time period, the Oklahoma Court of Criminal Appeals affirmed no fewer than twenty-four postconviction capital cases raising ineffective assistance of trial counsel claims and that not one remand was granted in those cases).

113. Oklahoma provides trial counsel to indigent defendants in three different ways: (1) through public defender offices; (2) through contracts under which private defense attorneys agree to be paid a flat fee to handle any and all indigent defendants who pass through the system; or (3) by paying private counsel an hourly rate (with fee caps) to take on the cases. OKLAHOMA INDIGENT DEFENSE SYSTEM ANNUAL REPORT 8 (2007), *available at* http://www.ok.gov/OIDS/documents/2007%20Annual%20Report.pdf. For a discussion of why all three of these systems create structural trial attorney ineffectiveness problems, see generally Primus, *supra* note 106, at 686–88. For a discussion of the ways in which Oklahoma specifically is underprotecting the right to counsel, see *Oklahoma Indigent Defense System's Struggles Continue*, 2 THE SPANGENBURG REPORT, 1996, at 11–12, *available at* http://www.spangenberggroup.com/newsletter/TSG_vol2_issue4.pdf.

assistance of counsel claims are typically about what attorneys failed to do, the courts' refusal to permit expansion of the trial record is devastating. The result is a statewide system in which defendants are denied their constitutional right to effective trial counsel and are prevented from challenging that denial in the state courts.[114]

2. Due Process Violations

Many states systematically violate federal due process rights by erecting procedural barriers that prevent defendants from exercising or vindicating other federal constitutional rights. The Oklahoma remand procedure just described is one example. Consider also the following practice, familiar in several states: A criminal defendant attempts to raise a claim on direct appeal and is told by the appellate courts that the claim can or should be raised during state postconviction review. However, when the defendant then attempts to raise the claim on state postconviction review, the postconviction court holds that the claim is procedurally defaulted for failure to comply with a state procedural rule requiring him to raise it on direct appeal.[115] Such a bait-and-switch effectively prevents defendants from ever having their federal claims considered.

In New York, state appellate courts systematically violate defendants' due process rights by routinely misapplying the state's contemporaneous objection rule in ways that prevent criminal defendants from vindicating their constitutional claims. Specifically, the appellate courts default federal claims for failure to comply with the rule even when the record demonstrates that the defendants

114. Oklahoma is not the only jurisdiction to have a procedural regime that, in practice, systematically denies defendants an opportunity to raise trial attorney ineffectiveness claims. *See, e.g.*, Hoffmann v. Arave, 236 F.3d 523 (9th Cir. 2001) (explaining that the Idaho statute requiring capital defendants to file any legal or factual challenges to their sentences or convictions within forty-two days of the judgment effectively prevents them from raising ineffectiveness challenges because forty-two days is not long enough to do any investigation or even get the trial transcripts). In New York, on-the-record ineffectiveness claims must be raised on direct appeal, but ineffectiveness claims that rely on evidence outside of the trial record may be raised during state postconviction proceedings. *See* N.Y. C.P.L.R. § 440.10(2)(c) (McKinney 2005). The New York courts, however, routinely bar ineffectiveness challenges raised during postconviction proceedings on the ground that they are on-the-record claims that should have been raised on direct appeal, even when they require factual development outside the record. *See* Ramsey v. Bennett, No. 02-CV-5290, 2007 U.S. Dist. LEXIS 45483, at *9–10 (E.D.N.Y. June 21, 2007); Powers v. Lord, 462 F. Supp. 2d 371, 378–79 (W.D.N.Y. 2006); Etoria v. Bennett, 292 F. Supp. 2d 456, 467 (E.D.N.Y. 2003); *see also* Bradley v. Clark, No. 99 C 1785, 2002 U.S. Dist. LEXIS 18490, at *7–16 (N.D. Ill. July 22, 2002) (finding a similar state problem in Illinois). And in Michigan, state procedural rules effectively prevent defendants from raising ineffective assistance of appellate counsel claims. *See, e.g.*, Lewis v. Bock, No. 01-10252-BC, 2006 U.S. Dist. LEXIS 4020, at *20–25 (E.D. Mich. Feb. 2, 2006) (ruling that the state courts' interpretation of the Michigan rules to default ineffective assistance of appellate counsel claims for failure to raise them on direct appeal was nonsensical because it required appellate counsel to raise his own effectiveness).

115. *See* Wilson v. Ozmint, 357 F.3d 461, 466 (4th Cir. 2004); *see also supra* note 114 (collecting New York cases).

made timely objections.[116] Despite several federal findings that the state contemporaneous objection rule, as applied, unduly burdens defendants' constitutional rights, New York courts continue to engage in this practice.[117]

To make matters worse, the very structure of the New York criminal justice system leaves many systemic violations of constitutional rights unchecked. Over three-quarters of New York's trial courts are "Justice Courts."[118] These courts handle roughly two million cases each year, including misdemeanor and lesser criminal cases, as well as arraignments for the most serious felonies.[119] But there is no statute requiring verbatim recordkeeping of any Justice Court proceeding,[120] and many Justice Courts have no official recording system. Typically, the local justice, who is often not even a lawyer, just takes handwritten notes on the proceedings.[121] If the case is appealed, there is no adequate record on appeal and thus no way to ensure that Justice Courts adequately enforce litigants' constitutional rights.[122]

3. Prosecutorial Misconduct

In *Brady v. Maryland*,[123] the Supreme Court ruled that criminal defendants have a due process right to exculpatory information and imposed an

116. *See, e.g.*, Garcia v. Portuondo, 104 Fed. Appx. 776, 780 (2d Cir. 2004) ("Garcia clearly objected on *Batson* grounds and did so in a manner that unmistakably made his position known to the court.") (internal quotations and ellipses omitted); Cotto v. Herbert, 331 F.3d 217, 246 (2d Cir. 2003) ("Cotto's compliance with New York's preservation rule here was arguably literal, and not just substantial."); Daley v. Artus, No. 03-CV-4109, 2003 U.S. Dist. LEXIS 23428, at *26–27 (E.D.N.Y. Dec. 31, 2003) ("Daley objected repeatedly at trial to specific questions . . . by the prosecutor, and at specific points in the prosecutor's summation. . . . Indeed, . . . the objections could not have been more 'contemporaneous.' . . . I question what else Daley could have done to make his position clear to the trial court."); *see also* Silverman v. Edwards, 69 Fed. Appx. 489, 491 (2d Cir. 2003) (same); Sanford v. Burge, 334 F. Supp. 2d 289, 299–300 (E.D.N.Y. 2004) (same). New York is not the only state that misapplies its preservation rules in order to default federal claims. *See, e.g.*, U.S. *ex rel.* Hardaway v. Young, 162 F. Supp. 2d 1005, 1012 (N.D. Ill. 2005), *rev'd on other grounds*, 302 F.3d 757 (7th Cir. 2002).

117. *See, e.g.*, Ojar v. Greene, No. 05-CV-3674, 2008 U.S. Dist. LEXIS 11744, at *24–26 (E.D.N.Y. Feb. 15, 2008); Fong v. Poole, 552 F. Supp. 2d 642, 652 (S.D.N.Y. 2007); Weathers v. Conway, No. 05-CV-139S, 2007 U.S. Dist. LEXIS 59911, at *19–20 (E.D.N.Y. Aug. 9, 2007); Garvey v. Duncan, No. 02 Civ. 4208, 2005 U.S. Dist. LEXIS 17499, at *15 (S.D.N.Y. Aug. 9, 2005).

118. JUDITH S. KAYE & JONATHAN LIPMAN, ACTION PLAN FOR THE JUSTICE COURTS, preface (2006) [hereinafter "ACTION PLAN"], *available at* http://www.nycourts.gov/publications/pdfs/ActionPlan-JusticeCourts.pdf.

119. *Id.*

120. *Id.* at 10.

121. *Id.* (noting that 72 percent of New York's nearly 2,000 town and village justices are nonlawyers).

122. *Id.* ("In part because particular record reconstructions have been found to be insufficient on which to conduct appellate review of Justice Court proceedings, the lack of *verbatim* Justice Court records has raised serious concerns about Justice Court enforcement of litigant rights and compliance with other constitutional, statutory and regulatory directives.") (footnote omitted).

123. 373 U.S. 83 (1963).

affirmative duty on prosecutors to disclose exculpatory information to defendants before trial. The Court extended this duty to disclose information to impeachment evidence in *Giglio v. United States*.[124] Unfortunately, prosecutors frequently violate the directives of *Brady* and *Giglio*,[125] and when they do, their misconduct is often not discovered until well into state postconviction review[126]—a process that occurs months or even years after trial and sentencing.[127] By that time, state statutes of limitations often prevent defendants from raising *Brady* or *Giglio* claims. For example, under Idaho law even capital defendants have only six weeks after sentencing to discover and argue that the state withheld critical impeachment evidence about prosecution witnesses.[128] Given that many *Giglio* violations are not discovered until long after trial,[129] the Idaho statute of limitations effectively denies most capital defendants their due process right to impeachment evidence.

Similarly, many states statutorily require that defendants demonstrate their factual innocence in order to obtain review of *Brady* claims that are not discovered within a prescribed time period.[130] The Supreme Court has never limited *Brady* due process rights to those who are factually innocent. On the contrary,

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124. 405 U.S. 150 (1972); *see also* United States v. Bagley, 473 U.S. 667 (1985).

125. *See, e.g.*, Garrett, *supra* note 14, at 401–03 (noting that suppression of evidence in violation of *Brady* is a frequent cause of capital reversals); *see also id.* at 423 (describing the repeated misconduct of Oklahoma County District Attorney Robert H. Macy).

126. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 909 (1995); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 702–03 (1987).

127. *See, e.g.*, *Thirty-Fifth Annual Review of Criminal Procedure*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 1, 360 n.1210 (2006) (collecting cases involving delays ranging from two to thirteen years).

128. *See* IDAHO CODE § 19-2719(5)(b) (2008) (requiring any challenge to a capital conviction or sentence to be brought within forty-two days of the imposition of the capital sentence and not permitting a successive petition for any claim that "alleges matters that are . . . impeaching . . ."); Row v. State, 21 P.3d 895, 899 (2001) (refusing to allow a *Brady* claim to move forward because, among other things, the evidence would be "merely impeaching").

Alabama has a similar rule with a one-year limitations period. *See* ALA. R. CRIM. P. 32.2(c) (imposing a one-year statute of limitations for all postconviction petitions); Barbour v. State, 903 So. 2d 858, 868 (Ala. Crim. App. 2004) (noting that *Brady* claims are subject to procedural default under Alabama Criminal Procedure Rule 32.2(c) unless they can qualify as "newly discovered" evidence under Rule 32.1(e)); ALA. R. CRIM. P. 32.1(e) (excluding newly discovered impeachment evidence from the purview of the rule). As these rules demonstrate, *Giglio* impeachment material that is discovered more than one year after conviction is statutorily barred from consideration by any Alabama court. *See* Johnson v. State, No. CR-05-1805, 2007 Ala. Crim. App. LEXIS 178 at *23 (Sept. 28, 2007) ("It is well-settled that newly discovered evidence under [Rule 32.1(e)] allows relief on *Brady* claims only where '[t]he facts do not merely amount to impeachment evidence.'").

129. *See* sources collected *supra* note 126.

130. *See* ALA. R. CRIM. P. 32.1(e). In Alabama, only defendants who can demonstrate their innocence are entitled to raise delayed *Brady* claims in the state courts, even though *Brady* itself clearly extends the right to exculpatory information to the guilty and innocent alike. *Id.* This is true even if the defendant's delayed discovery of the claim is attributable to the State.

it has expressly stated that a showing of materiality does not require any demonstration that disclosure of the suppressed evidence would have resulted in the defendant's acquittal.[131] Rather, evidence is material if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different.[132] Thus, by requiring a showing of factual innocence before they are willing to entertain *Brady* claims, these states nullify the rights of the many defendants who discover prosecutorial misconduct after the statute of limitations expires.

C. The Shortcomings of Proposed Reforms

Many judges and scholars recognize that the current habeas system needs to be reformed,[133] but most of the proposed reforms would fail to cure the problem of systemic violations. Some scholars have argued for a return to the Warren Court orientation under which federal courts were far more open to reviewing state criminal convictions. Proposed by Gary Peller and Justice William Brennan,[134] the Full Relitigation/Federal Forum Model would allow for full relitigation on habeas of all federal constitutional claims in federal court.[135] Clearly, such an approach would allow federal courts to consider claims of systemic state violations of constitutional rights, but it would not prompt the courts to focus on systemic problems. Rather, it would inundate the federal courts with petitions alleging individual as well as systemic errors.

Because federal judges are generally reluctant to make rulings that call into question larger numbers of cases,[136] and given the need to perform some form of triage on the flood of petitions that would result from full relitigation,[137] a system allowing federal judges to address individual *or* systemic claims on habeas review would often result in consideration of individual claims to the exclusion of systemic ones. And although the federal courts' willingness to step in and fix constitutional violations in individual cases could send a message back to the offending states to modify their systemic practices, it also could encourage elected state judges to avoid

131. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995).

132. *See id.*; *see also* Strickler v. Greene, 527 U.S. 263, 280 (1999).

133. *See* sources collected *supra* notes 1–5.

134. *See* Fay v. Noia, 372 U.S. 391, 420–22, 426–31 (1963); Peller, *supra* note 22.

135. *See* 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, 319–21; Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 992 (1985).

136. *See* Anthony Amsterdam, *Foreword* to 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE & PROCEDURE (3d ed. 1998) ("Unless [a federal] judge is satisfied that s/he can give relief *in this case* with no (or very little) prospect that other accused or convicted persons will escape punishment, the judge will simply not [grant relief].").

137. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result) ("He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search").

political pressure by denying constitutional challenges with full knowledge that the federal courts will right the wrong later.[138]

More fundamentally, the pressure to reduce the volume of habeas petitions has taken a full relitigation approach off the table as a practical matter. Even Larry Yackle, one of the most vociferous advocates of a federal forum for consideration of federal rights, has been forced to admit that full relitigation is no longer politically feasible.[139] Liberals and conservatives alike recognize that, in a world of limited time and resources, any proposed reform must streamline federal habeas review in some way in order to be viable.[140] Unfortunately, most proposals streamline federal habeas review in ways that would prevent the federal courts from addressing entire categories of systemic state violations.

Paul Bator's Process Model, for example, would give federal habeas courts the power to consider state criminal cases only if (1) the state prisoner was not afforded a full and fair opportunity to litigate his constitutional claims in state court, or (2) the state court did not have jurisdiction over his case.[141] Although federal courts operating under this model might address some systemic procedural violations, they would not be allowed to address any systemic substantive violations. In fact, Professor Bator explicitly states that federal habeas courts should not "question whether substantive error[s] of . . . law occurred" in the state courts.[142] Thus, state court judges could repeatedly ignore entire swaths of federal law when deciding constitutional questions, and their decisions would be insulated from federal review.[143] Much the same is true of Judge Henry Friendly's Innocence Model of federal habeas review,

138. *See* Semeraro, *supra* note 70, at 1248 ("Elected state judges may be more likely to deny constitutional challenges if they know that life-tenured federal judges are waiting to clean up the mess.").

139. *See* Yackle, *supra* note 1, at 553.

140. *See, e.g.*, Hammel, *supra* note 5, at 42 ("[a]ny reform, if it is to have a chance of success, must address the felt need to make habeas procedures more streamlined and efficient.").

141. *See* Bator, *supra* note 26.

142. *Id.* at 455.

143. *See* Semeraro, *supra* note 27, at 927 ("[P]rocess review . . . does no good if the state decision-maker ignores federal law."). Professor Semeraro argues for a Reasoning-Process Review Model of federal habeas corpus review under which the federal court would consider whether the state court cited the relevant federal law and weighed the appropriate factors when relying on that law to decide a federal constitutional issue. *See id.* at 927–28. If the state court relied on the correct law and weighed the appropriate factors, the federal court would let the decision stand. If it did not, the federal court would send it back to the state court for a more thorough analysis. *See id.* Unfortunately, this model, like the Process Model, fails to check substantive systemic violations of criminal procedure rights. A state court that correctly cites the relevant federal law but assigns different weight to the various factors or balances them differently would be insulated from federal review. Thus, a state court could dilute federal constitutional standards as long as it cited the right law and relied on the right factors when doing so.

Another variant of the Process Model was offered by Andrew Hammel. *See* Hammel, *supra* note 5, at 67. His Coercive Quid-Pro-Quo Model would allow the state to obtain expedited, deferential federal habeas corpus review of a state criminal conviction as long as it could show that there was a full and adequate hearing in state court. Like other process approaches, the Coercive-Quid-Pro-Quo Model ignores substantive systemic state violations.

which is essentially the process model plus an authorization for federal courts to review those cases in which the habeas petitioners can make a colorable showing of innocence.[144] This approach would ignore systemic substantive violations in all cases involving defendants who are unable to make such a showing.[145]

Some scholars and judges have advocated a claims-based approach to federal habeas review in which some constitutional rights are cognizable on federal habeas while others are not.[146] To some extent, the Supreme Court endorsed this view in *Stone v. Powell*,[147] when it removed most Fourth Amendment claims from federal habeas review. In the interest of streamlining habeas review by creating a hierarchy of federal rights, the claims-based model straightforwardly ignores systemic violations of disfavored federal constitutional rights that are not cognizable on habeas. Although such an approach might deter states from violating favored rights, its complete neglect of other rights might lead to more unconstitutional behavior overall.[148]

Most recently, Joseph Hoffmann and Nancy King have proposed eliminating federal habeas review entirely for most state prisoners[149] and reallocating the resources currently spent on federal habeas review to improve the quality of defense representation throughout the country.[150] Like the claims-based approach, this proposal favors one constitutional right—the right to counsel—over all others. Because counsel is the means through which other constitutional rights are raised, providing better counsel is likely to result in more constitutional challenges based on other violations of defendants' rights. However, the system proposed by Professors Hoffmann and King does not provide any mechanism for checking other systemic state violations of defendants' rights and does not ensure that systemic right-to-counsel violations will

144. *See* Friendly, *supra* note 24; *see also* Jeffries and Stuntz, *supra* note 25, at 691–92 (contending that, if such a showing is made, procedural barriers to review should be swept aside so that a possibly innocent person can obtain federal review but that, absent such a showing, there is no reason to excuse a default).

145. One might contend that, for every systemic substantive state violation of a constitutional right, there will be an innocent defendant whose rights are violated. That innocent defendant would then have standing to object on habeas under the Innocence Model. Thus, the federal courts will eventually address all systemic substantive violations through innocence cases. Such an argument, however, assumes that there will be enough innocent people convicted of crimes to ensure the presentation of all types of substantive violations. Moreover, the Innocence Model, like the Full Relitigation Model, does not force the federal courts to focus on systemic state errors and is subject to the same criticisms for that reason. *See* discussion *supra* Section II.C.

146. *See, e.g.*, Hoffstadt, *supra* note 28.

147. 428 U.S. 465 (1976).

148. *See, e.g.*, Stuntz, *supra* note 50, at 4.

149. They exempt from their proposal those who have never been convicted, those who claim they are in custody in violation of a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, those who claim they are innocent, and those sentenced to death who want to challenge either the constitutionality of the death sentence or their eligibility to receive a death sentence. *See* Hoffmann & King, *supra* note 1, at 819–21.

150. *See id.* at 797; *see also* Liebman, *supra* note 33.

not persist.

Although I agree with Professors Hoffmann and King that it is time to rethink the federal role in state criminal justice and that a reallocation of currently wasted resources is in order,[151] I am not as pessimistic as they are about the role that federal habeas review can serve in checking systemic state practices. Professors Hoffmann and King are right that, in its current form, federal habeas review does not provide a remedy for the vast majority of state criminal defendants and does not deter state violations of constitutional criminal procedure rights.[152] However, the fatal flaw underlying the current habeas corpus system, and many of the proposals for reform, is that they assume that habeas should deal with individual error correction and ask which errors are worth correcting—process errors, guilt-innocence errors, or favored-rights errors. By focusing on the aggrieved individual rather than the state, these habeas theories do not stop state actors from violating constitutional rights.[153] Only by shifting their focus to consider whether the state is creating systemic problems will the federal courts be able to check systemic state errors.

III
A MODEL FOR SYSTEMIC HABEAS REVIEW

This Part proposes a modified habeas system under which federal habeas review would focus on systemic state violations of constitutional rights. To be clear, I do not object in principle to federal courts' reviewing state criminal convictions to correct individual errors. As mentioned earlier, it would be advisable to preserve individualized federal postconviction review in capital cases, given the small number of capital cases and the severity of the punishment involved. In a world of unlimited resources, one could imagine an expanded error correction system for all cases, not just those involving capital punishment, existing alongside a habeas system focused on systemic errors.[154]

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151. *See* Hoffman & King, *supra* note 1, at 793.

152. *See id.* at 806, 810–15.

153. At least one other scholar has argued for a deterrence-related theory of federal habeas review. *See* Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH U. L.Q. 151 (1994). However, the systemic habeas system proposed in this Article is more likely to deter state courts from violating defendants' rights than the individual-deterrence proposal advocated by Professor Lee. Professor Lee would have federal habeas courts grant relief whenever the likelihood of deterring future state court constitutional violations outweighs the institutional and social costs of granting relief. *See id.* at 198. He argues for a case-by-case cost-benefit analysis in which the federal court asks, in each case, whether the deterrent function of granting relief is outweighed by the costs. *See id.* Such a proposal, however, stacks the deck in favor of the costs because the costs are aggregated and the benefits are localized. I would consider deterrence at a metalevel and find that, whenever the error is systemic, it needs to be deterred such that habeas relief should be granted.

154. At times, there have been proposals to expand the federal courts' direct appellate review by having federal courts of appeal review cases immediately after relief is denied by the highest state court as a way of supplementing the United States Supreme Court's direct review jurisdiction. *See, e.g.*, Steiker, *supra* note 135, at 320–21; Daniel J. Meador, *Straightening Out*

Given a world of limited resources, however, we must slice the habeas pie somehow. For the reasons described above, I propose slicing based on the prevalence of the constitutional violation at issue.

The proposed reform would require statutory modification addressing (1) standing to allege systemic violations; (2) procedural barriers to review; (3) burdens of proof, discovery, and evidentiary hearings; (4) remedies; and (5) legal assistance for petitioners. This Part describes the proposed model of systemic review by addressing those five subjects in turn and concludes with a discussion of potential Suspension Clause implications. Then, in Part IV, I explain why this approach would be more effective than the current habeas system at redressing systemic state violations, and, in Part V, I explain why this approach is better than other potential approaches to structural reform, including 42 U.S.C. § 1983, federal enforcement actions, and habeas class actions.

A. Standing

Any model of federal habeas review designed to address systemic state violations should focus on the state's systemic practices rather than on the circumstances of an individual petitioner's case. That said, the petitioner who is the vehicle for a systemic challenge must have a stake in the outcome, and his case must be representative of the systemic problem, so that the issue is well presented for federal consideration. To have standing to assert a systemic challenge, therefore, a petitioner would have to prove that his federal rights were violated in a way that was prejudicial to his own case.[155] If the state prejudicially violated the petitioner's federal rights, then the federal district court would proceed to consider whether the violation was systemic. If the state did not violate the petitioner's rights or if the error was harmless, the district court would deny the petition without ever reaching the systemic challenge.

B. Procedural Barriers to Review

Several procedural barriers to review that mark the present habeas system would make equally good sense in a system that was reconfigured to focus on systemic violations. The statute of limitations,[156] successive petition ban,[157]

Federal Review of State Criminal Cases, 44 OHIO ST. L.J. 273 (1983). Alternatively, it would be possible to have two different habeas tracks—one for individual errors and another for systemic ones.

155. *See* Brecht v. Abrahamson, 507 U.S. 619 (1993); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding that, in order to satisfy Article III's standing requirements, a federal litigant must show an injury in fact that is fairly traceable to the challenged action of the defendant and is likely to be redressed by a favorable court decision). A habeas petitioner under the proposed systemic regime would satisfy these Article III requirements. The petitioner would have to show that that the right at issue in the systemic challenge was actually violated in his case such that he was injured; that the violation is fairly traceable to the state and thus caused by the state; and that the error was not harmless such that granting habeas relief would actually redress the problem in his case.

156. *See* 28 U.S.C. § 2244(d) (2006).

retroactivity bar,[158] and procedural default doctrine[159] have underlying rationales that apply equally to habeas petitions focused on individual and systemic claims.[160]

The exhaustion requirement, however, would not be necessary in a systemic habeas model and should be eliminated. Under the current exhaustion doctrine, habeas petitioners are not required to exhaust state remedies if there is no available state corrective process or if the state process is ineffective at protecting their rights.[161] Systemic state violations are, by definition, circumstances under which the state process is ineffective. If a state judge or prosecutor makes an individual mistake, perhaps the state's system will correct it. But a systemic error is one that the state system countenances as a matter of routine. Accordingly, it would be futile for litigants to present their claims of systemic violations to the states, and litigants should not be required to exhaust state remedies before presenting systemic challenges on federal habeas.[162]

Eliminating the delay caused by the exhaustion requirement would yield many benefits. Perhaps most importantly for the project of correcting systemic misbehavior, permitting petitioners to commence their habeas actions with less

157. *See id.* § 2244(b).

158. *See* Teague v. Lane, 489 U.S. 288, 295–96 (1989).

159. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977). Given that there would be no exhaustion requirement in the proposed systemic habeas review system, *see infra* Section III.B., the number of systemic challenges that would be raised in state courts is likely to be small and, as a result, the impact of the procedural default doctrine would be reduced substantially. After all, if a habeas petitioner does not raise a systemic claim in state court, he will not have defaulted by virtue of the way in which the claim was raised. Moreover, as is true in cases of individualized habeas review, the federal court would always be able to entertain challenges to the adequacy of state procedural rules. Because the adequacy of a state procedural rule is a federal question that need not be initially raised in the state courts, *see* Lee v. Kemna, 534 U.S. 362, 375 (2002), a petitioner's failure to comply with a procedural rule that he alleges creates a systemic procedural due process problem in the state should not bar federal review.

160. *See infra* Sections III.D & IV.B (discussing the application of the successive petition ban and retroactivity bar to the current proposal). I do not mean to suggest that I agree with the ways in which these procedural doctrines are currently configured; the point is merely that the applicability of these doctrines does not turn on the difference between individual and systemic claims.

161. *See* 28 U.S.C. § 2254(b) (2006).

162. Some might contend that, because an individual petitioner's standing to assert a systemic challenge requires a showing of an individualized, prejudicial harm in his case, there should be an exhaustion requirement vis-à-vis that inquiry. The rationale behind the exhaustion doctrine, however, does not support such a requirement. Exhaustion is designed to prevent unnecessary disruption in state judicial proceedings by encouraging federal courts to wait to interfere until the state courts have had an opportunity to correct the constitutional violation. *See* Rose v. Lundy, 455 U.S. 509 (1982). When the question is whether the state is systematically violating defendants' constitutional rights, however, the very nature of the claim means that the state courts have had numerous opportunities to correct the error and have failed to do so. The individual petitioner is merely a vehicle through which to raise the claim. Moreover, the federal court does not disrupt state proceedings or provide any relief to the petitioner on the basis of the violation of his individual rights; that showing of a violation merely satisfies a threshold standing requirement. Therefore, an exhaustion requirement would merely tie up the federal courts in a complicated procedural inquiry that would delay consideration of the merits.

delay would improve the feedback mechanism to the offending states, thus increasing the deterrent value of the federal decisions. If a federal court grants habeas relief years after a state error, the case may have been forgotten, or the personnel involved may have changed, and thus the federal decision would effectively have no deterrent or reform value. Moreover, reducing delay would make it easier for federal judges to grant relief in deserving cases without fear that states would be unable to retry the petitioners.[163] Finally, shortening the timeline would bring habeas within the reach of large numbers of convicted defendants for whom the custody requirement now prevents the seeking of habeas relief at all.[164] A habeas corpus petition is, by definition, only available to persons who are currently being held in violation of federal law. Most people who are convicted of state crimes complete their sentences, and are thus no longer in state custody, before they exhaust all possible avenues of relief in the state courts. The exhaustion requirement therefore ensures that relatively few defendants have the opportunity to file habeas petitions.[165] Eliminating the exhaustion requirement would enable many more defendants to seek habeas relief.[166]

C. Evidence, Discovery, and Burdens of Proof

Once a habeas petitioner demonstrates that the state prejudicially violated his federal rights, he would have the burden of producing evidence of a systemic state problem. To satisfy this initial burden, the petitioner would have to come forward with some evidence that the error in his case was part of a pattern of errors and not simply an individual mistake.[167] The habeas court would ask whether, taking all of the petitioner's statements as true and drawing all inferences in his favor, there was some evidence of a systemic state problem. This initial burden should not be high, because much of the data about the state's practices in other cases is in the hands of the state rather than the petitioner.

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163. *See* THOMAS, *supra* note 48, at 165 (discussing that fear).

164. *See* 28 U.S.C. § 2254(a) (2006) (requiring custody); Hoffmann & King, *supra* note 1, at 796 (noting that few defendants can satisfy the custody requirement).

165. *See id.* at 810.

166. Allowing more defendants to file habeas petitions may lead to an increase in the number of filings. However, because the focus of the federal bench will be on whether the problem asserted is systemic in nature, many more cases will be resolved with each federal ruling. *See* discussion *infra* Section III.D. (discussing retroactivity principles that limit the scope of each ruling and explaining the successive petition ban).

167. *Cf.* 28 U.S.C. § 2255 (2006) (requiring the federal court to grant a defendant's request for a hearing on a postconviction motion "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief"); Primus, *supra* note 106, at 708–09 (arguing that appellants should be granted hearings on their ineffective assistance challenges if their pleadings state a colorable claim of ineffectiveness).

Although there is no magic number of times that a state would have to err in order to establish a systemic problem,[168] a few things are clear. For one, the first habeas petitioner to suffer from a given error could never demonstrate a systemic problem, so he could not have a cognizable claim. Similarly, claims that state judges unreasonably determined the facts in particular cases, or that the evidence in a particular case was not sufficient to support a conviction, would generally not be cognizable, because such errors tend to be individual rather than systemic.[169] Defendants who are victims of these individualized errors would have to resort to other causes of action to obtain relief.[170]

In some cases, demonstrating a systemic problem will be easy, because the systemic nature of some errors is clear on the face of trial and appellate records.[171] Errors in interpreting federal law often fall into this category. When a repeat-player state judge relying on an erroneous interpretation of federal law violates a given constitutional right in multiple criminal cases, the existence of a systemic problem is easily detected in the transcripts or opinions. In such cases, the petitioner can satisfy his burden by citing cases in which the state judge consistently misapplied the law. Similarly, procedures that deny criminal defendants' due process rights are often readily visible in state statutes or rules.

Unearthing systemic violations that are not clear on the face of state law is more difficult and requires greater knowledge of how the local criminal justice system operates. In such cases, petitioners would often have to carry their initial burden of production with affidavits from other defendants, defense attorneys, or prosecutors. Take, for example, the Oklahoma remand procedure for establishing ineffective assistance of trial counsel claims.[172] One way a habeas petitioner could attack that procedure as a systemic violation of the right to counsel would be to attach an affidavit from a state defense attorney explaining that the attorney had attempted to obtain numerous remands in order to raise ineffective assistance of counsel claims, that there was reason to believe that the claims were meritorious, and that the appellate courts never agreed to remand a single case. Alternatively, a habeas petitioner could submit affidavits from numerous defendants who sought remand, detailing their attempts, the uniform denials, and the facts in the underlying cases demonstrating that they were entitled to hearings.

Once a petitioner offered some evidence of a systemic problem, the federal district court would conduct an evidentiary hearing to decide whether

168. *Cf.* Batson v. Kennedy, 476 U.S. 79 (1985) (noting that the number of strikes that will lead to an inference of discrimination is going to depend on the available jury pool).

169. To the extent that a state routinely declares a type of evidence insufficient to support a verdict, it could pose a systemic problem.

170. *See infra* note 181 & accompanying text.

171. *See* Halpern, *supra* note 73, at 33 (noting that federal judges can often detect the systemic nature of an error on the face of the pleadings and state court opinions rendered in a case).

172. *See* discussion *supra* Section II.B.1.

there was a systemic state problem. The petitioner would be entitled to discovery prior to that hearing.[173] At the hearing itself, the state would have the burden of persuading the court that it adequately enforces the right at issue. After all, the state is better situated to explain its actions across cases, because it has greater access to information and evidence about its practices than the individual habeas petitioner does. If a petitioner establishes that his rights were violated and provides some evidence of a recurring state violation, it therefore makes sense to shift the burden to the state to refute the charge of a systemic problem.

Admittedly, discovery and evidentiary hearings are costly procedures that tax both the state charged with defending its practices and the federal judges charged with presiding over the proceedings. That said, states and federal courts already invest significant resources in habeas cases. However, the money is currently wasted either on the procedural morass of habeas jurisprudence or on redundant and deferential merits review. This Article's proposal would entail some expense, but it would also save a great deal elsewhere: what is now wasted could be reallocated to more fruitful uses.[174]

D. Remedies

If the federal judge finds that an individual petitioner's rights were prejudicially violated but that the violation was not a systemic one, she should deny habeas relief. Of course, the petitioner would have an opportunity to try to appeal the decision.[175] But once the decision was final, the ban on successive petitions would prohibit other similarly situated petitioners from raising the same systemic challenge,[176] assuming no change in circumstances in the state[177] and adequate representation of the petitioners' interests by effective

173. *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 100 (discussing the advantages of discovery in § 1983 cases and noting that federal discovery may go a long way toward uncovering and providing the remedy for patterns of error in our criminal justice system).

174. Moreover, some of the costs that states would bear when the new model of habeas was first introduced would decrease over time as technology is integrated into state courts. Admittedly, Oklahoma might now have difficulty determining how many times its judges have granted hearings in response to motions for remand alleging ineffective assistance of counsel. However, answering such questions should become easier as electronic filing becomes more routine. And it is already clear from other contexts that requiring state agencies to collect and maintain records of their practices is both feasible and valuable in monitoring future compliance with federal law. *See* John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1411–12, 1418–19 (2007) (discussing the value of data collection in the context of federal enforcement actions under 42 U.S.C. § 14141 (2006)); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 839–41 (1999) (same); *see also id.* at 854–55 (noting that whatever civil liberties costs are attendant upon the maintenance of such records will presumably be more than offset by the records' value).

175. *Cf.* 28 U.S.C. § 2253 (2006).

176. *Cf. Multiparty Habeas*, *supra* note 84 (noting that, if a constitutional claim is raised in the case of one individual and is denied, the question is settled).

177. Obviously, when the state revises or changes its procedures, a habeas petition that

counsel in the first case.[178]

At first blush, it might seem awkward for a federal court to find that a habeas petitioner's constitutional rights were prejudicially violated but still deny relief because the violation was not systemic. The federal judge would, in effect, be ruling that the petitioner has a right without a remedy, and that is a dissatisfying conclusion. But a moment's reflection is all that is needed to see how common a conclusion it is within the practice of the federal courts. Federal judges routinely find rights with no remedies in cases involving qualified immunity, for example.[179] Under the current habeas system, most petitioners whose rights are violated effectively have no remedies, due to the battery of procedural obstacles to relief as well as the deferential standard of federal habeas review.[180] Clearly, then, the fact that judges would often deny relief even after finding individual violations of constitutional rights cannot be a decisive objection to a systemic habeas approach.[181]

On the other hand, a federal judge who concluded that a state was systematically violating a constitutional right would have to craft an appropriate remedial order. Specifically, she would impose a variant of conditional release, which is the traditional habeas corpus remedy. Federal writs of habeas corpus may order a state to release a prisoner outright, but under the current system most writs grant release conditionally—for example, by ordering a petitioner released unless the state gives him a new trial.

Under the proposed model, a federal court that found a systemic violation would still order conditional release, but in a more detailed way. The order would set forth the evidence of a systemic violation of a constitutional right and then give the state a choice: either (1) remedy the systemic error within a reasonable period of time and apply the remedy to the instant petitioner's case, or (2) release the petitioner.

If the state chooses option (1) but fails to remedy the problem, the federal court would order the release of the habeas petitioner. If that happens, or if the

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alleges a systemic violation on the basis of the new conditions is not a successive petition. Rather, it is a new petition alleging a new systemic violation.

178. A decision in a pro se case that there was no systemic problem would not have preclusive effect on future litigation. *See* Garrett, *supra* note 14, at 415, 432–33; *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1310 (1976) (noting that public law litigation, because of its widespread impact, requires adequate representation). For a discussion of how habeas petitioners will obtain legal assistance under the proposed systemic habeas review system, see *infra* Section III.E.

179. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800 (1982).

180. *See* Hoffmann & King, *supra* note 1.

181. Moreover, a federal ruling that there is an individual violation but no systemic problem does not preclude that individual petitioner from filing different claims in state and federal court. For example, depending on the state's procedural rules, some petitioners could file additional postconviction actions in state court in an attempt to get relief. Others could petition for an original writ in federal court. *See* discussion *infra* Section III.F. Some petitioners would also opt to pursue civil damages or other forms of civil relief in state and federal court. *See, e.g.*, 42 U.S.C. § 1983 (2006).

state chooses option (2) outright, all future petitioners alleging that they were victims of the same systemic problem would be fast-tracked in the federal district court.[182] Upon a finding of prejudice in each particular case, the federal courts would issue the same order of conditional release. Thus, state prisoners would be released on an expedited basis until the state fixed the problem.

Consider again the Oklahoma remand procedure for addressing ineffective assistance of counsel claims. Suppose Petitioner Pete's trial lawyer was completely ineffective, and Petitioner Pete's request for a remand to challenge his attorney's conduct was denied. Petitioner Pete could file a federal habeas petition alleging a systemic violation of defendants' due process rights in Oklahoma and claiming that he was prejudicially affected by this practice. Upon finding a systemic violation, the federal judge would send Petitioner Pete's case back to the Oklahoma courts with an order requiring them either to (1) release Petitioner Pete or (2) devise some new means of allowing defendants to raise trial attorney ineffectiveness challenges and apply that new procedure to Petitioner Pete. The order would include a date on which the case would be reheard in federal court. At that date, the state would have to provide the federal court with evidence as to what new procedure it had devised to redress this constitutional problem and how that procedure had been applied to Petitioner Pete.

Upon receiving this order, Oklahoma would have multiple options. First, it could appeal the district court order and ask for a stay pending resolution of the appeal.[183] However, assuming that the order is final or that a stay is not granted, Oklahoma would still have other options. It could release Petitioner Pete and maintain its practices. Oklahoma would know that the federal courts would then expedite consideration of other petitions raising the same systemic problem and send more and more of these cases back with similar conditional release orders. But if Oklahoma believed that very few petitioners would be able to show that the practice at issue prejudiced their case, it might choose to release petitioners one by one.[184] Alternatively, Oklahoma could choose any of several new methods for handling ineffective assistance claims. It could develop standards for deciding when defendants who raise such claims on appeal should get hearings (and then apply those standards to Petitioner

182. There are a number of ways to expedite consideration of future claims. For example, all future cases could be channeled to the same judge who issued the original order finding a structural problem. *Cf.* Garrett, *supra* note 14, at 441–43 (describing how Judge Weinstein in the Eastern District of New York channeled all pending habeas corpus petitions to a single decisionmaker).

183. *Cf.* 28 U.S.C. § 2251, 2253 (2006).

184. If a state chose to ignore the federal finding of a systemic problem and just risk the release of petitioners one by one, the federal courts might respond by adopting a more defendant-friendly interpretation of the prejudice component in individual cases so as to increase the likelihood of a state response. Alternatively, criminal defendants from the state might attempt to use the federal court finding of a systemic violation to pursue remedies under civil rights' statutes. *See, e.g.*, 42 U.S.C. § 1983 (2006).

Pete).[185] It could move consideration of ineffective assistance claims to state postconviction proceedings where evidentiary hearings are available (and give Petitioner Pete an opportunity to file a new postconviction petition). It could create an independent commission to analyze the merits of each ineffective assistance claim and make recommendations to the judiciary about whether hearings are appropriate. These examples are only illustrative. The point is that the state would have a broad field of choice for how to alter its practices.

At the later federal court hearing, Oklahoma could explain how it had fixed the problem, and the federal court would either approve the proposed solution and dismiss Petitioner Pete's habeas action or tell Oklahoma that the proposed solution was constitutionally insufficient. At that point, the court would either order Petitioner Pete released or grant an extension to give Oklahoma a second chance to develop a remedy. If an extension were granted, the process would repeat until (1) Oklahoma came up with a constitutionally satisfactory alternative, (2) Oklahoma chose to release Petitioner Pete, or (3) the federal court ordered Oklahoma to release Petitioner Pete.

Requiring the federal courts to approve revised state procedures may seem invasive, but it would not be new. Under the current habeas system, when a federal court declares a state practice unconstitutional, the state must come up with a new practice if it wants to avoid future grants of habeas relief.[186] If that new practice is presented to the federal courts in subsequent habeas petitions, it will be struck down if it is not constitutionally adequate. The only innovation proposed here is that the federal court would retain jurisdiction over a particular case until the state either devised a constitutionally adequate alternative or released the petitioner. Admittedly, this change might upset state officials. But it also provides a more direct feedback mechanism than the current system, and the resulting interaction between the state and the federal court should have beneficial consequences. Once a state proposes a solution to a given systemic problem, the state and the federal court would engage in a dialogue aimed at finding a solution that adequately addresses the systemic violation. As Professors Robert Cover and Alexander Aleinikoff documented, such a dialogue would be salutary given the respective strengths of the state and federal courts.[187] State courts could educate their federal counterparts about their pragmatic constraints, and the federal courts could then take those constraints into account when interpreting federal law.[188]

185. *See* Primus, *supra* note 106.

186. Admittedly, some states choose to ignore the federal decision given the limited number of cases that actually get to the federal habeas stage. *See, e.g.*, *supra* note 117.

187. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

188. *See id.*

A word is in order about the applicability of the retroactivity doctrine to this proposed remedy. Under current doctrine, most new judicial decisions only apply retroactively to cases that are not yet final—that is, those that have not completed direct appellate review.[189] The same principle would apply here. For example, assume that Oklahoma's remand procedure prejudicially affected Defendants 1 through 10, of whom Petitioner Pete was Defendant 4. For whatever reason, Petitioner Pete was the first to file a habeas petition in federal court. After Petitioner Pete filed, the nine remaining initial defendants also filed petitions. Moreover, during the pendency of Petitioner Pete's federal habeas action, the defective remand procedure prejudicially affected Defendants 11 through 20. Then, before the case of Defendant 21 arose, the state devised a new and constitutionally adequate procedure in response to the federal court order in Petitioner Pete's habeas case. Defendant 21 and all subsequent defendants would get the benefit of the revised procedure. Petitioner Pete would also get the benefit of the revised procedure as a reward for successfully bringing the systemic challenge. In contrast, Defendants 1 through 20, excepting Petitioner Pete, would not get the retroactive benefit of the revised procedures unless their cases were still on direct appeal when the federal district court approved of the new procedure. That may seem harsh, of course, but it is no different from what would happen under current retroactivity doctrine.[190] Moreover, it avoids the problem of asking a federal judge to release entire groups of convicted criminals in order to improve a point of law. Judges who would be required to apply their rulings retroactively might be reluctant to find systemic state violations for fear of upsetting criminal convictions on a large scale.[191] Allowing judges to use individual petitioners' cases as vehicles to prompt forward-looking reforms gives them a softer stick that they will be more likely to use and is less offensive to federalism principles.[192]

E. Access to Counsel

Access to counsel is imperative under a systemic habeas model because state prisoners with limited investigative abilities must determine whether the errors affecting them are in fact systemic. And they cannot rely on the work of their trial or appellate counsel, given that those attorneys have no duty to investigate and present systemic state challenges to the state courts.[193] More-

189. *See* Teague v. Lane, 489 U.S. 288, 306 (1989).

190. This analysis assumes that the federal court's finding of a systemic violation and approval of a new state procedure would constitute a new ruling under *Teague* that would be subject to the retroactivity bar. *See id.* at 301.

191. *See* Amsterdam, *supra* note 136.

192. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 889 (1999) (explaining that courts, which are reluctant to enforce rights with strong remedies, may dilute the nature of the right to avoid the remedy if the remedy is perceived of as too strong).

193. *Cf.* Ross v. Moffitt, 417 U.S. 600, 616 (1974) (holding that there is no constitutional

over, to the extent that federal court decisions about the existence *vel non* of systemic state problems would have preclusive effects in future litigation, counsel is necessary to ensure adequate presentation of systemic habeas claims.[194] As a result, state prisoners would need legal assistance to ensure that this new habeas regime functioned effectively.

The cost of giving every state prisoner a right to an attorney would be extremely high. For this reason, no branch of government has thus far created an unqualified right to habeas counsel outside of the capital context.[195] One potential compromise would be to add a team of attorneys to the Special Litigation Section in the Civil Rights Division of the Department of Justice. These Justice Department attorneys would be responsible for investigating and challenging systemic state practices that violated defendants' federal rights. Prisoners could write letters requesting that the Department of Justice take their cases, and Justice Department attorneys would pick the cases that were most representative of serious systemic state problems. Justice Department attorneys would be able to identify systemic problems, launch suits, persuade judges, and monitor a state's attempts to make structural changes in ways that citizen-petitioners could not.[196] Moreover, the Justice Department could coordinate state efforts to communicate with one another so as to prevent future systemic violations.[197] Creating a team of highly trained lawyers to search for and challenge the most egregious state court practices could keep the costs under control while ensuring quality federal habeas litigation.[198]

Unlike a constitutional or statutory right to counsel for all habeas petitioners, creating a Justice Department Office is politically feasible as well as fiscally palatable. Congress has authorized the Department of Justice to sue police departments, mental hospitals, and housing authorities in order to ferret out practices that systematically violate individuals' civil rights.[199] For

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right to counsel for discretionary appeals); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (extending *Ross* to collateral attacks on criminal judgments after direct appeal).

194. *See* Garrett, *supra* note 14, at 415, 432–33; *see also* Chayes, *supra* note 178, at 1310 (noting that public law litigation, because of its widespread impact, requires adequate representation).

195. *See Finley*, 481 U.S. 551; Murray v. Giarratano, 492 U.S. 1 (1989). Capital defendants do have a federal statutory right to counsel in habeas proceedings, *see* 102 Stat. 4393 (codified at 21 U.S.C. § 848(q)(4)(B) (2006)), and if a federal evidentiary hearing is granted in their case, *see* 28 U.S.C. § 2254 (2006); FED. R. GOVERNING § 2254 CASES 8(c).

196. *See* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 22 (1978) (discussing the special competence of Department of Justice attorneys); *see also* David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1055 (2004) (discussing the economies of scale when the Justice Department is able to use the same techniques across states).

197. *See, e.g.*, Zaring, *supra* note 196, at 1068 (explaining how the Department of Justice developed on-line networks where information about prison, jail management, and best practices was shared among states).

198. *See* Robert D. Dinerstein, *The Absence of Justice*, 63 NEB. L. REV. 680, 690 (1984) (discussing the quality of Justice Department attorneys).

199. *See* 42 U.S.C. § 14141 (2006); *id.* § 1997 to 2000a-6.; Dinerstein, *supra* note 198, at

example, Congress reacted to the Rodney King beatings and other high profile instances of police misconduct by enacting 42 U.S.C. § 14141, which authorized the Justice Department to sue for equitable and declaratory relief to stop law enforcement officers from engaging in patterns or practices of conduct that violate individuals' civil rights.[200] Just as the Rodney King incident catalyzed legislative reform in the police misconduct context, recent high-profile accounts of egregious right-to-counsel violations could be used to spark criminal justice reform.[201]

Although there are many advantages to creating a specialized team of Justice Department lawyers, the political accountability that it would inject into the decision to sue and seek relief could also have adverse effects.[202] The Department of Justice has not always been at the front line in combating systemic civil rights violations.[203] Despite the widespread problem of police brutality in inner city departments, for example, the Department of Justice has filed very few § 14141 actions.[204] Some of this may be attributable to different administrations' political priorities.[205] But it is also caused, in part, by the Justice Department's unwillingness to sue local law enforcement agencies in an era when federal-state cooperation is a component of most successful federal prosecutions.[206] For similar reasons, we should expect the Justice Department to be reluctant to attack systemic misconduct by state prosecutors.

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200. *See* 42 U.S.C. § 14141 (2006).

201. *See, e.g.*, Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (noting that public defender caseloads are so heavy that defenders have been forced to refuse to take on new cases). Alternatively, the recent spate of DNA exonerations could be used to argue that constitutional rights have to be protected in order to ensure that innocents are not convicted. *See generally* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005). These arguments have worked to bring about other forms of pro-defense legislation. *See, e.g.*, The Innocence Protection Act of 2004, 18 U.S.C. § 3600 (2006); *see also* Press Release, Senator Patrick S. Leahy, Judiciary Panel Holds Second Hearing on Habeas Bill (Nov. 16, 2005) (describing the Act), *available at* http://leahy.senate.gov/press/200511/111605.html.

202. *See* Jeffries & Rutherglen, *supra* note 174, at 1421.

203. *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1409–10 (2000) (noting that the Department of Justice only assigns twenty-six attorneys and fifteen FBI agents to the Special Litigation Unit that is responsible for pattern or practice cases).

204. *See id.* at 1404 (citing only three).

205. *See* Matthew J. Silveira, *An Unexpected Application of 42 U.S.C. § 14141: Using Investigative Findings for § 1983 Litigation*, 52 UCLA L. REV. 601, 613 (2004) (noting that Presidents Clinton and Bush have used section 14141 differently); *see also* Dinerstein, *supra* note 198, at 681 (explaining how the Reagan Administration failed to enforce CRIPA); Gilles, *supra* note 203, at 1411 (same).

206. *See* Gilles, *supra* note 203, at 1410–11.

One potential way to address the financial and political constraints on the Justice Department's effectiveness is to allow privately initiated suits to fill the gap.[207] For example, 42 U.S.C. § 1988 could be modified to allow civil rights attorneys to recover reasonable fees from states that engage in systemic violations.[208] And where plausible, prisoners could hire private attorneys or file pro se petitions.

All attorneys or habeas petitioners not filing petitions through the Department of Justice would be required to notify the department of their cases. The notification process would include sending the Justice Department copies of the habeas petitions and making it aware of any case in which the state (1) agreed to release a habeas petitioner after a systemic challenge was filed, or (2) attempted to bargain with a petitioner in order to avoid a systemic challenge. In cases that settled, all discovery obtained prior to the settlement would have to be made available to the Department of Justice.

Notification is necessary to prevent states from contracting around their obligations to enforce federal rights. Once discovery or evidentiary hearings begin to reveal a systemic problem, it is in the state's interests to bargain with (or release) the prisoner so as to prevent the federal courts from granting a conditional writ and fast-tracking future petitions.[209] A notification requirement ensures that the Justice Department is aware of the systemic state problem, even if the state is successful in making a particular petition disappear. When appropriate, the Justice Department could then find other representative petitioners to serve as vehicles.

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207. *See id.* at 1459–50 (noting that we can expect greater responsiveness where investigation and litigation are funded by private parties); Jeffries & Rutherglen, *supra* note 174, at 1419–20.

208. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 870 (2007) (discussing the role of civil rights lawyers as private attorneys general); Gilles, *supra* note 203, at 1451 (noting that these organizations have the resources and legal expertise, as well as standing in the community, to bring legitimate petitions); *see also* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 621 (2006) (explaining that civil rights organizations often partner with large law firms that would commit additional resources).

One potential downside to this fee-shifting arrangement is that it will increase the cost of structural reform to the state, because the state will have to pay attorneys fees in addition to funding a remedial regime to redress its systemic problem. *See* 42 U.S.C. § 1988 (2006); THOMAS, *supra* note 48, at 171–72; Schlanger, *supra*, at 1624. Oftentimes, states engage in systemic violations of criminal procedure rights because they lack funding to fully and adequately enforce them. *See* discussion *supra* Section II.B.1. Adding to the financial burden of the state by forcing it to pay attorneys fees makes it more difficult for the state to afford solutions. On the other hand, if a state knows that it will be forced to pay attorneys fees in addition to paying for a remedy if it waits for litigation to force a solution, it might act proactively to redress its systemic problems.

209. Thus, under the proposed habeas regime, settlements would be much more frequent than under current law. *See generally* Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1 (2006) (discussing the infrequency with which habeas cases are settled and proposing various reforms to increase settlement rates).

A notification requirement would also help Justice Department attorneys develop expertise about the practices in each state.[210] And critically, it would prevent needless duplication of work. If a case settles after an extensive federal hearing related to a state practice, the information from that hearing should be made available to the Justice Department so that it does not start from scratch in a future case raising the same challenge.[211]

F. Suspension Clause Concerns

It is worth saying a word about the possibility that a systemic habeas approach would violate the Constitution's Suspension Clause[212] by failing to provide individualized review. Whether a suspension problem would in fact arise depends on how expansively the Suspension Clause is read. To date, the Supreme Court has said little on the matter.[213] As a result, theorists have a relatively wide open field in which to argue that suspension should be understood one way or another. At one extreme, some scholars rely on early Supreme Court dicta to argue that federal court jurisdiction to issue the writ to state prisoners is not inherent; rather, to this group it is a matter of legislative grace, and Congress could repeal the relevant statutes entirely without running afoul of the Constitution.[214] Others assert that the Fourteenth Amendment broadened the scope of the Suspension Clause and obligated the federal courts to provide habeas review to state prisoners.[215] Obviously, a suspension problem would only arise for the current proposal if the Supreme Court adopted the

210. *See* Zaring, *supra* note 196, at 1062–63 (discussing the benefits of having the same attorneys handle these cases because those attorneys build links between cases which lead to learning and standardization). Of course, a notification requirement would be unnecessary if the Department of Justice had the ability and resources to monitor the filing and outcome of habeas petitions in each state, and if the Justice Department had access to the discovery and evidentiary hearing transcripts in those cases that went to the hearing stage. The notification requirement assumes that there are limited resources that hamper the Justice Department's ability to obtain this information in other ways.

211. Given the cooperative relationship between the Department of Justice and civil rights organizations, *see* Livingston, *supra* note 174, at 821 n.23, I expect that the Justice Department would share this information with civil rights organizations.

212. U.S. CONST. Art. I, § 9, cl. 2 ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

213. *See* Hoffmann & King, *supra* note 1, at 837.

214. *See, e.g.*, Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605; *see also* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1289–92 (2003) (emphasizing that Justice John Marshall stated, in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), that federal court jurisdiction to issue the writ was not inherent but must be conferred by statute).

215. *See, e.g.*, Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 874–78 (1994). Recent dicta from the Supreme Court provides support for the argument that the scope of the Suspension Clause today is broader than it was at the time of the founding. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008); Felker v. Turpin, 518 U.S. 651, 663–64 (1996) ("[W]e assume, for purposes of decision here, that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789.").

latter understanding.

Even if the clause were held to guarantee some form of habeas review to prisoners in state custody, the little that the Court has said about suspension suggests that the present proposal would survive scrutiny. The clause clearly permits some restrictions on the scope of federal review of state court convictions, as demonstrated by the Supreme Court's removal of most Fourth Amendment claims from federal habeas review in *Stone v. Powell*.[216] More generally, the Supreme Court has said repeatedly that limitations on habeas review will survive scrutiny whenever there is an alternative form of adjudication that can serve as an adequate substitute for the Great Writ.[217]

Under the proposed systemic habeas review system, there are three alternative forms of adjudication available to state prisoners for raising individualized claims in federal court. First, a state prisoner could petition the United States Supreme Court to take his case at the conclusion of direct review. Second, he could again petition the United States Supreme Court to review his case at the conclusion of state postconviction proceedings. And third, if there were exceptional circumstances that justified issuance of a writ based on an individualized claim, the state prisoner could file a petition in federal court seeking an original writ of habeas corpus.[218] Given the Supreme Court's small docket and the rarity with which original writs have been issued, these alternatives might not seem like much, but the Supreme Court may well consider them to be enough. In approving a serious limitation on habeas petitioners' ability to file successive petitions, the Supreme Court recently emphasized that the theoretical ability to file an original habeas petition was sufficient to demonstrate an adequate alternative, regardless of how likely the Court was to entertain such a petition.[219] As long as that orientation stands, the proposed systemic habeas review system would not entail an unconstitutional suspension.[220]

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216. 428 U.S. 465 (1976).

217. *See, e.g.*, *Boumediene*, 128 S. Ct. 2229; *Felker*, 518 U.S. 651.

218. *See Felker*, 518 U.S. 651; *see also* SUP. CT. R. 20(a).

219. *See Felker*, 518 U.S. 651.

220. *See* Hoffmann & King, *supra* note 1, at 839–42 (arguing that these mechanisms might provide an adequate alternative under their proposal). If the Supreme Court held that a purely systemic form of federal habeas review violated the Suspension Clause, Congress could adopt a two-tiered federal habeas system in which systemic claims would be reviewed in accordance with the proposed systemic model while review of individual claims would be far more streamlined, providing only the bare minimum necessary to avoid a Suspension Clause problem. *Cf.* Garrett, *supra* note 14, at 443–44 (arguing for two-tiered review in which substantive claims based on predictable causes of wrongful convictions are given more review); Jeffries & Stuntz, *supra* note 25, at 691 (arguing for a two-tracked habeas system in which petitioners who show a reasonable probability of innocence would receive de novo review of their federal claims).

IV
THE POLITICAL VIABILITY OF SYSTEMIC REVIEW

Congress has been looking for ways to streamline federal habeas review,[221] but no reform can succeed without a compromise between rival political camps.[222] One constituency wants to remove procedural obstacles to relief and have federal courts vindicate substantive constitutional claims.[223] But another wants more stringent procedural default rules, more extensive harmless error doctrines, and more limited appellate rights in order to conserve federal resources and promote interests in finality and federalism.[224] The debate is therefore at a standstill, despite the recognized need for reform.

Successful reform requires balancing these two sets of interests. First, the new system must be more effective at deterring states from violating defendants' criminal procedure rights. A system that is simply a "lottery for lifers" is not worth the time and resources now expended on habeas review.[225] To be politically feasible, however, a reform that increases the federal courts' ability to check state practices must be streamlined. It should conserve resources, value finality, and respect federalism. In this Part, I explain how systemic habeas review effectively advances both sets of goals.

A. Improving Deterrence

Reorienting federal habeas review to focus on systemic errors would more effectively deter states from committing constitutional violations.[226] As

221. *See* sources collected *supra* notes 1 & 72 (noting that Senators Kyl & Kennedy both believe that habeas corpus law needs to be reformed); *see also* Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s109-1088 (most recent proposal for reform); H.R. 3035, 109th Cong. (2005).

222. *See, e.g.*, Yackle, *supra* note 1, at 543–46 (describing the many proposals for reform that were made before AEDPA and the stalemates in Congress that prevented their enactment); *see also* Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s109-1088 (proposed by Senator Kyl, the bill never passed); H.R. 3035, 109th Cong. (2005).

223. *See, e.g.*, Statement by Senator Patrick Leahy, Executive Business Meeting, Senate Judiciary Committee (Oct. 6, 2005), *available at* http://leahy.senate.gov/press/200510/100605.html (objecting to the obstacles to habeas corpus relief contained in the Streamlined Procedures Act); 151 CONG. REC. S12,801 (daily ed. Nov. 16, 2005) (statement of Sen. Leahy) (advocating for passage of the Innocence Protection Act of 2004), *available at* http://leahy.senate.gov/press/200511/111605.html.

224. *See, e.g.*, Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005), *available at* http://www.govtrack.us/congress/billtext.xpd?bill=s109-1088; *see also* Press Release, Senator Jon Kyl, Limiting Endless Death Penalty Delays (July 18, 2005), *available at* 2005 WLNR 11247996; 151 CONG. REC. S5540 (daily ed. May 19, 1995) (statement of Sen. Kyl) (complaining because "many Federal habeas corpus cases require 10, 15, or even 20 years to complete" and noting that victims "cannot be expected to 'move on' without knowing how the cases against the attacker has been resolved").

225. *See* Hoffmann & King, *supra* note 1, at 810.

226. *Cf.* Garrett, *supra* note 14, at 447–48; *see also* Lee, *supra* note 153, at 200 (noting that, under the current system, the threat is not sufficient to deter).

discussed above, eliminating the exhaustion requirement would give more defendants a realistic opportunity to seek federal relief.[227] And the corrective orders that these defendants would obtain would have a more powerful deterrent effect because they would come closer in time to the original violations. Rather than ordering states to release a few prisoners whose rights they violated years before, federal courts would send live, systemic issues back to the states.[228] The threat of fast-tracked petitions and waves of conditional release orders would alter state incentives so that reform would be in the best interests of state policymakers.[229] But the federal hand need not be too heavy: the proposed remedy allows the federal courts to push the states toward best practices while giving the states room to experiment and to use their local knowledge to craft effective and lasting solutions.[230]

B. Conserving Resources and Valuing Finality

As described earlier, habeas review today is redundant and wasteful. Federal judges spend a great deal of time denying petitions on procedural grounds, and in the rare cases in which they reach the merits, they often do no more than re-adjudicate issues a state court already analyzed and then defer to the state's decision. Modifying federal habeas to address systemic state violations should make it more useful and less redundant. Rather than focusing on individual error correction, which is what the appellate review system is designed to do, federal habeas courts would have something distinctive to add: the analysis of whether the state is violating federal rights *systematically*.

Once that initial determination is made, federal review would be streamlined in ways that would conserve federal resources. Specifically, if a state failed to correct a systemic violation, the federal courts would fast-track future petitions and conduct streamlined standing inquiries to determine who should get habeas relief. This streamlined process would make more efficient use of scarce resources and would make it possible to eliminate the exhaustion requirement, thereby making habeas review available to more criminal defendants without unreasonably taxing the federal courts. If the systemic challenge were rejected or if the state remedied the systemic problem, the ban

227. *See supra* Section III.B.

228. *See* Semeraro, *supra* note 27, at 929 (noting that deciding the merits of an issue rather than sending it back to the offending state court "improperly let[s] the state court off the constitutional hook that should require it to treat federal law as the supreme law").

229. *See* Jeffries and Rutherglen, *supra* note 174, at 1416 (noting that structural reform litigation places problems on the agenda for political reform by calling the problems to the attention of the other branches of government); Vidhya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the* Gideon *Right to Counsel* 33 (Wash. U. Sch. of Law Working Paper No. 1279185), *available at* http://ssrn.com/abstract=1279185; *see also id.* at 21–22 (noting that, in response to litigation efforts in 2003, the Georgia state legislature passed the Georgia Indigent Defense Act creating a statewide indigent defense system in Georgia).

230. *See* Livingston, *supra* note 174, at 845 (discussing how section 14141 consent decrees do the same thing).

on successive petitions would prohibit other petitioners from raising the same challenge, assuming adequate representation of the petitioners' interests by effective counsel in the first case.[231] Thus, by precluding needless relitigation, a systemic habeas review system would provide meaningful review to more defendants while at the same time valuing finality and conserving federal resources.

C. Respecting Federalism

Federalism does not require giving the states all possible autonomy. Rather, it entails striking a proper balance between state autonomy and federal oversight. All federal habeas review rests on the idea that the federal government must exercise some supervision over state courts,[232] but federal habeas should not unnecessarily compromise state autonomy. A federal habeas system that focused on systemic state violations would better protect both interests in the federalist balance, permitting more state autonomy than the present system while improving the quality of federal supervision.

If federal review is predicated upon a showing of a statewide systemic problem, most state judgments will stand. Only a repeated failure to enforce the Constitution or federal law would overcome the presumption that the state is entitled to operate without federal interference. When a state systematically flouts federal law, the deference appropriately shown to the state courts is at its nadir. It is more respectful of the state courts to limit federal intervention to such situations than it is to allow federal courts to review every state court criminal conviction for individualized errors.

The remedy I propose here is also more respectful of state autonomy than most other potential remedies. The state is informed of its systemic problem and given the choice of how—or even whether—to fix the problem. Often, the proposed remedy would also be less offensive to individual state officials than the current system. Currently, granting habeas relief requires a federal judge to tell a particular state judge that she made a mistake. In contrast, a systemic state problem often emerges because of the action (or inaction) of multiple actors.[233] In such cases, the responsibility for the problem is more diffuse. No individual state actor is singled out by the federal courts, which is arguably less demeaning to state judges than the current system.[234]

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231. *Cf. Multiparty Habeas*, *supra* note 84 (noting that, if a constitutional claim is raised in the case of one individual and is denied, the question is settled).

232. *See* Hammel, *supra* note 5, at 50 ("[T]he very existence of federal courts and most federal jurisdiction is based on a distrust of state courts.").

233. *See supra* Section II.B.

234. *See* Semeraro, *supra* note 27, at 929. This would not be true for a systemic dilution of a constitutional right by a state court judge. In such cases, there is a state court judge who could take umbrage at a federal finding of systemic violation. That said, one federal finding that a state judge's interpretation of the federal constitution is wrong and creates a systemic problem is less offensive than multiple individual findings by different federal courts that his interpretation of the

V
SYSTEMIC HABEAS REVIEW AS STRUCTURAL REFORM LITIGATION

Any attempt to have federal courts use habeas corpus to restructure state criminal justice systems is likely to face the same criticisms that other forms of structural civil rights litigation have encountered. In Section V.A, I explore these criticisms and explain how they have resulted in a narrower and less intrusive form of structural relief in other contexts. I also discuss why structural reform litigation is a natural tool to redress states' systemic violation of criminal defendants' constitutional rights and why a systemic habeas review system captures many of the benefits of structural reform litigation without some of the costs. In Section V.B., I explain why alternative forms of structural relief—including section 1983 litigation, federal enforcement actions, and habeas class actions—are not as well-suited to redress this particular systemic problem as a systemic habeas form of structural relief.

A. The Arc of Structural Reform

1. Old Structural Reform

After *Brown v. Board of Education*,[235] a new form of public law litigation emerged in which civil rights plaintiffs sought forward-looking relief from federal courts in the form of broad, negotiated judicial decrees requiring state political institutions to restructure in order to comply with federal law.[236] Schools, jails, mental hospitals, housing authorities, and police departments were all subject to continuing federal judicial supervision under these decrees.[237] Because federal judges are insulated from political pressure and can tailor solutions to particular situations without having to address generalized problems through bureaucratic channels, some scholars believed that federal courts were better positioned than legislatures or administrative agencies to provide structural relief.[238]

Nonetheless, the structural reform movement was controversial from its inception.[239] Some critics believe that such judicial intervention offends principles of federalism and violates the separation of powers doctrine.[240] Structural reform litigation might bypass democratic decision-making processes and allow unelected federal judges to play God in areas where they

federal law is wrong and merits the granting of multiple habeas corpus petitions.

235. 347 U.S. 483 (1954).

236. *See* Chayes, *supra* note 178.

237. *See* Jeffries & Rutherglen, *supra* note 174, at 1413; Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 949 (1978).

238. *See* FISS, *supra* note 196; Chayes, *supra* note 178, at 1307–09.

239. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1017 (2004).

240. *See id.* at 1017; *see also* Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 158–59 (2003).

have no real expertise.[241] To make matters worse, critics argue, the federal decrees resulting from structural reform lawsuits often involve sweeping, elaborate, and detailed remedies that extend beyond remedying unconstitutional conduct and require significant appropriations of state funds.[242]

Defenders of structural reform litigation emphasize the fox-guarding-the-henhouse problem that arises when the political branches are responsible for ensuring that state and local institutions respect individuals' constitutional rights.[243] Federal judicial intervention is necessary, they argue, precisely because the political branches have failed to protect countermajoritarian rights.[244] Moreover, they contend, the argument that structural reform litigation bypasses democratic decision-making processes ignores the involvement that the political branches have in the process of creating remedies.[245] As for the objection about the appropriation of state budgets, defenders of structural reform litigation emphasize that every judicial order implies an allocation of public funds sufficient to enforce it. Sometimes the enforcement costs are substantial, and sometimes they are not.[246] Moreover, each time structural reform injunctions have been issued, legislatures, agencies, or nongovernmental organizations have readily volunteered the requisite resources.[247]

2. Kinder, Gentler Structural Reform

Beginning in the 1970s, the Supreme Court substantially limited structural reform litigation by restricting the availability of injunctive relief[248] as well as the breadth of injunctive remedies.[249] The Court also encouraged lower courts

241. *See* Gilles, *supra* note 240, at 161; Jeffries & Rutherglen, *supra* note 174, at 1387.

242. *See* Jeffries & Rutherglen, *supra* note 174, at 1387; Sabel & Simon, *supra* note 239, at 1017.

243. *See* Gilles, *supra* note 240, at 160.

244. *See* FISS, *supra* note 196, at 60; Jeffries & Rutherglen, *supra* note 174, at 1399–1400; Zaring, *supra* note 196, at 1025 n.49.

245. *See* Zaring, *supra* note 196, at 1028; *see also* Sabel & Simon, *supra* note 239, at 1091 (noting that the remedial schemes are often created with substantial input from the legislatures). Defenders of structural reform litigation also point out that state officials often welcome these lawsuits, knowing that a federal court order will insulate them from political responsibility for taking a desired but politically unpopular action. *See* THOMAS, *supra* note 48, at 70; Dinerstein, *supra* note 198, at 688; Mishkin, *supra* note 237, at 958; Sabel & Simon, *supra* note 239, at 1063, 1065; *see also* Schlanger, *supra* note 208, at 563 (quoting a jail administrator: "To be sure, we used 'court orders' and 'consent decrees' for leverage. We ranted and raved for decades about getting federal judges 'out of our business'; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment. We 'cussed' the federal courts all the way to the bank.").

246. *See* Sabel & Simon, *supra* note 239, at 1059.

247. *See id.* at 1082.

248. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983); Rizzo v. Goode, 423 U.S. 362, 380 (1976); O'Shea v. Littleton, 414 U.S. 488, 493–99 (1974).

249. *See* Lewis v. Casey, 518 U.S. 343 (1996).

to terminate long-standing consent decrees.[250] As a result, federal judges are now less likely to create comprehensive remedial regimes regulating the details of a state institution,[251] and many scholars today regard structural reform litigation as largely a thing of the past.[252]

That conclusion, though common, is too quick. Structural reform litigation remains an important part of the work of the federal courts. It would be more accurate to say that a command-and-control style of structural injunctive relief has been largely replaced by a less intrusive and more experimentalist approach, one more focused on identifying goals that defendants are expected to achieve and outlining standards for measuring their performance in achieving those goals.[253] In that spirit, courts today are more likely to try to encourage the parties to craft flexible and provisional decrees.[254] These decrees often call for data collection, monitoring and reporting, the development of performance measures, and ongoing stakeholder participation in the remedy.[255] Current structural reform decrees tend to be narrower and less intrusive than the decrees of the past, but federal courts still use structural injunctions to shape institutional reform.[256] Hundreds of school districts and prisons continue to operate under judicial supervision today.[257]

B. The Fit with Criminal Procedure

Even in its softer modern form, structural reform litigation is not effective everywhere. As Myriam Gilles, Charles Sabel, and William Simon have shown, recent structural reform litigation appears most effective when there is broad consensus within legal intellectual circles[258] that underrepresented minorities' constitutional rights are being violated and that such violations are intolerable.[259] In such circumstances, structural reform is the only way to remedy a systemic constitutional violation, because majoritarian political control is unresponsive to the needs of the minority community.[260]

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250. *See* Garrett, *supra* note 208, at 871.

251. *See* Jeffries & Rutherglen, *supra* note 174, at 1410–12.

252. *See id.*; Schlanger, *supra* note 208.

253. *See* Jeffries & Rutherglen, *supra* note 174, at 1410–12; Sabel & Simon, *supra* note 239, at 1019; Schlanger, *supra* note 208, at 568.

254. *See* Jeffries & Rutherglen, *supra* note 174, at 1410–12; Sabel & Simon, *supra* note 239, at 1019, 1067–72.

255. *See* Jeffries & Rutherglen, *supra* note 174, at 1410–12; Sabel & Simon, *supra* note 239, at 1067–72; Schlanger, *supra* note 208, at 568.

256. *See* Garrett, *supra* note 208, at 872.

257. *See* Sabel & Simon, *supra* note 239, at 1018; Schlanger, *supra* note 208, at 554; Zaring, *supra* note 196, at 1019–20.

258. Legal intellectual circles would include judges, lawyers, academics, and other elites in the legal and political community more broadly. *See* Gilles, *supra* note 240, at 147–48.

259. *See id.* at 147–49; Sabel & Simon, *supra* note 239, at 1062.

260. *See* Jeffries & Rutherglen, *supra* note 174, at 1389; Sabel & Simon, *supra* note 239, at 1064; Russell L. Weaver, *The Rise and Decline of Structural Remedies*, 41 SAN DIEGO L. REV. 1617, 1631–32 (2004).

As I have detailed in this Article, criminal defendants' constitutional rights are routinely violated in state criminal courts. Criminal defendants are a despised minority with no real political power. Politicians, meanwhile, are unwilling to spend money on criminal justice reforms. Consequently, if there is no judicial intervention, state criminal justice systems will continue to systematically deprive defendants of their constitutional rights.[261] Admittedly, popular fear of crime and of releasing criminals makes structural reform more difficult here than in some other contexts.[262] But that does not mean it is impossible. Instead, it means that any proposal for structural reform must proceed incrementally, taking into account the political difficulties inherent in effectuating systemic change.

The federal judiciary is well positioned to effectuate criminal justice reforms. In fact, it is better equipped to redress systemic state violations of criminal procedure rights through structural reform than it is to redress other problems—like school segregation and prison condition violations—for which structural reform has already proven effective. After all, stopping criminal procedure violations is about the federal judiciary checking the state judiciary. It is not about reforming schools, prisons, or other institutions with which federal judges have less experience. It is about reforming a justice system, which is something that federal judges know a lot about. Indeed, if the issue is how to reform a justice system, federal judges are at least as competent as legislators and executive branch officials, and they are probably more realistic when assessing what can and cannot be accomplished in a reasonable period of time. On institutional competence grounds, federal courts are thus better equipped to bring about the kinds of policy changes that systemic habeas review would call for than they are to intervene in other areas where structural reform litigation currently operates.

C. Alternatives to Systemic Habeas

1. Section 1983

The federal causes of action that are typically used for structural reform litigation—42 U.S.C. § 1983 class actions and federal enforcement actions—are not well-suited to allow prisoners to file suit to stop states from systematically violating criminal procedure rights. Consider first the limits of section 1983.[263] Criminal defendants must have their unconstitutional convictions reversed before they are entitled to recover monetary damages

261. *Cf. id.* (making a similar argument about prisoners).

262. *Cf.* Sabel & Simon, *supra* note 239, at 1043 (noting that acceptance of institutional reform litigation in policing has been slower than in other areas because there is a popular fear of crime that makes judicial intervention seem costlier and riskier).

263. 42 U.S.C. § 1983 (2006).

through section 1983 suits.[264] Moreover, state judges, who are frequently the individuals engaging in the systemic violation of criminal procedure rights, are absolutely immune from civil damage suits for actions performed in their official capacities.[265]

The path to equitable relief is not much easier. Some litigants would have difficulty meeting section 1983's heightened standing requirements for injunctive relief.[266] Those who have standing are likely to be barred by statute from obtaining equitable relief against judicial officers unless declaratory relief is unavailable.[267] Moreover, abstention doctrines keep federal courts in section 1983 suits from enjoining or providing declaratory relief in pending state court criminal proceedings[268] and from reviewing state court decisions after the fact.[269] Nor may incarcerated persons use section 1983 to end or shorten their terms of confinement.[270] Instead, under existing doctrine, litigants seeking release from confinement must resort to habeas corpus.[271]

Finally, the pleading requirements make it difficult to achieve systemic state reform in the criminal justice system through a section 1983 action. Because there is no vicarious liability in section 1983 lawsuits, states have been held to be inappropriate defendants.[272] As a result, plaintiffs filing section 1983 lawsuits must sue individual officers for relief.[273] Such rules are problematic in the context of redressing systemic state violations of criminal procedure rights. Systemic problems regularly exist because of the action or inaction of multiple state actors, which compromises the defendant's ability to name each individual responsible for the alleged problem. Moreover, to the extent that the defendant is able to name each person, the number of defendants involved is likely to be high in many cases, resulting in more complex litigation and requiring more federal judicial time, energy, and resources. For all of these reasons, current section 1983 litigation is not an adequate vehicle through which to vindicate claims of systemic state violations.

Of course, Congress could retool section 1983 and attempt to address all of the foregoing problems. There are prudential and constitutional reasons,

264. Heck v. Humphrey, 512 U.S. 477 (1994).

265. Pierson v. Ray, 386 U.S. 547 (1967); *see also* Federal Courts Improvement Act of 1996, 104 Pub. L. No. 317, § 401, 110 Stat. 3847, 3853 (codified at 42 U.S.C. § 1983 (2006)).

266. City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983); Rizzo v. Goode, 423 U.S. 362, 380 (1976); O'Shea v. Littleton, 414 U.S. 488, 493–99 (1974).

267. *See* Federal Courts Improvement Act of 1996 § 401.

268. *See* Younger v. Harris, 401 U.S. 37 (1971).

269. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

270. *See* Heck v. Humphrey, 512 U.S. 44 (1994); Preiser v. Rodriguez, 411 U.S. 475 (1973).

271. *See id.*

272. *See* Schlanger, *supra* note 62, at 1676 n.391.

273. *See* THOMAS, *supra* note 48, at 167 (noting that many civil rights complaints are dismissed for failure to adequately name the specific persons who are responsible for the alleged violations).

however, why a structural habeas solution would be better than a modified section 1983 action.

First, there are important differences between the remedies available in habeas actions and those available through section 1983 litigation. The traditional habeas remedy—conditional or outright release of a single petitioner—is less likely to raise federalism concerns and create the kinds of problems that characterized early efforts at judicially imposed structural reform than the injunctive relief associated with section 1983. The fact that the relief provided by the federal court is individualized (that is, that conditional orders of release come one by one) makes it more politically palatable for a judge to grant relief. There is no requirement of immediate relief for all affected prisoners, and the state is not ordered to take expensive and time-consuming action. Rather, this Article's proposal gives the state the option of releasing prisoners and taking its time to think about how, and even whether, to devise a more comprehensive remedy. Compare this remedial approach with the remedies available under section 1983 where, even if the offending state institution plays an active role in crafting remedial orders,[274] an unelected federal judge is still forcing the state to enact reforms. In contrast, a judge who orders a habeas petitioner released does not bypass democratic institutions in the states and does not force the state to enact reforms, because the state does not have to enact *any* reforms. Instead, the threat of more conditional release orders gives the state an incentive to fix its procedures in its own way. The offending state can choose a judicial, legislative, or executive solution to the problem or can just opt to leave the problem intact and release prisoners whose rights were prejudicially affected. This system is more deferential to the state than a judicial order instructing the state to change and specifying how the reform must proceed.[275]

Of course, Congress could create a modified section 1983 action with the conditional release remedy proposed here, but release from confinement is the quintessential remedy for habeas actions. The difference in remedies is one of the key distinctions between habeas and section 1983, and this proposal's use of the traditional habeas remedy is one of its central features. It therefore makes sense to locate this proposal in the framework of habeas rather than that of section 1983. Moreover, federal habeas review is currently broken and in need of reform in ways that section 1983 is not, so if one is going to reform one framework or the other, habeas is a more logical candidate. The redirection of currently wasted federal resources from the old habeas system to a revised and more effective one ought to be more politically palatable than the creation of a new section 1983 cause of action designed to help a politically unpopular minority.[276]

274. *See* Lewis v. Casey, 518 U.S. 343 (1996).

275. *See* Mishkin, *supra* note 237, at 964.

276. To be sure, Congress could decide to repeal section 2254 entirely and redirect the resources that were previously devoted to federal habeas review to a new modified section 1983

In addition to these prudential reasons why reforms might be better located in habeas than in section 1983, there may be constitutional reasons to prefer a modified habeas corpus system. Consider the timing of the respective actions. Section 1983 actions can be filed before, during, or after a state court proceeding, whereas habeas actions under section 2254 must wait until after trial.[277] The timing is important because there are potential constitutional limitations on interference in ongoing state court criminal proceedings that would apply to many section 1983 actions but not to habeas actions.

In *Younger v. Harris*,[278] the Supreme Court relied on principles of comity and federalism to hold that the federal courts must abstain from enjoining or providing declaratory relief in pending state court criminal proceedings. Most experts believe that *Younger* abstention is a prudential doctrine,[279] but some have argued that implicit limits on federal judicial power contained in the Supremacy Clause, Article III, and the Tenth Amendment constitutionally require *Younger* abstention.[280] The Supreme Court has not yet addressed this question, and if it were to address it today, it would probably agree with the majority of commentators that the doctrine is prudential. But the conditions under which the Supreme Court would confront that question would be considerably different if Congress enacted a modified section 1983 statute designed to redress systemic state violations of criminal defendants' rights in pending cases. If every criminal defendant who wanted to allege pretrial that his appointed public defender was ineffective could file a federal action, the federal courts would be inundated with cases. Given that 80 percent of criminal defendants are represented by public defenders,[281] any federal ruling that there was a structural problem with the provision of indigent defense services would freeze the entire state criminal justice system. To the extent that there is any argument that *Younger* abstention is constitutionally required, the onslaught of federal filings and the potential disruption of an entire state criminal justice system would make the argument attractive to an overburdened federal

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cause of action. However, eliminating federal habeas review of state criminal convictions entirely is likely to pose a greater potential constitutional problem under the Suspension Clause than would a limitation of federal habeas review to systemic claims. *See supra* Section III.F.

277. *Compare* 42 U.S.C. § 1983 (2006) (listing no time restrictions), *with* 28 U.S.C. § 2254(a) (2006) (requiring that a prisoner be held pursuant to a state court judgment before the prisoner can file for federal habeas relief).

278. 401 U.S. 37 (1971).

279. *See, e.g.*, Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 261–65 (1992).

280. *See, e.g.*, Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 B.Y.U. L. REV. 811, 812–43 (1991); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 13.2 at 828–29 (5th ed. 2007) (explaining that it is an open question whether *Younger* abstention is constitutional or prudential and summarizing the arguments on both sides).

281. *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 815 (2006) (citing Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU OF JUST. STAT. BULL., Feb. 1996, at 4).

judiciary concerned with maintaining the federalist balance.

Congress could avoid this potential constitutional problem by requiring defendants to wait until after their state cases have been fully resolved to file challenges under its new civil rights statute. But, under that scenario, Congress runs the risk of confronting another potential constitutional problem: standing. The Supreme Court has held that a private citizen wishing to vindicate his rights under a civil rights statute only has standing under Article III to bring a claim for injunctive relief in the federal courts if he can show that he has sustained a real and immediate injury that has continuing and present effects.[282] Past exposure to illegal conduct is insufficient to satisfy the constitutional standing requirements.[283] So if litigants wait too long to file their civil claims and their sentences have expired, they may no longer be suffering from the effects of the alleged constitutional violation and will, as a constitutional matter, not state a case or controversy under Article III.

The best way for Congress to avoid both of these potential constitutional problems is to craft a statute that allows defendants who are still suffering from the effects of their criminal convictions—that is, defendants who are still in custody—to file post-trial attacks on their criminal convictions. And Congress has already drafted that statute: it is 28 U.S.C. § 2254, governing federal habeas review of state criminal convictions.

2. Federal Enforcement Actions

Instead of a modified section 1983 action, Congress could create a wholly new federal enforcement action designed to redress systemic state violations of criminal defendants' constitutional rights. Patterned after section 14141,[284] such legislation would make it unlawful for any state or state official to engage in a pattern or practice of conduct that deprives criminal defendants in that state of their rights under the Constitution. It would also give the attorney general the power to sue in federal court and obtain appropriate equitable relief whenever it has reason to believe that a state was in violation.[285]

A federal enforcement action is attractive for a number of reasons. Because the executive is not constrained by the Supreme Court's decisions

282. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1982) (holding that the plaintiff did not have standing to challenge the police department's chokehold policies because he could not show that he was suffering from an injury with present effects); Rizzo v. Goode, 423 U.S. 362, 372 (1975) (holding that the plaintiffs did not have standing to challenge the allegedly racially discriminatory practices of the police because they could not show a present injury); O'Shea v. Littleton, 414 U.S. 488, 495–97 (1973) (holding that the plaintiffs did not have standing to challenge the allegedly racially discriminatory practices of the criminal courts in setting bond, sentencing, and establishing jury practices because the plaintiffs could not demonstrate any injury to them).

283. *See* Rizzo v. Goode, 423 U.S. 362, 372 (1975).

284. 42 U.S.C. § 14141 (2006).

285. *See id.*

regarding redressability, equitable standing, and generalized grievances, it can avoid the standing problems that plague other civil rights statutes.[286] Moreover, a statute that provides for a federal enforcement action does not raise the same abstention concerns as a statute that authorizes citizen suits. A citizen suit provision would allow every criminal defendant who wanted to allege that his constitutional rights were violated as part of a systemic state practice to file a federal action. The federal courts would be inundated with cases, and there would be no check on frivolous claims.[287] In contrast, giving the Department of Justice the authority to file an action in a limited number of cases allows a small number of suits to go forward—enough suits to fix the problems, but without the onslaught of filings that would come with an unchecked private cause of action. Finally, the involvement of the United States carries a certain gravitas that the federal courts take seriously. As a result, when the Department of Justice has filed enforcement actions in other contexts, it has often brought the offending state officials to the negotiating table.[288]

That said, there are also some significant drawbacks to a federal enforcement action. Perhaps most important among them is the political accountability that it would inject into the decision to sue and seek relief.[289] As described above, relying solely on the Department of Justice to institute enforcement actions has not been effective in other contexts due to resource constraints, different administrations' political priorities, and hostility to the underlying claims.[290] For these reasons, any federal enforcement action would have to be supplemented with a modified habeas or section 1983 cause of action in order to be effective.

3. Habeas Class Actions

If habeas reform is the appropriate tool for redressing systemic state violations, one might also consider reviving the habeas class action.[291] Such class actions would achieve many of the same benefits as the proposed systemic habeas system. Aggregation of common claims would preserve judicial time, energy, and resources and would ensure that habeas petitioners had counsel to raise their common claims.[292] If successful, habeas class actions would provide states with strong incentives to end systemic violations of

286. *See* Gilles, *supra* note 203, at 1447.

287. *See id.* at 1384, 1452 (discussing the failure of citizen suits provisions to provide any check against frivolous claims).

288. *See id.* at 1404–06 (describing how all of the lawsuits that the Department of Justice filed under section 14141 have resulted in consent decrees)

289. *See* Jeffries & Rutherglen, *supra* note 174, at 1421.

290. *See* discussion *supra* Section III.E.

291. *See* Garrett, *supra* note 14, at 388 n.15 (noting that for two decades federal courts certified habeas class actions); *Multiparty Habeas*, *supra* note 84 (arguing for habeas class actions).

292. *See* Garrett, *supra* note 14, at 409.

constitutional rights.[293]

That said, using the class action for this purpose has important limits. Aggregating habeas claims without reforming the procedural obstacle course and the deferential merits review that now constitute the habeas process would leave in place many of the shortcomings that currently prevent habeas relief from deterring systemic state violations. Exhaustion rules would drastically limit the number of petitioners able to obtain habeas relief and increase the delay between state violation and federal feedback. Because habeas class actions would merely aggregate individual claims rather than changing the nature of the merits inquiry, the shift to habeas class actions provides no grounds for eliminating the exhaustion requirement. In a habeas class action, the state retains its interest in having an opportunity to redress the violations at issue before the federal court intervenes, particularly given that there is no suggestion that asking for state relief would be futile.[294]

The question of remedy raises further problems for class actions. Federal judges are generally reluctant to order the immediate release of large numbers of convicted criminals.[295] As a result, judges might be reluctant to find constitutional violations in class actions and indeed might dilute constitutional standards to avoid such findings.[296] The problem is particularly acute because a mandatory habeas class action would include absent class members. Thus, when the federal court granted relief, it would be granting relief to all prisoners who are potentially affected by its ruling.[297] In contrast, the proposed systemic habeas review system provides relief to only one petitioner at a time, and retroactivity principles limit the potential scope of each federal decision.[298]

Finally, there is the question of political feasibility. Reviving the habeas class action might garner support from those in Congress who are interested in using habeas review to protect individual rights, but it would receive little support from those interested in conserving federal resources and promoting finality and federalism. Given that there is not enough political support to ensure full relitigation of individual claims, it is hard to imagine that Congress would be willing to fund an expanded habeas review system that adds a second layer of systemic habeas review on top of the current individualized review system.

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293. *See id.* at 443.

294. *See id.* at 408.

295. *See, e.g.*, Amsterdam, *supra* note 136.

296. *See, e.g.*, Hammel, *supra* note 5, at 77 (referring to this concern as the "legitimation effect").

297. *See Multiparty Habeas*, *supra* note 84, at 1507 (noting that according benefits to all habeas class members may create a disruption in the administration of criminal justice which nonretrospective decisions are in part designed to prevent).

298. *See* discussion *supra* Section III.D.

4. Aggregation in State Courts

Another possible alternative to a systemic federal habeas system would be to look entirely outside the federal judiciary. In a recent article, Brandon Garrett has promoted the idea of aggregating claims in state courts across a variety of contexts.[299] As Professor Garrett shows, important benefits flow from a court's considering many instances of a legal problem, whether the particular aggregation is in the form of a class action, the consolidation of cases, or the channeling of a certain kind of case to a repeat-player judge.[300] Professor Garrett's analysis is illuminating, and it is accordingly worth considering whether the aggregation of criminal procedure claims in state courts would be a desirable method of redressing systemic violations of defendants' constitutional rights.[301]

A system of state court aggregation of such claims could prompt reform. Presenting aggregated defendants' claims through state class actions or consolidated appeals might force state judges to see and rule on systemic problems that they currently ignore. Unfortunately, there is little reason to believe that states have an incentive to adopt these procedures on their own.[302] Systemic state violations exist because of the failure of all three branches of state government. The right-to-counsel crisis, for example, exists in many states because state legislators underfund the public defender's office, public defenders do not provide effective assistance of counsel, prosecutors and trial judges do nothing to stop it, appellate and postconviction judges either ignore or refuse to address the problem, and the executive does not fix it. If any one of these state actors stepped in to remedy the situation, it would prevent the development of a systemic problem. Given that the systemic problems in need of correction are by definition tolerated by state courts, it might be overly optimistic to expect state judges to embrace state class actions or consolidated appeals that would bring the problems into focus. If one is trying to remedy a systemic state problem, it is more realistic to look outside the state.[303]

299. *See generally* Garrett, *supra* note 14.

300. *See id.*

301. Professor Garrett does not limit his argument for aggregation to the state court context, but for the reasons discussed *supra* Section V.C.3, I do not believe that procedural aggregation of claims in federal habeas would be as effective in checking systemic state violations as the proposed systemic habeas review system.

302. To be sure, there are examples of aggregation in criminal cases, but they are the exception rather than the rule. *See* Garrett, *supra* note 14, at 410–20 (describing instances of state aggregation).

303. That said, the proposed systemic habeas review system might give state courts an incentive to create aggregation mechanisms in order to redress systemic problems before they reach the federal habeas courts. If so, the benefits of state-court aggregation that Professor Garrett describes might be brought to bear.

5. Executive or Legislative Solutions

Even if it is appropriate to seek the solution to a systemic state problem at the federal level rather than expecting the state to correct the violations itself, it does not necessarily follow that the best federal officials to provide the solution are judges. Importantly, however, the kind of systemic failures at issue here concern the enforcement of criminal procedure rights. Criminal defendants have no lobbying power and therefore are poorly positioned to bring these issues to lawmakers' attention as they arise.[304] More importantly, federal executive and legislative officials are unlikely to pass multiple pieces of legislation designed to protect criminal defendants' rights for fear of being labeled as soft on crime and not winning reelection.[305] Given limited time and resources, legislative and executive officials are more likely to champion education or health care reform than to argue for expanded rights for alleged criminals.[306]

To be sure, there is much debate about the degree to which federal judges embrace countermajoritarian views in order to preserve individual rights.[307] Many federal judges are hesitant to intrude on their state court brethren and upset state criminal convictions.[308] And given the implications of finding a systemic state problem, judges might be more willing to redress individual

304. *See* 1972–2006 GENERAL SOCIAL SURVEY ON CRIME AND LAW ENFORCEMENT (2006), *available at* http://sda.berkeley.edu/cgi-bin/hsda?harcsda+gss06 (indicating that an overwhelmingly large majority of people surveyed believe that courts treat criminals too leniently).

305. *See* Rebecca Zeifman, *Backlogged DNA Tests Keep Hopes on Ice: Victims, Wrongly Convicted Anxiously Await Resolution*, CAPITAL TIMES (Madison, Wis.), Oct. 12, 2004, at 3A (noting that legislation to fund DNA testing in capital cases was "stalled in the Senate because of a provision that allocates $350 million to improved legal representation in death penalty cases," legislation that the Department of Justice and others called "soft on crime"); *see also* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997) ("Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to [criminal] defense. . . ."). Of course, certain issues—i.e., the right-to-counsel crisis or DNA exonerations—could spark an act of legislative reform that gave federal courts jurisdiction to entertain systemic claims. *See* discussion *supra* note 201 and surrounding text. However, it is unrealistic to think that Congress would be willing to enact individual reforms for each systemic problem that arises in a state.

306. *See* Charles Babbington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush: Constitutional Challenges Predicted*, WASH. POST, Sept. 29, 2006, at A01 (noting that Pennsylvania Senator Arlen Specter voted for a bill that would strip detainees of habeas corpus rights even though he believed the bill to be unconstitutional); *see also* Michels, *supra* note 106 (noting that Florida State Senator Victor Crist, when asked about budget cuts to the indigent defense system in that state, indicated that the legislature had no choice and stated, "Do we cut the schools? Do we cut health services? Everybody has to share in the reductions.").

307. *Compare* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 116 (2d ed. 1986) (espousing limited role of federal courts due to countermajoritarian difficulty), *with* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 667–68 (1993) (questioning the extent and force of the claim that federal courts are countermajoritarian).

308. *See* O'Shea v. Littleton, 414 U.S. 488, 501–02 (1974); FISS, *supra* note 196, at 65; Hammel, *supra* note 5, at 40.

errors than systemic ones.[309] That said, federal judges are certainly more insulated from political pressure than the executive or legislative branches. The premise of federal habeas review is that federal judges should oversee state court operations to the extent necessary to protect constitutional rights.[310] Of course, some federal judges will refuse to take seriously a congressional mandate to review state court criminal decisions, but the same attitudes that animate such a judge will exist in the legislative and executive branches as well.

CONCLUSION

At its inception, federal habeas corpus review of state court criminal convictions was designed not just to correct individual errors but also to check systemic state disregard for constitutional rights. That vision has faded over time. Today, judges and scholars who disagree about many aspects of habeas corpus share the assumption that the point of habeas is to remedy individual violations, and their disagreements concern which individuals should be entitled to relief—those who are actually innocent, those who were not afforded fair process, or those who had certain preferred rights violated. The struggle among these positions has created an unwieldy maze of procedural obstacles that currently prevents habeas from acting as a meaningful check at the systemic level. As a result, many states now violate criminal defendants' federal rights not just with impunity but also as a matter of routine.

This Article demonstrates that restoring the systemic mission of federal habeas review of state cases could both repair the federal habeas system and redress practices by which states systematically violate defendants' federal rights. Many who read this proposal may be skeptical—both about the proposal's feasibility and about its ability to spur reform if enacted. Admittedly, any attempt at systemic reform poses challenges as our experience with structural reform litigation in the civil context demonstrates. And the challenge is particularly difficult when the reforms are designed to benefit criminal defendants.

That said, the systemic problems in our criminal justice system are growing in both number and magnitude. The national media is beginning to pay attention,[311] and congressional committees are forming to consider these problems.[312] As a separate matter, Congress has long been interested in fixing

309. *See, e.g.*, Amsterdam, *supra* note 136; *see also* O'Shea v. Littleton, 414 U.S. 488, 501–02 (1974) ("[A] major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized. . . .").

310. *See* Hammel, *supra* note 5, at 50 ("[T]he very existence of federal courts and most federal jurisdiction is based on a distrust of state courts.").

311. *See, e.g.*, Eckholm, *supra* note 201; Amir Efrati, *It's Rare for Prosecutors to Get the Book Thrown back at Them*, WALL ST. J., Apr. 16, 2009, at A11.

312. *See, e.g.*, Press Release, National Legal Aid & Defender Association, NLADA's David Carroll to Testify in Historic Congressional Hearing on Topic of Right to Counsel:

the broken federal habeas system.[313] The systemic habeas review system proposed here offers Congress the opportunity to address both of these concerns.

Just as one important function of the individual's right to vote is to prevent the systemic distortion of political power, one important function of the Great Writ is to prevent states from ignoring defendants' federal rights systematically. A federal habeas system that required petitioners to demonstrate that they were prejudicially affected by a systemic state practice in order to obtain relief would go a long way toward fulfilling that function, and it could also go a long way toward reducing the waste and redundancy that plague habeas review today.

Congressional Hearing to Focus on Failings of Public Defense Systems, with Emphasis on Michigan, as Exposed in a Recent NLADA Report (March 19, 2009), *at* http://www.nlada.org/News/News_Press_Releases/2009031959108246.

313. *See supra* notes 221–24 and accompanying text.