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ABSTRACT

Federal habeas review of criminal convictions is not supposed to be a second opportunity to adjudge guilt. Oliver Wendell Holmes, among others, has said that the sole question on federal habeas is whether the prisoner's constitutional rights were violated. By the early 1970s, however, scholars criticized this rights-based view of habeas and sounded the alarm that postconviction review had become too far removed from questions of innocence. Most famously, in 1970 Judge Friendly criticized the breadth of habeas corpus by posing a single question: Is innocence irrelevant? In his view habeas review that focused exclusively on questions of rights in isolation from questions of innocence was misguided.

Over the last forty years the habeas landscape has changed so dramatically—through both statutory and common law limits on the writ—that it is appropriate to ask a very different question: Is guilt dispositive? Both substantive law and habeas procedure have evolved so as to substantially disadvantage a guilty habeas petitioner. In many cases, regardless of the merits of the constitutional claim, strong evidence of guilt is dispositive in ensuring that relief is denied. A recent trilogy of cases—Holland v. Florida, Maples v. Thomas, *and most importantly,* Martinez v. Ryan—*signals a potential shift in the Court's innocence orientation. This Article explores the potential impact of these decisions and, in particular, argues that they may*

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provide a roadmap for a proceduralist approach to modern habeas review that prioritizes fair procedures over innocence. The impact of Friendly's call for greater focus on innocence was gradual but profound, and this Article argues that the Martinez *trilogy may be similarly important in reversing habeas's four-decade-long infatuation with innocence.*

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INTRODUCTION

The conventional wisdom is that federal habeas is a meager shadow of its former self.[1] The once "Great Writ,"[2] it seems, has become emaciated by unforgiving procedural rules and one of the most deferential substantive standards of review known to law.[3] Federal review is inhospitable to relief and ever more focused on the actual innocence of the defendant. The answer to the most famous question about federal habeas corpus—"*Is innocence irrelevant?*"[4]—then, increasingly seems to be no. Indeed, one might fairly assert that, in light of modern statutory and case law developments, guilt and innocence have become the central considerations—that is, *guilt is dispositive* such that procedural vindication in the absence of a claim of innocence is rare to the point of near impossibility. The Supreme Court's recent abandonment of the habeas statute of limitations in the face of a colorable claim of innocence is illustrative.[5]

Perhaps, however, a shift is afoot. In just the last couple of terms, the Court's jurisprudence has reflected a newfound interest in permitting federal habeas to play the role of ensuring a full and fair

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1. Empirical data confirms this claim. A recent study showed that noncapital prisoners were granted federal habeas relief in less than 0.5 percent of all cases. *See* NANCY J. KING ET AL., HABEAS LITIGATION IN U.S. DISTRICT COURTS 58-59 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf. Renowned death penalty advocate Stephen Bright has argued that modern limits on habeas review have made relief so unlikely that "it is appropriate to ask ... whether fairness is irrelevant" to collateral review. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 5 (1997) (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970)).

2. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *129 (referencing the writ of habeas corpus as "the most celebrated writ in the English law").

3. *See* Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 35-36 (1990).

4. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 159-60 (1970) (emphasis added).

5. *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013) (refusing to insist on the elements of due diligence or exceptional circumstances required for equitable tolling when there is a colorable claim of actual innocence).

state court process.[6] Although it is far too early to make concrete predictions, some of the habeas scholars who have advocated a process-based orientation for federal review have seen signs of such theories being vindicated in habeas doctrine. Recent cases provide support for the view that federal habeas must, at the very least, play an active role in policing the procedures of state appellate and postconviction review. There is, in short, a resurgence of optimism in a legal-process view of habeas corpus. This Article maps the ebbs and flows of guilt-centered adjudications in federal habeas for the last century and is the first to examine in detail the scope of this new, process-oriented habeas optimism by considering the promises and limits of recent doctrinal shifts. A new era of federal habeas review—one that is concerned with process and not just guilt—is not inconceivable.

Part I revisits the details of Judge Friendly's half-century-old critique of expansive federal habeas. In particular, I explore the context for his assertion that a colorable claim of innocence should generally be required for a federal court to ignore the limits of finality and set aside a state conviction.[7]

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6. Of course, the trajectory of Supreme Court decisions cannot be described as truly linear. Recent decisions like *McQuiggin*, for example, tend to reflect a continued preoccupation with innocence. On the whole, however, the trend seems to reflect an increasing focus on process oriented habeas. *See* discussion *infra* Parts III-IV.

7. At this point in history, Friendly's work stands for the proposition that innocence should be central, and I am using his work for that proposition. Of course, Friendly echoed the earlier sentiments of Paul Bator by acknowledging that in certain circumstances habeas relief should be available even in the absence of a strong showing of innocence. *See* Friendly, *supra* note 4, at 152-53 (singling out unfair state procedures "at trial and on appeal" but not referencing state postconviction review). But it must be remembered that Friendly starts his essay by calling it "incredib[le]" that the Court had not accepted Justice Black's view that in habeas a defendant should never be entitled to relief unless he raises a claim that "casts some shadow of a doubt on his guilt." *Id.* at 142-43. The courts, Congress, and commentators, including Friendly's biographer, have described him as advocating for a conservative view of habeas that is without rival in American history. Commenting on Friendly's influence, a recent biography noted that scholars have detected a shift in "the pith of the habeas inquiry" such that innocence has moved to center stage. DAVID M. DORSEN, HENRY FRIENDLY 219 (2012). My point is not to opine on whether or not Judge Friendly would have appreciated the full-throated innocence approach identified in this in Article, but the defining aspect of Friendly's habeas legacy is certainly its connection to innocence. *See* Roger Berkowitz, *Error-Centricity, Habeas Corpus, and the Rule of Law as the Law of Rulings*, 64 LA. L. REV. 477, 491 (2004) (describing the Friendly-endorsed view of habeas as a shift from considering the "presence of error understood as unfairness, to error understood as an inaccurate determination of guilt").

Part II advances an initial thesis, namely, that in the years since Friendly's article, federal habeas has undergone an about-face such that in the absence of a showing of innocence, relief is almost always denied on federal habeas review. Questions of guilt are no longer irrelevant; they are oftentimes controlling.[8] Indeed, doctrines are altered and distorted in order to reflect the judicial preoccupation with innocence. This claim is developed and defended by surveying a wide range of habeas procedural rules, as well as the mechanics for litigating certain substantive claims.

Parts III and IV pose the question of how much optimism is warranted in the wake of cases like *Martinez* and *Maples*. Are these cases fool's gold, unlikely to impact the day-to-day litigation of post-conviction claims? Or, as we approach the golden anniversary of Friendly's article, might there be room for renewed optimism about federal habeas litigation that is untethered from strong showings of innocence? The answer to this question turns on a concrete assessment of the limitations imposed by these cases, either by their plain text or by reference to the greater habeas common law, and an assessment of how these cases have been applied in the lower federal courts. In the end, the numerous procedural questions surrounding the eventual application of recent decisions make it impossible to predict precisely how far-reaching the shift in the habeas landscape will be; however, unlike other scholarly works, this Article predicts that the emphasis on fair state court procedures represents the most monumental, prodefendant shift in habeas law in at least forty years.

This Article provides an explicitly descriptive and predictive account of modern habeas review. The first half of the paper summarizes the innocence focus of modern habeas prior to *Martinez v. Ryan,* and the latter half explores the likely and probable shifts in federal habeas in a *post-Martinez* world. More specifically, for decades, the guilt of the defendant has been a dispositive barrier to habeas relief.[9] But a change appears to be afoot. Scholars and the

8. In a sense, innocence has emerged as a necessary but not a sufficient condition for relief. *See* DORSEN, *supra* note 7, at 214-15 (calling Friendly's approach more "conservative" than others because he desired that prisoners show both innocence and a constitutional injury).

9. Summarizing Judge Friendly's influence, one pair of commentators has observed the "ascendancy of innocence." Irene Merker Rosenberg & Yale L. Rosenberg, *Guilt: Henry Friendly Meets the MaHaRaL of Prague*, 90 MICH. L. REV. 604, 606 (1991).

Supreme Court itself seem to recognize a role for federal habeas in policing the adequacy of state appellate and postconviction procedures. At least in certain circumstances, federal habeas review must be permitted even if the defendant is patently guilty. This shift is consistent with a normative vision of habeas that scholars, including myself, have advocated for over the past decade.

I. THE ORIGINAL MODEL: INNOCENCE AS IRRELEVANT

This Article focuses primarily on the contrast between the post-Warren Court innocence era and the rise of a potential post-*Martinez* process era. To provide some necessary context, however, a brief overview of the pre-Warren Court habeas history is necessary.

A. A Brief History of Modern Habeas, 1789-1970

Any attempt to distill doctrine is prone to oversimplification, if not outright misinterpretation.[10] This rule applies with more force than usual in the realm of habeas corpus because even the most respected scholars have disagreed and continue to disagree about the history of federal oversight of state convictions. There is disagreement about the basic purpose and origins of the writ all the way through to the meaning of the modern habeas reforms of the Antiterrorism and Effective Death Penalty Act (AEDPA), and everything in-between.

The controversy begins with the constitutional standing of habeas corpus. The Constitution, by its plain terms in the "Suspension Clause," does not provide an affirmative right to habeas corpus, but rather creates a general prohibition on the writ's suspension.[11] This

10. Moreover, comprehensive histories of habeas corpus have been provided by leading scholars in the field. *See, e.g.*, ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 463-99 (1963); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 279-80 (1988); Anne Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

11. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). For a thoughtful discussion on how the Suspension Clause should be read in the context of persons not facing criminal charges, see Amanda L. Tyler, *The Forgotten Core Meaning of the*

has given rise to an ongoing debate over whether the Constitution provides an affirmative right to habeas review, and if so, whether that right applies to prevent Congress from depriving federal prisoners, state prisoners, or both of the right to federal court oversight of their convictions.[12] And this disagreement about what the Suspension Clause means spills over into debates about what the Judiciary Act of 1789 (the Act) means. The conventional reading of the Act is that it "provided federal courts the authority to grant habeas corpus to federal prisoners."[13] But one of the most distinguished habeas scholars and historians, Eric Freedman, concluded based on archival research that "ever since the government began to function, the federal courts have had the power, both by federal statute and independently of it, to issue writs of habeas corpus in order to free state prisoners held in violation of federal law."[14] This is no mere idle conclusion insofar as it speaks to the original meaning of the Constitution and habeas corpus.[15]

Suspension Clause, 125 HARV. L. REV. 901, 903 (2012) ("The Suspension Clause remains a puzzle. Just what the Founding generation had in mind when they included it in the Constitution remains the subject of great debate, as does the role that it should play today in regulating government action taken in the name of national security.").

12. *Compare* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126-56 (1980) (concluding that the Suspension Clause only applies to prevent Congress from impeding a state court's ability to grant the writ), *with Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807) (concluding that the clause provides federal prisoners with an affirmative right to federal habeas review), *id.* at 95 (noting that if the Constitution did not require congressional enactment of a right to habeas corpus, then "the privilege itself would be lost, although no law for its suspension should be enacted"), *and* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 871-74 (1994) (concluding there is a constitutional right to federal oversight of state convictions). For a more detailed explanation of this history, see Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996).

13. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.2, at 897 (5th ed. 2007).

14. Eric M. Freedman, *Milestones in Habeas Corpus: Part I–Just Because John Marshall Said It, Doesn't Make It So:* Ex Parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 539 (2000); *see also id.* at 541 ("[T]he fact that habeas corpus powers were conferred on the federal courts by statute does not support *Ex parte Bollman*'s thesis that they would have lacked those powers in the absence of such a grant. Had the statute never been passed, the federal courts would still have had the power to issue the writ of habeas corpus and, specifically, to issue it to state prisoners.").

15. Although it is commonplace for the Supreme Court to apply the writ "as it exists today, rather than as it existed in 1789," Freedman, among others, has noted that the Court does so begrudgingly because it regards the modern application of the writ to be fundamentally different than the historical application. *See id.* at 537.

Despite confusion and disagreement regarding the statutory and constitutional origins of habeas corpus in the United States, one might reasonably assume that with the Reconstruction Era enactment of the Habeas Corpus Act of 1867 (Act of 1867),[16] federal courts and scholars would, at least as of this date, achieve consensus regarding the scope and nature of appropriate federal oversight. Such an assumption has proven misplaced.[17] Indeed, some of the most famous debates about the nature of federal habeas jurisdiction arose out of the Act of 1867. For example, Paul Bator famously argued for a very limited form of federal habeas review by reasoning that the Act of 1867 only permitted habeas relief when a state conviction was entered without jurisdiction.[18] Judge Friendly applauded Bator's insights, calling them "brilliant and suggestive."[19] By contrast, Gary Peller argued that the legislative history as well as the lessons of the Reconstruction Era dictated that nearly unlimited federal review of state convictions was essential to a properly functioning constitutional democracy and anticipated by the Act of 1867.[20]

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16. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (repealed 1868 and replaced by Act of March 27, 1868, ch. 34, § 2, 15 Stat. 44 and subsequently codified as amended at 28 U.S.C. §§ 2241-55 (2006)).

17. Lee Kovarsky's recent scholarship, however, promises to bring greater consensus to this field. Kovarsky has made a persuasive historical case that the Constitution grants federal habeas authority over federal courts, *see* Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 781-94 (2013), and that the Privileges and Immunities Clause of the Fourteenth Amendment guarantees state prisoners a federal habeas forum, *see* Lee Kovarsky, Prisoners and Habeas Privileges Under the Fourteenth Amendment (unpublished manuscript) (on file with author) [hereinafter Kovarsky, *Prisoners and Habeas Privileges*]. Kovarsky's work has the potential to bring greater consensus to the question of whether state prisoners are constitutionally entitled to federal habeas review.

18. Bator, *supra* note 10, at 526-27. One scholar has concisely and accurately summarized the thrust of Bator's project by saying:

> Paul Bator's Process Model, for example, would give federal habeas courts the power to consider state criminal cases only if (1) the state prisoner was not afforded a full and fair opportunity to litigate his constitutional claims in state court, or (2) the state court did not have jurisdiction over his case.

Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 24 (2010).

19. DORSEN, *supra* note 7, at 211 (quoting Letter from Henry J. Friendly, Judge, U.S. Court of Appeals for the Second Circuit, to Paul M. Bator, Professor, Harvard Law School (Jan. 28, 1963)).

20. Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 662-63 (1982).

This fundamental disagreement between Peller and Bator undergirds much of the modern habeas debate. Those who view the Warren Court as having fundamentally expanded the reach of the writ like Bator and soon thereafter, Judge Friendly—see themselves as simply advocating for a return to the legislatively and constitutionally intended scope of federal habeas review. By contrast, those who do not perceive any fundamental shift in the scope of habeas review during the Warren era find the call to narrow the writ's reach perplexing. Illustrative of this tension, one set of commentators frequently describes the Warren Court as having supplanted legislative discretion on the issue by drastically expanding the reach of federal habeas review, often citing *Brown v. Allen* for this point.[21] For example, Nancy King and Joseph Hoffmann have concluded that the Court dramatically "expand[ed] the availability and scope of federal habeas review."[22] Others, however, have essentially said that the Warren Court generally, and the *Brown* decision in particular, broke no new ground in federal habeas and attribute this false history to the prominence of Paul Bator's academic writing.[23] Eric Freedman, for example, has described the Warren Court's habeas revolution as the revolution that was not, explaining, in part, that:

> None of the developments, judicial or legislative, that followed upon the release of the [*Brown*] decision support the view that it significantly re-shaped the legal landscape. Nor did any of the contemporary antagonists over the appropriate scope of habeas corpus view it as having done so. Prior to the appearance of Bator's article, *Brown* was just another, not particularly prominent, episode in an ongoing contest that had begun long before and continues to this day. Indeed, to the extent it had any immediate impact at all, *Brown* seems to have increased the rate at which federal habeas corpus petitions by state prisoners were summarily denied.[24]

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21. 344 U.S. 443, 485-86 (1953); *see* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 803 (2009).

22. Hoffmann & King, *supra* note 21, at 801.

23. *See, e.g.*, Eric M. Freedman, *Milestones in Habeas Corpus: Part III*–Brown v. Allen*: The Habeas Corpus Revolution That Wasn't*, 51 ALA. L. REV. 1541, 1549-50 (2000).

24. *Id.* at 1610 (footnote omitted); *see also id.* at 1547 ("[E]mbracing seven collections of documents—and including two sets of notes of the critical Court conference—demonstrates

Likewise, some have explained that the Warren era did not effect a material expansion of federal habeas oversight, but rather its decisions were substantially in accord with the Suspension Clause and the Act of 1867.[25]

So, it is fair to say there is no consensus about whether or exactly how much the Warren Court expanded the scope of federal habeas review. Nonetheless, appearances often shape judicial reality. The conventional wisdom, even according to leading treatises, is that it was not until the Warren era that the "scope of habeas corpus began to change dramatically" such that the availability of habeas corpus was "greatly liberalized."[26] Whether this perception is historically accurate or not,[27] there is no question that it spurred calls for reform that have had a dramatic impact on federal habeas litigation and scholarship. Judge Friendly's famous article is an important piece of this historical legacy.

B. An (Un)-Friendly Response to the Expanding Reach of the Writ

There is no question as to which side of the habeas debate Judge Henry Friendly fell. In 1970 Judge Friendly delivered a speech and

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that the Justices did not view themselves as making new law concerning the scope of the writ.") (footnotes omitted). Similarly, in refuting the notion that federal habeas was originally the province of federal courts for reviewing federal convictions alone, Freedman has noted that "[i]n approaching Suspension Clause issues, the Court, like scholars, proceeds on the assumption that the [Suspension] Clause originally protected only federal, not state, prisoners. This assumption is a mistake." Freedman, *supra* note 14, at 536 (footnotes omitted); *see also* William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J. SOUTH. HIST. 530, 544 (1970) (discussing the belief that the Act of 1867 led to federal review of state court decisions); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2341-48 (1993) (discussing the views of the Court and scholars regarding habeas corpus for state prisoners).

25. *See, e.g.*, Peller, *supra* note 20, at 662-63. Additionally, such scholars might argue that it was the expansion of procedural and substantive rights at the hands of the Court that led to a greater reliance on federal habeas corpus.

26. CHEMERINSKY, *supra* note 13, at 899-900 (citing *Brown* as one of the "most important changes" in federal habeas review).

27. Even habeas historians like Eric Freedman seem to acknowledge that certain decisions from the Warren era represented important changes in the status quo. Freedman, *supra* note 23, at 1616. For example, *Fay v. Noia* permitted federal habeas relief of a claim not presented properly to the state court in all circumstances other than those in which the defendant "deliberately by-passed" the state procedures, and is probably fairly understood as a landmark decision. 372 U.S. 391, 438 (1963).

published an article by the same title criticizing what he perceived to be the unprincipled expansion of federal habeas review under the Warren Court.[28] In Friendly's telling of the habeas history, the writ "initially serving a felt need has expanded bit by bit, without much thought being given to any single step, until it ... assumed an aspect so different from its origin as to demand reappraisal."[29]

Specifically, Friendly lamented the fact that federal habeas relief was often granted without any concern for whether the prisoner was actually guilty of the offense—that is, Friendly objected to an era of habeas review in which, in his view, innocence had become irrelevant.[30] Friendly began his presentation of this issue by quoting a dissent from Justice Black: "In collateral attacks ... I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt."[31] To Friendly, it was utterly "incredibl[e] [that] these statements were made in dissent" rather than as a statement of law.[32] And "[e]ven more incredibl[e]," according to Friendly, was the fact that other dissenting Justices had even expressed qualms with the harshness of Black's proposal.[33] The noncentral role that innocence played in habeas review was a major failing of the federal system in Friendly's view.[34]

To remedy what he saw as the dramatic expansion of federal habeas review under the Warren Court, Friendly recommended that, as a general matter, federal habeas review should be barred

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28. Friendly, *supra* note 4.

29. *Id.* at 142; *see also id.* at 143 (claiming that his project was designed to "restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by current excesses").

30. *Id.* at 172.

31. *Id.* at 142 (quoting Kaufman v. United States, 394 U.S. 217, 235-36 (1969) (Black, J., dissenting)).

32. *Id.* at 143.

33. *Id.*

34. *Id.* (summarizing his article as an effort to "rescue [habeas corpus] from the disrepute invited by current excesses"). As previously noted, my point is not to gloss over the fact that Friendly's habeas model allowed for federal oversight of unfair procedures, which it explicitly did. Rather, my point is to emphasize that Friendly has become associated with a model of habeas that is primarily interested in preventing the punishment of innocents. *See, e.g.*, Berkowitz, *supra* note 7, at 498 (crediting Friendly and Bator with having "prodded" the Court to shift the focus of the habeas inquiry from procedural fairness to "verdict accuracy"); Rosenberg & Rosenberg, *supra* note 9, at 606 (noting that Friendly substantially succeeded in converting "factual guilt" into one of the "dominant themes of federal habeas corpus").

unless the prisoner could make a colorable showing of innocence.[35] Framing his argument, Judge Friendly explained:

> The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction. He would be surprised, I should suppose, to be told both that it never was really bad and that it has been steadily improving, particularly because of the Supreme Court's decision that an accused, whatever his financial means, is entitled to the assistance of counsel at every critical stage. His astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime.[36]

To be sure, Friendly was not only concerned with innocence. He recognized, for example, that state procedures must be sufficiently fair as to warrant nonintervention by the federal courts.[37] But his driving concern was what he perceived to be the Warren Court's expansion of habeas remedies for the guilty. As Friendly put it, "I perceive no general principle mandating a second round of attacks simply because the alleged error is a 'constitutional' one."[38] Because the scope of the Bill of Rights was expanded in the 1960s, Friendly, quite simply, found nothing particularly unique or deserving of additional process about an allegation of constitutional error.[39] Any "resourceful defense lawyer," he quipped, can frame defects in the trial as "constitutional" error.[40] The very label "constitutional error,"

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35. Friendly, *supra* note 4, at 160 (defining colorable claim of innocence as true innocence and not merely a showing that one would not have been convicted but for the illegally obtained evidence or statements); *see infra* note 43 (elaborating Friendly's innocence standard); *see also* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 609-10 (2005) (describing Friendly's article as having "repudiated the Warren Court's expansive treatment of collateral federal review of state court convictions as a vehicle for the consideration of all federal constitutional claims").

36. Friendly, *supra* note 4, at 145; *cf. id.* at 145 n.12 (quoting Chief Justice Burger as having observed that in some cases the "accused continued his warfare with society for eight, nine, ten years and more").

37. *Id.* at 152-53.

38. *Id.* at 155.

39. *Id.* at 156.

40. *Id.* ("Today it is the rare criminal appeal that does not involve a constitutional claim.").

then, was viewed as carrying "a connotation of outrage ... which is wholly misplaced."[41]

In short, Friendly argued for a system of federal habeas review in which, absent a few very limited circumstances such as unfair[42] or nonexistent state court review process, federal oversight is only permitted upon a showing of innocence.[43] The common, if reductionist, understanding of Friendly's thesis, then, is that innocence is an essential "precondition for federal habeas relief."[44] Such a proposal was said to be needed to "prevent abuse by prisoners [and] a waste

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41. *Id.* at 156-57.

42. The practicing lawyer knows that in many cases this is where the rubber hits the road. Problems of incompetent or underfunded counsel, refusal to permit discovery by a prisoner, or refusal to fund postconviction experts are recurring and debilitating problems. *See, e.g.*, Hoffmann & King, *supra* note 21, at 816, 832-33. At the time Friendly was writing, habeas was conceived of so broadly that acknowledging a baseline requirement of full and fair state review was an obvious, even necessary condition for being taken seriously. More recently, however, the innocence focus of Friendly's article has garnered prominence, but the baseline assumption about full and fair state review has often been overlooked. *See* Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudication*, 62 HASTINGS L.J. 1, 8 (2010); *see also* Eric M. Freedman, *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After* Martinez *and* Pinholster, 41 HOFSTRA L. REV. 591, 592-94 (2013) (discussing the use of full and fair state review in two current cases). In Parts III and IV of this Article, I demonstrate how the modern body of procedural scholarship, which emphasizes the fair procedure aspects of Friendly's and Bator's work, is coming of age in recent Supreme Court decisions.

43. Friendly, *supra* note 4, at 160. To make such a showing, mere doubt about guilt is insufficient; rather the prisoner would have to:

> show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Id. This formulation bears a striking resemblance to the *Schlup* standard of innocence as a gateway. Schlup v. Delo, 513 U.S. 298, 316 (1995) ("[I]f a petitioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.").

44. Steiker & Steiker, *supra* note 35, at 610 ("While the Court did not directly embrace potential innocence as a precondition for federal habeas relief, it instead repeatedly tightened procedural requirements for federal habeas petitions."). This is not to suggest that the Steikers engaged in a reductionist reading of Judge Friendly. Quite the contrary, their work aptly illustrates the way that courts, legislators, and commentators have come to understand and apply Friendly's proposal over the last half century.

of the precious and limited resources available for the criminal process."[45]

History has been kind to Friendly's proposals.[46] Judge Friendly's call for greater focus on innocence and finality achieved substantial success.[47] First, federal habeas review, particularly after the enactment of the AEDPA,[48] is considerably less hospitable to any federal judgments that would disturb the federalism concerns and finality of a state conviction.[49] Moreover, it is widely recognized that in recent years there is a growing concern with the innocence of the petitioner. For example, Jordan Steiker observed that the Court's habeas jurisprudence has increasingly and "repeatedly emphasized that the availability of habeas relief should depend in large measure on whether the petitioner is factually innocent."[50] Others have echoed this sentiment, noting that "[i]nnocence is now unquestionably

45. Friendly, *supra* note 4, at 172. It is worth noting that Friendly did expect state courts to provide a full and fair process to prisoners. He observed that the "state is bound by the supremacy clause to honor all constitutional guarantees," but emphasized that the state "is not bound to honor them more than once." *Id.* In other words, each prisoner must be afforded at least one full and fair opportunity for review of his constitutional claims. *See* Marceau, *supra* note 42, at 8-9. Such a recognition is entirely consistent with the recent landmark decision, *Martinez v. Ryan*, insofar as *Martinez* recognizes a right to have one's ineffective assistance of counsel claim fully and fairly aired. 132 S. Ct. 1309 (2012); *see* discussion *infra* Part III.

46. Of course, not everyone agrees with Friendly's reading of the habeas history or with his recommendation that innocence play a central role in determining who is eligible for habeas review. Leading habeas scholars Randy Hertz and James Liebman, for example, have argued that the history of our Constitution suggests that a prisoner's "apparent guilt should *heighten*, not cut off or diminish" federal habeas oversight. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.5, at 93, 95 (6th ed. 2011) (explaining that because the federal courts play a constitutional role in protecting against the tyranny of "local spirit," guilt "may pose the classic circumstance in which substitute federal appellate review under the writ is especially necessary" (quoting THE FEDERALIST NO. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

47. Leading scholars in the criminal law field have called for limiting federal habeas by focusing more on protections for the innocent. *See, e.g.*, John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 691-92 (1990).

48. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.)

49. *See, e.g.*, Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 606 (1999) (arguing that AEDPA does not necessarily favor or disadvantage innocence but rather prioritizes federalism concerns); Kovarsky, *Prisoners and Habeas Privileges*, *supra* note 17, at 58; Marceau, *supra* note 42, at 34-40.

50. Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 304 (1993).

relevant to federal habeas corpus review."[51] Another scholar explained, "As if in answer to Judge Friendly's original query, ... the Court shift[ed] the pith of the habeas inquiry from procedural demands for fairness to substantive claims of innocence."[52]

The following Part elaborates on the growing number of procedural and substantive barriers to habeas relief that are predicated on a desire to ensure that the guilty do not have access to federal habeas relief.[53]

II. THE INNOCENCE REVOLUTION: GUILT AS DISPOSITIVE

The state of postconviction law in 1970 compelled Judge Friendly to ask whether innocence had become irrelevant to federal habeas. Today it is much more salient to consider the extent to which guilt has become dispositive. This Part examines the development of a federal habeas jurisprudence that drastically disadvantages guilty defendants. Specifically, it examines changes in both procedural and substantive habeas law that prioritize a showing of innocence (or likely innocence) over a vindication of constitutional rights.[54] Despite the fact that several of the Supreme Court's decisions tend to reject a direct link between innocence and habeas relief,[55] the connection between the accuracy of the trial result and the availability

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51. Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 378 (2001); *see* McQuiggen v. Perkins, 133 S. Ct. 1924, 1928 (2013) (recognizing an innocence exception to the statute of limitations).

52. DORSEN, *supra* note 7, at 219 (alteration in original) (citing Berkowitz, *supra* note 7, at 501).

53. *Cf.* Steiker & Steiker, *supra* note 35, at 610 ("While the Court did not directly embrace potential innocence as a precondition for federal habeas relief, it instead repeatedly tightened procedural requirements for federal habeas petitions.").

54. The habeas culture has developed such that innocence is critically important to relief, and constitutional rights are regarded as "nothing more than a collection of 'technicalities.'" Bright, *supra* note 1, at 27 (explaining that modern habeas law reflects the view that "results are more important than process, that finality is more important than fairness, and that proceeding with executions is more important than determining whether convictions and sentences were obtained fairly and reliably").

55. Friedman, *supra* note 10, at 319 ("In the series of cases beginning with *Stone v. Powell* and culminating recently in *Kimmelman v. Morrison*, the Court rejected innocence as a limitation on the scope of the writ."); *see also* Rose v. Mitchell, 443 U.S. 545, 559-64 (1979) (granting habeas relief based on the failure of a grand jury selection process to be free from racial discrimination).

of federal habeas relief is, at this point in history, beyond peradventure for many aspects of habeas litigation.

As an initial matter, however, it is necessary to explain that the shift toward a more guilt-centered model *does not* reflect a corresponding maturation in the postconviction procedures for vindicating innocence claims. The focus is on denying relief to the guilty, not on providing relief to the innocent.[56]

A. A Focus on Guilt Rather Than Innocence

Although this Article identifies a dramatic reorientation of federal habeas—from the arguably freewheeling 1960s to the guilt focus of the modern era—it is important to distinguish between a guilt-centered and an innocence-centered model of habeas. Modern habeas is preoccupied with the former. Guilt has become a defining feature in denying federal habeas relief to prisoners, but a showing of innocence is, in many instances, still irrelevant to the likelihood of relief.[57] Stephen Bright, for example, has documented how modern procedures have resulted in numerous innocent persons being convicted, and even sentenced to death.[58]

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56. As some scholars have remarked, "The question Judge Friendly really was asking in 1970" is not whether innocence was irrelevant but whether guilt was irrelevant: "[H]is real concern was with regard to the 'great multitude of applications not deserving [the court's] attention' because the petitioners are steeped in guilt." Rosenberg & Rosenberg, *supra* note 9, at 622 (alteration in original) (quoting Friendly, *supra* note 4, at 150).

57. The most notable counterexample is *McQuiggin v. Perkins*, which recognized actual innocence as a basis for excusing an untimely federal habeas petition. 133 S. Ct. 1924, 1928 (2013). Prior to *McQuiggin*, even though equitable tolling of the habeas statute of limitations was permitted, a majority of federal courts had rejected an innocence exception to the statute of limitations. The First, Fifth, Seventh, Eighth, and Ninth Circuits have held that innocence is not an exception to the statute of limitations. Lee v. Lampert, 610 F.3d 1125, 1128-31 (9th Cir. 2010), *rev'd en banc*, 653 F.3d 929 (9th Cir. 2011); Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005); David v. Hall, 318 F.3d 343, 346-48 (1st Cir. 2003); Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002); Flanders v. Graves, 299 F.3d 974, 978 (8th Cir. 2002). Only the Sixth Circuit had reached a definitive contrary conclusion. Souter v. Jones, 395 F.3d 577, 599-600 (6th Cir. 2005); *see also In re* Davis, 130 S. Ct. 1, 2 (2009) (Stevens, J., concurring).

58. Bright, *supra* note 1, at 5-6, 24 (identifying a few notable examples of wrongful convictions); *see also* THE INNOCENCE PROJECT, 250 EXONERATED, TOO MANY WRONGFULLY CONVICTED (2010), *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf; *Reports and Publications*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/news/reports.php (last visited Apr. 8, 2014) (annual reports detailing such topics as wrongful convictions).

Moreover, leading habeas scholar Brandon Garrett has responded forcefully to the idea that innocence has assumed the cherished role anticipated by Judge Friendly:

> In his influential 1970 article, Judge Henry Friendly provocatively asked why innocence is irrelevant to federal habeas corpus review. Judge Friendly proposed that innocence should provide a ground for relief from a criminal conviction, but his call went unheeded, perhaps because at that time innocence could rarely be proven with any certainty.... Claims asserting the existence of new evidence of innocence were considered fundamentally equivocal, and, as a result, states imposed strict rules of finality, barring claims brought after limitation periods expired. Thus, in the decades since Judge Friendly first asked whether innocence should be relevant to criminal appeals, the Supreme Court has repeatedly declined to recognize a constitutional claim of innocence ... [And even with the advent of DNA evidence], the Court narrowly failed to recognize a constitutional innocence claim.[59]

As Garrett points out, Friendly argued that "there should be an exception to the concept of finality when a prisoner can make a colorable claim of actual innocence."[60] However, modern federal habeas law does not afford a critical role for innocence.[61] For example, commentators have observed that the Court "has not explicitly ruled that freestanding innocence claims are grounded in the Constitution."[62] Other commentators and judges have concluded

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59. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1630-31 (2008) (footnote omitted); *see also id.* at 1716 ("Everything and nothing has changed since 1970, when Judge Friendly called the lack of a freestanding constitutional innocence claim 'an anomaly.'" (quoting Friendly, *supra* note 4, at 158-60 & n.87)); *id.* at 1630-31 ("[I]n the decades since Judge Friendly first asked whether innocence should be relevant to criminal appeals, the Supreme Court has repeatedly declined to recognize a constitutional claim of innocence.").

60. *Id.* at 1704 (quoting Herrera v. Collins, 506 U.S. 390, 438 (1993) (Blackmun, J., dissenting)).

61. A striking example of judicial indifference to innocence and fixation on the legal construction of guilt is the practice of permitting defendants to plead guilty and waive access to DNA testing that could exonerate them. Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 1016-17 (2012) (discussing the growing practice of plea deals including DNA waivers).

62. Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 171 (2012). *But see id.* at 175-76 (observing that in one prominent case the Supreme Court exercised its original habeas jurisdiction to transfer a case of potential innocence to a district court for fact-finding).

that even if there is an actual innocence claim in the death penalty context, in noncapital cases there is no reason to assume that a claim of freestanding innocence has any constitutional grounding.[63] For its part, the Supreme Court has blithely stated that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."[64]

Thus, the law has developed such that guilt plays a critical role in barring access to relief, as discussed immediately below, and yet litigating claims of innocence remains disfavored and nearly impossible.[65] That is to say, innocence is still irrelevant as a vehicle for obtaining relief, but guilt is often determinative in a denial of relief.

B. Modern Habeas and the Role of Guilt

In a sense, one could imagine Judge Friendly would be both satisfied and dismayed with the current habeas system. On the one hand, it might strike him as unsettling that a colorable claim of innocence still does not justify habeas relief, and he would no doubt find it surprising that the Court has held that there is not even a right to test DNA evidence to prove one's innocence.[66] But on the

63. *See* Barnwell v. Lewis, Nos. 92-15458, 92-15459, 1993 WL 55199, at *5 n.2 (9th Cir. Mar. 3, 1993) (Rymer, J., concurring); People v. Washington, 665 N.E.2d 1330, 1335 (Ill. 1996) (stating the *Herrera* opinions are "conflicted," but "[c]onflicted or not, at least for noncapital cases, *Herrera* clearly states ... that a freestanding claim of innocence is not cognizable as a fourteenth amendment [sic] due process claim"); Caitlin Plummer & Imran Syed, *"Shifted Science" and Post-Conviction Relief*, 8 STAN. J. C.R. & C.L. 259, 291 (2012) (noting that with regard to freestanding innocence "it has never been defined beyond a mere hypothetical requiring a considerably high requisite showing. Second, both *Herrera* and *Bell* spoke of this freestanding innocence claim specifically and only in the context of death penalty cases. While a strong argument may be made to apply that reasoning to non-capital cases, the Supreme Court has never done so: indeed, the Court has noted in other contexts the fundamental difference in character between death and all other penalties."). *But see* Tennison v. Henry, No. 99-16362, 2000 WL 1844301 (9th Cir. Dec. 14, 2000) (applying *Herrera* in a non-capital context).

64. *Herrera*, 506 U.S. at 401.

65. The Court itself has acknowledged that its innocence doctrine is extremely limited and largely unavailable. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 321 (1995) (explaining that steps have been taken "[t]o ensure that the ... exception would remain 'rare' and would only be applied in the 'extraordinary case'").

66. *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 55-56 (2009).

other hand, Friendly was not an innocence crusader;[67] he wanted federal relief to be much rarer, and in this regard he would find much to his liking in the modern reforms.[68] Although innocence remains an unlikely basis for obtaining relief, patent guilt has emerged as a leading barrier to federal relief. This Section examines the range of ways in which guilt has become dispositive as to whether one is entitled to relief. Through a combination of subtle and explicit doctrinal developments, guilt has been incorporated as a threshold question of habeas eligibility in a variety of substantive and procedural areas of law.

1. Substantive Doctrines That Focus on Guilt

Whatever one may think about the rise of innocence-related requirements in the context of procedural law, there is nothing obvious about the link between questions of guilt and the merits of a constitutional question.[69] The Supreme Court itself has previously explained that the vindication of a habeas claim ought to be permitted "regardless of the ... apparent guilt of the offender."[70] In recent decades, however, the prominence of the guilt-as-disqualifying-for-relief approach has become increasingly entrenched.[71]

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67. Some have noted that it was not innocence *per se* that Friendly was concerned with; instead his primary concern was that guilty persons were eligible for habeas relief. *See, e.g.*, DORSEN, *supra* note 7, at 214-15 (noting that Friendly tended to regard innocence as a necessary but not a sufficient condition for relief); Rosenberg & Rosenberg, *supra* note 9, at 622.

68. Professors Steikers have previously noted that Friendly's call for an innocence-centered federal habeas system resulted in both substantive and procedural reforms:

> Friendly's exhortation fell on receptive ears on the Court, and the resulting judicial reorientation of federal habeas law is well-known—and frequently lamented by critics of capital punishment. While the Court did not directly embrace potential innocence as a precondition for federal habeas relief, it instead repeatedly tightened procedural requirements for federal habeas petitions, allowing only few and narrow exceptions for the many petitioners who failed to meet them—with innocence paramount among the exceptions.

Steiker & Steiker, *supra* note 35, at 610 (footnote omitted).

69. Sussman, *supra* note 51, at 377-78.

70. Irvin v. Dowd, 366 U.S. 717, 722 (1961); *see also* Rose v. Mitchell, 443 U.S. 545, 559-64 (1979); Schneckloth v. Bustamonte, 412 U.S. 218, 257 (1973) (Powell, J., concurring) ("I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt.").

71. Professors Carol and Jordan Steiker are some of the only scholars to emphasize the evolution of substantive habeas doctrine in a way that limits relief for the guilty. Steiker & Steiker, *supra* note 35, at 609-11.

a. Strickland *and* Brady *Claims*

Two of the most commonly raised claims by prisoners seeking federal habeas relief are Sixth Amendment claims pursuant to *Strickland v. Washington* and due process claims based on *Brady v. Maryland*.[72] The litigation of these claims is substantially intermingled with an assessment of how likely it is that the defendant is actually guilty. Indeed, a primary defense by a State to a claim of injury under these two lines of cases is to argue that, even assuming the prisoner's allegations are true, he is not entitled to relief because the evidence of guilt is "overwhelming."

Consider first the familiar Sixth Amendment test for assessing ineffective assistance of counsel under *Strickland v. Washington*.[73] First, there must be a showing that the attorney's conduct fell below a standard of reasonable professional conduct.[74] Second, the petitioner must show that he suffered actual prejudice as a result of the ineffective assistance of counsel.[75] To demonstrate prejudice he must show more than that "errors had some conceivable effect on the outcome of [the] proceeding[s]," and instead must make an affirmative showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."[76] Or, as the Court put it: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

72. *See* KING ET AL., *supra* note 1, at 28, 30 (finding that 81 percent of capital cases include an ineffective assistance of counsel claim and 43.1 percent include a claim relating to lost, falsified, or undisclosed evidence by the prosecution); *id.* at 30 (showing that claims relating to judicial comments to the jury or jury instructions are also common, occurring in about 68 percent of cases); *see also* JOHN M. BURKOFF & NANCY M. BURKHOFF, INEFFECTIVE ASSISTANCE OF COUNSEL § 1.2 (2013) ("Ineffective assistance of counsel is one of the most—if not *the* most—common appeal grounds asserted by convicted criminal defendants as appellants."); Sheri Lynn Johnson, *Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Capital Cases*, 91 CORNELL L. REV. 1105, 1108 n.5 (2006) ("The three most common species of claims in capital cases are ineffective assistance of counsel claims, *Batson* claims, and *Brady* claims.").

73. 466 U.S. 668, 687 (1984).

74. *Id.* at 690.

75. *Id.* at 691-92.

76. *Id.* at 693-94.

produced a just result."[77] Stated more directly, *Strickland*'s prejudice requirement typically requires that a prisoner present a colorable challenge to the evidence of guilt that resulted in his conviction; no matter how egregious the attorney's conduct, the prisoner is only entitled to relief if there is evidence "sufficient to undermine confidence in the outcome."[78] And, significantly, the prejudice determination is actually part of the *right*—that is, the *Constitution itself* is understood to require a showing of prejudice.

The effect of the prejudice prong, then, is to insulate attorney errors from constitutional scrutiny in precisely those cases in which a strong defense might be most important, when the prosecution has a strong case.[79] The examples of attorney errors that have been forgiven under this constitutional standard because the trial record as a whole provided overwhelming evidence of guilt are vast in number and staggering in scope.[80] Illustrative is Earl Washington's case.[81] Washington's lawyer failed to introduce evidence of exculpatory semen stains, but in light of Washington's own confessions, the Fourth Circuit found that the overwhelming evidence of guilt

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77. *Id.* at 686.

78. *Id.* at 694.

79. *See* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996); Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is It Possible to Keep Innocent People Off Death Row?*, 29 U. DAYTON L. REV. 319, 323-24 (2004). Of course, it cannot be gainsaid that a skilled lawyer might also make a positive difference for a guilty defendant, but there is a reasoned basis for concluding that the right to counsel is, at bottom, serving an innocence protecting function. Justin Marceau, Gideon*'s Shadow*, 122 YALE L.J. 2482 (2013).

80. As Anthony Amsterdam has put it:

> I had always thought that *Gideon v. Wainwright* incorporated the Sixth Amendment into the Fourteenth, but apparently I had that backward. According to *Strickland* it is the Fourteenth Amendment's right to a fair trial that gets incorporated into the Sixth Amendment right to counsel. And the test of fairness is judicial satisfaction with the outcome. So if reviewing judges are comfortable that a defendant is guilty and deserved the sentence he got, his lawyer's failure to come near meeting the minimum standards of professional performance doesn't violate the Sixth Amendment guarantee of the right to the assistance of counsel for one's defense.

Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law, November 22, 2004*, 33 HOFSTRA L. REV. 403, 408 (2004) (footnote omitted).

81. Professor Freedman has written a gripping insider's account of this case. Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA. L. REV. 1089 (2001); *see also* MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON JR. (2003).

required it to deny relief under *Strickland*.[82] Eventually DNA evidence conclusively established Washington's innocence and he was exonerated, but because of the evidence of guilt on the face of the trial record, Washington was ineligible for *Strickland* relief.[83] Obviously, if the *Strickland* standard countenances a denial of relief based on evidence of guilt when the defendant is actually innocent, relief is extremely hard to come by for defendants who cannot establish innocence. Unfortunately, examples abound where the astonishing failures of counsel to adequately represent their client are deemed constitutionally insignificant in our adversarial system because the evidence of guilt put on by the prosecution was sufficiently strong.[84]

Similarly, *Brady v. Maryland*, which provides the constitutional framework for challenging prosecutor misconduct in failing to disclose exculpatory evidence, has an identical guilt-centered limitation.[85] It is difficult for prisoners to obtain relief—even in the face of appalling prosecutor misconduct—unless they can undermine the prosecution's guilt-phase case because the *Strickland* standard for prejudice is explicitly incorporated into the *Brady* analysis.[86] In defining prejudice for *Brady* purposes the Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[87] And a "reasonable probability," the

82. Washington v. Murray, 4 F.3d 1285, 1292 (4th Cir. 1993).

83. *Id.* Interestingly, Professor Garrett has done substantial research regarding wrongful convictions and his impressive work has shown that in dozens of cases in which courts deny relief because of "overwhelming evidence of guilt," the defendant is actually innocent. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 61, 107-11 (2008) (recognizing that relief is regularly denied in cases of wrongful convictions because the errors were harmless or the evidence of guilt too strong).

84. *See, e.g.*, Woolley v. Rednour, 702 F.3d 411 (7th Cir. 2012), *cert. denied*, 2013 WL 2096667 (2013); Boyd v. Allen, 592 F.3d 1274 (11th Cir. 2010); Young v. Runnels, 435 F.3d 1038 (9th Cir. 2006); Henderson v. Thieret, 859 F.2d 492 (7th Cir. 1988) (denying sentencing phase relief); *see also* Kirchmeier, *supra* note 79, at 426-27 (discussing lawyers using cocaine during trial and similar ethical lapses); Mickenberg, *supra* note 79, at 319-20.

85. 373 U.S. 83, 87 (1963).

86. *See, e.g.*, Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law,* 2005 WIS. L. REV. 35, 77.

87. United States v. Bagley, 473 U.S. 667, 682 (1985). For a lucid and useful examination of how an analysis of *Brady* and *Strickland* prejudice should be integrated when a prisoner raises both claims, see John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error,* 95 J. CRIM. L. &

Court emphasized, "is a probability sufficient to undermine confidence in the outcome."[88] Indeed, scholars have recognized the link between *Brady* claims and innocence, noting that the absence of a clear right to litigate free-standing innocence on habeas has resulted in *Brady* emerging as the "most common vehicle for asserting an innocence claim in federal habeas."[89] And just as with right to counsel claims, egregious acts of prosecutor misconduct will not be regarded as running afoul of the Constitution so long as there is strong evidence of guilt.[90]

It is important to note that this focus on guilt as dispositive as to the Constitution's content and scope is not intuitive. Consider, for example, the rule for assessing whether the Constitution was violated by a defense lawyer's representation of a defendant despite the existence of a conflict.[91] Prejudice is not required when a conflict of interest is alleged.[92] It is far from clear that the Sixth Amendment's promise of the "assistance of counsel" is more easily compromised by a conflict of interest than sheer incompetence, and yet the two doctrines developed along divergent paths. Whereas *Strickland* (competence) violations require a showing of prejudice, *Cuyler* (conflict) violations require only a showing of attorney error or

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CRIMINOLOGY 1153, 1154 (2005) ("Even in cases where the defendant alleges both that the prosecution withheld evidence and that his counsel was incompetent, courts assess the impact of each party's conduct on the verdict independently. Our objectives here are two-fold. Our more modest objective is to argue that courts should consider the impact of *Brady* violations and *Strickland* violations together when evaluating whether a guilty verdict or death sentence is reliable.").

88. *Bagley*, 473 U.S. at 682.

89. *See* Johnson, *supra* note 72, at 1132.

90. A prime example of this post-hoc rationalization problem can be found in *Strickler v. Green*, 527 U.S. 263 (1999). The prosecution's lead witness—who was the only "disinterested" witness presented by the prosecution—"testified in vivid detail" implicating David Strickler in the kidnapping and murder of a college student. *Id.* at 266, 270-72, 293. Unknown to the defense at trial, the prosecutor had possession of undisclosed, detailed notes from a detective working on the case that impeached much of the witness's testimony. *Id.* at 273-75. In analyzing Strickler's *Brady* claim on habeas review, the Court found that "[w]ithout a doubt, [the witness's] testimony was prejudicial in the sense that it made petitioner's conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial." *Id.* at 289. Nonetheless, brushing aside the prosecutor's misconduct—and its own recognition of prejudice—the *Strickler* Court held that "even without the [witness] testimony, the evidence in the record was sufficient to establish petitioner's guilt on the murder charge." *Id.* at 266.

91. *See* Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980).

92. *Id.* at 350.

deficiency.[93] There is nothing obvious about distinctions such as these across claims arising under the same clause of the Sixth Amendment, but the Supreme Court's doctrine evolved such that the most commonly litigated habeas claims cannot result in relief unless the evidence of guilt was, in the first instance, underwhelming. As a result, the substance of the constitutional rights are inseparable from questions of guilt and innocence.

Guilt is often dispositive in finding no constitutional violation in both the *Strickland* and the *Brady* contexts.[94] Notably, both the *Strickland* and the *Brady* prejudice standards emerged after Friendly's call for increased attention to innocence.[95]

b. Harmless Error

A close relative of the prejudice standard used to evaluate claims of ineffective assistance of counsel and *Brady* claims is the harmless error standard. Where harmless error applies, the doctrine ensures that, even if a constitutional violation exists, relief is not available unless the error undermined confidence in the guilty verdict.[96] Thus, even for those constitutional claims that do not require a showing

93. To be more precise, *Cuyler* holds that a showing of actual conflict and adverse impact is required. *Id.* This is roughly translated as a showing of conflict and, in *Strickland* terms, some deficient performance. The adverse impact requirement should not be conflated with the more onerous and distinct requirement of prejudice under *Strickland*.

94. And it bears mentioning that the sort of guilt determinations relevant to this Article are often predicated on a flawed trial record. As Justice Marshall noted:

> On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting).

95. *Strickland* was decided in 1984. *See supra* note 73.

96. There are two types of harmless error analysis. The Supreme Court has instructed that a state court reviewing on direct appeal an allegation of constitutional error may only treat the error as harmless if that court finds "beyond a reasonable doubt" that the verdict was not impacted by the injury. Chapman v. California, 386 U.S. 18, 24 (1967). By contrast, on federal habeas review, federal courts are instructed to treat as harmless any error for which the prisoner fails to demonstrate a "substantial and injurious" impact on the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

of prejudice, a remedy is nonetheless unavailable if the error is deemed harmless.[97]

Notably, almost all constitutional errors are subject to harmless error review.[98] Only a handful of claims have been identified by the Court as structural error—a constitutional violation that warrants relief even without a harmless error analysis.[99] Most constitutional violations, including *Miranda* violations, improper identification procedures, and even illegal searches are all subject to harmless error review.[100] Indeed, the Supreme Court held in *Arizona v. Fulminante* that even a conviction resting upon a "coerced confession" was subject to harmless error review.[101]

In practice, this means that the strength of the evidence of guilt against a defendant is almost always relevant to a consideration of whether a constitutional violation warrants a remedy.[102] Strong

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97. For an insightful summary of harmless error law and a discussion of the role of guilt in this doctrine, see Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1173 (1995) ("At bottom, it is impossible for an appellate judge to consider whether an error has influenced a jury without thinking about the weight of the evidence against the defendant; and once an appellate judge lapses into this mindset, it is difficult to avoid guilt-based decisionmaking.").

98. The holding in *Chapman*—that most constitutional questions and not just technical, non-constitutional procedural rules were subject to harmless error review—was regarded as a monumental, progovernment change in the way constitutional rights were adjudicated. *See, e.g.*, David R. Dow & James Rytting, *Can Constitutional Error Be Harmless?*, 2000 UTAH L. REV. 483; Jason S. Marks, *Harmless Constitutional Error, Fundamental Fairness and Constitutional Integrity*, 8 CRIM. JUST. 2, 58 (1993) ("Harmless error appeared in our jurisprudence seemingly without warning."); James Edward Wicht III, *There Is No Such Thing as a Harmless Constitutional Error: Returning to a Rule of Automatic Reversal*, 12 BYU J. PUB. L. 73, 77 (1997).

99. As one commentator explained:

> The Supreme Court has recognized a narrow set of rights that, if denied, are structural errors: the rights to counsel and to counsel of choice, the right of self-representation, the right to an impartial judge, freedom from racial discrimination in grand jury selection, the right to a public trial, and the right to accurate reasonable-doubt jury instructions.

Kendra Oyer, Comment, *Classifying Constructive Amendment as Trial or Structural Error,* 158 U. PA. L. REV. 609, 612 (2010) (footnotes omitted).

100. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 52-54 (1970) (applying harmless error to Fourth Amendment violations); Butzin v. Wood, 886 F.2d 1016, 1019 (8th Cir. 1989) (applying harmless error to *Miranda* violations); Charles J. Ogletree, Jr., Comment, Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 153 (1991).

101. 499 U.S. 279, 306-10 (1991) (referring to an involuntary confession as a "classic trial error" that is subject to harmless error review and denying relief on this basis).

102. As Judge Edwards explained, the risk with harmless error is that courts will simply

evidence of guilt will routinely require a court to deny relief under the harmless error doctrine.[103] It is not the case that only "truly trivial and technical failures to observe arcane procedural formalities" are ignored when the evidence of guilt is overwhelming.[104] Instead, harmless error has become something approaching a "blanket rule" for upholding convictions even for the "most obvious and indefensible violations of basic constitutional guarantees" when the evidence of guilt is strong.[105] One need not take a normative position opposing this development to recognize the prevalence of guilt in constitutional adjudications. The Court itself has sought to instruct lower courts that "most constitutional errors can be harmless."[106]

Moreover, the outer limits of the harmless error doctrine roughly track those rights the Court has associated with innocence protection. For example, a violation of *Gideon* is deemed a structural error, as is a biased judge, because such errors tend to suggest that an innocent person may have been convicted.[107] Perhaps even more importantly, the nearly ubiquitous overlay of the harmless error doctrine tends to set the tone for appellate and habeas review. Anthony Amsterdam described the role of harmless error in setting a general mood for judicial review:

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treat the weight of the evidence against a defendant as "the sole criterion by which harmlessness is gauged." Edwards, *supra* note 97, at 1187; *see also id.* ("All too often an appellate court confuses review by applying the substantial evidence test to determine whether an error is harmless. Such a court considers only the evidence in support of the judgment and ignores erroneous matter. It assumes that the trier of fact, having decided against the appellant, believed all properly admitted evidence against him and disbelieved all evidence in his favor. No wonder that under such a review most errors are found harmless.") (quoting ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 28 (1970)).

103. This is not to suggest that the bounds of the harmless error doctrine map seamlessly onto the definition of innocence. Those errors that do not require harmless error review—the so-called structural errors—are difficult to neatly categorize. *See, e.g.*, Amy Knights Burns, *Counterfactual Contradictions: Interpretive Error in the Analysis of AEDPA*, 65 STAN. L. REV. 203, 217 (2013).

104. Amsterdam, *supra* note 80, at 405; *cf.* Edwards, *supra* note 97, at 1205 ("In other words, it is hard for a judge to discount a strong feeling that the defendant is guilty.").

105. Amsterdam, *supra* note 80, at 405.

106. *Fulminante*, 499 U.S. at 306.

107. *See* Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); *see also* Justin F. Marceau, Gideon*'s Shadow*, 122 YALE L.J. 2482, 2484-85 (2013).

> In theory, the standard by which appellate courts are supposed to test the harmlessness of most constitutional errors in the pretrial process and at trial is whether the judges are convinced beyond a reasonable doubt that the error did not contribute to the guilty verdict or the sentence. But in practice, it much more often boils down to whether the appellate judges think that the prosecution's evidence of guilt was potent and the sentence well deserved.[108]

c. AEDPA Deference Disadvantages the Guilty

For habeas petitions filed after the enactment of the AEDPA in 1996, the substantive standard for relief is notoriously high. A prisoner generally must show that the state court adjudication of a claim "involved an unreasonable application of" clearly established law.[109] A state court adjudication is said to be *reasonable*, and thus insulated from federal relief, "so long as 'fair-minded jurists could disagree'" about the issue.[110] Incorrect applications of the Constitution are not necessarily unreasonable for purposes of the AEDPA.[111]

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108. Amsterdam, *supra* note 80, at 405-06 (footnotes omitted). Amsterdam goes on to explain that:

> When appellate judges decide to reject a claim of error on harmless-error grounds, they very often do not say anything at all about the claim in their opinion. When they do say that the claim has been considered and rejected on harmless-error grounds, their explanation for why they regard any possible error as harmless is ordinarily brief and unrevealing, often conclusionary, almost always immune to criticism or review because it is case-specific and therefore opaque to anyone not thoroughly familiar with the record of the particular case.

Id. at 406. These statements underscore the importance and under-recognized contribution of Sherri Lynn Johnson's efforts to examine the record of Fourth Circuit cases. *See* Johnson, *supra* note 72.

109. 28 U.S.C. § 2254(d) (2006). In rare circumstances the prisoner could also prevail by showing that the state court decision was contrary to federal law then clearly established in the holdings of the Supreme Court, or that the state court decision was based on unreasonable determinations of fact. 28 U.S.C. § 2254(d)(1)-(2); Williams v. Taylor, 529 U.S. 362, 412 (2000). These two avenues of substantive relief are even rarer than a showing of § 2254(d)(1) unreasonableness.

110. Harrington v. Richter, 131 S. Ct. 770, 778 (2011) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)).

111. *See Williams*, 529 U.S. at 412. Elaborating, the Court recently explained:

> Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal. As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the

The AEDPA, then, makes relief rarer for all claims. But for claims like *Strickland* and *Brady* the substantive focus on guilt is amplified.[112] In describing the judicial review involved in adjudicating a *Strickland* claim on federal habeas, the Supreme Court recently explained:

> Surmounting *Strickland*'s high bar is never an easy task.... Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.... Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d).[113]

In short, the *Strickland* standard's performance and prejudice standards are both amplified under § 2254(d)(1). Because these doctrines emphasize the need for a showing of innocence even under de novo review, the showing of innocence necessary to justify relief is doubly high under AEDPA review.[114] Bare prejudice, while not requiring "a showing that counsel's actions more likely than not altered the outcome" will, in most cases, require something

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> claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Harrington, 131 S. Ct. at 786-87 (citation omitted) (internal quotation marks omitted).

112. Strickland v. Washington, 466 U.S. 668 (1984); Brady v. Maryland, 373 U.S. 83 (1963).

113. *Harrington*, 131 S. Ct. at 788 (citations omitted) (internal quotation marks omitted).

114. Because of the differences between the deficient performance and prejudice prongs of *Strickland*, some clarification is necessary as to the notion that both receive "double" deference under AEDPA. Given that the deficient performance prong turns on the judgments of defense counsel, there is inherently some deference built into the analysis. Thus, when AEDPA applies, the Court has fairly described the review of deficient performance claims as doubly deferential. Of course, the prejudice prong is quite different. There is no first order judgment by trial counsel that is merely receiving a second layer of deference under AEDPA. Obviously, then, the initial review post-conviction judge reviewing such a claim does not have anyone to defer to on this question of prejudice. Nonetheless, it is fair to describe the review of a prejudice claim conducted by a federal habeas court as doubly deferential—there is deference built into the prejudice analysis in the first order review, and then review under AEDPA amplifies this deference. That is to say, although it might make more intuitive sense to say that counsel's decisions (deficient performance) get double deference—once by the state court and once by the federal court—it is not inaccurate to think of the prejudice analysis as being doubly deferential as well—one source of deference is the *Strickland* standard itself, and the second is the standard of review announced in AEDPA.

tantamount to a showing of "more-probable-than-not" that the errors of counsel caused the guilty verdict.[115] When this already harsh prejudice standard is filtered through the AEDPA standard of unreasonableness, the result is an intensified focus on innocence. The most speculative evidence of guilt will, in many cases, justify a denial of relief when the prejudice prong is adjudicated under the AEDPA. Indeed, the Supreme Court has itself recognized that even the barest "conventional circumstantial evidence" of guilt will oftentimes suffice as a barrier to federal habeas relief under the AEDPA.[116]

In addition, a quick survey of the cases in which relief has been granted under the AEDPA tends to confirm that § 2254(d) entrenches the view that a guilt determination at trial is dispositive. Emphasizing that the trial and the guilt determination ought to be the "main event,"[117] the Supreme Court's AEDPA cases have ensured that relief is almost never available, and when available, it is almost always limited to a resentencing in a capital sentencing case. The relief that is granted, then, has nothing to do with guilt or innocence per se, but illustrates the absence of any prospect for relief other than in the sentencing context where "death is different."

Between 1996, when the AEDPA was enacted, and 2012, the Supreme Court has addressed hundreds of habeas cases and found the standard of review under § 2254(d) satisfied only seven times.[118] None of these seven cases required a new guilt phase trial or so much as called into question a guilty verdict.[119] All of the cases

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115. *Harrington*, 135 S. Ct. at 792 (internal quotation marks omitted).

116. *Id.*

117. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

118. *See* Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 101-03 (2012) (compiling empirical data regarding the rate of relief in habeas cases before the Supreme Court).

119. In 2012, the Supreme Court granted guilt-phase relief for the first time under § 2254(d). Lafler v. Cooper, 132 S. Ct. 1376, 1390-91 (2012). However, even here the question of guilt was not in dispute. The Court was considering whether the errors of counsel in failing to advise the client to accept a guilty plea could be so prejudicial to his sentencing as to require relief. *Id.* at 1384. That is to say, *Lafler* does not represent a true unsettling of a guilty verdict insofar as the defendant still seeks to plead guilty. Moreover, and equally important, relief was not actually ordered by the Court; instead, a remand was issued and the district court was instructed to assess whether relief was required in its discretion. *Id.* at 1389 ("[When the sentence is higher because of a missed plea opportunity,] the court may conduct

granting relief, then, are fundamentally cases about the appropriate procedures for sentencing. Specifically, three of the seven cases involve the Eighth Amendment requirement that the sentencer in a capital case be able to consider and give effect to all potentially mitigating evidence before deciding on the appropriate sentence.[120] In each of these three cases, the only issue was whether the State had impermissibly impinged the defendant's ability to present and have considered mitigating evidence that might justify a sentence other than death. The conviction itself was not in question. Similarly, in the other four cases granting relief under § 2254(d)(1), the Court found that the heightened importance of a capital sentencing proceeding justified unique requirements on defense counsel such that ineffective assistance of counsel was easier to establish.[121]

To put the matter as plainly as possible, the only cases in which relief was granted were those in which the only issue in dispute was the sentence—specifically a death sentence—and, as for the conviction, § 2254(d) effectively defers to the guilt and the trial proceedings such that relief is not available.[122]

In short, the reforms of the AEDPA and § 2254(d) in particular tend to reinforce the guilt-as-dispositive orientation of modern habeas review. The deferential standard of review forces even more

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an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea [and] [i]f the showing is made, the court *may exercise discretion* in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.") (emphasis added). In short, a constitutional violation under *Lafler* may, in the trial court's discretion, result in no remedy at all. And at bottom, a *Lafler* claim is a sentencing claim. *Id.* at 1385 (defining the prejudice inquiry as "a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed").

120. Abdul-Kabir v. Quarterman, 550 U.S. 233, 260 (2007) ("[T]he jury must be permitted to 'consider fully' such mitigating evidence and that such consideration 'would be meaningless' unless the jury not only had such evidence available to it, but also was permitted to give that evidence meaningful, mitigating effect in imposing the ultimate sentence." (quoting Penry v. Lynaugh, 492 U.S. 302, 321, 323 (2002))); Penry v. Johnson, 532 U.S. 782, 796-804 (2001) (mitigating evidence instruction); *see also* Brewer v. Quarterman, 550 U.S. 286, 292-96 (2007).

121. Porter v. McCollum, 558 U.S. 30, 40-41 (2009) (per curiam); Rompilla v. Beard, 545 U.S. 374, 390 (2005); Wiggins v. Smith, 539 U.S. 510, 534-35 (2003); Williams v. Taylor, 529 U.S. 362, 413-15 (2000) (O'Connor, J., concurring).

122. 28 U.S.C. § 2254(d) (2006).

attention to the prejudice prongs of constitutional claims, thereby amplifying the implausibility of relief in the absence of strong evidence of innocence. In addition, the Supreme Court's own application of § 2254(d) has evinced a willingness to tolerate relief only when guilt is assumed and the only question is whether a death sentence is the appropriate punishment. The scarcity of relief and the severity of the standard of review allow federal judges to deny relief to the guilty; indeed the AEDPA oftentimes seems to require it.

2. Procedures That Focus on Guilt

As explained immediately above, a number of substantive doctrines have emerged that tend to curb access to habeas relief when the defendant cannot rebut his conviction with sufficient proof.[123] Various procedural hurdles, however, make it difficult for prisoners even to reach the substance of their constitutional claim, and, increasingly, the procedures precluding substantive review are grounded in concerns about benefitting the guilty.[124] This Part discusses some of the key procedural limits and analyzes their relationship to precluding relief for the guilty. The claim is not that all features of habeas procedure filter litigation into an innocence-only posture;[125] however, the scope and range of critical habeas

123. *See supra* Part II.B.1.

124. As Amsterdam has described procedural habeas rules, "They are intricately labyrinthine, and so confusing that courts today devote ten times as much labor, intelligence, and prose to deciding whether they can hear a convicted person's constitutional claims at all as they devote to considering the merits of such claims." Amsterdam, *supra* note 80, at 409.

125. Although Friendly did not succeed in directly orienting habeas to innocence exclusively, he has achieved substantial indirect success. As explained in the text, his critique of expansive federal habeas review spurred a number of procedural limits. *See supra* Part I.B. These procedural limits have, in turn, drastically curtailed the number of prisoners who succeed in obtaining relief on federal habeas review. *See supra* note 1. And, now, in the face of such overwhelming statistics, leading habeas scholars Nancy King and Joseph Hoffmann have argued that because finding a meritorious habeas claim is like finding a needle in a haystack, all noncapital habeas relief should be barred except for those who are innocent. *See* NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 67-86 (2011). In light of the procedural reforms triggered by projects like Friendly's, this new wave of scholars is advocating for what Friendly could not do directly. *But see* John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435 (2011).

procedural law that is linked to innocence is significant and provides substantial support for the claim that habeas has shifted far afield from the time when innocence was arguably irrelevant.[126]

a. The Stone v. Powell *Limit*

Few Supreme Court decisions more dramatically reflect the shift away from constitutional adjudication and toward an innocence orientation than *Stone v. Powell*.[127] Likewise, few Supreme Court decisions have marked such a resounding adoption of a scholarly agenda than *Stone v. Powell*'s implementation of Friendly's innocence-focused notion of habeas.[128] Justice Powell, writing for the majority, held that Fourth Amendment violations are generally not cognizable on federal habeas.[129] Powell's reasoning for such a conclusion was clear: because Fourth Amendment "claims ... rarely bear on innocence" they are not well suited for federal habeas review.[130] Habeas corpus, in other words, should be directed toward

126. Although Garrett and others have persuasively argued that innocence remains substantially irrelevant to the nuts and bolts of habeas litigation, *see, e.g.*, Garrett, *supra* note 59, at 1684-99, it is "commonly, indeed virtually universally, believed that emphasis on the possible execution of the innocent is the best strategy to broadly reform or even to abolish the death penalty." Steiker & Steiker, *supra* note 35, at 607. Exploiting the public's "reflexive revulsion" at the prospect of punishing the innocent, it has become commonplace for the defense bar to focus on innocence as a justification for criminal justice reforms. *Id.* at 596. The "innocence revolution," through its prioritization of innocence, has itself spurred, entrenched, and legitimized some of the procedural limits discussed in this section. *Id.* at 607.

127. 428 U.S. 465 (1976); *see also* Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 624 (1994) ("The emphasis on 'factual innocence' is easily traceable to the Court's milestone decision in *Stone v. Powell*, wherein the majority held that resort to habeas corpus should be limited primarily to protect the innocent.").

128. *Stone*, 428 U.S. at 480 n.13, 489-95 (citing Friendly, *supra* note 4).

129. *Id.* at 494.

130. Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring). Commentators have taken note of the fact that Justice Powell was less explicit in his majority opinion in *Stone*. For example, Barry Friedman has explained that:

> Unfortunately for the coherent development of doctrine, Justice Powell said all of this in footnotes, while at the same time denying that he was making a statement about habeas at all. The body of the *Stone* decision reads like a Fourth Amendment case, all full of balancing the deterrent value of excluding evidence against the cost to society of doing so. The entire discussion regarding habeas corpus comes in footnotes 31 and 35 of the decision.

Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform,* 83 CALIF. L. REV. 485, 513 (1995) (footnotes omitted).

ensuring that "no innocent man suffers an unconstitutional loss of liberty." Under this view, because Fourth Amendment violations do not typically result in the punishment of innocents, habeas corpus relief is undesirable.[131]

In the view of the *Stone* Court, because the enforcement of the Fourth Amendment on federal habeas does not serve the "ultimate question of guilt or innocence" it is not cognizable on federal habeas review.[132] Such a holding largely parrots Friendly's insight that "simply because a claim can be characterized as 'constitutional', it should not necessarily constitute a basis for" relief in the absence of a colorable showing of innocence.[133] Indeed, Friendly had specifically identified Fourth Amendment litigation in his article as a category of constitutional challenges for which habeas relief should not be permitted because the constitutional error almost never leads to the "conviction of an innocent man."[134] Accordingly, leading scholars have regarded *Stone* as evincing the "view that habeas relates primarily to innocence" and have explained that this conception "was apparently borrowed from Judge Friendly."[135]

The Court's wholesale abandonment of an entire class of constitutional violations is illustrative of the shift toward a more innocence-oriented and less constitutional-right-oriented model of federal habeas review.[136] Indeed, in rejecting an argument that sufficiency of the evidence claims should be precluded on federal habeas review based on the reasoning of *Stone*, the Court emphasized that sufficiency of evidence claims, unlike Fourth Amendment claims,

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131. *See Bustamonte*, 412 U.S. at 256 (Powell, J., concurring); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1086 (1977) ("*Stone v. Powell* viewed the central function of habeas corpus as protection of *innocent* defendants from unconstitutional denials of their liberty.").

132. *Stone*, 428 U.S. at 490; *see also* Friedman, *supra* note 10, at 284 ("Justice Powell, who wrote the *Stone* opinion, consistently ... cited *Stone* in subsequent decisions to support a guilt-related interpretation of habeas jurisdiction.").

133. Friendly, *supra* note 4, at 156.

134. *Id.* at 162-63.

135. Friedman, *supra* note 130, at 513 n.184; *see also* Friedman, *supra* note 10, at 279 ("*Stone* is consistent with the guilt-related theory because ... evidence seized unlawfully is nonetheless probative of guilt.").

136. It is worth noting that the Court has refused to extend the *Stone* limitation to other instances in which the constitutional claim in question is unrelated to innocence. *See, e.g.*, Kimmelman v. Morrison, 477 U.S. 365, 379-80 (1986); *see also id.* at 391 (Powell, J., concurring).

adhere to the principle that guilt is dispositive. The Court explained: "The constitutional issue presented in this case is far different from the kind of issue that was the subject of the Court's decision in *Stone v. Powell*. The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence."[137] The centrality of guilt and innocence identified by the Court reflects a critical, if nonubiquitous, feature of modern habeas.

b. The Teague *Limit*

Historically, new rules of law applied to all cases regardless of their procedural posture;[138] however, under *Teague v. Lane*, with two narrow exceptions, a new rule of constitutional law does not apply to a case that is on federal habeas review.[139] The exceptions to nonretroactivity are substantive rules and watershed rules of procedure.[140] By limiting the retroactive application of legal decisions to substantive changes and watershed rules of procedure, the Court has enshrined innocence protection at the expense of procedural safeguards.[141] As explained below, the very ability of a court to pronounce "new" law is, under *Teague*, wedded to innocence.

First, a rule is "substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."[142] Stated more directly, a new substantive rule provides a basis for relief because the prisoner is actually *not guilty* of a crime.[143] The

137. Jackson v. Virginia, 443 U.S. 307, 323 (1979) (internal citation omitted).

138. BRIAN R. MEANS, POSTCONVICTION REMEDIES § 26:1 (2013); Note, *Retroactivity and the Exclusionary Rule: A Unifying Approach*, 97 HARV. L. REV. 961, 961 (1984) ("Before [*Linkletter v. Walker*], the Court would generally give full retroactive effect to its constitutional pronouncements. *Linkletter* rejected this blanket rule of retroactivity in favor of a balancing approach.") (footnote omitted).

139. Teague v. Lane, 489 U.S. 288, 310-11 (1989) (plurality opinion). Although *Teague* ushered in an era of more rigid, formalized rules for retroactivity, the Supreme Court had approved a limited form of retroactivity in *Linkletter v. Walker*, 381 U.S. 618, 639-40 (1965).

140. *Teague*, 489 U.S. at 311.

141. For a more detailed examination of the link between *Teague* and innocence, see Marceau, *supra* note 107, at 2488.

142. Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

143. For a useful discussion of the distinction between substantive and procedural rules, see MEANS, *supra* note 138, § 26:5, at 998-99 ("The category of substantive rules encompasses not only those rules forbidding punishment of certain primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status

crime for which the individual was convicted either cannot be enforced at all or cannot be enforced for the conduct at issue in his case.[144] In other words, by allowing substantive rules to apply retroactively, the Court has tailored habeas relief to the protection of the innocent; if the new substantive law does not permit a conviction, then habeas relief is available.[145]

Likewise, by limiting the scope of retroactivity for procedural rules, the Court has signaled the prioritization of innocence-related litigation. Procedural rules are those rules that govern the *manner* of ascertaining guilt, rather than the *fact* of guilt.[146] The Supreme Court has held that almost no procedural rules are sufficiently linked to innocence to justify retroactive application. Only those procedures that are so essential to the accuracy of the verdict—that is, those rules "that protect[ ] the innocence-serving function of the trial"—will be applied retroactively.[147] The Court has recognized only one such procedural rule: the requirement of counsel for any defendant charged with a felony enumerated in *Gideon v. Wainwright*.[148] And the Court explained that it is unlikely that any other rules of procedure are sufficiently linked to innocence as to deserve retroactive application.[149] One can quarrel about whether *Gideon* has had the effect of better protecting the innocent on the ground, but the Court has emphasized that it is the accuracy and innocence protecting functions of *Gideon* that justify treating the rule as retroactive.[150]

Simply put, the retroactivity doctrine reflects the doctrinal shift in habeas litigation away from procedures and pure rights-based litigation in favor of an innocence orientation. Only those issues of

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or offense.") (internal quotation marks omitted).

144. *Id.* at 999.

145. The Supreme Court has explained the exception to the general bar on retroactivity for substantive rules by noting that such a rule is designed to protect the innocent from punishment. *See, e.g.*, Bousley v. United States, 523 U.S. 614, 620 (1998) (observing that if a substantive rule did not apply retroactively there would be a "significant risk that a defendant stands convicted of an act that the law does not make criminal") (internal quotation marks omitted).

146. MEANS, *supra* note 138, § 26:5, at 999 (quoting *Summerlin*, 542 U.S. at 354).

147. Marceau, *supra* note 107, at 2488.

148. Whorton v. Bockting, 549 U.S. 406, 419 (2007) (recognizing *Gideon* as the "only case" that has satisfied the watershed rule exception).

149. Tyler v. Cain, 533 U.S. 656, 666 n.7 (2001).

150. Marceau, *supra* note 107, at 2488.

law with a direct connection to innocence can be applied retroactively to a case on federal habeas. As the Court has put it, a rule is regarded as a watershed only if it implicates "the fundamental fairness *and accuracy* of the criminal proceeding."[151]

c. Successive Petitions Limit

Weaving the postconviction needle between the requirement to fully exhaust claims in state court and the one-year federal habeas statute of limitations is difficult even for experienced habeas lawyers. Doing so while *pro se*, as most habeas petitioners are, borders on impossible.[152] Because they are unable to competently exhaust or raise all claims before the statute of limitations runs, vindicating material constitutional violations will, at least in some cases, involve the prisoner seeking to file a second habeas petition after his first petition has already been submitted. The rules are unforgiving to prisoners caught in this dilemma. There is no right to amend a pending petition to add unrelated claims.[153] And the filing of a second petition is strictly circumscribed.

Specifically, the AEDPA provides that "[a] claim ... that was presented in a prior application shall be dismissed."[154] For claims that have not previously been presented, federal habeas courts may

151. *Summerlin*, 542 U.S. at 352 (emphasis added); *see Whorton*, 549 U.S. at 419 (holding that a rule is not retroactive unless its relation to the accuracy of the verdict is "direct and profound").

152. Recently, the Supreme Court recognized an exception to the AEDPA statute of limitations for prisoners who are actually innocent. McQuiggin v. Perkins, 133 S. Ct. 1924, 1936 (2013). One can applaud the equities of this decision while also recognizing that it further entrenches the innocent/guilty dichotomy on federal habeas. Only those prisoners who are guilty are subject to an onerous statute of limitations.

153. Mayle v. Felix, 545 U.S. 644, 650 (2005).

154. 28 U.S.C. § 2244(b)(1) (2006). One notable exception to the general rule that a claim raised in a habeas petition can never be raised again is recognized in *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Under *Slack*, when a prisoner's claim is denied without a merits determination, for example for a procedural default or statute of limitations violation, the prisoner can challenge this previous ruling that resulted in a denial of relief without a merits adjudication. *Id.* That is to say, when a federal court has not previously resolved a claim "on the merits," a subsequent effort to obtain relief on that claim is generally not a successive petition. *See, e.g.*, Gonzalez v. Crosby, 545 U.S. 524, 532 & n.4 (2005). Subsequent cases have also acknowledged that not every habeas petition that is technically successive, or second in time, is treated as a second or successive petition. *See, e.g.*, Panetti v. Quarterman, 551 U.S. 930 (2007).

not exercise jurisdiction over a claim unless the claim meets one of two narrow exceptions:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[155]

New claims that were not raised in the first habeas petition, then, can be raised only if the prisoner can assert a "new rule of constitutional law," or a claim of innocence by "clear and convincing evidence." Notably for the reasons discussed above regarding *Teague,* only a prisoner with a claim of innocence will have a viable opportunity to file a successive petition.[156] The "new rule" prong has proven illusory because the Supreme Court has acknowledged that there are not likely to be many new rules of constitutional law announced.[157] In addition, if such a rule happened to exist, the statute of limitations would almost certainly render the successive petition untimely.[158]

Accordingly, a prisoner needing to file a second habeas petition is forced into innocence litigation. And this is innocence litigation at its very worst. The prisoner must not show that there was in fact reasonable doubt or that he was likely innocent, but rather he must demonstrate innocence to a trial court judge by clear and convincing evidence.[159] That is to say, the court must find the defendant

155. 28 U.S.C. § 2244(b)(2).

156. *Supra* Part II.B.2.b.

157. *Whorton*, 549 U.S. at 417-18.

158. *See, e.g.*, Tyler v. Cain, 533 U.S. 656, 677 (2001) (Breyer, J., dissenting); *see also* 28 U.S.C. § 2244(d)(1)(C).

159. Amsterdam, *supra* note 80, at 411 (calling this the squeaky clean standard—unless you can show by "clear and convincing" evidence that you did not commit the crime, you are not permitted to file a petition).

innocent by clear and convincing evidence to even exercise jurisdiction over a claim.

Moreover, this harsh burden of proof tends to understate the severity of this form of innocence-focused habeas as it is applied by federal courts. A recent federal appeal in the Tenth Circuit is illustrative. In *Case v. Hatch* the prisoner was forced to bring a *Brady* claim in a second habeas petition,[160] and, thus, was confronted with the onerous standards discussed above. Because *Brady* is not a new rule of law, the only way for Case to have the egregious act of prosecutor misconduct vindicated was to prove his innocence.[161] Remarkably, Case succeeded.[162] The district court found that Case had proved his innocence by clear and convincing evidence, as required by § 2244(b)(2)(B)(ii).[163] However, writing for a unanimous three-judge panel, Judge Tymkovich adopted a very narrow reading of the statute and reversed the district court.[164] Significantly, the appellate court did not reverse the finding of innocence. Instead the court insisted that only innocence that was proved based on evidence relating to the underlying claim would suffice.[165] Relying on the text of § 2244,[166] the court of appeals held that new DNA evidence and recantations that resulted in the innocence determination by clear and convincing evidence could not be considered.[167] Specifically, the court held that only evidence directly linked to the constitutional error—the *Brady* material—could be considered in determining whether a prisoner established his innocence.[168]

160. 708 F.3d 1152, 1159 (10th Cir. 2013).

161. The *Brady* evidence was sufficiently significant to justify a retrial. *See* Case v. Hatch, 773 F. Supp. 2d 1070, 1148-49 (D.N.M. 2011), *vacated*, 708 F.3d 1152 (10th Cir. 2013), *vacated on reh'g*, No. 11-2094, 2013 WL 1501521 (10th Cir. Apr. 12, 2013).

162. *Id.*

163. *Id.* at 1092, 1129.

164. *Case*, 708 F.3d at 1170 (10th Cir. 2013), *vacated on reh'g*, No. 11-2094, 2013 WL 1501521 (10th Cir. Apr. 12, 2013).

165. *Id.* at 1170, 1173-75.

166. The statute provides that a second petition is permitted if the "facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty." 28 U.S.C. § 2244(b)(2)(B)(ii) (2006).

167. *Case*, 708 F.3d at 1179.

168. *Id.* at 1170.

Innocence, then, has become a touchstone of habeas litigation for the thousands of prisoners each year who need to file a second habeas petition because, for example, the evidence suppressed by the prosecution was not available at the time the first petition was filed. But the form of innocence litigation that has emerged is so cramped that even a prisoner found to be innocent may not be entitled to have his habeas claims heard. It is innocence modified by a nearly insurmountable burden of proof, and cabined, at least in the Tenth Circuit, in procedural rules that make proving innocence cruelly insufficient. Innocence is necessary but often entirely insufficient as a basis for even affording the federal courts jurisdiction.

A second line of cases similarly illustrates the harsh innocence focus of the successive petition limits. It is unconstitutional to execute a prisoner who has been deemed mentally retarded.[169] In a sense, one who is mentally retarded is ineligible for the death penalty and, thus, innocent of the death penalty.[170] Recently, the Eleventh Circuit confronted the question of whether clear evidence of mental retardation justified permitting the prisoner to file a second habeas petition, and the court squarely held that mental retardation was insufficiently linked to innocence so as to justify a successive petition.[171] Even as one of the rare class of rules that qualifies for retroactive application, the mental retardation exception to the death penalty was regarded as an insufficient basis

169. Atkins v. Virginia, 536 U.S. 304 (2002).

170. *But see* Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 330-31 (2010) (stating that a death-ineligibility collateral challenge does not derive from actual innocence but from the unconstitutionality of the capital sentence under the Eighth Amendment).

171. *In re* Hill, 715 F.3d 284, 299 (11th Cir. 2013); *see also id.* at 302 (Barkett, J., dissenting) ("The idea that courts are not permitted to acknowledge that a mistake has been made which would bar an execution is quite incredible for a country that not only prides itself on having the quintessential system of justice but attempts to export it to the world as a model of fairness."). It is worth noting that a group of habeas scholars filed an amicus brief requesting that the Supreme Court grant an original writ of habeas corpus so as to avoid the unconstitutional execution. *See* Brief of Law Professors Eric M. Freedman & Brandon L. Garrett et al. as Amici Curiae Supporting Petitioner at 2, 8, *In re* Hill, 715 F.3d 284 (11th Cir. 2013) (No. 12-10469), *available at* http://www.law.du.edu/documents/news/Hill-SCOTUS-Amicus.pdf; *see also* Ellen Kreitzberg & Linda Carter, *Innocent of a Capital Crime: Parallels Between Innocence of a Crime and Innocence of the Death Penalty*, 42 TULSA L. REV. 437, 448 n.64 (2006) (citing cases in which the court held that mental retardation is not an element of a capital offense and placed the burden of proof on the defendant).

for permitting a second or successive federal petition. Specifically, the court of appeals concluded that the prisoner's mental retardation relates only to "his eligibility for a death sentence, and not whether he is 'guilty of the underlying offense,' and thus does not" justify a successive habeas petition.[172] The court stressed that because the petitioner was "guilty of the underlying offense," a successive petition was barred.[173] Under this rule, a prisoner who cannot be constitutionally executed is nonetheless barred from preventing his execution unless he can independently show he was innocent of the crime.[174]

The rules governing successive habeas petitions, an integral part of habeas litigation for prisoners who discover new evidence supporting a constitutional claim well after their conviction, are wedded to innocence. The fact of a prisoner's likely, or even potential, guilt, bars the litigation of colorable, never-before-litigated questions regarding the constitutionality of one's sentence or conviction. These limits were unknown at the time of Judge Friendly's call for a greater focus on innocence, but they have emerged as one of the most insurmountable limits on federal habeas relief.[175]

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172. *In re* Hill, 715 F.3d at 285 (beginning the decision with the heading, "Malice Murder Conviction and Unanimous Death Sentence").

173. *Id.* at 296-97 (emphasizing that "'[g]uilty' means '[h]aving committed a crime'" and thus noting that mental retardation is irrelevant) (quoting BLACK'S LAW DICTIONARY 776 (9th ed. 2009)); *id.* at 301 (holding that the innocence required to file a successive petition under AEDPA does not include "actual innocence of the death penalty" under *Sawyer v. Whitley*, 505 U.S. 333 (1992)).

174. *Id.* at 297 ("We are unable to transmute a claim that a petitioner is not eligible for a capital sentence into a claim that the petitioner is not guilty of the underlying offense.") (citation omitted) (internal quotation marks omitted); s*ee also In re* Schwab, 531 F.3d 1365, 1366-67 (11th Cir. 2008) (rejecting successive petition when the claims only go to the propriety of a death sentence rather than the question of guilt); Walker v. True, 399 F.3d 315, 326 (4th Cir. 2005) ("The state does not have a corollary duty to prove that a defendant is 'not retarded' in order to be entitled to the death penalty"); *In re* Johnson, 334 F.3d 403, 404-05 (5th Cir. 2003) (denying authorization to file a successive habeas petition because "Johnson's application does not state a *prima facie* case of mental retardation under *Atkins*, which this court stated is simply a showing of possible merit to warrant a fuller explanation by the district court") (citation omitted) (internal quotation marks omitted). *But see* State v. Jimenez, 880 A.2d 468, 483-89 (N.J. Super. Ct. App. Div. 2005) (concluding as a matter of state law that mental retardation may bar capital punishment, making it the functional equivalent of an element of the offense), *rev'd*, 908 A.2d 181 (N.J. 2006).

175. Prior to the strict bar on successive petitions, the Court had created an "abuse of the writ" limitation. McCleskey v. Zant, 499 U.S. 467, 470, 489 (1991); *see also* Slack v. McDaniel,

d. Limited Factual Development Under § 2254(e)(2)

Factual development in support of a claim of constitutional error is essential to obtaining federal habeas relief.[176] Yet, in a broad and expanding range of circumstances, the ability of prisoners to develop these new facts is circumscribed by an innocence-centered framework.[177] Under § 2254(e)(2), prisoners who did not develop facts in state court are barred from factual development in federal court unless:

> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[178]

In other words, any prisoner wishing to develop new facts must establish his innocence by clear and convincing evidence. Clearly then, factual development in support of a claim is expressly precluded for the guilty.

The impact of precluding factual development for federal habeas claims can hardly be overstated, and linking factual development of evidence to innocence renders the vast majority of claims ineligible for additional factual development. Although the innocence limits of § 2254(e)(2) only apply to petitioners who "failed" to develop the

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529 U.S. 473, 480-82 (2000) (discussing the link between pre- and post-AEDPA doctrine in this field).

176. *See, e.g.*, Justin F. Marceau, *Deference and Doubt: The Interaction of AEDPA § 2254(d)(2) and (e)(1)*, 82 TUL. L. REV. 385, 391 (2007).

177. The leading habeas treatise optimistically concludes that AEDPA places constitutional violations at the top of the reviewability "hierarchy" and determinations of factual questions at the "bottom." HERTZ & LIEBMAN, *supra* note 46, at 100-01. The only citation for this proposition is the text of § 2254, which first specifies that only "constitutional violations" give rise to relief, 28 U.S.C. § 2254(a) (2006), and then discusses factual litigation on habeas toward the bottom of the statute, § 2254(e).

178. 28 U.S.C. § 2254(e)(2).

facts in state court,[179] in recent years courts brazenly attributed fault to a prisoner for failing to present facts in state court when the fault lies with defective—or nonexistent—postconviction counsel or with arcane and generally ignored procedural rules.[180] Thus, the application of § 2254(e)(2) is expanding such that innocence plays an increasingly critical role in the crucial element of factual development on federal habeas review.

e. Procedural Default

Another illustrative example of the sort of procedural rules that have developed rendering the guilty ineligible for habeas relief is the procedural default doctrine.[181] Procedural default is one of the most common barriers to relief in modern habeas practice. When a claim is not fully exhausted in state court, when an appeal is not timely filed in state court, or when a state procedural rule is not strictly followed, a federal constitutional violation is said to be procedurally defaulted such that a federal court is precluded from granting relief.[182]

The purpose of the procedural default doctrine is to ensure that the guilt phase trial is the "main event" by precluding federal review of claims that are not properly or fully presented in state court.[183] But one can agree with the underlying purposes of the doctrine—giving force to state procedural rules—and still candidly acknowledge that its exceptions are rooted in concerns about guilt and innocence. Once a claim is procedurally defaulted, for any reason, the litigation path to overcome the default is steeped in questions of guilt and innocence.

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179. Williams v. Taylor, 529 U.S. 420, 435 (2000) ("The purpose of the fault component of 'failed' is to ensure the prisoner undertakes his own diligent search for evidence.").

180. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 754 (1991) ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation.").

181. MEANS, *supra* note 138, § 24:3, at 681 ("[A] prisoner who fails to satisfy the state procedural requirements forfeits his right to present his claim in federal habeas.").

182. *See, e.g.*, Bousley v. United States, 523 U.S. 614, 621 (1998) ("[P]etitioner contested his sentence on appeal, but did not challenge the validity of his plea. In failing to do so, petitioner procedurally defaulted [his] claim.").

183. MEANS, *supra* note 138, § 24:2, at 665 ("The paradigm case is one in which a prisoner fails to comply with a state procedural rule and the state courts decline, for that reason, to reach the merits of federal claims that would otherwise be presented.").

Leading habeas scholars have observed that the "rare exceptions to this rule precluding postconviction relief for constitutional violation are ... result-oriented inquiries."[184] Indeed, the most common way to argue that a procedural default ought not apply is for the prisoner to demonstrate "cause and prejudice."[185] Notably, the prejudice analysis in this context, no less than in the *Strickland* and *Brady* contexts, is a ready "device for telling judges to decline to entertain constitutional claims unless they are convinced that a criminal conviction was undeserved because of the defendant's likely innocence."[186]

The prejudice analysis functions such that strong evidence of guilt precludes relief. Indeed, evidence of guilt even precludes the habeas court from reaching the merits of the constitutional claim.[187] The effect of the procedural default doctrine's cause and prejudice inquiry is to convert all claims, even those fundamentally untethered from concerns of guilt, to a *Strickland*-type, guilt-as-dispositive model.[188] As Amy Knight Burns has observed, when it comes to structural errors—a class of cases for which it is impossible to demonstrate harm to the accuracy of the trial—the procedural default doctrine has the nonsensical effect of requiring a showing of prejudice for these claims.[189] A constitutional claim that necessarily has nothing to do with guilt or innocence, for example a *Batson* claim (a claim that the jury selection process was tainted with impermissible race or gender bias),[190] is rendered impossible to vindicate by the guilt orientation of the procedural default doctrine.[191] So the procedural default doctrine functions such that

184. Amsterdam, *supra* note 80, at 411.

185. *Id.* at 414.

186. *Id.* at 411.

187. *See supra* note 181.

188. *See supra* notes 73-79 and accompanying text.

189. *See* Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 STAN. L. REV. 727 (2012); *see also* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1197-1200, 1216-17 (2012) (explaining that postconviction relief based on a claim of ineffective assistance of counsel requires a showing of prejudice "on the outcome of the individual trial" and explaining the importance of effective counsel to prevent pretrial errors, which may "not directly implicate the fairness of the trial itself").

190. *See* Batson v. Kentucky, 476 U.S. 79, 96-100 (1986).

191. Burns, *supra* note 189, at 740 ("*Batson* claims represent an uncomfortable fit with a harmless error regime because requiring proof of a different outcome would entail the court

certain rights that are unconcerned with questions of guilt and innocence are rendered impossible to vindicate—that is, a procedurally defaulted structural error is not cognizable on federal habeas review under existing doctrine.[192] The takeaway, then, is that for some important but non-guilt-related rights, the cause and prejudice requirement makes vindicating these rights impossible.

It must be recognized that there is an exception to the rigorous cause and prejudice standard, but the exception is even more explicitly linked to innocence. The only accepted alternative to the cause and prejudice requirement is a so-called "miscarriage of justice" exception.[193] Recently the Court has regarded only one thing as a miscarriage of justice: the conviction of an innocent person.[194] Apparently, no patent violation of a criminal procedure right rises to the level of a miscarriage of justice.

However noble its underlying purposes, procedural default is yet another doctrine that feeds the federal habeas preoccupation with guilt. For one against whom there is strong evidence of guilt, the constitutional violations become substantially, if not entirely, irrelevant.[195]

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doing exactly what it has forbidden the lawyers to do: making an inference about how jurors would decide a case based on their race."); *id.* at 749 ("A trial error might be salvageable via the cause and prejudice exception, but a structural error never is, because structural errors by definition cannot give rise to a showing of actual prejudice. They are thus doomed to fail this test in every instance.").

192. *But see id.* at 753 (noting a "circuit split on the question of presuming *Strickland* prejudice for structural errors" and arguing that prejudice should be presumed for defaulted structural errors); Marceau, *supra* note 189 (arguing that recent changes to substantive ineffective assistance of counsel law ought to be imported to the procedural default realm so as to allow for the vindication of defaulted structural errors).

193. *See, e.g.*, Sawyer v. Whitley, 505 U.S. 333, 339 (1992).

194. Amsterdam, *supra* note 80, at 411 ("[C]ourts today believe that the only miscarriage of criminal justice is the conviction of somebody who was [not] involved in any way in the crime."). During the Warren era the miscarriage of justice concept appears to have enjoyed a more robust meaning. *See, e.g.*, Brown v. Allen, 344 U.S. 443, 558-60 (1953) (Frankfurter, J., dissenting) (using miscarriage of justice in a manner consistent with recognizing the need for relief from procedural errors); Berkowitz, *supra* note 7, at 495 ("It is the unfairness associated from errors of procedure that is considered to be an injustice."); *id.* at 497 (noting that some of the key Justices from *Brown v. Allen* regarded procedural errors as sufficient to constitute a miscarriage of justice).

195. A survey of the connection between procedural default litigation and innocence would be incomplete if it failed to acknowledge that in *Dretke v. Haley* the Supreme Court held that arguments regarding cause and prejudice or litigation regarding nondefaulted claims must proceed before litigation of an actual innocence exception to the procedural default rule. 541 U.S. 386, 392-96 (2004).

f. The AEDPA Statute of Limitations

As discussed below, non-innocence based equitable tolling of the AEDPA statute of limitations has been permitted in certain narrowly defined circumstances.[196] Still, for the vast majority of prisoners the statute of limitations will not yield to generic claims of inequity. It will be the rare prisoner who is able to mount a sufficient record to justify equitable tolling.[197]

There is, however, one general exception to the statute of limitations: those who are not guilty need not comply with the one-year statute of limitations. This is yet another example of how the doctrine has evolved to promote the primacy of a guilt-as-dispositive model of habeas adjudication.

As the previous discussion in this Article and other scholarly works make clear, remarkably little of the pre-AEDPA procedural landscape has survived the AEDPA revolution. The AEDPA rendered most of the defaults and prior procedures for federal habeas review obsolete and irrelevant. The rules for factual development—with or without an evidentiary hearing—have entirely changed,[198] the standard of review for such claims is unrecognizable when compared to the pre-AEDPA review,[199] the current standard for reviewing successive petitions bears little resemblance to the pre-AEDPA standard,[200] and so on. And yet, in the face of a procedural revolution by the AEDPA, the innocence exception remains unaltered. As the Court explained in *McQuiggin v. Perkins*, the innocence exception "survived AEDPA's passage intact and unrestricted."[201]

The primacy of innocence adjudications, then, is one of the rare constants from pre- to post-AEDPA. Few procedures remain intact, much less unrestricted, in light of the AEDPA. This led Jordan

196. *See infra* Part III.

197. As explained below, the requirements for equitable tolling in this context are seemingly beyond the reach of all but the rarest of prisoners. *See* Holland v. Florida, 130 S. Ct. 2549, 2564-65 (2010) (explaining the unique factual situation justifying equitable tolling).

198. *Compare* Townsend v. Sain, 372 U.S. 293, 310-18 (1963), *with* 28 U.S.C. § 2254(e)(2) (2006).

199. *Compare* 28 U.S.C. § 2254(d), *with Brown*, 344 U.S. at 460-65.

200. *Compare* 28 U.S.C. § 2244, *with* Kuhlmann v. Wilson, 477 U.S. 436, 449-51, 454 (1986).

201. 133 S. Ct. 1924, 1934 (2013).

Steiker to aptly refer to innocence as the one "get-out-of-habeas-procedure-free" card.[202] Like many of the doctrines discussed in this Section, the practical effect is that the guilty (or not clearly innocent) will languish under insurmountable procedural barriers. But for those who can muster a sufficiently strong showing of innocence, federal courts will consider the merits of the underlying constitutional claim. Innocence, again, is a necessary but insufficient condition for habeas relief.

g. Habeas Relief Based on Non-Constitutional Errors

The writ of habeas corpus in America has long been defined by the statutes of this country as available for prisoners who can show that they are "in custody in violation of the Constitution *or laws* or treaties of the United States."[203] Thus, it would seem that just as a conviction predicated on an unconstitutional process can give rise to habeas relief, so too could a conviction that rests on a violation of federal law or a treaty. The Supreme Court, however, has abridged this clear statutory authority and held that a violation of federal law can only serve as a predicate for habeas relief if the error in question amounts to "a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure."[204]

Stated more directly, the circumstances when a violation of federal, non-constitutional law may give rise to habeas relief are extraordinarily rare. As for errors that are inconsistent with rudimentary demands of fair procedure, such as the watershed rules of procedure under *Teague*, this exception seems to be substanceless verbiage.[205] That is to say, short of defects of the magnitude of a

202. Jordan Steiker, *Opinion Analysis: Innocence Exception Survives, Innocence Claim Does Not*, SCOTUSBLOG (May 29, 2013, 11:06 AM), http://www.scotusblog.com/2013/05/opinion-analysis-innocence-exception-survives-innocence-claim-does-not/.

203. 28 U.S.C. § 2254(a) (emphasis added); *see also id.* § 2241(c)(3).

204. Reed v. Farley, 512 U.S. 339, 348 (1994) (alteration in original) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)); *see also* Davis v. United States, 417 U.S. 333, 346 (1974) ("In *Hill v. United States,* for example, we held that collateral relief is not available when all that is shown is a failure to comply with the formal requirements of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error.") (citation omitted) (internal quotation marks omitted).

205. In announcing the standard, some courts do not even mention the potential for habeas relief for statutory violations unrelated to miscarriages of justice. *See, e.g.*, Miller v. United

Gideon violation, the Court simply does not recognize rudimentary or fundamental fairness as having been implicated.[206] Likewise, the question of whether there is a likely miscarriage of justice is generally a euphemistic way of asking whether the prisoner can demonstrate actual innocence.[207] At least as defined in related but distinct fields of habeas adjudication, the phrase miscarriage of justice has emerged as synonymous with innocence.[208]

States, 183 F. App'x 571, 578 (7th Cir. 2006) ("[Habeas motions are] not intended to be substitutes for direct appeals or as a means of appealing the same issues a second time. As a general rule, they are to be used only for raising alleged errors of law that are jurisdictional or constitutional in nature or that amount to a fundamental defect that results in a complete miscarriage of justice."); Boettcher v. Doyle, 105 F. App'x 852, 854 (7th Cir. 2004) ("[H]abeas corpus review is available to remedy violations of federal law if the asserted error is a fundamental defect resulting in a miscarriage of justice.") (internal quotation marks omitted).

206. *See* MEANS, *supra* note 138, § 6:2, at 161-70 (cataloguing cases in which attempts to obtain federal habeas relief for a statutory or treaty violation were unavailing); *see also Davis*, 417 U.S. at 346; Pethtel v. Ballard, 617 F.3d 299, 303 (4th Cir. 2010) ("It is a fundamental principle of habeas review that not every asserted error of law can be raised on a [§ 2254] motion. Instead, habeas review is available to check violations of federal laws when the error qualifies as a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.") (internal quotation marks omitted) (citing and quoting *Reed*, 512 U.S. at 348).

207. In case after case, the Court uses the phrase miscarriage of justice exception to mean "actual innocence exception." McQuiggin v. Perkins, 133 S. Ct. 1924, 1931-34 (2013) (recognizing the equivalence between a miscarriage of justice and innocence exception to various procedural rules); *see also* Berkowitz, *supra* note 7, at 501-02 ("Miscarriages of justice, the Court intones in a literal citation of Friendly's recommendation, are only present when the prisoner supplements his constitutional claim with a colorable showing of factual innocence.") (internal quotation marks omitted). Nonetheless, there are lower court decisions that conclude that fundamental misapplications of the federal sentencing statutes—for example, misconstruing the statute so as to treat one as a career offender—may amount to a miscarriage of justice. Narvaez v. United States, 674 F.3d 621, 630 (7th Cir. 2011). But this appears to be a relatively rare occurrence and not one that has been sanctioned by the Supreme Court. *Cf.* Sun Bear v. United States, 644 F.3d 700, 711 (8th Cir. 2011) (en banc) (Melloy, J., dissenting) (criticizing the narrow definition of miscarriage of justice applied by the majority in this context).

208. Some leading scholars take a more sanguine view of non-constitutional habeas. Professors Liebman and Hertz, for example, have optimistically characterized the law as permitting habeas relief for the violation of "important, but not other, federal statutory claims." HERTZ & LIEBMAN, *supra* note 46, § 9.1, at 528. The case law is sufficiently sparse that this question might fairly be deemed open. And to be sure, if indeed *Reed* only stands for the proposition that the "formalities and minutiae" of trial procedure do not provide a basis for habeas relief, then innocence does indeed remain irrelevant in this limited pocket of habeas corpus review. *Id.* (identifying factors that might be used to distinguish between a technical and nontechnical statutory violation without identifying any Supreme Court decisions granting relief under this broadly conceived framework for non-constitutional habeas); *see also* Phillips v. Holinka, No. 10-cv-439-bbc, 2012 WL 1516605, at *3 (W.D. Wis.

Simply put, obtaining habeas relief based on the violation of a federal statute has been substantially limited, and innocence seems to be a key indicator of relief eligibility under this framework.[209] Indeed, the only case in which the Supreme Court has recognized the possibility of overturning a conviction[210] on habeas through a non-constitutional error involved a federal statute that seemed to render the defendant's past conduct noncriminal. In that case, again, the focus was on those procedures and rights directly associated with one's guilt.[211]

Apr. 26, 2012) ("[P]etitioner has shown that because reckless endangerment is not a 'crime of violence' within the meaning of § 4B1.1, he should not have been sentenced as a career offender. Accordingly, I am granting petitioner's petition for a writ of habeas corpus and vacating his sentence for resentencing without the career offender enhancement."); United States v. Meadows, No. CIV. A. 97-2798, 1997 WL 835413, at *5 (E.D. Pa. Dec. 19, 1997) ("[T]he Government concedes and we agree that, pursuant to our power under 18 U.S.C. § 3582(c)(2) and Guideline § 1B1.10(a), we should apply Amendment 505's retroactive reduction of Meadows's base offense level under § 2D1.1(a) to 38.").

209. The Supreme Court reversed a federal court of appeals and suggested that a miscarriage of justice may have occurred when a change in the law rendered the defendant's actions not criminal. *Davis*, 417 U.S. at 346-47 ("If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances' that justify collateral relief.") (internal quotation marks omitted); *see also* Barrios v. United States, Nos. 3:07-CV-130-RLY-WGH, EV 02-CR-02-05-Y/H, 2012 WL 4470267, at *7 (S.D. Ind. Sept. 27, 2012) ("One of [petitioner's] convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense and must be vacated."); Scott v. United States, Nos. 90CR.45(MGC), 97CIV.1633(MCG), 2000 WL 1051873, at *3 (S.D.N.Y. July 28, 2000) ("Sentencing petitioner based on conduct for which he bears no legal responsibility is manifestly unjust. Therefore, petitioner's sentence should be vacated and reduced."); Cooper v. United States, 639 F. Supp. 176, 179 (M.D. Fla. 1986) ("Because the *Dowling* decision held that the National Stolen Property Act did not cover the activity that petitioners were charged with engaging in, this Court lacked jurisdiction to convict petitioners under that statute."). *But see* Ewell v. Scribner 490 F. App'x 891, 892-93 (9th Cir. 2012) (concluding that a violation by the State of a federal wiretap statute was not a miscarriage of justice or violation of fundamental fairness so as to justify federal habeas relief).

210. The Supreme Court has considered habeas challenges relating to one's sentence based on the misapplication of a federal statute. For example, in *Reno v. Koray*, the Court considered but denied habeas relief when a prisoner argued that certain pretrial release time should count as time served for his prison term. 515 U.S. 50 (1995).

211. *Davis*, 417 U.S. at 346. Illustrative of the lower court case law on this question is *Llamas-Almaguer v. Wainwright* 666 F.2d 191 (5th Cir. 1982). The court did not categorically preclude the prospect of habeas relief under Title III, but denied relief in the case at issue because there was "no reason to believe that appellant was not convicted on the basis of probative and reliable evidence." *Id.* at 194.

In short, an array of procedural rules have developed that undermine the prospects for habeas relief in cases in which the evidence of guilt is strong.[212] In many cases, with an array of issues—from whether factual development is permitted, to whether the prisoner can benefit from a new rule, to what types of constitutional claims can be brought, and so on—the threshold and generally dispositive question is whether the defendant is guilty.[213]

3. Distorting Doctrine to Prioritize Guilt

The discussion up to this point has focused on the fact that substantive doctrine and procedural law tend to prioritize questions of guilt. If a defendant is clearly guilty, or at least cannot make a plausible claim of innocence, the law rarely provides a federal habeas remedy. Before moving on, however, it is worth noting that the innocence saturation of modern habeas doctrine may have a spillover effect. The persistent focus on guilt as disqualifying for relief under established doctrine may condition courts to apply a guilt-centered focus in ways that existing doctrine does not contemplate. It is reasonable to believe that evidence of guilt plays an important role in shaping habeas outcomes even when it is not explicitly contemplated by current doctrine.

Cognitive science and common sense tell us that the general doctrinal fixation on guilt likely shapes the way that judges approach habeas issues that do not necessarily require the same focus on guilt.[214] Doctrines that do not consider guilt may begin to

212. Commenting on these procedural devices, it has been observed that: "such rules do nothing more or less than direct judges to make fact-centered, case-specific judgments, usually about the strength or weakness of the prosecution's evidence of guilt or of the ugliness of the crime for purposes of sentencing enhancement." Amsterdam, *supra* note 80, at 414.

213. *Cf. id.* at 407 ("Lately, courts have begun to develop similar rules with regard to an indigent defendant's entitlement to state funds for expert witnesses, investigative services, and other defense resources under *Ake v. Oklahoma*.").

214. In this regard, the social science literature on priming may be a useful reference. *See* Jeremy A. Blumenthal & Terry L. Turnipseed, *The Polling Place Priming (PPP) Effect: Is Voting in Churches (or Anywhere Else) Unconstitutional?*, 91 B.U. L. REV. 561, 563-64 (2011) ("A substantial social science literature has demonstrated the power of situational cues on behavior, decisions, choices, attitudes, and emotions."); Ap Dijksterhuis et al., *Effects of Priming and Perception on Social Behavior and Goal Pursuit*, *in* SOCIAL PSYCHOLOGY AND THE UNCONSCIOUS 51 (John A. Bargh ed., 2007); E. Tory Higgins, *Knowledge Activation: Accessibility, Applicability, and Salience*, *in* SOCIAL PSYCHOLOGY 133, 133-34 (E. Tory Higgins

do so at the margins, and doctrines that already consider guilt may bend further in that direction. As Anthony Amsterdam has put it:

> Judges parse the rules defining a defendant's constitutional rights more or less closely, more or less strictly, and more or less honestly, in order to grant or deny relief, depending upon whether they do or do not believe that the defendant suffered some outrageous injustice that is way out of proportion to the probability that he or she [is guilty].[215]

And even if this is slightly hyperbolic, it seems reasonable to worry that the guilt fixation of modern habeas is not neatly cabined into certain corners.

To be sure, reported decisions are unlikely to explicitly confirm the distortion of doctrine along these lines. However, notable exceptions exist. A Sixth Circuit decision, *Apanovitch v. Houk*, is illustrative.[216] Apanovitch's habeas litigation led to the discovery of several pieces of exculpatory evidence that had been suppressed by the trial prosecutors.[217] The question for the federal court, then, was whether Apanovitch was prejudiced by the nondisclosures so as to justify relief.[218] That is to say, was it possible that the trial outcome was tainted by the misconduct of the prosecutors? However, instead of answering this question directly, the federal court of appeals sanctioned a further investigation for more evidence of guilt.[219] Specifically, rather than merely remanding the case to the district court to assess all of the evidence presented at trial and weigh it against the suppressed material, the Sixth Circuit advised the

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& Arie W. Kruglanski eds., 1996) (defining priming as changing one's reaction to a condition by exposure to prior conditions or information). If judges are primed to think about guilt in the context of habeas through the variety of procedural and substantive doctrines discussed above, they will keep thinking about it and in some instances act on it regardless of whether it is actually relevant to the specific situation. *See id.* at 563-64 (summarizing research showing the impact of priming, even when it is merely subliminal); *id.* at 564 (explaining that when younger people were subliminally primed with stereotypes of the elderly, they themselves walked more slowly and cautiously); *id.* at 565 (concluding that the data unequivocally "demonstrate[s] the powerful influence of an individual's surroundings on his or her perceptions, thoughts, attitudes, and emotions").

215. Amsterdam, *supra* note 80, at 405.

216. 466 F.3d 460 (6th Cir. 2006).

217. *Id.* at 470-71.

218. *Id.* at 489.

219. *Id.* at 489-90.

district court that it should "authorize a DNA test comparing swabs of bodily fluid that had been collected from the victim's body" a decade and a half earlier to the DNA of Apanovitch.[220]

Such reasoning is a bold extension of the *Brady* doctrine. The already guilt-centered *Brady* doctrine is conceived of in even more stark terms: if there is evidence of guilt, even evidence not yet tested or discovered, much less introduced at trial, it can be assessed and introduced on habeas for the first time as a basis for denying relief.

The district court on remand followed the lead of the federal appellate court and issued an order allowing the State to conduct a new set of DNA tests in order to determine conclusively whether Apanovitch was guilty:

> In the present case, the Court finds that the DNA test results—if a match resulted between DNA found on the victim and Apanovitch's DNA—would show that even if *Brady* violations occurred, under the totality of the circumstances he has not shown that his trial was fundamentally unfair. The DNA test results would have the effect of making the *Brady* claims factually false resulting in a windfall to which Apanovitch is not entitled.[221]

Stated more starkly, a federal prisoner's habeas relief was conditioned upon him submitting to a DNA test and a finding based on that test that he was not guilty. The prosecution was permitted to put on new evidence—evidence that was unavailable or avoided at trial—in order to show that the prisoner was guilty and, therefore, undeserving of *Brady* relief. Prejudice for *Brady* purposes has an intrinsic connection to innocence, but never before has the doctrine countenanced that the prosecution can put on new evidence of guilt on habeas review in order to preclude relief.[222] The prejudice

220. *Id.* at 463. The fault for failure to test the evidence before trial apparently rested solely with the State. *Id.* at 470 ("Meanwhile, the state filed a supplemental return of writ in the summer of 1992 in which it explained that swabs of bodily fluids found in the victim's body, long thought destroyed inadvertently, had been found in a desk of an employee of the coroner's office who handled the Apanovitch case.") (internal quotation marks omitted).

221. Apanovitch v. Houk, No. 1:91CV2221, 2009 WL 3378250, at *12 (N.D. Ohio Aug. 14, 2009).

222. One can imagine under this reasoning that the prosecution could hold certain eye witnesses that may not present well to a jury and reserve them as "new" evidence of guilt that

prong's association with guilt led multiple federal judges to conclude that additional investigation and testing to prove guilt, even without a jury, was permissible as a rationale for denying federal habeas review.

If *Brady* claims open the door to a supplemental guilt trial on habeas—at least when DNA testing is available—then so must *Strickland* claims and arguably every claim for which harmless error applies. Other courts are likely to follow suit and explicitly permit new evidence of guilt untested by a jury to be a dispositive basis for denying federal habeas relief.[223] Most of this sort of maneuvering is likely to take place behind the scenes, far removed from a published order. But as the focus shifts from procedures and constitutional rules toward pure questions of guilt, the very nature of habeas review is altered.[224] Guilt becomes dispositive. Or to use one of our most lauded American metaphors, "[T]he blindfold that Justice is supposed to wear as she weighs competing rights and obligations with indifference to the outcome" is increasingly called into question.[225] In modern habeas, innocence is not irrelevant; increasingly the only question that matters is whether the evidence of "guilt [is] potent."[226]

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could be considered as a basis for precluding habeas relief. The prosecution, by establishing "guilt" without a jury determination, is able to avoid an otherwise obvious entitlement to habeas relief with new, untested evidence. *Cf. Apanovitch*, 466 F.3d at 489-90 ("We suspect that the DNA evidence, should it be introduced and subjected to appropriate evidentiary challenges in court, might help resolve lingering questions of whether Apanovitch suffered actual prejudice."). It is worth considering whether such a practice might eventually be barred by Sixth Amendment jury right considerations. *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 482-84 (2000) (holding that the judge's role in sentencing is constrained by the facts alleged in the indictment and found by the jury).

223. *In re* Wright, 298 F. App'x 342, 344-45 (5th Cir. 2008) (permitting evidence of guilt to be added to the habeas record as part of the prejudice inquiry).

224. If evidence of guilt may be introduced for the first time in habeas proceedings, then it would seem that new evidence of innocence—for example, DNA testing—should be permitted for the first time on habeas as well. Stated differently, the courts ought to recognize an exception to the extremely limited factual development permitted on habeas. *See* Cullen v. Pinholster, 131 S. Ct. 1388, 1401 (2011) (explaining that DNA evidence might show innocence sufficient to overcome a procedural default).

225. Amsterdam, *supra* note 80, at 405.

226. *Id.* at 406 & n.3 (compiling cases on this topic). There is much more that can and should be said about judicial hostility to habeas relief. The literature would benefit from a careful consideration, post-AEDPA, of, among other things, the impact of an increasingly conservative judiciary on habeas, the impact of ever increasing dockets on the time spent on habeas cases, and the frequency of relief. Moreover, the Supreme Court's seeming readiness

III. PROSPECTS FOR A NON-INNOCENCE ORIENTATION: THE "FULL AND FAIR" COUNTER-REVOLUTION

The above discussion has emphasized that Friendly's call for a greater focus on the innocence of the defendant gained substantial prominence in the decades following the publication of his article.[227] Simply put, Friendly's proposal has aged well such that the guilt of a prisoner has become a de jure or de facto reason for denying habeas relief in more than nine out of ten noncapital cases.[228] But if innocence has regained (or retained) center stage, the proposal that is probably its chief intellectual rival must also be acknowledged, and that is the focus of this Part.

There is an emerging scholarly field recognizing a set of process-based protections that are divorced from innocence and even the merits of the underlying claims. Of course, it must be acknowledged that prior habeas scholarship also advocated for a process-based orientation. For example, Paul Bator and Judge Friendly, among others, while critiquing the Warren Court, took as a given the requirement of fair state procedures.[229] In one sense, then, the

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to depart from its own standard for certiorari review in order to engage in error correction is worth attention. *See, e.g.*, Cavazos v. Smith, 132 S. Ct. 2, 9 (2011) (Ginsburg, J., dissenting) *reh'g denied*, 132 S. Ct. 1077 (U.S. 2012).

227. One of the most prominent works of habeas scholarship in recent years uses empirical data in support of an embrace of Friendly's model, or perhaps something even more extreme than Friendly's vision. Hoffmann & King, *supra* note 21, at 817 & n.94. King and Hoffmann do not seem to permit an exception to the habeas limits in individual cases even when the state process in that case was not full and fair. *See* Marceau, *supra* note 118, at 139-40 (describing the fact that in many ways the King and Hoffmann proposal is more limiting to prisoners than the model offered by Bator and Friendly because it has all of the substantive limits, but none of the procedural safeguards).

228. Rosenberg & Rosenberg, *supra* note 9, at 605 ("[I]t is clear that the probability that a habeas petitioner in fact committed the crime is not merely relevant, but often dispositive as a basis for denying relief."); *see* Garrett, *supra* note 59, at 1692 (noting the "decades-long campaign to restrict habeas review emphasizing guilt-based restrictions on habeas relief"); Hans Sherrer, *AEDPA Has Reduced Federal Habeas Relief for State Prisoners*, 39 JUSTICE DENIED 17, 17 (2008). Whereas Friendly was bothered by the prospect of guilty defendants getting relief, King and Hoffmann start from the opposite premise. *See* Hoffmann & King, *supra* note 21, at 817. King and Hoffman emphasize that because habeas relief is almost never granted, it ought to be eliminated for everyone other than those who can demonstrate innocence. KING & HOFFMANN, *supra* note 125, at 67 (referring to federal habeas as a "costly charade").

229. *See* Bator, *supra* note 10, at 441-42; Friendly, *supra* note 4, at 152-53.

modern scholarly calls for procedural habeas have a sort of back-to-the-future quality. That is to say, they reflect a robust and appropriate return to a structural view of habeas advanced by more conservative scholars of a previous generation.[230] In this view, habeas proceduralism has come of age. In another sense, however, it seems fair to regard the new generation of procedural habeas as entirely unique because although Friendly and others assumed the necessity of procedural adequacy, they wrote during an era when complete, unfettered habeas was the expectation, and they were advocating for the most limited model of habeas review that could plausibly be advanced.[231]

Either way, the scholarly proposals—both the current and previous generation—reject the call to limit habeas to innocent prisoners and instead suggest that, now more than ever, the salience of federal habeas as a check on the fairness of the state procedures must be emphasized.[232] Such recent scholarship has argued that federal habeas courts must ensure that, at the very least, the state court process was full and fair.[233] And increasingly there is the tantalizing possibility that this full and fair thesis—insisting that habeas courts must ensure the fairness of the state proceeding—is taking form in Supreme Court doctrine. In particular, habeas proceduralism has seen life in a groundbreaking set of recent cases—the *Holland-Maples-Martinez* trilogy.

This next Section briefly examines the scholarly underpinnings of the "full and fair" model for federal habeas, and then advances a reading of the recent procedural trilogy from the Supreme Court that suggests an alternative to the innocence model of federal habeas review. If full-dress merits review of state adjudications is a thing of the past, it is important to take seriously the role of federal habeas corpus as a safeguard for fair procedures.

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230. *See, e.g.*, Freedman, *supra* note 81, at 1107; Marceau, *supra* note 42, at 7.

231. In other words, it may not be fair to treat a modern habeas scholar's view of the necessity of fair procedure as conceptually the same as those made by Friendly and others insofar as today proceduralism would be a step up for federal habeas, but fifty years ago it would have reflected a massive diminution in the scope of federal habeas review. No doubt this is why courts and scholars tend to link Friendly with an innocence, rather than a procedural, orientation.

232. *See, e.g.*, Garrett, *supra* note 83, at 128-29; Marceau, *supra* note 42, at 6; Marceau, *supra* note 118, at 108; Primus, *supra* note 18, at 5.

233. Primus, *supra* note 18, at 5.

A. Academic Projects Identifying Habeas as a Procedural Safeguard

Scholars have recently paid increasing attention to the role that federal habeas plays in overseeing the fairness of the state post-conviction procedures.[234] Rather than emphasizing the role of habeas in sorting out the guilt of the defendant, or even necessarily the merits of the constitutional claim, scholars have recognized a role for habeas courts in ensuring that the state court process is full and fair.

Eve Brensike Primus, for example, has reluctantly called for a retooling of federal habeas review so as to focus more on state court inadequacies of process.[235] According to Primus, federal habeas presently serves no deterrent function for state court judges because "[s]tate judges know that, absent egregious errors, their decisions are insulated from federal attack. Thus, when faced with crushing caseloads, the lack of real federal review gives state judges an incentive to cut corners, which has the effect of diluting federal constitutional rights."[236] As a solution to this dilemma, Primus proposes drastically curtailing current, individual-focused habeas review and instead reinvesting limited federal resources in curing "systemic" violations.[237]

For Primus, then, the federal oversight should be focused exclusively on instances in which the state system has fundamentally broken down. The thrust of her scholarly efforts have been directed toward envisioning the implementation of reforms that would make such structural litigation viable, but Primus also

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234. *See, e.g.*, Giovanna Shay, *The New State Postconviction*, 46 AKRON L. REV. 473, 476-77 (2013).

235. Primus, *supra* note 18, at 15-16. In an ideal world, it seems beyond question that Primus would prefer full-dress, individual habeas review in each case. But in light of resource constraints and the limits on federal habeas review she accepts as the next best thing a limited, systemic form of review. *Id.*

236. *Id.* at 11. Interestingly, Primus believes that by reorienting federal review so as to focus only on systemic violations of federal rights, the deterrent value of federal review would increase. *Id.* at 12. Of course, under such a system, an individual judge would have absolutely no fear of federal reversal for a claim grounded in a right for which there are not systemic violations. *See id.* at 27 ("Given a world of limited resources, however, we must slice the habeas pie somehow. For the reasons described above, I propose slicing based on the prevalence of the constitutional violation at issue.").

237. *Id.* at 16.

recognizes that current habeas doctrine affords opportunities, often underutilized, to challenge failures of state process. For example, Primus points to the procedural default doctrine:

> Before the federal courts will procedurally default a habeas petitioner's claim for failure to comply with a state procedural rule, the federal court will ask whether the state rule is an adequate one—meaning, among other things, that it is consistently applied in the state courts and does not unduly burden the exercise of a federal constitutional right .... Thus, adequacy review encourages federal courts, in some cases, to focus on state practices that violate individual rights systematically.[238]

In a more recent article, Primus is even more explicit about the role that the existing procedural default doctrine might play in enforcing fair state postconviction procedures. Expounding on the application of recent cases, Primus explains that "adequacy challenges are often used to expose systemic failures in a state's procedures [and] [a]s a result, adequacy challenges have [great] potential to catalyze change in states' procedures."[239] Primus, then, is emblematic of an emerging class of scholars who seek, first and foremost, to use challenges to state procedures as a way of ensuring that federal habeas review remains relevant. Her work brings deserved attention to the adequacy doctrine and calls for creative litigation in order to ensure that state systems provide a fundamentally fair postconviction system.[240]

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238. *Id.* at 15; *see also id.* ("State actions that hinder compliance with a procedural rule or make compliance impracticable establish cause to excuse a procedural default."); *id.* at 28 ("Under the current exhaustion doctrine, habeas petitioners are not required to exhaust state remedies if there is no available state corrective process or if the state process is ineffective at protecting their rights. Systemic state violations are, by definition, circumstances under which the state process is ineffective."); *id.* at 28 n.159 ("[T]he adequacy of a state procedural rule is a federal question that need not be initially raised in the state courts ... a petitioner's failure to comply with a procedural rule that he alleges creates a systemic procedural due process problem in the state should not bar federal review.") (citation omitted).

239. Eve Brensike Primus, *Effective Trial Council After* Martinez v. Ryan*: Focusing on Adequacy of State Procedures*, 122 YALE L.J. 2604, 2607 (2013).

240. *Id.* at 2620 ("To be adequate, the underlying state procedural rule must be firmly established and consistently followed, and it must not be applied in ways that unduly burden the defendant's exercise of her constitutional rights."); *id.* at 2623-24 ("[T]he focus under adequacy doctrine is on the state's procedures. As a result, a federal court's ruling on an adequacy challenge often has broader implications for the offending state than an

Other scholars have made similar, even more robust calls for a process-oriented model of habeas review. For example, it has been argued that "[a]s substantive challenges become increasingly impotent, it is the duty of the federal courts, all the more, to ensure that the *state court process* served as a minimally adequate substitute for federal habeas review."[241] The focus of federal habeas, then, is on ensuring that the state court process comports with due process. For example, Professor Bator, even in the face of criticizing what he perceived as an overly robust federal system of review explained:

> It is, after all, the essence of the responsibility of the states under the due process clause to furnish a criminal defendant with a full and fair opportunity to make his defense and litigate his case: the state must provide a reasoned method of inquiry into relevant questions of fact and law (including, of course, all federal issues applicable to the case). If a state, then, fails in fact to do so, the due process clause itself demands that its conclusions of fact or law should not be respected.... Thus if a state fails to give the defendant any opportunity at all to test federal defenses relevant to his case, the need for a collateral jurisdiction to afford this opportunity would seem to be plain, and federal habeas is clearly an appropriate remedy: the state has furnished no process, much less "due" process, for the vindication of an alleged federal right.[242]

I have expressed a similar sentiment when addressing the impact of modern limits on habeas reform, noting, for example, that

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individualized finding of cause in a particular litigant's case."). 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. Often an inadequate process in a particular case will arise because of some systemic shortcomings. *Cf.* Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (distinguishing unfair process in *Martinez*). But in some instances, a state court may fail a particular prisoner in a unique way, and it would seem that such procedural lapses are also deserving of federal attention. For example, presumably if ineffective assistance of counsel claims ordinarily could be fairly litigated on direct appeal, but in a particular instance the procedures were so unfair as to deprive the prisoner of such an opportunity, then federal review is warranted. Of course, Primus might accept such a conclusion and note that in such circumstances there ought to be "cause" to overcome an inadequately developed claim. Primus, *supra* note 239, at 2607.

241. Marceau, *supra* note 118, at 136 (emphasis added).

242. Bator, *supra* note 10, at 456-57.

"challenges to process rather than to pure result will play a critical role in the next wave of habeas litigation."[243] It is possible to conceive of various litigation strategies for habeas lawyers who are interested in challenging the state postconviction process as lacking procedures for full and fair review.[244]

Likewise, Professor Brandon Garrett has recently discussed the unsettled relationship between due process and the Suspension Clause and noted that, at the very least, "due process does help to protect rights to adequate and effective access to courts at trial, appeal, and postconviction."[245] Garrett's thoughtful review of the Guantanamo cases places particular emphasis on the notion that the constitutionally "necessary scope of habeas review in part depends upon the rigor of any earlier proceedings."[246] Garrett recognizes a doctrinal and historical link between habeas and due process and regards both as important checks against inadequate procedures for developing facts and law relating to a prisoner's claims.[247]

Similarly, Professor Samuel Wiseman has observed that some "guarantee of fairness" is likely to be constitutionally required by the Suspension Clause and due process.[248] Regarding the Suspension Clause, he notes that the Supreme Court's recent Guantanamo cases, at bottom, require a full and fair review of all constitutional challenges to one's custody.[249] Likewise, Wiseman has argued that

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243. Marceau, *supra* note 118, at 146.

244. Marceau, *supra* note 176, at 393-94 (recommending the use of 28 U.S.C. § 2254(d)(2) as a possible vehicle for procedural challenges to state systems).

245. Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 73 (2012); *id.* at 82 ("[T]he Suspension Clause has independent force: Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant." (quoting Boumediene v. Bush, 553 U.S. 723, 785 (2008))) (internal quotation marks omitted).

246. *Id.* at 83 (quoting *Boumediene*, 553 U.S. at 781).

247. Notably, Garrett ultimately concludes that habeas corpus is not fundamentally divorced from questions of innocence. He argues forcefully that after *Boumediene* there is a necessary connection between accurate fact-finding or innocence and federal habeas review. *See id.* at 123. I do not understand Garrett's point to be in tension with my own; in fact I view them as complimentary. Garrett sees the Suspension Clause jurisprudence as undermining prior case law that questions whether there is a right to relief based on freestanding innocence. *See id.* at 122. I argue that whether or not the Constitution provides for such a claim, a habeas orientation toward fair procedures is required.

248. Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 992-1006 (2012).

249. *Id.* at 996 ("There is ... a strong argument under *Boumediene* that AEDPA cannot

due process must be understood as requiring a "federal remedy for unfair state postconviction" procedures.[250]

In sum, there is a growing body of scholarship recognizing a role for federal habeas that is distinct from a purely innocence-serving function.[251] Calls for federal oversight as to the fairness and adequacy of the procedures for legal and factual development, independent of the merits of the underlying claim, though historically underappreciated, are coming of age. As the recent procedural trilogy, described immediately below, makes clear, the Court itself seems to be moving away from its moorings in innocence and towards more of a legal process, equity orientation. It seems increasingly clear that an amorphous, evolving doctrine requires that a prisoner must be given one opportunity for "a full and fair review of his constitutional claims, either in state or federal court."[252]

B. The Procedural Trilogy: Holland-Maples-Martinez *and the Judicial Recognition of a Right to One Full and Fair Review of All Claims*

Consistent with the scholarly focus on fair and adequate procedures designed to ensure that the proceedings below were full and fair, decisions from the three most recent Supreme Court Terms evince a decidedly proceduralist turn. Since 2010, the Supreme Court has decided three cases—*Holland v. Florida*, *Maples v. Thomas*, and *Martinez v. Ryan*[253]—the two most recent of which

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constitutionally foreclose the consideration of new evidence in federal court when petitioners have been denied a full and fair hearing at the state level.").

250. *Id.* at 1004.

251. Eric Freedman has championed this movement toward habeas-oriented fair procedures both through his litigation and his scholarship. *See, e.g.*, Freedman, *supra* note 81, at 1108.

252. Marceau, *supra* note 42, at 7.

253. Maples v. Thomas, 132 S. Ct. 912, 916 (2012); Martinez v. Ryan, 132 S. Ct. 1309, 1313 (2012); Holland v. Florida, 130 S. Ct. 2549, 2565 (2010). *Martinez*, which is surely the most important of the three decisions, has been affirmed and extended in *Trevino v. Thaler*, which further entrenches the salience of habeas proceduralism. 133 S. Ct. 1911, 1914-15 (2013).

Martinez explicitly relies on one of the leading habeas proceduralists, Eve Brensike Primus, in declaring that federal courts have a duty to ensure basic fairness in the state court process. 132 S. Ct. at 1318 (citing Eve Brensike Primus, *Structural Reform in Criminal Defense*, 92 CORNELL L. REV. 679, 689 & n.57 (2004)) (demonstrating that in many states the procedures

stand among the most dramatic proprisoner habeas decisions in several decades. The *Holland-Maples-Martinez* trilogy has already been recognized by lower courts as a "remarkable ... development" insofar as it reflects a potentially new direction for federal habeas review.[254] As one scholar has put it: "Together, these cases send a strong signal that the Supreme Court takes seriously the need for states to provide prisoners with adequate representation to raise constitutional claims in state courts."[255] In light of these cases one can fairly announce the beginning of a new era of federal habeas, one that prioritizes protective proceduralism—that is, procedural habeas litigation designed to ensure fair state court procedures.[256]

1. Holland v. Florida

The first case of the trilogy, *Holland v. Florida*, raised the question of whether and in what circumstances the AEDPA statute of limitations could be equitably tolled.[257] Albert Holland was convicted for the murder of a policeman and sentenced to death.[258] Following the completion of direct review, Florida appointed an attorney, Bradley Collins, to represent Mr. Holland in all state post-conviction proceedings.[259] Mr. Collins then waited 316 days before filing a petition for relief in the case, leaving just 12 days remaining

for raising ineffective assistance of counsel on direct review are inadequate); *see also* Thomas M. Place, *Closing Direct Appeal to Ineffectiveness Claims: The Supreme Court of Pennsylvania's Denial of State Constitutional Rights*, 22 WIDENER L.J. 687, 706-07 (2013) (arguing for an exception to the rule that ineffective assistance cannot be litigated on direct appeal for defendants who receive short sentences and will not be able to avail themselves of collateral review); Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appoint Counsel*, 98 KY. L.J. 301, 326 (2012).

254. Lopez v. Ryan, 678 F.3d 1131, 1136 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 55 (2012).

255. Primus, *supra* note 239, at 2617-18.

256. One could fairly ask whether this reading of recent cases is overly sanguine. It is fair to ask, for example, whether these cases merely reflect an overdue reaction to the systemic failures of certain state systems. *Cf.* Carol S. Steiker, *Raising the Bar:* Maples v. Thomas *and the Sixth Amendment Right to Counsel*, *in* ESSAYS IN HONOR OF JUSTICE RUTH BADER GINSBURG 71, 74 (2013) (on file with Harvard Law School Library), *available at* http://dash.harvard.edu/handle/1/10582558?show=full. But the requirement of full and fair procedures identified by scholars is not a requirement of ideal procedures; it is the minimum amount of federal oversight required by due process. *Cf.* Stone v. Powell, 428 U.S. 465, 469 (1976).

257. 130 S. Ct. at 2554.

258. *Id.* at 2555.

259. *Id.*

under the one-year statute of limitations.[260] By the time his post-conviction case was on appeal to the Florida Supreme Court, the relationship between Mr. Holland and Mr. Collins had deteriorated, prompting Mr. Holland to write unsuccessfully multiple times to the court and the bar requesting a new attorney.[261] Mr. Holland also wrote to the court clerk requesting information about the status of his case and to Mr. Collins, specifically requesting that Mr. Collins timely file a federal habeas petition if the state petition failed.[262]

Unbeknownst to Mr. Holland, the Florida Supreme Court affirmed and finalized its decision on December 1, 2005, restarting the then twelve-day clock for the AEDPA statute of limitations.[263] Mr. Holland's subsequent request for updates from Mr. Collins went unanswered.[264] Five weeks after the expiration, Mr. Holland discovered on his own that the court had ruled against him and that his deadline had passed.[265] The next day Mr. Holland mailed a *pro se* habeas petition to the Federal District Court for the Southern District of Florida.[266] Mr. Collins never filed a habeas petition as Mr. Holland requested.[267] After Mr. Holland renewed his request to dismiss Mr. Collins as his attorney, the district court granted the motion and appointed Mr. Holland a new lawyer.[268]

The federal district court and the Eleventh Circuit both refused to apply equitable tolling to the case, holding that attorney negligence in a habeas proceeding is never an "extraordinary circumstance warranting equitable tolling," absent "bad faith, dishonesty, divided loyalty, mental impairment or so forth."[269] The Supreme Court reversed and remanded, holding that the AEDPA statute of limitations was subject to equitable tolling and rejecting the Eleventh Circuit's rule that attorney negligence is never an "extraordinary circumstance."[270] The Court reasoned that equitable

260. *Id.*
261. *Id.* at 2555-56.
262. *Id.* at 2556.
263. *Id.*
264. *Id.* at 2557.
265. *Id.*
266. *Id.*
267. *Id.* at 2559.
268. *Id.*
269. Holland v. Florida, 539 F.3d 1334, 1339 (11th Cir. 2008), *rev'd*, 130 S. Ct. 2549 (2010).
270. *Holland*, 130 S. Ct. at 2554.

tolling should apply to AEDPA, rejecting the Eleventh Circuit's per se rule in favor of a more flexible, case-by-case approach and emphasizing that the circumstances surrounding Mr. Holland's postconviction representation were "extraordinary."[271]

2. Maples v. Thomas

In *Maples v. Thomas*, the Supreme Court went one step further, holding that although negligence by a prisoner's postconviction attorney is not cause for excusing a procedural default, abandonment by a postconviction attorney may be.[272]

Cory Maples was sentenced to death in Alabama in 1997 for two murders.[273] Unlike almost all other states, Alabama "does not guarantee representation to indigent capital defendants in postconviction proceedings," but relies instead on volunteers.[274] Two New York lawyers, Jaasi Munanka and Clara Ingen-Housz of Sullivan & Cromwell, represented Maples *pro bono* in his postconviction proceedings.[275] Alabama required that out-of-state lawyers associate with a local lawyer in order to proceed *pro hac vice*.[276] An Alabama lawyer, John Butler, agreed to be Maples's local counsel, but Butler made clear that he would serve no substantive or active role in the case.[277]

Maples petitioned for Alabama postconviction relief, alleging ineffective assistance of counsel at trial.[278] The trial court denied the State's motion for summary dismissal.[279] While the petition was pending, Munanka and Ingen-Housz left Sullivan & Cromwell for new jobs that barred them from continuing to represent Maples; neither told Maples or sought permission from the trial court to

271. *Id.* at 2562-64.

272. 132 S. Ct. 912, 922 (2012). Carol Steiker has noted that *Maples* is illustrative of a growing body of cases in which Justice Ginsburg has sought to bring attention to the systemic defects surrounding many appointment of counsel issues. Steiker, *supra* note 256, at 73-75 (considering the relevance of the systemic defects in Alabama to the *Maples* decision).

273. *Maples*, 132 S. Ct. at 918.

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* at 919.

278. *Id.*

279. *Id.*

withdraw as required by Alabama law.[280] During the following months other lawyers from Sullivan & Cromwell had some involvement with Maples's case,[281] but none sought to become attorneys of record for Maples or to tell the court of Munanka's and Ingen-Housz's departure.[282] When the state trial court denied Maples's petition, the court clerk mailed notice to Munanka and Ingen-Housz at Sullivan & Cromwell and to Butler.[283] The letters to Munanka and Ingen-Housz were returned unopened to the court by the Sullivan & Cromwell mailroom; Butler got the letter but took no action because he assumed the New York lawyers would appeal.[284] Forty-two days later, Maples's time to appeal expired.[285] Maples only found out when he received a letter directly from the Alabama Attorney General's office informing him that he had missed the state appeal deadline.[286]

At Maples's family's urging, Sullivan & Cromwell attorneys moved for effective relief from the procedural default, but the trial court denied the motion.[287] The appeals court and the Alabama Supreme Court also denied relief, unwilling to excuse the failings of Maples's attorneys.[288] Likewise, relying on the holding of *Coleman v. Thompson* that ineffective postconviction counsel is not cause sufficient to excuse procedural default,[289] the district court and the Eleventh Circuit denied Maples's request for federal habeas review.[290]

The Supreme Court granted certiorari and reversed, finding Maples's circumstances qualified as cause excusing procedural default.[291] The Court distinguished *Coleman* by explaining that Maples's case was not one of postconviction attorney negligence, but was rather one of postconviction attorney abandonment.[292] The

280. *Id.*
281. *Id.* at 925.
282. *Id.* at 919.
283. *Id.* at 919-20.
284. *Id.* at 920.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 921.
289. 501 U.S. 722, 752 (1991).
290. *Maples*, 132 S. Ct. at 921 (citing Maples v. Allen, 586 F.3d 879 (11th Cir. 2009)).
291. *Id.* at 927.
292. *Id.* at 922-23.

principle that a prisoner-principal "bears the risk of negligent conduct on the part of his [attorney-]agent" in a postconviction setting only applies as long as the attorney remains the prisoner's agent.[293] Maples's failure to appeal on time was uniquely excusable because the listing of his absentee attorneys of record "meant that he had no right personally to receive notice," and no one informed him until it was too late that he needed to act.[294]

3. Martinez v. Ryan

The final case in the procedural habeas trilogy is *Martinez v. Ryan*, which recognized an exception to the general rule that attorney errors cannot serve as cause for overcoming a procedural default.[295]

Luis Martinez was convicted at trial of sexually abusing his eleven-year-old stepdaughter.[296] The prosecution's case included DNA evidence from the stepdaughter's nightgown and expert testimony explaining the stepdaughter's recantations.[297] Arizona appointed Martinez a new attorney for appeal, but Arizona law prevented the attorney from raising ineffective assistance of counsel on direct appeal, requiring instead the issue be raised in collateral proceedings.[298] While the direct appeal was pending, the same attorney initiated postconviction proceedings but "later filed a statement asserting she could find no colorable claims."[299] Martinez's conviction was affirmed on direct appeal and the Arizona Supreme Court denied review.[300]

Martinez filed a second collateral proceeding with a new lawyer, this time alleging ineffective assistance of trial counsel for, among other things, failure to pursue an alternate explanation for the DNA evidence or to counter the prosecution's expert testimony adequately.[301] The court dismissed Martinez's petition as without

293. *Id.* (citing *Coleman*, 501 U.S. at 753-54).
294. *Id.* at 927.
295. 132 S. Ct. 1309, 1315 (2012).
296. *Id.* at 1313.
297. *Id.*
298. *Id.* at 1314.
299. *Id.*
300. *Id.*
301. *Id.*

merit and as precluded by waiver for failing to raise the claims in the first collateral proceeding.[302] The appeals court affirmed on the preclusion grounds, and the Arizona Supreme Court denied review.[303]

On federal habeas review, Martinez again alleged ineffective assistance of trial counsel, but the district court denied the petition, explaining that collateral proceedings are not "first tier" review protected by the constitutional right to counsel[304] and that, under *Coleman* and similar cases, ineffective assistance of collateral counsel is not cause for procedural default.[305] The Ninth Circuit affirmed, finding that the right to counsel never extends to collateral proceedings[306] and that *Coleman* foreclosed any argument that collateral counsel's ineffectiveness qualified as cause for default.[307]

The Supreme Court granted certiorari and reversed, establishing an exception to *Coleman*: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."[308] Notably, the *Martinez* Court declined to take on the constitutional issue, choosing instead to exercise its discretion to elaborate "[t]he rules for when a prisoner may establish cause to excuse a procedural default."[309]

C. The End of Innocence: Seeing the Scholarly Influence in Modern Habeas

As noted above, the *Martinez*-trilogy suggests the beginning of a new, less innocence-centered era of federal habeas review. There is a sense that the four-decade-long fixation on guilt/innocence, spurred in part by Friendly, has run its course and a readjustment has commenced. A fair reading of these cases, particularly in the aggregate, triggers a very real possibility of judicial recognition that

302. Martinez v. Schriro, 623 F.3d 731, 734 (9th Cir. 2010), *rev'd sub nom*. Martinez v. Ryan, 132 S. Ct. 1309 (2012).
303. *Martinez*, 132 S. Ct. at 1314.
304. *Id.* at 1314-15.
305. *Id.* at 1315.
306. *Martinez*, 623 F.3d at 739-40.
307. *Id.* at 743 (citing Manning v. Foster, 224 F.3d 1129, 1133 (9th Cir. 2000)).
308. *Martinez*, 132 S. Ct. at 1315.
309. *Id.* at 1315, 1318.

prisoners are entitled to one full and fair adjudication of their constitutional claims.[310]

Consider first the changes effected by the precedent in *Holland* as well as the principles underlying the decision. *Holland* is the first decisive break from a well-established line of cases recognizing that, in the absence of a showing of innocence, the errors of a post-conviction lawyer are attributed to the client himself. As a doctrinal matter, few principles were more settled, or more reviled by the defense bar.[311] The Court summarized this agency approach to post-conviction review in *Coleman v. Thompson*, in which a prisoner's execution was upheld despite the failures of his state postconviction attorney to raise colorable constitutional claims: "Attorney ignorance or inadvertence is not 'cause' [justifying federal habeas review] *because* the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'"[312]

As a conceptual matter, the break from *Coleman* was significant. As a practical matter, however, the case has proven easy for prosecutors to distinguish, and commentators have lamented that *Holland* did not go far enough toward abandoning agency principles

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310. Marceau, *supra* note 42; Marceau, *supra* note 118. Habeas historians might fault me for conflating competing models of federal habeas review insofar as both innocence and process-oriented models of habeas could lead to the same results in some instances. For example, some Justices might require certain procedures out of a sincere desire to avoid punishing the innocent, while another Justice might do so out of a pure process rationale. Ultimately, however, if the two rationales converge on a roughly similar result of requiring one full and fair opportunity to litigate constitutional challenges to one's custody, then the underlying motivation is of no concern.

311. *See* Coleman v. Thompson, 501 U.S. 722, 753 (1991) ("[T]he petitioner must 'bear the risk of attorney error.'" (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986))); Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 848 (2013) (describing *Martinez* as having "upend[ed] what commentators and litigators had assumed for years was settled law regarding the relevance of postconviction counsel's competence"); Adam Liptak, *Lawyers Stumble, and Clients Take Fall*, N.Y. TIMES, Jan. 8, 2013, at A12 ("The legal system generally answers by saying that lawyers are their clients' agents.").

312. *Coleman*, 501 U.S. at 753 (emphasis added) (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)); *see also* Wendy Zorana Zupac, *Mere Negligence or Abandonment? Evaluating Claims of Attorney Misconduct After* Maples v. Thomas, 122 YALE L.J. 1328, 1343 (2013) ("According to the relationship-based model espoused in *Coleman*, well-settled principles of agency law require that the principal (the client) bear the risk of harm caused by the agent (the lawyer) in the scope of the agent's employment.") (internal quotation marks omitted).

in the habeas context.[313] First, the facts of the *Holland* case are so extreme[314] that it will prove difficult for subsequent prisoners to marshal circumstances that are analogous to the "extraordinary circumstances" required for equitable tolling.[315] Stated differently, even in granting Holland equitable tolling, the Court held that "attorney negligence" alone does not give rise to equitable tolling,[316] and proving that attorney errors crossed over from negligence to the sort of egregiousness anticipated by *Holland* will prove unworkable for most prisoners.[317] Indeed, a review of all published and unpublished federal decisions in the three years following *Holland* reveal that of the more than 1900 cases in which a prisoner sought tolling, federal courts granted equitable tolling in only eleven instances.[318] In addition, the Supreme Court seemed to regard *Holland* as a narrow carve out from the default practice, explaining its decision,

313. *See, e.g.*, Marni von Wilpert, Holland v. Florida*: A Prisoner's Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act's One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 FORDHAM L. REV. 1429, 1463 (2010).

314. In *Holland*, the court-appointed attorney did not file a timely federal habeas corpus petition, even though Petitioner Holland sent the attorney many letters stressing the importance of doing so. Holland asked for the lawyer to be removed from the case. The Eleventh Circuit held that Holland's case did not qualify under the "extraordinary circumstances" standard. Holland v. Florida, 130 S. Ct. 2549, 2559 (2010).

315. The reality is probably that ordinary negligence is so pervasive in some jurisdictions, particularly as to missed deadlines, that any robust application of *Holland* might risk swallowing the rule.

316. *Holland*, 130 S. Ct. at 2568; *see also* Zupac, *supra* note 312, at 1353-54 ("[T]he Court failed to articulate a clear theory for when attorney misconduct would be severe enough to qualify as extraordinary circumstances, referring instead to 'fundamental canons of professional responsibility.'" (quoting *Holland*, 130 S. Ct. at 2564)).

317. von Wilpert, *supra* note 313, at 1465 ("While the Court stated definitively that ordinary attorney negligence does not warrant equitable tolling, it did not actually articulate a definable standard as to what types of attorney behavior would rise to the level of extraordinary circumstances.").

318. The exception has proven largely costless for the federal courts. Less than one percent of the prisoners who sought equitable tolling during the first two years of the rule's existence were deemed deserving. From 2010, when *Holland* was decided, through April of 2013, there have been only eleven cases of equitable tolling out of nearly 2000 that sought such relief. This proposition is supported by a survey of the cases citing to Westlaw's Headnote eight of *Holland v. Florida*. As of April 11, 2013, 102 federally reported cases cited to Westlaw's Headnote eight. Each of these cases were surveyed. The author also examined unreported orders by using the following Boolean search: "order /5 grant! /10 equit! /2 toll!." Although the rate of habeas relief in noncapital cases has been shown to be similarly low under AEDPA, one might expect that the number of prisoners who miss the filing deadline but have a good excuse would be higher than the number of prisoners who can show that their state conviction is constitutionally unsound.

in part, by noting that they were forgiving only a federal as opposed to state rule violation. Accordingly, if only eleven cases are impacted, and if the Court itself treated *Holland* as a minor deviation from the agency/innocence model, then *Holland* stands as an important decision of principle but not of practice.[319] The decision and its application leave substantially intact the principal-agent model for understanding the attorney-client relationship in postconviction review.[320]

In *Maples* the Court picked up where it had left off in *Holland,* further chipping away at the dogma that, in the absence of a showing of innocence, the errors of postconviction counsel must be attributed to the prisoner.[321] As in *Holland*, the violation of a rule barring federal review was excused because of the errors of counsel.[322] But in *Maples* the Court excused the prisoner's violation of a state rule—as opposed to merely the federal statute of limitations.[323]

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319. The eleven cases in which equitable tolling were permitted are: Ross v. Varano, 712 F.3d 784, 804 (3d Cir. 2013); Grecu v. Evans, 467 F. App'x 718, 721 (9th Cir. 2012); Dykes v. Chappell, No. 3-11-CV-4454-SI, 2012 WL 3727263, at *2 (N.D. Cal. Aug. 28, 2012); Stevens v. Chappell, No. C 09-137 WHA, 2012 WL 3638547, at *3 (N.D. Cal. Aug. 22, 2012); Chatman v. Chappell, No. 3-7-CV-640-WHA, 2012 WL 2916358, at *2 (N.D. Cal. July 17, 2012); Pollock v. Martel, No. 4-5-CV-1870-SBA, 2012 WL 174821, at *2 (N.D. Cal. Jan. 20, 2012); Williams v. Birkett, 895 F. Supp. 2d 864, 872 (E.D. Mich. 2012); Salcido v. Martel, No. 09-00586 MMC, 2011 WL 6181466, at *1 (N.D. Cal. Dec. 13, 2011); Bolden v. Martel, No. 4-9-CV-2365-PJH, 2011 WL 6100509, at *2 (N.D. Cal. Dec. 5, 2011); Stanley v. Martel, No. 3-7-CV-4727-EMC, 2011 WL 3154792, at *2 (N.D. Cal. July 26, 2011); Doolin v. Cullen, No. 1:09-CV-01453-AWI-P, 2010 WL 3943523, at *3 (E.D. Cal. Oct. 1, 2010). Subsequent to the empirical study of *Holland*'s impact discussed in footnote 318, at least three additional federal courts have granted equitable tolling. *See* Sossa v. Diaz, 729 F.3d 1225 (9th Cir. 2013); Sanchez v. Gaetz, No. 12 C 6717, 2013 WL 4836697 (N.D. Ill. Sept. 9, 2013) (holding that equitable tolling was an alternative means to permit the defendant to file an untimely habeas petition); Randle v. United States, 954 F. Supp. 2d 239 (E.D. Pa. 2013).

320. The *Holland* decision actually emphasizes the distinction between excusing the federal AEDPA statute of limitations based on attorney errors and excusing a state procedural rule, as in *Coleman*. Only the latter, explained the Court, implicates heightened federalism concerns. *Holland*, 130 S. Ct. at 2563; *see also* Zupac, *supra* note 312, at 1353 ("[T]he Court distinguished *Coleman* as being a 'case about federalism' and the deference that federal courts owe to a state court's determination that its own procedural rules had been violated, while *Holland* and the equitable-tolling analysis concerned federal courts' ability to excuse a petitioner's failure to comply with *federal* procedural rules.").

321. In addition to a showing of innocence (a miscarriage of justice), the Court recognized additional, narrow circumstances when federal review was warranted. Maples v. Thomas, 132 S. Ct. 912, 922-24 (2012).

322. *Id.* at 927.

323. Zupac, *supra* note 312, at 1354.

That is to say, the relief sought in *Maples* implicated federalism concerns that were not at issue in *Holland*. Nonetheless, the *Maples* majority held that on the unique facts of the case, as discussed above, Maples had "shown ample cause ... to excuse the procedural default."[324]

By all outward appearances, then, *Maples* was a groundbreaking decision, allowing the errors of counsel to serve as a basis for excusing a procedural default, even when the prisoner is not able to make a colorable showing of innocence. The strict rule of attribution of errors from counsel to client[325] was excepted.[326] But Justice Ginsburg, writing for the Court, emphasized the apparently narrow reach of this exception by explaining that when postconviction counsel merely "misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause."[327] More to the point, the Court hewed to the principal-agent model, explaining that only "when an attorney abandons his client without notice" is the principal-agent relationship severed such that the acts or omissions of an attorney who has abandoned the client cannot be attributed to the client.[328] Misconduct, no matter how egregious, is not a basis for permitting federal review; in the absence of a showing of innocence, a factual showing of attorney abandonment is required.[329] Such a showing, of course, will often be impossible to establish.

The final and most important case in the trilogy is *Martinez v. Ryan*. If *Holland* and *Maples* were at odds with a trend of ever-constricting opportunities for federal review, then *Martinez* threatened to fundamentally reshape the habeas paradigm. Rather than requiring that a prisoner show complete abandonment, the Court

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324. *Maples*, 132 S. Ct. at 927.

325. Coleman v. Thompson, 501 U.S. 722, 752-53 (1991).

326. *See Maples*, 132 S. Ct. at 914-15; *Coleman*, 501 U.S. at 753.

327. *Maples*, 132 S. Ct. at 922. The circuit court in *Maples* reiterated the familiar principle that "a federal court may still consider the [defaulted] claim if a state habeas petitioner can show either (1) cause for and actual prejudice from the default; or (2) a fundamental miscarriage of justice." Maples v. Allen, 586 F.3d 879, 890 (11th Cir. 2009).

328. *Maples*, 132 S. Ct. at 914-15; *see also id.* at 924 ("[U]nder agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him.").

329. *See id.* at 922-23. Of relevance to the *Maples* Court was the fact that Maples's former lawyers had left the law firm and accepted jobs that barred them from continuing to represent Maples. *Id.* at 924. The majority emphasized, however, that the decision did not "disturb [*Coleman*'s] general rule." *Id.* at 922.

recognized an exception to *Coleman*.[330] Specifically, by satisfying the *Strickland* standard, the once-impenetrable barrier of *Coleman* can be overcome by a state prisoner.[331] To be sure, the full scope of the *Martinez* rule remains to be sorted out, and the rule may be tempered by some important exceptions.[332] Indeed the decision has even been described as "unusually" narrow in its holding.[333] However, for the dozens of prisoners who have been executed across the United States because errors of postconviction counsel precluded federal or state courts from reviewing the merits of their constitutional claims,[334] this decision holds out hope for a doctrinal shift that may prove to be the difference between life and death in many future cases.

There are two particularly significant aspects of the *Martinez* decision. First, as noted above, it narrows the reach of *Coleman*, one of the harshest and most widely applied doctrines for limiting federal habeas review outside of the AEDPA. Just this notion that—even in the absence of attorney abandonment—the errors of counsel can be charged against the State so as to excuse a prisoner's errors is monumental. Second, and at least equally important, *Martinez* has the effect of substantially curtailing the impact of two of the most damaging applications of the AEDPA limits. Specifically, *Cullen v. Pinholster* and *Harrington v. Richter* amount to a recent one-two habeas punch that was insurmountable for most prisoners prior to *Martinez*.[335]

Richter emphasizes the deference owed to state court conclusions of law by clarifying that the deference enshrined in § 2254(d)(1) requires that federal relief be denied if it "is possible [that] fairminded jurists could disagree" about the application of Supreme Court precedent to the issue in question.[336]

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330. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

331. *Id.* at 1318; *see also supra* text accompanying notes 73-78.

332. *See infra* Part IV.

333. Trevino v. Thaler, 133 S. Ct. 1911, 1922 (2013) (Roberts, C.J., dissenting).

334. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 752-53 (1991).

335. Cullen v. Pinholster, 131 S. Ct. 1388 (2011); Harrington v. Richter, 131 S. Ct. 770 (2011). In fairness, any number of recent habeas cases could be used here as a substitute for my focus on *Richter*. *Richter* is simply one in a long line of cases that systematically narrow the window for habeas relief available under § 2254(d)(1).

336. *See Richter*, 131 S. Ct. at 786; *see also* Marceau, *supra* note 118, at 108-16 (examining the holding and impact of *Richter*).

Pinholster, by contrast, holds that even if one could otherwise satisfy the daunting standard of review discussed in *Richter*, if a petitioner needs to develop new facts in order to establish these legal claims, he cannot do so. The factual record in federal court cannot include facts that were not part of the state court adjudication.[337] *Martinez* provides a plausible escape hatch from both of these doctrines for deserving prisoners.

Specifically, when, because of the errors of postconviction counsel, a claim is not fully developed in state court proceedings,[338] *Martinez* permits the prisoner to: (a) overcome the procedural default; and (b) avoid the strictures of § 2254(d) and, therefore, *Richter* and *Pinholster*. By its plain text, the holding of *Martinez* recognizes that defaults will be excused by a showing of ineffective assistance at an initial-review collateral proceeding.[339] Moreover, when a claim is deemed defaulted, then by definition it is not "adjudicated on the merits."[340] And an adjudication on the merits is a threshold requirement for the application of § 2254(d),[341] which in turn is the triggering mechanism for the limits imposed by *Pinholster* and *Richter*.[342] Accordingly, if a prisoner overcomes a procedural default by establishing a *Martinez* claim, then he is entitled to a federal adjudication of his claim unconstrained by the factual and legal record developed in state court.

It is premature to assess whether lower courts will recognize and accept this application of *Martinez*.[343] But two early examples of

337. *Pinholster*, 131 S. Ct. at 1398.

338. Martinez v. Ryan, 132 S. Ct. 1309, 1313 (2012).

339. *See id.* at 1315.

340. *See, e.g.*, *Pinholster*, 131 S. Ct. at 1401.

341. *See* 28 U.S.C. § 2254(d) (2006). As the analysis above demonstrates, if a showing is made under *Martinez*, then AEDPA's deferential standards of review should not have any application to the claim in question. This should be true whether the claim is not raised at all, as in *Martinez*, or the claim is raised, but raised poorly such that the properly raised federal claim is substantially based on different facts. Marceau, *supra* note 118, at 156-66 (arguing that a state prisoner might be able to get around the strict standard of *Pinholster* by bringing a new, unadjudicated claim regarding state process). The Supreme Court itself has recently noted the importance of ascertaining with care whether a claim was in fact adjudicated on the merits. *See, e.g.*, Johnson v. Williams, 133 S. Ct. 1088, 1091 (2013).

342. *See Pinholster*, 131 S. Ct. at 1398; Harrington v. Richter, 131 S. Ct. 770, 780-81 (2011).

343. It is worth noting that arguments that a procedural default should be excused under *Martinez* are no less strong if the failure to litigate a claim can be attributed to the state's failure to appoint counsel, as opposed to the ineffectiveness of counsel. *See* Trevino v. Thaler, 133 S. Ct. 1911, 1918 (2013); *see also* Nguyen v. Curry, 736 F.3d 1287, 1291, 1293 (9th Cir.

lower courts' application of *Martinez* provide room for limited optimism. First, in *Barnett v. Roper* a federal district court granted an evidentiary hearing on a claim that it previously had found to be defaulted.[344] Barnett had requested relief in state postconviction proceedings based on ineffective assistance of counsel at the penalty phase of his capital trial, but the state court concluded that his pleadings failed to follow a specific format and denied relief.[345] The federal district court, though finding that Barnett had "substantially complied" with the applicable state rule, nonetheless found the claim procedurally defaulted.[346] In revisiting its decision through a motion to alter its judgment under Federal Rule of Civil Procedure 59(e),[347] the federal court held that the postconviction lawyer's failure to comply with the state procedural rules regarding pleading requirements amounted to ineffective assistance of counsel so as to give rise to the "cause" necessary to forgive the procedural default.[348] Perhaps the most notable feature of the *Barnett* decision is the fact that the state procedures that resulted in the default seem significantly unfair. Specifically, Barnett was faulted for not complying with a pleading rule. But the district court, even in holding that he had defaulted under the rule, recognized that Barnett's pleadings "substantially complied with the procedural rule" and were actually quite "detailed [and] thorough."[349] The distinction is striking. Prior to *Martinez* the federal judge was willing to look the other way and ignore state procedural traps, but after *Martinez* the very same judge felt compelled to permit federal habeas review.[350] *Martinez*

2013) (applying *Martinez* to a case where the prisoner was without counsel for post-conviction litigation).

344. No. 4:03CV00614 ERW, 2013 WL 1721205, at *1-2, *17 (E.D. Mo. Apr. 22, 2013).

345. *Id.* at *1 n.1, *5.

346. Barnett v. Roper, No 4:03CV00614 ERW, 2006 WL 2475036, at *24-27 (E.D. Mo. Aug. 24, 2006).

347. *Barnett*, 2013 WL 1721205, at *2.

348. *Id.* at *10, *13 n.20.

349. *Id.* at *11 n.17.

350. The district court's analysis of the issue is revealing. The court seems to acknowledge that the procedural rule's application was petty and technical in a way that seemed unfair such that postconviction counsel was not actually ineffective. *See Barnett*, 2006 WL 2475036, at *26-27. However, in the wake of *Martinez*, the court explicitly recognized the need for procedural fairness by acknowledging that either the state process was unfair (in which case there was not adequate grounds for default), or the state process was fair (in which case postconviction counsel was ineffective and provided cause for overcoming the default). *See Barnett*, 2013 WL 1721205, at *11 n.17 ("It would seem inconsistent to this Court to allow its

seems to be having an effect on the ability of prisoners to undermine unfair state procedures. Guilt is increasingly *not* dispositive.

A second illustrative case, *Dickens v. Ryan*, is one of the first federal circuit court decisions to consider the potential breadth of *Martinez*.[351] Dickens had raised on state postconviction a claim of ineffective assistance of trial counsel for failing to develop a sufficiently strong mitigation case for the capital sentencing hearing, and thus the claim appeared to be exhausted for purposes of federal habeas review.[352] In support of federal habeas relief on this claim, however, Dickens offered "material additional evidentiary support" for his *Strickland* claim—that were not merely duplicative or corroborative of facts presented in state court. Instead, the facts fundamentally altered the legal claim.[353] Presented with materially new facts in support of a claim that was raised in state court, the federal court had two options—bar the new factual evidence from federal review under *Pinholster* and deny relief or treat the claim as procedurally defaulted insofar as the "new [material] evidence ... was not fairly presented to the state courts."[354]

Although both options seem to result in a defeat for the prisoner, the latter option—procedural default—actually provides an opportunity to the prisoner post-*Martinez*. Specifically, if a claim is deemed defaulted when key facts are not presented in state court, then the prisoner might be able to argue that the reason for the default—the failure to develop facts—was ineffective assistance of counsel under *Martinez*. If, per *Martinez*, the failure to appoint postconviction counsel is treated the same as ineffective assistance of postconviction counsel, then the failure to effectively litigate a claim ought to be deemed functionally equivalent to failing entirely to

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determination that Barnett's claims should *not* have been procedurally defaulted, to enable them to remain procedurally defaulted under *Martinez*.").

351. 688 F.3d 1054, 1072-73 (9th Cir. 2012). The Ninth Circuit has agreed to rehear the case en banc so the panel decision will be vacated. Dickens v. Ryan, 704 F.3d 816, 817 (9th Cir. 2013). However, regardless of how the case is ultimately resolved, the fact pattern illustrates the potential prominence of *Martinez* in future federal habeas litigation.

352. *Dickens*, 688 F.3d at 1057.

353. *Id.* at 1070.

354. *Id.*

raise a claim. Indeed, this is exactly what the three-judge panel held in *Dickens*.[355]

The court held that the failure of the prisoner to present material evidence in support of his claim to the state courts resulted in a procedural bar.[356] However, the court held that ineffective assistance of postconviction counsel in failing to develop these facts in state court may provide the cause and prejudice necessary to overcome the procedural barrier. Stated more directly, the court recognized that "the newly announced rule in *Martinez* may provide a path for Dickens to establish cause for the procedural default of his *newly-enhanced claim* of ineffective assistance of sentencing counsel, if he can show that the claim is substantial and that his PCR counsel was ineffective under *Strickland*."[357] In other words, by *enhancing* an old claim with material new facts, the prisoner may be able to sidestep the limitations announced in § 2254(d) and the barrier to factual development articulated in *Pinholster*.[358]

The *Dickens* application of *Martinez* is sufficiently important that it is worth breaking it into four analytic steps: First, the proffer of material new facts in federal court can result in a default because the claim is fundamentally different than the claim presented in state court.[359] Second, a default can be overcome through a showing of ineffective assistance of postconviction counsel under *Martinez*.[360] Third, if a claim is defaulted and then the default is overcome, the

355. *Id.* at 1072-73.

356. *Id.* at 1070.

357. *Id.* at 1072 (emphasis added). This argument is substantially enhanced by the *Trevino* decision. The essence of *Trevino* is an emphasis on meaningful, full and fair state processes. Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (emphasizing the import of a "meaningful opportunity" to litigate a claim). If ineffective postconviction counsel deprived the prisoner of a meaningful opportunity to litigate the claim, then federal review ought to be recognized as appropriate. *Id.*

358. I have previously argued that by advancing substantially new facts, a claim may be considered unadjudicated such that § 2254(d) does not apply. Marceau, *supra* note 118, at 160. Specifically, I argued that "if the claim presented to the federal habeas court is materially different than the claim presented to the state court, then § 2254(d) would not apply," and moreover, if that claim was not fully developed because of any inadequacies or unfairness in the state process, I argued, there must be grounds to excuse the procedural default. *Id.* at 157-58 ("Ordinarily, when a prisoner seeks to demonstrate cause and prejudice, he is pursuing an *entirely new* claim that came to light after the state postconviction proceedings had already concluded.").

359. *See Dickens*, 688 F.3d at 1070.

360. *Id.* at 1071.

claim was not "adjudicated on the merits" under § 2254(d)(1).[361] Fourth, a claim that was not adjudicated on the merits is reviewed *de novo*, and new evidence is permitted to be considered by the federal court.[362]

Dickens, then, differs from *Barnett* insofar as the claim—ineffective assistance of trial counsel—was actually presented to the state courts in *Dickens*.[363] In *Barnett* the claim was denied on procedural grounds in state court,[364] but in *Dickens* the claim—absent new facts developed in federal court—was denied on the merits.[365] Barnett wanted his exact same claim to be adjudicated by a federal court,[366] and Dickens wanted the federal court to characterize his claim as sufficiently new such that a federal court would be permitted to hear it.[367] But there is no apparent reason to treat these two situations differently. Both prisoners arrived in federal court unable to litigate a substantial claim of constitutional injury because of the errors of their postconviction counsel. It would seem incongruous to treat those who failed to raise a claim at all better than those who raised a claim in a defective, undeveloped, or unreasonable manner.[368] The "equitable" exception[369] would seem to have equal traction in either circumstance.

Dickens and *Barnett,* as well other cases recognizing similar applications of the *Martinez* rule,[370] tend to substantially reinvigorate federal habeas review toward a non-innocence orientation. Just

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361. *See id.* at 1072-73.

362. *See id.* at 1072.

363. *Id.* at 1068.

364. Barnett v. Roper, No. 4:03CV00614 ERW, 2013 WL 1721205, at *5 (E.D. Mo. Apr. 22, 2013).

365. *Dickens*, 688 F.3d at 1068.

366. *Barnett*, 2013 WL 1721205, at *1-2.

367. *Dickens*, 688 F.3d at 1068-69.

368. Justice Sotomayor, however, predicted that this is exactly the result of the Court's *Pinholster* decision. Cullen v. Pinholster, 131 S. Ct. 1388, 1418-19 (2011) (Sotomayor, J., dissenting).

369. *But see* Martinez v. Ryan, 132 S. Ct. 1309, 1319-20 (2012).

370. *See, e.g.*, Schad v. Ryan, No. 07-99005, 2013 WL 791610, at *5 (9th Cir. Feb. 26, 2013) (concluding "that Schad's new factual allegations set forth a new or different claim that was procedurally defaulted and this is 'substantial,'" and therefore a remand for a *Martinez* inquiry is justified), *rev'd*, 133 S. Ct. 2548 (2013); Castillo v. Haws, No. 1:12-cv-00302-LJO-BAM-HC, 2012 WL 5288813, *5 (E.D. Cal. Oct 23, 2012) (citing *Dickens* approvingly but finding that the new facts did not, in that instance, materially alter the claim) (report and recommendation), *aff'd*, 2013 WL 856556 (E.D. Cal. Mar. 6, 2013).

as the AEDPA and *Pinholster* threatened the largest curtailment of federal habeas oversight in decades,[371] *Martinez* holds the promise of restoring a sense of balance and equipoise to the field. Such an application is consistent with the scholarly view that federal habeas must, at the very least, ensure that the state court process is full and fair.[372] And such applications isolate innocence as substantially irrelevant to the right of a prisoner to obtain meaningful federal review.[373] At this point, it is far too early to make definitive predictions[374] about the long-term application of the procedural trilogy culminating in *Martinez*, but there is reason for optimism that the cumulative effect is a "converging pressure" to recognize the right of a prisoner to a full and fair opportunity to demonstrate the unconstitutionality of his conviction.[375] The remaining task is to consider the most likely limits on the broad, proceduralist application of *Martinez*.

IV. READING THE TEA LEAVES: GAUGING THE IMPORT OF THE *MARTINEZ* LINE OF CASES

In just the one year since it was decided, *Martinez* has been the source of considerable hope for habeas petitioners and academics who support, at the very least, a federal habeas review that

371. In *Pinholster* the majority opinion and Justice Sotomayor's dissent clashed over what sort of circumstances present a "new claim" such that *Pinholster* does not apply. *Compare* Cullen v. Pinholster, 131 S. Ct. 1388, 1401 n.10 (2011), *with id.* at 1418-19 (Sotomayor, J., dissenting). The robust application of *Martinez* in cases like *Dickens* substantially answers this question—all material new facts can render an old claim new and thus defaulted.

372. *See, e.g.*, Marceau, *supra* note 118, at 137.

373. The robust use of *Dickens* has not always proven successful. *See, e.g.*, Foley v. White, No. 6:00-552-DCR, 2013 WL 375185, at *7, *10-13, *15 (E.D. Ky. Jan. 30, 2013) (holding that the appellant's ineffective assistance of counsel claims were not procedurally defaulted, and, to the degree that they might have been, the underlying actions of his counsel did not rise to the level of substantial, nor did they prejudice the appellant), *amended by* 2013 WL 990828 (E.D. Ky. Mar. 12, 2013).

374. Few would be better at predicting the decision's long term impact than the writers on the Habeas Blog. Their assessment is cautious, but forcefully concludes that cases like *Dickens* have considerable grounding in *Martinez*. Jonathan Kirshbaum, *Habeas Corpus—Martinez vs. Pinholster—Who Wins?*, HABEAS CORPUS BLOG (Mar. 11, 2013), http://habeascorpusblog.typepad.com/habeas_corpus_blog/2013/03/habeas-corpus-martinez-vs-pinholster-who-wins.html.

375. Freedman, *supra* note 42, at 592.

safeguards against unfair state procedures.[376] Others, however, have predicted that *Martinez* will make no material difference.[377] Accordingly, it is necessary to consider some of the most salient limitations that have been urged by courts and commentators.[378] Most of these limitations can be derived from the rather caged reasoning of the *Martinez* decision itself. As Chief Justice Roberts has observed, "We were unusually explicit about the narrowness of our decision."[379]

Specifically, three categories of limits could be derived from the holding of *Martinez* itself: (1) the prisoner's state court system only permitted him to raise his ineffective assistance of trial counsel claim on postconviction review—it could not be done on direct appeal;[380] (2) the prisoner was completely denied counsel on postconviction review or his postconviction attorney's performance rose to the level of traditional ineffective assistance; and (3) the defaulted claim at issue was a colorable ineffective assistance of trial counsel claim.[381] No one can convincingly argue that in the absence of gross and prejudicial errors by postconviction counsel, *Martinez* provides a gateway to relief. Accordingly, only the first and third aspects of the holding present potentially novel and unexplored limits on the application of this decision. Both of these limits are discussed immediately below, along with the prospect of additional

376. *See, e.g.*, Mary Dewey, Martinez v. Ryan*: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U. L. REV. 269, 270 (2012); Freedman, *supra* note 42; Primus, *supra* note 239, at 2606-07. Some early federal decisions recognize, if not a monumental shift, the early signs of a broadening access to federal habeas relief. *See, e.g.*, Gray v. Pearson, No. 12-5, 2013 WL 2451083, at *3-*4 (4th Cir. June 7, 2013) ("[B]ecause Gray's counsel are barred from fully identifying, investigating and presenting his potential *Martinez* claims, we vacate the judgment of the district court and remand the case for further proceedings.").

377. Nancy King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2431 (2013).

378. Indeed, one of the most well recognized critics of federal habeas review, Kent Scheidegger, provided his guidance on how best to limit *Martinez* within days of the decision. Kent Scheidegger, Martinez *is Narrow, For Now,* CRIME & CONSEQUENCES (Mar. 20, 2012, 11:42 AM), http://www.crimeandconsequences.com/crimblog/2012/03/martinez-is-narrow-for-now.html.

379. Trevino v. Thaler, 133 S. Ct. 1911, 1922-23 (2013) (Roberts, C.J., dissenting) (describing *Martinez*'s holding as having been "aggressively limiting").

380. The Court invented a new term to describe this aspect of its holding, "initial-review collateral proceedings." *Id.* at 1918.

381. The Court held that the ineffective assistance of counsel claim must be "substantial" and cited to precedent defining the Certificate of Appealability standard in order to define substantial. *See* Freedman, *supra* note 42, at 593 & n.16.

significant limitations on *Martinez*, based on pre-existing habeas rules.

In short, this final Part provides a candid assessment of the potential limitations of *Martinez*. Only by anticipating the proper scope of the *Martinez* rule is it possible to realistically assess the extent to which the full and fair model of habeas review is likely to be a lasting doctrinal rival to the guilt-focused recent history of federal habeas.[382]

A. The Possibility of Raising the Claim on Direct Appeal

The plain language of *Martinez* limits relief to those prisoners who could not have raised the constitutional claim on direct appeal. The Court emphasized that for Martinez "state collateral review [was] the first place [he could] present a challenge to his conviction."[383] The Court explained that if a claim cannot be raised on direct appeal, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim."[384] The question for lower courts, then, was whether the existence of a very slight opportunity—one that is for all intents and purposes theoretical—to raise a claim on direct appeal completely forecloses the prospect of relief under *Martinez*. Leading proponents of limited federal habeas oversight argued that *Martinez* was generally inapplicable outside of Arizona because most states do not contain similarly explicit bans on raising ineffective assistance of counsel on direct appeal.[385] Stated differently, the view was that

382. The focus here is on potential limits to *Martinez* not because *Holland* and *Maples* are immune. Quite the contrary, *Martinez* stands as the culmination of these cases and to the extent *Martinez* thrives or diminishes, the same would be expected of these narrower procedural rules.

383. Coleman v. Thompson, 501 U.S. 722, 755 (1991) (announcing the possibility of an exception that was later developed and adopted in *Martinez*).

384. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (noting that ineffective assistance of direct appeal counsel can serve as cause to overcome a procedural default). As Professor Primus has noted, the Court was "clearly concerned about precluding federal review of ineffective assistance of trial counsel claims when the state itself had created a procedural system that effectively prevented defendants from having an opportunity to raise the claims in state court." Primus, *supra* note 239, at 2612.

385. Arizona is not alone as a state that requires certain claims to be raised in the first instance during state postconviction review. *See, e.g.*, Gray v. Pearson, No. 12-5, 2013 WL 2451083, at *2 (4th Cir. June 7, 2013) ("Virginia requires prisoners to bring ineffective-

Martinez must be read as limited to those jurisdictions in which there is a de jure barrier to ever raising the claim in question on direct review.

In May 2013, just over a year after *Martinez* was decided, the Supreme Court eschewed such a narrow reading of *Martinez* in *Trevino v. Thaler*.[386] In *Trevino* the Court held that even when there is no explicit barrier to raising a claim on direct appeal, if it is not likely, or if it is unreasonably difficult to litigate the claim on direct appeal, then *Martinez* continues to apply.[387] *Trevino*, then, marks an unabashed reading of *Martinez* as endorsing the proceduralist vision of habeas that requires, at the very least, a full and fair opportunity to litigate each constitutional challenge to one's sentence or conviction.[388] Of course, *Trevino* does not resolve the question of whether *Martinez* applies to convictions from every state.[389] In Arizona ineffective assistance of counsel claims could not be raised until postconviction review,[390] and in Texas the state courts had

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assistance-of-trial-counsel claims, for the first time, in state collateral proceedings.").

386. Trevino v. Thaler, 133 S. Ct. 1911, 1916-21 (2013).

387. *Id.* at 1921.

388. The habeas scholarship had previously explained that due process ought to be understood as requiring a "*meaningful opportunity* to litigate the constitutionality of one's conviction." Marceau, *supra* note 118, at 144 n.207 (emphasis added). In *Trevino*, the Court rejected the Fifth Circuit's limitation on *Martinez* because the Texas system did not "offer most defendants a *meaningful opportunity* to present [their constitutional claim]." *Trevino*, 133 S. Ct. at 1921 (emphasis added). The impact of the full and fair procedural revolution in habeas could be far-reaching. Indeed, although the scholarship and Supreme Court cases are still in their infancy, federal courts are already applying the basic reasoning to produce some astonishing results. The Ninth Circuit, for example, recognized an exception to the longstanding and largely unquestioned rule that state prisoners may not challenge a prior state conviction on federal habeas even if the prior conviction enhanced the current sentence under review. Dubrin v. California, 720 F.3d 1095, 1098 (9th Cir. 2013). Citing the need for full and fair state court review as a precondition to eliminating federal habeas oversight, the Ninth Circuit held that a prior conviction could be challenged on federal habeas if there was no full and fair opportunity to challenge that conviction in prior state or federal proceedings. *Id.* By contrast, the Fourth Circuit recently held that when the same lawyer is appointed for state postconviction litigation and federal habeas review, the opportunity to fully and fairly present the federal court with a *Martinez* claim—that is, an assertion of cause based on the failures of postconviction counsel—is unduly restricted. *Gray*, 2013 WL 2451083, at *3-4 (holding that new habeas counsel must be appointed to pursue ineffective assistance claims against the state habeas lawyer).

389. Indeed, the Chief Justice has predicted that, instead, it will spawn "state-by-state litigation" to work out *Martinez*'s application in every jurisdiction. *Trevino*, 133 S. Ct. at 1923 (Roberts, C.J., dissenting).

390. *Id.* at 1914.

recognized that it is "virtually impossible" to litigate ineffective assistance on direct review.[391] A number of other states are less explicit. Professor Primus summarizes the process in several states:

> The state does not forbid the claims on direct appeal, but it does not provide any mechanism for expanding the record to substantiate the claims. Without the ability to supplement the record, most defendants are unable to raise the claims on direct appeal. In these states with a de facto requirement, the courts strongly encourage defendants to wait until postconviction proceedings to raise ineffective assistance of trial counsel claims that require additional development, and that tends to be the overwhelming state practice.[392]

Based on Primus's research, she has concluded that in the *vast majority of states*, as a practical matter, it is impossible to fully and fairly litigate claims of ineffective assistance of counsel on direct review.[393] Even when the record could be expanded on direct appeal so as to develop such a claim, quite often the individual has insufficient time to develop such a claim—typically less than thirty days from the date of his conviction—and the individual is likely still represented during this period by the trial attorney whose ineffectiveness is at issue.[394] Thus, although commentators are sure to criticize the seemingly malleable "meaningful opportunity" standard from *Trevino*, it seems clear that *Trevino* dictates that in

391. *Id.* at 1915. Professor Primus, who has meticulously studied the various state rules regarding raising claims of ineffective assistance of trial counsel, has concluded that in many states the prohibition on raising these claims on direct review is de facto, rather than strictly de jure. Primus has summarized the state laws regarding these procedures by noting that in "the majority of states ... defendants must wait until state postconviction proceedings to raise claims of ineffective assistance of trial counsel." Primus, *supra* note 239, at 2613. Significantly, however, Primus concedes that even in the class of states that she characterizes as prohibiting claims of ineffective assistance from being litigated on direct appeal, the prohibition "is de facto rather than de jure." *Id.* at 2614 n.39.

392. Primus, *supra* note 239, at 2614 n.39.

393. Primus, *supra* note 253, at 689. Professor Primus has also observed that "[a]lthough there are a handful of states that—like Arizona—explicitly require defendants to raise ineffective assistance of trial counsel claims in state postconviction proceedings, most states' procedures are not so clear." Primus, *supra* note 239, at 2618.

394. Primus, *supra* note 239, at 2618-19.

a large number of states, *Martinez* applies so as to ensure procedural fairness.[395]

Accordingly, although a number of states and commentators concluded that *Martinez* does not apply beyond Arizona because other states do not have the same absolute prohibition,[396] such a position is no longer tenable after *Trevino*. In *Trevino*, the Court recognized that a hyper-formalist reading of *Martinez* is ill suited to the purpose of the rule.[397] It may be that some states provide (or will provide) an opportunity to litigate ineffective assistance of counsel on direct review that is full and fair as required by due process.[398] However, in the absence of a realistic—as opposed to merely theoretical—possibility of raising claims on direct appeal, the very purpose of *Martinez* in ensuring that prisoners enjoy a full and fair opportunity to raise their constitutional claims in state court is undermined.[399] Accordingly, in light of the *Trevino* gloss on *Marti-*

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395. Out of Texas alone, the Supreme Court immediately remanded six capital sentences for reconsideration in light of *Trevino*. Micheal Graczyk, *Death Row Reviews: U.S. Supreme Court Orders 6 Cases Reviewed, Including 'Texas 7'*, HUFFINGTON POST (June 3, 2013), http://www.huffingtonpost.com/2013/06/03/death-row-reviews-supreme-court-orders-6-cases_n_3379280.html.

396. Primus, *supra* note 239, at 2618 ("In Texas, for example, defendants are theoretically permitted to raise ineffective assistance of trial counsel claims on direct appeal. There is no explicit ban as there is in Arizona. As a practical matter, however, there is no realistic mechanism for expanding the trial record on direct appeal such that ineffective assistance of trial counsel claims that require extrarecord development typically must be reserved for state postconviction proceedings."); *id.* at 2619 (noting that within just one year of the decision, more than a half-dozen states had "convinced courts that they are not subject to *Martinez*'s requirements because their state procedures do not facially require that all ineffective assistance of trial counsel claims be raised in postconviction proceedings").

397. *See* Trevino v. Thaler, 133 S. Ct. 1911, 1914-15 (2013). Within weeks of the *Martinez* decision the Fifth Circuit held that *Martinez* did not apply to Texas, which has a reputation for being among the worst offenders of fair postconviction procedures. *Trevino* rejected this conclusion, and the impact of the decision, then, is to emphasize that *Martinez* is serious in recognizing the importance of postconviction counsel. *See id.*

398. Marceau, *supra* note 42, at 36 ("[A] process that fails to provide a meaningful opportunity to discover and produce evidence, fails to provide an opportunity to confront witnesses where necessary, and fails to make relevant findings of fact will not be full and fair.").

399. Martinez v. Ryan, 132 S. Ct. 1309, 1317 (2012) (noting that ineffective assistance of direct appeal counsel can serve as cause to overcome a procedural default). As Professor Primus has noted, the Court was "clearly concerned about precluding federal review of ineffective assistance of trial counsel claims when the state itself had created a procedural system that effectively prevented defendants from having an opportunity to raise the claims in state court." Primus, *supra* note 239, at 2612.

nez, courts must take a clear-eyed look at the state procedures and practices and assess whether, in a particular case, the prisoner had one full and fair opportunity to realistically litigate his constitutional claim.[400] When the time is too short or the procedures otherwise do not allow for a full and fair airing of a constitutional claim on direct review, the ineffective assistance of postconviction counsel in failing to fully litigate the claim should suffice to invoke the equitable protections of *Martinez*.[401]

In sum, *Martinez* has already proven itself sufficiently agile and adaptable so as to overcome one of the most anticipated limitations on its application. *Trevino* signals to lower courts a need to adhere to the spirit of *Martinez*—safeguarding procedural fairness—and suggests that formalistic limitations on the right to full and fair review are not likely to be upheld.

B. Right to Trial Counsel as a Unique Protection for the Innocent

As noted above, in *Martinez* the Court addressed only the question of whether a defaulted ineffective assistance of trial counsel claim could be overcome. The Court was not presented with the question of whether other, non-record-based claims that are generally or exclusively litigated through postconviction review are similarly deserving of the *Martinez* rule.

Particularly in light of the general reasoning of *Trevino*, it would seem strange to conclude that for other claims, which like a claim of inadequate representation at trial cannot be fully and fairly litigated on direct appeal, the equitable considerations are less

400. Professor Primus has persuasively argued that states are stuck in something of a procedural trap. They can either provide adequate procedures (including competent counsel) to litigate the claims in state postconviction review or they must be willing to forego arguments that the claims are defaulted. *See* Primus, *supra* note 239, at 2615-16.

401. Justice Scalia predicted that *Martinez* would not be a costless right. The decision, he predicted, "will impose considerable economic costs on the States." *Martinez*, 132 S. Ct. at 1327 (Scalia, J., dissenting). It seems correct to assume that if states fail to provide competent counsel capable of fully and fairly litigating claims that could not have been raised on direct review, then *Martinez* allows for an equitable exception from procedural default.

compelling.[402] Indeed, dissenting in *Martinez*, Justice Scalia candidly quipped:

> [N]o one really believes that the newly announced 'equitable' rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised.... The Court's soothing assertion that its holding "addresses only the constitutional claims presented in this case," insults the reader's intelligence.[403]

In spite of Justice Scalia's confident protestations to the contrary, some lower courts have endorsed a narrow, right-to-counsel-only reading of *Martinez*. In *Hodges v. Colson*, for example, the Sixth Circuit emphasized that *Martinez* holds only that ineffective post-conviction counsel may "establish cause for a procedural default of a claim of ineffective assistance *at trial*" and thus reasoned that no other defaulted claims could be excused by ineffective postconviction counsel.[404] The court of appeals concluded that the Supreme Court "meant exactly what it wrote" and held that *Martinez* does not apply to any claim other than a deprivation of the right to adequate trial counsel.[405] Specifically, the court held that not even a claim of

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402. Wiseman, *supra* note 248, 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)).

403. *Martinez*, 132 S. Ct. at 1321 (Scalia, J., dissenting) (internal citation omitted).

404. Hodges v. Colson, 711 F.3d 589, 602 (6th Cir. 2013) (quoting *Martinez*, 132 S. Ct. at 1315). Nearly identical reasoning was applied by a divided Ninth Circuit panel. Hunton v. Sinclair, 732 F.3d 1124, 1127 (9th Cir. 2013) (concluding that it was "plain that the [Martinez] exception extended no further" than ineffective assistance of trial counsel claims).

405. *Hodges*, 711 F.3d at 603. In the wake of *Trevino*, it is largely untenable to accept that the Court "meant exactly what" it said in *Martinez*. Indeed, the Chief Justice's dissent is largely a critique of the Court's willingness to flexibly apply *Martinez* without regard to the plain language of the holding. Trevino v. Thaler, 133 S. Ct. 1911, 1923-24 (2013) (Roberts, C.J., dissenting). Moreover, it is worth noting that some passages in *Martinez* suggest that the Court's analytic inquiry was not quite so limited:

> *Coleman*, however, did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. The alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner's claims had been addressed by the state habeas trial court.

inadequate assistance of *appellate* counsel, which cannot be raised until postconviction review, could be excused under the *Martinez* rule.[406] Only a showing of innocence would suffice to overcome the default, the court of appeals explained, because except as to claims involving ineffective assistance of trial counsel, the holding of *Coleman v. Thompson* "is still the law."[407]

The result in cases like *Hodges*, while defensible based on the plain text of the decision, is arguably at odds with the spirit of *Martinez* insofar as *Martinez* reflects a procedural preoccupation with ensuring a minimally full state process. Commentators have rightly embraced *Martinez* as the last best hope for meaningful federal habeas review.[408] Moreover, it would seem largely untenable to suggest, post-*Trevino*, that the *Martinez* decision must be read narrowly and not applied beyond the strict language of the decision.[409]

But the significance of this dispute should not be understated. Lurking just below the surface of this very issue is the central question presented in this Article: whether innocence or procedural fairness enjoys primacy. If *Martinez* is to be read narrowly, why would it be that the right to *trial* counsel should be read as uniquely deserving of this special layer of procedural protection? The answer, perhaps, could be that this procedure—an exceptional protection for the trial counsel right alone[410]—reflects an innocence-preoccupied notion of federal habeas review. Simply put, the right to trial counsel enjoys a status as the protector of innocence and truth par

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Martinez, 132 S. Ct. at 1316.

406. *Hodges*, 711 F.3d at 602.

407. *Id.* at 603.

408. *See, e.g.*, Dewey, *supra* note 376, at 269; Freedman, *supra* note 42, at 1106.

409. The Ninth Circuit addressed the exact issue decided in *Hodges*—whether the *Martinez* exception to procedural default applies to claims of ineffective assistance of appellate counsel—and reached the opposite result. Nguyen v. Curry, 736 F.3d 1287, 1294 (9th Cir. 2013) (holding that there is no reason to distinguish between ineffective assistance of trial and appellate counsel in this context). *But see* Ponis v. Hartley 534 F. App'x. 801, 805 (10th Cir. 2013) ("[T]he Court in *Martinez* made clear that it announced a 'narrow exception' that applies only with respect to 'cause for a prisoner's procedural default of a claim of ineffective assistance at trial.'").

410. In *Trevino*, the Court explained that the *Martinez* holding was based, in part, on a recognition that the right to counsel "at trial is a bedrock principle in our justice system .... Indeed, the right to counsel is the foundation for our adversary system." 133 S. Ct. at 1917 (quoting *Martinez*, 132 S. Ct. at 1317).

excellence.[411] Time after time in all sorts of different contexts the Supreme Court has recognized the trial-counsel-right as uniquely deserving of protection precisely because of the right's perceived affiliation with protecting the innocent. Indeed, the Court in *Gideon* linked the right to counsel with the protection of the innocent, explaining that without counsel "though [the accused] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[412] Certainly other rights, including the *Brady* right are strongly linked to innocence,[413] but time and again in a variety of contexts the Court has recognized the counsel-right as the protector of innocence par excellence.[414]

In short, it is possible that *Martinez* will be a limited exception to the general procedural default rules such that only failures by post-conviction counsel to adequately press claims relating to trial counsel will suffice.[415] The question is fundamentally one of just how "narrow [the] exception" in *Martinez* will be.[416]

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411. Marceau, *supra* note 107, at 2484 (explaining that in some instances rights are directly compared to the right to counsel and the effect is often that "the right in question is deemed undeserving of vindication because, compared to *Gideon*, the other right is too *insubstantial* and *unrelated* to *innocence* to warrant constitutional remediation"). At issue in *Martinez* is the *Strickland* right, which perhaps has a slightly more tenuous connection to protecting the innocent than the lodestar, *Gideon* itself. However, lower courts seemed to agree that *Strickland,* like *Gideon*, applied retroactively. *See, e.g.*, Perron v. Perrin, 742 F.2d 669, 672 (1st Cir. 1984) (applying *Strickland* to habeas petition filed in 1983); Wise v. Smith, 735 F.2d 735, 737 (2d Cir. 1984) (applying *Strickland* to habeas petition filed in 1979); United States v. Costanzo, 740 F.2d 251, 259 (3d Cir. 1984) (applying *Strickland* to habeas petition circa 1979). Of course, the explanation for this retroactive application might be simply that *Strickland* itself was decided on habeas review.

412. Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

413. *See, e.g.*, Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 591 (2002) (explaining that the *Brady* right is predicated on a desire to protect the innocent from punishment); *see also* Garrett, *supra* note 83, at 109-10 (describing *Brady* as an "innocence-related" claim).

414. *See* Marceau, *supra* note 107, at 2484.

415. Without conceding that *Martinez* is limited to postconviction efforts to vindicate the *Gideon* right, Ty Alper has noted that *Martinez* is undoubtedly a critical case for allowing defendants to "actualize *Gideon's* guarantee." Alper, *supra* note 311, at 841; *id.* at 846 (arguing that *Martinez*, though not a "broad right to postconviction counsel [represents] a narrower yet critical right to raise a *claim* of ineffective assistance of trial counsel in at least one forum").

416. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012) (describing the holding as a "narrow exception" to *Coleman*). Presently, the lower courts are divided on this question. Indeed, there is considerably less consensus about how *Martinez* applies then there was about the

Looking to the impact of the right to counsel on other doctrines, it has been observed that "[i]t is the abstract or idealized conception of *Gideon*—its primacy, scope, and innocence-serving function—that justifies limiting the vindication of other rights."[417] If this reasoning is applied in the *Martinez* context, then the most promising guarantee of a procedural fairness orientation in federal habeas will have been passed over for a continued preoccupation with innocence.[418]

C. The Limits of § 2254(e)(2) on Factual Development

In addition to the potential limitations on *Martinez* that can be recognized from the plain text of the decision, discussed above, other limits can be gleaned from an understanding of how the rule might fit into the larger habeas context. One of the most significant such limits is discussed in this Section.

In *Martinez*, the Supreme Court only addressed the "equitable" question of whether the ineffective assistance of postconviction counsel might serve as the basis for overcoming a procedural default.[419] The Court had no occasion to address some of the peripherally relevant statutory provisions that govern federal habeas review. Perhaps most important among the statutory rules that threaten a conflict with *Martinez* is 28 U.S.C. § 2254(e)(2), which governs the development of new facts in federal court.[420]

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seemingly opaque pre-*Martinez* doctrine. *Compare* Nguyen v. Curry, 736 F.3d 1287, 1294 (9th Cir. 2013) (recognizing that *Martinez* applies not only to claims relating to innocence like the right to effective trial counsel, but also to claims entirely divorced from innocence like ineffective assistance of appellate counsel), *with* Hunton v. Sinclair, 732 F.3d 1124, 1127 (9th Cir. 2013) (adopting a rigidly narrow reading of *Martinez* as limited exclusively to claims of ineffective trial counsel).

417. Marceau, *supra* note 107, at 2490.

418. In fairness, it must be acknowledged that treating *Martinez* as entirely disaggregated from a myopic right-to-counsel focus will invite *Martinez*-styled arguments for a variety of defaulted constitutional claims: for example, claims of prosecutorial nondisclosure of exculpatory evidence, prosecutorial nondisclosure of impeachment evidence, ineffective assistance of direct appeal counsel, jury bias claims based on extrinsic evidence, and a variety of other claims that state rules or procedures do not allow to be fully and fairly vindicated through direct appeal. *See* MEANS, *supra* note 138, § 6:18, at 241 ("[D]irect appeals are generally limited to the trial court record, whereas extrinsic evidence is commonly considered in postconviction review proceedings.").

419. *Martinez*, 132 S. Ct. at 1313.

420. By its plain terms § 2254(e)(2) only applies to limit evidentiary hearings, but it has

The plain text of § 2254(e)(2) provides that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim."[421] The question, then, is how this rule interacts with a situation like that presented in *Martinez* where, because of ineffective assistance of postconviction counsel, the defendant did not develop the factual basis for the claim in state court. Is the failure of counsel fairly attributable to the prisoner himself such that new facts may not be introduced in federal court? On the one hand, pre-*Martinez* case law defining "failed" for purposes of § 2254(e)(2) has stated that a prisoner fails if the nondevelopment of facts is due to a "lack of diligence or some greater fault, attributable to the prisoner or ... *prisoner's counsel*."[422] On the other hand, if § 2254(e)(2) is understood as barring factual development because of the failures of counsel in all cases, then *Martinez* will prove itself a substantially hollow remedy—the very existence of "cause" under *Martinez* will amount to a "failure" under § 2254(e)(2). One who establishes a basis for the federal court to review the merits of the claim because of the failures of counsel would, by the same proffer, demonstrate a failure for purposes of § 2254(e)(2) that bars the factual development necessary to litigate the claim.

To put this in perspective, there are four general types of cases in which the application of § 2254(e)(2) might be of interest.

First, it could happen that the prisoner's attorney diligently pursues a hearing or other opportunity to develop the facts in state court and is unreasonably denied this opportunity. Just as before *Martinez*, on these facts, the petitioner is not at fault for the defective state court record, and thus § 2254(e)(2) does not bar a

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been interpreted to impose similar limits on prisoners who simply attempt to expand the paper record that may be reviewed by the federal court. Holland v. Jackson, 542 U.S. 649, 652-53 (2004).

421. 28 U.S.C. § 2254(e)(2) (2006). The statute provides for two extremely narrow exceptions: (1) a showing of innocence and a new rule of law made retroactive; or (2) a showing of innocence and a new discovery of fact. *Id.* For a more complete discussion, see *supra* Part II.B.2.d, discussing the impact of § 2254(e)(2). These exceptions demonstrate that § 2254(e)(2) cannot be read as trumping *Martinez* because *Martinez* purports to find a new form of cause and prejudice, but under the § 2254(e)(2) exceptions, a prisoner must always show innocence. Notably, however, innocence was an exception to procedural default long before *Martinez*. *See* Schlup v. Delo, 513 U.S. 298, 313-32 (1985).

422. Williams v. Taylor, 529 U.S. 420, 432 (2000) (emphasis added).

federal evidentiary hearing.[423] That is to say, *Martinez* does not change the inquiry in these circumstances.

The second possible intersection of § 2254(e)(2) and *Martinez* could arise if counsel requested an evidentiary hearing but did not comply with every state procedure in advancing the request. For example, perhaps the state courts require that a request for a hearing be made in writing, or that such a request be accompanied by particular documents, or something altogether more byzantine. Such rules exist in various jurisdictions, and a court may hold that the failure to dutifully comply with every aspect of such rules regarding requesting a hearing can constitute a "failure" for purposes of § 2254(e)(2). In other words, the failure to comply with procedural minutiae at the state court level may trigger § 2254(e)(2)'s harsh limitations.

Although it is conceivable that *Martinez* might be limited such that federal factual development is not permitted in these circumstances, there are principled reasons for doubting that this will be so. First, the *Martinez* case is grounded in principles of equity—the idea that it is unfair to hold a prisoner accountable for his post-conviction lawyer's failures—and it would be inequitable to conclude that the failure of counsel to follow state procedures should be suffered upon the client, just as *Martinez* holds that it is inequitable to place blame on the client for his counsel's complete failure to raise a claim.[424] Stated more directly, after *Martinez*, at least in certain circumstances, it is inappropriate for errors of counsel in failing to develop the claim in state court to be attributed to the prisoner.[425] Second, it would be odd in the extreme if a *Martinez* error by counsel provided cause and prejudice to overcome a state

423. *Id.* at 432-36.

424. *Martinez* itself avoids creating a new constitutional rule. *See Martinez*, 132 S. Ct. at 1315. However, it is because of the availability of procedures for full and fair review, like those provided under *Martinez*, that a direct constitutional question is avoided. Without a rule permitting federal review in the face of a patently unfair state process, there is room for a constitutional challenge. *See, e.g.*, Wiseman, *supra* note 248, at 996 ("There is, then, a strong argument under *Boumediene* that AEDPA cannot constitutionally foreclose the consideration of new evidence in federal court when petitioners have been denied a full and fair hearing at the state level."); *see also* Marceau, *supra* note 42, at 9-20.

425. Freedman, *supra* note 42, at 596 ("[It is] axiomatic that '[e]quity looks upon that as done that ought to have been done.'" (quoting 3 ROSCOE POUND JURISPRUDENCE 553 (1959))); *see also* Zupac, *supra* note 312, at 1359-70 (noting the limits of the agency law analogy when the postconviction lawyer is not acting in the best interest of the client).

rule that is, as a matter of federal law, deemed to be sufficiently adequate and independent to deserve deference (procedural default), but the same *Martinez* rule was insufficient to overcome a state rule that need not be tested for adequacy or independence under § 2254(e)(2).[426] Simply put, the sort of procedural rules that are at issue when a state court denies an evidentiary hearing might not be well established or regularly applied; indeed, a novel rule might be applied for the first time[427] or in a way that resembles a procedural trap.[428] Accordingly, if the violation of a rule that is *adequate*, as a matter of federal law, can be overcome through a showing of ineffective assistance of postconviction counsel, then *a fortiori* such a showing must suffice to overcome a violation of a state rule that has not been tested for adequacy.[429]

The third variation of the way in which *Martinez* and § 2254(e)(2) could interact involves a postconviction lawyer who complies with the various state procedures, is afforded adequate opportunity to develop a claim, and simply fails to do so.[430] At least where the

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426. Jeffrey C. Metzcar, Note, *Raising the Defense of Procedural Default Sua Sponte: Who Will Enforce the Great Writ of Liberty?*, 50 CASE W. RES. L. REV. 869, 896-97 (2000) ("When a federal court conducts *direct appellate review* of a state court judgment, the 'independent and adequate state ground' doctrine, whether it applies to substantive or procedural state grounds, is a jurisdictional matter. Therefore, the presence of an 'independent and adequate state ground' is a matter of immediate consequence on direct review. Because state courts must often address overlapping state and federal issues, federal courts on appeal may be uncertain whether the previous state decision rested primarily on state or federal law.").

427. *See* 2 FED. PROC., L. ED. § 3:92, at 585-86 (West 2003) (recognizing that in order to be adequate grounds for a default the state rule must be "supported by prior state practice," must not be "[n]ovel", must be "well established" and cannot be an "obvious subterfuge or arbitrary device").

428. *See* Lee v. Kemna, 534 U.S. 362, 375-88 (2002).

429. Another formulation of this same argument is to say that by satisfying the "cause" standard required to overcome a default, a *Martinez*-petitioner necessarily satisfies the diligence (non-failure) standard under § 2254(e)(2). The Supreme Court's decisions provide substantial authority for this position insofar as they have linked the "failed" standard under § 2254(e)(2) to the pre-AEDPA standard under which a failure to develop facts was excused. *See* Williams v. Taylor, 529 U.S. 420, 444 (2000) (equating the diligence required under § 2254(e)(2) with the traditional cause standard required in the procedural default context); Keeney v. Tamayo-Reyes, 504 U.S. 1, 8-10 (1992).

430. An analogy might be drawn between these facts, and the Court's recognition that for equitable purposes, the same concerns arise whether a prisoner is appointed ineffective counsel or he is appointed no attorney at all. Martinez v. Ryan, 139 S. Ct. 1309, 1317 (2012) ("The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law.").

failure to develop the record ultimately leaves the claim untenable, a failure to develop facts—leading to something tantamount to a default—is the same as the failure to raise a claim: an actual default. If the failure to raise a claim entirely is grounds for excusing a default, then a lawyer's failure to meaningfully develop the same claim must also provide a basis for overcoming the default.[431] That is to say, when a claim is left in barebones form, undeveloped and implausible, denying the necessary development of the facts in support of that claim in federal court based on the plain language of § 2254(e)(2) once again would make no sense.[432] To read § 2254(e)(2) as a limit on *Martinez* in cases in which the prisoner does not raise, or factually develop, the claim is essentially to hold that *Martinez* does not in the slightest displace the prior *Coleman* precedent. If the procedural default is overcome through *Martinez* only to have a factual roadblock under § 2254(e)(2), *Martinez* has not changed the equities of postconviction litigation, just the labeling as to why one loses.[433] As Professor Freedman has insightfully summarized the situation: "*Martinez* will do nothing to help the federal habeas petitioner if the District Court considers his

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431. Some of the Justices have already expressed this very point. *See* Gallow v. Cooper, 133 S. Ct. 2730, 2731 (2013) (Breyer, J., respecting denial of the petition for writ of certiorari) ("I recognize that no United States Court of Appeals has clearly adopted a position that might give Gallow relief. But I stress that the denial of certiorari here is not a reflection of the merits of Gallow's claims."). Justice Breyer explained that a claim in which postconviction counsel failed to effectively litigate is no different than a claim that counsel failed to raise altogether. Remarking on the former, he noted that:

> A claim without any evidence to support it might as well be no claim at all. In such circumstances, where state habeas counsel deficiently neglects to bring forward "any admissible evidence" to support a substantial claim of ineffective assistance of trial counsel, there seems to me to be a strong argument that the state habeas counsel's ineffective assistance results in a procedural default of that claim.

Id.

432. At least one federal court of appeals has concluded, however, that postconviction counsel's failure to develop facts in support of a claim might be distinguished from the circumstances in which the underlying claim was entirely undeveloped. *See* Mann v. Moore, No. 13-11322-P, slip op. at 11 (11th Cir. Apr. 9, 2013) ("This Court also harbors serious doubts that *Martinez* applies to permit Mann to challenge the failure of his state collateral counsel to present ... evidence when the underlying constitutional claim was not procedurally defaulted.").

433. Instead of being denied federal review because of a procedural default, one would be denied the opportunity to develop a claim under § 2254(e)(2). The result is just as inequitable under either label.

underlying claim of trial court ineffectiveness on the very record that he asserts was flawed by the ineffective assistance of state post-conviction counsel."[434]

The fourth, final, and potentially most potent threat to *Martinez*'s robust application in this context arises in *pro se* state postconviction litigation. Although Martinez was appointed state postconviction counsel who could be faulted for the failure to raise a colorable claim of constitutional injury, in many instances a noncapital prisoner will not enjoy the assistance of counsel for postconviction litigation. Because there is generally no right to counsel under state or federal law for noncapital prisoners, perhaps the most common interaction of *Martinez* and § 2254(e)(2) could be the noncapital, *pro se* defendant who fails to properly raise a viable claim of constitutional error. Such cases will present courts with a difficult choice. On the one hand, *Martinez* is most directly and explicitly concerned with the inequity of suffering upon a prisoner the errors and omissions of an incompetent lawyer so as to deprive the prisoner of any meaningful opportunity to litigate a constitutional claim. On the other hand, if *Martinez* represents more broadly the realization that federal review is required in the absence of a meaningful opportunity to litigate federal constitutional claims in state court, then states that refuse counsel to postconviction prisoners could be opening the door to broader federal review.[435] It is simply too premature to make predictions about how courts will eventually apply *Martinez* in the context of noncapital prisoners who are not appointed postconviction counsel, but this certainly stands as the most daunting challenge under § 2254(e)(2) to a robust application of *Martinez* and, therefore, the proceduralist model of habeas review.

In short, one of the most debilitating limits on *Martinez* could be a strict reading of § 2254(e)(2) such that even though the default is forgiven, the impediment to factual development is not. Because the inability to develop a factual record on habeas would prove fatal to most such claims,[436] reading § 2254(e)(2) as trumping *Martinez*

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434. Freedman, *supra* note 42, at 596.

435. *Cf.* Primus, *supra* note 239, at 2620 (arguing that states must either provide adequate procedures, including competent counsel, or forego the benefits of the procedural default regime).

436. Marceau, *supra* note 176, at 391 (explaining the importance of factual development to federal habeas litigation).

would be a substantial death-knell to the full and fair model of habeas adjudication.[437] Particularly in light of *Trevino*, however, such a reading of *Martinez* seems unlikely to prevail. The thrust of the Court's *Martinez*-trilogy is to emphasize the need for federal courts to intervene when the state process fails to sufficiently protect the federal constitutional right in question—that is, when the state process is not full and fair. *Trevino* teaches that *Martinez* is a rule of function rather than formality, and reading § 2254(e)(2) as barring factual development for the very failures of process that justify *Martinez* relief would be incongruous. If state courts must abide by the rule that they provide minimally fair postconviction procedures—a meaningful opportunity to challenge the constitutionality of their conviction—then § 2254(e)(2) must not serve as a barrier to *Martinez* relief.

D. The Federal Statute of Limitations

An additional potential limitation on the availability of *Martinez*-based relief is the federal statute of limitations.[438] The statute of limitations is designed to facilitate the goal of speedier federal review and greater finality for state convictions by requiring that any federal claims be raised, if at all, within one year of the state conviction becoming final.[439] There are at least a couple of ways in which the viability of *Martinez* depends on the application of the federal statute of limitations.

First, it is conceivable that the errors of post-conviction counsel would be of such a nature as to deprive the prisoner of an opportunity to timely file his federal petition. If, for example, the State rules do not require that post-conviction petitions be filed within one year of the conviction, then a post-conviction lawyer might file a petition that is timely under state law but that will preclude the filing of a timely federal habeas petition.[440] In these circumstances the only

437. At least some courts appear to have recognized the need to avoid such a conundrum. *See, e.g.*, Collazo v. Curley, No. 11-6 Erie, 2012 WL 2026830, at *4-5 (W.D. Pa. June 5, 2012).

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

439. *See id.* (permitting tolling for the time during which the prisoner pursues state postconviction remedies).

440. The federal statute of limitations is one year and is tolled only after a state post-conviction is properly filed and pending in state court. § 2244(d)(1)-(2).

reason for missing the federal deadline for filing was an error or oversight of counsel. In such circumstances it is unclear whether the heightened standards of equitable tolling[441] would always permit the federal filing, but it is arguable that *Martinez* ought to excuse the missed deadline. Specifically, if the errors of post-conviction counsel can serve as a basis for overcoming a default, then presumably errors by counsel should also serve as a basis for tolling or excusing the federal statute of limitations.

In addition, the federal statute of limitations may be implicated when prisoners attempt to litigate claims based on new evidence discovered during federal habeas review. As discussed above, in any case in which habeas discovery leads to the development of *new evidence that materially alters* the underlying claim,[442] arguably *Martinez* applies so as to permit the prisoner to overcome a procedural default by pointing to the failures of postconviction counsel to develop the claim. The claim is "new" in the sense that there are materially different facts in support of the claim, and it is sufficiently different from the exhausted claim so as to be considered unadjudicated by the state courts. In this context, the Supreme Court's relation back doctrine may prove to be a barrier to *Martinez* relief.

The Supreme Court has held that a prisoner can add claims to an existing federal habeas petition after the running of the one-year statute of limitations only if the claims relate back to one of the timely filed claims.[443] Specifically, the Court has explained that amendments to habeas petitions are permitted only insofar as they arise out of "the same core facts as the timely filed claim."[444] Obviously, a single claim generally cannot simultaneously arise out of the same facts—so as to satisfy the statute of limitations—and be based on materially different facts that fundamentally alter the claim, so as to trigger *Martinez*'s exception to the procedural default rules.[445]

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441. Holland v. Florida, 560 U.S. 631 (2010) (recognizing the need for a flexible approach that considers negligence by counsel, but does not treat it as determinative and noting that simple errors in miscalculating deadlines will not suffice for equitable tolling).

442. *See* Dickens v. Ryan, 688 F.3d 1054, 1070 (9th Cir. 2012) (finding a claim to be "new" insofar as there was "material additional evidentiary support").

443. *See* Mayle v. Felix, 545 U.S. 644, 654-64 (2005).

444. *Id.* at 657.

445. Nguyen v. Curry, 736 F.3d 1287, 1296-97 (9th Cir. 2013) (concluding that a claim that

A simple fact pattern will help illustrate the conundrum. Assume that a state prisoner raises a claim of ineffective assistance of trial counsel based on counsel's failure to present compelling and available mitigation evidence during a capital sentencing proceeding. In state postconviction proceedings the claim is raised under the Sixth Amendment but the factual support is limited to a few conclusory allegations relating to the availability of the prisoner's mother to testify about the fact that he was bullied as a child. After relief is denied in state court, a federal habeas petition is filed, in which an ineffective assistance of trial counsel at sentencing claim is also raised. After filing the petition, federal habeas counsel seek to expand the record and obtain an evidentiary hearing to develop evidence showing considerable additional mitigating evidence such as child abuse and brain disorders. The new evidence is typically not permitted to be considered by the federal court.[446] However, if the prisoner can show that the new evidence materially alters the underlying claim so as to effectively render it a new claim (for example, a new claim of ineffective assistance at sentencing), then the federal court can permit the new evidence.[447] In such circumstances, *Martinez* may provide a basis for excusing the default of the *new* claim, but if the new evidence emerged after the expiration of the one-year statute of limitations, as is often the case, then it is conceivable that relief could nonetheless be precluded.

Stated differently, unless new claims—or material new facts in support of claims—are discovered prior to filing the initial federal habeas petition, overcoming a default based on *Martinez* could be substantially more difficult than originally anticipated because of the statute of limitations. Neither commentators nor courts have yet confronted this procedural conundrum. However, permitting such a limit on *Martinez* would subvert the decision's core promise of a meaningful opportunity to litigate constitutional challenges to one's conviction. The opportunity need not be perfect and the prisoner might not avail himself of the opportunity, but the proceduralist promise, embodied in cases like *Martinez*, is that every prisoner

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was cognizable because of the *Martinez* exception satisfied the relation back doctrine insofar as the key facts underlying the claim relate back to factual (though not legal) allegations contained in the initial, timely habeas petition).

446. *See, e.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1399 (2011).

447. *See, e.g.*, Marceau, *supra* note 118, at 157; Wiseman, *supra* note 248, at 968.

shall have a meaningful opportunity to litigate the federal constitutional challenges to his conviction. When ineffective assistance of postconviction counsel deprived a prisoner of the opportunity for such a review, the Court overturned prior precedent and carved out an exception to a longstanding rule.[448] Likewise, where the federal statute of limitations threatens to act as the barrier to a full and fair review of one's claims—claims that were not meaningfully reviewed in state court—the Court ought to recognize an exception.

As a doctrinal matter, the most plausible way around the statute of limitations problem that will arise in some *Martinez* litigation is to recognize the interaction of *Holland v. Florida* and *Martinez v. Ryan*. Operating in conjunction, *Martinez* would permit a prisoner the opportunity to raise a *new* claim on federal habeas review based on newly discovered facts when the reason the claim was not raised below was ineffective assistance, and *Holland* could be read as equitably tolling the statute of limitations so as to allow prisoners to litigate in federal court claims that were not meaningfully developed in state court litigation.[449] Such a development would represent only a modest shift in current habeas doctrine.[450] And more importantly, if a federal judge can overlook a prisoner's violation of an independent and adequate state rule when state postconviction counsel is ineffective, then surely a federal rule that lacks the same grounding in principles of comity and federalism should recognize a similar exception.[451] If *Martinez* opens the door

448. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

449. Many federal courts seem to treat *Pinholster* as a general bar on federal factual development. But if fact development might uncover defaulted claims—for example, unadjudicated claims for which habeas relief is available outside the confines of *Pinholster*—then discovery should be permitted in many cases. More to the point, it must be an abuse of discretion to reflexively deny funding to develop facts in support of defaulted claims, even if such an approach was permissible pre-*Martinez*. Factual development in federal court may be the only way that some defaulted claims will ever be discovered. Without federal discovery there may never be a "meaningful opportunity" to litigate a number of constitutional claims. *See* Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013).

450. It must be acknowledged that under the facts as described above the prisoner would not be entitled to traditional equitable tolling because he would likely not be able to show exceptional circumstances or diligence, but the equities would nonetheless balance in favor of permitting tolling. *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1931 (2013).

451. Interestingly, some federal courts have implicitly accepted this reasoning. For example, in a recent case, the Fourth Circuit remanded a habeas case so as to give the prisoner an opportunity to "fully identif[y], investigat[e], and present" potential *Martinez* claims. Gray v. Pearson, No. 12-5, 2013 WL 2451083, at *4 (4th Cir. June 7, 2013). Obviously,

to vindicating otherwise unavailable constitutional claims, the same equitable concerns that undergird the rule ought to prevent the federal statute of limitations from closing off such relief.

Martinez signals a new, proceduralist era for habeas corpus litigation, but there is a risk that one or more of the limits articulated in this section could subvert the decision's ability to have a monumental impact. This is problematic because *Martinez* is a necessary offset to the innocence focus of habeas review that has become entrenched over the last several decades. If habeas corpus law is going to embrace the call for greater attention to guilt, then it must also insist on the importance of fair state procedures.

Although writing at a very different time in habeas history, both Bator and Friendly took for granted the requirement of full and fair procedural review. Although both played a role in fostering the guilt-centered systems that now exist, given the choice, they would both probably prefer the procedural vision of habeas presented in this Article to the habeas model of innocence without fair procedures.[452] Whether one accepts or rejects the guilt focus of modern habeas, an insistence on full and fair state court procedures should be viewed as essential, and *Martinez* has the potential to safeguard such a proceduralist legacy.

CONCLUSION

Justice Holmes once famously described the role of federal habeas courts by explaining that "what we have to deal with is not the petitioner's innocence or guilt but solely the question whether their constitutional rights have been preserved."[453] This notion that rights, independent of a strong showing of innocence, justified federal relief was famously called into question by Judge Friendly. Friendly urged a system of federal habeas review in which innocence was more central. Changes on the Court and the political

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presenting such claims would require amending a habeas petition after the running of the statute of limitations, but the court seemed to assume that such an amendment is contemplated by the *Martinez* line of cases. *See id.* at *1-4.

452. *See* Marceau, *supra* note 118, at 137-38 (explaining that modern habeas is in the "worst" of all worlds in that it neither permits full merits relitigation, nor does it require a careful review of the fairness of state procedures).

453. Moore v. Dempsey, 261 U.S. 86, 87-88 (1923).

climate have afforded Friendly's proposal a sacred spot in the modern history of federal courts. Far from irrelevant, questions of guilt and innocence have generally emerged as dispositive. Obvious guilt is almost always a formal or informal barrier to federal habeas relief.

Recently, however, the Court has increasingly signaled its approval for a full and fair, proceduralist orientation to federal habeas. The Court has taken significant steps toward recognizing that federal habeas plays a critical role in overseeing the fundamental fairness of state procedures. It remains to be seen exactly how drastically the *Martinez*-trilogy will alter the habeas landscape. But in light of *Trevino*, it is difficult to dispute the Court's growing preoccupation with procedural fairness—that is, a requirement of a meaningful, or full and fair, opportunity to challenge one's conviction.[454] Increasingly, the Court is recognizing that, at least when it comes to safeguarding fair procedures and ensuring that every prisoner has one full and fair opportunity to challenge the legality of his conviction and sentence, innocence may still be irrelevant.

454. Chief Justice Roberts complained about the result in *Trevino* because it ignored the "repeated words of limitation that characterized the *Martinez* opinion." *See Trevino*, 133 S. Ct. at 1923-24 (Roberts, C.J., dissenting).