A Crisis in Federal Habeas Law

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A CRISIS IN FEDERAL HABEAS LAW

Eve Brensike Primus*


INTRODUCTION

Everyone recognizes that federal habeas doctrine is a mess.1 Despite repeated calls for reform,2 federal judges continue to waste countless hours reviewing habeas petitions only to dismiss the vast majority of them on procedural grounds.3 Broad change is necessary, but to be effective, such change must be animated by an overarching theory that explains when federal courts should exercise habeas jurisdiction. In Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ, Professors Nancy King and Joseph Hoffmann offer such a theory. Drawing on history, current practice, and empirical data, King and Hoffmann find unifying themes that not only explain our past use of the Great Writ but also give guidance regarding how we should interpret the writ going forward.

To their credit, the book is comprehensive in ways that most literature on habeas is not. To date, habeas scholarship has often been bifurcated: federal courts experts have written about executive detentions,6 and criminal

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1. See, e.g., Barry Friedman, A Tale of Two Habeas, 73 M I N N. L. R E V . 247, 253 (1988) ("[T]he rules governing access to habeas review have become hopelessly confusing and confused."); Larry Yackle, Federal Habeas Corpus in a Nutshell, HUM. RTS., Summer 2001, at 8 ("[F]ederal habeas corpus is bogged down in Byzantine procedural snarls that not only frustrate the enforcement of constitutional rights but also squander time and resources.").


4. Lee S. and Charles A. Speir Professor of Law, Vanderbilt University Law School.

5. Harry Pratter Professor of Law, Indiana University Maurer School of Law.

procedure scholars have written about federal review of criminal convictions.\footnote{See, e.g., Hoffmann & King, supra note 2.}

By considering the role of habeas corpus in every context from executive detentions to reviews of state and federal criminal convictions to sentence administration claims, King and Hoffmann offer new and exciting insights about what drives the expansion and contraction of habeas corpus doctrine. They elegantly demonstrate how the federal courts historically have used habeas as a tool to restore the governmental balance of power on occasions when a significant societal change or crisis has placed that balance in serious jeopardy (p. viii). They emphasize the importance of ensuring that federal courts have the flexibility to deploy the writ when necessary to combat government overreaching (p. 12). Yet, at the same time, King and Hoffmann recognize that the writ must not be overused, lest it lose its respected status (p. 66). Balancing the need for flexibility against the need for prudence, they explain, is the only way to ensure effective habeas reform going forward (p. 86).

*Habeas for the Twenty-First Century* is a wonderful book. It is nuanced while still being thorough, and it explains fairly technical material in an engaging and interesting way. It is probably the most accessible overview of the contours of the Great Writ that I have read. Its breadth, however, is also the source of one of its problems. King and Hoffmann want both to identify the overarching themes that can explain habeas in all of its diverse forms (p. viii) and to make concrete proposals for reform that have a reasonable chance of being adopted (p. ix). These two goals, however, are often in tension. What is politically feasible is not always consistent with their interpretive approach. Rather than admit this tension and explain why they choose one goal over the other, King and Hoffmann sometimes stretch their definition of what constitutes a crisis worthy of habeas intervention in an attempt to make it fit their reform proposals.

This is particularly true in the context of their approach to federal review of state criminal convictions. In that context, King and Hoffmann use history to argue that habeas’s primary role is to intervene whenever a federalism crisis places the balance of power between the federal and state governments in jeopardy (p. 49). Such a federalism crisis exists, they say, only when a state rejects federal law \emph{because it is federal}.\footnote{Pp. 66, 86; see also Joseph L. Hoffmann & Nancy J. King, Right Problem; Wrong Solution, 1 CALIF. L. REV. CIRCUIT 49, 53 (2010), http://www.californialawreview.org/assets/pdfs/Circuit/King31.pdf (emphasizing that federal habeas review of state court cases should be limited to state court failures to vindicate federal rights “because they are federal”).} According to King and Hoffmann, the propriety of habeas review does not depend on how frequently or egregiously a state violates its citizens’ constitutional criminal procedure rights. If the state does not act on the basis of an overt hostility to federal law, the federal courts should not use habeas to intervene.\footnote{See Hoffman & King, supra note 8, at 53.} Nonetheless, King and Hoffmann’s own proposal for reform contains provisions that would allow state prisoners to file habeas claims, such as claims alleging
actual innocence, even when there is no evidence that the states are hostile to these claims because of their federal nature. So if King and Hoffmann’s proposals for reform are sound, their statement of the circumstances in which federal habeas review is appropriate is too restrictive.

In this Review, I argue that King and Hoffmann should expand their concept of what constitutes a crisis worthy of federal habeas intervention to include situations in which a state systematically violates criminal defendants’ federal rights or systematically fails to provide defendants with adequate opportunities to vindicate those rights. A state’s entitlement to autonomy and respect is at its nadir when the state routinely flouts federal law, whereas the federal interest in using habeas review to catalyze structural reform in such a case is at its zenith.

King and Hoffmann are reluctant to expand their definition of crisis to include these cases in part because they believe that restructuring federal habeas review to address these claims is not politically viable. They believe that their own proposal, in contrast, will appeal to both sides of the political spectrum (p. ix). Specifically, they propose that Congress enact a statute limiting habeas review of noncapital state criminal convictions to cases involving retroactive applications of new law and claims of innocence predicated on newly discovered evidence (pp. 91–92). They then propose to use the resources saved by this streamlining to create a new federal initiative designed to help states improve their indigent defense representation systems (pp. 87–88, 91–92). At first blush, this idea has the appeal of a grand bargain, and King and Hoffmann make a helpfully provocative contribution to the habeas debate by putting this possibility forward. That said, the particulars of their proposed bargain are not realistic enough to make it viable. King and Hoffmann overestimate the cost savings that would accompany their alleged streamlining of federal habeas review, and they underestimate the expenditures required for their new federal initiative. As a result, their proposal is not as politically feasible as they suggest.

In Part I of this Review, I describe King and Hoffmann’s approach to federal habeas review of state criminal convictions and explain both their interpretive theory of federal habeas review and their specific reform proposals. In Part II, I analyze the mismatch between their theory that federal habeas review should operate only during federalism crises and their proposals for reform. I also explain why I think that King and Hoffmann should resolve this tension by expanding their definition of crisis to include situations where states systematically violate criminal defendants’ constitutional rights. In Part III, I contest the claim that King and Hoffmann’s reform proposal is politically viable by showing that they have both underestimated the costs of their new federal initiative and overestimated the savings that would accompany their proposed streamlining of federal habeas review.

11. See id. at 43.
12. See Hoffmann & King, supra note 8, at 55.
In *Habeas for the Twenty-First Century*, Nancy King and Joseph Hoffmann tell a compelling and enlightening story about the recent history of the writ of habeas corpus. Federal habeas review, they explain, has always been about providing the federal judiciary with a flexible and powerful tool to use whenever a significant social or political crisis places the governmental balance of powers in serious jeopardy (pp. viii, 42, 68, 89). The writ must remain flexible, they claim, to ensure that courts can use habeas aggressively when necessary to address these periodic crises (p. 136). However, courts must also be prudent in their exercise of habeas jurisdiction so as to not devalue the Great Writ (p. 66). Habeas should therefore be used only as a last resort, when other alternatives for judicial review are unavailable, and even then only as a temporary avenue for judicial review of unlawful imprisonment claims (p. 168). Once the political or social crisis that prompted the need for habeas review passes or adequate alternatives for judicial review are created, habeas must recede (p. 91).

Guided by these core principles of flexibility and prudence, King and Hoffmann make a number of proposals for reforming the current scope of the writ. In the context of executive detentions without trial, they explain that habeas review is “a vital structural protection for democracy and the rule of law” (p. 21). They suggest that federal courts should use habeas aggressively whenever the federal executive, acting alone or in combination with the legislature during a time of crisis, imprisons those it believes pose a threat (p. 24). In such situations, habeas serves to adjust the balance of power among the three branches of government by protecting individual liberties and curbing inappropriate governmental overreaching (p. 42). When the federal courts’ use of the writ becomes too common, the federal legislature responds by developing alternative avenues for judicial review and, in turn, the role of the writ recedes (p. 24).

In the context of federal review of state criminal convictions, King and Hoffmann detect a similar pattern, with the natural variation that the balance of power at stake in those cases is between the federal and state governments rather than between the branches of the federal government (p. 49). They explain that during crises of federalism, when hostile states disregard federally guaranteed rights, the federal courts should press habeas into service to release prisoners who would otherwise be left without adequate remedies (pp. 64–65). Once the federalism crisis passes, however, federal habeas review of state convictions should recede so as to prevent devaluation of the writ (pp. 64–65).

The problem today, King and Hoffmann claim, is that federal courts do not act prudently in exercising their habeas jurisdiction in state court criminal cases (p. 90). In their view, the last federalism crisis occurred decades ago, during the civil rights era, when the Supreme Court incorporated criminal procedure rights against the states (pp. 54–60). King and Hoffmann argue that states have long since accepted the supremacy of federal law and are today no longer hostile to federal claims just because they are
federal (pp. 64–66). Thus, under their theory, federal habeas review of state court criminal convictions should recede, but it has not done so (p. 66). As a result, state prisoner petitions flood the federal courts, provoking Congress to erect countless procedural barriers to federal habeas review (p. 66).

King and Hoffmann do a wonderful job of explaining how federal habeas review "has become, in essence, a lottery" (p. 68). It is very expensive and has no meaningful impact on the behavior of state officials (p. 68). Relying on a comprehensive recent empirical study,\(^\text{13}\) King and Hoffmann argue that federal habeas is "utterly worthless to the vast majority of state criminal defendants" (p. 169). Accordingly, they propose to eliminate federal habeas review of state prisoner petitions in all but a very narrow category of cases (pp. 91–92). They would condition their proposal to streamline federal habeas review upon the creation of a new federal initiative designed to help the states improve their defense representation systems (pp. 87–88, 91–92). The money saved from curtailed federal habeas review would thus enable a front-end reform that would promote quality defense representation in the states, which King and Hoffmann believe will go a long way toward ensuring that defendants' rights are better protected (pp. 87–88).

Notably, King and Hoffmann exempt from their proposal claims involving retroactive applications of new law, claims of innocence predicated on newly discovered evidence, and capital cases (pp. 91–92, 149). In those situations, they would still permit state prisoners to file habeas petitions. In all other cases, habeas review of state criminal convictions would be foreclosed unless a state "were suddenly to foment a new crisis of federalism by abdicating its responsibility to enforce certain federal constitutional rights" (p. 104). If that happened, King and Hoffmann would urge the federal courts to invoke the Suspension Clause\(^\text{14}\) and hold that their proposed streamlining statute, as applied to criminal cases from that particular state, represents an unconstitutional suspension of the writ (p. 104). Reliance on the Suspension Clause in this way, they claim, would preserve the Great Writ's flexibility to respond to future unforeseen federalism crises.

II. The Definition of Crisis

King and Hoffmann argue that expansive habeas review of state court criminal convictions is unnecessary today because there is no longer a crisis jeopardizing the proper balance of power between the state and federal governments (pp. 65–66). What would constitute such a crisis, however, is not clearly explained in the book. On one hand, King and Hoffmann clearly assert that the existence of a federalism crisis sufficient to warrant habeas intervention depends on a state's motives for refusing to enforce federal rights: such a crisis exists only if the state refuses to enforce rights because

\(^{13}\) See King Report, supra note 3.

\(^{14}\) U.S. Const. art. I, § 9, cl. 2.
they are federal.\textsuperscript{15} Note, however, that King and Hoffmann would permit claims of innocence to remain cognizable for all state prisoners. They would also permit more expansive habeas review in capital prisoners’ cases. These categories of permitted habeas petitions do not fit within their proffered understanding of what constitutes a federalism crisis. To be sure, King and Hoffmann try to bring these categories within their definition. But that attempt is not persuasive, as I will shortly explain. In the end, King and Hoffmann’s reasonable commitment to permitting federal review for innocence claims and capital cases suggests that they are unwilling to limit habeas review as drastically as their definition of crisis would direct.

I agree with King and Hoffmann’s overarching thesis that habeas should be used to intervene when significant societal crises place the governmental balance of powers in serious jeopardy. But I would adopt a more expansive definition of what constitutes such a crisis. Rather than limit habeas review to situations where states violate federal rights because those rights are federal, I would deem habeas review appropriate whenever a state systematically underenforces or violates a federal right. After all, if a state routinely ignores its obligation to enforce the federal constitution, such lawlessness is an affront to federal supremacy regardless of the state’s motives.

In Section II.A, I explore the internal tension in King and Hoffmann’s definition of crisis. Then, in Section II.B, I explain why an interpretation of crisis that encompasses systematic state violations of defendants’ rights is both consistent with habeas history and important on its own terms.

\textbf{A. A Lack of Clarity}

Relying on a historical analysis of how the writ of habeas corpus has expanded and contracted over time, King and Hoffmann argue that federal habeas review of state convictions is appropriate only when a state “resist[s] enforcing the criminal procedure decisions of the Supreme Court simply because they are federal rules rather than state rules” (p. 86). In support of this claim, King and Hoffmann emphasize that habeas review has “twice been pressed into service” to review state criminal convictions and that, both times, there were “major crises of federalism” (p. 64).

First, during Reconstruction, habeas was expanded “to enforce the supremacy of federal law against potentially recalcitrant Southern states and state officials” (p. 51). Congress enlarged federal habeas jurisdiction and then stripped the Supreme Court’s appellate jurisdiction to ensure that lower federal courts could force former Confederate states to obey federal law. Once Southern resistance had waned, however, Congress restored the Supreme Court’s appellate jurisdiction, and the Supreme Court was able to moderate the lower courts’ use of habeas review (pp. 64–65).

Second, when the Warren Court incorporated many constitutional criminal procedure rights against the states during the civil rights era, expansive habeas review was again necessary “to force recalcitrant states to obey fed-

\textsuperscript{15} Pp. 66, 86; see also Hoffmann & King, supra note 8, at 53.
eral law" (p. 65). According to King and Hoffmann, the Court's expansion of habeas review "sent a shot across the bow of the states" (p. 89) and led to the creation of sophisticated state postconviction proceedings designed to give defendants an opportunity to vindicate new federal rights (p. 65).

What unifies these two time periods, according to King and Hoffmann, is the state courts' hostility toward federal law. In both their book and their responses to commentary about their proposal, King and Hoffmann repeatedly explain that only when state courts are failing to vindicate federal rights because those rights are federal is there the kind of structural crisis involving government powers that habeas is designed to address.\(^{16}\)

As a practical matter, however, King and Hoffmann do not seem to embrace their own restrictive definition of when there is a crisis worthy of federal habeas review. In their discussions of both the ability of noncapital state prisoners to file innocence claims in federal court and the scope of habeas review of state capital cases, King and Hoffmann recognize other roles for federal habeas review of state cases. Specifically, they acknowledge that federal habeas review should be available when state procedures do not adequately protect federal rights and when there is a particularly important interest in preventing erroneous judgments.

1. Inadequate State Procedures

In addition to cases involving "defiance by state judges in the face of what they consider[] an unjustifiable incursion of federal law into the traditional domain of the states," King and Hoffmann also recognize a crisis warranting federal intervention when there is a "lack of state postconviction proceedings and remedies adequate to adjudicate defendants' constitutional claims" (p. 105). Assuming that not every lack of adequate proceedings is rooted in antipathy to federal rights solely because of their federal nature, this looks like a second definition of the kind of crisis for which habeas review is an appropriate solution. King and Hoffmann do not explain when proceedings and remedies should be deemed inadequate enough to rise to the level of a crisis.\(^{17}\) They do, however, provide one example: state procedures for entertaining claims of actual innocence.

"[T]he numerous DNA revelations of the last several years, combined with reluctance by some state officials to act quickly to correct and prevent such mistakes, could well be characterized as a new and growing crisis warranting federal intervention into state criminal justice."\(^{18}\) With respect to claims of innocence that depend on new evidence obtained after trial, King and Hoffmann contend that state procedures are "often clearly

\(^{16}\) Pp. 66, 86; see also Hoffmann & King, supra note 8, at 53.

\(^{17}\) The interpretation of adequacy could be very narrow or quite broad. Compare my proposed definition of adequacy, see infra Section II.B, with Senator Kyl's proposal in the Crime Prevention Act of 1995 to limit habeas review only to claims that "the remedies in the courts of the State are inadequate or ineffective to test the legality of the person's detention," S. 1495, 104th Congress, § 2257 (1995).

\(^{18}\) P. 93 (footnote omitted).
deficient” and “will continue for some time to be inadequate” (p. 98). They do not explain why those procedures are inadequate other than to say that they do not give inmates “reasonable access” to evidence of innocence (p. 98). But if “reasonable access” to evidence to support a claim is the test of adequacy, innocence claims are not the only claims that should be cognizable on habeas.

Consider, for example, the states’ complete failure to provide criminal defendants with access to appellate or postconviction review procedures that would allow them to vindicate their Sixth Amendment rights to effective trial attorneys. In most jurisdictions, criminal defendants must wait until state postconviction proceedings before they may challenge the effectiveness of their trial attorneys. In these jurisdictions, defendants often must first exhaust the direct appellate process before filing a state postconviction petition. A majority of inmates will have served their full sentences before they ever get to state postconviction due to the length of time it takes to process direct appeals. In some states, inmates who are not in state custody are not permitted to file state postconviction petitions. In these jurisdictions, a majority of inmates are never given an opportunity to challenge the effectiveness of their trial attorneys.

Moreover, even for those inmates who can file state postconviction challenges, there is no constitutional right to counsel on state postconviction review. Because claims of ineffective assistance of trial counsel are often predicated on what a trial attorney failed to do, these claims frequently require supplementation of the trial court record. Without a constitutional right to counsel, however, most prison inmates are unable to do the necessary investigation to substantiate their ineffectiveness claims. As a result, their claims are often summarily denied without a hearing.

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20. See Primus, supra note 19, at 693.

21. See id. at 694 (collecting statutes).


[M]any states do not provide for the appointment of counsel to assist an incarcerated prisoner in a noncapital collateral challenge, no matter how serious his allegations and no matter how incapable he is of presenting his own case pro se. In other states, limited or qualified rights to postconviction counsel do exist, but other factors, such as an absence of minimum qualification requirements for counsel or extremely low compensation rates, often result in the appointment of lawyers who neither know nor care about what they are doing and cannot afford to perform any better.


23. Primus, supra note 19, at 689.

24. Inmates in jurisdictions that permit defendants to raise trial attorney ineffectiveness challenges on direct appeal often face different procedural challenges. In sharp contrast
In short, throughout the country, state appellate and postconviction review procedures do not give criminal defendants “reasonable access” to the evidence necessary to assert a Sixth Amendment violation of their right to an effective trial attorney. Because state procedures are clearly deficient, state judges have done almost nothing nationwide to ensure that criminal defendants receive effective representation at trial. As a result, trial attorney ineffectiveness is rampant. Lawyers routinely fail to investigate cases before trial, do not meet with their clients before trial, and consistently fail to file any motions or object to inadmissible evidence offered at trial. Public defenders regularly handle well over 1,000 cases a year, more than three times the number of cases that the American Bar Association says one attorney can handle effectively.

King and Hoffmann do not deny that there is a crisis of counsel. As noted earlier, they want to devote whatever federal resources would be saved by their proposed modifications to a new federal initiative designed to help the states improve their defense representation systems (p. 100). But if there is a true crisis in criminal representation, why is that not reason enough to make ineffective assistance of trial counsel claims cognizable in federal habeas review proceedings in the same way that innocence claims are cognizable under their proposal? In the past, King and Hoffmann have invoked their restrictive definition of crisis to argue that ineffective assistance claims to the generous filing deadlines that many states are adopting to permit inmates to raise innocence claims based on new evidence (p. 98), states often have very restrictive time deadlines for filing direct appeals—deadlines that make it nearly impossible for a new attorney to get the trial transcript and reinvestigate the case in time to support an ineffectiveness challenge. See, e.g., Mich. Ct. R. §§ 7.211(C)(1)(a), 7.212(A)(1)(a). Unreasonable time limits are not the only problems in jurisdictions that currently permit defendants to raise ineffective assistance of trial counsel claims on direct appeal. See Primus, supra note 19, at 711–13 (describing the failure of some states to provide new counsel on appeal to raise these claims and the difficulty, in practice, of obtaining evidentiary hearings to support the claims).


should not be cognizable in federal habeas proceedings. In King and Hoffmann's view, the states are not failing to vindicate defendants' Sixth Amendment rights "because they are federal," and that should decide the question.\textsuperscript{24} This response, however, is inconsistent with their arguments for why innocence claims should be cognizable on habeas. It ignores their second definition of crisis.

States do not fail to provide adequate postconviction review procedures for innocence claims because they are hostile to those claims. No one is hostile to the idea that an innocent person should not be incarcerated. Moreover, as King and Hoffmann admit elsewhere, the Supreme Court has not yet held that there is a constitutional right to be free from imprisonment if you are innocent (pp. 95–97). If there is no recognized constitutional right to avoid imprisonment on the ground of innocence, the states' reasons for providing inadequate postconviction review procedures for innocence claims cannot be predicated on hostility to federal rights.

A crisis predicated on inadequate state procedures does not depend on the motivations that a state has for failing to enforce federal rights, and federal habeas review of such claims is not about upholding federal claims because they are federal. Rather, it is about ensuring that a state is not permitted to systematically avoid enforcing a constitutional right, regardless of the reasons. It is about ensuring that defendants are not precluded from enjoying their federal rights.

2. Error Correction in Capital Cases

King and Hoffmann would continue to allow state prisoners facing capital sentences to file federal habeas petitions. Indeed, they would relax some of the procedural restrictions that are currently imposed on those petitions (p. 152). In arguing for more expansive federal habeas review of state capital convictions, they explain as follows:

America remains deeply embroiled in an ongoing social and political crisis surrounding the death penalty. As long as that continues to be so, habeas corpus has a special role to play in this turmoil as it has in other periods of social and political crisis throughout American history: habeas can ensure that arbitrary governmental actions do not trample on the fundamental rights and liberties of individuals. (p. 145)

As a threshold matter, it is not clear why King and Hoffmann believe that the country is in crisis over the issue of capital punishment. To be sure, many people are passionately opposed to the practice. But public opinion on the issue has been relatively stable for a generation, and the politics of capital punishment rarely drive public affairs in anything like the way that the politics of other culturally divisive issues do. In short, it is possible that

\textsuperscript{28. Hoffmann & King, supra note 8, at 53 (noting that if states were failing to vindicate Sixth Amendment rights because they were federal, "then we might still be facing the kind of structural crisis involving government powers that habeas is designed to address," but countering that "[w]e are convinced . . . that this is no longer true").}
King and Hoffmann have mistaken a constituency's strongly held critique of existing law—a critique which may coincide with King and Hoffmann's own normative views, and with mine—for a social and political crisis. This crisis may be wishful rather than observed. But even if the crisis that King and Hoffmann imagine were truly abroad in the land, it would not be a federalism crisis of the kind that King and Hoffmann claim is necessary to support habeas review. To be sure, a "social and political crisis" about capital punishment would be serious business. But there is no reason to think that the crux of the crisis is a matter of federalism, much less that it is state hostility to federal rights.

Perhaps King and Hoffmann believe that other values—like the need to ensure that we do not erroneously execute someone—should trump their interpretive approach to federal habeas review of state criminal convictions in capital cases. They certainly suggest a number of reasons why they believe that "death is different" (pp. 135–45). Yet, at the same time, they also try to fit their more expansive approach to habeas review of capital cases into their claim that federal habeas review of state convictions is about remedying federalism crises. Specifically, they analogize capital cases to the second federalism crisis after incorporation. They state that "[t]he apprehension and aversion state judges may experience when dealing with the ever-changing constitutional rules that govern capital cases are reminiscent of the reactions that prompted the Warren Court's expansive use of habeas review in the 1960s and might justify a similar result today" (p. 140). But their argument for why "the revolution is far from over" in capital cases (p. 170) is speculative. They argue that because state judges do not handle many capital cases and are inexperienced when it comes to applying Eighth Amendment law, they will be apprehensive when they are forced to preside over capital cases (p. 140). The authors then conclude that "the unique challenges of this situation may generate feelings of resentment or even hostility toward the Eighth Amendment law" (p. 140). But they offer no support for the statement that state judges are hostile to Eighth Amendment law or that there is hostility toward that law because it is federal. Perhaps King and Hoffmann's choice of the phrase "may generate" rather than "does generate" or "has generated" indicates their own discomfort with their attempt to fit this part of the proposal into their federalism crisis theme.

Later in the book, King and Hoffmann reveal a more plausible rationale for expanded habeas review of state capital cases:

So long as the Court continues to announce new constitutional rules under the cruel and unusual punishments clause of the Eighth Amendment, it will continue to need the help of the lower federal courts to refine, apply, and enforce this shifting doctrine—just as the Warren Court did when it first announced its new due process rules for state criminal cases during the 'criminal procedure revolution' nearly fifty years ago... And so long as a significant portion of the judiciary and the American public remains deeply troubled about the possibility of mistakenly executing an innocent person,
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This makes more sense. Eighth Amendment jurisprudence is messy and evolving, and the Supreme Court needs feedback from the lower federal courts about how to apply it—not because of some hostility that state courts have to federal law, but because we want to get it right in capital cases and we trust the federal courts to get it right more than we trust the state courts. Federal judges will see all of the capital cases in a district or circuit and thus will be more experienced at dealing with them than their state counterparts. Federal judges are politically insulated from the pressure that accompanies capital cases and thus can make decisions without fear of electoral consequences. And maybe we just care more about getting it right when it is a capital case. But if so, maybe federal habeas review is, to this extent, more about providing a federal forum for capital petitioners in order to prevent errors than about restoring the balance of power during a crisis of federalism.

B. A Broader Definition of Crisis

King and Hoffmann are correct to suggest that the doors to federal habeas review should remain open whenever state appellate and postconviction review procedures are inadequate. They are also correct to suggest that some errors are simply too troubling to escape federal habeas review. So perhaps they would do better to avoid adopting such a restrictive view of the types of crises that merit federal intervention in state criminal justice. Both habeas history and current practices support a broader reading of crisis—one that would permit federal courts to entertain petitions alleging that a state is systematically underenforcing or violating criminal defendants’ constitutional rights, regardless of the reason for the state’s inaction.

29. Compare p. 140 (“Most state judges never have the same day-to-day experience applying the rules that govern capital cases”), with Gary Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579, 666–68 (1982) (arguing that federal judges are more expert in federal law than their state counterparts), and Robert J. Pushaw, Jr., A Neo-Federalist Analysis of Federal Question Jurisdiction, 95 Calif. L. Rev. 1515, 1517 (2007) (“Only Article III judges, who unlike their state counterparts are always politically independent and experts in federal law, can be trusted ultimately to expound that law accurately and guarantee its supremacy and uniformity.” (footnote omitted)).

30. Compare p. 140 (emphasizing how state judges are “under pressure” when capital litigation “heats up”), with Peller, supra note 29, at 666–68 (emphasizing that federal judges are politically independent), and Pushaw, supra note 29, at 1517 (same).

31. Cf. Larry W. Yackle, Explaining Habeas Corpus, 60 N.Y.U. L. Rev. 991, 992–97 (1985) ("State criminal defendants are entitled to litigate their federal claims in a federal forum other than the Supreme Court.").
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1. Habeas History

It is understandable that King and Hoffmann's historical arguments about habeas focus on Southern resistance to federal law. After all, that resistance was a central concern for the Reconstruction Congress that enacted the first statute creating federal habeas jurisdiction to review state court criminal convictions. That said, one reads the relevant history too simply if one imagines that only federalism was at stake. If a Southern state court issued a decision that fully enforced all federal rights but, in the course of doing so, included dicta suggesting that the court did not recognize federal authority, the federal courts would not have jurisdiction to take that case under the statute. Conversely, if a Northern state court made serious constitutional errors that resulted in the unlawful detention of a criminal defendant, the federal courts would have jurisdiction over that case, even though the Northern state court recognized the legitimacy of federal law and did its best to interpret it accurately. The Habeas Corpus Act of 1867 was just as much about ensuring that substantive federal rights were enforced in state courts as it was about bringing recalcitrant states into line.

Similarly, although there was a lot of noise in the postincorporation years about state court hostility to federal authority (pp. 54–60), underneath that trope lay a serious concern about enforcing the newly incorporated substantive rights themselves and ensuring that states had adequate procedures to enforce federal rights. King and Hoffmann recognize that the Warren Court—and particularly Justice Brennan, who authored a number of the postincorporation decisions expanding federal habeas jurisdiction—had more than one reason for expanding habeas jurisdiction (p. 105). It was not just about forcing states to recognize federal supremacy. It was also about using federal habeas corpus review to catalyze the creation of better state postconviction proceedings and remedies to vindicate defendants' constitutional rights. Justice Brennan did not care whether state procedures were

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32. See Primus, supra note 10, at 13–14 (discussing the focus of the Reconstruction Congress).
33. The petitioner would, under those circumstances, not be held in violation of the laws of the United States, a violation of federal law having always been a prerequisite for federal habeas jurisdiction. See Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, 385–86 (current version at 28 U.S.C. § 2241 (2006)).
34. The Supreme Court acknowledged as much in Fay v. Noia, 372 U.S. 391, 416 (1963), when it stated that the 1867 Act "seems plainly to have been designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantees."
36. See p. 85 ("Habeas served as a stopgap in the absence of reasonable alternatives for judicial review and influenced the development of institutional and structural reforms to provide such alternative review."); William J. Brennan, Jr., Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423, 441–42 (1961) (noting that "only a few States provide a post conviction proceeding adequate to permit the state courts to vindicate
inadequate because of hostility to federal rights or because of inertia. What was important to him was ensuring that federal rights were enforced.37

The historical record thus does not require the limited definition of crisis that King and Hoffmann initially suggest. In fact, history suggests that the Supreme Court was willing to expand federal habeas jurisdiction whenever it felt that states would systematically violate defendants’ constitutional rights, regardless of their reasons.

2. Current Practices

Unfortunately, states continue to systematically prevent criminal defendants from asserting and vindicating their constitutional rights. King and Hoffmann claim that because “convicted defendants generally now have access to state appellate and postconviction review processes in which they can litigate their federal constitutional claims” (p. 86), the situation is much better now than it was in the 1960s.38 But this misses the point. The question is not whether the states have created appellate and postconviction proceedings. The question is whether those procedures are adequate to allow defendants to vindicate their federal rights.39 For many federal constitutional rights in many states, the answer to that question is an emphatic “no.”

In addition to the egregious failure of state procedures to check trial attorney ineffectiveness, many state postconviction review proceedings make it nearly impossible for prisoners to adequately raise any claims that require factual development. Often, states do not provide attorneys to assist prisoners in investigating and obtaining new evidence.40 Many states have standards that make it virtually impossible for defendants to obtain hearings to develop these claims.41 Without access to competent counsel and without access to evidentiary hearings, prisoners do not have an adequate opportunity to raise a host of constitutional claims, including ineffective assistance of counsel claims, Brady v. Maryland42 claims that a prosecutor has unconstitutionally withheld exculpatory evidence, and claims of juror or judge bias predicated on newly discovered evidence. King and Hoffmann rely on these very inadequacies in state postconviction procedures to argue for an exception to their statutory scheme for claims of innocence based on new such violations of fundamental constitutional rights” and arguing that federal habeas jurisdiction should be used to “encourage [states] to vindicate” federal rights).

37. See, e.g., Noia, 372 U.S. at 441 (emphasizing that when “the States withhold effective remedy” for federal constitutional violations, “the federal courts have the power and the duty to provide it”).

38. Hoffmann & King, supra note 8, at 53.

39. In an article outlining their noncapital proposal, King and Hoffmann state that they “make no empirical claims about the effectiveness of present state appellate and postconviction review processes for addressing federal constitutional claims.” Hoffmann & King, supra note 2, at 836 (footnote omitted).

40. See supra note 22.

41. See Blume et al., supra note 22, at 445–47 & n.64 (documenting these standards).

42. 373 U.S. 83 (1963).
A Crisis in Federal Habeas Law

Ironically, states are likely to develop adequate postconviction review procedures to address factual innocence long before they adopt appropriate procedures to address attorney ineffectiveness or other claims of misconduct based on extrarecord evidence. There is no political downside for state-elected judges to releasing concededly innocent people from prison. There is, however, a huge political downside to being perceived as soft on crime. Because many state judges are elected, they are unlikely to make the politically unpopular move of giving expansive postconviction review to noninnocence-based constitutional claims.

If King and Hoffmann believe that it was appropriate in the 1960s for the Warren Court to use federal habeas review to force states to develop postconviction review proceedings (p. 65), they should similarly embrace an interpretation of habeas review that would ensure that those proceedings actually give prisoners a reasonable opportunity to vindicate their federal rights. They take a good step in that direction by making innocence claims based on new evidence cognizable. But they should not stop there.

If a state’s systematic failure to provide adequate procedures for vindicating federal rights is sufficient to constitute a crisis, so too should a state’s systematic affirmative misuse of procedural doctrines to prevent defendants from asserting federal rights. Similarly, when a state systematically makes substantive errors that misinterpret federal law and lead to the wrongful imprisonment of hundreds of people, that is also an error worthy of federal correction. At one point, King and Hoffmann argue that habeas review is necessary in capital cases because state judges do not have day-to-day experience with capital cases (pp. 139–40). Lack of experience, however, does not suggest the need for federal oversight as much as does evidence of routine mistakes that undermine the vindication of federal rights.

In short, there is a crisis worthy of federal habeas intervention whenever a state systematically violates defendants’ constitutional rights or systematically uses procedures to prevent defendants from vindicating their constitutional rights. In such circumstances, the need for federal intervention is at its peak and the state’s entitlement to deference is at its nadir.

King and Hoffmann resist any interpretation of crisis that would permit claims of systematic error to be cognizable on federal habeas (p. 169). As noted above, they conclude based on an empirical study of how habeas cases are processed in district courts that habeas is “utterly worthless” to most petitioners and cannot “prompt needed systematic changes” (p. 169). It is certainly true that habeas, as currently configured, provides little relief at

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44. Consider, for example, the practice of New York state appellate courts of systematically violating defendants’ due process rights by routinely misapplying the state’s contemporaneous objection rule in ways that prevent defendants from having their constitutional claims considered. Primus, supra note 10, at 20–21 (describing and documenting this problem).
great cost. But we need not and should not leave habeas in its current state. When we assess the potential of the Great Writ, it would be a mistake to deem all of the procedural obstacles to review that now attend federal habeas to be immutable parts of habeas itself. With respect to claims of ineffective assistance of trial counsel, King and Hoffmann go a step further and assert that “after-the-fact litigation about defense counsel’s effectiveness ... has failed—and will always fail—as a means of ensuring competent defense counsel in criminal cases” (p. 100). This view, however, is overly pessimistic and indeed inconsistent with their own historical account. After all, as King and Hoffmann tell us, “The Warren Court’s habeas expansion sent a shot across the bow of the states, signaling to state legislators and judges the need to revamp the mechanisms for judicial review of criminal cases in the state courts” (p. 89). If structured properly, why could federal habeas review not send another “shot across the bow of the states” and catalyze state reform of indigent defense delivery systems? When a state systematically violates its criminal defendants’ constitutional rights, its state institutions are not functioning properly and the mechanisms for judicial review of criminal cases in the state courts need to be revised. King and Hoffmann know that federal habeas review has served this purpose in the past. There is no reason why it cannot serve that purpose going forward.

III. POLITICAL FEASIBILITY

King and Hoffmann suspect that a federal habeas review system that attempts to redress systemic state violations of defendants’ rights is politically unrealistic.\footnote{See Hoffmann & King, supra note 8, at 55.} In contrast, they claim that their quid pro quo exchange of streamlined federal habeas review for a new federal initiative designed to combat trial attorney ineffectiveness in the states is both substantially less expensive and more politically feasible (pp. 85, 101). But both of these claims may be mistaken.

King and Hoffmann expect that their proposed limitation of federal habeas review in noncapital state cases to those claims involving a retroactive application of new federal law or compelling new proof of innocence would substantially reduce the current costs of federal habeas litigation (pp. 91, 99). At first blush, this seems both plausible and logical. The proposal appears to limit noncapital habeas petitioners to two claims and, as King and Hoffmann explain, only a small percentage of habeas petitions currently contain allegations of either kind (p. 99). Upon closer examination, however, it seems likely that their proposal would not dramatically reduce the number of habeas petitions; rather, it would change the nature of the petitions in three ways. First, more habeas petitioners would assert claims of innocence that would require substantial federal resources to resolve. Second, habeas petitioners who could not assert innocence would challenge the new habeas statute as applied on Suspension Clause grounds.
Given King and Hoffmann's proposed role for the Suspension Clause, substantial resources will also have to be spent resolving these challenges. Finally, those habeas petitioners who could neither assert innocence nor challenge the statute would merely recast their petitions as § 2241 petitions or petitions for original writs, requiring the federal courts to create a new body of jurisprudence on the appropriate scope of review for state prisoner claims filed in these forms.

Moreover, even if the proposed statute could reduce costs, King and Hoffmann propose to couple it with a new federal initiative whose costs threaten to dwarf the current costs of federal habeas review. Some members of Congress may be willing to entertain the proposed streamlining of federal habeas, but there is unlikely to be much political will favoring any significant investment of resources in front-end reform in the provision of indigent defense counsel. That would be true even under better fiscal circumstances than the government presently confronts; in the current climate, it is particularly unlikely that the government will want to fund the proposed initiative. Thus, King and Hoffmann's attempt at political compromise will not represent nearly the "ideological middle ground" that they had hoped (p. ix). Rather, only one half of their proposal could gain any political traction. Lacking broader appeal, this proposed reform would be just as politically difficult to enact as other recent attempts to streamline habeas. And if by some chance, the half of the proposal with political traction could be enacted, it would simply curtail federal habeas review while offering no improved means of vindicating constitutional rights in other forums.

A. Innocence

King and Hoffmann would allow state prisoners to file habeas petitions asserting claims of innocence predicated on newly discovered evidence. They argue that permitting these claims would not unnecessarily tax federal resources, because only a small percentage of current habeas petitioners allege actual innocence and because "few habeas petitioners will be able to make even a facially plausible showing of factual innocence" (p. 95). As a result, they predict that "habeas courts will rarely need to spend significant time reviewing the merits of habeas petitions making such innocence claims; most petitions will be summarily dismissed" (p. 95).

But of course, this picture would change if their proposed statute were adopted. In a world where innocence claims and claims involving the retroactive application of new law are the only cognizable claims, many more petitioners will raise these claims. This is particularly true given what we already know about the number of criminal defendants who receive inadequate


assistance of counsel at trial.\textsuperscript{48} When a trial attorney does little or no investigation, there is often new evidence that a habeas petitioner can find and then use to make an innocence claim. To a prisoner who has nothing else to do, even a meritless innocence claim is better than no claim at all.

King and Hoffmann underestimate the difficulty of resolving innocence claims. As others have pointed out,\textsuperscript{49} addressing claims of actual innocence is often a resource-intensive enterprise. This is particularly true when the claims rely on newly discovered evidence that would require factual development in an evidentiary hearing. Even if King and Hoffmann are correct that “only a tiny handful of habeas petitioners” would be able to produce compelling new evidence of innocence (p. 99), many petitioners would be able to make facially plausible claims that will require diligent federal courts to hold evidentiary hearings.\textsuperscript{50} This does not mean that there would be no reduction in the federal workload if other claims are not cognizable. But it does suggest that King and Hoffmann overestimate the savings that would accompany this part of their proposal.

\textbf{B. Suspension Clause Challenges}

The bigger costs of their proposal lie in the new role that they envision for the Suspension Clause. According to King and Hoffmann, if a state were to abdicate its responsibility for enforcing a federal constitutional right—either by refusing to enforce the right or by creating inadequate state procedures for vindicating the right—their proposed habeas restrictions would constitute a violation of the Suspension Clause as applied to prisoners from that state (pp. 104–05). Although King and Hoffmann envision few circumstances in which state procedures should be deemed inadequate,\textsuperscript{51} some federal courts may not agree.\textsuperscript{52} Either way, state prisoners who cannot file habeas petitions under King and Hoffmann’s proposed statute would have every incentive to file as-applied challenges to the statute instead.\textsuperscript{53} The federal courts would then confront a predictably large volume of claims that the states do not have adequate procedures in place to vindicate federal rights. The only way for the federal courts to resolve these claims would be to conduct resource-intensive reviews of how each state’s procedures actually operated in each petitioner’s case. And there is no limit to the number of potential as-applied Suspension Clause challenges.

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48. \textit{See supra} Section II.A.1.
49. \textit{See}, e.g., Blume et al., \textit{supra} note 22, at 460–61.
50. \textit{See id.}
51. \textit{See} p. 105 (“The Supreme Court should take care not to encourage wasteful habeas litigation over alleged state-specific suspensions of the writ.”); \textit{see also supra} Section II.A.1 (describing King and Hoffmann’s position that only when the inadequacy rises to the level of a federalism crisis is habeas properly invoked).
52. \textit{See supra} Section II.B.2 (documenting a number of inadequacies in state procedural rules).
53. \textit{See} Blume et al., \textit{supra} note 22, at 464 (noting that this would be “a litigation bonanza for state prisoners”).
\end{flushright}
If a federal court were to find that a state’s postconviction review procedures were inadequate, it would then declare King and Hoffmann’s proposed statute unconstitutional. This would be tantamount to sounding a general invitation for habeas claims from that state. Far from saving resources, King and Hoffmann’s proposal would create two tiers of federal review for many state prisoners. First, federal courts would have to review the Suspension Clause challenges. Then, after finding inadequate state procedures, federal courts would have to address the underlying individual habeas petitions.

C. More § 2241 Petitions and Original Writs

Although King and Hoffmann propose amending 28 U.S.C. § 2254—the statute that currently governs federal habeas review of state court criminal convictions—they do not seek to change the general grant of habeas jurisdiction to the federal courts contained in 28 U.S.C. § 2241, nor do they suggest any modifications to the Supreme Court’s original writ jurisdiction. As a result, they would leave the door wide open for state prisoners to file § 2241 petitions or original writs in order to avoid the substantive restrictions that King and Hoffmann’s proposed modifications to § 2254 would entail.

King and Hoffmann recognize that federal courts would have the power to broadly interpret § 2241 in ways that would allow them to hear claims that would be barred under their revised § 2254 statute (p. 105). Indeed, there is federal precedent that would support such an interpretation. In the context of federal postconviction review of federal prisoners’ claims, the lower courts have permitted federal prisoners to file § 2241 habeas petitions in order to avoid some of the more restrictive procedural limitations in 28 U.S.C. § 2255.54 Admittedly, § 2255 is quite different from § 2254 in that federal prisoners file motions under § 2255 that do not purport to be habeas actions. Their access to the general grant of habeas under § 2241 is thus arguably greater than that of their state counterparts. Nonetheless, King and Hoffmann suggest that federal judges who want to avoid addressing Suspension Clause challenges to their proposed statute could simply broaden the availability of § 2241 relief (p. 105). If that is true, the proposed reform would merely shift state prisoners from § 2254 to § 2241, thus forcing the federal courts (and ultimately Congress) to create an entire body of jurisprudence about what procedural restrictions should apply to § 2241 petitions filed by state prisoners.

Relatedly, King and Hoffmann do not propose any changes to the Supreme Court’s original writ jurisdiction. Pursuant to Supreme Court Rule

54. See, e.g., Triestman v. United States, 124 F.3d 361 (2d Cir. 1997) (analyzing a federal prisoner’s claim under § 2241 to avoid the procedural restrictions in § 2255); In re Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997) (holding that relief is available to a federal prisoner under § 2241 even if § 2255 would have foreclosed relief, because otherwise there would be a “complete miscarriage of justice” (quoting Davis v. United States, 417 U.S. 333, 346 (1974)) (internal quotation marks omitted)).
20.4(a), the Supreme Court may grant an original petition for a writ of habeas corpus if, inter alia, "exceptional circumstances warrant the exercise of the Court's discretionary powers." Although the Supreme Court rule is explicit that original writs should rarely be granted, the Supreme Court has recently shown increased willingness to entertain original writs. More prisoners have filed petitions for original writs since the Anti-Terrorism and Effective Death Penalty Act restricted other access to federal habeas review. King and Hoffmann's proposal, if adopted, would further restrict state prisoners' access to the lower federal courts, which would, in turn, cause more state prisoners to file petitions for original writs of habeas corpus in the Supreme Court. The Court would likely summarily deny most of these petitions, but reviewing the petitions would require additional time and resources. Moreover, the flood of worthless petitions would certainly make it more difficult for the Court to find those that might be meritorious.

D. New Federal Initiative

For all of the reasons discussed above, I am skeptical of King and Hoffmann's assertion that their proposed streamlining of federal habeas review of state convictions would substantially reduce costs even if it were a stand-alone proposal. But King and Hoffmann do not offer it as a stand-alone proposal. Rather, they condition their proposed streamlining of federal habeas upon the creation of a new federal initiative to reform state indigent defense systems (pp. 100-01). They do not discuss how much federal money they believe would be required for such an initiative to be successful, but the number would have to be astronomically high.

Consider, for example, the problems that exist in one county public defender's office in Tennessee. In a letter sent to that county's judges in 2007, Knox County Public Defender Mark E. Stephens indicated that misdemeanor defenders in his office were being assigned 1,841 cases per year and felony attorneys were being assigned 1,363 cases per year. Given prevailing standards about how many cases an attorney can handle effectively, that office would have to hire 31 additional attorneys just to get the caseloads...
down to a manageable level.\textsuperscript{61} With the starting salary for public defenders in that office at $43,584,\textsuperscript{62} the state or federal government would have to channel $1,351,104 of additional funding per year into that office just to bring caseload numbers down to what national standards recognize is the \textit{maximum} number of cases that an attorney can handle effectively.\textsuperscript{63} That figure does not include funding for any training to ensure that the attorneys are competent, nor does it include funding to ensure that defenders have access to the investigative and research-related resources they need to perform their jobs. And that is just the cost for one office in one county in one state.\textsuperscript{64}

King and Hoffmann's proposed front-end reform of indigent defense delivery systems would require a massive allocation of governmental funds, not to mention significant investments of time and energy by dedicated public servants. With electoral pressure to be tough on crime and with an economic recession that is already taxing the federal budget, it is unrealistic to believe that the federal government would be willing to invest the time and resources that would be required for effective front-end reform.\textsuperscript{65}

\textbf{CONCLUSION}

\textit{Habeas for the Twenty-First Century} does a wonderful job both of exploring the recent history of the Great Writ in all of its forms and of using that history to develop an insightful interpretive approach to guide the writ's evolution. I cannot do justice to the importance of Nancy King and Joseph Hoffmann's contributions to this area. Their book will play an essential role in academic and policy discussions for years to come.

The book's general claim that federal habeas should be interpreted as a tool to restore the balance of power whenever a significant societal change or crisis has placed the governmental balance of powers in serious jeopardy is persuasive. But its application of that concept to federal review of state prisoner petitions is too restrictive. It fails to take into account some of the historical reasons for expansive federal habeas review of state criminal convictions and the present reality of systemic state violations of

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  \item \textsuperscript{61} \textit{Id.} at 4–5.
  \item \textsuperscript{63} \textit{See TEN PRINCIPLES, supra note 27 (describing these standards).}
  \item \textsuperscript{64} Unfortunately, Knox County, Tennessee is not alone in having extraordinarily high public defender caseloads. \textit{See supra note 26}.
  \item \textsuperscript{65} As others note:

To have any chance of succeeding, the new federal initiative that Hoffman and King advocate would require, at a minimum, a massive amount of federal money, a commitment by Congress and the President to spend that money on indigent defense, and a willingness on the part of the states to commit their own resources to improving defense representation. None of these ingredients are in good supply . . . .

Blume et al., \textit{supra} note 22, at 468.
defendants’ criminal procedure rights. It is also inconsistent with some of King and Hoffmann’s proposals for reform.

Reconfiguring federal habeas review of state criminal convictions to focus on remedying systematic state practices that have the effect of underenforcing or violating defendants’ federal rights would be more consistent with historical practice and would also give habeas a meaningful role to play in our federalist system. King and Hoffmann are correct when they say that the current habeas review system has become an expensive lottery that is incapable of spurring state reform (p. 68). The answer, however, is not to give up on habeas for the vast majority of state prisoners. Rather, we should refine habeas to ensure that states do not routinely trample on the constitutional rights of their citizens. If we reimagine individual petitioners as vehicles for redressing systemic problems in states’ administration of criminal justice, we might restore meaning to federal habeas review and prevent future crises from occurring.