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WHAT IS FEDERAL HABEAS WORTH?

*Samuel R. Wiseman**

Abstract

Federal habeas review of state non-capital cases under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is widely regarded as deeply flawed for producing a huge volume of costly litigation and very little relief. Many scholars have called for AEDPA's repeal and a return to more robust federal review, but recently, several prominent commentators have suggested more dramatic change—radically limiting federal habeas in exchange for more fruitful reform efforts. In an era of limited criminal justice budgets and an increasing focus on efficiency, these proposals are likely to proliferate. This Article lays out a needed empirical and theoretical foundation for the debate over habeas's future. To date, no one has estimated how much federal habeas actually costs (and thus the potential savings from eliminating it), a figure necessary for assessing the feasibility and desirability of any radical reform scheme. This Article fills that gap, using available budget data, public records requests, and correspondence with state officials to estimate that figure at roughly \$327 million per year.

This sum, a tiny fraction of criminal justice spending and barely a blip in state and federal budgets, places recent reform proposals in a new light: it is possible that these proposals have failed to gain more traction because they would not free up sufficient funds to please either habeas proponents or opponents. The federal habeas system is one of the only mechanisms through which federal courts may reveal state violations of defendants' constitutional rights, and it retains both instrumental and symbolic value. Further, getting rid of the watered-down version of individual review that remains under AEDPA would likely be difficult to reverse, making a more robust system harder to realize in the future. Any proposals to curtail this system in exchange for state reforms therefore have a high barrier to overcome with habeas proponents. For federal habeas opponents, the current federal system is not particularly costly, either financially or otherwise, since so few petitioners obtain relief.

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Given the small cost of the current system, and thus the limited financial savings available, radical reform is probably unlikely, regardless of the desirability of any individual proposal. This Article therefore proposes more modest measures to make the current system more functional. One of these proposals is to ensure that federal habeas under AEDPA, despite statutory silence on the issue, is not blind to the quality of state postconviction processes.

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INTRODUCTION

Federal collateral review of state convictions might not be most people's first choice as a system of correcting or preventing the violation of constitutional rights or the conviction of the innocent. If the goal is to provide individual federal review of alleged federal rights abuses, why wait until the defendant has gone through the process of appealing his conviction in state court as well as exhausting his state postconviction remedies? The potential for needless and wasteful duplication and delay is obvious, and the task of reconstructing what happened at trial and before gets more difficult with the passage of time. And if the goal of

federal collateral review of state convictions is systemic oversight,¹ why rely on prisoners for information about how state criminal justice systems are functioning? Prisoners almost always lack the legal training to identify constitutional problems, and, worse, they have every reason to file a federal petition—the possibility of release—and very little reason not to.² The result is a “lottery” in which the federal courts are tasked with working through thousands of poorly drafted or documented and often frivolous petitions in search of a few winners.³ This approach is less efficient and effective than other possible approaches like setting federal standards for the functioning of state criminal justice systems and using highly skilled attorneys from the Department of Justice (DOJ) to monitor compliance.⁴

Of course, to a large extent, federal habeas is a product of history rather than conscious design. The roots of the writ of habeas corpus lie in judicial reaction to extreme executive (royal) abuse of the criminal process for personal and political ends.⁵ In a world without a procedure allowing those imprisoned by the crown to challenge their confinement in court, habeas corpus was an excellent invention,⁶ and it can still be an effective means of addressing the most blatant government abuses.⁷ In the United States, the modern era of federal habeas began as federal collateral review expanded along with the Warren Court’s federalization

1. See generally Richard H. Fallon, Jr., *Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988) (discussing the competing “Nationalist” and “Federalist” models of judicial federalism).

2. For a fuller exploration of these problems, see *infra* Part III; NANCY J. KING & JOSEPH L. HOFFMANN, *HABEAS FOR THE TWENTY-FIRST CENTURY* (2011) (describing the low levels of state petitioner success in habeas and the time and expense associated with numerous, largely unsuccessful petitions and proposing major reforms); Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 815 (2009).

3. See KING & HOFFMANN, *supra* note 2, at 68 (describing habeas as a “lottery”); *infra* Part I.

4. See Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 36 (2010) [hereinafter Primus, *Structural Vision*] (calling for the creation of new team of DOJ lawyers to assist habeas petitioners in asserting systemic rights violations).

5. See Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1367 (2010) (“Habeas corpus emerged as the English writ of liberty during the constitutional struggles of the seventeenth century, when it was used as a remedy against political arrest by King Charles and his privy council.”). See generally PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 18, 99–201 (2010) (describing how the writ of habeas corpus evolved to have a primary purpose of protecting against abuse of royal power).

6. See Proceedings on the Habeas Corpus, brought by Sir Thomas Darnel, Sir John Corbet, Sir Walter Earl, Sir John Heveningham, and Sir Edmund Hampden, at the King’s-Bench in Westminster-Hall, *reprinted in* 3 COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 2 (1809).

7. See, e.g., *Miller-El v. Dretke*, 545 U.S. 231, 235, 237 (2005) (granting habeas relief under § 2254 of AEDPA for the prosecutor’s use of a peremptory challenge for racial reasons).

of criminal procedure by incorporation.⁸ In the face of significant opposition from all levels of state criminal justice systems, federal habeas was, again, a very useful tool for a branch of government with few other options.⁹

Taking, then, the existence of federal collateral review of state convictions as a given, few people's preferred design would likely look much like our current system under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹⁰ Along some dimensions, AEDPA can, perhaps, be seen as a reasonably successful compromise between the more robust habeas statute that it replaced and a more radical scaling back of federal review. It has achieved the goal of protecting states' sovereignty and finality interests by reducing federal court reversals of state convictions while providing an avenue for federal relief in extreme cases,¹¹ but little else can be said for it. Because the difficulty (for skilled practitioners, let alone pro se litigants) of navigating its procedural maze is matched only by the challenge of overcoming the deference it affords state court decisions, AEDPA has failed at reducing the volume, pace, or complexity of federal review. Nor does it provide states with an incentive to improve their own systems of postconviction review, as it affords considerable deference to state court decisions without any explicit reference to the quality of the processes that produced them.¹² It is not

8. See Hoffmann & King, *supra* note 2, at 800–05; Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 105–06 (describing the expansion of federal collateral review of state convictions under the Warren Court).

9. See Hoffmann & King, *supra* note 2, at 805 (“For the Warren Court, expanding federal habeas review of state criminal cases served two critical functions. It provided a powerful incentive for the states to improve their own postconviction review processes. And it sent clear notice to defiant state judges that they could not thumb their noses at, or deliberately ignore, federal law.”).

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

11. Arguably, these are the goals of federal courts, not of the enacting Congress. See Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 445 (2007) (stating that “contrary to the pronouncements of the federal judiciary, the 104th Congress did not ‘intend’ comity, finality, and federalism—at least not in any way meaningful to interpreters of legal texts”).

12. See, e.g., Eric M. Freedman, *State Post-Conviction Remedies in the Next Fifteen Years: How Synergy Between the State and Federal Governments Can Improve the Criminal Justice System Nationally*, 24 FED. SENT'G REP. 298, 299 (2012) (describing pressure on states to ensure that their “systems provide a full and fair opportunity for the litigation of prisoners’ constitutional claims”); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 978–92 (2012) [hereinafter Wiseman, *Habeas*] (discussing ways of attacking state postconviction processes through AEDPA); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 146–66 (2012) [hereinafter Marceau, *Habeas Process*] (suggesting process-based challenges); see also *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) (describing federal judges’ deference to state court decisions when reviewing state habeas cases); *Trevino v.*

even particularly well drafted—AEDPA’s sphinx-like prose has contributed to it being the subject of more than one hundred Supreme Court decisions in its short life.¹³

Since the passage of AEDPA it has become increasingly clear that non-capital federal habeas cases—the vast majority of federal habeas petitions—have become less useful, as massive resistance has been replaced by facial compliance and undercut by chronic underfunding.¹⁴ As groundbreaking empirical work starkly demonstrates, AEDPA has generated an enormous amount of litigation and very little relief.¹⁵ This huge volume of litigation and dreadful success rate—only 0.82% of petitioners obtain any sort of relief¹⁶—have changed the debate over federal habeas. Prior to AEDPA, for example, Professors William Stuntz and Joseph Hoffmann argued for greater deference to state courts on the grounds that federal habeas was over-deterring rights violations.¹⁷ Post-AEDPA, Professors Hoffmann and Nancy King argue that non-capital federal habeas should be radically limited and the resources devoted to it used elsewhere because it deters too little at too high a price.¹⁸ Similarly,

Thaler, 133 S. Ct. 1911, 1917 (2013) (citing *Martinez*). Compare Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2449–55 (2013) [hereinafter King, *Enforcing Effective Assistance*] (arguing that *Martinez* will not lead to a meaningful increase in successful habeas petitions, and providing empirical data), with Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071 [hereinafter Marceau, *Is Guilt Dispositive?*] (arguing that the Court is moving towards prioritizing fair procedures over innocence).

13. See Marceau, *Habeas Process*, *supra* note 12, at 98–101, 100 n.47 (describing 115 post-AEDPA Supreme Court decisions as “cases of state prisoners challenging the constitutionality of their detention through federal habeas” and excluding executive and immigration detentions).

14. See, e.g., Eve Brensike Primus, *A Crisis in Federal Habeas Law*, 110 MICH. L. REV. 887, 900–01 (2012) [hereinafter Primus, *Crisis*] (reviewing KING & HOFFMANN, *supra* note 2) (noting that state postconviction procedures offer little opportunity for petitioners to produce the evidence needed and that postconviction counsel are often inadequate); Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 598–99 (2014); *id.* at 528 (arguing that the Roberts Court’s habeas jurisprudence “allocates relief based on a normative judgment about the degree to which both the state and its prisoners have complied with relevant legal norms”).

15. NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 9–10, 51–52 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf>; FRED L. CHEESMAN ET AL., NAT’L CTR. FOR STATE COURTS, A TALE OF TWO LAWS REVISITED: INVESTIGATING THE IMPACT OF THE PRISONER LITIGATION REFORM ACT AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY 53 (2004), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/19>.

16. Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308, 309 (2012) [hereinafter King, *Non-Capital Habeas*].

17. See Hoffmann & Stuntz, *supra* note 8, at 100–01.

18. KING & HOFFMANN, *supra* note 2, at 49, 74–76, 87–101 (calling for the elimination of most federal collateral review of state convictions because, *inter alia*, federal habeas review fails to deter constitutional violations and “is nothing more than a costly charade”).

Professor Eve Brensike Primus, noting the “enormous expense” of the current system, has proposed limiting federal review to claims of systemic rights violations, curtailing most federal review of individual cases while creating a new team of Department of Justice attorneys to help address structural problems.¹⁹

Unsurprisingly, these proposals to radically restructure federal habeas are controversial.²⁰ Even assuming that these reform proposals would survive a Suspension Clause challenge²¹—as they likely would—radically curtailing the scope of federal review of state convictions raises important concerns. Federal habeas is undeniably important, even under AEDPA, to the successful petitioners who would not otherwise obtain relief; it also gives state court judges an additional reason to respect the federal constitution, and it has significant symbolic and historical value.²² And, as many have argued, AEDPA could serve these functions more effectively if its onerous procedural and substantive barriers to relief were removed.²³ It is perhaps not surprising that there appears to be little political appetite for repealing AEDPA, given that Congressional proponents of the federalism arguments that helped lead to its passage have grown in number and passion over the last twenty years. That may change in the future, however, and recreating a more robust federal habeas would likely be more difficult if individual review of state convictions is further restricted.

Further, federal collateral review is not just a particularly unwieldy part of federal review of individual cases or the functioning of state criminal justice systems—it is one of the primary means of such oversight. Due to procedural and substantive limitations like the *Younger v. Harris* abstention doctrine²⁴ and *Heck v. Humphrey*’s bar on § 1983

19. Primus, *Structural Vision*, *supra* note 4, at 4–5, 36.

20. See, e.g., Huq, *supra* note 14, at 597–98 (arguing that Hoffmann and King’s proposed fiscal tradeoff is “implausible and unsustainable” and will “produc[e] systemic difficulties for the judiciary”); John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 439 (2011).

21. Hoffmann & King, *supra* note 2, at 839, 841, 843–44; Primus, *Structural Vision*, *supra* note 4, at 39–40 (arguing that the Court would uphold significant limits to federal habeas as long as states provide adequate postconviction remedies).

22. See Blume et al., *supra* note 20, at 451–54.

23. See *id.* at 473–77 (proposing changes to the statute of limitations and other ways to remove barriers in federal habeas); Freedman, *supra* note 12, at 298–99 (interpreting current law to require a fair state postconviction process and, if states fail to provide this, more searching review of state decisions by federal courts).

24. 401 U.S. 37, 54 (1971) (holding that “the possible unconstitutionality of a statute on its face does not in itself justify an injunction against good-faith attempts to enforce it” (internal quotation marks omitted)).

claims that imply the invalidity of a conviction,²⁵ individual federal review through other avenues is limited. For similar reasons, as well as because of the doctrines of judicial, prosecutorial, and qualified immunity²⁶ and the Court's increasingly rigorous class certification requirements,²⁷ civil rights litigation under § 1983 is not as useful a tool for enforcing criminal procedural rights as one might hope or expect.²⁸ The Supreme Court takes far too few cases every year to provide more than a minute chance of individual review or to effectively monitor state courts through certiorari,²⁹ and neither the Department of Justice nor any other federal agency is charged with that task.

Legislation imposing greater federal involvement in state criminal justice also seems unlikely in the near future except, perhaps, as part of some kind of larger bargain.³⁰ Because enforcing the rights of criminal defendants is rarely especially high on politicians' agendas,³¹ and in light of the ongoing struggle over the Medicaid expansion, politicians may well have little appetite for further federal incursions on state sovereignty.³² A major shift in the Supreme Court's interpretation of AEDPA or the Suspension Clause seems almost as unlikely.³³ Although federal habeas review of non-capital state convictions under AEDPA may

25. 512 U.S. 477, 487 (1994) (“[W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.”).

26. See, e.g., *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1250–51 (2012) (holding that police officers had qualified immunity from damages sought in a suit alleging an invalid search where “no reasonable officer would have recognized” that the search was invalid).

27. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (reversing a class certification); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1435 (2013) (reversing another class certification).

28. See Primus, *Structural Vision*, *supra* note 4, at 47–50 (discussing problems with using § 1983 to achieve reform of the state criminal justice system).

29. See *Table A-1, Supreme Court of the United States—Cases on Docket, Disposed of, and Remaining on Docket at Conclusion of October Terms, 2007 Through 2011*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/A01Sep12.pdf> (last visited May 1, 2015) (showing 75, 87, 82, 86, and 79 cases argued during each term in 2007 through 2011, respectively).

30. But see *infra* Part III (arguing that such a bargain is unlikely).

31. See Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1397 & n.237 (2014) [hereinafter Wiseman, *Pretrial Detention*] (listing and describing sources that explore the under-representation of criminal defendants in the political process).

32. FRANK J. THOMPSON, *MEDICAID POLITICS: FEDERALISM, POLICY DURABILITY, AND HEALTH REFORM* 167–68 (2012) (highlighting political tension over Medicaid expansion under the Affordable Care Act and the opposition it has faced from members of the federalist Tea Party).

33. Cf. Wiseman, *Habeas*, *supra* note 12, at 992–99 (arguing that a lack of adequate fact-finding procedures in state postconviction review could give rise to a Suspension Clause violation if federal fact-finding is not available under AEDPA).

not be especially effective, eliminating it would be difficult, if not impossible, to undo even if conditions change. So for those concerned about remedying individual rights violations and monitoring the adequacy of state procedures, federal, non-capital habeas retains significant practical and symbolic value.

Nonetheless, in light of the near-universal criticism of AEDPA's wasteful futility and the recent Congressional emphasis on reducing federal spending and intrusion into state affairs, it is perhaps surprising that these (or similar) proposals have not gotten more traction. In a time of tight state and federal budgets, a costly, ineffective system would seem to be an attractive target. Part of the reason that non-capital habeas survives under AEDPA is, as argued here, that its costs are relatively low, at least in the context of state and federal spending. This Article provides the first,³⁴ albeit rough, estimate of what the current system of federal

34. See Blume et al., *supra* note 20, at 468 ("Given the number of times by that point that Hoffmann and King have labeled habeas review a 'waste' of money or resources, we read expectantly for their estimate of the federal and state dollars waiting to be liberated by the elimination of noncapital habeas review—but no estimate ever appears. Nor do they attempt any projection of the cost to establish and operate the new federal initiative." (footnote omitted)); Hoffmann & King, *supra* note 2, at 816 (generally noting federal costs likely caused by the time expended on habeas petitions by judges, clerks, magistrate judges, and pro se attorney staff and the lack of e-government rules in this area, and concluding that there is "significant expenditure of state dollars," citing the number of state habeas petitions filed annually and testimony regarding the number of state lawyers who work on habeas cases to support the expense estimate (citing Hearing on Habeas Reform: the Streamlined Procedures Act of 2005: Hearing on S. 1088 Before S. Comm. on the Judiciary, 109th Cong. 2–3 (2005), available at http://www.constitutionproject.org/pdf/eisenberg_11_16_05_testimony.pdf)); Primus, *Crisis*, *supra* note 14, at 902–03 (expressing skepticism that there will be many cost savings under King and Hoffmann's proposal but not directly estimating costs or savings). Only rough, generalized cost estimates for habeas review of state cases appear to be available in the literature. See ROGER A. HANSON & HENRY W.K. DALEY, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS, at v (Sept. 1995), available at <http://www.bjs.gov/content/pub/pdf/FHCRSCC.PDF> (discussing the number of habeas cases and case processing times but not estimating costs); 141 CONG. REC. S7596, S7597 (May 26, 1995) (statement of Sen. Hatch), available at <http://www.gpo.gov/fdsys/pkg/CREC-1995-05-26/pdf/CREC-1995-05-26-pt1-PgS7596-2.pdf#page=2> (concluding that frivolous habeas petitions cost "millions and millions of dollars" based on the anecdotal evidence that "[m]ost prosecutors tell me that they spend a high percentage of their time just answering habeas petitions"); Richard Faust, Tina J. Rubenstein & Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 639, 673–705 (1990–1991) (pre-AEDPA, examining how habeas cases "may affect the work of the federal district courts" and describing the types and timing of state petitioners' federal habeas claims and counsel provided, but not estimating costs); PAUL H. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS 21–23 (1979), available at <https://www.ncjrs.gov/pdffiles1/Digitization/63085NCJR.S.pdf> (pre-AEDPA, noting court costs that arise as a result of state habeas petitions, including clerk's office processing and creation of files, magistrate review, court hearings, state-appointed counsel, and state responses to requests for records and facts, but not providing specific cost

collateral review of state non-capital cases costs the federal and state governments. It analyzes data compiled from public records requests and online sources to arrive at a ballpark figure of \$327 million per year. While this is, of course, a significant sum of money by most measures, it is a small drop in the bucket of government criminal justice spending, and a tiny speck in the overall budget. If this number is even roughly accurate, the current system of non-capital federal review might not be quite as bad as Professors King, Hoffmann, and Primus have suggested: even if it provides little relief or deterrence, it does so at what might be seen as a reasonable cost.

Saying that non-capital habeas under AEDPA might be better than nothing at a given price certainly does not answer the question of whether other alternatives would be preferable.³⁵ If these proposals can achieve at least some of the goals of federal habeas more efficiently, we might still expect them, or proposals like them, to generate Congressional interest, and here the relatively small expense of the current system might explain the lack of support for reform. Little can be surmised from Congressional inaction, though, especially given the increasingly sclerotic nature of the legislative process. And, given the recency of the proposals, it may simply be a matter of time before Congress revises or repeals AEDPA.

Still, one possible explanation for the lack of Congressional interest in habeas reform is that the value to its proponents of retaining individual federal review, even in its current form, exceeds what its opponents would be willing to give up to drastically limit it. Individual federal review of state convictions under AEDPA has both instrumental and symbolic value, but habeas under AEDPA produces so little relief that it is a relatively minor burden on sovereignty interests. Eliminating individual federal review would mean sacrificing an important piece of federal oversight of state criminal justice systems unless a substitute, such as an expanded role for the DOJ, were offered in its place. Given the

estimates); Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1554 n.221 (1997) (in suggesting that federal habeas is not very costly, focusing primarily on the percentage of federal cases that are habeas cases—a statistic that has since increased—and not providing direct estimates of funds expended for habeas). Some cost estimates only address habeas costs in capital cases. See, e.g., *Guide to Case Management and Budgeting in Capital Habeas Cases*, U.S. DISTRICT CT., N.D. CAL., <http://www.cand.uscourts.gov/caphabbudgeting> (last visited May 1, 2015) (reporting hourly rates of lead counsel in capital habeas cases and the cost of paralegals and law clerks).

35. See Shawn J. Bayern, *False Efficiency and Missed Opportunities in Law and Economics*, 86 TUL. L. REV. 135, 140, 142 (2011) (observing that “[t]he general problem is that an activity may be efficient, productive, or wealth-producing in the narrow sense that it is better for it to occur than for it not to occur” but that better alternatives are often ignored (internal quotation marks omitted)).

interests involved, neither option seems especially likely. Thus, proponents' valuation of the status quo may outweigh the value opponents place on further limiting its reach. Even if this is true, we still might expect a stronger drive to limit federal review if the current system generated significant monetary costs: the cost savings could make the deal broadly appealing. In other words, if federal habeas under AEDPA were costly enough, then reallocating the money towards other goals would create a surplus to be divided between the two sides. King and Hoffmann, for example, suggest using the savings to pay for indigent defense,³⁶ and it might be possible to use the savings to reduce the federal tax burden.

But if the cost figure calculated here is remotely accurate, the available savings may not be adequate to overcome opposition to significantly altering the status quo. These costs, moreover, will fall if the prisoner population, and thus the number of habeas petitions, continues to decline.³⁷ Further, because judicial expenditures are relatively fixed and prisoner litigation has inherent problems, it would be difficult to generate significant savings without entirely foreclosing individual review.

Thus, while they might be superior to the current regime in many respects, King and Hoffmann's and Primus's proposals may have little chance of success as long as the existing climate persists. And as others have observed, if the existing political or, more likely, judicial climate changes, then a more functional system of individual review may once again be attainable.³⁸ Moreover, this is likely true of arguably even more politically appealing proposals, such as curtailing individual review in exchange for states adopting a package of reforms to reduce wrongful convictions. While such proposals are undoubtedly valuable in provoking thought about what habeas should look like in the future, in the short term perhaps the most that can be hoped for is more modest reform aimed at increasing federal scrutiny of state postconviction processes under AEDPA.³⁹

In a more ideal world, these issues would not come up—there would be the political will to invest in improved indigent defense, greater federal oversight of state criminal justice systems, innocence protection reforms, *and* more robust postconviction review. Nothing herein suggests otherwise; if anything, the relatively modest total cost of the current system estimated below indicates that an expanded habeas would make

36. See KING & HOFFMANN, *supra* note 2, at 88, 100–01, 107.

37. I am indebted to Professor King for this observation.

38. Huq, *supra* note 14, at 597; Blume et al., *supra* note 20, at 474–78 (criticizing Hoffmann and King for discounting the possibility of doctrinal changes to habeas law to reduce litigation and increase relief).

39. See *infra* Part IV; Wiseman, *Habeas*, *supra* note 12.

only a small ripple in state and federal budgets. This suggests that the real obstacle to reform is not monetary cost, but states' opposition to expanded federal involvement in their justice systems. Because AEDPA has dramatically limited that involvement in non-capital cases, however, further curtailment is unlikely to be a sufficient carrot for major reform.

This Article has four Parts. The first provides an overview of federal habeas and its dysfunction, as well as of the recent proposals to significantly limit the scope of federal habeas in exchange for other reforms. Part II contains an estimate of the costs of federal collateral review of state non-capital cases calculated with data compiled from public records requests as well as online sources. This Part also includes an account of the non-financial sovereignty and finality interests that would weigh in any bargain. It then provides an account of the difficulties inherent in individual review that make realizing all of the potential savings hard to achieve without eliminating federal collateral review entirely. Part III then considers recent, radical reform proposals, arguing first that, at least when viewed in isolation, AEDPA is a justifiable use of resources. This Part then considers the proposals individually and the prospects for significant change more generally, tentatively concluding that the cost savings that could be generated by eliminating most federal review of state non-convictions would likely be an insufficient catalyst for reform. It concludes that, given the fairly limited impact of the current system on states, any realistic proposal will necessarily be rather modest. Part IV suggests one such reform, arguing that the Court should build on its recent decisions in *Martinez v. Ryan*⁴⁰ and *Trevino v. Thaler*⁴¹ to focus on the adequacy of state postconviction processes. Although, due to the near-uniform frustration with the current federal habeas system, proposals to use its resources elsewhere have some appeal, the fairly low costs associated with individual federal review suggest that they may be both implausible and unwise.

I. THE FAILURES OF AEDPA AND PROPOSALS FOR REFORM

The writ of habeas corpus has a long and storied history, with roots reaching as far back as sixteenth-century England, when the king sought greater control over jailers' activities.⁴² Although the writ originally

40. 132 S. Ct. 1309 (2012).

41. 133 S. Ct. 1911 (2013).

42. Remedies that partially resembled the modern writ emerged as early as the 1500s, although by many historical accounts the writ that reflects the same values enshrined in modern habeas fully emerged in seventeenth-century England. See HALLIDAY, *supra* note 5, at 18, 27 (noting that in the "latter part" of the sixteenth century, justices of the King's Bench used habeas corpus and that the writ was "newly invigorated in the decades around 1605" and was used to ensure that other jurisdictions "followed their own rules and that local customs regarding

strengthened royal power,⁴³ sometimes to the detriment of prisoners, it grew to protect individuals against imprisonment contrary to the law.⁴⁴ In America, this essential piece of the common law was adopted early on by states⁴⁵ and within the federal Constitution.⁴⁶ There was little disagreement when the Founders included a limitation on the suspension of the writ into the Constitution,⁴⁷ aside from a lively debate over the details of the limit.⁴⁸ After state prisoners gained access to federal habeas in subsequent legislation,⁴⁹ federal habeas review of state convictions—already providing an important remedy for individual injustices⁵⁰—also

imprisonment were not repugnant to common law and common weal”); Redish & McNamara, *supra* note 5, at 1367 (explaining that “[h]abeas corpus emerged as the English writ of liberty during the constitutional struggles of the seventeenth century”).

43. HALLIDAY, *supra* note 5, at 42–43 (describing the “period when habeas corpus came to be most closely attached to the king’s prerogative” and explaining that “[t]he rationale behind the direction of the writ . . . lay in a personal relationship: that between the king and his franchisee, to whom the king had delegated authority to hold people in his name so long as he did so according to the king’s laws”).

44. *Id.* at 197 (noting a growing conception of habeas as “help[ing] redirect law’s attention from liberties to imprison, to liberties of individuals not to be imprisoned”).

45. Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 145–46 (1952) (describing the incorporation of habeas corpus into state constitutions).

46. U.S. CONST. art. I, § 9, cl. 2.

47. See Redish & McNamara, *supra* note 5, at 1370 (“Participants in the Convention debates seemed unanimous in their belief that the maintenance of a strong writ of habeas corpus was essential to the preservation of individual liberty.”); ERIC M. FREEDMAN, *HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY* 14 (2001) (observing that “[d]iscussions of the Clause focused on the power of suspension rather than on the nature of the writ”); see *id.* at 14–17 (explaining that although all agreed on the nature of the writ, some members of the Convention argued that the Suspension Clause was unnecessary because the Constitution provided that the federal government lacked powers not explicitly granted to it, and therefore certain members were concerned about the prospect of federal tyranny based on the power granted by the Clause).

48. FREEDMAN, *supra* note 47, at 14–17 (describing the debates surrounding suspension); Redish & McNamara, *supra* note 5, at 1370–74 (describing different versions of the Suspension Clause and different views of suspension offered by Charles Pinckney, John Rutledge, James Wilson, and Thomas Jefferson).

49. See 28 U.S.C. § 2254 (2012). It is generally understood that the Judiciary Act of 1789, which directly established a federal writ of habeas corpus, did not allow federal judges to review state petitions, although some argue whether the Suspension Clause itself, or other existing law, provided a right to federal review of both state and federal habeas petitions. See KING & HOFFMANN, *supra* note 2, at 8 (noting the “prevailing view that ‘the writ was available under the 1789 act only to those held under federal authority’”); JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA* 31–32 (2011) (describing debates as to whether the Clause provided a habeas right or whether subsequent legislation was necessary); FREEDMAN, *supra* note 47, at 36–41 (arguing that “no statute of Congress was needed to give the federal courts authority to issue the writ of habeas corpus” and that common law and state habeas law provided this federal authority).

50. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 742–43 (2008) (noting that “the Framers considered the writ a vital instrument for the protection of individual liberty”); FREEDMAN, *supra* note 47, at 12 (describing a consensus by the Founders that the writ was to “protect the liberty of

came to serve another important, related purpose within our federal system. During periods of systemic failures of justice in state courts, the threat of federal habeas review served as a deterrent against the worst abuses.⁵¹ As the Civil Rights Era drew to a close, however, critics of federal habeas's impingement on state sovereignty and the inefficiency of its multilayered review gained prominence, ultimately leading, *inter alia*, to the passage of AEDPA, designed to streamline, and curtail, federal review. As Professor King, Fred Cheesman, and Brian Ostrom's important empirical work has shown, AEDPA has succeeded in limiting successful claims but failed at reducing costs.⁵² With federal habeas review of state convictions reduced, in King and Hoffmann's view, to a "costly charade,"⁵³ they, as well as Primus, have suggested dramatic reform, proposing to all but eliminate review in individual cases and to use the recovered resources for systemic improvements.⁵⁴

A. *The Need for Change*

Habeas remains the only federal mechanism state prisoners have to challenge the legality of their convictions,⁵⁵ and they use it frequently—state prisoners file thousands of petitions in federal court each year.⁵⁶ But it is widely acknowledged that federal collateral review of state criminal convictions under AEDPA produces a great deal of litigation yet only a

individuals against its possible wrongful deprivation by the government"); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691 (1990) (arguing "that defendants should have easy access to habeas review where consideration of the defaulted claim might correct an unjust conviction (or sentence of death), but not otherwise"); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150, 159 (1970) (noting the burden on federal courts as a result of voluminous state habeas petitions and arguing for a system of limited review).

51. *See, e.g.*, KING & HOFFMANN, *supra* note 2, at 50 (explaining that the Habeas Corpus Act of 1867 was designed to protect reconstruction officials and slaves from "persecution by unrepentant state officials—including state judges—who refused to shift their loyalties from the defeated Confederacy to the ideals of equality and due process expressed in the newly enacted Thirteenth Amendment and recently proposed Fourteenth and Fifteenth Amendments to the federal Constitution"); *id.* at 65 (noting that the Warren Court's "reinvigoration" of habeas in the 1960s allowed the "lower federal courts to force recalcitrant states to obey federal law").

52. KING ET AL., *supra* note 15, at 51–52, 54–55.

53. KING & HOFFMANN, *supra* note 2, at 67.

54. Hoffmann & King, *supra* note 2, at 822–23; *see also* KING & HOFFMANN, *supra* note 2, at 87–107; Primus, *Structural Vision*, *supra* note 4, at 5.

55. *See, e.g.*, Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011) ("Habeas is the exclusive remedy . . . for the prisoner who seeks immediate or speedier release from confinement." (internal quotation marks omitted)).

56. KING ET AL., *supra* note 15, at 9–10 ("Each year, more than 18,000 cases, or one out of every 14 civil cases filed in federal district courts, are filed by state prisoners seeking habeas corpus relief, and more than 6000 of those cases reach the courts of appeals.").

small amount of relief.⁵⁷ As introduced above, many prisoners enter its maze of procedural barriers and deferential standards of review, but few will win: “The percentage of these petitioners receiving any sort of relief in federal court seven or eight years after filing, considering both district and circuit court review, is just 0.8 percent.”⁵⁸

With this abysmal success rate, federal habeas for state petitioners no longer provides a meaningful opportunity for correcting wrongs in individual cases. Nor does it do much to encourage state level systemic improvements such as more accurate investigative procedures or better representation of indigent defendants. AEDPA grants deference to state-court factual and legal conclusions almost without regard to the process that produced them, removing any federal incentive for improved state postconviction procedures.⁵⁹ Indeed, the U.S. Supreme Court has rejected the notion that avoiding federal habeas review motivates state courts.⁶⁰ The futility and expense of the current system have led to proposals, taking up the suggestion of earlier commentators, to seriously curtail federal review of state convictions and shift the resources currently spent on federal habeas to improve state criminal processes.⁶¹

57. See, e.g., KING & HOFFMANN, *supra* note 2, at 68 (arguing that federal habeas is “wholly incapable of producing any substantial increase in the enforcement of federal constitutional rights” and will “never” meaningfully impact state courts, police, or lawyers); Primus, *Structural Vision*, *supra* note 4, at 1 (“Experts have described the current system as ‘chaos,’ an ‘intellectual disaster area,’ ‘a charade,’ and ‘so unworkable and perverse that reformers should feel no hesitation about scrapping large chunks of it.’” (footnotes omitted)); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 542 (2006) (describing the federal habeas system as being “in chaos”).

58. King, *Non-Capital Habeas*, *supra* note 16, at 310.

59. See 28 U.S.C. § 2254(d)(1) (2012) (allowing a federal grant of state habeas relief only if the state adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court”).

60. See, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011) (“Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court.”).

61. Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2526 (1993) (questioning “the relative usefulness of habeas corpus as a means of ensuring adequate protection of federal constitutional rights in state criminal trials”); Friendly, *supra* note 50, at 148 (describing how collateral attack has become “a gigantic waste of effort”); see also PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 106 (1976) (arguing for the unification of the state review processes to more efficiently manage judicial resources); James S. Liebman, *Opting for Real Death Penalty Reform*, 63 OHIO ST. L.J. 315, 333–42 (2002) (proposing a trade of narrower federal and state postconviction review for “trial and direct appeal protections”); Paul H. Robinson, *Proposal and Analysis of a Unitary System for Review of Criminal Judgments*, 54 B.U. L. REV. 485, 485 (1974) (concluding that postconviction remedies “fall short of achieving adequate fairness and comprehensiveness”).

B. Recent Resource-Shifting Proposals

Recognizing the problems with AEDPA, many scholars have called for a reduction of the barriers to meaningful federal review of state prisoners' cases and improvements in state postconviction review processes,⁶² although neither the legislative nor judicial branches appear likely to take these routes in the near term.⁶³ Recent resource-shifting proposals, one by King and Hoffmann and another by Primus, take a different approach. In the most provocative and widely-discussed reform proposals within the current, expansive habeas literature, they argue that federal postconviction review for most individual habeas claims is a waste of resources that could be better spent elsewhere.⁶⁴

In light of the time-and-resource consuming futility of federal review of state convictions, and the fact that state courts generally, by their account, do a good job,⁶⁵ King and Hoffmann suggest that all federal habeas review should be abolished for non-capital habeas cases except for cases that involve claims of actual innocence or the application of "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."⁶⁶ Beyond these two types of substantive claims, state prisoners under this proposal would only have access to federal courts if the state failed to provide a full and fair hearing of their claim.⁶⁷ These prisoners would have to demonstrate that the lack of an adequate hearing so affected their case that the state had

62. See Blume et al., *supra* note 20, at 447 (noting inadequate state postconviction review); *id.* at 454 (arguing that the "writ's remaining capacity to impact individual cases" should not be discounted despite the "array of judicially and legislatively created devices that give primacy to states' interests in finality"); Marceau, *Habeas Process*, *supra* note 12, at 169–70 (proposing an avenue around habeas in the form of challenges to inadequate state habeas processes under § 1983).

63. See Hoffmann & King, *supra* note 2, at 833–34 (noting that their proposal would require a "comprehensive political shift in focus . . . from the back end to the front end of the criminal justice system" (emphasis omitted)).

64. See *supra* notes 18–19 and accompanying text.

65. See KING & HOFFMANN, *supra* note 2, at 65 (arguing that earlier, more expansive federal judicial review drove states to recognize federal constitutional rights and offer better appellate and postconviction review).

66. Hoffmann & King, *supra* note 2, at 819.

67. *Id.* at 812, 822–23 (noting that their proposal echoes *Stone v. Powell*, 428 U.S. 465 (1976), which barred federal habeas review of state claims involving the Fourth Amendment if petitioners received "an opportunity for full and fair litigation" in state court," but is broader than *Stone* in that it bars more types of claims, and also observing that the Court in *Stone* reasoned that federal habeas review of Fourth Amendment claims had no deterrent effects on state prosecutors and courts).

unconstitutionally suspended the habeas remedy.⁶⁸ This would allow the federal courts to “restore broader habeas review for criminal cases in a particular state”⁶⁹ if the state, following a cutback of federal habeas review, responded “by eliminating or substantially curtailing its own appellate and postconviction review processes.”⁷⁰ This proposal partially echoes the earlier systemic theory of habeas offered by Paul Bator, which suggested that federal habeas review was duplicative of the thorough and generally adequate review already conducted by the states, though he acknowledged the need for federal involvement where state processes were inadequate.⁷¹

Eliminating most non-capital federal habeas review of state petitions, however, is only part of King and Hoffmann’s proposal. They would divert the resources currently spent on non-capital habeas to state indigent defense,⁷² calling for a Congressionally authorized, “Federal Center for Defense Services,” modeled on a similar institution previously proposed by the American Bar Association.⁷³ This nonprofit institution would offer “matching grants and other financial incentives for state and local governments to improve their efforts to provide defense representation.”⁷⁴ As King and Hoffmann acknowledge in their 2009 article, the “comprehensive political shift in focus . . . from the back end to the front end of the criminal justice system” that they envision would require additional funds beyond the savings generated by cutting back on habeas review.⁷⁵ In their 2011 book, however, they suggest that the establishment of the Center could, perhaps, be a condition on the scaling back of habeas that they envision.⁷⁶

68. See *id.* at 842–47 (explaining that the proposed limitations on habeas remedies would be “lifted” if state appellate and postconviction review processes available to prisoners were substantially curtailed).

69. *Id.* at 843.

70. *Id.* at 842.

71. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 449, 451 (1963) (arguing that “the choice between the two [federal habeas review] arrangements must be made on the basis of functional, institutional and political considerations; and that *neither arrangement can be validated by the assertion that it is logically necessary if ‘truth’ is to be established*” and describing how “[m]ere iteration of process,” without a justification like ensuring that courts uniformly offer fair hearings, can do widespread damage to state courts).

72. See KING & HOFFMANN, *supra* note 2, at 101 (“A proactive federal program with the clear mission, and the funding, to encourage the states to improve their defense representation services offers a realistic promise of reform that case-by-case habeas review cannot deliver.”).

73. Hoffmann & King, *supra* note 2, at 825 & n.118, 828.

74. *Id.* at 828–29.

75. *Id.* at 833–34 (emphasis omitted).

76. See KING & HOFFMANN, *supra* note 2, at 101.

Similarly, another leading scholar, Professor Primus, has concluded that an individually-focused federal habeas approach, though desirable in a more ideal world, is untenable in the existing one.⁷⁷ She argues that “[g]iven limited resources, complete relitigation of state court criminal cases on federal habeas is not feasible,” and thus substantial curtailment of federal habeas claims filed by state prisoners is necessary.⁷⁸ She is, however, more skeptical of the adequacy of state criminal justice systems⁷⁹ and would therefore retain federal review of non-capital cases involving systemic (not just individual) state violations of constitutional rights.⁸⁰ To support these systemic claims, Primus would eliminate the requirement that petitioners exhaust their state remedies,⁸¹ and would provide petitioners with improved access to counsel.⁸² A new team of attorneys in the Special Litigation Section of the Civil Rights Division of the DOJ would be tasked with “investigating and challenging systemic state practices that violated defendants’ federal rights” and would review petitioners’ claims, picking those “most representative of serious systemic state problems.”⁸³ Individual petitioners would, however, still be able to directly file claims of state systemic violations in federal court after notifying the DOJ of their claim.⁸⁴

Both of these proposals involve trading expensive, but mostly futile, federal review of individual cases for reforms designed to improve the functioning of state criminal justice systems. Neither, however, attempts to answer a critical question: what does federal habeas review of state convictions actually cost the federal and state governments? Without at least a rough estimate of the money at stake, it is difficult to evaluate the true extent of the problem or, relatedly, the feasibility and desirability of the proposed solutions.

It is difficult, if not impossible, to defend the habeas status quo, but radically limiting the scope of federal habeas for state prisoners would have significant and long-lasting consequences that are almost as difficult to quantify. Most obviously, it would deny relief to the relatively small

77. Primus, *Structural Vision*, *supra* note 4, at 5.

78. *See id.* at 5–6.

79. *Id.* at 1–2.

80. *Id.* at 5 (“The key to that reform involves reimagining individual petitioners as vehicles for redressing systemic or structural problems in states’ administration of criminal justice.”).

81. *Id.* at 28–35 (describing how individual petitioners would raise claims and the remedies they would receive if successful).

82. *Id.* at 36 (noting that individual petitioners would need the support of counsel and that providing each petitioner with counsel would be “extremely” costly).

83. *Id.* (proposing as “[o]ne potential compromise” the use of the Special Litigation Section).

84. *See id.* at 38 (noting one potential gap-filling solution that would “allow privately initiated suits to fill the gap”).

number of petitioners who could obtain it under the current system.⁸⁵ In the longer term, it would also signal a retreat from federal protection of an individual criminal defendant's constitutional rights, one that may be difficult to reverse even if needs and budget projections change. Nonetheless, if we are to evaluate current proposals for further curtailing the scope of federal habeas review in exchange for other reforms, we need to have an estimate of the cost of that review and ideas about how to best spend the capital saved by a more limited habeas system.

II. THE COST OF FEDERAL HABEAS

Thinking seriously about the plausibility of major legislative change is a necessary preliminary to evaluating both the proposals described above and any future work along the same lines. To do that, we first need an estimate of how much non-capital federal habeas review for state prisoners currently costs governments, a figure missing from both King and Hoffmann's and Primus's work.⁸⁶ This Part attempts to roughly estimate federal and state expenditures on federal habeas review of non-capital state convictions. To be fair to the reform advocates, I attempt to err on the side of overestimating the costs. With at least a rough estimate in hand, it will then be possible to evaluate the likelihood of significant Congressional action.

A. Federal Court Costs

To arrive at a working estimate of federal expenditures on habeas review of state cases, I calculated the proportion of all federal district and appellate cases that are non-capital habeas challenges to state convictions, and then applied this proportion to the relevant sections of the federal court budget. It might be argued that this methodology is flawed, even for a rough approximation, because non-capital habeas cases consume more court resources than other case types, but this seems unlikely. Federal statistics suggest that habeas cases, although occupying some

85. See Blume et al., *supra* note 20, at 451, 454–55 (objecting to Hoffmann and King's argument that federal habeas should be narrowed due to low success rates and describing "noncapital cases in which constitutional rights were violated but state courts declined to remedy those violations," to suggest that we still need federal habeas review opportunities).

86. See *id.* at 468 (noting the lack of an "estimate of the federal and state dollars waiting to be liberated by the elimination of noncapital habeas review"). Nor have other accounts provided direct estimates of habeas costs; most assume high or low costs based on overall case numbers. See, e.g., HANSON & DALEY, *supra* note 34, at v (focusing on the total number of state habeas cases in federal courts, the processing times for these cases, and how processing times varied depending on the issues in the cases); Donald Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015, 1043–44 (2013) (concluding that the cost impact of state habeas cases on federal courts is "minimal compared to that of diversity of citizenship cases" and § 1983 civil rights litigation).

court time, are not particularly burdensome compared to other cases. Non-capital habeas cases—from the time of the first docket filing to the termination of a case or the last docket entry—average 11.5 months for cases not transferred from other courts, with a median time of 8.1 months.⁸⁷ The median time for all civil cases, on the other hand, was 7.8 months.⁸⁸ Further, “about half of all noncapital habeas cases are dismissed or denied without reaching the merits of any claim,” although even deciding procedural default can be time consuming.⁸⁹ Moreover, federal district courts assign “weights” to different types of cases “representing the average amount of judge time the case is expected to require” relative to other types of cases,⁹⁰ and non-capital federal habeas cases receive a low weight.⁹¹

Although federal courts have not labeled non-capital habeas cases as highly time consuming, the judicial resources that they require should not be understated. In a large sample of state habeas cases filed in federal court in 2003 and 2004, King and Hoffmann noted that magistrate judges reviewed more than fifty percent of them, which provided additional opportunities for petitioners to challenge court findings.⁹² Magistrate judges’ clerks devote additional resources to these cases, perhaps disproportionately, as prisoners are not required to e-file.⁹³ Further, “[m]ore than one of every eight cases included an amended petition, and amended petitions generally require[d] an additional responsive

87. KING ET AL., *supra* note 15, at 41, 43.

88. Table C-5, *U.S. District Courts—Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending September 30, 2012*, U.S. COURTS, <http://www.uscourts.gov/statistics/table/c-5/judicial-business/2012/09/30> (last visited May 1, 2015).

89. KING & HOFFMANN, *supra* note 2, at 78–80 (noting that “it takes habeas courts up to 17 percent longer, on average, to complete cases in which a claim was dismissed as defaulted than it does to complete cases in which no claims were dismissed for this reason”).

90. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-862T, *FEDERAL JUDGESHIP: THE GENERAL ACCURACY OF DISTRICT AND APPELLATE JUDGESHIP CASE-RELATED WORKLOAD MEASURES 1–2* (2013) (statement of David C. Maurer, Director, Homeland Security and Justice), available at <http://www.judiciary.senate.gov/imo/media/doc/091013RecordSub-Sessions.pdf>.

91. *Id.* at 3 (explaining that 2004 case weights “are still in use”); see PATRICIA LOMBARD & CAROL KRAFKA, *FED. JUDICIAL CTR., 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY 5* (2005), available at [http://www.fjc.gov/public/pdf/public/lookup/CaseWts0.pdf/\\$file/CaseWts0.pdf](http://www.fjc.gov/public/pdf/public/lookup/CaseWts0.pdf/$file/CaseWts0.pdf) (showing a weight of 0.54 for “§ 2254 Habeas Corpus Petitions,” as compared to, for example, 0.75 for “Prisoner Civil Rights/Prison Conditions (Federal),” and 12.89 for “Death Penalty Habeas Corpus”); *id.* (showing lower weights assigned to prisoner litigation cases, including 0.44 for “Deportation/Immigration” and 0.49 for “Mandamus”); *id.* (showing examples of the higher weights assigned to non-prisoner cases, for example, 3.45 for “Antitrust,” 1.41 for cases involving “Insurance Contracts,” and an unusually high 4.79 for “Environmental Matters”).

92. KING & HOFFMANN, *supra* note 2, at 80.

93. Hoffmann & King, *supra* note 2, at 816.

pleading.”⁹⁴ Hiring pro se and other support clerks and staffing pro se intake units also adds to federal expenditures.⁹⁵ The preparation of pro se handbooks that guide petitioners through the process and other filing instructions, notices in multiple languages, brochures, and special websites likely also add minor costs in some districts.⁹⁶ Ultimately, the time and resources devoted to state non-capital habeas cases in federal courts likely varies in large part by the judge.⁹⁷ On balance, then, using the challenges to state non-capital convictions as a percentage of all federal cases to calculate the fiscal burden on the federal government seems a reasonable, if admittedly rough, approach.

All of the costs discussed above—including the many costs incurred by these offices and clerks for non-habeas cases—are included in the total budget numbers described below, as the federal budget numbers used include judicial salaries as well the “salaries and expenses” of “supporting personnel such as the administrative and legal aides required to assist the judges” at both the district and appellate levels.⁹⁸ Not

94. *Id.* at 815 (footnote omitted).

95. *See, e.g.,* DONNA STIENSTRA ET AL., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS 12 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/\\$file/proseusdc.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/proseusdc.pdf/$file/proseusdc.pdf) (showing that of the ninety districts responding, four have no “permanent pro se law clerks with substantial responsibility for pro se cases,” seventeen have 1–1.5 of these clerks, twenty have 2–2.5, nineteen have 3–3.5, twenty-six have 4–9, and four have ten or more permanent pro se clerks); *id.* at 11–12 (noting that of the ninety districts responding, in addition to their permanent pro se clerks, fourteen have no clerks’ office staff “with substantial responsibility for pro se cases,” fourteen have one staff member, twenty-four have two to five, sixteen have six to ten, sixteen have eleven to twenty, and six have more than twenty staff with responsibility for pro se cases). Twenty-five of the ninety districts responding indicate that pro se law clerks handle “[o]nly prisoner pro se cases.” *Id.* at 13; *see also Representing Yourself in Federal Court* (Pro Se), U.S. DISTRICT CT., S. DISTRICT OF N.Y., http://www.nysd.uscourts.gov/courtrules_prose.php?prose=office (last visited May 1, 2015) (indicating that the unit does not provide legal advice to pro se litigants but receives all pro se filings and provides procedural assistance).

96. *See, e.g.,* STIENSTRA ET AL., *supra* note 95, at 11 (noting that eight out of ninety responding districts provide services like brochures, handbooks, and websites in other languages). *Cf.* U.S. DIST. COURT FOR THE S. DIST. OF CAL., PRO SE HABEAS CORPUS HANDBOOK: A MANUAL FOR STATE PRISONERS (2000), available at <https://www.casd.uscourts.gov/Attorneys/FilingProcedures/Lists/General%20Filing%20Procedures/Attachments/3/Pro%20Se%20Habeas%20Corpus%20Handbook.pdf> (providing guidelines intended to assist litigants bringing habeas claims under §§ 2241 and 2254).

97. *See* David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 338 (1973) (noting judges’ varied approaches and corresponding attention given to habeas cases).

98. GOV’T PRINTING OFFICE, JUDICIAL BRANCH: THE BUDGET FOR FISCAL YEAR 2013, at 54, available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2013-APP/pdf/BUDGET-2013-APP-1-4.pdf> (last visited May 1, 2015).

included, however, is the appointment or hiring of counsel and experts.⁹⁹ It appears that few counsel are appointed for federal habeas cases: for non-capital federal habeas cases in federal district courts in 2003 and 2004, “92.3% (or 2202) of the cases involved no petitioner’s counsel,” suggesting a small but perhaps non-negligible additional expense.¹⁰⁰

Turning, then, to the numbers: In the U.S. courts of appeals, during the twelve-month period concluding December 31, 2013, of 41,775 civil and criminal cases addressed by the courts of appeals, 5456 cases arising from the district courts were non-capital habeas cases filed by state petitioners.¹⁰¹ Of all of the cases addressed by the circuit courts in this time period, 30,078 were civil.¹⁰² Non-capital habeas cases arising from state petitioners therefore comprised more than 18% of the circuit courts’ civil caseload and 13% of their total caseload. During this same time period (the twelve-month period ending December 31, 2013), U.S. district courts received a total of 16,903 general habeas petitions from state prisoners.¹⁰³ Table 1 summarizes these statistics.

99. A full examination of costs would include appointments, as some habeas petitioners receive appointed counsel. *See, e.g.,* STIENSTRA ET AL., *supra* note 95, at vii (noting that in a survey of the chief judges of federal district courts (addressing pro se assistance for prisoners and non-prisoner petitioners), more than two-thirds of sixty-one judges responding indicated that they appoint “counsel when the merits of the case warrant it”). But appointed counsel is relatively rare for state habeas petitioners in federal court. *See infra* text accompanying note 100.

100. KING ET AL., *supra* note 15, at 15, 23.

101. *Table B-7, U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising from the U.S. District Courts, by Circuit, During the 12-Month Period Ending December 31, 2013*, U.S. COURTS 1–2, <http://www.uscourts.gov/statistics/table/b-7/statistical-tables-federal-judiciary/2013/12/31> (last visited July 8, 2015) [hereinafter *Table B-7*] (showing 960 general (non-capital) habeas cases with the United States as a defendant and 5456 general habeas cases involving federal question jurisdiction).

102. *Id.* at 1.

103. *Table C-3, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending December 31, 2013*, U.S. COURTS 1–2, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCUQFjAB&url=http%3A%2F%2Fwww.uscourts.gov%2Ffile%2F10223%2Fdownload%3Ftoken%3DB3fLw8BY&ei=j3idVdbWEYn3-QG2pJ6IBQ&usg=AFQjCNGZE4DxGpo0EkaHTyky-Iwvk37IDQ&sig2=O9wlyuxz2ER53NEUkJ2gEg&bvm=bv.96952980,d.cWw&cad=rja> (last visited July 8, 2015) [hereinafter *Table C-3—December 31, 2013*]. These numbers exclude alien-detainee habeas cases, for which 777 petitions were filed in the time period described. *Id.* at 1.

Table 1. Summary of state prisoners' non-capital habeas claims filed in federal courts January 1, 2013–December 31, 2013, excluding alien detainee habeas claims and prison condition cases

	U.S. District Courts – petitions received	U.S. Courts of Appeals – cases arising from district courts
State non-capital habeas petitions	16,903 ¹⁰⁴	5456 ¹⁰⁵
Total of all criminal and civil cases, including habeas	382,593 ¹⁰⁶	41,775 cases arising from district court ¹⁰⁷
General non-capital habeas percent of total cases	4.42%	13.07%

As shown by Table 1, habeas cases are a moderate percentage of district courts' and appellate courts' caseloads. If one combines the general non-capital habeas cases filed by state petitioners—16,903 in district courts and 5456 in appellate courts—and the total cases in these courts—382,593 in district courts and 41,775 in appellate courts—general non-capital habeas cases make up only 5.27% of all cases in the federal court system. The federal judiciary budget projection for 2013, including funding for the Supreme Court, Courts of Appeals, District Courts, security, the Administrative Office, and the Federal Judicial Center, was approximately \$3.84 billion.¹⁰⁸ Of this amount, roughly 20%

104. *Id.* at 2.

105. *Table B-7, supra* note 101, at 2.

106. *Table C-3—December 31, 2013, supra* note 103, at 1; *Table D-3, U.S. District Courts—Criminal Defendants Commenced, by Offense and District, During the 12-Month Period Ending December 31, 2013*, U.S. COURTS 1, <http://www.uscourts.gov/statistics/table/d-3/statistical-tables-federal-judiciary/2013/12/31> (last visited July 9, 2015).

107. *Table B-7, supra* note 101, at 1.

108. *See* GOV'T PRINTING OFFICE, *supra* note 98, at 51, 53, 56, 58–59 (adding \$77 million in estimated 2013 expenses for the Supreme Court, \$632 million for Courts of Appeals, \$2435 million for District Courts, \$515 million for court security, \$149 million for Administrative Office of the Courts, and \$28 million for Federal Judicial Center). Excluded from this list of 2013 costs are amounts for care of the building and grounds for the Supreme Court and costs for the Federal Circuit Court, Court of International Trade, bankruptcy courts, probation and pretrial services,

appears to go to facilities and utilities, which are likely largely fixed in the short to medium term, leaving around \$3.07 billion.¹⁰⁹ If one assumes that court costs were allocated equally among various types of cases, non-capital habeas cases accounted for approximately \$161.79 million of the federal court budget in 2012.¹¹⁰ The federal government, however, is not the only body absorbing the costs of non-capital habeas review—the states’ expenditures must be estimated as well.

B. State Costs

Ignoring, for the moment, the impact on states’ comity interests and other difficult-to-quantify costs of federal review of state habeas claims,¹¹¹ the state costs of administering state petitioners’ federal habeas claims primarily arise from efforts to defend the claims and comply with various court requirements, such as delivering the full state record to the federal habeas court. Most states have an office devoted expressly to the defense of criminal convictions, and in some states a division is solely tasked with the defense of criminal convictions in federal court. In Texas, for example, the Postconviction Litigation Division of the state Office of the Attorney General “defends state felony convictions and sentences against constitutional challenge in federal court.”¹¹² In Oregon, one section—the Criminal and Collateral Remedies Litigation Section—litigates “State Post-Conviction Relief, Federal Habeas Corpus, State Habeas Corpus, and Psychiatric Security Review Board Cases.”¹¹³ Other states assign habeas cases to a few attorneys within an office with a broader mandate, such as a criminal or appellate division of the state’s attorney general’s office. In Colorado, for example, three attorneys in the Appellate Division of the Criminal Justice Section of the Office of the

and defender services, as habeas cases do not directly, or in most cases even indirectly, generate these costs.

109. *Id.* at 54–55 (showing estimated 2013 total costs of \$5494 million for the courts of appeals, district courts, bankruptcy courts, and probation/pretrial services, of which \$993 million will be for rental payments and \$125 million will be used for communications, utilities, and miscellaneous expenses). *Cf.* Huq, *supra* note 14, at 598 (“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.”).

110. This rough figure is calculated by multiplying the fraction of federal district and appellate court cases in 2013 that were state habeas cases (0.0527) by the court budget for 2013, excluding facilities and utilities.

111. *See* CHEESMAN ET AL., *supra* note 15, at 40 (noting the uncertainty for states that is caused by federal review of the validity of convictions).

112. *Criminal Justice Divisions*, TEX. ATT’Y GEN., <https://www.texasattorneygeneral.gov/cj/criminal-justice-divisions> (last visited May 1, 2015).

113. *Trial*, OR. DEP’T OF JUST., http://www.doj.state.or.us/divisions/pages/trial_index.aspx (last visited May 1, 2015).

Attorney General, “work primarily on non-capital habeas cases.”¹¹⁴ Louisiana, on the other hand, appears to employ a mix of lawyers from the state attorney general’s office, district attorney’s offices, and private counsel.¹¹⁵

Many states do not track the amount of money spent on non-capital federal habeas or federal habeas generally¹¹⁶—in part, perhaps, because many do not have separate offices devoted to postconviction matters—but a rough estimate of the funds they expend on non-capital federal habeas is possible.¹¹⁷ California’s Appeals, Writs, and Trials Section spent \$8.54 million on non-capital federal habeas petitioners for Fiscal Year 2012–2013, \$8.64 million for Fiscal Year 2011–2012, and \$10.31 million for Fiscal Year 2010–2011, for an average of \$9.16 million.¹¹⁸ In the twelve-month period ending in September 2013 (the data that most closely matches California’s fiscal year), California prisoners filed

114. E-mail from Catherine P. Adkisson, Deputy Solicitor Gen., Appellate Div., Office of the Attorney Gen. of Colo., to Samuel Wiseman, Assoc. Professor of Law, Fla. State Univ. Coll. of Law (Jan. 27, 2014, 12:50 PM); see *Appellate Division*, COLO. ATT’Y GEN., http://www.coloradoattorneygeneral.gov/departments/criminal_justice/appellate_division (last visited May 1, 2015).

115. *Divisions Overview*, LA. OFFICE OF THE ATT’Y GEN., <http://www.ag.state.la.us/Article.aspx?articleID=2&catID=0> (last visited May 1, 2014).

116. See, e.g., E-mail from Liz Brocker, Pub. Info. Officer, N.D. Attorney Gen., to Samuel Wiseman, Assoc. Professor of Law, Fla. State Univ. Coll. of Law (Jan. 29, 2014, 9:48 AM) (providing—in response to an inquiry about the number of attorneys devoted to non-capital federal habeas cases in the state and the budget allocated to these cases—a general link to North Dakota’s biennial reports, without specific budget numbers, and indicating that this is the information that the state compiles); E-mail from Beth A. Burton, Deputy Attorney Gen. of Ga., to Samuel Wiseman, Assoc. Professor of Law, Fla. State Univ. Coll. of Law (Jan. 27, 2014, 9:50 AM) (noting that “[i]t would be impossible” to identify specifically how much money is devoted to non-capital federal habeas cases, as the state does not “have that type of information,” but indicating the number of attorneys in the state that handle all state murder cases, state habeas cases, and federal habeas); E-mail from William R. Stokes, Deputy Attorney Gen. of Me., Chief, Criminal Div., to Samuel Wiseman, Assoc. Professor of Law, Fla. State Univ. Coll. of Law (Feb. 6, 2014, 4:03 PM) (noting that the state does not track expenditures attributable to non-capital federal habeas but explaining that the state has one attorney who handles all homicide appeals and federal habeas matters).

117. The estimates provided here are from electronically available state habeas cost data and from state officials who responded to my e-mail, telephone, and public records request inquiries regarding state expenditures on non-capital habeas. After identifying telephone, e-mail, or public records contacts for thirty states (this information was not readily available for the remaining twenty states), I received individualized responses from individuals in approximately seven states; some of the information provided was not sufficiently specific to include in the data set. This is, of course, not a comprehensive or necessarily representative data set, although it includes a relatively diverse set of states from the perspective of geography, size, and the number of prisoners and habeas petitioners within the state.

118. E-mail from T. Maggio, Pub. Inquiry Unit, Cal. Attorney Gen. Office, to Samuel Wiseman, Assoc. Professor of Law, Fla. State Univ. Coll. of Law (Feb. 14, 2014, 2:00 PM).

approximately 2921 non-capital federal habeas petitions, representing approximately 17.46% of non-capital habeas petitions filed by all state prisoners.¹¹⁹ For the period ending September 2012, California prisoners filed approximately 3443 non-capital federal habeas petitions, representing approximately 21.61% of non-capital habeas petitions filed by all state prisoners.¹²⁰ And for the period ending September 2011, California prisoners filed approximately 3853 non-capital federal habeas petitions, representing approximately 23.22% of non-capital habeas petitions filed by all state prisoners.¹²¹ Extrapolating this data to the national level would suggest a total of \$48.91 million spent by all states on noncapital federal habeas cases in 2013, \$39.95 million spent in 2012, and \$44.42 million spent in 2011, for an average of \$44.43 million spent by all states.

California may achieve significant economies of scale, however, and data was also obtained from less populous states. Colorado's three

119. See Table C-3, *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2013*, U.S. COURTS 2, 6, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.uscourts.gov%2Ffile%2F10198%2Fdownload&ei=83qdVa-2K8jt-AH25b-ABg&usg=AFQjCNGG-gDbMiklMysE-ExOu7HsHYoBXQ&sig2=iU6bM2P23x-QIG9Md9o6Tw&bvm=bv.96952980,d.cWw> (last visited July 8, 2015). During this time period California petitioners filed 479+770+1392+280= 2921 non-capital habeas petitions in U.S. district court. *Id.* at 6. Total state, non-capital habeas corpus petitions filed by state petitioners in U.S. district court for the twelve-month period ending September 30, 2013 were 16,729. *Id.* at 2.

120. See Table C-3, *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2012*, U.S. COURTS 2, 6, https://www.google.com/search?q=Table+C-3%2C+U.S.+District+Courts%E2%80%94Civil+Cases+Commenced%2C+by+Nature+of+Suit+and+District%2C+During+the+12%E2%80%93Month+Period+Ending+September+30%2C+2012&rlz=1C5AVSZ_enUS615US616&oq=Table+C-3%2C+U.S.+District+Courts%E2%80%94Civil+Cases+Commenced%2C+by+Nature+of+Suit+and+District%2C+During+the+12%E2%80%93Month+Period+Ending+September+30%2C+2012&aqs=chrome..69i57.255j0j7&sourceid=chrome&es_sm=91&ie=UTF-8 (last visited July 8, 2015). For this time period California petitioners filed 557+914+1594+378=3443 non-capital habeas petitions in U.S. district courts. *Id.* at 6. Total state, non-capital habeas corpus petitions filed by state petitioners in U.S. district court for the twelve-month period ending September 30, 2012 were 15,929. *Id.* at 2.

121. See Table C-3, *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2011*, U.S. COURTS 2, 6, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.uscourts.gov%2Ffile%2F10196%2Fdownload&ei=fHydVey3G8Pz-AH3goqIBQ&usg=AFQjCNEGv43ncgCKzsqtgn4P0Td4YOIAAA&sig2=F7ZbcwoRMmK2r2lmti51oA&bvm=bv.96952980,d.cWw> (last visited July 8, 2015). For this time period California petitioners filed 712+1084+1726+331=3853 non-capital habeas petitions in U.S. district courts. *Id.* at 6. Total state, non-capital habeas corpus petitions filed by state petitioners in the U.S. district courts for the twelve-month period ending September 30, 2011 were 16,595. *Id.* at 2.

attorneys assigned to non-capital habeas cases do not work only on habeas matters but devote about two-thirds of their time to them, at a billing rate (to other departments) of \$94.95 hourly.¹²² Although the attorneys do not track their hours, the Deputy Solicitor General roughly estimates that they each works approximately 1800 hours annually, amounting to yearly expenditures of approximately \$341,820 on non-capital federal habeas cases.¹²³ From January through December 2013, petitions from Colorado inmates represented approximately 1.59% of all state, non-capital habeas petitions in federal district courts.¹²⁴ All states' expenditures on federal non-capital habeas—extrapolating from Colorado's expenses—would be \$21.56 million.

In Georgia, twelve attorneys handle all of the state's criminal cases, state habeas cases, and federal habeas petitions, with four assigned to non-capital federal habeas petitions.¹²⁵ Assuming that attorneys receive approximately \$100 hourly (an estimate based on Colorado's \$94.95 hourly cost and accounting for overhead), and that they also work 2000 hours annually, Georgia's annual expenditures are \$800,000 annually. Extrapolating Georgia's 3.38% of federal habeas cases from December through January 2013¹²⁶ to the national level would represent roughly \$23.64 million in total state expenditures on federal habeas.

In Maine, one attorney handles "all . . . appeals in homicide cases" and "all federal habeas matters."¹²⁷ Assuming, generously, that federal habeas occupies 90% of this attorney's time, this would mean that \$180,000 is expended annually. Maine's six petitioners amounted to 0.04% of federal non-capital habeas cases from January through December 2013,¹²⁸ which would extrapolate to \$507.09 million in total state expenditures on federal non-capital habeas.¹²⁹ The more modest extrapolations from the more populous states suggests that they do indeed achieve economies of scale.

122. Adkisson, *supra* note 114.

123. *Id.*

124. See Table C-3—December 31, 2013, *supra* note 103, at 2, 6. In 2013, Colorado petitioners filed 268 non-capital habeas petitions in federal district court. *Id.* at 6.

125. Other states logged surprisingly low expenditures. Idaho, for example, appears to have spent only \$1500 on non-capital federal habeas in 2013. E-mail from Kriss Bivens Cloyd, Constituent Info. Specialist, Idaho Office of the Attorney Gen., to Samuel Wiseman, Assoc. Professor of Law, Fla. State Univ. Coll. of Law (Feb. 6, 2014, 3:31 PM).

126. See Table C-3—December 31, 2013, *supra* note 103, at 2, 6. In 2013, Georgia petitioners filed 338+142+92=572 non-capital habeas petitions in federal district court. *Id.* at 6.

127. Stokes, *supra* note 116.

128. See Table C-3—December 31, 2013, *supra* note 103, at 2. In 2013, Maine petitioners filed 6 non-capital habeas petitions in federal district court. *Id.*

129. Maine does not have a death penalty. See STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 220–22 (2002).

Oregon appears to most closely and directly track expenditures on federal habeas cases. The legislatively approved budget for its Defense of Criminal Convictions Program (DCC) in 2011–2013 was \$17,361,631.¹³⁰ For this same period, the section’s federal habeas appeals and Supreme Court cases¹³¹ required 3.05 full-time equivalents (FTE) in federal appellate court for attorneys, paralegals, law clerks, and investigators,¹³² out of a total 21.97 FTE for the section’s appellate division.¹³³ Federal district court federal habeas cases required 4.62 FTE out of 20.14 total FTE for the section’s trial division.¹³⁴ This suggests that federal habeas work occupies approximately 14.1% of the section’s time.¹³⁵ These figures include time spent on capital cases but, during the period in question, there was a death penalty moratorium in Oregon, leading to a reduction in litigation.¹³⁶ Assuming that all expenditures were attributable to non-capital cases and that federal habeas cases required a similar percentage of overhead and fixed costs, 14.1% of the 2011–2013 biennium budget of more than \$17 million for the DCC is \$2.45 million,¹³⁷ or \$1.23 million annually. Oregon’s habeas cases represented approximately 0.84% of all non-capital federal habeas petitions in calendar years 2011 through 2013, and if one assumes, as with the states previously discussed, that Oregon represents 0.84% of state expenditures on federal habeas cases generally,¹³⁸ the states combined might spend \$145.72 million annually on non-capital federal habeas.

In Wyoming, the Deputy Attorney General estimated in January 2014 that “about 2000 attorney hours per year” and “200 paralegal hours” are devoted to defending non-capital habeas corpus petitions in federal

130. *Governor’s Balanced Budget, Defense of Criminal Convictions*, OR. DEP’T OF JUST., http://www.doj.state.or.us/about/pdf/13-15_doj_gbb_dcc.pdf (last visited May 1, 2015).

131. This assumes, for the purposes of making as generous an estimate of costs as possible, that all Supreme Court cases involved a federal habeas issue.

132. *Governor’s Balanced Budget, Defense of Criminal Convictions*, *supra* note 130, at 6. FTE for federal habeas cases required 0.47 FTE and Supreme Court cases required 2.58. *Id.*

133. *Id.* Projected total FTE is 18.65 for attorneys, 0.87 for paralegals, 1.93 for law clerks, and 0.52 for investigators, a total of 21.97. *Id.* The “2.58” in the “AY 13 FTE Resources” cell appears to be a typographical error. The total indicated in that cell, it appears, should be 21.97. *Id.*

134. *Id.*

135. *Id.* Total FTE for federal appellate court habeas cases, Supreme Court cases, and federal district court habeas cases is $0.47 + 2.58 + 4.62 = 7.67$ FTE. *Id.* Total FTE for the trial portion of the section and appellate portion of the section is $21.97 + 20.14 = 42.11$. *Id.*

136. *Oregon Governor Declares Moratorium on Death Penalty*, L.A. TIMES (Nov. 22, 2011, 6:04 PM), <http://latimesblogs.latimes.com/nationnow/2011/11/oregon-governor-kitzhaber-executions-death-penalty.html>.

137. *Governor’s Balanced Budget, Defense of Criminal Convictions*, *supra* note 130, at 13.

138. See Table C-3—December 31, 2013, *supra* note 103, at 2, 6. In 2013, Oregon petitioners filed 137 non-capital habeas petitions in federal district court. *Id.* at 6.

courts.¹³⁹ If one assumes that attorneys and paralegals make \$100 hourly (as with the Georgia estimate, an estimate based on Colorado's \$94.95 hourly cost and accounting for overhead), Wyoming spends \$220,000 annually on habeas. From January through December 2013, the state represented 0.09% of all non-capital federal habeas cases filed by state petitioners¹⁴⁰ and, making the same assumptions regarding representativeness as made above, this would suggest that all states combined spend \$247.91 million annually on non-capital federal habeas.

Table 2 summarizes the range of estimates of total expenditures by states on federal habeas by extrapolating from state budgets using each state's total percentage of federal habeas cases filed by state petitioners. As described above, I have relied on estimates where hard data is unavailable, and estimates may of course be inaccurate.

Table 2. Estimated total state expenditures on non-capital federal habeas as extrapolated from annual state budgets

State	Approximate annual expenditures on federal non-capital habeas	State petitioners: percent of total federal non-capital habeas petitioners (in the year or years of estimated expenditure)	Extrapolated total state expenditures (in millions)
California	\$9.16 million	20.74%	\$44.17
Colorado	\$341,820	1.59%	\$21.56
Georgia	\$800,000	3.38%	\$23.64
Maine	\$180,000	0.04%	\$507.09
Oregon	\$1.23 million	0.84%	\$145.72
Wyoming	\$220,000	0.09%	\$247.91
<i>Average</i>	--	--	\$165.01

139. E-mail from Dave Delicath, Deputy Attorney Gen., Wyo. Attorney Gen. Office, to Samuel Wiseman, Assoc. Professor of Law, Fla. State Univ. Coll. of Law (Jan. 29, 2014, 11:57 AM).

140. See *Table C-3—December 31, 2013*, *supra* note 103, at 2, 6. In 2013, Wyoming petitioners filed 15 non-capital habeas petitions in federal district court.

The average of the rough estimates of total state expenditures on federal habeas, extrapolated from individual state budgets, is \$165.01 million, with a median of \$94.94 million. The costs to the federal government and the states of administering and participating in federal habeas review, combining this rough average state statistic and the equally rough federal estimate from Section II.A, could be approximated at \$327 million annually.¹⁴¹

This estimate is intentionally expansive; due to the lower per-petition costs that appear to be achieved in the states with large prison populations, the state estimate, in particular, is probably inflated due to the inclusion of data from Maine and Wyoming, which together had just twenty-one habeas petitions filed in the sample period. Omitting Maine and Wyoming, the estimated state costs would be \$58.77 million, for a combined state-and-federal estimate of \$221 million. Nonetheless, I use the larger number to attempt to account for costs potentially omitted due to oversight, and, ultimately, to identify the largest amount of money that might be available to invest in improving state trials through initiatives like better indigent defense, if most federal habeas is eliminated.

C. *The Difficulty of Habeas Cost-Cutting*

The rough estimate of the cost of federal review of non-capital state habeas claims to the federal courts and state governments shows that eliminating most federal habeas review would free up only a modest amount of funds for habeas reform in the best case. Moreover, although the best institutional model for enforcing habeas is perhaps debatable, one thing seems very clear: any proposed system that relies on prisoner petitions in any capacity will, like habeas under AEDPA, either fail, be expensive to administer, or both. The reason is straightforward: it costs prisoners essentially nothing to file lawsuits, and so they do, whether they have a colorable claim or not. This, of course, is far from a novel observation,¹⁴² and it figures centrally in King and Hoffmann's work.¹⁴³ But both they and Primus fail to take it completely to heart, and as a result their proposals lead into what one might call the habeas trap.

King and Hoffmann recognize that if federal habeas review is unavailable to most state prisoners, then ensuring the adequate

141. This number is the sum of estimated federal expenditures and state expenditures.

142. Friendly, *supra* note 50, at 149 (noting "Justice Jackson's never refuted observation that '[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones'" (quoting *Brown v. Allen*, 334 U.S. 443, 537 (1953) (alteration in original))).

143. Hoffmann & King, *supra* note 2, at 797, 848 (noting the "doomed strategy of post hoc, case-by-case federal litigation" filed by convicted defendants and arguing for a "new Federal Center for Defense Services" that would not rely on individual claims to improve indigent defense).

functioning of state postconviction review systems is both normatively desirable and, under the Suspension Clause, probably constitutionally required.¹⁴⁴ Their solution is to allow individual prisoners to challenge the adequacy of their state's processes, acknowledging that this "will prompt prisoners seeking habeas relief to [file]" and initially burden the courts.¹⁴⁵ But they suggest that the courts will quickly decide what counts as an impermissible suspension of habeas by the states and will soon be able to "dispose" of certain claims "summarily."¹⁴⁶ As others have pointed out, this might not be true, and extensive, wasteful litigation might result.¹⁴⁷ But even if King and Hoffmann are right that the prisoner claims will be resolved quickly, they will very likely not be resolved accurately over the long run. A federal court may give the first Suspension Clause challenge careful consideration, but in following years, as a constant inundation of petitioners allege worsened conditions, it will again be extremely difficult for the court to "separate the wheat from the chaff."¹⁴⁸

Similarly, Professor Primus proposes that prisoners could "write letters requesting that the Department of Justice take their cases, and Department attorneys would pick the cases that were most representative of serious systemic state problems."¹⁴⁹ Additionally, she suggests that prisoners could file pro se petitions.¹⁵⁰ Here, too, either the DOJ or the courts would spend considerable resources trying to sort valid claims from a huge pile of frivolous claims—many of them facially plausible—

144. *Id.* at 839–43 (concluding that it is clear under *Boumediene* "that substantive restrictions on the scope of habeas can survive a Suspension Clause challenge only if an 'adequate substitute' is available" and that their proposal "will not violate the Suspension Clause *so long as* the states continue to provide *not only* a rigorous and Due Process-compliant initial adjudication of guilt *but also* reasonable levels of state appellate and postconviction review."). They note, though, that if states unreasonably curtail postconviction procedures, federal habeas review will expand. *Id.*

145. *Id.* at 845–46.

146. *Id.* at 846.

147. Blume et al., *supra* note 20, at 463 ("We have no confidence that the Suspension Clause issues Hoffmann and King frame would be resolved as quickly, cleanly, or finally as they envision."); *id.* at 460 (suggesting that "the resources consumed in Suspension Clause litigation would dwarf those spent processing claims under the actual-innocence exception"); Primus, *Crisis*, *supra* note 14, 904 (arguing that petitioners would have "every incentive" to file Suspension Clause claims and that "[t]he only way for the federal courts to resolve these claims would be to conduct resource-intensive reviews of how each state's procedures actually operated in each petitioner's case"); see also Huq, *supra* note 14, at 568–69.

148. Hoffmann & King, *supra* note 2, at 814.

149. See Primus, *Structural Vision*, *supra* note 4, at 36 (noting that under "[o]ne potential compromise" to providing each petitioner with counsel, "Justice Department attorneys would be responsible for investigating and challenging systemic state practices that violated defendants' federal rights").

150. *Id.* at 38.

or they would give up, and throw the needles out with the haystacks.

This problem is not unique to habeas, but it is unusually hard to solve in the habeas context. Professors Tonja Jacobi and Gwendolyn Carroll propose a loss of good-time credits as a way to disincentivize frivolous requests for postconviction DNA testing, but, as they note, their system may not successfully translate to habeas.¹⁵¹ DNA tests are both objective and binary, making the decision to impose penalties simple. On the other hand, determining whether a habeas petition is frivolous is both subjective and complex; given the necessarily modest nature of any penalty,¹⁵² any reduction in the number of petitions would likely be offset by the time spent determining frivolousness.¹⁵³

Thus, the best way to avoid the habeas trap is for courts not to entertain prisoner petitions, and instead to rely, as discussed above, on some combination of federal actors and nonprofits to make sure that state postconviction systems (or, in Professor Primus's proposal, state criminal justice systems more broadly)¹⁵⁴ are adequately functioning. As others have similarly argued,¹⁵⁵ such a scheme, along with the possibility of certiorari and the theoretical possibility of an original writ, would probably survive a Suspension Clause challenge. But, as argued in Part III below, to the extent that avoiding increased federal intervention in state criminal justice is a key goal of a significant Congressional faction, replacing pro se prisoners with competent, better funded attorneys is a goal that likely cannot be achieved in the near term. If it is not, a large chunk of any savings would be sucked into the habeas trap. And at the other end of the spectrum, completely eliminating federal court oversight of non-capital state convictions would be both deeply controversial and quite arguably a Suspension Clause violation. Thus, it may be difficult to

151. See Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. 263, 304–06 (2008).

152. A criminal penalty would require significantly more process, even beyond constitutional concerns. See *id.* at 268–69.

153. Cf. FED. R. APP. P. 22 (explaining AEDPA appeals of denials of appealability); Hoffmann & King, *supra* note 2, at 815–16.

154. Primus, *Structural Vision*, *supra* note 4, at 2–3.

155. Hoffmann & King, *supra* note 2, at 841 (arguing that their system of narrowed habeas review, which allows Suspension Clause challenges alleging deficient state postconviction procedures, “will not violate the Suspension Clause so long as the states continue to provide not only a rigorous and Due Process-compliant initial adjudication of guilt but also reasonable levels of state appellate and postconviction review” (emphasis omitted)); Primus, *Structural Vision*, *supra* note 4, at 39–40 (noting potential Suspension Clause challenges to her proposal for limiting federal habeas claims to arguments that states systematically violated petitioners’ constitutional rights). Professor Primus concludes that her proposal likely does not violate the Suspension Clause in light of the fact that the “clause clearly permits some restrictions on the scope of federal review of state court convictions” as shown by *Stone v. Powell*, 428 U.S. 465 (1976), and she notes the cases in which individualized review under her proposal would still be available. *Id.*

realize even the relatively modest cost savings potentially available from restricting non-capital habeas.

D. *Non-Financial Costs*

The cost of federal habeas review of state convictions is not limited to the expenditures estimated above. This is because there are more abstract values that review impinges on as well, and to the extent opponents of federal habeas would give something up to avoid them, they must figure in the calculation. One set of criticisms focuses on the harms of federal habeas review to the dignity of state criminal justice systems, and state comity more generally. They suggest that “public respect for the judgments of criminal courts” is damaged by the fact that the case could be reopened at any time,¹⁵⁶ and that federal habeas review is “subversive of a judge’s sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well.”¹⁵⁷ Accordingly, courts and scholars alike have urged a respect for states—comity—that allows competent state courts to make decisions about the constitutionality of detention.¹⁵⁸ Relatedly, the annoyance, embarrassment, anger, and resentment that actors in state criminal justice systems may sometimes feel upon having their convictions questioned or vacated by a federal judge are costs as well. Questioned or vacated decisions also damage the federalist notion that states should have the authority to set criminal procedural rules within their borders. For ease of reference, I refer to these varied but related ideas as state sovereignty interests. They are undoubtedly important to the states, but, given the rarity of federal relief under AEDPA, the additional benefit of further reducing the scope of federal review may be small.

Another intangible value undermined by federal collateral review is finality. Federal habeas introduces uncertainty and delay into the conviction process, introducing potentially “endless relitigation of the merits,”¹⁵⁹ and, in so doing, impacts victims, communities, and

156. Friendly, *supra* note 50, at 149.

157. Bator, *supra* note 71, at 451.

158. Preiser v. Rodriguez, 411 U.S. 475, 491 (1973) (stating “[t]he rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity,” which connotes “a proper respect for state functions” (quoting Younger v. Harris, 401 U.S. 37, 44 (1971) (internal quotation marks omitted)); Frank v. Mangum, 237 U.S. 309, 334 (1915) (concluding that a state court decision may not be “ignored or disregarded” and that to do so “would be not merely to disregard comity, but to ignore . . . whether the State, taking into view the entire course of its procedure, has deprived [a defendant] of due process of law”); see Kovarsky, *supra* note 11, at 454–56 (describing comity, federalism, and finality interests); J. Skelly Wright & Abraham D. Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 903 (1966) (exploring justifications based in comity).

159. Bator, *supra* note 71, at 447.

defendants. Convicted defendants who know that they might have another means of challenging the legality of their imprisonment might not begin the important rehabilitative process because they are holding out hope of a habeas victory.¹⁶⁰ This appears to still be true despite the abysmally low success rate in federal court. The fact that defendants take the time to file thousands of ultimately futile claims suggests that they at least retain some small hope of release. Knowledge of the opportunity for federal habeas review—and a false hope that this review might be successful—also might cause the threat of imprisonment to have weaker deterrent effects.¹⁶¹ Further, victims and their families waiting for a federal habeas determination remain in an unpleasant limbo, concerned that the individual they believe committed the crime will be released and will threaten further physical and emotional harm. Here, too, the paucity of relief under AEDPA has already reduced these costs.

Although it is impossible to quantify these costs with any degree of precision, it is possible, for present purposes, to get an idea of their importance. States are not constitutionally required to provide collateral review, and many state postconviction review processes came into being partly as a result of states' desire to insulate their decisions from federal habeas, which even before AEDPA, provided deference to some state decisions.¹⁶² The costs of maintaining these systems are fairly substantial, but some caveats are necessary. First, of course, states have always had reasons for allowing collateral review—correcting individual injustices

160. See *id.* at 452 (noting that the “first step” in rehabilitation “may be a realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation”); see also Friendly, *supra* note 50, at 146 (concluding that collateral attack limits rehabilitation and that the argument that rehabilitation would not occur anyway, as prisons are not operated with this goal in mind, are irrelevant).

161. *Teague v. Lane*, 489 U.S. 288, 309 (1989) (opinion of O'Connor, J.) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); see also Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interests of Finality,”* 2013 UTAH L. REV. 561, 563 (summarizing the arguments in favor of finality, including the *Teague* Court’s deterrence conclusions).

162. See, e.g., Blume et al., *supra* note 20, at 441 (describing “a series of rules” for the “protection of states’ interests in the finality of their judgments” under the Burger and Rehnquist Courts); *id.* at 445 (“[M]any states do not provide for the appointment of counsel to assist an incarcerated prisoner in a noncapital collateral challenge.”); Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO ST. J. CRIM. L. 183, 184–85 (2006) (describing the risks that states face under federal habeas review if competent counsel are not provided in the state postconviction process); King, *Enforcing Effective Assistance*, *supra* note 12, at 2443 (noting that only a “minority of states . . . routinely appoint counsel in postconviction cases”); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1043–44 (1977) (noting that even after two cases that expanded federal habeas, “state courts retained the power legitimately to resist lower federal court determinations of what the Constitution required of the state criminal courts”).

and providing systemic oversight, for instance—beyond avoiding federal review. These reasons may now be paramount even if they were initially not. Popular resentment of federal oversight of state governments has almost certainly decreased since the era of widespread school integration and prison reform litigation,¹⁶³ and the rareness of relief under AEDPA reduces its sovereignty harms. Second, the mixed history of attempts under AEDPA, and afterward, to incentivize states to meet certain standards in capital cases, including appointment of counsel in state collateral proceedings, in exchange for fast track review in federal court, suggests caution.¹⁶⁴ A number of states have attempted to qualify, but none has ever been certified for fast-track review, although this may be attributable, in part, to litigation and delay over the issuance of relevant standards by the Attorney General.¹⁶⁵

Further, the aftermath of *Martinez v. Ryan*¹⁶⁶ and *Trevino v. Thaler*¹⁶⁷ may provide a small natural experiment on the value states currently place on avoiding federal review. As a result of those cases, states that have procedural frameworks that make it “highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal” cannot rely on the state procedural default doctrine to avoid federal merits review unless they provide collateral counsel for that claim.¹⁶⁸ So, the states have a choice: they can “elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings.”¹⁶⁹ Thus, whether such states amend their procedures to provide counsel for ineffective assistance of trial counsel claims, which will involve some additional

163. See Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661–62, 708, 714–17 (1978) (describing federal court decrees in these areas).

164. In 1996, the federal government offered states an “opt-in” system for capital habeas, in which federal habeas claims for capital cases would be substantially limited in terms of the statute of limitations and the types of claims that could be raised if states met certain conditions that include showing that the defendant had adequate counsel. 28 U.S.C. §§ 2261–66 (2012); see also Doug Lieb, *Regulating Through Habeas: A Bad Incentive for Bad Lawyers?*, 65 STAN. L. REV. ONLINE 7, 7–8 (2012) (describing the original fast-track provision and the DOJ’s more recent proposed rules). Yet although some states took initial steps toward this opt-in option, none ultimately participated in the program. Blume et al., *supra* note 20, at 470–71. Several DOJ rules recently re-defined the conditions states must meet to receive fast track status, but these might not be enough to incentivize states to participate. See *Habeas Corpus Res. Ctr. v. U.S. Dep’t of Justice*, No. C 13-4517 CW, 2013 WL 5692031, at *3 (N.D. Cal. Oct. 18, 2013).

165. See Blume et al., *supra* note 20, at 470–71 & n.189.

166. 132 S. Ct. 1309 (2012).

167. 133 S. Ct. 1911 (2013).

168. See *id.* at 1921 (quoting *Martinez*, 132 S. Ct. at 1320).

169. *Martinez*, 132 S. Ct. at 1320.

costs, or instead allow the claims to proceed to merits review in federal court, will provide some indication of their willingness to spend to avoid federal review under AEDPA.¹⁷⁰ In any case, for the moment, the most that can probably be said is that the non-financial costs associated with federal review of state cases are real and potentially quite significant. But given that AEDPA has already significantly reduced these costs, further curtailing federal oversight may not be a particularly important goal of the states.

III. THE PROSPECTS OF RADICAL CHANGE

Recently, Professor Aziz Huq has questioned the viability of dramatic reform proposals generally, and Hoffmann and King's proposal specifically, pointing to the Supreme Court's historical leading role in the development of habeas, the unlikelihood of Congress acting at all (or acting at variance with the Court), and the implausibility of Hoffmann and King's fiscal tradeoff.¹⁷¹ This Part builds on Huq's criticism, lending empirical and theoretical support to the claim that significant legislative change is unlikely.

As calculated above, state and federal governments might save as much as \$327 million annually from the elimination of most non-capital habeas, though probably significantly less is more realistic. Based on this calculation, a tentative cost-benefit analysis of non-capital habeas under AEDPA is possible: although this program is unlikely to win any prizes for efficiency, its costs are not so disproportionate to the important goals it serves that reasonable people cannot think it worthwhile. That it is not an indisputable waste of resources in itself goes some distance to explain AEDPA's longevity, but its relatively low cost also points to another, more subtle obstacle to reform.

The most prominent recent reform proposals would reallocate funds to state indigent defense programs, or to the DOJ, to aid state petitioners raising claims of systemic federal rights violations.¹⁷² One could imagine other, arguably less judicial-resource intensive and more politically appealing proposals to eliminate most non-capital habeas in exchange for badly needed reforms to reduce wrongful convictions in state court. This Part suggests, though, that given even a fairly small gulf between AEDPA's instrumental and symbolic value on one hand and its relatively minor impact on state interests on the other, the limited resources that could be freed up by further curtailing non-capital habeas would be

170. See King, *Enforcing Effective Assistance*, *supra* note 12, at 2431 (arguing that *Martinez* is unlikely to increase the provision of counsel in state postconviction cases).

171. See Huq, *supra* note 14, at 595–99.

172. KING & HOFFMANN, *supra* note 2, at 88, 100–01, 107; Primus, *Structural Vision*, *supra* note 4, at 36.

insufficient to bridge that gulf and spur reform.¹⁷³ If this is the case, then dramatic reform is likely unrealistic in the near term.

A. *A Small Price to Pay*

If AEDPA is indeed not all that costly—or is at least reasonably low priced for the value it provides in the form of a slim opportunity for correcting injustice and granting very occasional relief, along with whatever deterrence the threat of that relief provides—then proponents of federal habeas will be less willing to part with it. And while a precise cost-benefit analysis in this context is probably impossible, non-capital habeas, even as it currently exists, does not appear to be a terrible value. Based on Professor King's research, non-capital federal habeas produces a roughly 0.82% success rate.¹⁷⁴ Using the \$327 million estimate from Section II.B., the cost per grant is \$2.4 million.¹⁷⁵ This sounds like, and is, a high figure. And, as Professor King documents, this accounts for all relief, including much that does not lead to a release from prison.¹⁷⁶ But this cost must be considered in the context of government spending. For perspective, the total federal budget for 2013 was about \$3.4 trillion,¹⁷⁷ of which roughly \$200 million was spent promoting American agricultural products in foreign countries.¹⁷⁸ At the state and local level, one estimate puts total yearly government expenditures at \$3.2 trillion.¹⁷⁹ Of this spending, if recent trends hold, around a billion dollars will go to building stadiums for privately-owned professional sports teams.¹⁸⁰

173. Cf. Huq, *supra* note 14, at 597 (arguing that the “fiscal tradeoff Hoffmann and King propose is implausible and unsustainable” because “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”).

174. King, *Non-Capital Habeas*, *supra* note 16, at 309.

175. See *supra* note 103 and accompanying text (noting 16,903 cases filed by state prisoners in federal district courts in 2013). At a rate of 0.82% of non-capital cases filed by state prisoners receiving grants of relief, see King, *Non-Capital Habeas*, *supra* note 16, at 309, this would produce 138.6 grants of relief.

176. See King, *Non-Capital Habeas*, *supra* note 16, at 311–15.

177. Barry Blom, *How the Actual Federal Budget Results for 2013 Compared with CBO's May 2013 Estimates*, CONG. BUDGET OFFICE (Nov. 6, 2013), <http://www.cbo.gov/publication/44711>.

178. U.S. DEP'T OF AGRICULTURE, FY 2014 BUDGET SUMMARY AND ANNUAL PERFORMANCE PLAN 35 (2014) available at <http://www.obpa.usda.gov/budsum/FY14budsum.pdf> (noting 200 million “to reimburse participating organizations for a portion of the cost of carrying out overseas marketing and promotional activities, such as consumer promotions” under the DOA's Market Access Program).

179. JEFFREY L. BARNETT ET AL., U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS: FINANCE—STATE AND LOCAL GOVERNMENT SUMMARY REPORT 2 (2014), available at http://www2.census.gov/govs/local/summary_report.pdf.

180. See Patrick Hruby, *National Freeloader League*, POLITICO (Jan. 31, 2014), <http://www.politico.com/magazine/story/2014/01/nfl-money-national-freeloader-league-102965>

With this in mind—even leaving aside the potential for relatively modest doctrinal change to increase the number of grants of relief without significantly increasing the financial cost, thus bringing down the per-grant cost, and only considering the benefit to individuals—the value proposition is not so bad. Certainly, white-collar criminal defendants are willing to pay far more to ensure their rights are vigorously protected.¹⁸¹ Professors John Blume, Sheri Lynn Johnson, and Keir Weyble—some of the strongest proponents of maintaining federal habeas—hint at this cost’s reasonableness, viewing the benefits of the current, flawed system as making its costs worthwhile, whatever those costs might be.¹⁸² They contest Hoffmann and King’s conclusion “that any negligible benefits the system does produce simply cost more than they are worth.”¹⁸³

Non-capital habeas is the principal and most visible means of federal oversight of state criminal justice, a remedy with historical roots so deep and deeply cherished that it is one of the few criminal procedural protections enshrined in the original Constitution. As such, it retains significant symbolic value in addition to the instrumental value discussed above.¹⁸⁴ The availability of federal habeas process signals a federal commitment to the protection of constitutional rights, even if the prospect of relief is largely illusory.¹⁸⁵ And as Professor Huq has recently argued, even when the Supreme Court denies relief, the Court’s habeas decisions may serve as a “catalyst” for criminal justice reform by bringing national attention to the issues.¹⁸⁶ This reform is made possible by the nascent retreat from the extremely punitive sentiments that have informed criminal justice policy in recent decades.¹⁸⁷ Moreover, for those convinced of a need for a more robust individual federal remedy,

_Page2.html (noting that the public spent \$16 billion over a 14 year period to renovate or build professional sports stadiums).

181. Walter Pavlo, *The High Cost of Mounting a White-Collar Criminal Defense*, FORBES (May 30, 2013), <http://www.forbes.com/sites/walterpavlo/2013/05/30/the-high-cost-of-mounting-a-white-collar-criminal-defense/>.

182. See Blume et al., *supra* note 20 at 439, 453–56.

183. *Id.* at 443.

184. Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 OHIO ST. L.J. 307, 335 (1983) (“Thus, to the extent that a broad writ has symbolic value, any severe limitations on habeas corpus procedure drastically curtail both justice and the appearance of justice.” (footnote omitted)).

185. Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367 (1983) (noting that advocates “regard habeas corpus as symbolic of a commitment to constitutional values and to the ideal that no person shall be convicted in violation of the fundamental law of the land”). Cf. Meir Dan-Cohen, *Acoustic Separation*, 97 HARV. L. REV. 628, 631 (1984) (observing that rules convey important messages to the public and to judges).

186. See Huq, *supra* note 14, at 601–02. This role is, however, likely more pronounced in the capital context, where cases tend to receive more publicity.

187. See *id.*

retaining the structural shell of that remedy is likely of non-trivial importance: if individual review were broadly curtailed, resurrecting its edifice would likely be a more daunting political challenge than loosening AEDPA's strict procedural requirements and standards for relief.¹⁸⁸ Taken as a whole, then, even at its current low ebb, non-capital habeas is quite arguably worth the money.

B. *The Difficult Calculus of Dramatic Reform*

If the current system is indeed defensible from a cost-benefit perspective, it blunts the case for reform somewhat; if it is not utterly broken, why risk the trouble and uncertainty of fixing it?¹⁸⁹ But saying that non-capital federal habeas under AEDPA is worthwhile in a vacuum does not mean dramatic reform is undesirable. If a different system could produce better results at lower cost, it would obviously be preferable even if we might rather have AEDPA than nothing. But the low financial cost of non-capital habeas likely militates against sweeping reform in other ways as well.

First, the relatively small amount of money at issue, regardless of whether it is well spent, is a reason to doubt it will be a Congressional priority. Less obviously, as King and Hoffmann have starkly demonstrated, non-capital habeas under AEDPA generates very little relief.¹⁹⁰ Given this dynamic, its proponents may well place more value on retaining even AEDPA's watered-down version of individual review than its critics place on eliminating it, creating a "value gap." Habeas opponents have little to gain immediately, and the uncertain prospect of more petitioner-friendly jurisprudence in the future is unlikely to incentivize them to risk the immediate uncertainty of dramatic change. Moreover, habeas opponents are probably comparatively indifferent to the symbolic and catalytic values¹⁹¹ of habeas relative to the number of petitioners granted relief; indeed they may also value them. This hypothesized value gap, however plausible, is both speculative—these valuations can only be guessed at—and rooted in current realities.

188. *Id.* at 544–47 (making the case that much of the futility of the current system is the work of the Supreme Court, which has created a "coherent" yet very limited avenue for relief in a two-track analysis, and it can be relatively easily undone by future Courts); *id.* at 596 (arguing that the current system "is not the work of Congress, but that of a transient group of federal judges" and is not entrenched beyond modification).

189. *See id.* at 598 (arguing that the current system has achieved needed rationing of judicial resources in habeas, "arguably with some degree of injustice but with no obvious systemic failures" and that proposals for reform would produce "systemic difficulties for the judiciary").

190. *See, e.g.,* King, *Non-Capital Habeas*, *supra* note 16, at 309; KING ET AL., *supra* note 15, at 9–10.

191. Blume et al., *supra* note 20, at 453–54; *see also* Huq, *supra* note 14, at 601 (noting that court decisions can serve as "catalysts for larger processes of social and political movements").

The suggested gap is also simplistic—perhaps to a fault—glossing over a great deal of complexity in what we know about the legislative process in favor of a reductive conception of two negotiating parties whose preferences are uniform and consistent.¹⁹² But assuming it reflects, at least broadly, a key feature of the disagreement over the future of non-capital habeas—tension between the protection of constitutional rights and the protection of state courts from federal interference¹⁹³—we might still expect sweeping change if it could generate savings significant enough to compensate both sides for the damage to their interests. Under the Coase Theorem, in a world without transaction costs we would expect a hydroelectric dam to be built¹⁹⁴ if it would produce enough income to offset flooding damage to neighboring landowners who could veto the project. Similarly, to use an extreme example to illustrate the point, if non-capital habeas cost a trillion dollars per year, reform would almost certainly occur, with the two sides using the surplus for other goals favored by their constituencies.¹⁹⁵ In fact, as described above, the costs appear relatively modest, and thus unlikely to generate enough savings to make a deal attractive. This hypothesis is applied below to King and Hoffmann’s and Primus’s proposals. It is also applied to a third, arguably more politically appealing and less resource-intensive proposal that eliminates individual review in exchange for state adoption of reforms designed to reduce wrongful convictions.

1. King and Hoffmann’s Approach

In their proposal to shift funds from federal habeas to the state level, King and Hoffmann understandably seek to address one of the clearest causes of injustice that emerges at an earlier stage in the state process—the lack of adequate representation of indigent defendants at trial.¹⁹⁶ The continuing failure by states to provide counsel at many stages of the state criminal process, beginning at the pretrial stage and continuing through conviction, causes ongoing constitutional violations and wrongful convictions at the state level.¹⁹⁷

192. See, e.g., Kovarsky, *supra* note 11, at 472 (discussing Arrow’s Impossibility Theorem); Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. POL. ECON. 328, 330 (1950).

193. This is, of course, hardly a novel conception.

194. Leaving aside environmental harms.

195. Even here, strategic transaction costs, in this case legislative pathologies, may prevent the bargain from occurring. Intuitively, however, the greater the surplus, the greater the likelihood that these transaction costs would be overcome.

196. KING & HOFFMANN, *supra* note 2, at 88, 100–01, 107.

197. See Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 445 (2011) (“Habeas petitioners are not only raising claims of ineffective assistance of counsel more frequently than they raise any other claim, courts are also finding ineffective assistance of counsel throughout the criminal adjudication process and are using the doctrine to address

As King and many others have observed, representation at all stages of the criminal process is often substandard for indigent defendants despite the promise of *Gideon v. Wainwright*.¹⁹⁸ Many defendants lack counsel during the setting of bail.¹⁹⁹ Lacking counsel, indigent defendants, even non-dangerous ones,²⁰⁰ are more likely to have bail set at levels they cannot afford.²⁰¹ Many of them plead guilty even if they are innocent because their time spent in jail pretrial often exceeds the sentence they receive under the plea.²⁰² When counsel is appointed, state judges often appoint deficient counsel.²⁰³ Additionally, public defenders deal with low salaries and caseloads too heavy to adequately represent individual defendants,²⁰⁴ and they are “denied the resources necessary for

constitutional violations that may not otherwise entitle a petitioner to relief. Ineffective assistance of counsel doctrine thus reaches almost any error that the defense attorney can make, plus almost any error that the judge or prosecutor can make, if unaddressed.”).

198. 372 U.S. 335 (1963); Hoffmann & King, *supra* note 2, at 793–94; AMERICAN BAR ASS’N, *GIDEON’S BROKEN PROMISE* 7 (2004), available 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; Eve Brensike Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2606 (2012) [hereinafter Primus, *Effective Trial Counsel*] (“Everyone knows that excessive caseloads, poor funding, and a lack of training plague indigent defense delivery systems throughout the states, such that the promise of *Gideon v. Wainwright* remains largely unfulfilled.” (footnote omitted)).

199. See Douglas L. Colbert, *Coming Soon to a Court Near You—Convicting the Unrepresented at the Bail Stage: An Autopsy of a State High Court’s Sua Sponte Rejection of Indigent Defendants’ Right to Counsel*, 36 SETON HALL L. REV. 653, 708–09 (2006) (noting that “only eight states guarantee counsel at an accused’s arraignment or initial appearance statewide”).

200. See Eric Holder, Attorney Gen., Speech at the National Symposium on Pretrial Justice (June 1, 2011), available at <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html> (“Many of these individuals [jailed pretrial] are nonviolent, non-felony offenders, charged with crimes ranging from petty theft to public drug use. And a disproportionate number of them are poor.”).

201. See Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002); THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf> (noting correlation between bail amount and probability of release); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1346 (2014).

202. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2492–93 (2004) (“The pretrial detention can approach or even exceed the punishment that a court would impose after trial.”).

203. See Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 789 (1997) (“In jurisdictions where judges appoint lawyers to defend cases, it is no secret that judges do not always appoint capable lawyers to defend the poor.”).

204. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1053–54, 1062 (2006).

a full investigation and the retention of necessary expert witnesses.”²⁰⁵ And even under *Gideon*, defendants lack a right to counsel during the state postconviction stage.²⁰⁶

As described above, King and Hoffmann propose to create a new Federal Center for Defense Services to study how to improve representation and give matching grants to state and local governments to further that goal.²⁰⁷ They acknowledge in their earlier work that additional funding, beyond the savings from cutting back on habeas, would be necessary to achieve their goals, and that this would require an “extraordinary political commitment.”²⁰⁸ Subsequently, they suggest that creating the Center might be a condition for eliminating most non-capital habeas.²⁰⁹ State and local governments spent approximately \$5.3 billion on criminal indigent defense in 2008.²¹⁰ Assuming that the estimate of the savings available from curtailing non-capital habeas is roughly correct, this would amount to only around a six-percent increase in indigent defense spending.²¹¹ Such a sum could, of course, generate meaningful improvements but it is arguably a modest sum relative to the perceived value of individual federal review—and, given AEDPA’s fairly small impact on states’ non-pecuniary interests, the desire to limit it further may not provide much incentive to significantly sweeten the deal with increased funding from other sources.

Moreover, King and Hoffmann’s proposal for narrowing federal habeas jurisdiction is limited by the possibility of petitioners bringing Suspension Clause challenges to the adequacy of state postconviction

205. Bright, *supra* note 203, at 787.

206. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). *But see* Primus, *Effective Trial Counsel*, *supra* note 198, at 2606–08 (noting that *Martinez v. Ryan*, which excuses state petitioners’ procedural default on ineffective assistance of counsel claims when the failure to raise the claim in the first collateral review proceeding at the state level resulted from a lack of effective counsel, might allow more effective federal challenges to state procedures and a closer review of “what procedures states need to have to give defendants an opportunity to vindicate their Sixth Amendment rights to effective trial counsel” (citing *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)). *Contra* King, *Enforcing Effective Assistance*, *supra* note 12, at 2431 (using empirical evidence to argue that “*Martinez* is not likely to lead to more federal habeas grants of relief”).

207. Hoffmann & King, *supra* note 2, at 833–34.

208. *Id.* at 833; *see also* Blume et al., *supra* note 20, at 468 (noting the unusual political commitment that would be required to create the necessary “massive amount of federal money” for the proposal).

209. *See* KING & HOFFMANN, *supra* note 2, at 101.

210. *See* HOLLY R. STEVENS ET AL., STATE, COUNTY, AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 6–7 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf.

211. The estimated \$327 million in state and federal expenditures on federal habeas is 6.17% of \$5.3 billion.

procedures, similar to the regime for review of alleged Fourth Amendment violations ushered in by *Stone v. Powell*.²¹² It is possible that complying with this command would be costly for some states, cutting into the available funding for indigent defense.²¹³ The quality of state postconviction review is questionable, at best,²¹⁴ and Professor King's own recent empirical research suggests that this skepticism may be warranted: as she documents, pro se litigants and "paper hearings" are the norm in many states,²¹⁵ and relief is rarely granted in most jurisdictions.²¹⁶ Although petitioners have had little success under *Powell*, they may fare at least somewhat better outside the Fourth Amendment context, where, in contrast to *Brady v. Maryland*²¹⁷ and *Strickland v. Washington*²¹⁸ claims for example, the desire for accuracy in criminal justice cuts so strongly against them. If so, some states would be required to improve their procedures to gain the benefits of reduced federal habeas jurisdiction, which would likely involve increased funding.

Any increased investment in state indigent defense would help improve state systems. But if the valuation gap hypothesized above exists, this proposed reform, which would be difficult to undo once made,

212. See Hoffmann & King, *supra* note 2, at 822–23 (noting that their proposal would "operate something like *Stone v. Powell*," in that it would preclude non-capital habeas review for non-innocence claims only if petitioners had received an opportunity for a full and fair hearing at the state level).

213. See Primus, *Crisis*, *supra* note 14, at 902–03 (arguing that the proposal will simply shift habeas claims to other types of claims and will still be costly).

214. See, e.g., Freedman, *supra* note 12, at 298–99 (arguing that state postconviction proceedings must improve if they are to produce value in the federal system, and that providing counsel in state postconviction proceedings would help ensure that these proceedings were fair); Marceau, *Habeas Process*, *supra* note 12, at 145 n.210 (arguing that "there is good reason to believe that states remain resistant to providing robust state postconviction review that would approximate the protections provided through federal review"); Wiseman, *Habeas*, *supra* note 12, at 973–74 (describing deficiencies in state postconviction procedures).

215. King, *Enforcing Effective Assistance*, *supra* note 12, at 2442 ("Based on available information, the provision of counsel and hearings varies from almost always to nearly never."); *id.* at 2444 ("Most states authorize the appointment of counsel for noncapital petitioners only if a judge first decides the case has merit or orders a hearing or discovery. In such states, only a small portion of petitioners appear to receive counsel."); John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 YALE L.J. 2126, 2138 n.71 (2013) (observing that "in many jurisdictions . . . inmates have no right to postconviction counsel").

216. King, *Enforcing Effective Assistance*, *supra* note 12, at 2431.

217. 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

218. 466 U.S. 668, 688 (1984) (defining the duties of counsel representing criminal defendants and specifying that an inquiry into the adequacy of counsel must ask "whether counsel's assistance was reasonable considering all the circumstances").

is probably unlikely to occur because the available costs savings will likely be insufficient to trigger it. Until, as King and Hoffmann advocate, a “comprehensive political shift in focus . . . from the back end to the front end of the criminal justice system”²¹⁹ occurs through other means, change is unlikely.

2. Primus’s Approach

As described above, Professor Primus, acknowledging the dysfunction of the current system and the resources required for meaningful federal review of individual cases, proposes to limit federal habeas to petitioners alleging widespread, or systemic, violations of constitutional rights.²²⁰ To aid deserving petitioners, she calls for the creation of a new team of attorneys in the DOJ’s Special Litigation Section that would investigate and litigate claims.²²¹ These new DOJ lawyers would be supplemented by a provision allowing private habeas attorneys “to recover reasonable fees from states that engage in systemic violations.”²²² As Primus convincingly argues, systemic state violations of defendants’ constitutional rights are unfortunately common.²²³ Dedicating a group of skilled counsel with the resources of the DOJ behind them, perhaps in combination with a fee-shifting provision to incentivize private counsel, to end these violations is an appealing proposition.

Others have questioned how much savings Primus’s proposal would actually generate given its complexity.²²⁴ If the hypothesized value gap exists, then it would, depending on the details, inevitably ask too little or too much in return for the elimination of most federal habeas review. Hoffmann and King have made the latter criticism, partly on the grounds that states would resist being potentially subject to close federal supervision.²²⁵ And indeed, this is a real possibility; as discussed above, the current system provides such weak oversight that a sum in the range of \$327 million could not induce them to acquiesce to meaningful federal supervision.

On the other hand, a closer look suggests that the odds of such supervision would be quite low for all but the worst jurisdictions. Without help from the DOJ, it would be nearly impossible for individual prisoners,

219. Hoffmann & King, *supra* note 2, at 833–34 (emphasis omitted).

220. Primus, *Structural Vision*, *supra* note 4, at 7, 26–27.

221. *Id.* at 36.

222. *Id.* at 38.

223. *Id.* at 17.

224. John L. Hoffmann & Nancy J. King, *Right Problem; Wrong Solution*, 1 CALIF. L. REV. CIRCUIT 49, 54–55 (2010) [hereinafter Hoffmann & King, *Right Problem*].

225. *Id.* at 55.

who already struggle with presenting their own claims, to make out successful claims of systemic violations. And there might be little help from the government. The entire Special Litigation Section currently consists of forty-three attorneys divided among six practice areas.²²⁶ Although these attorneys are among the most skilled and dedicated in the country, there simply may not be enough of them to play a significant supervisory role. The most analogous team of the Special Litigation Section, which deals with complaints against state and local law enforcement, describes itself as having investigated “dozens” out of the thousands of police and sheriff departments around the country, and lists only thirty-four separate cases and matters since 2002.²²⁷ On the other hand, this may dramatically understate their supervisory impact; it is possible that informal investigations lead to significant change without leaving an obvious paper trail. Professor Primus additionally suggests providing attorney’s fees for successful claimants in order to incentivize the participation of private and non-profit counsel,²²⁸ although this would be costly.

If the value gap exists, however, Primus’s proposal is likely implausible in the short term, regardless of how the details are filled in. If there is a robust role for the DOJ and private counsel, the modest savings could not compensate states for the increased federal intrusion into their affairs. If there is not robust control—and even if there were initially, DOJ funding is subject to Congressional control²²⁹—habeas proponents have little incentive to discard individual review.

3. Another Possibility: Innocence Protection Reforms

Ultimately, although the deterrent effect of federal habeas is difficult to quantify, in light of King and Hoffmann’s devastating critique of the status quo, both their proposal (even in a more realistic, scaled-down form as discussed below) and Primus’s might well do more to improve the functioning of state criminal justice systems than federal habeas as it currently exists under AEDPA. Nonetheless, the relatively modest gap

226. See U.S. DEP’T OF JUST., FY 2014 PERFORMANCE BUDGET, CIVIL RIGHTS DIVISION 2–3, 50 (2014), available at <http://www.justice.gov/jmd/2014justification/pdf/crt-justification.pdf>; *Special Litigation*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/about/spl/> (last visited May 1, 2015) (describing the practice areas).

227. *Conduct of Law Enforcement Agencies*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/about/spl/police.php> (last visited Mar. 16, 2015); *Special Litigation Section Cases and Matters*, U.S. DEP’T OF JUST., <http://www.justice.gov/crt/about/spl/findsettle.php#police> (last visited May 1, 2015).

228. See Primus, *Structural Vision*, *supra* note 4, at 38 & n.208.

229. Cf. Huq, *supra* note 14, at 598 (criticizing Hoffmann and King’s proposal as unstable because future Congresses would likely not continue to fund the suggested indigent defense initiative).

between the value of the current system of non-capital habeas to its proponents and its non-pecuniary costs to the states suggests neither proposal is likely to gain traction in the near term. To illustrate the fundamental nature of the underlying problem, it is worth considering another, arguably more appealing and less resource-intensive reform proposal—limiting individual review in exchange for state adoption of reforms designed to reduce wrongful convictions. Despite the broad attraction of protecting the innocent, even this proposal would likely fail to bridge the value gap.

Although it undeniably has served an important role in the historical struggles between different branches²³⁰ and levels²³¹ of government the writ of habeas corpus has always been a means of ending undeserved imprisonment.²³² As these struggles have, to a significant degree, subsided, it would be plausible, as others have suggested, to refocus habeas on this core purpose.²³³ And in recent decades, spurred by the advent of DNA testing, scholars and citizens alike have grown increasingly concerned at the possibility that our legal system convicts large numbers of innocent defendants.²³⁴ This is a deeply disturbing proposition. As the most terrible rights abuses of the past slowly recede from collective memory, the often more subtle problem of modern wrongful convictions has come to the fore. Despite its historic importance as a tool to combat wrongful detention, recently federal habeas has not directly played a large role in the protection of the innocent, and there are significant hurdles to overcome before it could do so.

Calls for a greater emphasis on innocence in federal habeas have been common. Most famously, Judge Henry Friendly proposed a “requirement that, with certain exceptions, an applicant for habeas corpus must make a colorable showing of innocence” in order to, *inter alia*, “enable courts of first instance to screen out rather rapidly a great multitude of applications

230. See HALLIDAY, *supra* note 5, at 134–36 (describing use of habeas as a means of limiting royal power).

231. See King & Hoffmann, *supra* note 2, at 51 (describing use of habeas as a means of forcing state compliance with federal law after the Civil War); Hoffmann & Stuntz, *supra* note 8, at 77–79 (describing the impact of federal law on state criminal procedure starting in the 1960s); cf. Primus, *Crisis*, *supra* note 14, at 907–08 (arguing that King and Hoffmann overlook the role of habeas in correcting systemic problems in state criminal justice systems); Hoffmann & King, *Right Problem*, *supra* note 224, at 54–55 (arguing that habeas is not designed to, and cannot, solve current systemic problems).

232. Redish & McNamara, *supra* note 5, at 1367, 1374.

233. See Hoffmann & Stuntz, *supra* note 8, at 80, 95–97 (arguing that states have internalized federal constitutional criminal procedure and calling for recognition of a stand-alone innocence claim in federal habeas); Friendly, *supra* note 50, at 160 (arguing for narrowing most federal habeas review, with the exception of cases in which a petitioner makes a colorable innocence claim).

234. See Hoffmann & King, *supra* note 2, at 820; see also *infra* notes 242–43.

not deserving their attention and devote their time to those few where injustice may have been done.”²³⁵ More recent proposals would provide a two-track model in which “petitioners who can demonstrate a reasonable probability of innocence would receive de novo review of their federal claims, free of the restrictions currently imposed by the habeas doctrines of procedural default and retroactivity,” while all other claims would receive only reasonableness review.²³⁶ And, as described above, King and Hoffmann would retain federal habeas review for petitioners satisfying AEDPA’s innocence gateway because “cases of wrongful conviction involve the most fundamental kind of unjust incarceration.”²³⁷ Nonetheless, there are serious obstacles preventing federal habeas from being an effective remedy for wrongful convictions, even as an “emergency backstop.”

Critiques of the system and reform proposals, both old²³⁸ and new,²³⁹ have recognized that limiting the scope of federal habeas to innocence claims will likely lead to a vast increase in the number of petitions alleging innocence: with little for defendants to lose, why not? This is a serious problem not just because of the associated costs in time and money, but because “[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones.”²⁴⁰ In the analogous context of DNA testing statutes, for example, where the odds of being erroneously exonerated are extremely low, “[m]eritorious claims for post-conviction DNA testing are extremely likely to be lost in the sea of petitions” from guilty petitioners with nothing much to lose.²⁴¹

In death, however, AEDPA could conceivably do more to prevent wrongful convictions than it has in life. An evolving literature on the causes of wrongful convictions holds out the promise of relatively straightforward, inexpensive fixes. As evidence for specific reforms builds, the carrot of reduced federal habeas jurisdiction could, in theory, spur jurisdictions into action: in exchange for a state adopting a certain package of reforms, federal courts would not entertain non-capital habeas petitions originating in that state.

Although there have been many valuable contributions to the wrongful convictions field,²⁴² Professor Brandon Garrett has conducted

235. Friendly, *supra* note 50, at 150.

236. Hoffmann & Stuntz, *supra* note 8, at 69.

237. Hoffmann & King, *supra* note 2, at 820.

238. Friendly, *supra* note 50, at 150.

239. Primus, *Crisis*, *supra* note 14, at 903–04.

240. Friendly, *supra* note 50, at 149 (quoting *Brown v. Allen*, 344 U.S. 443, 537 (1953) (internal quotation marks omitted)).

241. Jacobi & Carroll, *supra* note 151, at 269–70.

242. Jon B. Gould et al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 507 n.91 (collecting examples).

perhaps the best known study—an extremely thorough investigation of the 250 DNA exonerations discussed by the Innocence Project and the causes of these wrongful convictions—suggesting needed reforms to avoid wrongful convictions.²⁴³ Explorations of these practices by Professor Daniel Medwed,²⁴⁴ Professor Dan Simon,²⁴⁵ and others,²⁴⁶ combined with detailed recommendations for fixing them, identify similar themes.²⁴⁷ Many of the causes could be treated with cheap reforms, including, for example, the use of double-blind lineups, random photo arrays, and recording of eyewitnesses' initial impressions,²⁴⁸ as well as the exclusion of unreliable forensic evidence by courts²⁴⁹ and requirements for full disclosure of benefits offered to jailhouse snitches in exchange for their testimony.²⁵⁰

243. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT* (2011) (examining 250 exonerations, identifying how criminal prosecutions can go wrong, and suggesting reforms that would help to avoid wrongful convictions).

244. See generally DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* 85 (2012) (exploring the prosecutor's role in convicting innocent persons by analyzing pretrial, trial, and postconviction phases of trial and prosecutors' incentives and practices within these phases).

245. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 3–16 (2012) (discussing errors in criminal justice investigations and suggesting potential reforms).

246. See, e.g., James M. Doyle, *Learning from Error in American Criminal Justice*, 100 J. CRIM. L. & CRIMINOLOGY 109 (2010) (exploring in detail psychological and scientific studies of errors and reforms proposed historically); Gould et al., *supra* note 242, at 482–515 (conducting a quantitative and qualitative analysis of a set of wrongful convictions, identifying their causes, and proposing solutions); *State Bar Association Creates Blue Ribbon Task Force to Study Proliferation of Wrongful Convictions*, N.Y. ST. B. ASS'N, (June 4, 2008), <http://www.nysba.org/CustomTemplates/Content.aspx?id=5941> (announcing the assignment of a task force to identify the causes of wrongful convictions from case studies and provide reform recommendations).

247. Some prominent scholars have expressed considerable skepticism about our ability to learn from exonerations or even to assess the scope of the problem, pointing to the difficulty of identifying causes rather than correlates of wrongful convictions and the unrepresentativeness of exonerations as to both type (they are overwhelmingly for murder and rape cases) and method (trial, rather than plea bargain). Jennifer Laurin, *Still Convicting the Innocent*, 90 TEX. L. REV. 1473, 1489–95 (2012) (reviewing GARRETT, *supra* note 243) (noting the “near impossibility of isolating and assessing the significance of any single factor in a given case” and other data-based and analytical challenges); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 929 (2008) (“[T]here is no systematic way to identify false convictions in retrospect.”). Other leading researchers are much more sanguine about the project. See, e.g., Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 29 (2009) (concluding that although many studies of wrongful conviction have been largely descriptive, there are also numerous empirical studies, and “it is not necessary to know the incidence or prevalence of a phenomenon to study it empirically or scientifically”).

248. See GARRETT, *supra* note 243, at 81–84.

249. *Id.* at 116–17.

250. *Id.* at 142–44.

These reforms, in light of habeas's historical role in remedying wrongful detention, would make an arguably fitting exchange. And, given the general agreement on the undesirability of convicting the innocent,²⁵¹ such a trade would perhaps be more broadly popular than (sorely needed) increases in indigent defense funding, hiring more government lawyers, or increasing payouts to plaintiffs' attorneys.²⁵² Further, it would be possible to structure the proposal so as to minimize litigation costs: the task of determining whether the specified reforms had actually taken place could be handled administratively by the DOJ.²⁵³

I do not defend the wisdom of this proposal because, for the reasons discussed above, giving up entirely on one of the few avenues for federal oversight of state criminal justice systems at a time when they are widely acknowledged to systemically violate defendants' rights is probably unwise. Instead, the proposal serves as an example of a bargain that avoids some of the flaws in existing proposals and is apparently more politically plausible. Nonetheless it is also likely a non-starter if the hypothesized value gap exists. On one hand, it would sweep away individual federal review in non-capital cases, giving up the limited relief and deterrence the current system provides along with its significant symbolic value while making resurrection of a more robust, functional habeas less likely. On the other hand, it would require non-trivial federal oversight of the workings of state systems to ensure compliance, along with possibly expensive changes. Like increased indigent defense funding and reductions in systemic rights violations in state courts more broadly, innocence reform is badly needed. But because of the important values served by non-capital habeas, and the relatively small sums at stake, habeas reform is, at least in the near term, unlikely to be a successful vehicle for achieving them.²⁵⁴

251. *But see* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 75, 84 (2008) (arguing that while there is an "intuitive appeal" to viewing mistaken convictions as "evil," reality may be more complex: "[i]mposing an unbridgeable firewall against false convictions . . . would visit unearned, grievous harm on vast numbers of innocent citizens, victimized by those guilty felons whom the justice system . . . wrongfully committed").

252. *See* Huq, *supra* note 14, at 595–96 (noting the "appealing political logic" of reorienting habeas towards innocence); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1645 (2005) ("Broadly speaking, legislatures are interested in accurate criminal adjudication, but they do not view zealous defense attorneys as the best way to achieve that goal. Accordingly, adversarial process will not be a politically sustainable means for assuring the accuracy of fact-gathering.").

253. *Cf.* Primus, *Structural Vision*, *supra* note 4, at 36 (describing a more active monitoring role for the DOJ in her proposal).

254. Nor does the Supreme Court appear likely to drastically alter habeas law. It refused to extend *Stone v. Powell* outside the Fourth Amendment context even prior to AEDPA, and there is little reason to think it would revisit that decision now.

IV. THE PRAGMATIC CASE FOR MODEST REFORM

If the foregoing is correct, radical reform is unlikely, and AEDPA is, for better or worse, likely to be with us for at least the near term. If so, this does not call the value of far-reaching reform proposals, or the thoughtful criticism they provoke, into question. One of the great services academic commentary can offer is to consider possibilities beyond those immediately feasible, and to make us reassess the value of even our most cherished institutions. It does suggest, though, the need to focus scholarly attention on making the best of what we have.²⁵⁵

Individual review under AEDPA may never be particularly efficient or effective at correcting individual injustice, deterring rights violations, or uncovering systemic problems—but it could be more efficient, and more effective. And, of course, numerous thoughtful proposals along these lines have been made. King and Hoffmann’s suggestion of moving disputes over prison administrative decisions out of habeas and into a more tailored process has much to recommend it.²⁵⁶ Blume, Johnson, and Weyble’s call to abandon the procedural-default rules that lead to so much arcane litigation is deeply attractive.²⁵⁷ Somewhat less modestly, Professors Eric Freedman and Larry Yackle have each called for wider availability of postconviction counsel.²⁵⁸ All of these proposals have merit, although each would require either legislative action or Supreme Court reconsideration of fairly settled precedent. This final Part turns briefly to an emerging problem, largely of the Court’s own-making, that threatens to further dramatically weaken review of state convictions. I and others have suggested a variety of doctrinal solutions, all of which the Court has yet to address, and for which the Court’s decisions since I last addressed the issue give a (rare) glimmer of hope.

In *Cullen v. Pinholster*,²⁵⁹ the Supreme Court limited federal courts to review of the state record when addressing a claim of state court legal error under § 2254(d)(1).²⁶⁰ Access to state postconviction fact development, as well as counsel, is generally quite limited, and as a result records are often sparse and inadequately developed.²⁶¹ Prior to

255. See Huq, *supra* note 14, at 608 (concluding that “habeas will prove as recalcitrant, as obdurate, as Banquo’s specter” and calling for renewed scholarly attention to habeas doctrine).

256. See KING & HOFFMANN, *supra* note 2, at 47, 76, 81, 86–88.

257. Blume et al., *supra* note 20, at 472–78.

258. See FREEDMAN, *supra* note 47, at 151–53; Yackle, *supra* note 57, at 569.

259. 131 S. Ct. 1388 (2011).

260. *Id.* at 1398–99.

261. See Wiseman, *Habeas*, *supra* note 12, at 970–71 (noting a federal court of appeals’ dissatisfaction with a “sparse” state record); *id.* at 954–56 (discussing another state case with a shockingly inadequate record); *id.* at 972–77 (exploring other scholars’ research addressing inadequate state records and fact development procedures).

Pinholster, access to federal fact development was an important feature of federal habeas, particularly for claims like failure to investigate under *Strickland* or failure to turn over exculpatory material under *Brady*—claims that often cannot be proven without access to extrinsic evidence.²⁶² Absent some way to challenge the fairness of state postconviction review, *Pinholster* would allow states to clothe their merits judgments (which, under *Harrington v. Richter*, can be summary denials²⁶³) in AEDPA deference regardless of the process that produced them.²⁶⁴ Such a result would be a significant, and significantly unfair, blow to habeas’s (remaining) usefulness: if petitioners cannot generate a meaningful record of what happened outside the trial record, they are less likely to get relief or reveal flaws in state criminal justice.²⁶⁵ It would also be deeply ironic, given that, as Professor Lee Kovarsky has shown, the enacted version of AEDPA was seen as more moderate than competing proposals that would have granted deference to “full and fair” state adjudication.²⁶⁶ There is, however, some reason for optimism.

As Professor Justin Marceau has argued, recent cases on the procedural default doctrine provide hope that the Court has awakened to the limitations of state postconviction process.²⁶⁷ In *Martinez v. Ryan*, the Supreme Court held that if a state requires defendants to wait until collateral review (where, unlike direct review, counsel is not constitutionally required) to raise ineffective assistance of trial counsel claims, non-existent or ineffective counsel will qualify as cause to overcome a procedural default.²⁶⁸ As with deficient counsel on appeal, with deficient (or absent) counsel in state collateral review “the prisoner has been denied fair process and the opportunity to comply with the State’s procedures and obtain an adjudication on the merits of his claims.”²⁶⁹

262. *Id.* at 958, 989.

263. 131. S. Ct. 770, 784–85 (2011).

264. *See* King, *Enforcing Effective Assistance*, *supra* note 12, at 2449 (conducting an empirical review of state postconviction processes and concluding that, prior to the Supreme Court’s decision in *Martinez v. Ryan*, “many prisoners had only the slimmest hope of securing counsel or a hearing, much less relief, for a claim of ineffective assistance of trial counsel” and arguing that this is unlikely to change); *cf.* F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443, 454 & n.42 (2013) (citing *Pinholster* as example of judicial deference in habeas context).

265. *Cf.* Huq, *supra* note 14, at 601–02 (arguing that habeas can play an important role in catalyzing and organizing reform efforts).

266. Kovarsky, *supra* note 11, at 463–64 (internal quotation marks omitted); *accord* Yackle, *supra* note 57, at 545 (“Democratic leaders resisted procedural restrictions as onerous and viewed the ‘full and fair’ plan as an effort to abrogate habeas corpus for state convicts altogether.”).

267. *See* Marceau, *Is Guilt Dispositive?*, *supra* note 12, at 2149–54.

268. 132 S. Ct. 1309, 1315, 1320 (2012).

269. *Id.* at 1317.

A subsequent case, *Trevino v. Thaler*, expanded *Martinez* to states where it is permissible to bring ineffective assistance of trial counsel claims on direct review, but in practice, this is “virtually impossible.”²⁷⁰ Writing for the majority, Justice Steven Breyer concluded that refusing to apply *Martinez* simply because a state did not *require* inadequate assistance claims to be raised on collateral review would create “significant unfairness.”²⁷¹ Defendants who fit within *Martinez* and *Thaler* should be able to avoid the application of § 2254(d) and thus *Pinholster*.²⁷² Perhaps more importantly, although they are narrow decisions and their likely impact is disputed,²⁷³ they clearly have the potential to be the groundwork for a broader attack on the fairness of postconviction process.²⁷⁴ And, building on *Martinez*, Professor Primus has argued that the adequacy rule, which requires a state procedural rule to be “be firmly established and consistently followed and . . . not . . . applied in ways that unduly burden the defendant’s exercise of her constitutional rights” in order to bar federal review under the procedural default doctrine, can be used to “to expose systemic failures in a state’s procedures.”²⁷⁵ Where deficient fact-finding systemically threatens the ability to bring constitutional claims outside the trial record, this approach may prove fruitful.

Further, as I and others have suggested, there are several other potential routes around the *Pinholster* problem.²⁷⁶ Perhaps the most promising approach is arguing that a state court decision, even if legally

270. 133 S. Ct. 1911, 1915 (2013).

271. *Id.* at 1919.

272. See Marceau, *Is Guilt Dispositive?*, *supra* note 12, at 2143 (arguing that *Martinez* should allow petitioners to avoid the application of *Pinholster* because “when a claim is deemed defaulted, then by definition it is not ‘adjudicated on the merits’”).

273. See *id.* at 2148–49.

274. See *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) (expressing skepticism that the Court’s equitable rule will remain limited to ineffective assistance of trial counsel claims); Marceau, *Is Guilt Dispositive?*, *supra* note 12, at 2136–54 (discussing the implications of *Martinez* and *Trevino*); Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 HOFSTRA L. REV. 591, 596 (2012) (arguing that “the equitable rationale of *Martinez* should apply to a number of claims other than ineffective assistance of trial counsel”); Wiseman, *Habeas*, *supra* note 12, at 989 (“Although *Martinez* is narrowly focused on the right to effective trial counsel, its holding is based, inter alia, on the fact that a ‘prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.’” (quoting *Martinez*, 132 S. Ct. at 1317)).

275. Primus, *Effective Trial Counsel*, *supra* note 198, at 2607, 2620; see also Marceau, *Is Guilt Dispositive?*, *supra* note 12, at 2128 (noting that Primus’s “work brings deserved attention to the adequacy doctrine”).

276. See Wiseman, *Habeas*, *supra* note 12, at 992–1000 (discussing other potential arguments, including due process and Suspension Clause approaches); Marceau, *Habeas Process*, *supra* note 12, at 169–70 (discussing challenges to the adequacy of state processes).

reasonable under § 2254(d)(1) on the basis of the record, is nonetheless “an unreasonable determination of the facts in light of the evidence,” opening the door to federal fact finding and, potentially, relief.²⁷⁷ This argument has the advantage of having a sound statutory anchor, as well as the ability to address extraordinary failures in individual cases.²⁷⁸ It has also found some success in the lower courts. As Judge Alex Kozinski has argued, unreasonable determinations might occur when “the fact-finding process itself is defective.”²⁷⁹

The Supreme Court has not addressed the issue, but a petition for certiorari in *Hurles v. Ryan*,²⁸⁰ a decision from the U.S. Court of Appeals for the Ninth Circuit, has been re-listed twenty-three times as of December 1, 2014.²⁸¹ Even if the Court does not reject the argument entirely (when and if it decides to consider it), it may well limit the argument, consistent with its recent interpretation of reasonableness under § 2254(d), to decisions denying fact development that “no fairminded jurist” could have made.²⁸² Even that standard would correct some of the worst problems,²⁸³ but the better approach, in light of AEDPA’s legislative history, would be to require at least that the proceeding be “full and fair.”²⁸⁴ Ominously, the *Hurles* petition presents the question of whether “state court adjudications [are] *per se* unreasonable and not entitled to deference under 28 U.S.C. § 2254(d)(2) merely because the state court does not conduct an evidentiary hearing.”²⁸⁵ Still, *Martinez* and *Thaler* provide some reason for

277. See Wiseman, *Habeas*, *supra* note 12, at 979 n.141, 984–85 (internal quotation marks omitted); Marceau, *Habeas Process*, *supra* note 12, at 150–52 (discussing a challenge to state procedures under § 2254(d)(2)).

278. See Marceau, *Is Guilt Dispositive?*, *supra* note 12, at 2129 n.240 (“The one limiting feature of Primus’s proposals is that they tend to focus on systemic violations, rather than unfair procedures in any particular case.”).

279. Taylor v. Maddox, 366 F.3d 992, 1000–01 (9th Cir. 2004).

280. 706 F.3d 1021 (9th Cir. 2013).

281. Lyle Denniston, *Oft-Relisted Ryan v. Hurles Denied*, SCOTUSBLOG (Dec. 1, 2014, 10:15 AM), <http://www.scotusblog.com/2014/12/oft-relisted-ryan-v-hurles-denied/>.

282. Huq, *supra* note 14, at 539 (noting Richter’s quiet adoption of the “no fairminded jurist standard” for reasonableness (internal quotation marks omitted)); see also Harrington v. Richter, 131 S. Ct. 770, 785–87 (2011).

283. It would also be consistent with Professor Huq’s fault-based gloss on the Court’s recent habeas jurisprudence, as it would indicate “an extraordinary measure of fault” on the part of the state. See Huq, *supra* note 14, at 528.

284. See Kovarsky, *supra* note 11, at 507 (arguing that AEDPA gave “federal courts all authority that they would have enjoyed under prior ‘full and fair’ proposals”); see also Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 443 (1996) (arguing persuasively that, based on AEDPA’s legislative history, AEDPA should be read “to permit independent Federal court review of constitutional claims” (internal quotation marks omitted)).

285. Petition for Writ of Certiorari at i, *Hurles v. Ryan*, No. 12-1472 (June 17, 2013), 2013 WL 3076565.

optimism—and regardless of the result in *Hurles*, if any, the need for a variety of solutions to adapt federal habeas to identify and respond to the failures of state postconviction process will remain. Radical reform of any sort is probably unlikely in the near term. It is critical, then, to make the best of AEDPA.

Federal habeas may never be the powerful agent of change it once was. But with relatively modest changes, it easily could be more useful than it currently is.

CONCLUSION

If, as Professor Huq suggests, “[s]cholars have fallen out of love with habeas,”²⁸⁶ the disenchantment is understandable. For an entire generation of legal academics concerned about the protection of state court defendants’ constitutional rights, federal habeas has provided little of which to be enamored. AEDPA is restrictive enough on its face, and most Supreme Court terms seem to place a new, more restrictive gloss on it.²⁸⁷ This is deeply frustrating. In light of our collective wealth and our apparently low threshold for parting with it, it is tempting to think that if our current system of federal collateral review of non-capital state convictions is broken—and it is hard to argue that it is not—then the solution is to fix it, even if it costs a little more. Eliminating barriers to substantive review, providing postconviction counsel,²⁸⁸ appointing more judges, and hiring more judicial staff would be expensive, but not ruinously so, and not even in the same league, as, say, farm subsidies.²⁸⁹ For the safeguarding of constitutional rights and a last, federal check against miscarriages of justice, it seems like a price we should be willing and able to pay, even if, for the reasons described above, backend review is never likely to be especially efficient. At the front end of the process, the argument is even more compelling. We know that the states are failing to provide adequate funding for indigent defense, and that this has devastating consequences.²⁹⁰ For a fraction of the federal budget, we could dramatically improve the quality of indigent representation.²⁹¹ For

286. Huq, *supra* note 14, at 607.

287. *Id.* at 528–29, 531–41 (describing a progression of cases adding procedural, evidentiary, and standard-of-review barriers to habeas relief); Kovarsky, *supra* note 11, at 480–502.

288. *See, e.g.*, FREEDMAN, *supra* note 47, at 151–53 (calling for provision of postconviction counsel); Yackle, *supra* note 57, at 569 (proposing provision of federal postconviction counsel).

289. *See, e.g.*, David J. Lynch & Alan Bjerga, *Taxpayers Turn U.S. Farmers into Fat Cats with Subsidies*, BLOOMBERG PERS. FIN. (Sept. 9, 2013), <http://www.bloomberg.com/news/2013-09-09/farmers-boost-revenue-sowing-subsidies-for-crop-insurance.html>.

290. *See* Primus, *Effective Trial Counsel*, *supra* note 198, at 2606; *see also supra* note 198 and accompanying text.

291. *See supra* Part II; Hoffmann & King, *supra* note 2, at 823–33 (proposing enhanced indigent defense spending).

vastly less, we could fund a new initiative by the DOJ to address systemic problems in state justice systems.²⁹² Nothing in this Article is meant to suggest that doing any or all of these things would not be money well spent.

But we seem unlikely to do any of them, at least in the near term. Realistically, we will probably not invest significant new money in truly meaningful postconviction review or adequate representation for the poor. Given the scarcity of criminal justice resources, allocating them efficiently is important. For this reason, federal review of state convictions under AEDPA has been, and will probably continue to be, a target of resource-shifting proposals. But individual federal review of state convictions, even under AEDPA, has value, not just to a lucky few defendants, but also as a symbol of our commitment to the protection of constitutional rights and, more importantly, the potential to once again be more than a symbol. If eliminating individual review could generate huge savings, it might be both plausible and desirable. But, as shown above, it cannot, and it probably is not. AEDPA may be terrible, but it is ours, and making it less terrible—or at least not more terrible—is a worthwhile project.

292. Primus, *Structural Vision*, *supra* note 4, at 36 (proposing a new team of lawyers in the DOJ tasked with correcting systemic problems in state criminal justice system).