Habeas and the Roberts Court

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Postconviction habeas comprises about 7 percent of federal district courts' dockets and between 8 and 20 percent of Supreme Court certiorari work. Scholars of all stripes condemn habeas as an empty "charade" lacking "coherent form." They consequently urge root-and-branch transformation. Resisting that consensus, this Article first advances a descriptive hypothesis: The Roberts Court's habeas jurisprudence is more internally coherent than generally believed—even if its internal logic has to date escaped substantial scholarly scrutiny. That jurisprudence is an instrument for sorting at the front end of litigation between cases warranting either less or more judicial attention. This account suggests that the Roberts Court titrates judicial attention by streaming cases into one of two channels via a diverse set of procedural and substantive mechanisms. In Track One, petitioners obtain scanty review and almost never prevail. In Track Two, by contrast, petitions receive more serious consideration and have a more substantial (if hardly certain) chance of success. This stylized account of the case law enables more focused investigation of the values that the Roberts Court pursues through its current articulation of habeas doctrine—and this is the Article's second task. Drawing on both doctrinal analysis and law-and-economics models of litigation, the Article explores several possible justifications for the Court's observed bifurcated approach. Rejecting explanations based on state-centered federalism values, sorting, and sentinel effects, the Article suggests that some conception of fault best fits the role of a central organizing principle. This aligns habeas with constitutional-tort law, suggesting a previously unexamined degree of interdoctrinal coherence in the Roberts Court's attitude to otherwise distinct constitutional remedies. While the central aim of this Article is positive and descriptive in character, it concludes by examining some normative entailments of habeas's persistence in a bifurcated state. Specifically, I suggest that a better understanding of the Court's fault-based logic casts skeptical light on existing reform proposals, and is at

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least consistent with the possibility that habeas could still serve as a tool in some larger projects of criminal-justice reform.

INTRODUCTION

Like a guest lingering when the banquet has ended, postconviction habeas corpus persists as an obdurate and often unwelcome fixture of the federal court docket.[1] In the district courts,

[1] Federal courts have jurisdiction to issue writs of habeas corpus pursuant to 28 USC § 2241 and § 2254(a). Postconviction review for federal prisoners occurs under conditions defined primarily in 28 USC § 2255. Prisoners convicted in state court are governed by rules enunciated in 28 USC § 2254. See Brandon L. Garrett and Lee Kovarsky, *Federal Habeas Corpus: Executive Detention and Post-Conviction Litigation* 134 (Foundation

6.77 percent of cases filed in the year ending September 30, 2012, sought noncapital postconviction relief.[2] At the Supreme Court, habeas also consumes a surprisingly large share of judicial bandwidth. In October Term (O.T.) 2012, 8 percent of the Court's merits docket concerned habeas.[3] In O.T. 2011, it was 20 percent; in O.T. 2010, 10 percent.[4] This persistence of federal habeas review—even aside from its famously quirky doctrinal contours—is poorly explained by any obvious functional benefit. To be sure, the state criminal-justice systems producing most challenged convictions remain deeply riven by serious constitutional flaws.[5] Of these, perhaps the most embarrassing is the states' persistent failure to furnish or fund the effective assistance of counsel that is required by the Sixth Amendment.[6] But patterns of federal habeas relief do not obviously reflect a rational response to ongoing concerns with the state of criminal-justice systems. To the contrary, the Great Writ has been characterized as a cruel "charade"

2013). This Article largely concerns challenges to state criminal convictions under 28 USC § 2254, which make up the lion's share of Supreme Court jurisprudence and which thereby determine the general trajectory of the doctrine.

2 In the twelve-month period ending on September 30, 2012, a total of 18,851 noncapital habeas petitions were filed with the federal courts; 19,624 petitions were filed in the twelve months before that. See *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, during the 12-Month Periods Ending September 30, 2011 and 2012* *1, 3 (Administrative Office of the United States Courts 2012), online at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C02Sep12.pdf (visited May 21, 2014). In the year ending September 30, 2011, 6.78 percent of cases filed were habeas petitions. Id.

3 *Stat Pack for October Term 2012* *6 (SCOTUSblog June 27, 2013), online at http://scotusblog.com/wp-content/uploads/2013/06/SCOTUSblog_Stat_Pack_OT12.pdf (visited May 21, 2014).

4 *Stat Pack for October Term 2011* *6 (SCOTUSblog Sept 25, 2012), online at http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/SCOTUSblog_Stat_Pack_OT11_Updated1.pdf (visited May 21, 2014); *Stat Pack for October Term 2010* *5 (SCOTUSblog June 28, 2011), online at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf (visited May 21, 2014).

5 See Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 Cal L Rev 1, 16–23 (2010) (documenting structural problems in state criminal-justice systems).

6 This has been documented in a score of reports over the past decade. See, for example, Robert C. Boruchowitz, Malia N. Brink, and Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* *14–17 (National Association of Criminal Defense Lawyers Apr 2009), online at http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (visited May 21, 2014); National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* *49–99 (Constitution Project Apr 2009), online at http://www.constitutionproject.org/pdf/139.pdf (visited May 21, 2014); American Bar Association Standing Committee on Legal Aid and Indigent Defendants, Gideon's *Broken Promise: America's Continuing Quest for Equal Justice* *7–28 (ABA Dec 2004), online at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf (visited May 21, 2014).

ending in a vanishingly small chance of relief for petitioners.[7] This is said to be particularly so in noncapital cases, in which the conventional wisdom suggests that "habeas is completely ineffectual."[8] Not for the first time, a wave of commentary argues that federal postconviction jurisdiction should be either largely abolished[9] or radically "modified."[10] Scholars who are sympathetic to federal habeas's libertarian ends also characterize the law of postconviction review as "confusing"[11] and a "mess."[12] Even some of habeas's most dedicated advocates acknowledge intellectual confusion in the doctrine and suggest instead a need to "draw back, take stock, and set about reconstructing federal habeas corpus in a sensible, coherent form."[13] If there is a common thread to commentary on the writ, in short, it is that there is no common thread to the doctrine. The Court, all agree, has made a hash of the law that only radical surgery can now unravel.

In the half light of this crepuscular skepticism, the retail legal doctrine leaping like showers of sparks from the Supreme Court's anvil each year suffers comparative neglect.[14] Such ne-

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7 Joseph L. Hoffmann and Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 NYU L Rev 791, 816 (2009). Hoffmann and King have also articulated their argument in book form. See generally Nancy J. King and Joseph L. Hoffmann, *Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ* (Chicago 2011).

8 Hoffmann and King, 84 NYU L Rev at 793 (cited in note 7).

9 See id at 818–23. Their analysis has been powerfully challenged. See, for example, Eve Brensike Primus, Review, *A Crisis in Federal Habeas Law*, 110 Mich L Rev 887, 892–908 (2012) (noting the conceptual incoherence and ineffectualness of reform proposals); John H. Blume, Sheri Lynn Johnson, and Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 Cornell L Rev 435, 439 (2011) (arguing that Hoffmann and King's assessment "underestimates the importance of rectifying cases of horrendous error and rests on a set of assumptions that we believe do not comport with the reality of contemporary postconviction litigation").

10 Primus, 98 Cal L Rev at 26 (cited in note 5).

11 Samuel R. Wiseman, *Habeas after* Pinholster, 53 BC L Rev 953, 959 (2012). See also Lee Kovarsky, *Original Habeas Redux*, 97 Va L Rev 61, 80 (2011) (noting the "poor drafting" of the habeas statute).

12 Primus, Review, 110 Mich L Rev at 887 (cited in note 9). See also Larry Yackle, *AEDPA* Mea Culpa, 24 Fed Sent Rptr (Vera) 329, 329 (2012) (invoking "the colossal mess that federal habeas corpus has become"); Primus, 98 Cal L Rev at 12 (cited in note 5) (describing habeas as "broken").

13 Yackle, 24 Fed Sent Rptr (Vera) at 333 (cited in note 12).

14 Important exceptions to this trend analyzing specific aspects of doctrine include Wiseman, 53 BC L Rev at 953–54 (cited in note 11); Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 Wash & Lee L Rev 85, 98–104 (2012).

glect is hardly benign when it comes to the blue-collar neighborhood of postconviction remedies.[15] Habeas law is largely a product of the Supreme Court, rather than of Congress.[16] In my view, it is the pedestrian, piecemeal development of judicial doctrine—more than statutes—that creates, allots, and eliminates opportunities for habeas relief.[17]

Of course, judicial authorship of basic doctrinal structures is no guarantee of coherence: any body of judicially articulated rules risks reflecting the ebb and flow of evolving coalitions of justices, and hence is vulnerable to Arrovian cycling.[18] And it is no doubt possible to explain habeas's labyrinthine, looped sequences of procedural and substantive gateways as evidence that the justices are ensnared in the doctrinal paradox.[19]

Nevertheless, a retreat to social-choice-infused cynicism is unwarranted. The doctrine—at least in its major outlines rather than its epicycles—may well have more of an internal logic and structure than is commonly supposed. The justices, at least, seem to think so. They find coherence in the serried crowd of hobnailed habeas precedents. That conviction manifests, for instance, in unanimous decisions, extending into O.T. 2013, in which the Court, often acting per curiam, reversed habeas decisions (mostly grants of relief) from the Ninth Circuit Court of Appeals without briefing or oral argument.[20] That is, the justices' views about the

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15 See Douglas G. Baird, *Blue Collar Constitutional Law*, 86 Am Bankr L J 3, 3 (2012).

16 See John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Cornell L Rev 259, 262 (2006) ("While the Court maintains that the scope of the writ is primarily for Congress to determine, it does not, in my view, really believe that to be true. . . . [It] has assumed a fair share of the responsibility for determining the scope of habeas review, or how much habeas is enough."). There are, of course, important exceptions. The most important of these is the habeas statute of limitations enacted in 1996. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub L No 104-132, 110 Stat 1214, 1217, codified at 28 USC § 2244(d)(1) (creating a one-year statute of limitations).

17 See text accompanying notes 33–44 for further discussion.

18 The Arrovian paradox concerns the instability of collective decisions due to the irreducible risk of cycling among outcomes. See Frank E. Easterbrook, *Ways of Criticizing the Court*, 95 Harv L Rev 802, 815–17, 823–31 (1982).

19 The doctrinal paradox arises when a collective forms a judgment on a single issue based on numerous subissues, and different ultimate results are obtained by a single all-or-nothing vote versus seriatim issue-by-issue voting over subissues. See Christian List, *The Probability of Inconsistencies in Complex Collective Decisions*, 24 Soc Choice & Welfare 3, 4–5 (2005).

20 See generally, for example, *Ryan v Schad*, 133 S Ct 2548 (2013) (per curiam); *Nevada v Jackson*, 133 S Ct 1990 (2013) (per curiam); *Marshall v Rodgers*, 133 S Ct 1446 (2013) (per curiam); *Johnson v Williams*, 133 S Ct 1088 (2013); *Martel v Clair*, 132 S Ct

contents of the habeas playbook are so propinquitous that they are able routinely to jettison their own prohibition against treating the writ of certiorari as an exercise in mere error correction.[21] Plainly, such comfortable unanimity on so divisive a Court reflects an uncommon consensus on habeas's normative goals, one that transcends ideological lines in form if not in substance.

This Article offers an account of the Roberts Court's habeas jurisprudence. That description is offered here as a catalyst for clearer thinking about the postconviction writ's purpose and justification in the dimmed dusk of Warren Court judicial liberalism. To that end, I aim to distill from recent case law a concededly broad-brush synthesis of how judicial labor is organized and allocated in the postconviction context. I do not aim to capture every detail of a very complex body of law. *Caveat lector*, therefore: what follows is far less than a comprehensive, treatise-like account of the doctrine, but simply an attempt to capture its motive, immanent logic. Of necessity, moreover, my Supreme Court–focused account pays disproportionate attention to those margins of the law that have received greater attention from the apex tribunal of late. The Article's threshold goal, I should further underscore, is resolutely positive, not normative, in character (although I shall endeavor to harvest some normative pickings from my account).

A central premise of my account is that federal judges in habeas have developed doctrinal and jurisdictional tools to sort at the front end of a case between those petitions that warrant either more or less attention. This sorting is necessarily temporally antecedent to any decision as to whether relief should be granted. Indeed, front-end sorting is useful precisely *because* it allows judges to identify the cases to which they should attend more closely in terms of the standards of review, the scope of evidentiary consideration, and the availability of any merits consideration at all. To a remarkable degree, the justices have coalesced on a specific, bifurcated process for triaging postconviction habeas petitions in this fashion. To describe that process is necessarily to underscore some elements of the doctrine more than others. Call this process two-track habeas.

1276 (2012); *Greene v Fisher*, 132 S Ct 38 (2011). For a rare instance of a per curiam decision in favor of a habeas petitioner, see *Porter v McCollum*, 130 S Ct 447 (2009) (per curiam).

[21] Supreme Court Rule 10 makes clear that error correction is not ordinarily a ground upon which the Court will grant a petition for a writ of certiorari.

I thus do not address at length the concept of "fundamental miscarriage of justice," which is infrequently involved with success.[22] The complex body of law around postconviction habeas's statute of limitations also receives short shrift here. In my view, although this body of case law is often outcome determinative, especially in the complex circumstances of capital litigation, it represents less an emanation of some deeply felt judicial principle than the Court's necessary scrimmaging with a poorly drafted rule encountering a heterogeneous set of external circumstances. Therefore, in the bulk of what follows, case law concerning the statute of limitations is crudely assimilated into the procedural briar patch habeas petitioners must overcome.[23] Such simplifications, I submit, are warranted in the service of my ambition of capturing the elemental movements and motive forces of the postconviction habeas case law generated by the Roberts Court.

The setting forth and then explaining of this immanent dynamic within the case law proceeds in three stages, corresponding to the Article's three Parts. Its load-bearing elements, however, are Parts I and II, which are descriptive and positive in character. Only in Part III do I entertain some normative entailments—and then only with due caution. In Part I, I offer a parsimonious account of 28 USC § 2254 jurisdiction.[24] My aim in so doing is to

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[22] See *Schlup v Delo*, 513 US 298, 326–27 (1995). See also text accompanying notes 55–65 for further discussion.

[23] See AEDPA § 101, 110 Stat at 1217, codified at 28 USC § 2244(d).

[24] It bears repeating that I do not here focus on the case law created by petitions filed by federal prisoners pursuant to 28 USC § 2255, even though they add up to "one-third to one-half of the number of federal habeas petitions." Garrett and Kovarsky, *Federal Habeas Corpus* at 420 (cited in note 1). The overwhelming majority of habeas cases decided by the Supreme Court are § 2254 cases. Many of these cases effectively produce doctrine for both § 2255 and § 2254. Based on my reading of the case law, I find little evidence that § 2255 plays a formative role in the justices' thinking. As a result, the Court's conception of and frameworks for habeas are driven primarily by concerns about federal-state relations rather than concerns internal to the national government. As a result of these considerations, narrowly targeted attention to § 2254 cases alone (which, again, are most of the Court's diet) provides an effective and sufficient snapshot of the Court's larger understanding of the postconviction habeas writ's function—which is the ultimate goal of my analysis here.

Nor do I focus on the use of habeas in the national security context, about which I have written elsewhere. See generally Aziz Z. Huq, *What Good Is Habeas?*, 26 Const Commen 385 (2010). See also Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 Duke L J 1415 (2012) (analyzing the choice between Article III and Article I forums in national security lens using institutional design tools from the political science and complex-systems literatures). One of the surprising aspects of habeas practice, indeed, is the degree of conceptual and doctrinal separation between postconviction habeas and habeas as a challenge to executive detention. As a former habeas practitioner, my suspicion is that lawyers in both camps sought to avoid being tarred by association with the other camp.

show that—contra the weight of commentary—the Roberts Court has converged upon a coherent approach to habeas review at least at the molar level and at least for the time being.[25] This framework comprises two tracks or channels—hence the two-track model of habeas[26]—into which petitions are slotted at a relatively early stage of litigation (and certainly long before a merits decision).[27] For petitions slotted into Track One, relief is well-nigh impossible to secure due to rules limiting the constitutional issues that can be raised and the evidentiary record that can be considered, not to mention a host of threshold procedural barriers. This first track covers much of the landscape of postconviction habeas. By contrast, Track Two is, in numerical terms at least, highly liminal—except at the US Supreme Court. But in a sequence of unusual cases over the past four years, the Roberts Court has carved out, and then repeatedly affirmed, an alternative pathway to relief for a small class of habeas petitioners able to opt out of Track One, usually by showing excuse for a procedural default. For cases that are moved into this second track, procedural barriers dissolve, constraints on the scope of the evidentiary record relax, and deference deliquesces. A central question raised by this analysis concerns the precise nature of the sorting mechanism at work here: What is it that moves a petitioner from the modal Track One to the exceptional Track Two? I offer some narrow, doctrinal answers in Part I, but this question demands a more sustained theoretical analysis.

Part II thus homes in upon the question of what analytic framework best explains the Court's sorting between Track One and Track Two. I consider a series of potential normative justifications for the Court's bifurcated approach. My aim in so doing is

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[25] No doubt, there are many granular details within the doctrine that are currently unresolved or contested, and I do not mean to suggest otherwise.

[26] I use the metaphor of two tracks in a somewhat different way from Joseph L. Hoffmann and William J. Stuntz, *Habeas after the Revolution*, 1993 S Ct Rev 65, 69. Hoffmann and Stuntz deploy the metaphor not in a descriptive fashion, but in a normative manner in order to propose a bifurcation in the treatment of habeas cases depending on whether innocence is at issue. As I explain in Part II.B, I do not believe that the Court is sorting cases in order to identify likely innocent petitioners, as Hoffmann and Stuntz suggest that they should. Further, I should note that I use the term "model" to refer to a cluster of interlocking doctrinal rules that have a constant net effect on outcomes. My usage of the term hence differs from the usage of Richard Fallon, who deploys the term to reference "intellectual constructs, formed by a synthesis of familiar arguments and views." Richard H. Fallon Jr, *The Ideologies of Federal Courts Law*, 74 Va L Rev 1141, 1143 n 3 (1988).

[27] See generally Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich L Rev 1145 (2009).

not to defend or vindicate what the Court has done. I do not mean to suggest that the Court's two-track model is optimal. Rather, I more modestly aspire to *understand* whether there is any analytic coherence underwriting the Court's unusual consensus on managing the postconviction docket—to identify the analytic framework, that is, that best predicts what the Court is doing. Chastened as this enterprise might be in scope, its results warrant attention as a necessary precondition for any more ambitious reformist agenda or enterprise involving postconviction habeas.

After briefly considering and rejecting federalism as an organizing optic, the balance of Part II considers closely three potential analytic foundations of current habeas doctrine. The first views the two-track model as a sorting device. Bifurcation between habeas petitioners might hence be explained as a strategy for searching for a hidden quality of habeas petitioners. On this view, the aim of habeas doctrine is to separate petitions between the two tracks under conditions in which unsuccessful petitioners are likely to mimic successful applicants. Drawing on insights from an economic literature on signaling, I raise doubts about the Court's success in fashioning a mechanism that sorts meaningfully between different classes of petitioners.

Second, the two-track model might be glossed as a mechanism to generate needful feedback between state and federal courts. On the one hand, habeas doctrine must incentivize state judges, prosecutors, and defense counsel to comply with relevant constitutional norms. On the other hand, it must avoid overdeterrence or the supposedly costly intergovernmental friction triggered by disregard for the state's interest in finality.[28] At the same time, habeas doctrine must avoid unintended perverse effects, such as moral hazard for state actors or for prisoners.[29] Exploring both of these potential feedback mechanisms, which I call the "moral hazard" and the "sentinel" theories of habeas, I suggest that feedback-based explanations do not satisfactorily elucidate existing doctrine.

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[28] See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv L Rev 441, 452–53 (1963).

[29] See *Murray v Carrier*, 477 US 478, 491–92 (1986) (expressing concern about petitioners "sandbagging" prosecutors).

A final explanation of two-track habeas looks to the "fault-based standard" that has on one account become "the general liability rule for constitutional torts."[30] Rather than attending to hidden qualities or incentive effects, that is, habeas doctrine allocates relief based on a normative judgment about the degree to which both the state and its prisoners have complied with relevant legal norms. In Track One, prisoners prevail only by demonstrating an extraordinary measure of fault akin to gross negligence or recklessness on the part of the state. In Track Two, prisoners prevail by showing an extraordinary degree of faultlessness *coupled to* a degree of state blameworthiness. Of these three models, the fault-based model is perhaps the closest fit with existing case law. Moreover, there is striking parallelism between the way that the Court conceptualizes fault in the constitutional-tort context and the way it organizes its postconviction jurisprudence. In effect, I suggest, the Court has aligned the liability rule in postconviction doctrine with that employed in other domains of constitutional remedies.

Part III considers the implications of habeas's coherence for reforming agendas proposed in recent scholarship. Clarifying the justifications for existing doctrine, I suggest, undermines restrictionist reform agendas in particular. In the alternative, I suggest a more modest role for our current habeas writ, albeit within a larger enterprise: the difficult effort to reform criminal-justice institutions at a moment of sudden flux and opportunity in public and political attitudes toward that system. This reformulation of the writ, while not meet to all appetites, at least provides a direction and purpose to the seemingly endless milling of habeas petitions into dust by the cogs and pistons of the federal judicial system.

I. HABEAS'S TWO TRACKS

A simple bifurcated framework undergirds the postconviction-habeas jurisprudence of the Roberts Court—or so I shall argue in this Part. Habeas, on this view, has two tracks onto which petitions are triaged. This doctrinal splitting is a device for calibrating how much judicial attention a petition should receive.

Track One captures most petitions that are either adjudicated on the merits in state court or, instead, subject to adequate

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[30] John C. Jeffries Jr, *The Liability Rule for Constitutional Torts*, 99 Va L Rev 207, 209 (2013).

and independent state bars or, alternatively, federal procedural constraints. Track One, indeed, can be understood as the *summa* of a familiar web of procedural and substantive barriers that dominate much habeas case law and practice. Further, Track One terminates in stringent criteria for relief. Few, if any, of the petitioners who reach this point can hope to obtain a vacatur of their conviction.

In Track Two, by contrast, there are very few petitions: it is a residual category into which only the rare petitioner falls, usually as a result of demonstrating cause and prejudice to excuse an otherwise prohibitory procedural bar. But in Track Two the thicket of procedural hurdles is thinned and the standard of review is substantially more generous toward petitioners. The expected rate of relief in Track Two is higher than in Track One.

Two important threshold caveats to this account are worth flagging: First, the model limned below does not explain all of the doctrine's complexities. Instead, it aims to capture the basic logic by which judicial resources are allocated and, as a consequent, habeas relief is granted or denied. Its focus is also the "law on the books" (and in particular the law in the US Reports), and not "law in the trenches." Compliance by lower courts with the framework likely varies by judge and circuit, as in most other domains of law.[31] Obviously, a circuit-by-circuit treatment of habeas law would require volumes—and would be of uncertain use for future guidance. Because several of the model's key elements are of relatively recent vintage,[32] not all of the framework's elements can be observed working out fully in practice. To the extent it is relevant, however, I flag obvious bellwether cases in the federal circuit courts.

Second, my account here is largely preoccupied with precedent, and it has relatively little to say about the statute's origins or those cases that merely grapple with the plural and overlapping opacities of the federal postconviction-review statute. Habeas demands a statutory basis, or so claimed Chief Justice John

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[31] See Blume, Johnson, and Weyble, 96 Cornell L Rev at 452 (cited in note 9) (noting that "petitioners' success rates vary enormously by circuit"). There is much work to be done developing a nuanced account of how habeas jurisprudence modulates between circuits.

[32] Two important cases were handed down in May 2013—too recently to have an observable impact on the courts of appeals. See generally *McQuiggin v Perkins*, 133 S Ct 1924 (2013); *Trevino v Thaler*, 133 S Ct 1911 (2013).

Marshall in dicta in 1807.[33] Consistent with the obligation to enact such jurisprudence that Marshall perceived in the Constitution, Congress installed habeas in Section 14 of the 1789 Judiciary Act.[34] That jurisdictional grant did not, however, permit state prisoners to challenge their convictions in federal court.[35] It was not until 1867 that Congress expanded the writ's compass to reach postconviction review of state convictions.[36] But that led to no immediate change in patterns of case filings or dispositions. It was not until almost a century later that the Court read that 1867 grant expansively enough to enable meaningful ex post review of state convictions.[37] If nothing else, the pace of this development underscores the extent of judicial rather than congressional control over the writ's trajectory. The Court's eventual acquiescence to such jurisdiction was taken in the teeth of fierce criticism on historical grounds from the academy[38] but has stuck at least until now.

The 1867 jurisdictional anchor has been amended numerous times,[39] most recently in the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA).[40] Despite this rich history of legislative action, the text and structure of the habeas statute, which is centered on 28 USC § 2254, the statutory text, too often does scanty explanatory work.[41] And in many instances Congress

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33 See *Ex Parte Bollman and Ex Parte Swartwout*, 8 US (4 Cranch) 75, 94–95 (1807).

34 Judiciary Act of 1789, § 14, 1 Stat 73, 81–82. But see Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 20–38 (NYU 2003) (arguing that Marshall erred in requiring a statutory basis for a federal court's exercise of habeas jurisdiction).

35 Appellate writ-of-error review, however, could be obtained in the Supreme Court under § 25 of the Judiciary Act if a state statute was challenged as "repugnant to the constitution, treaties or laws of the United States." Judiciary Act of 1789 § 25, 1 Stat at 85–87.

36 Act of February 5, 1867 ("Habeas Corpus Act of 1867"), § 1, ch 28, 14 Stat 385, 385–86.

37 *Fay v Noia*, 372 US 391, 415–16 (1963).

38 See Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U Chi L Rev 31, 35–38 (1965) (criticizing the use of legislative history in *Fay v Noia*).

39 See Larry W. Yackle, *The Habeas Hagioscope*, 66 S Cal L Rev 2331, 2350–76, 2416–23 (1993).

40 Pub L No 104-132, 110 Stat 1214.

41 The legislative history of major changes to the habeas statute is notoriously opaque. The legislative history of the 1867 Act comprised "presentation without written report . . . without discussion of its purposes in either house other than the explanation offered by the member reporting it, with its proponent in the Senate ignorant of both its genesis and of the explanation offered by its draftsman on the floor of the House." Mayers, 33 U Chi L Rev at 42 (cited in note 38). The legislative history of AEDPA is also ambiguous and less subject to unidirectional readings than the Court has sometimes suggested. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tulane L Rev 443, 445

simply codifies post hoc judicial innovations or accepts ideas floated outside the context of regnant law.[42] On other occasions, the statutory text is so ambiguous, and so generative of circuit splits, that it might as well have been drafted as a delegation to the Court. Although notionally interpretations of the habeas statute, and in particular AEDPA, the most important elements of postconviction habeas jurisprudence limned below are either free-standing judicial creations or statutory texts codifying judicial ideas. Contra the great Chief Justice, therefore, habeas today is in large measure not a product of legislative intent, but rather the product of his own Court.[43] Whatever justifications, whatever downstream effects the two-track model has, in my view they should be traced back primarily to the Supreme Court, and not to Congress.[44]

A. Track One

Track One captures the modal—indeed all but the marginal—postconviction habeas petitioner. It is characterized by three barriers to relief: (1) a sequence of procedural bars largely imagined first by the Court, (2) a standard of review that tips the scales heavily toward the state, and (3) a chary understanding of the relevant evidentiary record. As onerous as the Track One path

(2007) ("Given what we know about AEDPA's legislative history, there is little support for the argument that courts should interpret AEDPA's ambiguities with any particular purposes in mind."). See also Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 NYU L Rev 699, 705 (2002) ("AEDPA is replete with ambiguities and apparent inconsistencies [that] are quite obviously the products of the haste with which the statute was drafted and the emotional context in which it was debated and enacted.") (citation omitted). Efforts to explain habeas jurisprudence in light of a single congressional intent, accordingly, are futile.

[42] Consider, for example, Justice Thomas's plurality opinion for himself, Chief Justice Rehnquist, and Justice Scalia in *Wright v West*, 505 US 277, 288–95 (1992), which argued for something less than de novo review of state-court rulings on federal law. Justice Thomas's conclusion anticipated the standard articulated in 28 USC § 2254(d)(1).

[43] See Freedman, *Rethinking the Great Writ* at 139 n 21 (cited in note 34) (collecting authorities for this point). On the supervisory power of the Supreme Court, see *McNabb v United States*, 318 US 332, 340 (1943) (asserting such authority).

[44] The division of institutional labor in the articulation of habeas jurisdiction, in my view, warrants more careful theoretical scrutiny than it has to date received. The general pattern (with some recent exceptions) is that Congress has expanded or consolidated jurisdiction, whereas the Court has propelled jurisdictional retrenchment. Contra the image of empire-building justices keen on amplifying their suzerainty over a maximum scope of policy matters, the judiciary seems to have a veritable allergy to habeas jurisdiction. I aim to explore this dynamic, which I only touch on here, in future work.

has been, the Court amplified its difficulties in a pair of 2011 decisions.[45] Although both decisions attracted partial dissents, in neither case did the dissent attract four votes. Moreover, neither decision provoked durable resistance from any member of the Court. I first present the central trilogy of barriers (procedural, then evidentiary, then substantive) that regulate the availability of habeas relief. I next separately examine the Court's 2011 decisions as a way of underscoring the motifs that consciously underwrite Track One. These two decisions merit highlighting for the additional reason that they contrast usefully with a sequence of five contemporaneous decisions handed down from 2010 to 2013 that cement the contours of Track Two.[46]

1. Procedural barriers.

A plurality of claims in postconviction habeas petitions are dismissed on procedural grounds applicable prior to merits consideration.[47] Most importantly, a claim can be aired in postconviction habeas only if it has been fairly presented to a state court and thereby "exhausted."[48] Originally a judicially crafted rule,[49] exhaustion has had a statutory berth since 1948.[50] The statutory text, though, provides incomplete direction as to how exhaustion works. Rather, the mechanics of exhaustion have emerged via serial judicial glosses. For instance, the Court has installed a "full" exhaustion rule such that all claims in a petition must be exhausted before any can be adjudicated in federal court.[51] The Court has also limited petitioners' opportunities to stay federal

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45 See generally *Cullen v Pinholster*, 131 S Ct 1388 (2011); *Harrington v Richter*, 131 S Ct 770 (2011).

46 See text accompanying notes 124–42.

47 A 2009 study led by Professor Nancy King concluded that 58 percent of noncapital habeas cases in a sample of federal court litigation were dismissed entirely on procedural grounds. See Nancy J. King, Fred L. Cheesman II, and Brian J. Ostrom, *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* *45 (2007), online at https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (visited May 21, 2014).

48 See, for example, *O'Sullivan v Boerckel*, 526 US 838, 839 (1999). The state can also expressly waive its exhaustion defense. 28 USC § 2254(b)(3).

49 See *Ex parte Royall*, 117 US 241, 251 (1886).

50 28 USC § 2254(b)(1)(A). See also *Rose v Lundy*, 455 US 509, 515–16 (1982) (discussing codification history of exhaustion doctrine).

51 *Lundy*, 455 US at 519–20.

proceedings so as to return to state court to raise their unexhausted claims.[52] Claims not aired adequately in a state tribunal are dismissed under a nonstatutory procedural-default doctrine.[53] In addition to the Scylla and Charybdis of exhaustion and procedural default, there are additional statutory barriers to second or successive petitions[54] and untimely petitions (pursuant to a stringent one-year federal statute of limitations).[55]

Importantly, this cluster of threshold impediments to merits consideration is not without exceptions. The exceptions—which I will take up in more detail when I turn to Track Two—do not alter fundamentally the modal or median outcome in habeas litigation. In the case of procedural default, the Court has carved out exceptions when petitioners show "cause and prejudice," or alternatively present evidence of a "fundamental miscarriage of justice."[56] The term "fundamental miscarriage of justice" comprises those extremely rare instances in which a court is presented with powerful evidence that a constitutional violation has likely resulted in the conviction of one who is "actually innocent."[57] Obviously, this occurs very infrequently,[58] and it cannot be assumed that the fundamental-miscarriage-of-justice rule will play a significant role in practice beyond a marginal set of outlier cases.[59]

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52 See *Rhines v Weber*, 544 US 269, 277 (2005) (holding that "stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court"). District courts also need not warn petitioners of the consequences of withdrawing a petition for exhaustion purposes. See *Pliler v Ford*, 542 US 225, 231 (2004).

53 See *Coleman v Thompson*, 501 US 722, 753–54 (1991) (elaborating the procedural-default rule).

54 See 28 USC § 2244(b)(1)–(2). The term "second or successive," however is a "term of art," which does not encompass all cases within its literal compass. *Magwood v Patterson*, 130 S Ct 2788, 2797 (2010), quoting *Slack v McDaniel*, 529 US 473, 486 (2000). See also text accompanying notes 119–23 for further discussion of the exceptions.

55 28 USC § 2244(d). In the decade after AEDPA's enactment, the Court granted review in nine cases involving the statute of limitations, making it one of the primary sources of doctrinal complexity in postconviction habeas. See Blume, 91 Cornell L Rev at 290 (cited in note 16).

56 *Coleman*, 501 US at 753–57.

57 *Murray v Carrier*, 477 US 478, 495–96 (1986); *Schlup*, 513 US at 326–27; Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 Cornell L Rev 329, 336–37 (2010) (exploring the history of the fundamental-miscarriage-of-justice exception).

58 This infrequency may be either due to the absence of instances of actual innocence or alternatively due to the resource constraints on convicted defendants.

59 The fundamental-miscarriage-of-justice exception, however, may play a significant role in those cases in which there is exculpatory DNA evidence that comes to light after a conviction becomes final. I am grateful to Professor Garrett for conversation on this point.

Cause for a procedural default, by contrast, has been only loosely defined to require something "external" to a petitioner[60] whereas the definition of prejudice has remained somewhat fuzzy at the edges.[61] Violations of the Sixth Amendment right to counsel count as excusing cause.[62] This may not be of much consequence, for the standard for unconstitutionally ineffective assistance is pitched exceedingly low. Cause, therefore, does not sweep in quotidian attorney negligence, which may well be pervasive in states' criminal-adjudicative systems.[63] This places extenuating cause beyond the grasp of most petitioners.[64] In consequence, excuses for procedural defaults—and by analogy excuses for untimeliness or a successive petition—are scarce, albeit seemingly more common than fundamental miscarriages of justice. They are, though, the main gateway through which petitioners can step to enter Track Two. Accordingly, I will assume it is not feasible to make such an excuse for the purposes of discussing Track One, although I will pick up on that possibility in the following Sections.

2. Evidentiary and standard-of-review barriers.

Petitioners who thread these procedural gateways are not yet out of the woods. They still face two additional doctrinal hurdles. In 2011, the Court substantially transformed both of these hurdles. To understand those changes, it is helpful to keep in mind the law prior to 2011. I accordingly begin by specifying that status quo ante. First, the Court has long imposed strict limits to petitioner efforts to expand the evidentiary record upon which relief might be granted.[65] In the decade and a half after AEDPA's enactment, it was common ground in the courts of appeals that petitioners challenging their state-court convictions on the ground of

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60 *Carrier*, 477 US at 488.

61 See Randy Hertz and James S. Liebman, 2 *Federal Habeas Corpus Practice and Procedure* § 26.3[c] at 1507–16 (Lexis 6th ed 2011) (citing various formulations of the prejudice test).

62 *Carrier*, 477 US at 488. See also *Coleman*, 510 US at 754.

63 For the standard's canonical formulation, see generally *Strickland v Washington*, 466 US 668 (1984).

64 See *Maples v Thomas*, 132 S Ct 912, 922 (2012) ("Negligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'"), quoting *Coleman*, 510 US at 753.

65 See *Keeney v Tamayo-Reyes*, 504 US 1, 7–8 (1992).

a factual error could not expand the record.[66] In contrast, petitioners asserting legal error could under limited circumstances seek to expand the evidentiary record to demonstrate how a state court went astray.[67]

Second, AEDPA imposed highly deferential standards of review for both legal and factual error when a state court has reached the "merits" of a constitutional claim.[68] Assuming the state court reached a merits decision, factual errors are cognizable only if "unreasonable."[69] A merits decision warrants relief on the basis of legal error if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[70] As first interpreted by the Supreme Court in the 2000 case of *Terry Williams v Taylor*,[71] this allowed relief only when "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts" or, alternatively, when the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[72] At least as initially specified, this formulation did not constitute categorical deference to state courts' opinions on constitutional matters.[73] Indeed, in *Terry Williams* itself, the Court rejected a ruling from the Fourth Circuit Court of Appeals to the effect that "a state-court judgment is 'unreasonable' in the face of federal law only if all reasonable jurists would agree that the state court was

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66 28 USC § 2254(d)(2) (barring relief unless "a [state court] decision . . . was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*") (emphasis added).

67 Wiseman, 53 BC L Rev at 963 (cited in note 11) ("Lower courts [ ] believed that they could conduct new fact development when deciding whether a state court decision was unreasonable or contrary to clearly established federal law, even if they did not always choose to allow in new evidence.").

68 28 USC § 2254(d)(1)–(2). In addition, courts will decline to apply "new rule[s]" in habeas cases except in exceptional circumstances. *Teague v Lane*, 489 US 288, 307 (1989) (plurality). *Teague*, however, rarely bites in noncapital cases, likely because of the stringency of § 2254(d)(1). See King, Cheesman, and Ostrom, *Final Technical Report* at *49 (cited in note 47) (noting rarity of *Teague* arguments in noncapital cases since the rule "may be subsumed under . . . § 2254(d)").

69 28 USC § 2254(d)(2). See also *Wood v Allen*, 130 S Ct 841, 848 (2010) (noting circuit conflict about how the reasonableness rule in § 2254(d)(2) interacts with the presumption in favor of state-court factual conclusions in § 2254(e)(1), but declining to resolve it).

70 28 USC § 2254(d)(1).

71 529 US 362 (2000).

72 Id at 412–13.

73 See Blume, 91 Cornell L Rev at 276 (cited in note 16).

unreasonable," and granted habeas relief.[74] Nevertheless, the Court's construction of § 2254(d)(1)'s legal standard in *Terry Williams* certainly added to the barriers narrowing the way to habeas relief.[75]

3. *Richter* and *Pinholster*.

All this seems minatory enough. Yet the Court in 2011 issued two decisions that render the possibility of relief even more remote by calcifying both the evidentiary standard and the standard of legal review, particularly regarding summary opinions. First, *Cullen v Pinholster*[76] reconfigured habeas practice by holding (contra most circuit precedent) that habeas petitioners are categorically prohibited from expanding the record when challenging errors of law at least when a claim has been adjudicated on the merits in state court.[77] *Pinholster* limits the evidentiary record available to the federal habeas tribunal to that developed in state court. This record can be especially cramped when an issue, such as ineffective assistance of counsel or a state failure to produce exculpatory material, can be raised only after an appeal is complete.[78] States rarely provide counsel on state postconviction review and often make it "virtually impossible" to secure an evidentiary hearing in such proceedings.[79] The effect is likely amplified by the frequency of impoverished performances by trial counsel. Until *Pinholster*, "[f]actual development through discov-

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74 *Terry Williams*, 529 US at 377 (Stevens) (discussing a standard installed in *Green v French*, 143 F3d 865, 870 (4th Cir 1998)).

75 A harmless error threshold also constrains habeas relief, although in practice rarely seems to bite. See *Brecht v Abrahamson*, 507 US 619, 637 (1993) (holding that habeas relief will issue only when an error has "a substantial and injurious effect" on the jury verdict).

76 131 S Ct 1388 (2011).

77 Id at 1398 (holding that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"). Only Justices Alito and Sotomayor objected to this ruling. Id at 1411 (Alito concurring); id at 1413–15 (Sotomayor dissenting). Justices Ginsburg and Kagan joined another part of Justice Sotomayor's dissent. *Pinholster* was anticipated by *Schriro v Landrigan*, 550 US 465 (2007), which sharply limited the discretionary authority of district courts to hold evidentiary hearings. Id at 473–74. But the conventional reading of AEDPA prior to *Pinholster* was that it wrought no "dramatic change" on the availability of evidentiary hearings. Larry W. Yackle, *Federal Evidentiary Hearings under the New Habeas Corpus Statute*, 6 BU Pub Int L J 135, 144 (1996).

78 See Eve Brensike Primus, *Effective Trial Counsel after* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 Yale L J 2604, 2609 (2013).

79 Primus, Review, 110 Mich L Rev at 900 (cited in note 9).

ery and evidentiary hearings" was therefore a "hallmark" of habeas practice.[80] Now, such hearings will never occur pursuant to the central provision of AEDPA, and only "errors . . . apparent from the record" will be "redressable under § 2254(d)."[81]

Pinholster is in addition another noteworthy departure from the statutory text. The latter contains a pellucid limit on the relevant record in § 2254(d)(2) but, equally clearly, does not contain a parallel limit in § 2254(d)(1). The *Pinholster* pivot away from the statute's most obvious meaning had a "swift impact," marked by a spate of reversals and denials of relief in both the Supreme Court and the federal courts of appeals.[82] Once more, that impact is most fairly ascribed to the justices, and not to the 1996 Congress that scripted the words that the Court purported to be interpreting. Hence, *Pinholster* is yet another example of important habeas policy innovation starting with the Court rather than Congress.[83]

The second transformative opinion of 2011, *Harrington v Richter*,[84] addressed two puzzles instigated by the § 2254(d)(1) standard of review. First many state-court opinions in criminal-appeal and postconviction matters are summary in form and provide no legal reasoning.[85] Section 2254(d)(1)'s command to examine the reasonableness of such decisions had long divided lower federal courts.[86] Resolving those disputes, *Richter* held that summary dispositions could be treated as merits judgments for the purpose of federal habeas review.[87] In addition, Justice Kennedy's majority opinion in *Richter* deployed a novel verbal formulation

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80 Marceau, 69 Wash & Lee L Rev at 122 n 135 (cited in note 14).

81 *Ryan v Gonzales*, 133 S Ct 696, 708 (2013).

82 Wiseman, 53 BC L Rev at 968–71 (cited in note 11). In *Greene v Fisher*, 132 S Ct 38 (2011), the Court extended *Pinholster* by holding that the "clearly established" federal law relevant to the § 2254(d)(1) inquiry encompassed only decisions handed down when the state court ruled, rather than when that ruling became final. Id at 44–45, citing § 2254(d)(1). See also Amy Knight Burns, Note, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 Stan L Rev 203, 228–30 (2013) (analyzing *Greene*).

83 For further discussion of this point, see text accompanying notes 33–45.

84 131 S Ct 770 (2011).

85 "[I]n California, upwards of 97%" of state postconviction litigation ends with a summary disposition. Matthew Seligman, Note, Harrington*'s Wake: Unanswered Questions on AEDPA's Application to Summary Dispositions*, 64 Stan L Rev 469, 471 (2012).

86 See id at 477–79 (discussing case law).

87 See *Richter*, 131 S Ct at 784–85 ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."). In *Early v Packer*, 537 US 3, 8 (2002), the Court anticipated *Richter* by holding that § 2254(d)(1) required no citation of federal case law by the state court.

to characterize the posture federal judges should adopt toward state courts' merits judgments. In granting relief, Justice Kennedy explained, a federal judge should ensure that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents."[88] In so holding, the Court implicitly rejected an alternative, and less onerous, threshold for relief whereby a petitioner would have to repudiate only the most likely or plausible ground of decision.[89] In the context of summary dispositions, the *Richter* ruling means a federal court must hypothesize all potential grounds upon which a state court might have relied—and then deny relief if any one of those is reasonable.[90]

Pinholster and *Richter* deepen the odds against Track One habeas relief both directly and indirectly. Their direct effect is obvious enough from their verbal formulations. Their indirect effect arises as follows: One way in which a petitioner could challenge a summary disposition even after *Richter* was to invoke extra-record evidence demonstrating that the disposition was unreasonable.[91] Yet *Pinholster* might well preclude this.[92] The combined footprint of the two decisions, therefore, may be wider than first appears because *Pinholster* compromises the one way petitioners could meet the *Richter* standard when faced with a summary order.

Although neither Justice Kennedy nor any other Justice noted as much, *Richter* marked an abrupt departure from the central standard of legal review employed in postconviction habeas

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88 *Richter*, 131 S Ct at 786 (adding that only "extreme malfunctions in the state criminal justice system" warrant relief) (citation omitted). It is tolerably clear that *Richter* has not displaced the *Terry Williams* rule with respect to the "contrary to" element of § 2254(d)(2). See *Metrish v Lancaster*, 133 S Ct 1781, 1787 n 2 (2013).

89 See Burns, Note, 65 Stan L Rev at 220–21 (cited in note 82) (providing a rich and insightful analysis of the possible ways in which unreasoned state-court opinions could have been treated).

90 "Federal habeas courts defer to state determinations that may in fact never have been made whenever they find a summary, unexplained rejection of a federal claim to be sustainable." *Johnson v Williams*, 133 S Ct 1088, 1101 (2013) (Scalia concurring).

91 See Seligman, Note, 64 Stan L Rev at 498–99 (cited in note 85) (developing this argument).

92 Wiseman argues that petitioners can also argue that "a state court's procedures are woefully deficient," making a decision on the merits infeasible. Wiseman, 53 BC L Rev at 978–81 & n 148 (cited in note 11) (citing post-*Pinholster* efforts to develop this argument). See also Marceau, 69 Wash & Lee L Rev at 149 (cited in note 14) ("[T]he best reading of *Pinholster* is that its limitations on federal factual development are, like the deference in (d)(1) more generally, conditioned on a full and fair state process."). In effect, these potential responses to *Pinholster*—which, to be clear, have yet to be tested in the federal courts' crucible—would seek to wrench the case into what I call Track Two.

since 2000. Of note here, *Richter*'s no-fairminded-jurist standard tracks precisely the no-reasonable-jurist standard that the *Terry Williams* Court had *rejected* eleven years previously when it repudiated a decision of the Fourth Circuit Court of Appeals deploying almost exactly the same verbal formulation.[93] What at least seven Justices found banal in 2011,[94] that is, had been repudiated sharply by six Justices in 2000 as inconsistent with the statutory text.[95]

It is too soon to say whether this intellectual shift will make much difference in the lower court trenches. Habeas denial rates may be so high already that *Richter*'s impact will be inframarginal. Nevertheless, there are early signs that at least lower court judges are heeding *Richter*'s new verbal formulation.[96] For instance, a six-justice majority of the Court has reaffirmed the "beyond any possibility of fairminded disagreement" language late in the Court's October 2013 Term in *White v. Woodall*.[97] Writing for the majority, Justice Scalia further appeared to rule out the possibility that a state-court opinion can be deemed sufficiently erroneous to warrant habeas relief simply because it unreasonably fails to extend a given Supreme Court holding.[98] Although *Woodall* purports merely to be an application of settled law, it is at minimum evidence that the linguistic shift in *Richter* has induced a more rigorous principle of habeas rationing.[99] It is further reason to believe, in short, that the purpose of § 2254(d) now is not the identification of *serious* errors of law (which may

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93 See text accompanying notes 68–75.

94 Justice Ginsburg concurred in the *Richter* judgment in a concurrence that is hardly limpid in its clarity (and Justice Kagan did not participate). 131 S Ct at 793. But both Justices later endorsed *Richter*. See *Metrish*, 133 S Ct at 1786–87 (Ginsburg); *Greene*, 132 S Ct at 43–44 (unanimous opinion filed by Justice Scalia relying on *Richter*).

95 Both Justice Stevens's plurality opinion (joined by Justices Souter, Ginsburg, and Breyer) and Justice O'Connor's controlling concurrence (joined by Justice Kennedy) rejected the Fourth Circuit standard. *Terry Williams*, 529 US at 376–90, 412–13.

96 See, for example, *Young v Conway*, 715 F3d 79, 96–97 (2d Cir 2013) (Raggi dissenting) (arguing that *Richter* did change the applicable standard of review). See also *Dorsey v Stephens*, 720 F3d 309, 315 (5th Cir 2013) (emphasizing the "fairminded jurists" language in dismissing a claim).

97 No 12-794, slip op at 4 (S Ct Apr 23, 2014), quoting *Richter*, 131 S Ct at 784–85. Justice Breyer's dissent, joined by Justices Ginsburg and Sotomayor, did not contest the verbal formulation that Justice Scalia's majority opinion applied for determining the availability of relief. It instead contested the application of that rule to the facts of the case.

98 Id at 9.

99 *Woodall* may also install a rule of narrow construction in respect to Supreme Court holdings. In effect, it may make it less likely than before that such a holding could provide a basis for habeas relief in the absence of a precise congruence between the facts of the original case and the facts before the postconviction court.

be quite frequent) as the *Terry Williams* Court suggested, but only a tail population of *extreme* errors (which, by definition, must be rare).

Moreover, it is instructive to consider the cause of this shift in doctrinal specification: The State of California's brief in *Richter* did not challenge the *Terry Williams* formulation. Nor did it seek its dilution.[100] Hence, like *Pinholster*, *Richter* not only made a striking change to habeas practice based on a statutory interpretation of a fifteen-year-old law that had been consistently interpreted otherwise by lower courts—it also did so sua sponte. All recognize that statutory interpretation rests on some exercise of judgment, but it beggars belief to attribute the *Pinholster* and *Richter* rules to a Congress that has remained largely idle in respect to postconviction habeas for fifteen years after the law was enacted.

Instead, the catalyst to alter the law—without briefing, without public deliberation, and almost *sotto voce*—was instead an ideologically heterogeneous supermajority of the Court itself. For neither *Pinholster* nor *Richter* prompted even a protesting squeak from the liberal wing of the Court. To the contrary, liberal justices either joined the two majority opinions or joined later judgments employing the *Richter* standard.[101] These cases thus present in rich distillate the Court's shared view of the Great Writ—a view that may evolve over time, but that, as it evolves, secures updated doctrinal formulation without regard to any infidelity to the preferences of the enacting 1996 Congress.

The net effect of Track One's procedural, evidentiary, and standard-of-relief barriers approaches a categorical prohibition on relief for habeas petitioners. To see why, consider what a habeas petitioner would have to do to secure relief within the strictures of Track One (assuming, again, there is no cause for procedural-default purposes).

To begin with, the petitioner would have to air both the factual and legal predicates of his or her claim in state court without violating any adequate and independent state-law procedural constraints. Having timely filed in federal court a petition with solely exhausted claims, the petitioner would then have to identify and prove up either an unreasonable factual finding—without

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[100] See generally Petitioner's Brief on the Merits, *Harrington v Richter*, No 09-587 (US filed May 10, 2010).

[101] For subsequent high court invocations of the *Richter* standard, see, for example, *Jackson*, 133 S Ct at 1992; *Lancaster*, 133 S Ct at 1787.

being able to introduce contrary extrarecord evidence—or a ruling on constitutional law that no reasonable jurist could endorse. Finally, the petitioner would have to show a valid claim on the merits notwithstanding habeas's nonretroactivity and harmless error rules. In many instances, moreover, the state-court ruling will be summary in nature, containing no legal reasoning. In such instances, the petitioner will have to imagine all possible grounds of decision the state court might have conjured—and refute all of them. Add to this the fact that the petitioner most likely lacks counsel both in the state postconviction context and the federal habeas context. It is hardly surprising that habeas relief rates in this context are vanishingly small.

B. Track Two

Were Track One the whole story, assessment of postconviction habeas would be a simple matter. The doctrinal framework, however, contains an avenue that permits petitioners to present claims for de novo review notwithstanding procedural barriers. Even as the Court in *Pinholster* and *Richter* was narrowing the strait gate through which the modal habeas petitioner had to pass, the very same slate of justices handed down a sequence of five other decisions limning options that kept open this Track Two alternative for a select handful of prisoners. Like *Pinholster* and *Richter*, these recent cases are poorly explained by appeal to the bare statutory text or inchoate congressional policy. Rather, they enact freestanding judicial preferences. Even if Track Two as recently clarified provides no general license to opt out of the strictures binding Track One,[102] the Court's insistent preservation of this alternative—sometimes in the teeth of the statutory text—hints at a distinct judicial understanding of habeas that cannot be reduced to mere hostility to petitioners.

1. Excusing defaults.

The kernel of Track Two lies in the deployment of excuses to threshold procedural doctrines as a mechanism to avoid (or water down) downstream evidentiary and standard-of-review barriers. That is, a petitioner initially confronted by a gateway impediment

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[102] Professor Nancy King has recently argued that recent decisions will change little because of inter alia declining prison sentences, plea deals that preclude postconviction review, the absence of feedback effects, and continued fiscal constraints. See Nancy J. King, *Enforcing Effective Assistance after* Martinez, 122 Yale L J 2428, 2449–55 (2013).

to habeas review, such as procedural default, the statute of limitations, or the rule against second and successive petitions, provides a reason for excusing that barrier. The petitioner is then entitled to a merits review. But this review will not be executed under the straitened evidentiary record and standard of review that regulate Track One if there is no state-court decision on the merits. Able to supplement the record and not shackled by the need to demonstrate the unreasonableness of another judge, a petitioner has in expectation a greater chance at (but hardly a guarantee of) relief than a substantially similar litigant in Track One.

It is worth reiterating that as between the two routes petitioners might take to excuse threshold procedural bars, the invocation of cause and prejudice is likely more promising than the fundamental-miscarriage-of-justice route. It is a "rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt."[103] By contrast, violations of the Sixth Amendment right to effective assistance of counsel, which can excuse procedural default and untimeliness,[104] are likely to arise more frequently. Indeed, even if exiguous in its content, the constitutional right to effective assistance is said to be one of the "most common" forms of cause invoked.[105]

Indeed, the Court is conscious of the Sixth Amendment's gatekeeping role in habeas doctrine. In a companion case to *Richter*, Justice Kennedy called for "scrupulous care" in Sixth Amendment analysis because "[a]n ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings]."[106] The

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[103] *House v Bell*, 547 US 518, 554 (2006). See also *Schlup*, 513 US at 327.

[104] The habeas statute of limitation is a creature of Congress. 28 USC § 2244(d)(1). The Court, however, has supplemented the statute with an equitable-tolling exception. Pursuant to that exception, "a [habeas] 'petitioner' is 'entitled to equitable tolling' only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v Florida*, 130 S Ct 2549, 2562 (2010). See also *McQuiggin v Perkins*, 133 S Ct 1924, 1931 (2013). The *Holland* standard refers to "extraordinary" interference, language that aligns it closely with the cause-and-prejudice standard employed for procedural defaults.

[105] Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 Stan L Rev 727, 747 (2012). See also Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 SC L Rev 425, 447 (2011) ("Ineffective assistance of counsel is a claim that is seemingly specifically tailored to the cause and prejudice test.").

[106] *Premo v Moore*, 131 S Ct 733, 739–40 (2011) (brackets in original), citing *Richter*, 131 S Ct at 787–88. As one commentator notes, "ineffective assistance of counsel claims came to dominate and define federal habeas litigation [and] changed the structure of state

Court's concern is somewhat overstated. Ineffective assistance is formally irrelevant to the question whether successive petitions can be adjudicated because Congress in AEDPA displaced the Court's previous cause-and-prejudice regime[107] with a narrower gateway resembling the fundamental-miscarriage-of-justice rule.[108] Further, the Court has previously suggested that an ineffective-assistance claim proffered as an excuse must be aired first in state court.[109] There are thus doctrinal limits to the excusing effect of ineffective assistance, even without judicial recalibration of the underlying constitutional right.[110]

What then happens when a petitioner has not raised a claim in state court and would be blocked by the procedural-default rule but for the excusing effect of an ineffective-assistance argument? Such a claim will not have been resolved "on the merits."[111] The deferential standard of legal review embedded in AEDPA's central provision accordingly will not apply after a procedural default has been excused—although the same result will not necessarily hold if a petitioner succeeds in having a failure to comply with the statute of limitations excused.[112] Nor will the *Pinholster* limitation on expansions of the record apply (because there has been no state-court adjudication on the merits).[113] In its place, a far more forgiving standard for ascertaining when an evidentiary hearing

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postconviction rules in reaction to the new prominence of ineffective assistance of counsel claims at the federal level." Brandon L. Garrett, *Validating the Right to Counsel*, 70 Wash & Lee L Rev 927, 929 (2013).

[107] See *McCleskey v Zant*, 499 US 467, 493 (1991) (holding that the cause-and-prejudice standard applied in the abuse-of-the-writ context).

[108] 28 USC § 2244(b)(2)(B).

[109] See *Edwards v Carpenter*, 529 US 446, 451–52 (2000); *Carrier*, 477 US at 489. The *Carpenter* rule might undermine the capacity for ineffective assistance to ever serve as excusing cause. In effect the rule requires petitioners to raise an excusing ineffective-assistance claim in state postconviction proceedings, thereby creating another state-court ruling (reasoned or not) as a spur to federal court deference. Yet in the sequence of recent cases discussed in this Part, the Court does not seem to view the absence of exhaustion as grounds for not employing ineffective assistance as cause. Rather, the Court's failure to make more of *Carpenter* is striking.

[110] This is an instance of "remedial equilibration," in which there is a "symbiotic relationship" between right and remedy. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum L Rev 857, 914 (1999).

[111] 28 USC § 2254(d). Default rests on an adequate and independent state ground. The independence prong ensures that a claim found to be defaulted is never "on the merits."

[112] When a petitioner fails to comply with AEDPA's statute of limitations, and secures equitable tolling under *Holland*, 130 S Ct at 2562, the federal court will still be asked to review a state-court judgment that is potentially "on the merits."

[113] See *Pinholster*, 131 S Ct at 1401 (noting the possibility).

is warranted arguably obtains.[114] In what superficially seems a paradox, the habeas petitioner who plays by the rules and presents a claim within the mainstream of Track One is subject to a *less generous* regime than one subject to a procedural bar that is excused. In the context of Track One, the Court has secured the doctrine against the possibility of de novo review by installing presumptions first in favor of procedural default[115] and then in favor of inferring the existence of a state-court merits judgment.[116]

The availability of a Track Two safety valve seems of importance to the justices. Even when congressional intervention seemingly quashes the possibility of excusing cause, the Court has found ways to reinstall an escape hatch. Its decisions in this vein challenge any reading of habeas jurisprudence as merely a jeremiad against habeas petitioners[117] in addition to confirming once more the jurisprudence's independence of any constraining textual anchor.

Consider, for instance, the treatment of Eighth Amendment claims concerning the capital punishment of an offender who is incompetent at the time of execution.[118] In 1996, AEDPA ousted the previously applicable cause-and-prejudice regime for excusing second and successive petitions.[119] Taking the section of AEDPA

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[114] See 28 USC § 2254(e)(2); *Michael Williams v Taylor*, 529 US 420, 427–29 (2000) (construing § 2254(e)(2) as a cause-and-prejudice standard with respect to new evidentiary hearings). One wrinkle merits attention here: In his *Pinholster* concurrence, Justice Alito argued that the rule of *Schriro v Landrigan*, 550 US 465 (2007), would limit the availability of hearings even when *Pinholster* did not. *Pinholster*, 131 S Ct at 1411–12 (Alito concurring in part and concurring in the judgment). *Landrigan*, however, confirmed the "basic rule" that "the decision to grant an evidentiary hearing was generally left to the sound discretion of district courts." *Landrigan*, 550 US at 473. It then imposed limitations *keyed to the limits on discretion contained in § 2254(d)(2) and (e)(1).* Id at 473–74. When the reasons for these limits on discretion do not obtain, there is no reason to think *Landrigan*'s limitation applies.

[115] See *Coleman*, 501 US at 732–33, 737–40 (refusing to apply the presumption from *Michigan v Long*, 463 US 1032 (1983), that an ambiguous state-court decision rested on federal-law grounds).

[116] See *Richter*, 131 S Ct at 784–85.

[117] This is not to say that the Court's jurisprudence is free of value judgments. As in other areas of the law, Justice Scalia is often willing to make his substantive policy views known in the course of setting forth notionally neutral legal grounds. Compare *Martinez v Ryan*, 132 S Ct 1309, 1322 (2012) (Scalia dissenting) (complaining about the "monotonously standard" claims of ineffective assistance in habeas and venturing sarcastically to ask "has a duly convicted defendant *ever* been effectively represented?"), with James S. Liebman, *The Overproduction of Death*, 100 Colum L Rev 2030, 2102–10 (2000) (demonstrating how poor lawyering correlates to imposition of the death penalty).

[118] See *Ford v Wainwright*, 477 US 399, 409–10 (1986) (prohibiting such executions).

[119] Compare 28 USC § 2244(b)(2)(B), with *McCleskey*, 499 US at 493.

at face value would entail a de facto prohibition on the aforementioned strain of Eighth Amendment claims, which could not reliably be raised at the time a first federal habeas petition is typically filed. But the Court has read AEDPA's seemingly airtight textual prohibition on second or successive petitions to contain hidden exceptions.[120] It has insisted that "second or successive" is a "term of art" imbued with elasticity.[121] Further, the Court has declined to treat a later petition containing such an Eighth Amendment claim concerning execution-related competence as either second or successive. Whether or not a first petition mentioned the Eighth Amendment issue, petitioners have been allowed to press the competency argument at the time of execution.[122] Even absent the perhaps powerful normative tugs on second-and-successive doctrine from the competence-to-be-executed issue, the Court's interpretation of that statute has thus evinced singular unwillingness to remain bound to the plain text thereof.[123] Rather than fidelity to congressional intent, or some mechanical and unvaried antipathy to habeas petitioners, the structure of habeas jurisprudence here evinces a commitment to maintaining some pathway (however narrow) to Track Two.

2. The apotheosis of Track Two.

Such narrow pathways to relief as Track Two contains might be dismissed as illusory. And one might expect the Court that handed down *Pinholster* and *Richter* to tighten the screws on the procedural, evidentiary, and substantive barriers to habeas review in Track Two, rendering the latter largely illusory. But in a sequence of five opinions, the same Court that produced *Pinholster* and *Richter* has amplified and confirmed the existence of Track Two—often by supermajoritarian margins. To be clear, my argument here is not concerned with the empirical magnitude of

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120 For more examples of how congressional intent is not always a powerful predictor of the direction of subsequent case outcomes, see text accompanying notes 77–101.

121 *Magwood*, 130 S Ct at 2797, quoting *Slack*, 529 US at 486.

122 See *Panetti v Quarterman*, 551 US 930, 947 (2007) (creating an "exception" to the prohibition in § 2244(b) for second applications raising a claim that would have been unripe in a first application); *Stewart v Martinez-Villareal*, 523 US 637, 643 (1998) (treating a second application as part of a first application in which it was premised on a newly ripened claim that had been dismissed from the first application "as premature").

123 Another example is an opinion by Justice Thomas—joined by Scalia, Breyer, Sotomayor, and Stevens—that construed § 2244(b) not to prohibit a claim raised in a habeas petition challenging a resentencing, even though the claim could have been raised in an earlier petition. See *Magwood*, 130 S Ct at 2801.

these decisions' effects, which is already subject to debate.[124] My argument instead is that these Track Two decisions are evidence that the Roberts Court has a coherent analytic approach to habeas. Only by accounting for both tracks, in my view, can one comprehensively grasp the Court's aspirations for the writ.

Three of these five cases illustrate how poor lawyering can trigger an excuse for noncompliance with a procedural bar. Each of the three decisions affirms and expands a Track Two alternative to Track One's exigencies. To begin with, recall that bad defense lawyering provides excusing cause for a procedural default only if a petitioner has a Sixth Amendment right to counsel at the time of the poor attorney performance.[125] But the Sixth Amendment applies only through plea bargaining to trial and appeal—and not, crucially, to postconviction contexts.[126] Yet, either by law or by practice, many states limit direct appeals to legal questions that can be resolved on the merits, channeling issues that require factual development to some form of collateral forum.[127] In two recent instances, however, the Court has departed sharply from the previously ironclad rule that only constitutionally deficient ineffective assistance counted as exculpatory counsel for the sake of procedural default.

In the first case, *Martinez v Ryan*,[128] the habeas petition centered on alleged ineffective assistance of counsel in Arizona, which expressly channeled that issue to the postconviction context.[129] The petitioner in *Martinez* had counsel at the state postconviction phase, but this lawyer failed to raise a Sixth Amendment ineffectiveness claim.[130] By a vote of seven to two, the Court held that such ineffective assistance, while not violating the Constitution, could nonetheless rank as cause excusing a procedural default in "an initial-review collateral proceeding on a claim of ineffective assistance at trial."[131] By the same seven-two vote, the

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[124] Compare Primus, 122 Yale L J at 2613–16 (cited in note 78) (arguing for a broad effect), with King, 122 Yale L J at 2433–35 (cited in note 102) (developing a more skeptical analysis).

[125] See *Carrier*, 477 US at 488 (1986).

[126] See *Pennsylvania v Finley*, 481 US 551, 555 (1987); *Murray v Giarratano*, 492 US 1, 10 (1989).

[127] See Primus, 122 Yale L J at 2609 (cited in note 78).

[128] 132 S Ct 1309 (2012).

[129] Id at 1314.

[130] Id. Martinez also asserted that "he was unaware of the ongoing collateral proceedings and that counsel failed to advise him of the need to file a *pro se* petition to preserve his rights." Id.

[131] Id at 1315. Justices Scalia and Thomas dissented. Id at 1321 (Scalia dissenting).

Court in *Maples v Thomas*,[132] held that cause was present "when an attorney abandons his client without notice, and thereby occasions [a] default."[133] Unlike *Martinez*, *Maples* established no substantially new rule of law.[134] It may be the rare mirror image to the seriatim Ninth Circuit reversals that have characterized recent Supreme Court terms:[135] an instance in which the Court feels that a lower court denial of relief on procedural grounds (here, in a capital case) cannot go unremarked.

Two years later, *Trevino v Thaler*[136] extended *Martinez* to jurisdictions such as Texas in which "state law . . . does not on its face *require* a defendant initially to raise an ineffective-assistance-of-trial-counsel claim in a state collateral review proceeding," but rather makes it "'virtually impossible' for an ineffective assistance claim to be presented on direct review."[137] When the "structure, design, and operation" of the state judiciary have the practical effect of channeling certain claims into a forum in which the Sixth Amendment does not obtain, Justice Breyer wrote for a five-member majority in *Trevino v Thaler*, ineffectual assistance by a lawyer or by the petitioner can serve as excusing cause for failure to press a claim in state court[138]—and thus a gateway to more amplitudinous evidentiary and legal review in federal court.[139] Both Chief Justice Roberts and Justice Alito had been members of the *Martinez* majority, but dissented in *Trevino* on the ground that *Martinez* had been a "narrow" holding creating a

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132 132 S Ct 912 (2012).

133 Id at 922.

134 *Maples*, though, focused on abandonment as the lodestar of the ineffectiveness analysis, whereas *Martinez* focused on the quality of attorney performance. See Wendy Zorana Zupac, *Mere Negligence or Abandonment? Evaluating Claims of Attorney Misconduct after* Maples v. Thomas, 122 Yale L J 1328, 1357–58 (2013). *Maples* also applies to a broader range of claims than *Martinez*, which may be limited to trial-level ineffective-assistance claims. See *Hodges v Colson*, 2013 WL 4414811, *9–10 (6th Cir) (declining to apply *Martinez* to an underlying claim of ineffective assistance of appellate counsel).

135 See note 20 (listing cases).

136 133 S Ct 1911 (2013).

137 Id at 1915.

138 Id at 1921.

139 In addition, the Court has recently extended Sixth Amendment effective-assistance-of-counsel obligations to the plea bargaining context. See *Lafler v Cooper*, 132 S Ct 1376, 1386 (2012) (holding that the Sixth Amendment can be violated by counsel's advice to reject a plea deal if a trial leads to a worse outcome); *Missouri v Frye*, 132 S Ct 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). This raises the intriguing possibility that a state-law adequate and independent bar arising from a plea deal (such as a waiver of collateral review) can be attacked as wanting a foundation in effective counsel.

"sharply defined exception" and hence "a clear choice" for states.[140] The last point, it bears noting, is somewhat difficult to grasp. As much as *Martinez*, *Trevino* presents states with a clear choice respecting appellate design, albeit with a more pro-petitioner tilt. The Roberts/Alito position instead may rest on the proposition that whereas states cannot openly choke off initial review of ineffective-assistance claims, they may so do *sotto voce*.

The final pair of opinions deal with the timeliness rules. I have to this point given such rules short shrift on the ground that most of the Court's jurisprudence on AEDPA's statute of limitations is the result of a judicial need to resolve the complications cast up by a poorly drafted provision. The two opinions addressed here, though, intersect with the larger concern with procedural probity and effective assistance articulated in *Martinez* and *Trevino*, and therefore warrant closer attention.

In the 2010 case of *Holland v Florida*,[141] the Court endorsed the possibility of extrastatutory equitable tolling of AEDPA's statute of limitations.[142] Then, in the 2013 case of *McQuiggin v Perkins*,[143] the Court held that a plea of actual innocence can excuse noncompliance with the federal statute of limitations, even though Congress had seen fit to include no such ground in its statutory schema for timely filing.[144] Through these cases, the Court mitigated the textual rigor of AEDPA's statute of limitations through atextual interpolations. Both open breathing room for later-developed evidence, vitiating the possibility that a federal court will be presented with compelling evidence of actual innocence and barred by a finality-promoting procedural rule from accounting for it.

C. Two-Track Habeas: A Recapitulation

Postconviction habeas has proven easy to caricature as empty "charade" or as intolerable incursion on state sovereignty. Yet scrape away the carapace of dueling rhetoric, and a more coherent doctrinal structure emerges from the fog of discrete outcomes. In this model, there are two tracks into which habeas petitioners can be triaged at the inception of litigation. That triaging is a tool for

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140 *Trevino*, 133 S Ct at 1922–23 (Roberts dissenting).

141 130 S Ct 2459 (2010).

142 See id at 2562.

143 133 S Ct 1924 (2013).

144 See id at 1933.

rationing judicial resources. It operates as a mechanism for determining ex ante the quantum of judicial resources to be allocated to any given petitioner. The doctrine accordingly winnows a small number of cases for serious judicial consideration, leaving a large body to be resolved in what might fairly be termed a summary fashion.

In this procedural system, the overwhelming majority of petitions remain in the strictures of Track One. This is the Minoan labyrinth of exhaustion, procedural default, abuse of the writ, and untimeliness. Here, even petitioners who navigate sharp-elbowed threshold doctrines are largely laid low by the twin minotaurs of *Pinholster* and *Richter*. If there is an Ariadnean thread unspooling through Track One, it is cruelly evanescent. Track Two, though, is a way of opting out of the labyrinth entirely—of finding an exit from procedural and substantive barriers. That exit is formulated through the confirmation (in *Martinez* and *Maples*, for example) and the expansion (in *Trevino*, for example) of ineffective counsel as a gateway to more plenary review than federal courts are accustomed to allowing. These two tracks emphatically coexist: it is, after all, the same Court that decided *Pinholster* and *Martinez* (both seven to two) within the same year.[145]

I believe that this account of the overall doctrine is superior to any obvious competitor. Before turning to the question of what might account for this arrangement in Part II, however, I should reject an obvious competing account of the doctrine. This alternative explanation would focus on the distinction between capital and noncapital cases. To see the attraction of this alternative account, consider a 2009 empirical study by Nancy King, Fred Cheesman, and Brian Ostrom of post-AEDPA cases litigated in the district courts largely between 2000 and 2005—a study that identified large, statistically significant differences between capital and noncapital cases.[146] The King, Cheesman, and Ostrom study found that capital petitioners take longer to file cases, are

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[145] This complex of rules bears a resemblance to Professor Bator's conception of habeas as a guarantee of a "full and fair opportunity" to litigate a constitutional claim, but the parallels are not exact. Bator, 76 Harv L Rev at 455–56 (cited in note 28). Hence, *Pinholster* and *Richter* in tandem can extinguish federal consideration of a claim even when there was no plausible opportunity to develop that claim in state court. The Bator formulation also does not explain the residual form of review in Track One or provide any traction on the breath of the pathways from Track One into Track Two. Finally, the notion of a "full and fair opportunity" is elastic enough to allow for a spectrum of doctrinal arrangements. Of necessity, therefore, some further explanatory work must be done to determine how judicial attention and habeas relief are allocated.

[146] King, Cheesman, and Ostrom, *Final Technical Report* at *60 (cited in note 47).

dismissed as time-barred less frequently than noncapital cases, receive evidentiary hearings more frequently than noncapital petitioners, are more likely to receive merits review, and (most strikingly) are thirty-five times more likely to be granted than cases with no death penalty at stake.[147] Underlying these findings is another striking contrast: whereas all but seven percent of capital petitioners have counsel, only seven percent of noncapital filers benefit from a lawyer's aid.[148]

Notwithstanding this powerful observational evidence, there are several independent reasons for resisting the temptation to boil down the observed doctrinal structure to a crude capital/noncapital distinction. To begin with, this distinction does not precisely map onto the Supreme Court cases. Some Track Two cases, such as *Martinez*, are noncapital in nature. Many Track One cases are capital in nature. Second, the Court has not verbally formulated the doctrine in terms of a capital/noncapital distinction. If this distinction indeed was driving the case law, it is hard to understand why the Court would obscure the font of its motivation. At least in the absence of reason to do otherwise, it seems unwise to assume that judicial actors lack even a scintilla of sincerity.

Third, the claim that the Court has crafted habeas doctrine to enable more amplitudinous review in capital cases is at war with what is known about the Court's views of that strain of cases. As Professor Bryan Stevenson has recounted in his fine account of recent habeas history, justices starting with Lewis Powell have "inveighed against [ ] manipulation of the system by capital prisoners and their lawyers."[149] Given the justices' expressed preferences about the capital/noncapital distinction, it is not obvious why they would now converge upon a doctrinal framework that treats capital cases with *greater* diligence and care than might otherwise be the case.

Finally, the assumption that the capital/noncapital distinction so powerfully evinced in the results of Professor King and her colleagues drives the formulation of two tracks in habeas might have matters backward. It may be that the causal arrow runs from the presence of postconviction counsel, rather than from the capital nature of a case, to the strikingly different results observed in postconviction death cases.

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147 Id at *63.

148 Id at *62.

149 Stevenson, 77 NYU L Rev at 714–15 & n 75 (cited in note 41).

This point requires some unpacking. The political economy of capital punishment is notoriously perverse. On the one hand, trial-level actors have strong incentives to maximize the number of death sentences produced, and on the other hand there are "anti-death penalty forces . . . [who] very early on [ ] made a . . . strategic decision to concentrate *their* efforts at the *post-conviction* stages."[150] The result of this lopsided political economy of litigation is a pool of cases that are routinely characterized by *both* careless trial lawyering and also high-quality (and amply funded) postconviction representation. The latter counsel are not only well positioned to identify errors in state judicial process,[151] they are also skilled repeat players, well equipped to navigate the hairpin bends and doctrinal switchbacks necessary to enter Track Two.

On this account, it is not that the death penalty is different. It is rather that capital petitioners (or at least their postconviction counsel) are better positioned to exploit the two-track structure of habeas because of an exogenously determined political economy of litigation-related resources. That is, they tend to be poorly represented in state court and effectively represented in federal postconviction proceedings. The observed distribution of habeas outcomes is hence not necessarily explained as caused or motivated by the capital/noncapital distinction. Indeed, the persisting success of capital habeas petitions might well generate continuing pressure from the conservative wing of the Court to reform or collapse some aspects of two-track habeas. In summary, while the Court's analytic framework is surely informed by the capital/noncapital distinction, it also stands independent of that distinction—and can properly be analyzed in such terms.

Yet at the same time, there are also clear and substantial limits to the two-track model's predictive and explanatory force. In particular, it is important here to emphasize that mine is an account of the Court's overall approach to the doctrine, rather than an observational account of what happens on the ground. Because Supreme Court doctrine is no proxy for empirical patterns in the lower federal courts, I stress once more that this Part in no fashion substitutes for the admirable empirical work by Professor King and others. Patterns of case law in the apex court are

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150 Liebman, 100 Colum L Rev at 2032, 2073 (cited in note 117).

151 And there are many. See Andrew Gelman, et al, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J Empirical Legal Stud 209, 213–17 (2004).

salient instead if one believes that it is the justices, and not Congress, that are driving and shaping the general contours of post-conviction habeas. The Court's jurisprudence then reflects the ideological and normative preferences that are motivating legal change. It is a distillate of the implicit assumption that acts as a motor in a discrete case.

There is no reason to think that this distillate precisely reflects lower court practice. To the contrary, habeas doctrine reflects the Court's effort to signal its preferences over habeas policy to a dispersed and periodically refractory federal judiciary. That is, the Supreme Court stands in a principal-agent relationship with lower federal courts.[152] Enunciated doctrine in published opinions is a channel through which the Court's instructions flow to its judicial agents across the country.[153] Specific precedent, for example, might render "control over the appellate courts more effective; or . . . reduce the opportunities those courts might enjoy for adventurism free of close supervision by the Court; or . . . shape lower court results to reduce the likelihood of conflicts requiring Court intervention."[154] In each of these enterprises, though, the Court must necessarily account for the possibility that "utility maximizing appeals court judges also have their own policy preferences, which they may seek to follow to the extent possible."[155] The ensuing doctrine is accordingly "a means . . . to communicate . . . policy preferences," albeit one that must be adjusted for the risk of agency slack.[156] Hence, we might expect the ensuing jurisprudence to deemphasize points of convergence across the federal judicial hierarchy, while underscoring moments of disharmony.

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[152] Compare Charles M. Cameron, Jeffrey A. Segal, and Donald Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 Am Polit Sci Rev 101, 103 (2000), with Donald R. Songer, Jeffrey A. Segal, and Charles M. Cameron, *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court—Circuit Court Interactions*, 38 Am J Polit Sci 673 (1994).

[153] See Ethan Bueno de Mesquita and Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 Am Polit Sci Rev 755, 757 (2002).

[154] Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum L Rev 1093, 1095 (1987). Professor Strauss's point concerns Supreme Court review of the agencies, but it translates here.

[155] Songer, Segal, and Cameron, 38 Am J Polit Sci at 675 (cited in note 152).

[156] Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 Nw U L Rev 535, 536–38 (2011) (describing the role of doctrine in principal-agent accounts of the judicial hierarchy, but also going on to explore the limitations of such models).

Given these complex and entangled judicial purposes, it would be implausible to assert that the existence of Tracks One and Two translates in some mechanical way into empirical regularities in the lower courts. Nor am I suggesting that the increased frequency of Track Two cases in the Roberts Court corresponds to an uptick in grants of relief below the apex tribunal.[157] As commentators have been well aware for many years, securing habeas relief is akin to passing through a "needle's eye."[158] The rise of Track Two might or might not greatly affect the size of the eye. Instead, the two-track model of habeas I have developed in this Part should be understood as evidence of the (agency-slack adjusted) policy preferences of the justices in relation to postconviction habeas policy. The animating architecture of those preferences merits attention on its own terms—as the next Part endeavors to do—and further as a platform from which to assess and critique the possibilities for habeas reform proposed in the literature.

II. EXPLAINING TWO-TRACK HABEAS

Two-track habeas jurisprudence is a sustained "intellectual construct" on the part of the justices[159] that reflects judicial policy preferences over the uses and limitations of postconviction review. The aim of this Part is to pick out those ideas and preferences that best "capture, and at the same time [ ] explain and unify"[160] two-track habeas. My aim is to examine and test possible analytic models that might explain why the Court has adopted *this* method of triaging cases. I examine a series of hypotheses concerning which analytic framework best predicts the Court's overall approach. Based on this examination, I then proffer a judgment about which one most closely fits the case law. To be

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157 To the contrary, the increase in petitioner-friendly decisions in the Supreme Court may be a slightly lagged signal of the absence of charity toward petitioners among lower court judges, if the Court is operating as a corrective to trends in the courts of appeals and supplying a modicum of equilibration.

158 Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 Colum L Rev 1103, 1104 (1999).

159 Fallon, 74 Va L Rev at 1143 n 3 (cited in note 26).

160 Id at 1145.

very clear, my aim is to understand, not defend, the Court.[161] Although I do claim to identify which ideological justification best underwrites two-track habeas, I posit only that this model has predictive force, not that it is attractive. Accordingly, this Part should be read as an attempt, modest in scope, to explain the ways of the justices, not as a vindication of those ways.

One obvious candidate should be ruled out *ab initio*: two-track habeas is not, in my view, plausibly described as an exercise in constitutional interpretation. The consensus view today is that Congress can licitly withhold all postconviction review of state convictions, as it did until 1867.[162] Some recent scholarship presses an alternative constitutional pedigree for postconviction habeas.[163] But there is little evidence the Court is likely to accept such arguments anytime soon.[164] Even if Article III, the Suspension Clause, or the Due Process Clause could sustain some mandatory quantum of postconviction habeas review,[165] I do not rely on speculative inferences from ethereal abstractions to justify the observed doctrine. Rather, this Part seeks to make sense of how the Court has sized and sliced habeas relief by recourse to more mundane and less controversial models.[166]

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[161] I do defend the Court to the extent that my claim in this Part is that its habeas jurisprudence is analytically coherent. Whether it is analytically attractive, however, is another matter entirely.

[162] But see Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 Mich L Rev 862, 868 (1994) (arguing that "the Fourteenth Amendment constitutionalized this supremacy-ensuring role of the federal courts such that Congress is obligated to make federal review of state criminal convictions practically available through federal habeas corpus").

[163] See generally Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 Cornell L Rev 47 (2012); Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 Va L Rev 753 (2013).

[164] Indeed, the Court has long failed to cite constitutional concerns even in cases in which they might be thought to subsist close to the surface. See Jordan Steiker, *Habeas Exceptionalism*, 78 Tex L Rev 1703, 1705 (2000) (noting the absence of such discussion in the *Terry Williams* opinions).

[165] The idea of some mandatory quota of federal court jurisdiction goes back at least to *Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 327–37 (1816).

[166] Social-choice theory suggests that the collective choice of a group decision maker such as the Court can be prone to cycling. Easterbrook, 95 Harv L Rev at 815–17 (cited in note 18). The further inference might then be drawn that the two-track model may simply reflect an arbitrary local equilibrium, and as such bears no sustained analysis. I am not convinced this is so. For one thing, scholars of social-choice theory emphasize the way in which agenda-setting mechanisms can suppress cycles by favoring some outcomes over others. See Kenneth A. Shepsle and Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 Pub Choice 503, 507 (1981). Accordingly, the stability of the two-track model likely reflects an equilibrium induced by the Court's certiorari voting practice and its norms of intracollegial deference.

My analytic reconstruction begins in seriousness with a rejection of one staple explanation of habeas jurisprudence—federalism. I do not wholly deny that federalism (in the sense of a regard for the regulatory autonomy of states) is an important concern in habeas jurisprudence. Without obscuring the echoes that percolate between postconviction habeas and other lines of federalism jurisprudence, I suggest that federalism interests cannot alone explain the balance struck in the two-track model. Instead, I consider at greater length three alternative, more nuanced accounts, each of which is functionalist: the first is based on habeas as a sorting mechanism either for innocence or for grave constitutional error, the second speaks in terms of incentivizing state officials and prisoner-litigants, and the third sounds in terms of fault concepts drawn from constitutional-tort doctrine. Ultimately, I suggest that the final, fault-based account of two-track habeas best fits the doctrinal evidence.

A. Habeas as a Laboratory for Federalism

Perhaps the most famous sentence in contemporary habeas jurisprudence is attributed to Justice O'Connor. Writing for the Court in *Coleman v Thompson*,[167] she began her majority opinion with a forceful declaratory statement: "This is a case about federalism."[168] Taking Justice O'Connor's unsubtle hint, federalism—by which she presumably means a due regard for state-level preferences as against national laws and institutions—might provide a touchstone for habeas jurisprudence. Consistent with this view, both liberal and conservative justices tirelessly invoke a concern about states' interests in finality and the control of their adjudicatory apparatuses.[169] The persistence of this federalism lament might be strong evidence for construing habeas jurisprudence as simply another forum in which the Court has worked out the consequences of its distinctive view of federal-state relations. If high-profile cases involving the 2010 federal healthcare legislation[170]

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[167] 501 US 722 (1991).

[168] Id at 726. For a critical examination of this dictum, see Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, in James R. Acker, Robert M. Bohm, and Charles S. Lanier, eds, *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 553, 567–68 (Carolina Academic 2d ed 2003).

[169] See, for example, *Perkins*, 133 S Ct at 1932 (Ginsburg) (referring to finality and comity concerns); *Edwards v Carpenter*, 529 US 446, 451 (2000) (Scalia).

[170] See generally *National Federation of Independent Business v Sebelius*, 132 S Ct 2566 (2012).

and voting rights measures[171] are any guide, the Court consistently views national intervention into regulatory domains of traditional state competence through a skeptical lens.

On this view, the jurisprudential framework of habeas might simplistically be glossed by noticing that the Court is often asked to resolve intraconstitutional tensions between the 1787 disposition of federalism and the post–Civil War or post–New Deal settlements. Even when there is a strong textual and originalist basis for cabining the 1787 view of federal-state relations—as there surely is with the Reconstruction Amendments—the Court persistently prefers the older dispensation. It thus protects the legacy of the original Founders against those who have amended the Constitution by formal Article V process or otherwise. The diminution of postconviction writ is then just another casualty of the war of the 1780s against 1860s and 1870s.[172]

No doubt, federalism concerns gauged in this gauzy fashion loom large in the habeas canon. To ignore the keening threnody of comity and finality recited through the Court's postconviction jurisprudence would plainly slight a value close to the Court's collective heart. Nevertheless, there is some reason to think federalism concerns cannot provide a comprehensive lodestar for understanding the operation of two-track habeas.

To begin with, notice that the opening phrase of Justice O'Connor's *Coleman* opinion is announcing an outcome, not an analytic framework. Federalism values, that is, lie on one side of the scale—but the other side has not been wholly evacuated. Even Roberts Court jurisprudence evinces some concern for "the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law" as a counterweight on the other side of the scales.[173] Doctrinal outcomes in habeas cases are no mechanical function of states' interests. Rather, they flow from a complex

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171 See generally *Shelby County, Alabama v Holder*, 133 S Ct 2612 (2013).

172 But see Mayers, 33 U Chi L Rev at 52–55 (cited in note 38) (doubting that the 1867 statute was initially understood as a means of implementing the Fourteenth Amendment, as opposed to preventing the use of debt peonage arrangements as a substitute for slavery). I am not persuaded by Mayers's historical gloss: He assumes that the 1867 statute was limited to a particular evil that manifested starkly to the law's Republican drafters. But the law itself is written in general terms, and can also plausibly be read to encompass other noncore cases of unjust imprisonment.

173 *Trevino*, 133 S Ct at 1916–17. See also *Martinez*, 132 S Ct at 1315–16; *Holland*, 130 S Ct at 2562, quoting *Slack v McDaniel*, 529 US 473, 483 (2000) (recognizing the "vital role in protecting constitutional rights" that habeas plays).

balancing of finality and constitutional-compliance concerns. Attending solely to one side of the scale yields only incomplete insight because it does not speak to how the scale is calibrated. As a result, it cannot explain the outcomes in cases such as *Martinez*, *Holland*, or *Trevino*—all supported by justices with strong priors in favor of state control such as Justice Kennedy.

Complicating the picture further, pro-state federalism concerns can cut in both directions. In *Danforth v Minnesota*,[174] for example, the Court held that the strong nonretroactive presumption for federal habeas did not carry over into state court because "considerations of comity militate in favor of allowing state courts to grant habeas relief to a broader class of individuals."[175] Despite having expressed strong preferences for policy decentralization elsewhere, Chief Justice Roberts and Justice Kennedy dissented.[176] Both the outcome and the distribution of votes in *Danforth* suggest that the justices' votes cannot always be predicted or explained in terms of pure federalism preferences.

Nor is *Danforth* unique. In other cases, the Court has construed habeas's statute of limitations to ignore variance in state law in favor of federal uniformity,[177] and even allowed states to withdraw waived objections to procedural defenses on the ground that AEDPA's federalism-related goals overtake the usual presumption of litigant autonomy.[178] These outcomes are not well glossed by a concern with state autonomy.

In any event, it is misleading to assume that the Roberts Court has applied a consistent preference for decentralization that impacts each substantive domain in the same way and to the same extent. To the contrary, even in core battlefields of federalism—such as in the drawing of boundaries around Congress's enumerated powers—the Court has expressed heterogeneous and highly variable federalism-related preferences. It has toggled between deferential and strict scrutiny in assessing congressional

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174 552 US 264 (2008).

175 Id at 279–80. But see Jason Mazzone, *Rights and Remedies in State Habeas Proceedings*, 74 Albany L Rev 1749, 1765–66 (2011) (suggesting that *Danforth* might have little impact).

176 See *Danforth*, 552 US at 291–92 (Roberts dissenting).

177 See, for example, *Gonzalez v Thaler*, 132 S Ct 641, 655–56 (2012) (refusing to recognize state-law exceptions to the end of the window for discretionary state–high courts appeals in applying AEDPA's statute of limitations).

178 See *Day v McDonough*, 547 US 198, 208 (2006) (holding that "[t]he considerations of comity, finality, and the expeditious handling of habeas proceedings that motivated AEDPA . . . counsel against an excessively rigid or formal approach to [the limitations defense]").

work product.[179] In the Court's preemption case law, the federalism boot is often on the other foot. There, it is the liberal justices who bemoan the demise of decentralization and conservatives who laud national power.[180] Preemption is a particularly potent counterexample since its case law deals with states' interests not wholly dissimilar to those at stake in habeas jurisprudence. In effect, justices of all stripes treat states' interest in finality in criminal cases as sufficiently different from states' interest in its rules for assigning liability out of private transactions. Yet the criminal and tort liability addressed in habeas and preemption doctrine might arise from the very same transaction and concern the very same individual. There is no obvious reason the state's interest should be assigned polar-opposite valences in the two lines of cases.

In short, federalism concerns may loom large in habeas jurisprudence, but the justices' faith in states is a fickle, fluctuating one. To explain habeas jurisprudence by conjuring federalism is to beg the question. Moreover, the corpus of recent federalism jurisprudence provides no single measure of appropriate deference to state-level choices, and no single transsubstantive theory of federal-state relations, to extend mechanically to the habeas context. Instead, the Court sifts and assigns weights to specific state interests differently in distinct institutional and doctrinal contexts.[181] Resiling mechanically to the rhetoric of federalism, accordingly, is hardly a comprehensive diagnosis of the two-track model's origins or analytic foundations. A more precise instrument is needed to locate the cut point between Track One and Track Two.

B. Habeas as a Sorting Mechanism

A first possible alternative to federalism is that the two-track model of habeas is a mechanism to sort among the large pool of

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[179] See Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U Chi L Rev 575, 586–611 (2013) (illustrating the use of different standards of review across federalism jurisprudence).

[180] For examples of preemption cases in which liberals defend localism and conservatives defend national power, see generally *Mutual Pharmaceutical Co v Bartlett*, 133 S Ct 2466 (2013); *Egelhoff v Egelhoff*, 532 US 141 (2001).

[181] See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm & Mary L Rev 1733, 1748–49 (2005) ("The open-textured nature of the Constitution's structural commitments calls for judicial implementation through doctrine: There is simply no way to administer our federal system without developing rules to flesh out the allocation and balance of authority.").

habeas filings for a subclass of petitioners. To explore this possibility, I first set forth a basic logic of sorting drawn from economics scholarship. I then ask whether that logic can explain observed doctrine assuming one of two underlying targets for judicial search—innocence and serious constitutional error.

1. The logic of sorting.

Habeas petitions are presented to the federal judiciary en masse. Good petitions are mixed together with bad nonmeritorious petitions. All habeas petitioners seek the same relief, but only some are entitled to it. Federal judges, however, cannot directly observe the parameter that determines eligibility for relief. To be sure, some information appears on the face of a petition. But sorting still presents a challenge since, at least at the filing stage, meritorious and nonmeritorious petitions are hard to distinguish. Appearances—that is, the content of petitions—are unreliable because applicants with nonmeritorious petitions have strong incentives to mimic the observable characteristics of meritorious applicants by parroting the outward aspects of a meritorious claim.[182]

To be sure, this assumes some sophistication on habeas petitioners' part. But it is not implausible to envisage how such narrowly defined sophistication arises. Imagine, for instance, a large prison population in which one out of every 5,000 petitioners overcomes motions to dismiss and secures a colorable hearing, such that the balance of potential petitioners need merely mimic that successful petition. As a result of these dynamics, judges accordingly must seek out a proxy that creates a separating equilibrium, rather than a pooling equilibrium, between meritorious and nonmeritorious petitions.[183]

A threshold puzzle embedded in the sorting theory of habeas is that there is disagreement about the underlying trait that warrants relief. In a famous article, Judge Henry Friendly identified

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[182] See Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 Am Econ Rev 460, 463–64 (2002) ("[T]here are incentives on the part of individuals for information not to be revealed, for secrecy, or, in modern parlance, for a lack of transparency.").

[183] For the difference between pooling and separating equilibria, see Andreu Mas-Colell, Michael D. Whinston, and Jerry R. Green, *Microeconomic Theory* 455–57 (Oxford 1995).

actual innocence of a crime as the salient parameter.[184] Although the Court has never treated actual innocence—in the sense of not being the person who committed a charged crime[185]—as a free-standing ground for relief,[186] it is possible that the Court's complex menagerie of rules is nonetheless a way of screening indirectly for innocence given the difficulty of direct screening. Alternatively, the underlying case characteristic upon which the Court may be focused might well be the commission of egregious violations of constitutional criminal procedure that are linked to "extreme malfunctions in the state criminal-justice system."[187] Although some commentary might be read to imply that state judicial hostility to constitutional rights no longer exists,[188] one might still explain the two-track-habeas model as an effort to sift out errors so egregious only hostility (or perhaps inexcusable indifference) to constitutional norms could have elicited them.[189]

Whether actual innocence or egregious error is the underlying characteristic of interest, the basic technology for sorting is invariant across very different contexts. The relevant body of the-

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[184] See generally Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U Chi L Rev 142 (1970) (arguing that, subject to exceptions, "convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence").

[185] See Emily Hughes, *Innocence Unmodified*, 89 NC L Rev 1083, 1085–86 (2011); Brandon L. Garrett, *Claiming Innocence*, 92 Minn L Rev 1629, 1645 (2008) (observing that "[t]he word 'innocence' is used casually in the media and by lawyers, convicts, scholars, and courts," and defining "innocent" as "those who did not commit the charged crime"). A distinct sense of innocence is in play, however, in litigation about capital sentencing, in which the question is eligibility for the death sentence.

[186] See *District Attorney's Office for the Third Judicial District v Osborne*, 129 S Ct 2308, 2321 (2009) (explaining that whether "actual innocence" exists as a federal right remains an "open question"); *Herrera v Collins*, 506 US 390, 404–05 (1993) (explaining that "actual innocence" has never been held to be an independent constitutional claim).

[187] *Richter*, 131 S Ct at 786 (quotation marks omitted).

[188] See Primus, Review, 110 Mich L Rev at 900 (cited in note 9) (noting that this is an implication of the Hoffmann and King argument, and responding that "states continue to systematically prevent criminal defendants from asserting and vindicating their constitutional rights").

[189] Picking up on this possibility, Hoffmann and King suggest that state hostility to federal rights in the 1950s and 1960s explained and warranted federal habeas intervention in state criminal-justice systems. Hoffmann and King, 84 NYU L Rev at 801–02 (cited in note 7). As Primus correctly notes, King and Hoffmann supply no reason to focus on a state's *reasons* for persistently disregarding federal rights, while viewing as unproblematic cases in which states systematically impinge on such rights not because of hostility to federal rights qua federal rights, but for other reasons. Primus, Review, 110 Mich L Rev at 900–01 (cited in note 9). I therefore do not mean to suggest that a bad intent would be necessary to show an egregious constitutional error.

ory was developed by economists to explain job-market interactions—in which employers face the same problem of creating a separating equilibrium to distinguish desirable from undesirable job applicants.[190] Like federal habeas courts, employers need a signal that distinguishes "good" from "bad" types. A parameter can function as a signal in this fashion only if "the cost of the signal is negatively correlated with the unseen characteristic that is valuable to employers."[191] That is, "[s]ignals reveal type if only the good types, and not the bad types, can afford to send them, and everyone knows this."[192] For example, in the employment context it is cheaper for a more productive employee to obtain education as a way to signal her worth than it is for an unproductive employee to mimic that signal. The additional marginal cost to unproductive employees makes mimicry too costly and hence not worthwhile. Analogously, federal habeas courts must identify a signal that is more costly for nonmeritorious litigants to produce than meritorious petitioners. The negative correlation between the cost of signaling and underlying quality makes it inefficient for the latter to mimic the former.[193]

The two-track model of habeas would be an effective sorting device, either for actual innocence or for egregious error, if the following conditions were satisfied: the two-track model (1) allows petitioners to signal that a hidden trait in their cases provided the necessary basis for relief, and at the same time (2) makes it costly for other petitioners lacking that characteristic to mimic the same signal.

The analysis is complicated by the fact that there are at least two sorting mechanisms at work in two-track habeas. First—and most importantly—doctrine sorts cases between Track One and Track Two. Cases in Track One are very likely to be decided in favor of the state with little judicial exertion. Cases in Track Two are likely to be decided with somewhat more careful consideration of the facts and law, with a higher rate of vacaturs and remands

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[190] For an overview, see Patrick Bolton and Mathias Dewatripont, *Contract Theory* 100–07 (MIT 2005). See also generally Joseph E. Stiglitz, *The Contributions of the Economics of Information to Twentieth Century Economics*, 115 Q J Econ 1441 (2000).

[191] Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 Am Econ Rev 434, 437 (2002).

[192] Eric A. Posner, *Law and Social Norms* 19 (Harvard 2000).

[193] See Michael Spence, *Job Market Signaling*, 87 Q J Econ 355, 367 (1973) (noting that a negative correlation of signaling costs and the subject that is signaled, which in Spence's study is the productive capability of employees, "is a necessary but not sufficient condition for signaling to take place").

for petitioners at the margin. But second, within Track One there is yet further sorting between cases dismissed on procedural grounds and those dismissed on the merits because their constitutional claims do not warrant relief under the strictures of AEDPA.[194]

I will focus in what follows on sorting between Track One and Track Two and then return to sorting within Track One. I will assume that getting onto Track Two is a precondition of relief. Consideration of both these sorting effects together suggests that the best case for explaining habeas as a sorting mechanism may focus on egregious state-court error as the underlying hidden characteristic. But even if it is a means for bringing to light egregious error, however, the two-track model of habeas is nevertheless poorly designed. Sorting therefore does a poor job of explaining bifurcated habeas review at least without some further theoretical elaboration.

2. Sorting between Tracks One and Two in practice.

I begin by asking how a petitioner shifts from Track One to Track Two—that is, from likely dismissal to possible relief. What signal, in other words, allows the leap from Track One, which is the default channel for the majority of habeas petitioners, to Track Two? Recall that Track Two petitions are subject to a threshold procedural bar, albeit one that has to be excused under the cause-and-prejudice standard. Moreover, in the core Track Two case, there is no state-court adjudication on the merits to trigger AEDPA deference.[195] Typically, this set of conditions will be satisfied when there is a *concatenated failure to press and adjudicate a constitutional claim*—that is, a failure of not just trial counsel and the trial court to successfully demonstrate constitutional error, but also appellate and postconviction counsel and court.

Concatenated failures can start when a constitutional violation occurs at trial and trial counsel fails to raise or preserve the issue (such that there is no state-court ruling). Alternatively, they can begin with the ineffective assistance of trial counsel. This sec-

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194 Again, it is worth emphasizing that I am making generalizations here. There are instances in which lower courts deny relief, and the Supreme Court reverses. See, for example, *Rompilla v Beard*, 545 US 374 (2005). These do not fit neatly into this scheme.

195 See 28 USC § 2254(d). If there is such a merits determination, the petitioner has not left Track One.

ond possibility picks up a nontrivial slice of the federal courts' habeas docket. Indeed, empirical studies find that a majority of claims raised on federal habeas review turn in some fashion upon ineffective assistance of trial counsel.[196] (Ineffective assistance is also the only way to raise a violation of the Fourth Amendment exclusionary rule on postconviction review[197] although it is not clear that this basis of habeas jurisdiction is especially significant in numerical terms.) Once a trial-level constitutional error has occurred, whether based on the Sixth Amendment or otherwise and gone unnoticed, it is generally the responsibility of appellate or postconviction counsel to raise the claim and to exhaust it. If a claim is properly presented at this stage, it will be exhausted and so teed up for Track One consideration. It is only if there is yet another increment of ineffective assistance that there might be a pathway through the procedural-default rule to reach federal court consideration without the hobbling AEDPA deference most habeas petitions confront. That is, in most instances, it is a *concatenation* of errors in state court that switches a case from Track One to Track Two.

Both *Martinez v Ryan*[198] and *Trevino v Thaler*[199] exemplify this dynamic of track switching based on concatenated error. In *Martinez*, trial counsel failed to challenge a critical piece of evidence, while the appellate attorney, who also served as postconviction counsel, not only failed to raise the ensuing Sixth Amendment issue but also allegedly failed to notify Martinez of the existence of his collateral proceeding.[200] Similarly, in *Trevino* the petitioner's postconviction counsel failed to raise the question whether the petitioner's trial counsel had been ineffective by failing to investigate and present mitigating factors in Trevino's capital-sentencing hearing.[201]

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196 King, Cheesman, and Ostrom, *Final Technical Report* at *28 (cited in note 47) (finding that 50.4 percent of noncapital habeas cases contained one ineffective-assistance claim). See also Victor E. Flango, *Habeas Corpus in State and Federal Courts* *45–59 (1994), online at http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/0 (visited May 21, 2014); Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Capital Cases*, 91 Cornell L Rev 1105, 1108 n 5 (2006).

197 Compare *Kimmelman v Morrison*, 477 US 365, 379–80 (1986) (allowing Sixth Amendment claim on habeas to challenge failure to object to evidence that should have been excluded), with *Stone v Powell*, 428 US 465 (1975) (barring direct litigation of Fourth Amendment claims on habeas).

198 *Martinez*, 132 S Ct at 1309.

199 *Trevino*, 133 S Ct at 1911.

200 *Martinez*, 132 S Ct at 1313–14.

201 *Trevino*, 133 S Ct at 1915–16.

Notice that in both *Martinez* and *Trevino*, one can posit a counterfactual scenario in which the petitioner remained on Track One simply by raising the underlying constitutional claim on appeal or in a postconviction forum. Had they done so, and had they secured a state-court merits adjudication, the petitioners in those cases would have been channeled directly to a federal court determination of whether the state-court ruling on the Sixth Amendment was unreasonable in violation of AEDPA. The federal habeas court would never have had an occasion to ask whether the quality of counsel in the state postconviction context was sufficiently poor to qualify as cause for the purpose of excusing a procedural default.

3. Sorting for innocence.

Concatenated error of the sort found in *Martinez* and *Trevino* is not obviously a signal of innocence rather than guilt. Indeed, it is possible to hypothesize as a threshold matter that concatenated error involving ineffective counsel will be *more* common in cases of actual guilt than in cases of actual innocence. If defense counsel accurately estimate guilt and innocence, they may exert more effort with clients they believe to be actually innocent than with clients they believe guilty. On this view, seriatim failures by counsel to invest in defenses might be a rough proxy for underlying guilt. By contrast, when an actually innocent defendant is wrongly convicted it will tend ceteris paribus to be despite counsel's substantial efforts, and hence within Track One's unforgiving bounds. Hence, Track Two will perversely select for guilty rather than innocent petitioners.

Alternatively, and perhaps more plausibly, state-funded defense counsel may often be so overloaded with cases that they are unable to engage effectively in any threshold sorting based on guilt and innocence. Public defenders rarely have the luxury to engage in extensive (or perhaps any) investigation. Often, their opportunities to meet with clients are abbreviated. Compounding the problem is variance in the quality of defense counsel. Many defenders no doubt work diligently to maximize their aid to clients, but it is surely unrealistic to expect that none of them will ever slacken in their effort. Hence, it is certainly plausible to expect some poor lawyering, albeit in stochastically selected cases. As a result, ineffective counsel will likely be randomly distributed

between innocent and guilty defendants.[202] Under these conditions, concatenated error would at best be an underinclusive proxy and at worst uncorrelated to innocence.

4. Sorting for egregious constitutional error.

What then of the possibility that the Track One/Track Two sorting has the effect of flagging egregious errors of state-court process rather than innocence? Superficially, this is not implausible. It is conceivable that there is a correlation between concatenated error on the part of counsel and judges in the state-court context and the occurrence of especially grave or compelling constitutional error. Moreover, this sorting effect aligns Track Two with the very small class of cases in which relief is warranted under the stringent definition of unreasonableness articulated in *Richter*. Sorting for egregious error, therefore, superficially seems an attractive account of the jurisprudence.[203]

Nevertheless, there are at least three reasons to think that the two-track model does not sort effectually for egregious errors at the state-court level. First, it is not sufficient for a petitioner to have suffered from the seriatim failures of counsel and state actors to obtain Track Two relief. The complex procedural skein of Track Two requires that a federal habeas petition explain how the state-court judicial hierarchy had been navigated, and then show that this trajectory matches precisely the strictures of the cause-and-prejudice gateway. The petition must also do so while complying with the federal statute of limitations[204] and abuse-of-the-writ rules.[205] This pirouette will likely defeat many a smart lawyer. It is likely to be beyond the reach of at least a substantial number of petitioners (even those able to mimic the surface attributes of a previously successful petition).[206]

For these petitioners, who will often lack counsel at the federal habeas stage, Track Two may often be unreachable given the epistemic transaction costs of litigation. Put otherwise, it will often be the case that a petitioner will lack particularly diligent or

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[202] I am grateful to Professors Brandon Garrett and Eric Freedman for helpful conversations on this point.

[203] Note that this is not quite the same as encouraging defendants to treat state proceedings as the main event—to do this, it would suffice to abolish habeas without the sort of distinctions currently drawn in the doctrine.

[204] 28 USC § 2244(d).

[205] 28 USC § 2244(b)(1)–(2).

[206] For a counterexample, see *Holland*, 130 S Ct at 2556–57 (2010) (describing an instance in which petitioner got the law right, and his counsel did not).

careful counsel at the state-court level and still lack such counsel at the federal habeas stage—in which case Track Two will be unavailing. It is also worth recalling though, as discussed in Part I, that there is at least one important class of cases in which poor lawyering at the state-court level is typically followed by exceedingly good lawyering at the federal habeas level: death-penalty cases.[207]

Second, and relatedly, the two-track model is likely to be substantially underinclusive. Petitioners unable to access Track Two will be subject to a second sorting mechanism, which occurs within Track One. A substantial number of Track One claims are never addressed on the merits, but resolved on procedural grounds such as exhaustion, procedural default, untimeliness, or successiveness. One study suggests such procedural dispositions are the fate of a near-majority of all claims filed.[208] Among the pool of largely unrepresented petitioners, the threshold complexity of procedural rules likely selects those who are less familiar with the rules for nonmerits disposition.[209] Consider, as an example of that complexity, the rule that for the purposes of AEDPA's statute of limitations, the time a petitioner expends appealing a conviction directly to the US Supreme Court counts, but the time spent appealing on writ of certiorari a denial of collateral relief does not.[210] All else being equal, it will be the career criminal, not the first-time offender, who successfully navigates such rules.[211] At least within Track One, it is possible that the petitioners least able to navigate the criminal-adjudicatory system and to employ intelligently their criminal-procedural entitlements are also most likely

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[207] See Liebman, 100 Colum L Rev at 2073 (cited in note 117).

[208] See King, Cheesman, and Ostrom, *Final Technical Report* at *45 (cited in note 47) (finding that 48 percent of petitions were dismissed wholly on procedural grounds).

[209] See Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 Duke L J 947, 961 (2000) (noting that "procedural doctrines distinguish between defendants differently based on each defendant's respective ability to navigate the procedural thicket, which has little or no bearing on that defendant's substantive entitlement to relief").

[210] Compare *Jimenez v Quarterman*, 129 S Ct 681, 685–86 (2009) (direct-appeal rule), with *Lawrence v Florida*, 549 US 327, 337 (2007) (collateral-review rule).

[211] Moreover, conditions in most state prisons tend to pose a "serious threat to inmates' health and safety." Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 NYU L Rev 881, 888–89 (2009). Seasoned inmates are more likely to adapt to such circumstances, and thus can exert more effort toward figuring out the complexities of federal habeas. Prison is likely to be far more stressful for first-time and new inmates. As a result of the ensuing mental and physical stress, it is more likely that they will fail to account for the threshold complexities of federal habeas law.

to be dismissed at the threshold rather than the merits. By contrast, sophisticated, if not necessarily more worthy, petitioners are likely to have more success threading the procedural maze in order to reach merits consideration.[212] In those cases, the federal court may still have an opportunity to search for serious legal error—at least until *Richter* and *Pinholster* combine over time to rob even this review of any relief-generating potential. Hence, the internal mechanisms of Track One are likely to obscure systematically the frequency of petitioners raising egregious errors because those cases in which such errors are most likely to occur are also least likely to be resolved on the merits.

Finally, notice an odd result that bears on the significance of the Track One/Track Two distinction: A petitioner representing himself who diligently raises a constitutional issue in the state postconviction context may be subject to the relatively hostile regime of AEDPA deference. On the other hand, a petitioner representing himself who has failed to raise the same issue on state postconviction review—and who can persuade the federal habeas court to treat his or her failure as excusing cause—secures a more favorable standard of relief and a more latitudinarian judicial attitude toward the evidentiary record. This raises the following question: Under what circumstances, after *Martinez* and *Trevino*, can a petitioner who represents himself or herself in state postconviction proceedings plead the inefficacy of defense counsel as an excuse for failing to raise an issue? Some elements of the Court's recent decisions suggest that failures of self-representation can sometimes count as excusing cause.[213] But it is not clear how often this will be the case. Perhaps it is sufficient to say most failures of self-representation are "insubstantial," and hence not enough to open the Track Two gateway.[214] However the Court resolves this issue, the salient point here is that the election between Track One and Track Two will often depend on how effective self-representation is judged to be. In this class of cases in particular, it is not clear how any rational sorting either for egregious error or actual innocence will occur.

These three effects together render the two-track model of habeas substantially underinclusive as a sorting mechanism for

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[212] It is hardly implausible to think that some habeas petitioners will be sophisticated. See, for example, *Holland*, 130 S Ct at 2549.

[213] See *Trevino*, 133 S Ct at 1918.

[214] *Martinez*, 132 S Ct at 1319.

identifying instances of egregious state-court error. The separating equilibria produced by the two-track model of habeas, moreover, are also likely to have a distributive effect. For the reasons canvassed above,[215] the pool of cases that do reach merits consideration will largely comprise the most serious alleged offenders (death penalty cases in Track Two) and savvy serial offenders who know how to navigate both prison life and the federal habeas maze. That pool will tend to exclude the vulnerable and novices to the criminal-justice system.[216] Perverse sorting effects of this kind are nothing alien to American criminal procedure. It has been argued that the *Miranda* warnings tend to be exploited by career criminals and largely fail to aid the innocent, in effect sorting the most vulnerable for police interrogation.[217] Similarly, prior to policing reforms in the 1960s and the rise of professionalism, urban criminal-justice systems were shot through with corruption, abuse, and extortion—weak points that were most easily exploited by career criminals.[218] If habeas is to be condemned for serving as a stepping stone for the strong and an oubliette for the weak, therefore, it would not stand alone as a uniquely perverse aspect of American criminal procedure. Familiarity, however, should not breed complacency. It might be objectionable to design a postconviction-review system to favor the sophisticated over the vulnerable however common such an effect may be across the domain of criminal law and procedure.

Adding to the grounds for concern, the two-track model's distributive consequences may render habeas politically fragile or unsustainable. The logic here borrows from an argument made by Professor Akhil Amar in his work on the Fourth Amendment: The exclusionary rule of *Mapp v Ohio*,[219] notes Amar, treats guilty de-

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[215] See text accompanying notes 208–12.

[216] This is not a unique consequence of signaling in the habeas context. For an account of how separating equilibria in the very difficult context of privacy law can have distributive effects, see Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 Harv L Rev 2010, 2032 (2013).

[217] See David Simon, *Homicide: A Year on the Killing Streets* 210 (Ivy 1991) ("Repetition and familiarity with the process soon place the professionals beyond the reach of a police interrogation."). For the leading study on this topic, see Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J Crim L & Criminol 621, 655 (1996) (explaining that Fifth Amendment rights are most likely to be invoked by suspects who are repeat players in the criminal-justice system).

[218] See Stephen J. Schulhofer, Review, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 Mich L Rev 1045, 1053 (2013).

[219] 367 US 643 (1961) (incorporating the exclusionary rule against the states).

fendants as "a surrogate for the larger public interest in restraining the government."[220] It also directs judicial relief away from the actually innocent whose Fourth Amendment rights are violated. In the long term, Amar argues, this corrodes support for the underlying right.[221]

Substantially the same effect might be observed emanating from the two-track model: by assigning relief to the sophisticated, and by failing to select for the vulnerable, habeas appears to be—and indeed perhaps is—a device for rewarding the cunning criminal at great expense to the public fisc, while leaving the vulnerable behind bars. To be sure, resentment at habeas as an instrument deployed by capital defendants is nothing new.[222] But the two-track model of habeas may be organized in such a way as to confirm and even amplify such negative sentiments. Over time, the operation of two-track habeas thus undermines the political support necessary to maintain its successful operation.

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It is at least possible to fit the two-track model of habeas to the project of sorting for egregious state-court error, if not for actual innocence. But such a defense is fragile. The two-track model is substantially underinclusive as a sorting mechanism. Instead, it will have perverse and likely undesirable distributive consequences. Sorting theory thus fails to supply a satisfactory explanation for the jurisprudence—at least if one assumes that the justices are even partially successful in promoting their normative and policy goals through doctrinal articulations. To understand what the Supreme Court is doing, therefore, we must look elsewhere.

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[220] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 796 (1994).

[221] See id at 799 ("In the popular mind, the Amendment has lost its luster and become associated with grinning criminals getting off on crummy technicalities. When rapists are freed, the people are *less* secure in their houses and persons—and they lose respect for the Fourth Amendment.") (citation omitted).

[222] See Anthony G. Amsterdam, *Selling a Quick Fix for Boot Hill: The Myth of Justice Delayed in Death Cases*, in Austin Sarat, ed, *The Killing State: Capital Punishment in Law, Politics, and Culture* 148, 165–69 (Oxford 1999) (explaining how some justices depended on a conception of the capital-defense bar as "a tiny but immensely powerful cabal of schemers" that manipulates the system to prevent the orderly implementation of lawful sentences of death).

C. Habeas as Feedback Mechanism

A second potential explanation of two-track habeas focuses on the incentives it fosters for judges, prosecutors, and petitioners in the state trial, appeals, and postconviction contexts. Federal court review, on this view, is warranted not simply because it will intercept a substantial number of constitutional errors,[223] but because it will change the behavior of participants in the state-court system in ways that deter future constitutional violations. That is, judges, prosecutors, and petitioners will anticipate the availability of federal habeas relief, and rationally change their behavior to account for it in socially desirable ways.

To determine whether the two-track model of habeas can be explained in these incentive-based terms, it is helpful to ask first what sort of feedback mechanism might connect state and federal judicial processes. This threshold inquiry turns out to be more complex and contested than might first appear. I accordingly begin my analysis by setting forth two possible accounts of a feedback mechanism linking state-court criminal adjudications and federal postconviction review. While empirical testing of these accounts is beyond my mandate here, I suggest which seems to me most likely to hold, and then assess its consequences for the two-track model.

1. A moral hazard theory of habeas.

Postconviction habeas is characterized by some of its supporters as a safety net to minimize the net rate of uncorrected constitutional error in state criminal adjudication.[224] It is well-known,

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[223] Early debates on post–*Brown v Allen* habeas focused on the value of this error-correction function. Compare Bator, 76 Harv L Rev at 454 (cited in note 28), arguing that

> if one set of institutions has been granted the task of finding the facts and applying the law and does so in a manner rationally adapted to the task, in the absence of institutional or functional reasons to the contrary we should accept a presumption against mere repetition of the process on the alleged ground that, after all, error *could* have occurred,

with Robert M. Cover and T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L J 1035, 1045 (1977) (arguing that jurisdictional redundancy "fosters greater certainty that constitutional rights will not be erroneously denied"). The argument from incentives errors, however, is more subtle than the argument from error correction because it accounts for the possibility of dynamic interaction between state and federal judiciaries. Professors Cover and Aleinikoff vaguely allude to this possibility by praising the "dialogue" between state and federal courts initiated by habeas. Id at 1052–54. They fail, however, to define with any precision the social welfare effects of this dialogue.

[224] See, for example, Cover and Aleinikoff, 86 Yale L J at 1045–46 (cited in note 223).

however, that insurance often has unintended moral hazard effects.[225] Just as insurance against loss tends to reduce incentives to prevent or minimize the cost of loss, so too insurance in the form of the federal exercise of postconviction review may tend to reduce the precautionary care that state-court judges take anticipating and mitigating deviations from constitutional desiderata.[226] A theory of habeas as safety net, therefore, must account for the possibility of moral hazard in order to allocate habeas relief in ways that do not yield ex ante incentives for state courts to underinvest. I therefore start my examination of feedback-based explanations by considering whether a theory of moral hazard might explain the two-track model.

A moral hazard theory of postconviction review requires at least three empirical predicates to hold in order to work. First, the theory assumes that state judges, in the absence of federal judicial supervision, would tend to conform to constitutional criminal-procedure rules. Constitutional violations, that is, must be a "consequence" that counts in state judges' welfare function.[227] If the rate of constitutional violations is not of material consequence to state judges, then no moral hazard effect will occur. Second, the theory requires that judges be adequately positioned to take precautions against a risk materializing.[228] Finally, moral hazard arguments assume that the insured actor will respond to the provision of insurance by lowering the level of care exercised.[229] If all these elements hold and moral hazard is substantial, then habeas relief would best be allocated so as to maximize error correction

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[225] See Kenneth S. Abraham, *Distributing Risk: Insurance, Legal Theory, and Public Policy* 14 (Yale 1986) ("Moral hazard is the [ ] tendency of an insured to underallocate to loss prevention after purchasing insurance.").

[226] State-court trial judges may be better positioned to take precautions—and hence would be subject to ex ante moral hazard—whereas state appeals and postconviction judges would be able to mitigate, and hence would be subject to ex post moral hazard. See George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L J 1521, 1547 (1987) (developing the ex ante/ex post moral hazard distinction).

[227] See Joseph E. Stiglitz, *Risk, Incentives and Insurance: The Pure Theory of Moral Hazard*, 8 Geneva Papers on Risk & Ins 4, 6 (1983) ("[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions.").

[228] See Tom Baker, *On the Genealogy of Moral Hazard*, 75 Tex L Rev 237, 279 (1996) ("If the people exposed to the insurance incentive are not in control of the behavior that matters, then reducing the insurance incentive will impose a cost on those people while providing little benefit in the way of reduced accidents.").

[229] See id at 285–86 (noting that this does not occur with workers' compensation schemes).

without producing an aggregate higher rate of error at the state-court stage.

A variant on the moral hazard argument was tendered by Professor Paul Bator, who opined that "nothing [is] more subversive of a judge's sense of responsibility . . . than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."[230] I do not rely on Bator's psychologicalized account of moral hazard here for two reasons. First, Bator provided no evidence of demoralization effects among state-court judges. Nor did he explain why he pressed that hypothesis, rather than the contrary, perhaps equally plausible, hypothesis that those judges would instead be grateful for the implicit reduction in their workload. Accordingly, his argument appears to rest on an unjustified election between two opposing, equally unsupported possibilities. Second, Bator did not explain why state-court judges differ from other agents in judicial hierarchies (for example, magistrate judges, bankruptcy judges, federal district court judges, and federal law clerks) whose work is equally subject to revision. If Bator's argument held true, demoralization would be a widely observed effect of hierarchical control mechanisms. Because there is little evidence this is so there is even less cause to credit Bator's naked and unsupported hypothesis.

Setting aside Bator's unreliable iteration of the argument, the moral hazard theory of postconviction review initially seems a promising candidate for explaining the two-track structure of current doctrine. To begin with, the Supreme Court commonly justifies new restraints on habeas review by conjuring a "comity" value in threshold state-court determination of constitutional questions.[231] Demanding initial review in a state court would make little sense if the Court believed state courts did not prefer

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[230] Bator, 76 Harv L Rev at 451 (cited in note 28).

[231] See, for example, *O'Sullivan v Boerckel*, 526 US 838, 844–45 (1999); *Rose v Lundy*, 455 US 509, 515–16 (1982). The Court often justifies comity concerns by citing the need for reducing "friction" between state and federal judiciaries. *Boerckel*, 526 US at 844–45. It is not clear what the Court means by this. It does not obviously make sense to talk of "friction between courts" in the same way as "friction between nations" is a meaningful concept. Unlike governments, courts do not stand in relations of amity or enmity toward each other—or at least not in common parlance. Moreover, the idea that federal courts are hierarchically superior to state courts with respect to federal law has been intricated into the Supreme Court's jurisdiction since *Hunter's Lessee*, 14 US (1 Wheat) at 304. Consider also the possibility of removal from state court and the common use of stays in bankruptcy litigation to freeze state-court proceedings. Given this extensive range of judicial contact points, it is not at all clear why the Court should single out habeas as a unique source of intergovernmental friction in the judicial context.

compliance with federal constitutional norms.[232] Further, recall that Track Two selects for closer scrutiny those cases in which there has been concatenated error of some sort.[233] Typically, although not inevitably, this involves the serial failure of effective defense representation, which will obviate the possibility of a state court passing on a constitutional issue. Hence, Track Two's intensification of federal court consideration likely correlates with the incidence of cases in which a state court has had no effective chance to rule on a constitutional question—that is, cases in which there is no potential for moral hazard.[234] If the Court is selecting these cases for more intensive review, then it is picking out precisely those proceedings in which the moral hazard feedback effect will be the slightest. Stated otherwise, the Track One/Track Two distinction might be a way to provide some federal relief for constitutional claims, but only when doing so catalyzes no deleterious moral hazard effect.

In other respects, however, the specific workings of Track One can be aligned with a moral hazard theory of habeas only with some awkwardness. At least in regard to petitioners able to navigate habeas's procedural shoals, courts within Track One allot relief only to egregious deviations from constitutional norms *known* to state courts.[235] This is not an effective strategy to dampen moral hazard, even if it is effective way to secure a deterrent effect.[236]

Consider a somewhat mundane analogy to illuminate this point: To mitigate moral hazard ordinarily, an insurer will typically demand that an insured exercise some minimal level of care (for example, the use of a fire alarm or an antitheft device on a car) and will not pay when the insured fails to take such threshold

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[232] Indeed, for at least two decades, "[t]he Court has been saying . . . that state courts are to be trusted with claims of constitutional right." Barry Friedman, *Habeas and Hubris*, 45 Vand L Rev 797, 818 (1992).

[233] See text accompanying notes 196–98.

[234] Why not remand to state court for further review even in Track Two cases? See *Rhines v Weber*, 544 US 269, 275–77 (2005) (recognizing district court authority to issue stays to allow petitioners to return to state court "in limited circumstances"). A partial, but rather unsatisfactory, answer is that after so much litigation, the remand may be an "unwelcome burden" on state courts. *Boerckel*, 526 US at 847. If moral hazard indeed explained habeas jurisprudence, a *Rhines* stay might be the optimal tool in all cases.

[235] See text accompanying notes 65–67.

[236] See Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J Legal Stud 307, 309 (1994) ("[G]reater accuracy is valuable [as a deterrent] only to the extent it involves dimensions about which individuals are informed at the time they act.").

precautions.[237] The insurer does not, however, require the owner to take very costly prophylactic measures (for example, never taking a vehicle from a locked garage) in order to warrant a payout. Moral hazard, that is, is mitigated by making the exercise of some care a precondition to insurance. If the organizing principle of habeas doctrine were the minimization of moral hazard, then federal courts would not step in when state courts failed to take any care at all (in other words, when they invested in an inefficiently low level of precautions). By contrast, they would step in to provide a safety net when a state court has taken reasonable precautions, but an erroneous outcome has nonetheless slipped through the net.

This is basically the inverse of the current habeas regime. At present, federal courts provide "insurance" (in other words, they correct errors of constitutional dimension) when a state court has made an unreasonable mistake, but not when the error is a reasonable one.[238] If the organizing principle of two-track habeas were the mitigation of moral hazard, federal judges would be obligated to behave in roughly the opposite fashion: habeas relief should be unavailable when constitutional errors were obvious and easily avoided, but readily available only when such errors could be mitigated by exerting an extremely high degree of care. Paradoxically, therefore, Track One seems designed to invite, not dampen, moral hazard at least along this dimension.

Even aside from this problem (which is internal to Track One), there is some reason to be skeptical that the moral hazard theory can explain the distinction between Track One and Track Two. None of the three empirical predicates of moral hazard theory is obviously true. Without an exceptional feat of analytic fiat, therefore, the two-track model cannot be justified as empirically warranted. The first factual predicate of a moral hazard theory—that state judges value constitutional entitlements as opposed to, say, populist retributivist goals—is in tension with available empirical evidence. Eighty-nine percent of state judges face voters in some form of election, whether for appointment or retention.[239]

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[237] See Baker, 75 Tex L Rev at 280–81 (cited in note 228) ("Insurance is often conditioned on 'care.' . . . Examples include requirements for anti-theft devices, smoke alarms, and sprinkler systems.").

[238] See 28 USC § 2254(d)(1).

[239] Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Georgetown L J 1077, 1105 (2007).

Most empirical studies show that these judges are strongly influenced by factors other than legal norms in criminal cases. Elections have statistically significant influence on sentencing generally and on capital cases in particular. Elected judges tend to impose higher sentences before retention votes.[240] Judicial elections, whether partisan or nonpartisan, "are affected by candidate- and issue-based forces."[241] Anecdotal evidence of state courts yields an equally glum picture of incompetence compounded with animus.[242] In the capital context, studies find a strong link between ambient public support for capital punishment and the likelihood of a capital sentence.[243]

To be clear, this evidence does not show that state judges will systematically or persistently disregard constitutional norms, but it suggests they are highly alert to public demands for punitive action, which are likely in some tension with constitutional rules. This evidence hence raises the question whether the downstream prospect of federal habeas review can be assumed to suppress compliance with those norms. If elected judges anticipate elective discipline by a public with punitive preferences, they may already be relatively indifferent to the rate of constitutional compliance at the margin. The prospect of downstream habeas relief may have little suppressive effect. At a minimum, it seems hasty to structure postconviction review around the prospect of moral hazard when the magnitude of feedback effects might be trivial.

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[240] See Gregory A. Huber and Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 Am J Polit Sci 247, 261 (2004); Sanford C. Gordon and Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q J Polit Sci 107, 133 (2007).

[241] Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 Am Polit Sci Rev 315, 326 (2001). See also Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 Duke L J 623, 629 (2009) (finding that "unlike judges facing retention decisions, judges who do not need to appeal to voters shape their rulings to voters' preferences less. For example, voters' politics has little effect on the rulings of judges with permanent tenure or who plan to retire before the next election"); Melinda Gann Hall and Paul Brace, *Justices' Responses to Case Facts: An Interactive Model*, 24 Am Polit Q 237, 255 (1996) (finding that "judicial decisions intrinsically are political"). One study not specific to the criminal law context finds no evidence of judicial responses to political pressure. See Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary*, 26 J L, Econ & Org 290, 326–28 (2008).

[242] See, for example, William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, NY Times A1 (Sept 27, 2006) (discussing the "long trail of injustices and mangled rulings" associated with one local court system); William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, NY Times A1 (Sept 25, 2006).

[243] See, for example, Paul Brace and Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am J Polit Sci 360, 370 (2008).

Respecting the second and third predicates of moral hazard theory, state judges' capacity to take precautions in response to federal habeas rulings may be highly constrained. Of course, trial and appellate judges can vary in their attentiveness to constitutional claims, and may be more or less willing to take note sua sponte of transgressions by the government.[244] But the state judiciary's capacity to mitigate systemic constitutional violations may be limited such that a feedback effect from federal habeas cannot be assumed.

To perceive the limits of judicial precautions, consider the ineffective-assistance-of-counsel claims that comprise a large share of federal habeas actions. Commentators have identified "rampant underfunding of noncapital defense" as a barrier to general vindication of Sixth Amendment rights.[245] Publicly funded defense lawyers are not only poorly compensated[246] but also lack resources to conduct adequate investigations[247] and often labor under astonishing caseloads.[248] State-court judges may be able to respond to the most extreme cases of ineffective assistance by appointing new counsel. But they are poorly situated to respond to endemic underfunding that underwrites many violations of the Sixth Amendment currently.[249] Unlike state judges, state legislators who do control funding levels are unlikely to be vulnerable to moral hazard from federal habeas.[250]

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[244] State judges cannot obviously diminish care with respect to hidden violations, such as violations of *Brady v Maryland*, 373 US 83 (1963).

[245] Benjamin H. Barton and Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U Pa L Rev 967, 974 (2012). See generally Karen Houppert, *Chasing* Gideon*: The Elusive Quest for Poor People's Justice* (New Press 2013).

[246] See Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 Mo L Rev 907, 912–13 (2010). The situation in capital cases is no better. See Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 Vand L Rev 307, 323–26 (2010).

[247] See Paul C. Giannelli, Daubert *and Forensic Science: The Pitfalls of Law Enforcement Control of Scientific Research*, 2011 U Ill L Rev 53, 76–77 & n 158 (noting underfunding of expert assistance for indigent defendants).

[248] See Primus, Review, 110 Mich L Rev at 895 (cited in note 9).

[249] Efforts to obtain injunctions under state constitutions requiring better indigent-defense funding have generally failed. See, for example, *Quitman County v State*, 910 S2d 1032, 1048 (Miss 2005); *State v Peart*, 621 S2d 780, 785–92 (La 1993).

[250] Generalizations here—as in much of this analysis—are hazardous. In New York State, Chief Judge Jonathan Lippman has been instrumental in securing increased defense funding. See *Law Day Remarks by Chief Judge Jonathan Lippman* (NY Courts May 1, 2013), online at http://www.nycourts.gov/ctapps/lawday13trans.pdf (visited May 21, 2014). It is surely regrettable that Chief Judge Lippman's concern with constitutional compliance appears to be the exception, and not the rule.

The inelasticity of indigent-defense underfunding to outcomes in postconviction review directly undermines the descriptive plausibility of a moral hazard theory of federal habeas. But it also has an indirect effect: state-court judges necessarily rely on defense counsel to identify constitutional questions. Inadequate funding and overwhelming caseloads blunt defense counsel's ability to flag constitutional questions. Subject to lopsided epistemic updating from defense and prosecution,[251] state judges may be in no position to identify, let alone remedy, the full panoply of constitutional concerns implicated in a given case. The moral hazard effect of habeas under these circumstances may be limited.

Even though the Track One/Track Two distinction can be explained in terms of moral hazard, in sum, the case for anticipating nontrivial moral hazard effects from federal postconviction review is fragile. To the extent that habeas is intended to diminish the net frequency of constitutional violations, therefore, it is not clear that any scaling back based on moral hazard concerns is warranted. It follows that the theory does not provide a plausible explanation of what the Court is doing in its two-track habeas jurisprudence.

2. The "sentinel effect" of habeas.

An alternative feedback mechanism linking state-court process and federal habeas is a "sentinel effect," whereby the prospect of subsequent review induces greater care on the part of the front-line decision maker.[252] The possibility of a sentinel effect was first identified in the medical literature, in which it generated a justification for securing second opinions on recommended surgeries as a means toward reducing the number of unnecessary medical interventions.[253] In the habeas context, the argument would be that the prospect of later review for constitutional error induces greater care on the part of state judges. Judges would have to be motivated by a preference for not being contradicted by

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[251] See Barton and Bibas, 160 U Pa L Rev at 975–76 (cited in note 245) (noting asymmetry, and explaining that "[f]elony defenders also have little time to meet with their clients. . . . Their only communication with each client may be no more than a hurried conversation in a courtroom hallway or holding cell in the few minutes before a court appearance").

[252] Adrian Vermeule, *Second Opinions and Institutional Design*, 97 Va L Rev 1435, 1464 (2011).

[253] See Suzanne Grisez Martin, et al, *Impact of a Mandatory Second-Opinion Program on Medicaid Surgery Rates*, 20 Med Care 21, 31–32 (1982).

a federal judge and would have a sufficiently low discount rate so as to be motivated by the specter of federal habeas relief some ways down the road. (Note that this is the opposite assumption to the one underpinning a moral hazard theory of habeas, which posits that state judges dial down efforts when their errors are fixed in subsequent federal collateral review.) The allocation to petitioners of the decision to invoke habeas, additionally, would increase the chance that postconviction review would pick up instances of false positives in state adjudications.[254]

The two-track model of habeas cannot, however, be explained in terms of sentinel effects or some similar deterrence-based account.[255] If federal invigilation of constitutional compliance in state criminal adjudication increased compliance rates with the relevant rights, then the two-track model has matters exactly backwards. At present, the intensity of federal review is greatest when state courts have not had an opportunity to pass on a legal question. By contrast, adjudication of a claim on either substantive or procedural grounds moves a claim into Track One, in which a state judge's reasoning is likely to receive little or no scrutiny.

Within Track One, the doctrine elicits reductions in state judges' care respecting constitutional error. The treatment of summary opinions as merits judgments,[256] for example, effectively imposes a tax on reasoned adjudication by state courts. Confronting a summary opinion, a habeas petitioner must address all potential reasonable explanations of the outcome in order to secure relief.[257] By contrast, a reasoned opinion narrows the field of potential explanations, giving the petitioner a precise target. State

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[254] See Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J Legal Stud 379, 381 (1995) (arguing for investments in appellate review rather than a better trial process, because "litigants possess information about the occurrence of error and appeals courts can frequently verify it").

[255] The doctrine, though, creates obviously powerful incentives for habeas petitioners to turn square corners in state court. For two reasons, it is doubtful this feedback effect is effectual. First, it is hardly clear that noncapital petitioners have any significant incentive to engage in strategic deferment (or sandbagging) in the first place. See *Morrison*, 477 US at 382 n 7. Second, the sanctioning of petitioners based on defaults by omission in state court is unlikely to have much effect on state-funded defense counsel, who do not bear those costs. Only by imposing a formalist model of agency between petitioner and counsel—a formalism that flies in the teeth of the available empirical evidence—does this deterrence mechanism even begin to make sense.

[256] See *Richter*, 131 S Ct at 784–85.

[257] See text accompanying notes 85–92.

judges seeking insulation from reversal have a new reason to expend less, rather than more, work on drafting opinions. A similar dynamic logic operates in respect to *Pinholster*'s new constraints on the evidentiary basis of merits review.[258] By limiting merits review to the record before the state court that adjudicated a constitutional claim, the Court encourages state courts to be chary in their admissibility and discovery decisions[259] even as it "places an extraordinary premium on effective fact development at the state level."[260] By imposing strict limits on a defendant's ability to introduce exculpatory or mitigating evidence through "independent and adequate"[261] time limits, state courts can further buffer themselves from habeas's sentinel effect. Retail decisions to deny expansions of the record, which since 2009 have been treated as adequate and independent procedural bars,[262] may further conduce to a diminished prospect of effective collateral review.

Rather than having a benevolent sentinel effect, therefore, two-track habeas may undermine observable signals of state criminal adjudications' quality. The basic insight here was powerfully articulated by the late Professor William Stuntz. He observed that procedural constraints on law enforcement "[create] a series of political taxes and subsidies, making some kinds of legislation and law enforcement more expensive and others cheaper."[263] As a result, Stuntz argued, criminal-procedure rules often had perverse effects because they leave "[p]oliticians [ ] freest to regulate where regulation is most likely to be one-sided and punitive."[264] Two-track habeas is akin to other forms of regulation in that it makes one activity more costly than an obvious substi-

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258 See *Pinholster*, 131 S Ct at 1388.

259 See, for example, Wiseman, 53 BC L Rev at 968–71 (cited in note 11) (showing how *Pinholster* has changed the evidentiary demands that federal habeas courts place on their state counterparts).

260 Id at 972. A different issue is presented if a petitioner seeks factual development in the state court and is denied.

261 *Coleman*, 501 US at 729.

262 See *Beard v Kindler*, 130 S Ct 612, 618 (2009) (holding that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review").

263 William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv L Rev 781, 782 (2006). See also William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 Geo Wash L Rev 1265, 1274 (1999) (arguing that criminal-procedure rules "[act] as a tax, a mechanism for making some activities more expensive relative to their substitutes").

264 Stuntz, 119 Harv L Rev at 783 (cited in note 263). See also William J. Stuntz, *Race, Class, and Drugs*, 98 Colum L Rev 1795, 1819–24 (1998) (developing the perverse-effects argument in respect to the Fourth Amendment).

tute. The taxed activity here is careful adjudication of constitutional criminal-procedure issues. The obvious and readily available substitute is less attentive adjudication. *Richter* and *Pinholster*, that is, are subsidies for constitutional slovenliness.

In a sense, the two-track model's incentive effects stand in opposition to the incentive effects that Stuntz inveighed against. But it is important to see that the two sets of incentives (those identified in Stuntz's path-marking work and those elaborated here) do not offset each other. Stuntz argued that the response to Warren Court criminal-procedure rules was greater punitiveness in criminal legislation and sentencing.[265] But the inflationary dynamic of criminal penalties and sentencing has already occurred: the operation of two-track habeas today does nothing to mitigate the "pathological" punitiveness to which Stuntz objected for the simple reason that its effects occur only *after* state legislatures have ramped up the scope and weight of criminal law.[266] Hence, it seems likely that two-track habeas will exacerbate overcriminalization and punitive sentencing policies by making convictions easier to obtain.

Of course, this assumes feedback is indeed transmitted between state and federal judiciaries via habeas relief. But this requires "that the low habeas grant rate [ ] reflects the effective deterrence of constitutional violations by the threat of habeas review."[267] It may instead be, as Hoffmann and King suggest, that most sentences are too short to allow habeas review, that defendants waive access to collateral relief in plea bargains, that state-court evidentiary records are unlikely to support Sixth Amendment relief, and that federal intervention is too "infrequent" to have any deterrent effect.[268] These arguments, however, do not undermine the possibility of perverse feedback effects. To the contrary, the first two points made by Hoffmann and King in fact may reflect state courts' efforts to *avoid* federal habeas review by

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[265] See Stuntz, 119 Harv L Rev at 802 (cited in note 263) (explaining how constitutional criminal procedure has "encourage[d] legislatures to expand criminal codes and to enact tougher sentencing rules").

[266] See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 505 (2001).

[267] Hoffmann and King, 84 NYU L Rev at 810 (cited in note 7).

[268] Id at 810–11. Hoffmann and King are not entirely consistent on this point. They elsewhere argue that wholesale reform of federal habeas, which they propose, might tempt states into "reducing or eliminating their own postconviction review procedures." Id at 835. In this passage, Hoffmann and King suggest that federal habeas has a deterrence effect in regard to state procedural safeguards. This seems in tension with their skepticism elsewhere of deterrence effects.

awarding shorter sentences and encouraging plea-bargained waivers. They are consistent, that is, with the existence of feedback effects.

Their last two points are also consistent with the perverse feedback effects I have identified. Scantier evidentiary records, summary decisions, and low rates of relief are all consequences of the specific contours of two-track habeas. That is, they might reflect strategies deployed by state judges to minimize the tax imposed by federal habeas review by shifting toward less observable ways so as to continue dubiously constitutional modalities of criminal adjudication. They are possible evidence of efforts to vitiate habeas's substance if not evade it entirely.

Sentinel effects, in sum, provide little justification for the two-track-habeas model. Rather, attention to how the incentive effects of postconviction review are distributed suggests that the model has undesirable, even perverse, social-welfare effects.

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Two kinds of feedback mechanisms can be posited as justifications for two-track habeas. A moral hazard theory would justify the bifurcated structure of the current doctrine. A sentinel-effect theory would not. The empirical presuppositions of moral hazard theory, however, are not satisfied. And attention to sentinel effects reveals a potential for perverse consequences given prevailing rules. No less than sorting theories, theories based on feedback loops provide no compelling normative warrant for the doctrinal status quo.

D. Habeas and the Distribution of Constitutional Fault

A third possible account of the two-track model of habeas focuses on the role of fault as a key to constitutional remedies. On this view, two-track habeas is a mechanism to identify the tranche of cases in which there is a large asymmetry in fault between the petitioner and the state. Only by demonstrating his or her own exceptional blamelessness (in Track Two) or the exceptional blameworthiness of the state (in Track One) can a petitioner succeed in securing relief from a federal habeas court. On this account, postconviction jurisprudence has moved into alignment with its remedial kin—the law of constitutional tort.

1. Fault as lodestar.

A threshold reason to take fault seriously as a key to understanding the two-track model of habeas is the organizing role that it plays in other domains of constitutional remedial doctrine. With the exception of municipal liability,[269] the absolute immunity of states and state agencies[270] means that a constitutional-tort plaintiff must sue state officials in their individual capacities in order to secure money damages based on a constitutional tort.[271] Officials, however, are "protected by qualified immunity, a fault-based standard approximating negligence as to illegality."[272] Over time, the liability rule has gone "well beyond shielding reasonable error" to demand a showing akin to "gross negligence."[273] Fault terminology also leaks into the Fourth Amendment context, in which the invalidity of a warrant no longer requires exclusion unless an officer acts with "deliberate, reckless, or grossly negligent conduct" or with "recurring or systemic negligence."[274] Hence, when a police officer violates a constitutional norm that is minted by the Court only after the relevant conduct, the Court has rejected the remedy of exclusion, intimating that the officer is not to blame.[275]

In perhaps the most influential work on constitutional tort, Professor John Jeffries has suggested that the centrality of fault is best explained in terms of a "noninstrumental conception" of corrective justice, according to which "fault supplies [a justifying] moral dimension" for the "restorative transfer from wrongdoer to victim."[276] Much the same dynamic has been identified in the Fourth Amendment exclusionary rule context.[277]

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[269] See *Monell v Department of Social Services of the City of New York*, 436 US 658, 701 (1978) (holding that municipalities can be sued under 42 USC § 1983); *Owen v City of Independence*, 445 US 622, 638 (1980) (imposing strict liability on municipalities). But see *City of Newport v Fact Concerts, Inc*, 453 US 247, 271 (1981) (holding that municipalities are absolutely immune from punitive damages).

[270] See *Will v Michigan Department of State Police*, 491 US 58, 65–66, 71 (1989).

[271] See *Harlow v Fitzgerald*, 457 US 800, 807–08, 815 (1982).

[272] Jeffries, 99 Va L Rev at 208 (cited in note 30).

[273] Id at 258 ("Whatever the label, qualified immunity has evolved toward an overly legalistic and therefore overly protective shield against liability for constitutional torts.").

[274] *Herring v United States*, 129 S Ct 695, 702 (2009); *United States v Leon*, 468 US 897, 913 (1984) (recognizing a good faith exception to Fourth Amendment exclusionary rule when officers reasonably rely on a faulty warrant).

[275] See *Davis v United States*, 131 S Ct 2419, 2423–24 (2011).

[276] John C. Jeffries Jr, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 Mich L Rev 82, 93–95 (1989).

[277] See, for example, Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 Colum L Rev 670, 706 (2011) (suggesting the Court's

At first blush, the concept of fault seems to run substantially into the concept of egregious constitutional error discussed earlier in this Part. But they are not quite the same. Fault, unlike error, is a relational concept. Rather than being measured against a baseline of constitutional compliance, fault contrasts the blameworthiness of the state actor and the blamelessness (*vel non*) of the criminal defendant turned habeas petitioner. It also provides a normative foundation for a "restorative transfer." As I use the term here, fault therefore implies an asymmetrical relationship between the petitioner and the state that yields a distinctive normative evaluation and recommendation. Such an asymmetry is wanting when a grievous constitutional error is made, but a petitioner nevertheless egregiously fails to press and seek timely judicial consideration of that error.

Fault, again as I will use the term, can also be established with a greater variety of tools than a mere showing of one-sided egregious constitutional error. Most pertinent here, it can be established by showing an ordinary error coupled with an exceptional degree of blamelessness on the petitioner's part, as well as by pointing to an exceptionally culpable fumble by the state.

To a startling degree, this symmetrical, moralized conception of fault fits well with the observed doctrinal contours of two-track habeas just as it fits the law of constitutional torts and (increasingly) the operation of the Fourth Amendment exclusionary rule. To begin with, within Track One it is tolerably clear that a petitioner cannot secure relief without a showing of extraordinary fault—one might even say "deliberate, reckless, or grossly negligent conduct"[278]—on the part of a state court. The alignment of Track One with a conception of fault drawn from the constitutional-tort context is amplified by the tailored scope of the habeas court's inquiry: after AEDPA as modified by *Pinholster*, the federal habeas court is constrained not only to the universe of Supreme Court cases that obtained at the precise moment at which a state court rendered the relevant judgment, but also to the four corners of the record before that court. This is so however powerful the petitioner's reasons for omitting evidence, and however compelling that evidence might be. It hardly makes sense to impose these limitations on a federal court in searching for constitutional error or innocence, or seeking to optimize the state

impetus for "conceiving of the exclusionary rule as a remedy premised upon fault and desert" derives from constitutional-tort doctrine).

[278] *Herring*, 129 S Ct at 702.

court's incentives. To the contrary, a leading economic theory of appellate review points out that it is precisely the fact that appeals may select for "the subset of cases in which errors were more probably made" and may allow appellants to flag those errors that makes such second opinions worthwhile.[279] The observed limitations on habeas relief, though, comfortably fit with the judicial labor of winnowing out extraordinarily wrongful state-court decisions.[280]

Fault also helps explain the asymmetric treatment of litigation error on the part of petitioners and the state within Track One. For example, whereas state miscalculations of AEDPA's complex timeliness rule are treated with leniency,[281] petitioner and defense-counsel errors (such as mistakenly filing in federal rather than state court first) are viewed with Spartan disdain.[282] This is so even if most petitioner errors are more fairly described as the errors of (state-selected and state-funded) counsel.[283] Yet little short of abandonment by counsel seems sufficient to warrant extenuation of Track One's procedural rigors.[284]

At least superficially, this distribution of equitable relief from litigation error seems perverse. The state, after all, is the repeat player, and so is better able to internalize knowledge of the complexities of habeas law. Habeas petitioners, by contrast, are typically uncounseled, often one-shot players (at least outside the capital context, in which counsel is more often available); they are more likely to be subject to cognitive and epistemic constraints than the state's lawyers. To extenuate the former, but not the latter, makes sense only if the habeas court's ultimate touchstone is the presence of extraordinary fault by the state.

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279 Shavell, 24 J Legal Stud at 381 (cited in note 254).

280 After *Martinez* and *Trevino*, this includes both state trial courts and state collateral review.

281 See *Day*, 547 US at 208–09. Deliberate state forfeitures, by contrast, are subject to a more unforgiving rule. See *Wood v Milyard*, 132 S Ct 1826, 1830 (2012).

282 See *Duncan v Walker*, 533 US 167, 180 (2001) (emphasizing the need to incentivize petitioner compliance with AEDPA's statute of limitations). See also *Pace v DiGuglielmo*, 544 US 408, 427 (2005) (Stevens dissenting).

283 Federal courts have systematically ignored the paradox that results from attributing state-funded lawyers' errors to petitioners when those errors are more plausibly traced back to (under-)funding decisions by state legislatures. For a rare instance of judicial attention to that question, see *Dunphy v McKee*, 134 F3d 1297, 1299 (7th Cir 1998).

284 See *Maples*, 132 S Ct at 922 (stressing that mere negligence by defense counsel will not excuse a procedural default). For a criticism of the pinched view of equitable discretion evinced in *Maples*, see Adam Liptak, *Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes?*, 110 Mich L Rev 875, 885 (2012) ("Agency principles can only do so much work, and at some point equity must matter, too.").

A related conception of fault animates Track Two. Here again, an exceptional measure of blamelessness—in the form of concatenated error and the seriatim failure to address a petitioner's constitutional claims—opens the door to serious consideration of the state's omission or error, which need not be so grave in magnitude. To be sure, concatenated error can occur without any fault on the state's part.[285] But there Track Two petitioners must in effect again demonstrate a large gap between their own blamelessness and the state's conduct. In Professor Anthony Amsterdam's words, they must show conformity with "a standard that can only be described as the squeaky clean test."[286] Even having navigated the serial showings necessary to enter Track Two, a petitioner must still demonstrate some degree of fault on a state court's part. At a minimum, the petitioner must still point to a constitutional error[287] and then overcome both the harmless error standard[288] and the general rule against retroactive application of constitutional rules.[289] Hence, Track Two might be understood to treat the extraordinary blamelessness of the petitioner as a substitute for the supernumerary demand for state fault that is levied in Track One.

In short, the Court has imported a specific conception of fault-based limitations in suits against the state by habeas petitioners from the context of suits against the state by constitutional-tort plaintiffs. The pivotal concept of fault, to be sure, is not clearly stated in the jurisprudence and is ambiguous in its precise application. Nevertheless, it can be understood to pick out instances of egregious noncompliance with a relevant rule or standard, as well

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[285] Justice Alito makes this point in his *Maples* concurrence, in which he notes that gross attorney error can occur regardless of the specifics of the state's scheme for appointing counsel to indigent defendants. *Maples*, 132 S Ct at 928–29 (Alito concurring).

[286] Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law, Nov 22, 2004*, 33 Hofstra L Rev 403, 411 (2004).

[287] See 28 USC §§ 2243, 2254(a) (predicating habeas relief on a violation of the US Constitution, laws, or treaties).

[288] See *Brecht v Abrahamson*, 507 US 619, 637 (1993). *Strickland* and *Brady* claims, though, already require a showing of prejudice in order to obtain relief, making *Brecht* less significant.

[289] Formally, the nonretroactivity rule of the plurality in *Teague v Lane*, 489 US 288, 310 (1989) (plurality), would apply even after a petitioner passes through the Track Two gateways to reach the merits. For an example of the stringency with which *Teague* is applied, see *Horn v Banks*, 536 US 266, 271 (2002) (holding that *Teague* can apply even when the state court ignores that rule).

as other instances in which there is a large gap in the blameworthiness of the petitioner and the state, while leaving open how to calibrate egregiousness and how to treat cases of bilateral fault.

2. Why fault?

Why, though, should this particular conception of fault provide a lodestar to guide the doctrinal development of postconviction habeas? After all, there is no reason that constitutional-tort damages, the application of the exclusionary rule, and habeas relief should all be geared to the same standard. Moreover, fault is hardly a unitary concept, and it is certainly possible to imagine other, less normative but efficiency-oriented ways of conceptualizing that term.[290]

A threshold possibility might build on Professor Richard Fallon's "Equilibration Thesis," which posits that "courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies."[291] With the exception of some species of equitably titrated injunctive relief, the results of my analysis suggest that the Court seems to have installed a transsubstantive rule of fault on remedies that conjoins constitutional-tort rules, the exclusionary rule, and habeas.[292] Private plaintiffs seeking divergent remedies—whether it be the exclusion of inculpatory evidence, money damages, or vacatur of a state-court conviction—must confront and overcome the same bar to liability.

But if this account goes long on consistency, it is not clear what else recommends it. Perhaps habeas, suppression, and money damages are pure substitutes for a small domain of Fourth Amendment violations, but they do not generally operate as natural alternatives. There is hence no reason to enforce remedial

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290 For a brief but illuminating survey of some of the legal issues related to defining fault in another legal context, contract law, see generally Omri Ben-Shahar and Ariel Porat, *Foreword: Fault in American Contract Law*, 107 Mich L Rev 1341 (2009).

291 Richard H. Fallon Jr, *The Linkage between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 Va L Rev 633, 637 (2006).

292 I have argued elsewhere that transsubstantive spillover effects have an important causal role in doctrinal development in public law. See generally Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 S Ct Rev 225.

conformity to limit litigant gamesmanship.[293] The reasons commonly adduced for a fault-centered jurisprudence of constitutional-tort law cannot be straightforwardly translated over to the habeas context. Qualified immunity has been justified, for example, by the concern that courts would otherwise hesitate before expanding constitutional rights.[294] The same justification does not apply to the habeas context. Long before the development of two-track habeas, the Court in *Teague v Lane*[295] imposed a nonretroactivity rule on federal collateral review that obviates any friction on doctrinal evolution by imposing, in effect, a fault standard on state courts.[296] *Teague*'s nonretroactivity rule is an early incarnation of fault's role in habeas. And *Teague* could have been the limit of fault's relevance. As Justice Stevens emphasized in his plurality opinion in *Terry Williams*, AEDPA's standard of review for legal error could quite plausibly have been read as codifying the *Teague* rule.[297] Of course, Justice Stevens did not command a majority in *Terry Williams*. Instead, the more stringent reading of the statute initially adopted by Justice O'Connor has been entrenched and even reinforced by *Richter*.[298] The ensuing overlay of two-track habeas on *Teague* arguably adds little marginal insulation that might tend to promote or enable legal change.[299] To the contrary, two-track habeas may have a net retarding effect on doctrinal efflorescence by limiting opportunities for legal development to the context of direct review of state supreme court judgments[300]—a context, of course, in which not all constitutional errors will be in evidence.[301]

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293 The problem of gamesmanship animates the Court's treatment of the overlap between habeas and 42 USC § 1983. See, for example, *Heck v Humphrey*, 512 US 477, 481–82 (1994).

294 See John C. Jeffries Jr, *The Right-Remedy Gap in Constitutional Law*, 109 Yale L J 87, 98–100 (1999).

295 489 US 288 (1989).

296 Id at 288 (plurality).

297 See *Terry Williams*, 529 US at 384–90 & n 14 (plurality).

298 See text accompanying notes 68–90.

299 This is quite aside from the question of whether the Roberts Court seeks breathing room to expand criminal-procedure entitlements—a supposition that might reasonably be doubted.

300 The Court could begin accepting more certiorari petitions from state postconviction judgments. See generally Giovanna Shay and Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 Wm & Mary L Rev 211 (2008). This has not happened yet.

301 Both doctrines provide for resolution of a case in the state's favor without reaching a ruling on the precise contours of the underlying law. See Stephen I. Vladeck, *AEDPA,*

Nor is it possible to transpose the other leading account of qualified immunity to the habeas context. This account insists on the need to liberate state officials to "act upon their own free, unbiased convictions, uninfluenced by any apprehensions."[302] This account rests on the observation that officials typically do not internalize all positive externalities from their decisions, and a liability rule forcing them to internalize negative externalities would create an undesirable asymmetry in incentives and so lower levels of desirable government action.[303] There is no parallel asymmetry, though, in the habeas context. Judges do not internalize the cost of habeas relief (as opposed to the costs of habeas *adjudication*) in the same way they might internalize money-damages remedies. Even a strict liability rule on collateral review would engender no asymmetrical incentives concern. Hence, the reasons normally offered for limiting the availability of tort damages for constitutional violations do not easily translate to the habeas context.

I therefore conclude that it is not possible to adduce a decisive explanation for the salience of fault in organizing the two-track model of habeas beyond the aesthetic appeal of uniformity across divergent constitutional remedies. Nevertheless, in the absence of more secure evidence, I will offer a hypothesis. A dominant characteristic of the American criminal-justice system since the 1970s has been its engorging volume.[304] Between 1972 and 2012, the US prison population grew by 705 percent.[305] Whereas "[i]n the early 1980s most state felony offenders served, on average, sixteen to seventeen months," by 2006 the "average felony sentence in state court exceeded four years."[306] This development is

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Saucier*, and the Stronger Case for Rights-First Constitutional Adjudication*, 32 Seattle U L Rev 595, 598–601 (2009).

[302] *Filarsky v Delia*, 132 S Ct 1657, 1661–62 (2012) (citation omitted).

[303] See Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 59–81 (Yale 1983). See also Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 Wash L Rev 635, 638–40 (1982) (extending the same asymmetric-incentives argument to the Fourth Amendment exclusionary rule).

[304] See generally Justice Policy Institute, *The Punishing Decade: Prison and Jail Estimates at the Millennium* (May 2000), online at http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf (visited May 21, 2014).

[305] Pew Center on the States, *Prison Count 2010: State Population Declines for the First Time in 38 Years* *1 (Apr 2010), online at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/Prison_Count_2010.pdf (visited May 21, 2014).

[306] Anne R. Traum, *Mass Incarceration at Sentencing*, 64 Hastings L J 423, 430 n 38 (2013).

unmatched in other industrialized nations.[307] It is a unique, and historically novel, political economy of mass incarceration.

Habeas provides no obvious solution for the pathologies of mass incarceration because of the prevalence of plea bargaining and the inability of many prisoners to access postconviction review before being released.[308] But that does not mean mass incarceration has no effect on federal postconviction institutions. Rather, the new political economy of penality imposes two strains on federal postconviction relief that together yield a vice-like squeeze. First, increases in the numbers of prisoners serving sentences long enough to enable them to seek habeas relief seems to have outpaced the ability of federal courts to maintain the same quality and quantity of per capita attention. As a result, resource constraints pinch with increasing vigor over time. Second, the growing volume of criminal defendants—many indigent[309]—has not been accompanied by a commensurate growth in the nation's fiscal commitments to effective indigent defense representation. To the contrary, overwhelming evidence suggests that fiscal provision for indigent-defense counsel has failed to keep up with demand.[310] Hence, the dynamic that dilutes the capacity of the federal courts to give individualized attention to constitutional violations in discrete cases also increases the frequency of Sixth Amendment violations. Demand for postconviction relief correspondingly inflates as supply dwindles.

The increased cost of searching for and identifying errors—to say nothing of the political costs of granting relief—places immense new strains on the federal judiciary. There is much greater pressure to tolerate a lower threshold of effective counsel lest the

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307 See Roy Walmsley, *World Prison Population List (Ninth Edition)* *1 (International Centre for Prison Studies July 2011), online at http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf (visited May 21, 2014) ("The United States has the highest prison population rate in the world, 743 per 100,000."); Marc Mauer, *Race to Incarcerate* 15–20, figs 2-1, 2-2 (New Press 1999).

308 See Traum, 64 Hastings L J at 446–47 (cited in note 306).

309 A Department of Justice study found that 82 percent of those charged with a felony offense in large state courts received appointed counsel by the end of their case. See Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* *1 (Department of Justice Nov 2000), online at http://www.bjs.gov/content/pub/pdf/dccc.pdf (visited May 21, 2014). Increasing income inequality means this figure is likely higher now. There is a tight bilateral causal relationship, moreover, between exposure to the criminal-justice system and poverty. See Bruce Western, *Punishment and Inequality in America* 11–33 (Russell Sage Foundation 2006).

310 See note 6.

number of successful constitutional challenges prove either systemically burdensome or politically unsustainable. The overload also inculcates skepticism: "He who must search a haystack for a needle," noted Justice Robert Jackson long ago, "is likely to end up with the attitude that the needle is not worth the search."[311] Over time though, the haystack has taken on dimensions Jackson could hardly have conjured.

Conservative or liberal, justices sitting in the apex court may well be aware of the acute systemic pressures these countervailing forces impose on the federal judiciary. Conservative or liberal, the justices' motivations more than likely "are shaped in part by a sense of institutional duty."[312] If this hypothesis of institutional identification is plausible, it may be that justices of all ideological stripes perceive a need to converge on some tool for rationing habeas in an era of waxing demand and waning supply. My hypothesis is that fault has played that role. Fault, as a concept drawn from corrective justice, provides an implicit intellectual framework that is, at least on its face, somewhat orthogonal to otherwise powerful liberal and conservative policy preferences about the states' criminal-justice systems.[313] Reliance on a concept of fault obscures the extent to which it is the federal judiciary's institutional compulsions that are driving the narrowing gyre of habeas relief notwithstanding the eroding institutions of state criminal-justice administration.[314] It also borrows from an area of law, constitutional tort, perceived as contiguous to habeas, and hence ripe for doctrinal transplantation.[315] Fault therefore provides a useful focal point for channeling concerns about institutional overload into doctrinal limits on habeas relief.

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311 *Brown v Allen*, 344 US 443, 537 (1953) (Jackson concurring).

312 Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 Am Polit Sci Rev 321, 323 (2007).

313 See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U Toronto L J 349, 349 (2002) ("Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another."). This formulation leaves open the degree of fault required to trigger a duty of rectification—which, of course, is the battlefield on which the scope of modern habeas is decided.

314 Conversely, however, *expansions* of federal judicial power are "effected by acts of Congress." Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* 273 (Princeton 2012). The distinctive, asymmetrical politics of jurisdictional expansion and contraction is an interesting topic that warrants its own separate treatment beyond my scope here.

315 See Joseph L. Hoffmann and William J. Stuntz, *Habeas after the Revolution*, 1993 S Ct Rev 65, 66 ("Habeas issues have thus been seen as 'of a kind' with issues that arise in Section 1983 litigation, the immunity of state governments and officials, *Younger v Harris* abstention, and the Eleventh Amendment.").

But this is not to say that fault concepts are not always uncontroversial among the justices, or that convergence on a fault standard precludes ideologically tinged disagreement. When the Court began importing inchoate versions of the fault concept into habeas jurisprudence in the late 1970s in cases such as *Wainwright v Sykes*,[316] fault was a divisive conceptual borrowing. Judicial restriction of habeas relief then reflected the same dynamics of conservative political pressure that were catalyzing the Court's larger punitive turn in criminal justice.[317]

In contrast, the ideological consensus on fault that I have posited emerges somewhat later, at a time at which the docket pressures instigated by mass incarceration were becoming clearer to the Court. By the time the two-track model of habeas had developed, moreover, fault had also crystallized as the dominant and broadly accepted lodestar in the constitutional-tort context.[318] It was only more slowly, with the numbing caress of time's passage, that fault filtered into habeas jurisprudence's mainstream and then calcified as an intellectual touchstone that could transcend ideological divisions in order to resolve, at least on the surface, the rationing problem fostered by mass incarceration.

Of course, agreement on a general principle of fault, at least as defined as egregious noncompliance with standing rules or norms, does not preclude sharp, ideological differences on doctrinal mechanics. Nevertheless, the vocabulary and conceptual baggage of fault might be not only a point of consensus, but also an arena for contestation and debate using a shared, nonideological vocabulary. Indeed, it may be a virtue of a fault-oriented framework that its foundational concept is highly plastic and can be tweaked or perhaps even reimagined without shedding the vocabulary of previous cases.

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316 433 US 72 (1977).

317 Empirical work by Katherine Beckett demonstrates that shifting public and political attitudes toward crime from the 1960s onward were consequences of "the definitional activities of state actors and the mass media"—beginning with Barry Goldwater's campaign focus on street crime—rather than a response to increasing levels of criminality. Katherine Beckett, *Setting the Public Agenda: "Street Crime" and Drug Use in American Politics*, 41 Soc Probs 425, 426–27 (1994). See generally Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (Oxford 1997). Neither Beckett's article nor her book, both of which are otherwise insightful and rewarding, addresses the role of the Rehnquist and Burger Courts. But it seems plausible to posit that those bodies are among the "state actors" that kindled newly punitive public attitudes.

318 See Jeffries, 99 Va L Rev at 250–58 (cited in note 30) (recounting doctrinal development). The earliest uses of fault in constitutional-tort doctrine predate *Sykes*. See, for example, *Wood v Strickland*, 420 US 308, 322 (1975).

One might hence gloss the debates about the state's culpability in *Martinez* and *Trevino*, or the appropriate demand on defense counsel in *Maples* and *Holland*, as part of an ongoing contestation over the meaning of fault. That the Court can continue these debates within the delimited vocabulary of fault suggests that the latter concept at present succeeds in providing a bridge across otherwise recalcitrant ideological divides—a common ground on which to pursue or to divide over when self-serving institutional interests should trump the federal courts' care for individuals' constitutional entitlement.

This hypothesis, alas, may want for many testable predictions any time soon. One exception, though, concerns the extension of the *Martinez* rule to issues other than the Sixth Amendment's promise of effective assistance of counsel. For example, in October 2013, the Ninth Circuit Court of Appeals held that *Martinez* does not extend to claims that the state failed to disclose exculpatory evidence pursuant to *Brady v Maryland*[319] over a powerful dissent by Judge William Fletcher.[320] Yet the overall fault-oriented structure of habeas jurisprudence suggests that *Brady* claims are an even stronger candidate for exculpating cause than *Strickland* claims: by definition, an undiscovered *Brady* violation is not one that a petitioner can reasonably be blamed for having omitted.

Zooming out, the picture may be less amenable to interpretation. Recent years have witnessed a slight dip in national incarceration rates.[321] It is thus possible that the conditions that produced two-track habeas will recede within the imaginable future. But there is no reason to think that the two-track model of habeas will deliquesce in lockstep. Doctrinal and analytic structures can outlive their precipitating causes as a result of institutional inertia and path-dependency dynamics.[322] These forces are exacerbated in the judicial context by the institutional tic of stare decisis. Even absent its natal conditions, therefore, a bifurcated

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[319] 373 US 83 (1963).

[320] See *Hunton v Sinclair*, 2013 WL 5583975, *1 (9th Cir). See also *Hodges v Colson*, 727 F3d 517, 540 (6th Cir 2013) (intimating that *Martinez* and *Trevino* do not extend beyond the Sixth Amendment context).

[321] See Lauren E. Glaze and Erika Parks, *Correctional Populations in the United States, 2011* *1 (Department of Justice Nov 12, 2012), online at www.bjs.gov/content/pub/pdf/cpus11.pdf (visited Dec 3, 2013) (noting a three-year decline in the correctional population).

[322] See Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* 17–18 (Princeton 2004).

system of habeas may endure as a stable "jurisprudential regime" for years to come.[323]

E. Summary

It is tempting to write off the Roberts Court's approach to habeas cases as merely another instance of the diffuse, reflective judicial hostility toward criminal defendants that has infused the apex tribunal's jurisprudence since the Burger Court.[324] The temptation, though, should be resisted. The transformation of habeas into its current bifurcated structure is the work not of an ideologically coherent coalition of justices, but of ideologically heterogeneous supermajorities. Accordingly, it is necessary to seek an explanation that works across ideological lines. Federalism, I have suggested, is a poor candidate in this regard. Instead, I have developed three potential explanations of two-track habeas and suggested that one matches observed outcomes better than the other two. First, habeas does not function well as a sorting mechanism notwithstanding the obvious screening effects it has. Second, the two-track model of habeas is poorly explained in terms of its incentive effects on state-court actors. Functionalist explanations, that is, fall short.

Instead, perhaps the most promising explanation of two-track habeas centers on the concept of fault. The doctrine selects for a narrow class of cases in which there is an exceptional asymmetry between the blameworthiness of the petitioner and the blameworthiness of the state. In Track One, petitioners prevail by demonstrating exceptional state fault; in Track Two, they prevail by showing their own extraordinary blamelessness. This normative economy of habeas relief, I have suggested, is perhaps best understood as a way of titrating habeas relief in an era of massive docket pressures.

III. THE AGENDAS OF HABEAS REFORM

Postconviction-habeas scholarship today, by and large, assumes there is merit in reform and then debates what direction

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[323] Mark J. Richards and Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 Am Polit Sci Rev 305, 308 (2002) (defining "jurisprudential regime" as "a key precedent, or a set of related precedents, that structures the way in which the Supreme Court justices evaluate key elements of cases in arriving at decisions in a particular legal area").

[324] See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich L Rev 2466, 2467–68 & nn 5–12 (1996).

such reform should take. That debate, however, has occurred in the absence of any serious accounting of current doctrinal formations of the sort offered in Part II. In effect, reformist scholarship takes the remedial scarcity of habeas as a given, skips over the doctrinal predicates of such scarcity, and then offers reform proposals that account neither for the causal forces that have shaped the doctrine nor for the policy aims the law currently promotes. There is, in consequence, a touch of *Hamlet* without the prince: Scholars give no reason to take the doctrinal status quo as a given, and yet do. Rather than asking what habeas is for, or what it ought to be, they ask what habeas can be in light of the transient political preferences of the day. The resulting inquiry is perhaps less telling of habeas's potential than it is of scholars' pinched political imaginations.

This Part breaks from the consensus approach in the scholarship by considering the implications of the two-track model and its fault-based logic for one leading habeas reform proposal, which has been eloquently advanced by Professors Joseph Hoffmann and Nancy King. I focus on their position not because it is new—in important ways it largely echoes and updates positions taken by an earlier generation of habeas commentators such as Judge Henry Friendly and Professor Paul Bator—but because it is the most eloquent and cogent formulation among the recent calls to restrictively reimagine habeas. Taking doctrine seriously, I suggest, demonstrates the fragility of their proposals. Rather than adding to the overstuffed catalog of ambitious reform proposals likely to gather dust on law-library shelves, I offer instead some reasons to think that the two-track model of habeas as it now exists can be useful as a discrete instrument within the much larger project of reforming larger criminal law institutions in ways that improve social welfare.

In this final Part of the Article, I should flag here, I move from the descriptive to the normative. I identify the possibility of larger criminal-justice reform with the potential for net social welfare gains. By positing a connection between habeas and a larger reformist project, I plainly endorse the desirability of that project, although I do not fully defend its substantive merits here. Readers should therefore be aware that this last Part reflects my own normative views to an extent that the Article until now has not.

A. The Limits of Habeas Reform

In a trenchantly argued article and book, Joseph Hoffmann and Nancy King have developed a powerful and radical reformist position. Building on Professor King's impressive 2009 empirical study of federal habeas litigation, they predict that "habeas will . . . be inaccessible to the vast majority of state criminal defendants" because of plea-bargained waivers and short sentences and that even for prisoners with access to federal collateral review, the inadequate development of claims in state court will doom them to procedural default.[325] Taking this bleak landscape as a given—and without considering whether a different standard of relief or more generous evidentiary rule might change outcomes[326]—Hoffmann and King conclude that noncapital habeas should be scrapped except for "clear and convincing" claims of actual innocence and new constitutional rules made retroactive on retroactive review.[327] "Whatever can be saved by cutting back on habeas review," they suggest, should be allocated to funding indigent defense.[328]

Comparison with the two-track model of habeas brings into focus an important set of puzzles about the Hoffmann-King proposal.[329] I have argued that the two-track model of habeas is best understood as a means of rationing federal court time and labor in a fashion that cuts across ideological lines. In effect, what Hoffmann and King propose is simply a new rationing device. Under their proposal, scarce federal judicial attention and remedial power would be channeled toward cases of actual innocence rather than according to concepts of fault. Their proposal, therefore, has strong normative credentials to the extent that actual innocence is a more compelling trigger for habeas relief than fault. It

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325 Hoffmann and King, 84 NYU L Rev at 814 (cited in note 7).

326 I am skeptical that this assumption is a defensible one. Given the large body of evidence demonstrating pervasive constitutional violations in state criminal-justice systems, I am dubious that the currently stringent rules for titrating habeas relief should be taken for granted. *A fortiori*, I am highly skeptical that it is appropriate to conclude that the low rate of relief (which is endogenous to those legal standards) is a justification for the abolition of most habeas relief.

327 Hoffmann and King, 84 NYU L Rev at 820–21 (cited in note 7).

328 Id at 823–33.

329 For persuasive criticism of this proposal, see generally Primus, Review, 110 Mich L Rev 887 (cited in note 9); Blume, Johnson, and Weyble, 96 Cornell L Rev 435 (cited in note 9); Lee Kovarsky, Review, *Habeas Verité*, 47 Tulsa L Rev 13 (2011). I do not repeat the powerful criticisms developed by these commentators, criticisms with which I am largely in accord.

also has an appealing political logic, insofar as it mitigates habeas's public relations problem as a device that avails the cunning, not the worthy.[330]

Yet once it is apparent that the central problem habeas must solve is one of rationing—and that two-track habeas is already doing one sort of rationing—the Hoffmann-King proposal begets more questions than answers. To begin with, two of the reasons Hoffmann and King adduce for the disutility of federal habeas themselves mitigate the rationing problem. Abbreviating sentences and securing validly bargained-for waivers may constitute ways of winnowing the pool of state defendants down to a subpopulation that will benefit most from habeas review.[331] Assuming, however, that such winnowing through changed sentencing practice proves insufficient, then Hoffmann and King's argument boils down to taking for granted the cohort of procedural bars to habeas consideration that preclude relief in most cases and refusing to consider whether any should be relaxed or changed. In harmony with this strategy, King has argued in recent work that *Martinez* (and, presumably, related Track Two cases) will make little difference.[332]

As an initial matter, it is not clear why the two-track model of habeas should be accepted as a given, or accepted as entrenched beyond modification. After all, it is not the work of Congress, but that of a transient group of federal judges. It is also hardly beyond reproach. To the contrary, as Part II demonstrated, the two-track model fails to further central functions of an effective postconviction-review system—preventing serious constitutional error, freeing the innocent, and creating desirable incentives for state actors. Instead, it sits on an arbitraged notion of corrective justice morality that fits awkwardly with the history and purposes of the habeas writ. There are ample ways in which scholars and commentators can (and do) argue for mitigating reforms. Indeed, recent Track Two case law demonstrates that the Court's chosen vocabulary of fault allows for a surprising degree of internal debate and reform. Hoffmann and King supply no reason for simply abandoning this doctrinally oriented reformist project, or for

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330 See text accompanying notes 219–21.

331 This assumes, of course, defendants entering plea bargains have "good information" enabling them to "rationally forecas[t] probabilities" of conviction and sentences. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal L Rev 1117, 1126 (2011). I leave aside the question whether further reforms are warranted to assure that this demanding empirical condition is satisfied.

332 See King, 122 Yale L J at 2449–55 (cited in note 102).

thinking that its expected payoffs are substantially less than the costly and risky alternative they propose.

Alternatively, perhaps Hoffmann and King's argument for major reform relies on an implicit *institutional* comparison: it might be that the Court is unlikely to change course on habeas, while Congress might still enact reform if "extraordinary political commitment" were exerted.[333] In effect Hoffmann and King have given up on the Court and rest their hopes on Congress.

There are three problems with this notion. First, as Part I showed, the two-track model—like much of habeas's evolution—is largely the Court's work, not Congress's. There is no reason to expect the justices to take a backseat now given the extent of their historical control over the shape of habeas doctrine. Second, there is also no clear reason to expect congressional action of the sort Hoffmann and King propose. Of late, Congress's inability to fulfill even basic functions necessary to sustain the national public good has been painfully clear. But even putting the 2013 debt ceiling and related government shutdowns aside, there is scant reason to expect Congress to move more rapidly than the courts. Empirical work comparing the ideal points of Congress and Supreme Court along a common metric finds little gap between those two institutions.[334] The increasingly conservative cast of the House of Representatives since 2007 and growing legislative gridlock make Hoffmann and King's optimism about Congress less than obviously plausible—and this is so even before one accounts for the possibility of future judicial appointments leaning to the liberal side.[335]

Finally, even if Congress were to act, the fiscal tradeoff Hoffmann and King propose would be implausible and unsustainable. Although they do not quantify the cost savings of their proposed pruning of habeas,[336] it is hardly tenable to posit that the marginal reduction in the federal budget from trimming 6.77 percent of the federal court docket will be substantial. For one thing, most

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[333] Hoffmann and King, 84 NYU L Rev at 833 (cited in note 7). They also seem to assume that any proposal must be revenue neutral to be feasible.

[334] See Michael A. Bailey, *Comparable Preference Estimates across Time and Institutions for the Court, Congress, and Presidency*, 51 Am J Polit Sci 433, 444 (2007) (presenting historical data about presidential, congressional, and judicial preferences).

[335] See Michael J. Tetter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 Wisc L Rev 1097, 1104 (noting that the 112th Congress passed only 283 bills and that this is historically quite low).

[336] See Blume, Johnson, and Weyble, 96 Cornell L Rev at 468 (cited in note 9) (making this complaint).

of the federal courts' operating costs are fixed, not variable. Shaving off even one twentieth of the docket is unlikely to make much difference. Without changing fixed costs (of operating courthouses, paying salaries, running the judiciary's administrative structure, and the like), substantial cost savings will in all probability prove a mirage. Stated otherwise, Hoffmann and King implicitly inflate the *marginal* fiscal benefit of streamlining habeas, when a fairer assessment would undermine their normative claims and proposed reforms.

Moreover, their counterproposal is politically flimsy and unlikely to survive long. Hoffmann and King propose a funding *stream* to replace a general-purpose institution. Funding streams must be reappropriated each year. They are vulnerable to diminishment each year. Hostage to legislative fortune in an era of relentless pressure toward austerity, Hoffmann and King's proposed funding would likely prove far more fragile than current habeas entitlements, which are bundled into institutional spending packages and hence less vulnerable to erosion.

But there is an even more serious problem with the proposed rehabilitation of noncapital habeas: two-track habeas currently manages the rationing problem, arguably with some degree of injustice but with no obvious systemic failures. By contrast, Hoffmann and King's alternative to the current deployment of fault as a rationing mechanism is likely to fail, producing systemic difficulties for the judiciary. To see this, notice first that their call for an innocence-centered writ is rather old hat.[337] And Hoffmann and King do not say anything convincingly about why that call has for so long been ignored. An obvious explanation is readily at hand. However normatively compelling it is, innocence cannot serve as an effectual rationing mechanism for federal habeas in the way that fault can and does. As Professor Eve Brensike Primus has observed, an innocence standard would not diminish the volume of habeas petitions filed in federal court.[338] Instead, suits presently framed around the Sixth Amendment right to effective counsel would be repackaged as actual-innocence suits. This transmigration of claims across legal forms would be worse than futile. It would raise the per capita cost of resolving cases by replacing legal inquiries into procedural compliance with "resource-

[337] See, for example, Friendly, 38 U Chi L Rev at 142–43 (cited in note 184).

[338] See Primus, Review, 110 Mich L Rev at 902–03 (cited in note 9).

intensive" questions about factual innocence.[339] Stated in terms of the signaling theory deployed in Part II, an actual-innocence threshold for relief will not create a separating equilibrium.[340] Both meritorious and meritless petitioners will file petitions asserting superficially colorable innocence claims. Rather than separating different classes of petitioners, an actual-innocence rule would likely create a pooling equilibrium. The administrative costs of adjudicating habeas would rise sharply, provoking the systemic problem that habeas doctrine, at its core, is designed to mitigate.

Finally, whereas the fault-based framework for habeas is likely to be relatively stable, an innocence-based one is unlikely to prove a durable equilibrium. The evolution of two-track habeas hints at likely judicial responses to the pooling equilibrium that Hoffmann and King's proposal would engender: By hook or by crook, the Court will construe the habeas statute to manage the ensuing toll on judges' human capital. The long-term consequence of Hoffmann and King's proposal, in short, is likely to be even greater narrowing of the criteria for relief, albeit without any necessary decrease in the volume or cost of postconviction litigation. Rather than infusing habeas with new purpose, it would confirm the most corrosive and pessimistic generalizations about the writ. In comparison to this outcome, the two-track model employed at present may indeed appear attractive.

B. Two-Track Habeas and the Reform of Criminal-Justice Institutions

Perhaps, though, habeas reform should not be isolated from the larger context of criminal-justice administration. Notwithstanding its mention in the Constitution, habeas is not a good in itself. It is an institutional feature that enables other valuable human ends (in particular, individual liberty from unlawful or unjust government confinement) to be realized. In concluding, I develop the possibility that our unreformed two-track habeas can play a role in stimulating reform in the criminal-justice institutions engendered by the usually punitive political economy of the past half century. Perhaps, that is, it is not necessary to destroy habeas in order to redeem it. Rather, it is desirable to think about

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[339] Id at 904. See also Blume, Johnson, and Weyble, 96 Cornell L Rev at 460 (cited in note 9).

[340] See text accompanying notes 182–93.

how the exercise of habeas jurisdiction, even in the straitened terms set out by the Roberts Court, fits into larger processes of social and institutional change beyond the courts.

The role of habeas is not a direct one. Hoffmann and King are surely correct that postconviction habeas is no panacea to criminal law institutions' dysfunctionalities.[341] Federal habeas is largely irrelevant, for example, to systems of misdemeanor prosecutions that comprise more than three-quarters of state criminal-justice dockets.[342] Yet federal courts evince little appetite for institutional reform. Twice in recent years, the Court has confronted nonhabeas cases starkly presenting dysfunctionalities in state criminal-justice institutions. Both times, the Court ducked substantive judgments about the state's conduct.

First, in *Boyer v Louisiana*,[343] the Court confronted a challenge to Louisiana's woefully underfunded indigent-defense funding system.[344] Although formally a Sixth Amendment speedy-trial case, Boyer's certiorari petition presented an opportunity for the Court to speak directly to the underlying funding crisis in indigent defense in the context of especially compelling facts. Instead, the Court issued a per curiam opinion (over a sharp dissent from Justices Sotomayor, Ginsburg, Breyer, and Kagan) dismissing the case on the basis of a factual finding sharply at odds with the lower court's conclusions.[345] Then, in *Connick v Thompson*,[346] the same five-justice majority overturned a damages award against a New Orleans prosecutor's office that had withheld exculpatory evidence in capital proceedings.[347] The *Thompson* ruling rejected the

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341 See Hoffmann and King, 84 NYU L Rev at 810–14 (cited in note 7). But see Primus, 98 Cal L Rev at 32–33 (cited in note 5) (arguing that habeas should be reformed as a structural remedy by requiring petitioners not just to show a discrete constitutional violation in their case, but also "evidence of a systemic violation of a constitutional right").

342 Robert C. LaFountain, et al, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* *24 (National Center for State Courts Dec 2012), online at http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx (visited May 21, 2014) (showing the breakdown of criminal-case type in 17 states). See also Alexandra Natapoff, *Misdemeanors*, 85 S Cal L Rev 1313, 1316 (2012) (identifying high rates of wrongful misdemeanor convictions).

343 133 S Ct 1702 (2013) (per curiam).

344 Id (Alito concurring). See also generally M. Isabel Medina, *Reforming Criminal Indigent Defense in Louisiana—An Introduction to the Symposium and a Brief Exploration of Criminal Indigent Defense and Its Relationship to Immigrant Indigent Defense*, 9 Loyola J Pub Int L 111 (2008) (documenting problems in Louisiana's indigent-defense system).

345 See *Boyer*, 133 S Ct at 1704, 1706 (Sotomayor dissenting) (noting that the Court was acting inconsistently with the state court's finding that most of the delay was caused by the unavailability of funds for the defenses).

346 131 S Ct 1350 (2011).

347 See id at 1355–56.

jury's finding of municipal liability on the factual ground—sharply contested by Justice Ginsburg in dissent—that the plaintiff had not shown a sufficient pattern of misconduct.[348] Even in the teeth of strong evidence of systemic breakdowns in criminal justice, that is, the Court tends to blink even without the blinding optics of habeas.

Perhaps, though, it is too much to ask courts to address institutional pathologies of the kind at work in *Boyer* head-on. Scholars have long rehearsed the limits of judicial reform capacity and counseled for chastened expectations on that front.[349] But there is an alternative. Court decisions, for example, can still provide both focal points and catalysts for larger processes of social and political movements. Supreme Court opinions, even if not effectual directly, can still generate "a political symbol that might assist others in the organizing, demanding, and resisting that is the stuff of oppositional politics."[350] A nascent literature on the Supreme Court's national agenda-setting role finds that at least some opinions indeed have an enduring "step effect," amplifying media attention on issues that would otherwise remain trapped in news epicycles.[351] In this indirect way, judicial rulings can open pathways to beneficial social change.

Habeas review arguably might still play a coordinating and a catalyzing role in respect to the larger project of criminal-justice

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348 Id at 1360. See also id at 1370–75 (Ginsburg dissenting). The *Thompson* Court's gimlet-eyed approach to evaluations of systemic constitutional violations suggests that Primus's proposal to raise the stakes of discrete habeas action by making each one systemic in scope is at least perilous. Rather than catalyzing reform, federal courts might be unwilling to make politically contentious findings of systemic harm and therefore even more inclined to deny habeas relief to individuals. For another 42 USC § 1983 case in which the Court declined to explore the existence of a systemic failure, see *Van de Kamp v Goldstein*, 129 S Ct 855, 861–62 (2009) (holding that prosecutors "involved in [ ] supervision or training or information-system management enjoy absolute immunity" from certain constitutional-tort claims).

349 For the leading works on this subject, see generally Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford 2004); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 2d ed 2008).

350 Louis Michael Seidman, Brown *and* Miranda, 80 Cal L Rev 673, 746 (1992).

351 Roy B. Flemming, John Bohte, and B. Dan Wood, *One Voice among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947–92*, 41 Am J Polit Sci 1224, 1234 (1997). See also Roy B. Flemming, B. Dan Wood, and John Bohte, *Attention to Issues in a System of Separated Powers: The Macrodynamics of American Policy Agendas*, 61 J Polit 76, 92 (1999).

reform, even when it fails to supply individual relief.[352] This possibility arises solely because of a sudden—and, to many observers, unexpected—pivot in public and political sentiment regarding crime and punishment. The pivot is evident both in terms of criminal-justice outcomes and in terms of observed policy.

To begin with, after many years of persistent increase, national incarceration rates have begun to stagnate. In 2009, for the first time in three decades, the number of individuals under correctional supervision fell.[353] Many states, including California, Florida, Georgia, Illinois, Massachusetts, Michigan, Nebraska, Ohio, Pennsylvania, New York, Texas, and Virginia, have also slowed or halted prison construction.[354] The thirteen-fold increase in state spending on incarceration between 1977 and 2004 no longer seems as sustainable as it once did.[355] Criminal laws are also becoming less punitive. Two changes at the federal level can serve as illustrations: In 2008, Congress enacted the Second Chance Act, supporting state-level reentry and reintegration efforts.[356] In 2010, it partially mitigated the disparity in sentencing consequences between crack- and powder-cocaine crimes.[357] In 2012, Attorney General Eric Holder announced that federal pros-

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[352] In their book, King and Hoffmann argue that habeas "helps to restore the balance of powers on which our divided government rests," using the Guantánamo detentions as a case study. See King and Hoffmann, *Habeas for the Twenty-First Century* at 47 (cited in note 7). Elsewhere, I have argued that this optimistic reading of Guantánamo-related habeas litigation is belied by the empirical evidence of case outcomes and detention rates. See Huq, 26 Const Commen at 402–03 (cited in note 24). In addition the idea of "balance" in constitutional design is beset by well-known and insuperable conceptual difficulties that King and Hoffmann simply blink. See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 Cal L Rev 887, 929–44 (2012); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 Va L Rev 1127, 1155–57 (2000). The net result of their analysis is a repudiation of a concrete liberty value universally recognized as central to social welfare in favor of an alluring but ultimately inchoate, and perhaps even incoherent, structural concept.

[353] Pew Center on the States, *Prison Count 2010* at *1 (cited in note 305).

[354] See Vanessa Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* 6 (Oxford 2009).

[355] See John F. Pfaff, *The Durability of Prison Populations*, 2010 U Chi Legal F 73, 76–77 ("States spent a total of $2.8 billion on corrections in 1977 and $39.3 billion in 2004; this represents a thirteen-fold increase in nominal dollars and a four-and-half-fold increase in real dollars (although per-prisoner expenditures have actually declined slightly in real terms).").

[356] Second Chance Act of 2007, Pub L No 110-199, 122 Stat 657 (2008).

[357] See Fair Sentencing Act of 2010, Pub L No 111-220, 124 Stat 2372, 2372, codified at 21 USC § 841(b)(1) (reducing the disparity between crack- and powder-cocaine penalties from 100-to-1 to 18-to-1).

ecutors would no longer list quantities of illegal narcotics in indictments for certain low-level drug cases, a move that would sidestep the triggering of long mandatory-minimum sentences.[358]

Quite what caused this unexpected ebbing of the undertow in American punitiveness is currently hard to discern with certainty. Crack-related violence is less salient than it once was. States and localities are under growing fiscal pressures due to the 2008 financial crisis and crystallizing concerns about incipient pension liabilities. Perhaps a certain style of politics that fed on crime-related fears has become less palatable.[359] Regardless of its causes, at least one of its consequences is clear: the Supreme Court's typically punitive attitude to crime and criminals now seems sharply out of step with contemporary political pressures. justices appointed by presidents who made crime control a central talking point[360] are no longer vocalizing a wider political zeitgeist.

In this new context, the Court's occasional interventions on behalf of habeas petitioners may stand a chance of catalyzing or sustaining a larger shift away from a costly, punitive approach to criminal justice, in favor of a more tempered modality in which convictions and sentences are not pursued at any and all cost. No doubt the justices will never play a sole leadership role in this effort. But it has long been understood that the Court can and does play a tutelary role in national public debates.[361] Habeas—by drawing attention in a dramatic and specific fashion to particular pathologies in the criminal-justice system—may be an im-

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358 Eric Holder, *Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates* (Department of Justice Aug 12, 2013), online at http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html (visited May 21, 2014).

359 One leading study attributes American punitiveness to "the belief that those disproportionately subject to [ ] harsh sanctions are people they do not like: African American offenders." James D. Unnever and Francis T. Cullen, *The Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 Criminol 99, 119 (2010). Whether this race-oriented thinking has shifted of late—perhaps with installation of an African American in the White House—is a large and difficult question that lies far beyond my remit here.

360 For President Richard Nixon, see *Annual Message to the Congress on the State of the Union*, 1970 Pub Papers 8, 12 (declaring a war on crime). For Presidents Ronald Reagan and George H.W. Bush, see Michael Tonry, *Race and the War on Drugs*, 1994 U Chi Legal F 25, 70. It would be misleading to suggest that Democratic presidents have not shared this rhetoric. See William Jefferson Clinton, *Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994*, 20 U Dayton L Rev 567, 568 (1995) (signing a harsh crime bill and remarking that "[t]here must be no doubt about whose side we're on").

361 This has been so since the early days of the Republic. See Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 S Ct Rev 127, 177–80.

portant element of this judicial role. And the fault-based framework of two-track habeas arguably channels judicial attention toward a subset of cases most likely to have the largest long-term public impact. Indeed, given the sheer volume of habeas petitions, neither the Supreme Court nor the lower federal courts would be able to play this role at all without the triaging provided by the two-track model.

The sheer volume of postconviction-litigation may, in addition, influences policy outcomes. Habeas thus matters to any larger project of criminal-justice reform not only because the sheer cost of habeas litigation likely has a frictional effect on the punitiveness of state criminal law.[362] The resources now devoted by the state to defending its convictions are resources that would otherwise be deployed in the creation of new convictions.

Even in these early days of the Roberts Court's bifurcated approach to habeas, there is some evidence that the Court is able and willing to play a supporting role in the larger project of criminal-justice reform. Three recent examples from cases on both Track One and Track Two serve to demonstrate the point.

The first is the unanticipated spate of Track Two cases from *Martinez* and *Maples* to *Trevino* that have underscored the architectonic role that effective assistance of counsel might be thought to play in a well-tempered criminal-justice system. Even if courts resist frontal confrontation with the underfinanced realities of indigent defense in *Boyer* and serial prosecutorial misconduct in *Connick*, they are nonetheless capable of indirectly narrating compelling stories of how failures of counsel compromise broadly shared criminal-justice goals. Hence, in *Maples v Thomas*, Justice Ginsburg strategically situated the attorney error in that case in the larger context of Alabama's systemic failure to provide effective counsel in capital cases.[363] Although Ginsburg did not belabor the point, it was clear from her opinion that the breakdown in Maples's case ought not to be ranked as a surprise. The implications for larger reform are clear for those willing to see.[364] Given the Court's high profile in national affairs, such cases provide opportunities for advocates of criminal-justice reform to press their

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362 See Louis Michael Seidman, Review, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 Yale L J 2281, 2314 (1998).

363 See *Maples*, 132 S Ct at 917–18.

364 See Carol S. Steiker, *Raising the Bar:* Maples v. Thomas *and the Sixth Amendment Right to Counsel*, 127 Harv L Rev 468, 470–71 (2013) (developing the larger implications of the *Maples* opinion).

case in the teeth of a spasmodic and sensation-filled news cycle. Opinions like Justice Ginsburg's provide a legitimating platform for advocates and legislators seeking to erode punitive and niggardly approaches to criminal justice and indigent defense.

A second example concerns the Court's role in national debates about capital punishment. Even aside from its elaboration of new constitutional rules, interventions via habeas provide a focal point for debate and mobilization on the death penalty.[365] What might otherwise be a local event of interest solely to single-issue activists becomes national news through the operation of federal habeas. The Court's intervention to stay briefly the execution of Troy Davis by the state of Georgia in 2011, for example, though ultimately unavailing,[366] generated a national and even international debate.[367] No doubt capital cases would generate some attention even in the absence of habeas review,[368] but the Court's participation via postconviction habeas underscores the high moral stakes in play and also legitimatize wider condemnations (and, equally, defenses) of what otherwise might be a local sensation.

On the other hand, there is a powerful potential counterargument to this point: it is also possible that concerns about capital punishment have come to pollute pervasively the justices' thinking about habeas, edging to the margins other serious worries about more mundane noncapital criminal-justice systems. This elision arguably blinds the Court to the real stakes of habeas litigation and distorts its analysis by filtering it through the emotive and polarizing lens of debates on the death penalty.[369] Far better to detach habeas from the related, but conceptually distinct, question of capital punishment—as I have aimed to do here.

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[365] See Timothy R. Johnson and Andrew D. Martin, *The Public's Conditional Response to Supreme Court Decisions*, 92 Am Polit Sci Rev 299, 304–07 (1998) (analyzing capital punishment cases, and finding that the Court's influence on public opinion is greatest the first time the Court rules on an issue).

[366] The Court exercised its original jurisdiction to remand Davis's petition for an evidentiary hearing. See *In re Davis*, 130 S Ct 1, 1 (2009). The district court and Eleventh Circuit ultimately denied relief. See *Davis v Terry*, 625 F3d 716, 719 (11th Cir 2010). Davis was executed on September 22, 2011.

[367] See, for example, John Schwartz, *In the Debate on Capital Punishment, Davis Execution Offers Little Closure*, NY Times A17 (Sept 23, 2011); Scott Sayare, *In Europe, a Chorus of Outrage over a U.S. Execution*, NY Times A13 (Sept 23, 2011).

[368] See David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* 294–95 (Belknap 2010).

[369] This might suggest that the project of larger criminal-justice reform is best pursued when decoupled from debates about the death penalty.

Finally, sometimes individual cases can present facts so striking their public resonance is unmistakable. In 2011 the Court issued one of its serial per curiam reversals of the Ninth Circuit's grants of habeas relief in a case involving a grandmother called Shirley Ree Smith. Smith was convicted in relation to her grandchild's death from "shaken baby" syndrome.[370] Smith's case—and the prospect of a clearly traumatized grandmother being punished for the death of a grandchild when her guilt was, to say the least, under a cloud—occasioned national attention, which in turn elicited a rare exercise of gubernatorial clemency by Jerry Brown.[371] Smith's habeas petition may not have been directly successful, but it again turned a local issue into a national one—and arguably catalyzed relief through a political mechanism that has until recently been largely moribund.[372] It also shows how even a denial of habeas relief can lead to localized reform. In all of these cases, habeas at least presented a possible platform for social and political mobilization, even if the ensuing opportunities have been taken up in only a patchwork and unsatisfying fashion.

To many, all this may seem the squeezing of sour lemonade from withered lemons. It is very clear, after all, that the role of habeas in any movement to transform criminal justice writ large will be liminal rather than central. Others, however, may reflect that the palette of instruments available to reformers of the criminal-justice system is not a large one to begin with, so that reformers must seize on even the thinnest of wedges. Habeas has the advantage of a long history and a constitutional pedigree. Although I have criticized the fault-based standard, I have not ruled out the possibility that fault will prove a sufficiently plastic notion that it might allow the Court to play a more aggressive role in policing criminal-justice administration over time. Reformers may also note that habeas allows bottom-up percolation of problems in state criminal-justice institutions. In cases like *Holland* and *Maples*, it ventriloquizes the most disdained and least politically powerful among us. For all its flaws, postconviction review

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370 *Cavazos v Smith*, 132 S Ct 2, 6–8 (2011).

371 See Emily Bazelon, *Jerry Brown Shows Mercy to Shirley Ree Smith: The Governor Does the Right Thing in a Doubly Tragic Shaken Baby Case*, Slate (Apr 6, 2012), online at http://www.slate.com/articles/news_and_politics/crime/2012/04/jerry_brown_pardons_shirley_ree_smith_in_an_old_sad_shaken_baby_case_.html (visited May 21, 2014).

372 See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 Va L Rev 239, 251 (2003) (noting the decline in and infrequent use of clemency from 1973 to 1999).

is thus a political rarity insofar as it allows prisoners and their counsel to set an agenda on a national scale. Such review thereby can provide a vehicle for perceived local injustice to reach and linger before national audiences. The value of such symbols and platforms for organizing is hard to predict and may not be obvious contemporaneously.

To many, it will seem obvious that the benefits flowing from a handful of Supreme Court cases do not warrant the costs involved in lower courts' daily adjudications.[373] Simple cost-benefit analysis is difficult without complex comparative judgments across different political toolkits, and recalcitrant predictive judgments about the pathways of institutional change.[374] By keeping questions such as capital punishment and our ongoing indigent-defense crisis in the public eye, it may nevertheless be that habeas yields sufficient offsetting benefits within the larger project of criminal-justice reform to justify its marginal costs for federal courts and state prosecutors.

CONCLUSION

Scholars have fallen out of love with habeas. Yet the Supreme Court still consumes a regular diet of postconviction cases. A consequence of academic disfavor has been that the Roberts Court's large body of habeas jurisprudence has gone unexamined. Instead, scholars have leapt to the conclusion that doctrine is a mere "charade" unworthy of attention. That assumption is untenable and should be abandoned.

The central descriptive aim of this Article has been to demonstrate the surprising internal coherence of the Roberts Court's postconviction doctrine. Bifurcated into two distinct tracks, that structure operates as a mechanism for titrating both the quality of scrutiny petitions receive and for rationing the thimbles of habeas relief now granted. My second goal has been to analyze potential justifications for this two-track model of habeas. Rejecting functionalist explanations predicated on selection effects or feedback mechanisms, I have posited fault as an organizing lodestar that has been borrowed from the constitutional-tort context. To many, this will seem an unappealing, and even irrelevant, central

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[373] Although I am skeptical that the marginal fiscal cost of habeas is large. See text accompanying notes 336–37.

[374] See Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 Ann Rev Polit Sci 369, 383 (1999) (describing studies that show how symbolic policies subsequently catalyze substantive shifts in policy).

value. My aim here is not to defend per se the role of fault, but simply to suggest that it has provided the justices with a needful tool for reconciling competing demands of institutional capacity and equity. A deeper understanding of the doctrinal architecture also helps illuminate the extant critiques of postconviction review and points the way toward a better conceptualization of the writ's role in efforts to reform our dysfunctional criminal-justice systems.

And so, like Banquo's ghost lingering at Macbeth's banquet,[375] postconviction habeas is an insistent reminder of unfinished business. In my judgment, it will not do simply to wash one's hands of that responsibility by pretending that our criminal-justice system is in sound working order. Nor it is appropriate to resile to the fiction that the national political process stands in good repair and hence will eventually supply a full measure of responsive change. These are illusions best dispelled in short order. On the other hand, I suspect that habeas will prove as recalcitrant, as obdurate, as Banquo's specter given the continuing absence of any plausible alternative mechanism for rationing judicial labor. Hard to banish, postconviction habeas in all its somewhat baroque and bloody glory warrants continued attention, and not the disdain that to date it has received.

[375] See William Shakespeare, *Macbeth* Act III, Scene IV (American Book 1904).