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Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine

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FEDERAL REVIEW OF STATE CRIMINAL CONVICTIONS: A STRUCTURAL APPROACH TO ADEQUACY DOCTRINE

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Modern state postconviction review systems feature procedural labyrinths so complicated and confusing that indigent defendants have no realistic prospect of complying with the rules. When defendants predictably fail to navigate these mazes, state and federal courts deem their claims procedurally defaulted and refuse to consider those claims on their merits. As a result, systemic violations of criminal procedure rights—like the right to effective counsel—persist without judicial correction.

But the law contains a tool that, if properly adapted, could bring these systemic problems to the attention of federal courts: procedural adequacy. Procedural adequacy doctrine gives federal courts the power to ignore procedural defaults and declare state procedural rules inadequate when those rules unduly burden defendants' abilities to assert violations of their federal rights. And unlike the more commonly invoked cause and prejudice doctrine, which excuses default on the theory that a defendant's unusual circumstances justify an exception to the rules, procedural adequacy doctrine allows courts to question the legitimacy of the state procedural regimes themselves. Procedural adequacy doctrine can therefore catalyze reform in a way that cause and prejudice cannot.

For procedural adequacy litigation to catalyze reform, however, it must be adapted to modern circumstances in one crucial respect. Historically, procedural adequacy doctrine focused on cases involving the deliberate manipulation of individual rules. Today, what is needed is a structural approach to adequacy, one that would consider how the interaction of multiple procedural rules unfairly burdens federal rights. Such a structural approach to adequacy is consistent with the doctrine's original purposes and is the most sensible way to apply procedural adequacy under current conditions. Litigants should accordingly deploy a structural approach to procedural adequacy doctrine and use it to stop states from burying systemic constitutional violations in complicated procedural labyrinths.

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Introduction

It is no secret that criminal justice is badly in need of reform.[1] In state after state, criminal court systems violate defendants' constitutional rights through prosecutorial misconduct,[2] inadequate indigent defense delivery

1. *See, e.g.*, Radley Balko, *Here's What Presidential Candidates' Websites Say About Criminal Justice Reform*, Wash. Post: Watch (Aug. 6, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/08/06/heres-what-presidential-candidates-websites-say-about-criminal-justice-reform/ [https://perma.cc/M4X3-M4A8] ("Criminal justice reform is the one issue that just about everyone seems to agree on right now. There are certainly disagreements over the details, but . . . nearly everyone agrees at least in principle that the system needs to be reformed.").

2. *See, e.g.*, Alex Kozinski, Preface, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xxii–xxvi (2015) (describing cases of serious prosecutorial misconduct); Jonathan Abel, *Prosecutors' Duty to Disclose Impeachment Evidence in Police Personnel Files: The Other Side of Police Misconduct*, Wash. Post: Volokh Conspiracy (July 11, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/11/prosecutors-duty-to-disclose-impachment-evidence-in-police-personnel-files-the-other-side-of-police-misconduct/ [https://perma.cc/EF2X-CLC7] (describing systematic and pervasive failures across states to disclose exculpatory impeachment material in violation of *Brady v. Maryland*, 373 U.S. 83 (1963)).

systems,[3] and the admission of shoddy scientific evidence.[4] Yet, despite the broad and growing awareness of pervasive problems in state criminal justice systems, few federal courts confront the need for reform in any systematic way.[5]

Why do federal courts not engage these well-known problems more comprehensively? A full answer would account for several different causes. But one important and underappreciated reason is rooted in the process of criminal litigation. Federal courts confront state criminal justice systems through the review of individual criminal convictions, and postconviction review features a complex web of procedural rules that deflects judicial attention away from systematic substantive problems.[6]

At the state level, modern postconviction review schemes are often so complicated and confusing that indigent criminal defendants have no realistic prospect of complying with the procedural rules.[7] A failure to comply, in turn, means that the state courts will refuse to consider the merits of a defendant's underlying constitutional claims.[8] Most defendants who fail to run the state's gauntlet of procedural rules successfully then find that the federal courts will not address their claims on the merits out of deference to the state court's finding of procedural default.[9] In short, the extreme difficulty of

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3. *See, e.g.*, Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150 (2013) (describing how indigent defendants' rights to effective trial counsel are systematically violated throughout the country); *see also* Sara Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15, 19–20 (2016) ("[P]ublic defenders nationwide are underfunded and overworked . . . .").

4. *See, e.g.*, Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009) (documenting how invalid and/or unsupported forensics testimony contributed to wrongful convictions across twenty-five states); Kozinski, *supra* note 2, at v ("Some fields of forensic expertise are built on nothing but guesswork and false common sense. Many defendants have been convicted and spent countless years in prison based on evidence by arson experts who were later shown to be little better than witch doctors." (footnote omitted)).

5. *See* Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1221 (2015) (describing how the federal courts have "embarked on a path designed to render constitutional rulings by state courts nearly unreviewable by the federal judiciary").

6. *See, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 792–815 (2009) (explaining how the federal courts have opted for case-by-case review of criminal justice problems and describing the ways in which federal review of state criminal convictions is currently limited); Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010) (noting that federal judges rarely address state criminal defendants' constitutional claims on their merits).

7. *See infra* Part I (documenting this problem).

8. The defendant is said to have procedurally defaulted or waived his underlying claims by failing to comply with the state's procedural rules. *See generally* DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK (2016–2017 ed. 2016) (describing the different statutes that each state has to address procedural defaults).

9. *See* Coleman v. Thompson, 501 U.S. 722, 744 (1991); Wainwright v. Sykes, 433 U.S. 72 (1977); *see also* Martinez v. Ryan, 132 S. Ct. 1309, 1323 & n.4 (2012) (Scalia, J., dissenting) (citing statistics indicating that "procedural default accounted for the largest percentage of

complying with the relevant procedural requirements prevents all but a small number of defendants from bringing many criminal procedure problems into the courts for adjudication on the merits. Given the small volume of merits cases, courts do not engage the underlying substantive problems as systemic rights violations calling for major responses, and the problems continue to go unaddressed.[10]

Consider, for example, how states handle ineffective assistance of trial counsel ("IATC") claims.[11] Many states relegate all IATC claims to the postconviction process, rather than permitting those claims to be raised on direct appeal.[12] But in the postconviction process, most prisoners must proceed pro se, because states do not provide prisoners with lawyers.[13] (Under prevailing Sixth Amendment doctrine, the right to counsel applies only at trial and on the first appeal as of right.)[14] Obviously, prison inmates cannot effectively reinvestigate their cases or get sworn affidavits from witnesses without outside assistance. Moreover, state postconviction processes routinely feature strict pleading requirements with which unskilled pro se litigants will predictably be unable to comply.[15] The combined effect of these

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procedural dispositions" for appeals in noncapital cases). To be sure, a federal court can look past a procedural default upon a finding of cause and prejudice or a fundamental miscarriage of justice. *See Coleman*, 501 U.S. at 750. But as I explain *infra*, these inquiries direct judicial attention in precisely the wrong direction: they focus on the conduct of the individual petitioner, and what is needed is a focus on the structure of the state rules. *See infra* Part IV.

10. Some advocacy groups have attempted to remedy this deficiency by resorting to class action civil rights lawsuits. *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (discussing these lawsuits). Although these lawsuits have had some limited success, they face a number of procedural barriers in federal courts. *See* Erwin Chemerinsky, Remarks, *Lessons from* Gideon, 122 Yale L.J. 2676, 2688 (2013) (noting that state and federal courts have not been receptive to claims about systemic right-to-counsel violations); Primus, *supra* note 6, at 47–51 (discussing how standing and abstention doctrines have thwarted attempts to use civil rights statutes to redress systemic criminal procedure problems in the states).

11. The current legal standard for judging posttrial ineffective assistance of trial counsel claims requires the defendant to show that his counsel performed unreasonably given prevailing norms of practice and that counsel's errors were serious enough to undermine confidence in the outcome of the case. *See* Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

12. *See* 3 Wayne R. LaFave et al., Criminal Procedure § 11.7(e) (4th ed. 2015) (noting the general trend to have IATC claims raised on postconviction rather than on direct appeal).

13. *See* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 Yale L.J. 2428, 2442–45 (2013) (noting that most states only appoint counsel for postconviction petitioners if a judge first decides that the case has merit and "only a small portion of petitioners appear to receive counsel" in those states).

14. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions and we decline to so hold today." (citation omitted)); *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (plurality opinion) (applying the rule of *Finley* to capital cases).

15. See sources cited *infra* notes 103–104 for examples.

procedural rules is to bounce IATC claims out of court without ever requiring the state to entertain them on the merits.[16] The resulting failure to address large numbers of IATC claims is particularly problematic given the widespread understanding that states systematically underfund and overburden indigent defense attorneys in ways that compromise their ability to provide effective representation.[17] In short, the system engenders widespread ineffectiveness of defense representation by refusing to fund indigent defense adequately, and then it prevents courts from redressing the resulting constitutional violations by creating procedural barriers to reviewing claims of ineffective assistance.

As noted above, the federal courts have not done much to stop states from relying on procedural rules to avoid addressing defendants' constitutional claims. Most federal review of state court convictions occurs in the context of petitions for habeas corpus relief under 28 U.S.C. § 2254,[18] and petitioners who fail to navigate their states' procedural labyrinths successfully are generally deemed to have "procedurally defaulted" their constitutional claims.[19] Citing federalism concerns and the value of respect for state law rules, federal habeas courts will review only the petitions of those lucky few who flawlessly complete the procedural obstacle course of state postconviction review.[20] Given how few petitioners manage that feat,[21] most of the underlying constitutional issues go unaddressed in federal court, and the problems persist.

As this Article explains, the same current body of habeas law that deems so many habeas petitions procedurally defaulted also contains a powerful and underused tool that litigants could use to bring systemic problems in

16. *See generally* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679 (2007) (documenting this problem).

17. *See, e.g.*, Eric Holder, U.S. Attorney Gen., Address at the American Bar Association's National Summit on Indigent Defense (Feb. 4, 2012), http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html [https://perma.cc/RY5G-NKEW] (noting that "[a]cross the country, public defender offices and other indigent defense providers are underfunded and understaffed" and that, as a result, "when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight").

18. Antiterrorism and Effective Death Penalty Act of 1996 § 104, 28 U.S.C. § 2254 (2012).

19. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991); Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977).

20. *See, e.g.*, *Coleman*, 501 U.S. at 726–27 (refusing to consider the legitimacy of a capital murder conviction because pro bono attorneys for the petitioner filed his postconviction appeal one day late and noting that "[t]his is a case about federalism").

21. *See* Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 60–63 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/6987-E78T] [hereinafter King Report] (noting that over 40 percent of noncapital state prisoners' habeas cases are disposed of in federal court without reaching the merits of any claim).

state criminal justice to the attention of federal courts.[22] That tool is the doctrine of procedural adequacy.

Procedural adequacy is an equitable doctrine that took shape during the heyday of the civil rights movement.[23] At that time, federal courts understood that state courts would often be hostile to criminal defendants' exercise of their federal constitutional rights, such that federal courts were badly needed as alternative forums in which defendants could raise constitutional challenges.[24] The federal courts further recognized that state courts were often willing to manipulate their procedural regimes in order to preclude federal review of constitutional claims by finding unreasonable or arbitrary ways of declaring that criminal defendants had failed to comply with procedural rules.[25] So when state courts attempted to avoid addressing federal questions by resting their decisions on unreasonable applications of state procedural rules, the federal courts deemed the state procedural grounds inadequate to preclude federal review.[26] In short, procedural adequacy doctrine gives federal courts the power and the duty to declare state procedural rules inadequate when those rules unduly burden defendants' abilities to assert violations of their federal rights,[27] and that is precisely what many state postconviction labyrinths do.

Unfortunately, litigants too often fail to raise procedural adequacy challenges when the state procedural problem is structural, meaning that it is the interaction among state postconviction rules that precipitates a procedural default. Instead, litigants and their lawyers (to the extent that they have lawyers) think of procedural adequacy as a doctrine to invoke when *one* particular procedural rule is applied problematically.

The paradigmatic scenario in which federal courts declared state rules procedurally inadequate is, of course, the 1950s or '60s case in which a racist Southern judge would deliberately make up a rule, or apply a rule bizarrely, in order to dismiss a constitutional claim brought by a black defendant or a civil rights activist (or a person who was both).[28] But procedural adequacy doctrine is not just a rule against the deliberate manipulation of state

22. *See* Karl N. Llewellyn, The Bramble Bush: The Classic Lectures on the Law and Law Schools 129 (Oxford Univ. Press 2008) (1930) ("[F]or too much law, more law will be the cure.").

23. *See infra* Section II.A. Procedural adequacy doctrine emerged early in the twentieth century, but developed more fully during the civil rights movement. *See infra* Section II.A.

24. *See infra* Section II.A.

25. *See infra* Section II.A.

26. *See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 422 (1965); Henry v. Mississippi, 379 U.S. 443, 447–48 (1965); Barr v. City of Columbia, 378 U.S. 146, 149–50 (1964); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 297 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457–58 (1958); Reece v. Georgia, 350 U.S. 85, 87 (1955); Williams v. Georgia, 349 U.S. 375, 383 (1955).

27. *See* Lee v. Kemna, 534 U.S. 362, 376 (2002).

28. *See* cases cited *supra* note 26.

processes, and there is no reason why it should apply only when a petitioner's problem is the unfairness arising from a single procedural rule as opposed to the unfairness arising from the way that multiple rules interact.

Indeed, the Supreme Court took a more structural approach to procedural adequacy (without naming it as such) more than sixty years ago to stop one state from using the interaction of multiple procedural rules to undermine criminal defendants' federal constitutional rights.[29] The point of procedural adequacy doctrine, after all, is that a petitioner's federal habeas claims should only be procedurally defaulted if the procedural regime with which he failed to comply in state court was a regime that a petitioner could reasonably have been expected to navigate.[30]

In this Article, therefore, I argue that more litigants should raise *structural* adequacy challenges to state procedural regimes. A structural adequacy challenge would require the federal courts to consider not just the application of one state procedural rule, but the interaction of multiple procedural rules and practices. Such a structural approach is consistent with the original purposes of procedural adequacy doctrine.[31] And because what currently prevents federal courts from redressing systemic constitutional violations is often the combined effect of a web of procedural rules rather than the deliberate manipulation of a single rule, a structural approach to procedural adequacy is the most logical way for the doctrine to apply today.

So if structural adequacy challenges are available and useful tools for reform, why have litigants not been raising structural adequacy challenges? Part of the reason, as suggested above, may be the historical association of procedural adequacy with cases involving the deliberate manipulation of individual rules, rather than cases involving the combined effect of several rules in a Kafkaesque system. But another important reason is that litigants seeking to overcome state procedural defaults have instead focused their attention on another equitable doctrine: the doctrine of cause and prejudice.[32]

Under the cause and prejudice doctrine, which emerged in the 1970s, a state prisoner who failed to comply with state procedural rules can have her federal claim considered on the merits in federal court if she can show cause (meaning an objective factor external to the defendant) for failing to comply with the state's procedural regime and prejudice to the outcome of her case.[33] Cause and prejudice pushed structural procedural adequacy doctrine offstage.

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29. *See* Marino v. Ragen, 332 U.S. 561 (1947) (per curiam); Carter v. Illinois, 329 U.S. 173 (1946); Woods v. Nierstheimer, 328 U.S. 211 (1946).

30. *See* Davis v. Wechsler, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

31. *See infra* Parts II, IV.

32. *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (establishing the cause and prejudice doctrine).

33. *See id.*

The Supreme Court has not addressed a structural procedural adequacy challenge since the 1940s, despite recent opportunities. Consider *Martinez v. Ryan*[34] and *Trevino v. Thaler*,[35] the 2012 and 2013 cases in which the Supreme Court analyzed a series of procedural rules and practices that effectively prevented most criminal defendants in Arizona and Texas from ever raising Sixth Amendment claims alleging ineffective assistance of trial counsel. The story is a familiar one. In slightly different ways, Arizona and Texas relegated all IATC claims to postconviction review and did not permit litigants to raise IATC on direct appeal.[36] But the states also did not give prisoners effective counsel to help them raise their IATC claims on postconviction review.[37] As a result, prisoners routinely failed to raise IATC claims at the postconviction review stage in accordance with the state's procedural rules. When they got to federal habeas review, their IATC claims were procedurally defaulted.[38]

The Supreme Court considered these shell games unjust and inequitable. But rather than declaring Arizona's and Texas's procedural rules structurally inadequate, the Court relied on cause and prejudice doctrine as a way to excuse these individual petitioners' procedural defaults.[39] At no stage in either case did any litigant raise, nor did any federal court consider, whether the structure of Arizona's and Texas's procedural rules provided criminal defendants with an adequate opportunity to raise their Sixth Amendment claims.[40] Both cases focused exclusively on cause and prejudice as a means of

34. 132 S. Ct. 1309 (2012).

35. 133 S. Ct. 1911 (2013).

36. *See Martinez*, 132 S. Ct. at 1313 (noting that Arizona law "does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review" but requires the prisoner to "bring the claim in state collateral proceedings"); *see also Trevino*, 133 S. Ct. at 1915 ("The structure and design of the Texas system in actual operation . . . make[s] it 'virtually impossible' for an ineffective assistance claim to be presented on direct review." (quoting Robinson v. State, 16 S.W.3d 808, 811 (Tex. Crim. App. 2000))).

37. *Trevino*, 133 S. Ct. at 1915–16 (noting that Trevino's assigned postconviction counsel failed to raise a claim of ineffective performance by the trial attorney at the penalty phase of his capital case even though trial counsel had only presented one witness—Trevino's aunt—at the penalty phase); *Martinez*, 132 S. Ct. at 1314 (noting that Martinez's assigned postconviction counsel "made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all").

38. *E.g.*, *Trevino*, 133 S. Ct. at 1916 (noting a default); *Martinez*, 132 S. Ct. at 1314 (same).

39. *Trevino*, 133 S. Ct. at 1921; *Martinez*, 132 S. Ct. at 1318–20.

40. *See Trevino*, 133 S. Ct. at 1917 ("[A] conviction that rests upon a defendant's state law 'procedural default' . . . normally rests upon 'an independent and adequate state ground.'" (quoting Coleman v. Thompson, 501 U.S. 722, 729–30 (1991))); *Martinez*, 132 S. Ct. at 1316 (2012) ("There is no dispute that Arizona's procedural bar . . . is an independent and adequate state ground.").

excusing any procedural default.[41] In this respect, *Martinez* and *Trevino* are only too typical of habeas litigation as a whole.[42]

This development is unfortunate. Procedural adequacy and cause and prejudice are both equitable concepts, but the two doctrines look in different directions. Cause and prejudice asks whether an individual defendant had a legitimate excuse for failing to comply with state procedures.[43] Adequacy doctrine, on the other hand, judges the legitimacy of the state procedures themselves. It asks not whether the defendant should be forgiven for failing to comply with legitimate rules but whether the state's rules are legitimate in the first place—whether they warrant the respect and deference that justify procedural default.[44]

These different orientations mean that procedural adequacy is more likely than cause and prejudice doctrine to catalyze state procedural reform. A finding of cause that excuses a procedural default gives a pass to the individual petitioner, but it legitimizes the procedural regime. Such a finding does not tell the state that its procedures are inadequate, so it puts no pressure on the state to change its behavior.

Indeed, decisions excusing procedural default on cause and prejudice grounds have little impact at all beyond the particular cases in which they occur. A court conducting a cause and prejudice analysis focuses on the blameworthiness or excusability of an individual petitioner's conduct, and the fact-specific nature of that inquiry usually gives the cases little precedential value.[45] In contrast, a finding of structural inadequacy would initiate direct dialogue between the federal courts and the states about the legitimacy of the states' procedures.[46] The federal court would be saying that the

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41. *Trevino*, 133 S. Ct. at 1921; *Martinez*, 132 S. Ct. at 1316. Counsel in *Martinez* did argue that there should be a constitutional right to an attorney at the initial collateral review stage under certain circumstances, but he did not raise any adequacy challenge to Arizona's procedures. Brief for Petitioner at 16, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), 2011 WL 3467246, at *16. And Trevino's lawyer simply argued for an application of the *Martinez* cause and prejudice holding to his case without raising an adequacy challenge. Brief for Petitioner at 34, *Trevino*, 133 S. Ct. 1911 (No. 11-10189), 2012 WL 6587438, at *34.

42. Litigators' instincts to resort to cause and prejudice rather than adequacy doctrine to bypass procedural defaults are well known by those who practice and write in the field. *See, e.g.*, Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After* Martinez, 55 Wm. & Mary L. Rev. 2071, 2115 (2014) ("[T]he most common way to argue that a procedural default ought not apply is for the prisoner to demonstrate 'cause and prejudice.'").

43. *See, e.g.*, Goodrum v. Busby, 824 F.3d 1188, 1193 (9th Cir. 2016) (describing cause and prejudice as "a legitimate excuse for not raising the claims in an earlier petition").

44. *See, e.g.*, Clifton v. Carpenter, 775 F.3d 760, 764–65 (6th Cir. 2014) ("Whether a state procedural rule is 'adequate and independent' generally requires 'an examination of the legitimate state interests behind the procedural rule . . . .'" (quoting Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986))).

45. One need look no farther than the *Martinez* case itself on remand to see how fact-specific and nongeneralizable the application of the *Martinez* cause gateway is. *See* Martinez v. Schriro, No. CV 08–785–PHX–JAT, 2012 WL 5936566, at *7–13 (D. Ariz. Nov. 27, 2012) (dissecting each of eight different IATC claims and dismissing them on fact-specific grounds).

46. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035 (1977) (arguing that federal habeas corpus review of state

procedures themselves need to change. It is time to restore a structural approach to adequacy doctrine[47] and encourage the federal and state courts to have that dialogue and work together to reform broken state postconviction procedures.

This Article has four Parts. In Part I, I demonstrate that state procedural regimes persistently and pervasively prevent criminal defendants from securing judicial review of the merits of their federal claims. I explore how this phenomenon has evolved from the deliberate manipulation of individual procedural rules to the cumulative impact—whether purposeful or simply negligent—of the many different rules in a state's procedural web.

In Part II, I discuss how a structural procedural adequacy approach could catalyze reform. I explain the origin and purpose of procedural adequacy doctrine, introduce the concept of a structural approach to procedural adequacy, and show how the Supreme Court itself used structural procedural adequacy in the 1940s to prevent a combination of state procedural rules from undermining criminal defendants' constitutional rights.

In Part III, I explain how cause and prejudice doctrine displaced structural procedural adequacy as the primary means of getting around harsh state procedural defaults. Finally, in Part IV, I argue for a return to structural procedural adequacy doctrine and explain why it is better suited than cause and prejudice doctrine to catalyze procedural reform in the states.

I. State Procedural Rules as Obstacles to the Adjudication of Criminal Defendants' Federal Claims

State procedural rules routinely prevent criminal defendants from ever having their constitutional claims heard in court. This phenomenon has taken different forms at different times and places, and it probably flows from more than one cause. Some state officials may be hostile toward particular defendants and willing to use unfair tactics against them.[48] Others may be hostile toward the underlying federal rights, rather than toward particular defendants.[49] Others who are not particularly hostile to specific defendants or to the exercise of federal rights as such may nonetheless be willing to sacrifice the robust protection of those rights to other ends—for reasons ranging from the speedy disposition of cases on crowded criminal dockets[50]

court criminal convictions is about ensuring a dialogue between the federal courts and the state courts).

47. *See infra* Section II.B (discussing how the Supreme Court used to have a structural orientation to procedural adequacy doctrine before it was displaced by the cause and prejudice doctrine).

48. *See, e.g.*, Abbe Smith, *Defense-Oriented Judges*, 32 Hofstra L. Rev. 1483, 1484–85, 1490–92 (2004) (documenting examples of judges who are openly hostile to criminal defendants).

49. *See generally* Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977) (arguing that state courts are often hostile to criminal defendants' federal rights).

50. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583, 600–02 (2005) (describing the "[e]xtreme docket pressure" in criminal courts).

to the desire to appear tough on crime before facing the local voters.[51] And some state officials may be completely ignorant of the ways that their actions prevent criminal defendants from ever asserting violations of their constitutional rights.[52] Given the well-known tendency of electoral politics to underattend to the interests of indigent criminal defendants,[53] a procedural system that effectively prevents those defendants from exercising their rights is likely to have staying power once it comes into being.

To be sure, the ways that state procedural rules have blocked the exercise of federal rights have changed over time. In the first six decades of the twentieth century, local judges were often overtly hostile toward defendants' attempts to exercise their constitutional rights. This phenomenon was paradigmatically a problem in criminal cases involving black (and especially black male) defendants and, especially toward the end of the period, in cases involving both black and nonblack defendants who were arrested while actively challenging the law of Jim Crow.

Consider some illustrative examples. In *Rogers v. Alabama*, a black defendant filed a two-page motion objecting to the intentional exclusion of African Americans from the list of persons eligible to serve as grand jurors.[54] The trial court refused to entertain the merits of the motion, and the Supreme Court of Alabama upheld the trial court's action under a state procedural rule providing that "if any pleading is unnecessarily prolix . . . it may be stricken."[55] As the United States Supreme Court recognized, describing a two-page motion as "unnecessarily prolix" was an obviously unfair application of the procedural rule, one deployed simply to avoid adjudicating the underlying constitutional claim.[56]

Similarly, when a black man accused of killing a white man in Georgia wanted to file an extraordinary motion for a new trial alleging a violation of his equal protection rights in the selection of his petit jury, the Georgia courts relied on the discretion vested in the state procedural rule governing new trial motions to reject the motion.[57] Recognizing that Georgia had allowed defendants in relevantly similar cases to have their extraordinary motions considered on the merits, the Supreme Court determined that the

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51. *See* Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. Rev. 1101, 1101 (2006) ("[S]tudies show that elected judges give harsher punishments to criminal defendants as elections near.").

52. *See, e.g.*, Smith, *supra* note 48, at 1493 (discussing judges acting out of ignorance).

53. *See, e.g.*, Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 Fordham L. Rev. 1615, 1618 (2002) ("[C]riminal defendants have no powerful lobby at either the state or federal level.").

54. *See* 192 U.S. 226 (1904).

55. *Rogers*, 192 U.S. at 229–30 (internal quotation mark omitted) (quoting Civ. Code Ala. § 3286, amended and currently codified in Ala. R. Civ. Proc. 12(f)).

56. *Id.* at 231.

57. Williams v. Georgia, 349 U.S. 375 (1955).

Georgia court was, in effect, using its discretion only to "avoid[ ] . . . the federal right."[58]

As is true in many areas of discrimination law, once it was clear that the federal courts would not permit overt discrimination, many states that wanted to discriminate looked for more subtle ways to do so.[59] In the criminal procedure context, when the Supreme Court began telling states that they could not rely on arbitrary or novel applications of state procedural rules to bar consideration of federal claims, some states found ways to hide their discriminatory practices in a labyrinth of procedural rules.

Consider, for example, Illinois's attempts in the 1940s to prevent indigent defendants, many of them black, from arguing that they were denied their rights to counsel, physically coerced into confessing, or both. At that time, an Illinois criminal defendant who wanted to challenge his conviction had three procedural avenues: (1) the writ of error, a form of appellate review that was limited to the bare trial record and often would not include the motions and rulings of the trial court or a description of the evidence unless the defendant prayed for and the trial court permitted a bill of exceptions; (2) the writ of habeas corpus, which was limited to questions about the jurisdiction of the convicting court or contentions that subsequent events had voided the conviction; or (3) the writ of coram nobis, which was limited to allegations that a significant error of fact occurred in the trial court and had affected the outcome.[60]

Taken individually and at face value, nothing might seem amiss about any of these procedures. But Illinois systematically used the interaction among the procedural rules to create what Justice Wiley Rutledge called a "merry-go-round" that sent prisoners in circles.[61] If an indigent prisoner filed a writ of error, the Illinois courts would interpret the claim as requiring extrarecord development and dismiss it on the procedural ground that it should have been filed as a habeas petition.[62] But when a prisoner filed a habeas petition, Illinois would dismiss the petition after finding a way to characterize it as raising new facts that were only appropriately considered through an application for coram nobis.[63] If the prisoner filed a coram nobis petition, the Illinois courts would still dismiss it on procedural grounds,

58. *Id.* at 383.

59. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915) (describing Oklahoma's practice of trying to get around the constitutional prohibition on banning black men from voting by adopting a provision that only permitted individuals whose grandparents had voted to vote). This is not to suggest that overt discrimination did not continue, because it did. I only mean to point out that more discrimination went underground once overt attempts to prevent defendants from asserting federal rights were unsuccessful.

60. *See* People v. Loftus, 81 N.E.2d 495, 497–98 (Ill. 1948) (per curiam) (describing the writ of error and the writ of coram nobis); People *ex rel.* McGee v. Hill, 183 N.E. 17, 19 (Ill. 1932) (describing the writ of habeas corpus).

61. Marino v. Ragen, 332 U.S. 561, 569–70 (1947) (Rutledge, J., concurring).

62. *See, e.g.*, Carter v. Illinois, 329 U.S. 173 (1946).

63. *See, e.g.*, Woods v. Nierstheimer, 328 U.S. 211 (1946).

either because it was not timely filed[64] or because the petitioner was trying to raise newly discovered evidence or correct a matter that had been adjudicated at trial, neither of which was permissible.[65] Illinois had effectively created a "procedural labyrinth . . . made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one."[66]

Today, the postconviction procedures of many states are in various ways reminiscent of the Illinois labyrinth. Indeed, the very complexity of postconviction review and the fact that most indigent prisoners must manage the maze of postconviction review without the aid of counsel[67] mean that few prisoners will ever succeed in having their federal claims considered.[68] There are simply too many traps for the unwary, too many ways in which pro se litigants and even nonexpert lawyers are liable to fail to comply with this or that procedural requirement.

For a more modern example of this problem, consider how Georgia handles alleged violations of indigent defendants' Sixth Amendment rights to effective trial counsel. Under Georgia law, a defendant who wants to raise an IATC claim must do so at the earliest practicable moment—if possible, on direct appeal.[69] Georgia defendants are theoretically entitled to new counsel on appeal in order to raise IATC claims,[70] and the Georgia Public Defender Council ("GPDC")[71] is charged with appointing new counsel on

64. There was a strict five-year statute of limitations for filing coram nobis petitions. *See* People v. Rave, 65 N.E.2d 23, 28 (Ill. 1946).

65. *See* Note, *A Study of the Illinois Supreme Court*, 15 U. CHI. L. REV. 107, 119–30 (1947) (collecting cases and noting that most coram nobis petitions in Illinois were dismissed on procedural grounds, because "[c]oram nobis motions do not lie for newly discovered evidence, for false testimony at the trial, or for the correction of any matter which has been adjudicated[, nor may coram nobis] be used to contradict matters of record").

66. *Marino*, 332 U.S. at 567; *see also* Curtis R. Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1358–59 (1961) (discussing the "largely unsatisfactory nature of state postconviction processes" and noting that the "possibilities of procedural obstacles in state postconviction processes are legion"). The Supreme Court ultimately shut down Illinois's "procedural labyrinth." *See infra* Section II.B.

67. *See* sources cited *supra* notes 13–14.

68. *See* KING REPORT, *supra* note 21, at 60–63.

69. *See* Garland v. State, 657 S.E.2d 842, 844 (Ga. 2008).

70. *See id.*

71. The Georgia Public Defender Council used to be called the Georgia Public Defender Standards Council, but the legislature dropped the "Standards" part in 2015. Act of May 5, 2015, No. 74, § 7-1, 2015 GA. LAWS 519, 528 (amending GA. CODE ANN. § 17-12-1 (2013)). For consistency, I will refer to the Council by its current acronym—GPDC.

appeal for that purpose.[72] But for years, the GPDC in practice routinely refused to appoint new counsel on appeal.[73] (The GPDC's lack of independence might be part of the problem: it is an arm of the executive branch, under the control and supervision of the governor and attorney general.)[74] After a successful class action, the GPDC finally agreed to appoint new counsel for defendants on direct appeal.[75] Even now, however, the GPDC is still finding ways to erect procedural obstacles for defendants who want to obtain new counsel to raise IATC claims on direct appeal. For example, the GPDC now requires indigent defendants to detail in writing why they need

72. *See* GA. CODE ANN. § 17-12-22(a) (2013); *see also In re* Formal Advisory Op. 10-1, 744 S.E.2d 798 (Ga. 2013) (noting that it would be an impermissible conflict of interest to have a different attorney from the same public defender's office handle the appeal); Flournoy v. State, No. 2009CV178947, 2010 WL 9037133, at *25–26 (Ga. Super. Ct. Feb. 23, 2010) (noting that a case must be transferred to the GPDC for the appointment of appellate lawyers where the Georgia defendant has been represented by a circuit public defender at trial).

73. *See Flournoy*, 2010 WL 9037133. The GPDC admitted that as of January 2010, there were 191 convicted defendants who remained unrepresented after requesting a new appellate attorney, because the GPDC simply refused to assign them attorneys. *See id.* at *7–8. By 2011, this number had grown to more than 800 unrepresented defendants. *See* Greg Land, *Southern Center Drops Suit Over Indigents' Appeals*, DAILY REP., July 21, 2014, at 10.

74. In 2007, Georgia passed legislation that transferred the GPDC from the judicial branch to the executive branch. GA. CODE ANN. § 17-12-1(b) (2013) ("The Georgia Public Defender Standards Council shall be an independent agency within the executive branch of state government."); *see also* Brief of Amici Curiae Honorable Norman S. Fletcher et al. at 8–9, Ga. Pub. Def. Standards Council v. Buchanan, 679 S.E.2d 712 (Ga. 2009) (No. S09A0440), 2009 WL 3342659, at *8–9 [hereinafter Brief of Amici Curiae]. As a result of this transference, the GPDC is now under the control and supervision of the governor and attorney general. *See* GA. CODE ANN. § 17-12-5(a) (2013) ("The director [of the GPDSC] shall be appointed by the Governor and shall serve at the pleasure of the Governor."); *id.* § 45-15-34 (explaining that the Department of Law is "vested with complete and exclusive authority and jurisdiction in all matters of law relating to" every department and agency of the executive branch); Brief of Amici Curiae, *supra*, at *8–9, *11. This system creates a conflict: the attorney general and governor are expected to dually represent both the prosecutorial and defense functions of the state. *Id.* at *14. Georgia has created a system in which the attorney general's office is on opposite sides in criminal cases: the office represents the state's prosecutorial interests while also advising the GPDC, which is supposed to be an independent agency representing the interests of criminal defendants. This inherent conflict creates obvious problems. For example, while the GPDC could theoretically address its budgetary concerns by suing the state for failure to provide adequate funding for indigent defense, the attorney general has barred the GPDC from doing so. The Georgia attorney general issued an opinion stating "that the best interests of the State would not be served by having one state government entity sue another" and that "it is not in the best interest of the State under the circumstances presented here for the Attorney General to institute litigation in which the GPDSC sues another entity of state government." *See* Ga. Att'y Gen. Op. No. 2009-2 (Jan. 13, 2009), http://law.ga.gov/opinion/2009-2 [https://perma.cc/G3A5-MCUM]. The attorney general opinion cited approvingly to an earlier 1976 opinion which explained that litigation by one agency of the executive branch against another with the consent of the attorney general would "obviously create a serious ethical problem," as the attorney general would be counsel for both plaintiff and defendant. *See id.*; Brief of Amici Curiae, *supra*, at *23 (quoting Ga. Att'y Gen. Op. No. 76-93 (Aug. 18, 1976), 1976 Ga. AG LEXIS 370).

75. Flournoy v. State (*Flournoy II*), No. 2009CV178947, 2012 WL 5885196, at *3 (Ga. Super. Ct. Mar. 12, 2012); *Flournoy*, 2010 WL 9037133, at *34–37.

new attorneys on appeal.[76] Needless to say, indigent defendants regularly lack the skills to convey their needs in writing to the satisfaction of the GPDC. And if an indigent defendant cannot substantiate his IATC claim in writing, the GPDC refuses to appoint appellate counsel, thus forcing him to proceed with his trial attorney on appeal.[77] As should be obvious, a defendant who is still represented by the attorney whose trial performance is alleged to have been ineffective is not in a good position to raise an IATC claim, both because few attorneys are keen to prove their own ineffectiveness and because an attorney who was ineffective at trial might not be particularly effective on appeal. So defendants who do not get new counsel on appeal are left to raise their IATC claims during state habeas proceedings,[78] for which Georgia does not provide indigent prisoners with counsel at all.[79] Such a habeas petitioner is then left to investigate his fact-intensive IATC claim from his prison cell, without the aid of a lawyer to develop the facts, understand the law, or present the arguments to a court.

It is difficult to imagine a pro se litigant successfully mounting a challenge to such a complicated set of procedures. It is hard enough for such a litigant to show that a particular rule was applied unreasonably in his individual case. It is vastly harder to explain—or even to realize—that the problem precluding him from raising a federal claim arises from a multitude of procedures rather than any one rule considered individually. And modern postconviction systems exhibit a byzantine level of complexity. As a result, officials who purposely use procedural rules to undermine federal rights have opportunities to hide behind bewildering rules, and officials who in good faith are not hostile to the exercise of federal rights often experience genuine confusion about where in the process to address some federal claims. It is often hard to tell whether the resulting prejudice to criminal defendants is intentional, merely hapless, or something in between.

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76. Email from Ga. Pub. Def. to author (Dec. 4, 2014) (on file with author).

77. *Id.* This is just the most recent in a long line of efforts by the GPDC to block indigent defendants from getting new counsel on appeal to raise IATC claims. In the past, the GPDC argued that it was not responsible for providing new appellate counsel until the trial attorney filed a formal motion to withdraw in the trial court. *Flournoy*, 2010 WL 9037133, at *8. Similarly, the GPDC argued that it was not obligated to appoint counsel until the local public defender office physically transferred the case file and transcript to the GPDC. *Id.* The *Flournoy* court rejected both of these claims as insufficient to justify the GPDC's refusal to provide the constitutionally required counsel. *Id.* at *29–31.

78. Williams v. Moody, 697 S.E.2d 199, 201 (Ga. 2010) ("Where, as here, the defendant is represented by trial counsel through completion of the appellate process, the failure to raise the issue of ineffective assistance of trial counsel prior to the direct appeal does not constitute a waiver of the ability to raise the claim since the defendant is able to raise the claim in a habeas proceeding." (footnote omitted)).

79. Donald E. Wilkes, Jr., *The Great Writ Hit: The Curtailment of Habeas Corpus in Georgia Since 1967*, 7 J. Marshall L.J. 415, 503 (2014) ("Georgia is one of only seven states . . . with no statutory right to postconviction counsel."); *see also* Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999) ("[T]here is no federal or state constitutional right to appointed counsel in Georgia habeas corpus proceedings."). *See generally* Ga. Code Ann. §§ 9-14-40 to -54 (explaining Georgia law on state habeas corpus proceedings).

Consider as an illustration that in some states there is so little communication between the state appellate and postconviction courts that a state court may give a prisoner permission on direct appeal to have a claim considered later in postconviction only to have the postconviction court then deem the claim defaulted as something that should have been raised on direct appeal.[80] Sometimes that scenario arises from the judiciary's hostility to the exercise of federal rights, but often it is at least equally possible that these missteps are attributable to confusion within the state about the web of overly complicated state procedural rules.[81] If the state judiciary and the attorneys involved cannot figure out when claims should be raised, indigent defendants proceeding pro se in state postconviction procedures certainly won't be able to navigate the procedural maze. As a result, federal rights routinely get lost in the swamp of complex procedural requirements.

Oklahoma, for example, has a procedural maze of rules governing a criminal defendant's ability to challenge a guilty plea. One rule provides that a defendant who wishes to challenge a guilty plea must file an application to withdraw the plea in the trial court within ten days of the judgment and sentence.[82] According to another rule, if the defendant wants to preserve his right to challenge that guilty plea on appeal, he must file a petition for a writ of certiorari in the Court of Criminal Appeals within ninety days of conviction.[83] A third rule indicates that the failure to follow either of these requirements prevents the defendant from obtaining any further postconviction review unless the defendant can articulate special circumstances that justify excusing his prior failure in a subsequent application.[84] But Oklahoma case law does not consider ineffective assistance of trial counsel to be a "special circumstance" that would justify the failure to timely challenge a guilty plea.[85] Finally, Oklahoma practice does not provide for the assignment of new counsel within the time period during which a defendant's application

80. *See* Wilson v. Ozmint, 357 F.3d 461, 466–67 (4th Cir. 2004); *see also* Brown v. Sec'y for the Dep't of Corr., 200 F. App'x 885, 887–88 (11th Cir. 2006) (discussing a case in which Florida state courts rejected a postconviction motion, noting that the issues could have been raised on appeal and were therefore barred even though Florida law clearly indicated that the defendant could wait until postconviction to raise the claims); McLeod v. Sec'y, Dep't of Corr., No. 8:06-cv-794-T-23EAJ, 2008 WL 5381865, at *19 (M.D. Fla. Dec. 22, 2008) (discussing a case in which Florida state courts improperly held that the defendant's extrarecord claim was barred because it was not raised on direct appeal even though the state did not provide an avenue for raising extrarecord claims on direct appeal, such that the claim could only have been raised in postconviction); Clarke v. Goord, No. 07-CV-0366 (BMC), 2007 WL 2324965, at *2–5 (E.D.N.Y. Aug. 10, 2007) (showing a similar situation in New York).

81. *See* Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 959 (1965) (noting that states might default federal claims because of "a purpose to avoid a federal claim" but also noting that "arbitrariness can also be the product of stupidity [or] . . . an aberrational lapse from reasoned judicial behavior").

82. *See* OKLA. R. CRIM. APP. 4.2(A).

83. *See* OKLA. STAT. tit. 22, § 1051 (2011).

84. *See id.* § 1086.

85. *See* Hickman v. Spears, 160 F.3d 1269, 1271–74 (10th Cir. 1998) (discussing Oklahoma practice).

to challenge a guilty plea must be filed.[86] As a result, it is up to the defendant himself to recognize and brief his counsel's ineffectiveness in order to comply with these time restrictions.[87]

Each one of these rules may seem fair when considered in isolation, but the combination of these rules effectively precludes many Oklahoma defendants who plead guilty (and the vast majority of defendants do plead guilty)[88] from challenging the effectiveness of their trial attorneys' performance. Most Oklahoma defendants will not even have new counsel appointed within the time frame necessary to raise an IATC claim.[89]

Perhaps Oklahoma is trying to prevent defendants from raising these challenges, in which case this scenario would illustrate overt hostility. But it is also highly possible that courts (and the legislatures that enacted these rules) simply do not consider how the entire scheme of procedural rules works to disadvantage large classes of defendants. Legislatures enact rules that seem sensible on their own, and courts get presented with individual cases in which litigants did not comply with the ten-day or ninety-day rule, and they do not look beyond the rule at issue to think about how the rules interact.[90]

Under current conditions, courts have little incentive to become more ambitious about discovering ways in which the system is treating criminal defendants too cursorily. Most state systems are trying to manage overwhelming dockets,[91] and as a result they are willing to be consciously indifferent to the exercise of federal rights if it means that they can process cases faster. Between the Warren Court's incorporation of criminal procedure rights against the states in the 1960s and the proliferation of criminal offenses that accompanied the war on drugs in the 1970s, criminal dockets exploded, and the state courts were overrun with criminal cases presenting

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86. *See id.* at 1272.

87. As many jurisdictions have recognized, it is unrealistic to expect an attorney to raise his own ineffectiveness. *See, e.g.*, People v. Bailey, 12 Cal. Rptr. 2d 339, 340 (Ct. App. 1992); People v. Moore, 797 N.E.2d 631, 638 (Ill. 2003); Robinson v. State, 16 S.W.3d 808, 812 (Tex. Crim. App. 2000); Calene v. State, 846 P.2d 679, 684 (Wyo. 1993).

88. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 226846, Felony Sentences in State Courts, 2006 – Statistical Tables 25 (2010), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/YD9K-FNRV] (noting that 94 percent of criminal defendants plead guilty).

89. *See Hickman*, 160 F.3d at 1272 ("[T]he short time frame in which petitioner had to perfect a certiorari appeal under Oklahoma law did not give him sufficient opportunity to discover and develop his ineffective assistance of counsel claim.").

90. *See* DeYoung v. Schriro, 201 F. App'x 443, 445 (9th Cir. 2006) (deeming Arizona's procedural scheme for raising involuntary waiver of trial counsel claims inadequate because "almost all involuntary-waiver-of-counsel claims are barred by the state rules rejecting claims that (1) are not raised in trial court or (2) are based on errors the petitioner contributed to" and noting that, because a defendant "must affirmatively assert a waiver of counsel, [the defendant] always 'contributes' to the error and it would be extremely rare for the person asserting the waiver to object at the same time to the court's acceptance of that assertion").

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

federal constitutional issues.[92] In order to manage their burgeoning dockets, state courts had to find ways to cut corners and process cases. Reliance on procedural rules to bounce cases from the courtroom was one effective tool to manage those overwhelming dockets.[93]

The imperatives of docket management may help to explain how a number of states handle IATC claims in particular. It is no secret that public defenders handle the vast majority of cases in state criminal justice systems and that they are systematically overworked and underfunded.[94] Caseload statistics alone reveal that many public defenders are structurally ineffective.[95] They have too many cases even to meet with each client before trial, let alone investigate or research the law animating their cases.[96] And they are frequently not given the funding that they need to investigate or hire experts.[97] It is hardly surprising, therefore, that ineffective assistance of trial counsel is one of the most frequently raised claims in federal habeas proceedings.[98]

Despite widespread understanding of the structural problems of trial attorney ineffectiveness, the procedural systems of a vast majority of states systematically prevent defendants from ever having their IATC claims considered on the merits. First, in a majority of states, IATC claims have been removed from direct appeal and relegated to postconviction review.[99] This means that defendants have to wait four or five years—which is often how long it takes to complete the direct review process[100]—before they will be

92. *See id.*; *see also* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2151 (2002) (noting how "[c]riminal dockets were exploding" in response to the war on drugs).

93. *See generally* B.E. Bergesen III, *California Prisoners: Rights Without Remedies*, 25 STAN. L. REV. 1, 40–41 (1972) (discussing how docket management often plays a role in constitutional interpretation).

94. *See* sources cited *supra* note 3.

95. *See, e.g.*, NORMAN LEFSTEIN, AM. BAR ASS'N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12–19 (2011), http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf [https://perma.cc/3HV9-EK5A] (cataloguing recent reports that document excessive caseload problems in public defender offices across the country).

96. John Pfaff, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html?_r=0 [https://perma.cc/A9W6-M2AM] (describing how public defender offices are underfunded and overwhelmed).

97. *See* Bright & Sanneh, *supra* note 3, at 2152–53.

98. *See* KING REPORT, *supra* note 21, at 28 (noting that eighty-one percent of capital cases included an allegation of ineffective assistance and over half of the non-capital cases included such an allegation).

99. *See* Primus, *supra* note 16, at 688–97 (summarizing this trend).

100. *See* Marc M. Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437, 437–38 (1990) (noting that delays of six years, "while 'shocking,' are not 'unusual'" (quoting Mathis v. Hood, 851 F.2d 612, 614 (2d Cir. 1988))); *see also* Commonwealth v. O'Berg, 880 A.2d 597, 602 (Pa. 2005) (noting that Pennsylvania appeals can take more than four years to be completed); *Speedy Trial*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 360, 360 n.1210 (2006) (collecting cases involving delays ranging from two to thirteen years).

permitted to raise a claim that their trial attorney was ineffective. For defendants whose sentences are short, there is little incentive to pursue postconviction remedies once they are released from prison. In fact, many jurisdictions won't allow them to file postconviction petitions if they are no longer in custody.[101] Thus, by pushing fact-intensive IATC claims to postconviction review, states ensure that fewer prisoners are able to raise these challenges, which then eases the state's caseload burdens.

There is also a facially legitimate reason for states to locate these claims in the postconviction stage. IATC claims often require extrarecord development and, in many jurisdictions, defendants are not permitted to open the record on direct appeal (which again is thought necessary to save costs and encourage an end to litigation).

As already noted, however, these states do not provide lawyers for defendants at the postconviction review stage. So even if a defendant makes it to postconviction review and wants to allege that his trial attorney was ineffective, he must find a way to reinvestigate his case from within his prison cell and present the ineffectiveness claim without the assistance of an attorney.[102]

Finally, many of these states impose additional requirements on the form that these pro se pleadings must take. In a number of states, for example, state courts must reject prisoner pleadings if they are too conclusory in nature[103] or if the moving papers do not contain sworn allegations.[104]

On their face, these rules support legitimate state interests in ensuring that petitions are adequately presented for review and are not based wholly on unreliable hearsay. But when states relegate all IATC claims to state postconviction processes and fail to provide prisoners with lawyers at the postconviction stage, imposing these strict pleading requirements on pro se prisoners usually ensures that they will be unable to raise their constitutional challenges. How can an unrepresented prisoner who is confined to a cell get sworn affidavits from witnesses?[105] How is a prisoner supposed to understand how to flesh out a conclusory pleading when he has no lawyer to

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101. *See, e.g.*, 42 PA. STAT. AND CONS. STAT. ANN. § 9543(a)(1) (2007) ("To be eligible for [postconviction] relief . . . the petitioner must [be] . . . currently serving a sentence of imprisonment, probation or parole for the crime . . . ."); *cf.* Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 157 (2000) (explaining that the collateral consequences of criminal conviction do not by themselves permit a defendant to file a habeas corpus petition).

102. *See* Primus, *supra* note 16.

103. *See, e.g.*, Penn v. Smyth, 49 S.E.2d 600, 601 (Va. 1948); *see also* Henry v. Murray, No. 91-6684, 1993 WL 22008 (4th Cir. Feb. 3, 1993) (per curiam).

104. *E.g.*, N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2012); *see also* Smart v. Scully, 787 F.2d 816, 818–21 (2d Cir. 1986) (discussing New York's rule); Agosto v. Senkowski, No. 99 Civ.9013 LTS KNF, 2004 WL 1814020, at *2 (S.D.N.Y. Aug. 16, 2004) (same).

105. *See Smart*, 787 F.2d at 819–20 (declaring this requirement inadequate). *But see* Rosa v. Herbert, 277 F. Supp. 2d 342, 352 (S.D.N.Y. 2003) ("Surprisingly, *Smart v. Scully* is cited infrequently, and a number of district courts in this circuit have held, without reference to *Smart* or much discussion, that a dismissal for failure to file an affidavit pursuant to section 440.30 represents an adequate and independent state ground.").

help him and often is not even given a second chance to try to do it himself?[106]

The combined effect of these procedural rules is to bounce IATC claims out of state court without ever requiring the state to entertain them on the merits. To repeat, it is not always obvious why states create rule structures with these effects. Perhaps some states are hostile to IATC claims and are trying to frustrate them with a clever procedural strategy; perhaps state courts have not thought about how all of these rules interact to prevent litigants from ever having the claims considered on the merits. It is also possible that state courts are aware of the effects of their scheme of rules but are not motivated to do anything ameliorative, because the need to control the size of their dockets trumps any concern they have about the problem of ineffective trial attorney performance. IATC claims are routinely raised and usually fact intensive, thus requiring significant judicial time to resolve. Finding ways to limit the number of IATC claims eases caseload burdens. It follows, of course, that the federal right to an effective attorney is, as a practical matter, illusory in many states, because there is no real opportunity to have a claim of ineffectiveness adjudicated on the merits. But that seems to be a price that states are willing to pay.[107]

IATC claims are not the only claims that are typically relegated to the state postconviction process. In most states, litigants must wait until the postconviction review stage to raise any claims that involve newly discovered evidence and therefore require extrarecord development.[108] In addition to IATC, claims predicated on prosecutorial misconduct for withholding evidence,[109] judge and/or juror bias, and newly discovered scientific evidence often require such extrarecord development. Under current law, defendants

106. *See Henry*, 1993 WL 22008 (holding that Virginia's *Penn v. Smyth* rule defaulting petitioners' conclusory assertions was inadequate as applied to pro se litigants who were given no opportunity to amend a conclusory petition); Clay v. Murray, No. 91-6269, 1992 WL 83301 (4th Cir. Apr. 27, 1992) (per curiam) (same); Crutchfield v. Garraghty, No. 86-7689, 1987 WL 38485 (4th Cir. Aug. 13, 1987) (per curiam) (same); *see also* Godfrey v. Mahoney, No. CV 09-35-M-DWM-JCL, 2009 WL 5371196, at *6 (D. Mont. Nov. 24, 2009) (discussing Montana's practice of requiring a defendant who wants to allege ineffective assistance of trial counsel to obtain an affidavit in support from a member of the ineffective defense team and noting that "[t]o require a person alleging ineffective assistance of counsel to obtain an affidavit from counsel admitting the facts constituting ineffectiveness plainly frustrates attempts to vindicate the Sixth Amendment right to effective assistance"), *adopted by* 2010 WL 122191 (D. Mont. Jan. 8, 2010), *aff'd*, 511 F. App'x 613 (9th. Cir. 2013); MICH. CT. R. 7.211(C)(1) (imposing a similar requirement in Michigan that a defendant who wants to have his case remanded by the appellate court for a hearing on a claim of ineffective assistance of trial counsel must include an "affidavit or offer of proof regarding the facts to be established at a hearing").

107. Even states that permit defendants to open the record on appeal and raise trial attorney ineffectiveness at that earlier stage often implement complex procedural requirements, the combination of which effectively deprives defendants of the ability to have their claims ventilated. *See* Primus, *supra* note 16.

108. *See id.* at 689, 704 (documenting this majority position).

109. *See* Brady v. Maryland, 373 U.S. 83 (1963).

are not constitutionally entitled to attorneys to raise claims in state postconviction proceedings.[110] As a result, pro se litigants are often at the mercy of state procedural mazes that do not give them effective opportunities to raise any of these postconviction challenges.[111]

Whether grounded in hostility, confusion, ignorance, or the regrettable consequences of having to cope with overwhelming dockets, the rise of complex statutory appellate and postconviction review regimes in the states has led to a situation where the constitutional claims of large numbers of criminal defendants are routinely deemed procedurally defaulted and thus never heard on the merits. The old regime under which a state would rely on the deliberate manipulation of *one* procedural rule to block a federal claim is largely gone. But in its place stands a set of procedural labyrinths, each one with its traps for unwary defendants.

II. Structural Adequacy Doctrine as a Potential Solution

There are many possible ways to try to prevent complex procedural rules from unfairly precluding the substantive adjudication of criminal defendants' rights. We could have more defense-oriented judges on the bench.[112] We could encourage states to overhaul their criminal procedure rules with an eye toward ensuring that defendants have legitimate opportunities to raise their constitutional claims. We could ease docket pressure through decriminalization.[113] Here, I focus on one potential tool—the doctrine of adequacy—that already exists in current law. Obviously, the deployment of this tool alone will not solve every problem. But it would help, and it would not require new legislation.

In Section II.A, I will explain the origin and purpose of procedural adequacy doctrine. Then, in Section II.B, I will introduce the concept of a *structural* approach to procedural adequacy, one under which federal courts analyze not just the application of one state procedural rule but the interaction of multiple state procedural rules. I will explain how a structural approach to procedural adequacy doctrine is both consistent with the original purposes of procedural adequacy doctrine and the most logical way to apply the doctrine today, given the current structure of state criminal justice systems. Finally, I will explain how the Supreme Court itself recognized and used a structural approach to procedural adequacy (albeit without naming it

110. *See* cases cited *supra* note 14.

111. *See* Martinez v. Ryan, 132 S. Ct. 1309, 1321 (2012) (Scalia, J., dissenting) (noting that procedurally "[t]here is not a dime's worth of difference in principle between [IATC] cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised").

112. *See, e.g.*, Smith, *supra* note 48, at 1484, 1502–03 (pointing out how few judges have defense experience and arguing for more defense-oriented judges).

113. *See, e.g.*, Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 Minn. L. Rev. 1769, 1804 (2016) (talking about recent movements to decriminalize and/or reclassify low-level criminal offenses).

as such) more than sixty years ago to stop one state from using multiple procedural rules to undermine federal constitutional rights.

A. *The Origin and Purpose of Procedural Adequacy Doctrine*

Cases that proceed from state courts to the United States Supreme Court often involve issues of both state and federal law. The United States Supreme Court is, of course, the final arbiter of the meaning of federal law, and the point of taking a case from a state's highest court to the Supreme Court is to secure review of some federal question that the case presents. But if a case involves a state law issue as well as a federal issue, and if the state court's resolution of the state law issue is sufficient to support the state court's judgment regardless of how the federal issue is resolved, the Supreme Court will not decide the federal issue.[114] To decide federal issues in such cases, after all, would be tantamount to issuing advisory opinions, because the outcome in such a case does not depend on anything that the Court would decide.[115] Even if the Supreme Court took the time and made the effort to reverse the state court's resolution of the federal issue, the case would simply be remanded to the state court, which would then reach the same outcome as before on state law grounds.[116] Hence the doctrine of "adequate and independent state grounds" ("AISG"): when a state court's judgment is supported by a ground that is (1) adequate to direct the result in the case and (2) independent of federal law, the Supreme Court "will not take jurisdiction of the case, even though it might think the position of the State court an unsound one."[117]

Scholars and courts have fought for decades over whether AISG doctrine is constitutionally required,[118] statutorily required,[119] or a creature of common law.[120] But whatever the answer to that question might be, AISG

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114. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635 (1874).

115. Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

116. Stated differently, the substantive AISG doctrine is designed to prevent "a useless and profitless reversal" on federal grounds. *Murdock*, 87 U.S. (20 Wall.) at 635.

117. Klinger v. Missouri, 80 U.S. (13 Wall.) 257, 263 (1871); *see also* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); *Murdock*, 87 U.S. (20 Wall.) at 635.

118. *See* Herb v. Pitcairn, 324 U.S. 117, 125–26 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."); Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 Am. U. L. Rev. 1053, 1100 (1999).

119. *See* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 Colum. L. Rev. 1888, 1899–1903 (2003) (arguing that the procedural variant of AISG is based in statute).

120. *See* Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1158–1200 (1986) (common law); *see also* Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent*

doctrine is a long-standing and well-accepted part of federal court practice.[121]

Procedural adequacy doctrine emerged early in the twentieth century as a complement to substantive AISG doctrine.[122] At that time, the Supreme Court already required most state court litigants with federal claims to present those claims in state courts before bringing them to federal court.[123] This exhaustion requirement—so called because litigants were required to "exhaust" their avenues of relief in the state system before turning to federal forums—was grounded in principles of federalism and comity. It sought to ensure that state courts would have opportunities to remedy state officials' violations of federal law before the federal courts would step in.[124] If the states would fix the problems themselves, the reasoning went, there would be no need for federal courts to point fingers, and friction between the federal and state governments would be minimized.

The requirement of exhaustion gave rise to the doctrine of procedural default, under which a litigant who has an opportunity to present his federal claims in state court but fails to do so in accordance with the state's procedural rules thereby forfeits his opportunity to present those claims in federal court.[125] The logic of procedural default is straightforward. Exhaustion requires state court litigants to present their federal claims to the state courts first, and a failure to abide by that requirement is met with the natural sanction: the loss of the right to raise those claims. More particularly, the threat of procedural default requires litigants to comply with state court procedural rules regarding where, when, and how to present their claims.

States have an obvious and important interest in orderly judicial procedures.[126] If state rules require criminal defendants who want to raise constitutional challenges to jury composition to do so before their trials begin,

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State Grounds Doctrine, 86 COLUM. L. REV. 1291, 1294–1366 (1986) (summarizing the three positions).

121. Some scholars have argued that AISG doctrine should have different contours on direct appeal than it does on federal habeas review. *Compare* Reitz, *supra* note 66, at 1338–63 (different), *and* Catherine T. Struve, *Direct and Collateral Federal Court Review of the Adequacy of State Procedural Rules*, 103 COLUM. L. REV. 243, 289–301 (2003) (different), *with* Henry M. Hart, Jr., *The Supreme Court Term, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (same). In this Article, I remain agnostic about the direct appeal versus habeas debate with the following caveat: a structural approach to procedural adequacy is more likely to have teeth in federal habeas review than on direct review simply because there are more varied and complex state court procedures at play the later one gets into the review process.

122. *See, e.g.*, Rogers v. Alabama, 192 U.S. 226, 229–31 (1904).

123. *Ex parte* Royall, 117 U.S. 241, 251 (1886).

124. Rose v. Lundy, 455 U.S. 509, 515 (1982) ("[A]s a matter of comity, federal courts should not consider a claim in a habeas corpus petition until after the state courts have had an opportunity to act.").

125. Wainwright v. Sykes, 433 U.S. 72, 86–88 (1977).

126. *See* Coleman v. Thompson, 501 U.S. 722, 745–56 (1991); *see also* Johnson v. Lee, 136 S. Ct. 1802, 1807 (2016) ("A State's procedural rules are of vital importance to the orderly administration of its criminal courts . . . .").

then a criminal defendant must comply with those rules, and the failure to do so could result in a waiver—that is, a procedural default—of the constitutional challenge.[127]

But the AISG doctrine places an important limit on procedural default. Just as the Supreme Court will defer to a state court's substantive disposition of a case on state law grounds only if those grounds are both adequate to sustain the judgment and independent of federal law, federal courts will only consider a litigant's federal claims defaulted for failure to comply with state procedures if those procedures are adequate and independent of federal law.[128] As in the substantive AISG context, independence here can be defined in analytic terms: a state law ground for deeming a litigant to have failed to comply with necessary procedures is independent of federal law if it is not intertwined with federal law questions, such that the views of the state courts are conclusive.[129] What adequacy means, in contrast, is perhaps less reducible to an analytic formula.

Adequacy sounds in equitable concerns about fairness and due process. If a case presents a federal question and the state court attempts to "evade" federal court review by resting its decision on state rules that are "so palpably unfounded"[130] that they can be "properly . . . regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question,"[131] then the federal court will deem the state ground inadequate to preclude federal review.[132] The Supreme Court famously explained procedural adequacy doctrine in *Davis v. Wechsler*[133] in the following terms: "Whatever springes the State may set for those who are endeavoring to assert

127. *See* Murray v. Carrier, 477 U.S. 478, 485–87 (1986).

128. Lee v. Kemna, 534 U.S. 362, 375 (2002).

129. *See* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (noting that the state law claim cannot be "interwoven with the federal law").

130. Leathe v. Thomas, 207 U.S. 93, 99 (1907).

131. Enter. Irrigation Dist. v. Farmers Mut. Canal Co., 243 U.S. 157, 164 (1917); *see also* McCoy v. Shaw, 277 U.S. 302, 303 (1928) ("It is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment, cannot be reviewed by this Court, unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question."); Johnson v. Risk, 137 U.S. 300, 307 (1890) ("[I]f the independent ground was not a good and valid one . . . this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on ground clearly untenable."); Chapman v. Crane, 123 U.S. 540, 548 (1887) ("If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right . . . as if it had been specifically referred to and the right directly refused.").

132. *See* Hill, *supra* note 81, at 958–59 (noting that the Supreme Court uses the idea of "evasion in an objective sense . . . where the attack is not upon a state decision but upon a state rule of general application" and "[a]n attribution of willfulness should be unnecessary").

133. 263 U.S. 22 (1923).

rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."[134]

The Supreme Court recognized the procedural form of adequacy doctrine early in the twentieth century,[135] but it was the civil rights movement that prompted the doctrine to develop more fully. During the 1950s and '60s, changing norms about racial equality within the federal judiciary and the NAACP's strategy of filing lawsuits to combat racial discrimination meant that federal courts became more aware of the mistreatment of African Americans in state courts and more willing to intervene in state affairs to combat inequality. Many state courts tried to prevent federal courts from vindicating the constitutional rights of black litigants, and one common strategy was to interpret state procedural barriers to review in whatever stingy or arcane ways would enable state judges to rule that the litigants had defaulted their claims.[136] In response, the Supreme Court fleshed out procedural adequacy doctrine, maintaining that arbitrary or unreasonable constructions of state procedural rules would not be permitted to defeat federal claims.[137]

In so doing, the Court recognized four different aspects of procedural adequacy: due process, novelty, inconsistency, and undue burden. These four aspects of procedural adequacy often overlap, of course. But it can also be helpful, in the course of trying to understand adequacy doctrine, to think about them one by one.

Due Process. A state procedural rule that violates a party's due process rights is per se inadequate. Indeed, the application of such a rule constitutes a constitutional violation of its own. For example, Georgia once required any criminal defendant who wanted to challenge the composition of a grand jury to do so *before* an indictment was issued.[138] When Georgia applied that rule to bar the claim of "a semi-illiterate Negro of low mentality" who was not appointed counsel until after the indictment was issued, the Supreme Court held that Georgia's application of the rule violated the defendant's due process rights.[139] As the Court stated in another case, the state cannot "deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."[140]

Novelty. When Alabama courts imposed a $100,000 fine on the NAACP after holding the organization in contempt for failing to give its membership lists to the state, the NAACP appealed the decision to the United States Supreme Court.[141] Alabama argued that the Supreme Court was procedurally

134. *Davis*, 263 U.S. at 24.

135. *See, e.g.*, Rogers v. Alabama, 192 U.S. 226, 230 (1904).

136. *See* cases cited *supra* note 26.

137. *See* cases cited *supra* note 26.

138. Reece v. Georgia, 350 U.S. 85 (1955).

139. *Id.* at 88–90.

140. Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930).

141. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457–58 (1958).

barred from considering the merits of the federal claims, because the NAACP had failed to comply with Alabama procedures requiring the NAACP to challenge a contempt order through mandamus rather than upon a writ of certiorari in the state courts.[142] The Supreme Court, noting that it could find no support in Alabama law for this requirement, rejected the state's claim of default and stated that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."[143] A sense of the importance of fair notice clearly animated the Court's decision. After all, if the litigants reasonably relied upon prior interpretations of the state court rule, it would be unfair to deny them an opportunity to have their federal claims considered. It was also clear, however, that the Court was concerned about what motivated states to create novel interpretations of their procedural requirements.[144] The Court was not going to let states invent new procedural requirements just to avoid recognizing federal rights.[145]

Inconsistency. A rule may also be inadequate if it is erratically or inconsistently applied. When five black college students sat down at a lunch counter in South Carolina and asked to be served, they were arrested and charged with breaching the peace and trespass.[146] They challenged the constitutionality of their convictions all the way to the Supreme Court, where the City of Columbia argued that their constitutional claims were procedurally defaulted because the South Carolina courts had refused to consider the claims on the procedural ground that those claims were "too general to be considered."[147] The Supreme Court, noting that South Carolina courts had entertained and adjudicated the same constitutional challenges, phrased in the same way, in other cases, held that that "state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."[148]

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142. *Id.*

143. *Id.*

144. *See* Beard v. Kindler, 558 U.S. 53, 64 (2009) (Kennedy, J., concurring) ("We have also been mindful of the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard.").

145. *Patterson*, 357 U.S. at 457–58; *see also* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 297 (1964) (noting that Alabama cannot avoid federal review by applying a procedural rule with "pointless severity" when the petitioner has complied with the rule in substance and form "in every real sense").

146. Barr v. City of Columbia, 378 U.S. 146, 147–48 (1964).

147. *Id.* at 148–49 (quoting City of Columbia v. Barr, 123 S.E.2d 521, 523 (S.C. 1961), *rev'd*, 378 U.S. 146 (1964)).

148. *Id.* at 149; *see also* Ford v. Georgia, 498 U.S. 411, 425 (1991) (dictum) ("Since the rule was not firmly established at the time in question, there is no need to dwell on the further point that the state court's inconsistent application of the rule in petitioner's case . . . would also fail the second *James* requirement that the state practice have been regularly followed."); James v. Kentucky, 466 U.S. 341, 348–51 (1984) (holding that only a "firmly established and regularly followed state practice" can prevent federal review of a federal constitutional claim); Hathorn v. Lovorn, 457 U.S. 255, 263 (1982) ("State courts may not avoid deciding federal

Like novelty, inconsistency is important precisely because it may signal that state courts are using their discretion to impose "unforeseeable requirements without fair or substantial support in prior state law."[149] As the Supreme Court recently explained, "[F]ederal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights," and there is a concern that inconsistently applied rules will be used "to the particular disadvantage of petitioners asserting federal rights."[150]

Undue Burden. Perhaps the most amorphous (and most controversial) variant of procedural adequacy doctrine is the one that focuses on whether a state procedural rule unduly burdens the exercise of federal rights. The Supreme Court's first statement of the undue burden idea came in *Brown v. Western Railway of Alabama*,[151] a civil suit decided in 1949.[152] In that case, the Supreme Court held that "a Georgia rule of practice to construe pleading allegations 'most strongly against the pleader'" could not be applied to suits under the Federal Employers' Liability Act, because "[s]trict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws."[153] To permit "over-exacting local requirements" to defeat federal rights, the Court noted, would prevent courts from achieving "desirable uniformity in adjudication of federally created rights."[154]

As the Supreme Court later explained, "The test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court.'"[155] The State cannot require a litigant to "resort to an arid ritual of meaningless form"[156] that serves "[n]o legitimate state interest."[157]

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issues by invoking procedural rules that they do not apply evenhandedly to all similar claims."); Williams v. Georgia, 349 U.S. 375, 383 (1955) ("A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.").

149. 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4026 (2d ed. 1996).

150. Walker v. Martin, 562 U.S. 307, 321 (2011).

151. 338 U.S. 294, 298–99 (1949).

152. Arguably, the Court's decision in *Rogers v. Alabama*, 192 U.S. 226, 230–31 (1904), discussed *supra* Part I, planted the seeds for what would become the undue burden branch of procedural adequacy.

153. *Brown*, 338 U.S. at 295–96, 298.

154. *Id.* at 299.

155. Michel v. Louisiana, 350 U.S. 91, 93 (1955) (quoting Parker v. Illinois, 333 U.S. 571, 574 (1948)).

156. Staub v. City of Baxley, 355 U.S. 313, 320 (1958).

157. Douglas v. Alabama, 380 U.S. 415, 422 (1965) ("No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court . . . ."); *see also* Osborne v. Ohio, 495 U.S. 103, 125 (1990) (concluding that no legitimate state interest would have been served by requiring a futile objection); James v. Kentucky, 466 U.S. 341, 349 (1984) (insisting on a particular label for a statement would "further no perceivable state interest"); Monger v.

During the heyday of the civil rights movement, the Supreme Court further expounded the meaning of "undue burden" in *Henry v. Mississippi*.[158] Aaron Henry, a NAACP official in Mississippi, was convicted in state court for disturbing the peace.[159] He challenged the admission of a police officer's testimony about observations the officer made after allegedly violating Henry's Fourth Amendment rights.[160] But Henry failed to object contemporaneously to the officer's testimony.[161] Instead, he objected at the close of the State's evidence and asked for a directed verdict.[162] The Supreme Court, in suggesting that Mississippi's contemporaneous objection requirement might not be adequate on the facts of Henry's case, noted that "[i]n every case we must inquire whether the enforcement of a procedural forfeiture serves . . . a [legitimate] state interest."[163] Here, the Court felt that the delayed objection "cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case. If this is so, and enforcement of the rule here would serve no substantial state interest, then settled principles would preclude treating the state ground as adequate . . . ."[164]

Though *Henry* has been described as a "radical" application of procedural adequacy doctrine,[165] the Supreme Court has more recently reiterated that if the purposes of a state procedural rule have been substantially served through alternative means, there is no legitimate state interest that would support a finding of default.[166]

Underlying all four branches of procedural adequacy doctrine is a common concern: that states should not be permitted to use procedural rules as a shield to avoid enforcing federal rights. Thus, from its inception, federal courts have used procedural adequacy doctrine as an equitable tool to stop states from using state procedures unfairly to undermine litigants' abilities to have their federal claims vindicated.[167]

Florida, 405 U.S. 958, 962 (1972) (Douglas, J., dissenting) ("In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest.").

158. 379 U.S. 443 (1965).

159. *See* Terrance Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 190 (describing the background in the case).

160. *Id.* at 190–91.

161. *Id.* at 191.

162. *Id.*

163. *Henry*, 379 U.S. at 447.

164. *Id.* at 448–49.

165. RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 543 (7th ed. 2015) (describing the "radical potential" of *Henry*); Struve, *supra* 121, at 247 n.14 (collecting sources debating how radical *Henry* was).

166. Lee v. Kemna, 534 U.S. 362, 376–78 (2002) ("There are . . . exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.").

167. Scholars have fought about whether procedural adequacy doctrine should be considered a facial inquiry (asking about a rule's general applicability across cases and the state's

B. *A Structural Approach to Procedural Adequacy*

In the first half of the twentieth century, the typical procedural adequacy case involved an allegation that a state court had applied *one* procedural rule in a way that undermined a litigant's ability to have her federal claims heard. Things were different back then: there were fewer state procedural rules, hostility toward the exercise of federal rights was often transparent, and state court judgments that undermined the exercise of those rights often did so obviously.[168] Situations in which the application of a single procedural rule effectively undermines a criminal defendant's ability to have his federal claims heard are, to be sure, still with us today.[169] But under current conditions, there are also far more situations like those detailed in Part I—situations in which the interaction of multiple state procedural rules at different stages of the criminal process routinely prevents entire classes of defendants from having their federal claims heard. To address that kind of problem, litigants should raise *structural* adequacy challenges—challenges to the way that a whole set of rules operates—because the relevant inadequacy exists not at the level of any individual rule but at the level of the system that those rules jointly constitute.

Given the increased complexity of procedural rules in states' criminal justice systems, procedural adequacy doctrine cannot serve its purpose unless it expands its vision and becomes structural. If adequacy doctrine is trained only on particular rules, states hostile toward the exercise of federal rights will be permitted to mask their hostility in procedural labyrinths, and state officials who are not purposely hostile to federal rights will fail to see the unintended ways in which even well-intentioned rules operate to prevent the exercise of federal rights.

The United States Supreme Court tacitly endorsed a structural approach to procedural adequacy doctrine and illustrated how effectively a structural adequacy doctrine can catalyze procedural reform when it engaged with Illinois's framework for postconviction review in the 1940s. Recall Illinois's practice at that time of using the interaction among its writs of error, habeas corpus, and coram nobis to create a "merry-go-round" of obstacles that made the availability of postconviction review illusory.[170] When the Illinois

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interest in the rule as a general matter) or an as-applied inquiry (looking at whether the state procedural rule serves a legitimate state interest in the way that it was applied in one particular case). *See, e.g.*, Struve, *supra* note 121. The Supreme Court has clearly used both facial and as-applied approaches when analyzing the adequacy of a state procedural rule. *Id.* at 264–77. Although I believe that both rightly have a place in the doctrine, my goal in this Article is not to enter into that debate. Instead, my goal is to add a different dimension to that debate and encourage federal courts to consider not just how one procedural rule operates (whether as applied or facially) but rather to consider how the state's structure of procedural rules operate (whether as applied or facially). *See infra* Section II.B, Part IV.

168. *See* cases discussed *supra* Section II.A.

169. *See, e.g.*, *Lee*, 534 U.S. 362 (describing the Missouri courts' reliance on individual state procedural rules to avoid addressing the defendant's federal claims).

170. Marino v. Ragen, 332 U.S. 561, 569–70 (1947) (Rutledge, J., concurring).

courts repeatedly ducked prisoners' petitions seeking review of blatant constitutional violations, those prisoners increasingly sought review in the United States Supreme Court until that Court was inundated with petitions from Illinois prisoners alleging that their due process rights had been violated.[171] Illinois had summarily denied the vast majority of these petitions on procedural grounds without ever asking the state for a response and without having a hearing of any kind.[172]

At first, the Supreme Court dismissed the prisoners' petitions because, in each individual case, the state court decision appeared to rest on an adequate procedural ground.[173] If the prisoner should have pursued a different procedural vehicle as required under state law, then it seemed fair for the state to require the prisoner to proceed via that route.

Over time, however, the Supreme Court began to understand that Illinois was not using *one* procedural rule but a series of state procedures to effectively deny indigent prisoners the opportunity to raise federal constitutional claims. As Justice Rutledge noted,

> The trouble with Illinois is not that it offers no procedure. It is that it offers too many, and makes them so intricate and ineffective that in practical effect they amount to none. The possibility of securing effective determination on the merits is substantially foreclosed by the probability, indeed the all but mathematical certainty, that the case will go off on the procedural ruling that the wrong one of several possible remedies has been followed.[174]

After that realization, the Supreme Court cracked down on Illinois. By declaring Illinois's procedural system inadequate to support procedural default, the Court permitted prisoners to seek the adjudications to which they were entitled.[175] At least as importantly, the Court's refusal to let the prisoners' petitions suffer the fate of procedural default pressured Illinois to reform a system whose defects were now patent.

And the strategy worked. The Court's interventions prompted Illinois to be one of the first states to develop a comprehensive, statutory state postconviction review system, one that provided defendants with much clearer guidance regarding how to raise claims in state court.[176] The National Conference of Commissioners on Uniform State Laws soon followed suit

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171. *Id.* at 563 ("[I]n the 1944 term, out of a total of 339 petitions filed *in forma pauperis*, almost all by prisoners, 141 came from Illinois; in the 1945 term, 175 out of 393 were from Illinois; and in the 1946 term, 322 out of 528 came from that state.").

172. *See id.* at 563–64.

173. *See, e.g.*, Carter v. Illinois, 329 U.S. 173 (1946); Woods v. Nierstheimer, 328 U.S. 211 (1946).

174. *Marino*, 332 U.S. at 565.

175. *See, e.g.*, Jennings v. Illinois, 342 U.S. 104, 105–12 (1951); Young v. Ragen, 337 U.S. 235, 236–40 (1949).

176. *See* Illinois Post-Conviction Hearing Act, 725 ILL. COMP. STAT. 5/122 (2004) (first enacted 1963).

and promulgated a Uniform Post-Conviction Procedures Act.[177] A number of states began to develop postconviction review systems patterned on the Uniform Act, the Illinois Act, or federal statutes.[178]

Today, every state has a system in place for providing postconviction review.[179] Procedural adequacy doctrine was thus one of the Court's primary tools for catalyzing reform in state criminal justice systems nationwide[180]: as a means of giving their procedures the sort of regularity that adequacy doctrine demanded, the states created navigable and rule-governed systems of postconviction review.[181]

Having seen how effective a structural approach to procedural adequacy doctrine could be in catalyzing state reform, one might wonder why the Supreme Court did not continue to use this tool to monitor the development of the complex state procedural systems that arose in the wake of the Court's intervention in Illinois. One important reason, I suspect, is that the Court shifted its focus in the 1960s from procedural adequacy doctrine to what would become cause and prejudice doctrine, and litigants and lower federal courts followed suit. In the next Part, I explain how cause and prejudice effectively displaced structural procedural adequacy. I then turn in Part IV to explaining why structural adequacy is preferable to cause and prejudice as a tool for reform going forward.

III. Structural Adequacy Doctrine Falls Dormant: How the Federal Courts Shifted to a Cause and Prejudice Analysis

The seeds of the cause and prejudice doctrine were planted by Justice Brennan in his 1963 opinion for the Court in *Fay v. Noia*.[182] Charles Noia had been convicted of felony murder based solely on a confession that everyone agreed had been unconstitutionally coerced.[183] But he had failed to appeal his conviction during the time allowed by New York's procedural

177. Unif. Post-Conviction Procedure Act (Nat'l Conference of Comm'rs on Unif. State Laws 1955).

178. *See, e.g.*, Alice McGill, Comment, Murray v. Giarratano*: Right to Counsel in Postconviction Proceedings in Death Penalty Cases*, 18 Hastings Const. L.Q. 211, 218–19 (1990) (summarizing the different state approaches).

179. Donald E. Wilkes, Jr., Federal and State Postconviction Remedies and Relief § 9-2 & app. A (2d ed. 1987 & Supp. 1990); Ark. R. Crim. P. 37 (postconviction review system abolished May 30, 1981; reinstated and revised Oct. 29, 1990; effective Jan. 1, 1991).

180. *See* Wilkes, *supra* note 179, § 9-2 (noting that the incorporation of criminal procedure rights against the states also contributed to this development).

181. Many of those systems have since become considerably less navigable, of course, including in the ways described *supra* in Part I. But that regrettable development means only that reform does not ensure permanent solutions; a positive step toward greater rationality and transparency in a set of rules can always be undone later on by subsequent steps toward baffling complexity.

182. 372 U.S. 391 (1963).

183. *Noia*, 372 U.S. at 395–96 (noting that the coercive nature of Noia's confession was stipulated to).

rules.[184] Relying on those rules, the federal district court refused to address Noia's challenge to the validity of his confession.[185] The Supreme Court decided to look past Noia's default and consider his claims on their merits.[186]

Justice Brennan wrote for the Court that "the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted the federal courts under the federal habeas statute."[187] According to Justice Brennan, federal habeas review was not like a direct appeal, under which the federal court would review the correctness of the state courts' rulings.[188] Instead, habeas was about reviewing the constitutionality of a defendant's continued detention.[189] And where the issue was the power of a federal court to decide that question, Justice Brennan argued, it did not matter whether a petitioner had properly raised his claims in state court.[190]

The *Noia* Court's statement that federal courts must have the *power* to review the constitutionality of a petitioner's detention, however, was not a declaration that the federal courts would in fact exercise that power of review in all cases, regardless of whether petitioners complied with state procedural rules. In other words, *Noia* did not deny the value of letting state courts have the first crack at remedying constitutional violations as a general matter.[191] So, in response to the dissent's argument that disregard for state procedural rules would disrespect the states and encourage flouting of state procedures, Justice Brennan conceded that federal judges should have "the discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts."[192]

In other words, petitioners were still expected to present their federal claims to state courts, where opportunities for relief in the state courts existed. But a petitioner who failed to comply with state procedures would not automatically default his claims. Instead, the question of default would turn on a question of intention, or of blameworthiness: the petitioners who would not be entitled to federal review were those who knowingly engaged in the "deliberate by-passing of state procedures."[193]

The advent of this "deliberate bypass" doctrine was a turning point for procedural adequacy doctrine. *Fay v. Noia* shifted the attention of federal habeas courts away from the adequacy of state procedures and toward the

184. *Id.* at 396–97.

185. *Id.* at 396.

186. *Id.* at 398–99.

187. *Id.* at 399.

188. *Id.* at 423–24.

189. *Id.* at 426, 430–31 (describing federal habeas jurisdiction as predicated not on the "judgment of a state court but detention *simpliciter*").

190. *Id.* at 398–99.

191. *Id.* at 432–33.

192. *Id.* at 433.

193. *Id.* at 439.

actions and state of mind of individual petitioners. The question was now whether the prisoner was to blame for any state court default.[194]

At first, that question was asked in a way that was relatively friendly to petitioners. As the language of "deliberate bypass" suggests, the presumption after *Noia* was that the federal courts would entertain a state prisoner's claims unless the prisoner had knowingly chosen not to avail himself of state procedures.[195] But as the Burger and Rehnquist Courts succeeded the Warren Court, Supreme Court doctrine changed that presumption. As under *Noia*, courts confronting potential procedural defaults were to assess the conduct of the petitioner, not the adequacy of the state's rules. But in *Wainwright v. Sykes*,[196] the Court replaced Justice Brennan's deliberate bypass test with the cause and prejudice test: a state prisoner whose federal claim had been defaulted in state court could overcome that default and have her claims considered on the merits in federal court only if she could show "cause" (meaning an objective factor external to the defendant) for failing to comply with the state procedural rule and "prejudice" to the outcome of her case.[197]

It was no longer enough for a prisoner to demonstrate that he had not intentionally failed to comply with the state procedural rule. A negligent failure to follow state procedural rules, or a purely unknowing one, would not excuse a default.[198] Given how easy it is for pro se litigants to violate procedural rules unintentionally, this move from deliberate bypass to cause and prejudice vastly increased the likelihood that any given petitioner's federal claims would be lost under the procedural default doctrine.

In the decades that followed *Wainwright v. Sykes*, the federal courts focused on fleshing out the cause and prejudice standard. The courts' focus on the individual petitioner's potential fault and on what reasons would be sufficient to overcome a state procedural rule meant that consideration of the adequacy of the state procedural scheme itself was often lost. To be sure, the Supreme Court sometimes recognized the continued existence of AISG doctrine in federal habeas review.[199] But it would be more than twenty years before the Court seriously considered procedural adequacy doctrine in the

194. *Cf.* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. Chi. L. Rev. 519, 591 (2014) (describing the Supreme Court as having embraced a fault-based approach to habeas review).

195. *Noia*, 372 U.S. at 439.

196. 433 U.S. 72 (1977).

197. Coleman v. Thompson, 501 U.S. 722, 746–47 (1991); *Wainwright*, 433 U.S. at 87.

198. *See* Murray v. Carrier, 477 U.S. 478, 486–87 (1986).

199. *See Coleman*, 501 U.S. at 744 (discussing the fact that AISG applies to habeas but noting that adequacy was not a part of the petition for certiorari); Harris v. Reed, 489 U.S. 255, 262 (1989) ("The adequate and independent state ground doctrine . . . is of concern not only in cases on direct review . . . but also in federal habeas corpus proceedings . . . ."); *see also* Edwards v. Carpenter, 529 U.S. 446, 452–54 (2000) (recognizing that adequacy applies in federal habeas proceedings); Lambrix v. Singletary, 520 U.S. 518, 523 (1997) (noting that continued application of AISG in federal habeas cases ensures that "equitable considerations of federalism and comity" are acknowledged).

context of a criminal conviction.[200] And even when the Supreme Court did again ask whether a state procedural rule was adequate, it looked only at individual procedural rules.[201]

The extent to which the cause and prejudice inquiry has overshadowed *structural* procedural adequacy inquiries is illustrated by two recent Supreme Court cases: *Martinez v. Ryan*[202] and *Trevino v. Thaler*.[203] In *Martinez v. Ryan*, the Supreme Court analyzed a series of Arizona procedural rules and practices that prevented most criminal defendants from ever raising Sixth Amendment claims alleging ineffective assistance of trial counsel.[204] As noted earlier, Arizona relegates all IATC claims to postconviction review and does not give prisoners counsel at the postconviction stage.[205] As a result, prisoners routinely fail to raise IATC claims at the time when the state's procedural rules require them to do so. When they get to federal habeas review, therefore, their IATC claims are procedurally defaulted.[206] In *Martinez*, the Supreme Court deemed this arrangement unjust and inequitable. But rather than declaring Arizona's procedural rules structurally inadequate, the Court relied on cause and prejudice doctrine as a potential way to allow prisoners to bypass procedural defaults.[207] In other words, rather than saying that Arizona's rules were unworthy of deference, the Court treated those rules as presumptively valid but was willing to excuse a particular petitioner's failure to comply with them.

The Court took the same approach in *Trevino v. Thaler*, in which Texas's system was challenged for similar reasons: once again, the Supreme Court used cause and prejudice rather than procedural adequacy to address the problem, suggesting a willingness to excuse a particular petitioner's failure to comply rather than saying that something is wrong with the rules as such.[208]

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200. Lee v. Kemna, 534 U.S. 362 (2002). The Court did have one case in 1990 in which it declared an Ohio state procedural rule to be inadequate to bar federal relief, Osborne v. Ohio, 495 U.S. 103 (1990), but the analysis of the adequacy issue in that case was brief, *see id.* at 123–25.

201. Each of the Court's recent habeas cases addressing procedural adequacy has examined state application of a single procedural rule. *See* Walker v. Martin, 562 U.S. 307 (2011); Beard v. Kindler, 558 U.S. 53 (2009); *Lee*, 534 U.S. 362. Practice in the lower federal courts largely mirrors Supreme Court practice in this respect. *See* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.2[d][i] (6th ed. 2011) (collecting cases). Occasionally, a lower federal court will address a structural adequacy issue, but it is rare. For examples of some lower court cases that have addressed structural adequacy problems in state procedures, see *DeYoung v. Schriro*, 201 F. App'x 443 (9th Cir. 2006); *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001); *Hickman v. Spears*, 160 F.3d 1269 (10th Cir. 1998); and *Breechen v. Reynolds*, 41 F.3d 1343, 1364 (10th Cir. 1994).

202. 132 S. Ct. 1309 (2012).

203. 133 S. Ct. 1911 (2013).

204. *See Martinez*, 132 S. Ct. at 1313–14.

205. *See supra* notes 36–37 and accompanying text.

206. *E.g.*, *Martinez*, 132 S. Ct. at 1314 (noting a default).

207. *Id.* at 1318–20.

208. *Trevino*, 133 S. Ct. at 1921.

At no stage in either case did any litigant raise, nor did any federal court consider, whether the structure of Arizona's and Texas's procedural rules provided criminal defendants with an adequate opportunity to raise their Sixth Amendment claims.[209] Both cases focused exclusively on cause and prejudice as a means of excusing any procedural default.[210] In this respect, *Martinez* and *Trevino* are typical of habeas litigation more broadly: cause and prejudice, rather than adequacy, is the predominant framework for addressing state procedural problems on federal habeas review, even when those problems are structural.[211]

The fact that habeas litigants focus on cause should not be surprising. Because there is no constitutional right to federal habeas counsel, many federal habeas cases are not litigated by public defenders.[212] The petitioners are usually poor and are forced to proceed pro se or rely on pro bono assistance that typically comes from large law firms or legal institutions that do not focus on criminal cases.[213] The attorneys arguing these cases pro bono are frequently good generalist lawyers, but habeas litigation is often not their bread and butter, and they often lack deep experience with the states' procedural regimes in criminal cases.[214] What these lawyers do know about overcoming procedural defaults is often what they remember from law school and what they can glean from basic legal research.

On the former count, few law schools have freestanding courses on federal habeas corpus law or clinics that focus on learning habeas doctrine in depth. Instead, the only real exposure that law students get to habeas doctrine comes in a few days of a federal courts class, which tend to highlight

209. *Id.* (noting that there are "often good reasons" for a state like Texas to choose certain postconviction procedures); *Martinez*, 132 S. Ct. at 1316 ("There is no dispute that Arizona's procedural bar . . . is an independent and adequate state ground.").

210. Counsel in *Martinez* did argue that there should be a constitutional right to an attorney at the initial collateral review stage under certain circumstances, *see* Transcript of Oral Argument at 5, *Martinez*, 132 S. Ct. 1309 (No. 10-1001), but he did not raise any adequacy challenge to Arizona's procedures.

211. *See* Marceau, *supra* note 42, at 2115 (noting that "the most common way to argue that a procedural default ought not apply is for the prisoner to demonstrate 'cause and prejudice' ").

212. Pennsylvania v. Finley, 481 U.S. 551, 554–55 (1987) (holding that there is no constitutional right to counsel for collateral attacks on criminal judgments after direct appeal); Murray v. Giarratano, 492 U.S. 1, 10 (1989) (extending *Finley* to capital cases). Although it is not constitutionally required, some federal defender offices do handle habeas cases. *But see* KING REPORT, *supra* note 21, at 23 (noting that 92.3% of noncapital habeas petitioners did not have attorneys).

213. *See* Ty Alper, *Toward a Right to Litigate Ineffective Assistance of Counsel*, 70 WASH. & LEE L. REV. 839, 860 (2013) (explaining how prisoners "must petition non-profit organizations, law school clinics, or law firms to take their cases pro bono").

214. *See, e.g.*, Maples v. Thomas, 132 S. Ct. 912, 916–22 (2012) (describing one such situation). There are, of course, exceptions to this rule. Some law firms have brought experienced public defenders in to create their pro bono programs and train their attorneys. *See* Carol S. Steiker, Keynote Address, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2710 (2013) (describing some of these law firms). And prisoners lucky enough to be represented by law school clinics at good schools often get excellent representation.

the doctrine of cause and prejudice.[215] To the extent that graduating law students have thought about procedural default in the context of habeas at all, they have been taught to think about cause and prejudice as the antidote.[216] Moreover, most law students are not taught how to find and recognize structural adequacy problems. Focusing on one defendant and whether he has an excuse for failing to comply with state procedures is much easier and more straightforward than trying to understand the complex workings of an unfamiliar system and suggesting that that system is to blame.

Doing basic legal research won't lead lawyers to think in terms of structural adequacy rather than cause and prejudice. After all, if most lawyers arguing habeas cases argue in terms of cause and prejudice, most cases will be decided within that rubric, and when lawyers in later habeas cases search for relevant case law, they will find cases about cause and prejudice much more often than they find cases about adequacy.[217] Naturally, they will then tend to make arguments that align with the cases they found. And because the judges address the arguments presented to them, the opinions will predominantly focus on cause.[218] In short, the focus on cause becomes self-perpetuating.[219]

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215. In the all-important federal courts casebook—Hart and Wechsler—procedural adequacy in the context of federal habeas review appears only in passing, but cause and prejudice is illustrated in detail, with *Wainwright v. Sykes*, 433 U.S. 72 (1977), as a main case followed by a series of notes and questions. *See, e.g.*, FALLON ET AL., *supra* note 165, at 1323–46. In fairness, the casebook does discuss other procedural adequacy cases in an earlier section on the relationship between state and federal law, but that section is about federal court power to act over the states and contains civil and criminal law cases as well as constitutional theory about the role of the federal courts. *Id.* at 534–46. Students are not focused on procedural default in the criminal context until the federal habeas corpus chapter, where cause and prejudice is the highlighted route to bypassing a default.

216. They have also likely been told about the fundamental miscarriage of justice exception, also known as the innocence bypass, to procedural default. *See* House v. Bell, 547 U.S. 518 (2006) (recognizing that petitioners who can demonstrate their innocence can bypass a procedural default to have the merits of their claims considered); Schlup v. Delo, 513 U.S. 298 (1995) (same). The innocence gateway is similarly focused on individual petitioners rather than the legitimacy of state procedures.

217. If you do a Westlaw or LexisNexis search to determine how often federal courts entertaining state habeas petitions talk about cause and prejudice versus how often they talk about procedural adequacy, you will quickly learn that the former dwarfs the latter. *See, e.g.*, 2 HERTZ & LIEBMAN, *supra* note 201, § 26.2, at 1437–58, § 26.3, at 1476–1519 (needing forty-three pages to catalogue federal cases interpreting the meaning of cause and prejudice but only twenty-one pages to list the procedural adequacy cases).

218. *See id.*

219. This necessarily means that reviving a structural approach to procedural adequacy has start-up costs. Many habeas petitioners are pro se and will have difficulty learning about and understanding the complicated interplay of state procedural rules. In reality, large law firms and nonprofit organizations that take habeas cases pro bono will probably be the ones to unearth and litigate structural adequacy challenges at first. Once litigated successfully, however, pro se prisoners will learn about them and cite them to bypass inadequate state procedures that affected them as well.

IV. Why Structural Adequacy Is Better Than Cause and Prejudice

Some may wonder whether it matters that litigants have failed to raise structural procedural adequacy challenges. As long as litigants are raising structural problems and federal courts are addressing them, why is it important whether the litigants and courts code the inquiry as cause rather than "adequacy"? The answer is that it matters a great deal, because the two doctrines are not interchangeable. They ask different questions, offer relief under different circumstances, and call forth critically different remedies.

In the first three Sections that follow, I will explore these differences and highlight them to explain why structural procedural adequacy doctrine is more likely to catalyze change in state practices than cause and prejudice doctrine. Then, in Section IV.D, I will explain why, independent of its relative superiority as a tool for change, a structural approach to procedural adequacy doctrine is needed to promote more coherence in federal habeas doctrine and to adapt procedural adequacy doctrine to the modern world so that it may continue to serve its intended purpose.

A. *Different Orientations: The Prisoner Versus the System*

Procedural adequacy doctrine has a different orientation from cause and prejudice doctrine. Courts adjudicating the issue of cause ask whether the prisoner is at fault for having failed to present his claim in state court.[220] The focus is on actions that the particular prisoner took (or didn't take) and on whether some external impediment prevented him from complying with state procedural rules.[221] A petitioner seeking to be excused for cause is seeking an *excuse*—a reason why the courts will exercise their discretionary power of forgiveness in favor of someone who failed to follow the rules. If a flood destroys the prison library, for example, such that inmates have no access to legal resources, an inmate might have cause for failing to file a brief on time. If a rogue prosecutor withholds exculpatory information in violation of *Brady v. Maryland*,[222] defendants affected by that prosecutor's behavior might have cause for not having raised a claim related to the withheld material earlier.[223] In circumstances like these, there is nothing wrong with the state's procedural rules: it is valid to expect briefs and motions to be filed on time. The issue is merely whether there is some special reason why a prisoner should not be held to the rules, given extenuating circumstances beyond his control.

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220. *See* Hertz & Liebman, *supra* note 201, § 26.3(b), at 1478 (noting that the Supreme Court's decisions suggest that cause includes "'extraordinary circumstances suggesting that the party [including counsel] is faultless' in causing the default" (alteration in original)).

221. *See id.*

222. 373 U.S. 83 (1963).

223. *See, e.g.*, Banks v. Dretke, 540 U.S. 668 (2004); Strickler v. Greene, 527 U.S. 263 (1999); *cf.* Amadeo v. Zant, 486 U.S. 214 (1988) (finding cause for procedural default based on procedural misconduct).

Adequacy, on the other hand, analyzes the soundness of the state's rules and procedures. The focus is not on the individual prisoner, and the question is not whether a failure to comply with legitimate rules should be excused. Rather, the question is whether the state's procedures are legitimate enough to warrant the respect and deference that justifies procedural default in the first instance. To go back to procedural adequacy's roots, "The test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court.'"[224] If the state does not provide that opportunity—whether because of hostility toward the federal right at issue, hostility toward the defendant, confusion about how the procedural rules operate, the subordination of constitutional rights to the pursuit of efficient or other public imperatives, or for any other reason—the federal courts should declare the procedural scheme inadequate for protecting the federal rights at stake and therefore not worthy of the respect for state processes that underwrites procedural default.

The Court's treatment of Arizona's procedural regime for ineffective assistance of trial counsel claims in *Martinez v. Ryan*[225] highlights this difference in focus. Because Martinez's claim was cast in cause and prejudice terms, the Court clarified that it was not "imply[ing that] the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding."[226] Rather, the Court was simply asking whether the state's procedures "significantly diminish[ed Martinez's] ability to file [his IATC] claims."[227] Thus, under a cause analysis, to the extent that there is any analysis of the state's procedures, it is only to ascertain whether the state created an impediment to procedural compliance or the petitioner did. It is about whether the petitioner or someone else is at fault for the procedural noncompliance. It is not about analyzing the propriety of the state's procedural regime.

Had the Court addressed the problem in *Martinez* under adequacy doctrine, however, the inquiry would have been different. The legitimacy of the state's procedures would have been at issue. If Arizona set up its state procedures in such a way that criminal defendants do not have realistic opportunities to raise Sixth Amendment claims, the federal courts would declare the procedures inadequate as a general matter.

B. *Different Relief*

The difference between the questions that the cause and adequacy doctrines ask—whether the petitioner was at fault or whether the system's rules are worthy of respect—corresponds to a difference between the kinds of relief available under the two doctrines. Structural procedural adequacy

224. Michel v. Louisiana, 350 U.S. 91, 93 (1955) (quoting Parker v. Illinois, 333 U.S. 571, 574 (1948)).

225. 132 S. Ct. 1309 (2012).

226. *Martinez*, 132 S. Ct. at 1318.

227. *Id.*

challenges encourage a more direct dialogue between the federal courts and the states about the legitimacy of the states' procedures,[228] because the analysis focuses on the state procedures themselves. Findings of cause and prejudice, on the other hand, do not send any direct message to the offending state. They merely excuse a prisoner's failure to comply with the state's rules.

Federal courts should tell states when their procedures are inadequate to protect federal rights, and they should do it overtly. As discussed above, some states might not even realize that their systems of procedural rules impede the vindication of constitutional rights. If they were told, they might alter their procedures. Casting structural inadequacy as a form of cause that excuses a procedural default (as the Court did in *Martinez v. Ryan*)[229] thus sends the wrong message. It legitimates the state procedures while at the same time giving individual petitioners a bypass.

Yes, it is better than doing nothing, because it holds out the possibility that a particular petitioner's claims will not be blocked by a flawed procedural regime. But excusing a single petitioner, or a small number of petitioners one by one, is not as likely to catalyze change as a statement of inadequacy. If the state procedures are illegitimate, the federal courts should say so in a direct way—one that tells the state in question that the federal court is aware that the problem lies with the state and that solving the problem will require changing the rules.

There is a reason why Illinois responded as it did to the Supreme Court's holdings on the structural adequacy of its procedural system.[230] The Court said in no uncertain terms that Illinois failed to provide a fair forum for the litigation of constitutional rights.[231] That message would have been diluted had the Court merely allowed some individual petitioners to bypass default.

Now consider what difference it might have made if *Martinez v. Ryan* had been litigated as a case about structural adequacy rather than a case about cause and prejudice. Had Martinez raised an adequacy challenge to the systemic burden that Arizona's procedural system places on the exercise of the right to effective trial counsel, the question that the Court would have addressed would not have been as particular to the specific defendant. The Court would have asked how the state's procedural rules affect a broad class of defendants. A determination that Arizona's procedural scheme was inadequate as applied to that broad class of defendants raising IATC claims would have opened the doors for future Arizona prisoners to have their IATC claims heard on the merits in federal court: anyone caught in the same procedural vice as Martinez would have been able to say, as a matter of law, that

228. *See* Cover & Aleinikoff, *supra* note 46 (arguing that federal habeas corpus review of state court criminal convictions is about ensuring a dialogue between the federal courts and the state courts).

229. 132 S. Ct. 1309 (2012).

230. *See* discussion *supra* notes 170–176 and accompanying text.

231. *See* discussion *supra* notes 170–176 and accompanying text.

the relevant state process was inadequate. The resulting flow of petitioners with otherwise defaulted claims that the federal courts were now willing to entertain on the merits would be more likely to get the attention of state officials than any one petition—as would the federal court's direct statement that the procedures are themselves inadequate. Arizona policymakers would then be in the position of feeling pressured to respond to the court's ruling—something that deciding cases on the excuse-based ground of cause allows officials to avoid.[232]

But as we know, *Martinez* was litigated as a case about cause, not a case about adequacy. As a result, the Supreme Court's holding focused the lower federal courts' inquiry on the facts and circumstances of each particular prisoner's case. According to the *Martinez* Court, when a state requires its defendants to raise IATC claims in initial-review collateral proceedings, there will be cause to excuse a procedural default if (1) in the initial review collateral proceeding, there was no counsel, or counsel in that proceeding was ineffective under *Strickland v. Washington*,[233] and (2) the underlying IATC claim is a substantial one.[234]

Notice what this holding requires lower federal courts to ask: Was this particular prisoner's initial collateral review attorney ineffective under *Strickland* (or, alternatively, did this particular prisoner not have a postconviction attorney)? Was this particular prisoner's underlying IATC claim a substantial one? With such individualized questions, no lower court decision applying *Martinez* is likely to have much precedential value. Each decision will involve determinations particular to the individual petitioner at issue, so the holdings will not create generalizable rules of law.[235] Had the *Martinez* Court addressed the adequacy of Arizona's procedures, however, the subsequent proceedings could have had a broader impact (by declaring the procedures inadequate as applied to all relevant petitioners) and also given rise to a more generalizable rule (because the question would be about the relationship among legal rules rather than about the facts of individual petitioners).

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232. It is, of course, true that the states are not required to change their procedures in response to a finding of inadequacy. The federal court's power in habeas corpus is over the actual detention of the person in front of it, so its only power is that of releasing the petitioner. *See* Cover & Aleinikoff, *supra* note 46, at 1043 (discussing this limit in habeas corpus). That said, if the states fail to respond to repeated statements from the federal courts that their procedures are inadequate, it might draw the ire of the federal court judges issuing the decisions and could make them more receptive to other kinds of stronger constitutional challenges. *See, e.g.*, Eve Brensike Primus, *Effective Trial Counsel After* Martinez v. Ryan*: Focusing on the Adequacy of State Procedures*, 122 YALE L.J. 2604, 2625 (2013) (discussing the possibility that the Supreme Court would recognize a "constitutional right to counsel on initial collateral review" if states fail to give defendants a realistic opportunity to raise IATC claims after being told repeatedly to do so by the federal courts). The distance between an equitable finding of inadequacy and a constitutional finding of a due process violation is not great. *See supra* Section II.A (describing due process violations as one kind of adequacy problem).

233. 466 U.S. 668 (1984).

234. *Martinez*, 132 S. Ct. at 1318.

235. *See supra* note 45.

Consider, by contrast, the Ninth Circuit's structural adequacy approach to a set of Idaho procedures that effectively prohibited capital defendants from raising IATC claims. Idaho has a statute that requires the consolidation of postconviction and direct appeal claims in a single petition.[236] It also has a law requiring capital defendants to file any and all legal challenges to their convictions and sentences within forty-two days of the entry of judgment.[237] The Idaho Supreme Court had strictly construed the statute as limiting a capital defendant to "one opportunity to raise all challenges to the conviction and sentence" except in "unusual cases."[238] And the Idaho courts did not deem IATC allegations "unusual,"[239] even if the capital defendant had still been represented by his original trial counsel during his postconviction proceedings.[240] In fact, all indigent capital defendants in Idaho were represented by the same counsel at trial and on postconviction until 1995.[241] Given that no appeal process lasts less than forty-two days, every Idaho capital defendant was thus effectively required to file any IATC challenge during the time when he was still represented by the lawyer alleged to be constitutionally ineffective. And as discussed earlier, there is something weirdly unrealistic about expecting a defendant to raise the claim that his trial counsel was constitutionally ineffective during the period of time when he is still represented only by that trial counsel.[242]

While this regime was in place, Maxwell Hoffman was convicted of murder in an Idaho court.[243] On postconviction and appellate review, he was represented by his trial attorneys.[244] He eventually got new counsel and wanted to raise an IATC claim. But, of course, that happened only after his forty-two day deadline had passed.[245] Hoffman filed a second petition for postconviction relief with the help of his new counsel, but Idaho said that he had procedurally defaulted his IATC claims, because he had not raised them in his original postconviction petition.[246]

The Ninth Circuit, after analyzing the structure of Idaho's procedural rules, found that the procedural default was "an unreasonable restriction on the exercise of the federally protected constitutional right to counsel and

236. Hoffman v. Arave, 236 F.3d 523, 532 (9th Cir. 2001).

237. IDAHO CODE § 19-2719(3) (2004 & Supp. 2016).

238. State v. Rhoades, 820 P.2d 665, 677 (Idaho 1991).

239. Pizutto v. State, 903 P.2d 58, 60–61 (Idaho 1995).

240. *See* Paz v. State, 852 P.2d 1355 (Idaho 1993).

241. *See* IDAHO CODE § 19-2720 (2004 & Supp. 2016) (adding a provision in 1995 that "upon a particularized showing that there is a reasonable basis to litigate a claim of ineffective assistance of trial counsel, new counsel may be appointed to represent the defendant to pursue such a claim in a post-conviction proceeding"); *see also* IDAHO CRIM. R. 44.2.

242. *See supra* note 87 and accompanying text.

243. Hoffman v. Arave, 236 F.3d 523, 527 (9th Cir. 2001).

244. *Id.* at 528.

245. *See id.* at 530.

246. *Id.*

therefore [was] inadequate to bar federal review."[247] Since that time, there has been a robust dialogue between Idaho and the federal courts about Idaho procedure,[248] and the focus has been on *the procedures* and whether modifications to them are adequate. Importantly, the question has not been whether an individual petitioner has a good enough excuse to bypass a default. If the goal is to encourage states to reform their procedures, a structural procedural adequacy approach is a more direct and effective way to catalyze change.[249]

C. *Different Obstacles to Review*

There are also technical reasons why petitions alleging the inadequacy of state procedures are more likely to be successful in federal court than petitions pleading cause and prejudice. Consider, for example, a difference in the way that the requirement of exhaustion applies to the two types of claim. Under current doctrine, state prisoners must present any potential cause grounds to the state courts before federal courts may consider relying on those grounds to excuse a procedural default.[250] The reason, of course, is grounded in the same desire to respect state courts that underlies the exhaustion requirement and procedural default doctrine in the first place: presumptively, the state courts should get the first crack at questions of cause, just as they should get the first crack at everything else in postconviction review.

It might make sense to discard that presumption in cases where the question is precisely whether the state's system of review is entitled to that kind of respect—that is, in cases raising issues of structural procedural adequacy. But the allegation that a state prisoner has cause for his failure to comply with a legitimate state procedural rule does not suggest anything improper about how the state's procedures have operated. As a result, the Supreme Court requires state prisoners to present any cause grounds to the

247. *Id.*

248. *Compare* Stuart v. State, 232 P.3d 813 (Idaho 2010) (imposing a heightened pleading requirement that petitioners who file successive petitions must affirmatively demonstrate that they did not and could not reasonably have known about the claim(s) within forty-two days), *with* Stuart v. Fisher, No. 1:02-cv-00020-BLW, 2012 WL 3839616 (D. Idaho Sept. 5, 2012) (declaring the heightened pleading requirement inadequate).

249. Some may worry that the federal courts will not be willing to indict entire state procedural regimes this way and litigants who might have won cause and prejudice challenges will lose structural adequacy approaches. I am a bit skeptical of that criticism for two reasons: First, there are already examples of cases in which the federal courts were willing to find structural adequacy problems when presented with them. *See, e.g.*, Hoffman v. Arave, 236 F.3d 523, 527, 531 (9th Cir. 2001). Second, cause and prejudice and adequacy arguments are not mutually exclusive. Litigants could choose when to push which argument or could raise both arguments and let the federal courts decide when to use the bigger hammer of structural adequacy.

250. Edwards v. Carpenter, 529 U.S. 446, 450–51 (2000).

state courts first.[251] And if a state prisoner fails to exhaust his cause grounds in state court or does not present those grounds in accordance with state court procedures, the right to argue that he had cause for his initial procedural transgression will itself be procedurally defaulted.[252]

No such special pleading requirements apply to adequacy challenges. The federal courts recognize that an adequacy challenge raises the possibility that the state courts do not provide reasonable opportunities to vindicate the relevant constitutional rights.[253] If the allegation is sound, it would be futile to require exhaustion of the claim in the state courts. After all, if the state's procedures do not provide prisoners with the opportunity to litigate constitutional claims, it is reasonable to suspect that those same procedures would deny prisoners the opportunity to litigate the failure of the state to provide such an opportunity.

Stated differently, once a prisoner claims that a state is hostile to the vindication of federal constitutional rights, the federal courts will not require the prisoner to ask the state to declare itself hostile to federal rights. Rather, the question of whether the state procedural scheme is hostile to the exercise of federal rights is deemed already fit for the consideration of a federal court.

In addition to this procedural difference, there is reason to believe that the federal courts will impose additional substantive requirements on individual prisoners who seek to overcome procedural defaults through cause and prejudice. As discussed earlier, in *Martinez v. Ryan*,[254] the Court held that a petitioner's underlying IATC claim must be "a substantial one" before he will be permitted to rely on cause and prejudice to bypass a procedural default.[255] It is not enough if a defendant's trial counsel is constitutionally ineffective and his initial postconviction attorney is also deficient under the *Strickland* standard. His trial attorney's constitutionally ineffective performance must be deemed "substantial" enough to merit bypassing a procedural default.

The heightened burden to demonstrate that the underlying constitutional claim is "substantial" is puzzling. After all, either there is a factor external to the defendant that prevented her from complying with the state procedural rules or there is not. And one would think that the prejudice requirement itself would provide enough of a check on frivolous claims.

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251. *See id.*; *see also* McIntyre v. McKune, 480 F. App'x 486, 489 n.3 (10th Cir. 2012) (suggesting that *Edwards* applies to *Martinez* cause grounds and requires exhaustion of *such claims in state court*); Klocko v. Lester, No. 3:12-0670, 2013 WL 4830921, at *4–5 (M.D. Tenn. Sept. 10, 2013) (same), *vacated*, No. 14-5244 (6th Cir. Apr. 1, 2015); Decker v. Roberts, No. 11-3069-SAC, 2013 WL 1074761, at *7 (D. Kan. Mar. 14, 2013) (same).

252. *Edwards*, 529 U.S. at 451. Unless, of course, that metadefault is excused as itself having been the product of legitimate cause, or on miscarriage of justice grounds, as with the first-level form of default. *Id.* But even to state this possible solution is to emphasize how tangled this road to review can become.

253. Michel v. Louisiana, 350 U.S. 91, 93–95 (1955).

254. 132 S. Ct. 1309 (2012).

255. *Martinez*, 132 S. Ct. at 1318.

Although the *Martinez* Court did not explain the substantiality requirement, it seems to reflect a compromise predicated on federalism principles. The logic seems to be that if the state procedures were just and the prisoner has been granted only an excuse for noncompliance, perhaps federal courts should only upset state court convictions when the underlying federal violation is particularly egregious. After all, the state did nothing wrong.

Whatever the rationale for imposing it, this heightened substantive requirement for pleading cause and prejudice has practical consequences. After *Martinez v. Ryan*, *lower courts* have been able to avoid addressing state prisoners' IATC claims by simply finding that a litigant's IATC claims are not "substantial" enough to take advantage of any cause gateway that might exist after *Martinez*.[256]

In a structural procedural adequacy analysis, there is no comparable heightened burden regarding the severity of the underlying constitutional violation that a petitioner must show. The question is the adequacy of the procedures themselves. If the state procedures are inadequate for the adjudication of federal claims, the federal court is less concerned about upsetting the state's interests. It will hear the challenge without worrying about the magnitude of the constitutional violations for which the alleged procedural inadequacies are responsible.

D. *Doctrinal Coherence and Original Purposes*

Independent of its superiority as a catalyst for change in the states, adopting a structural approach to procedural adequacy doctrine would also create coherence in habeas doctrine more generally. The context of procedural default is not the only setting in which federal habeas courts ask questions about the structural adequacy of procedural rules. Consider, for example, *Boumediene v. Bush*,[257] in which the Supreme Court considered the adequacy of Congress's proposed substitute for habeas corpus review of executive detentions in Guantanamo Bay and noted that any alternative must provide "a meaningful opportunity to demonstrate that [the prisoner] is

256. *See, e.g.*, Hamlett v. Sec'y, Dep't of Corr., No. 8:13-cv-1923-T-33AEP, 2015 WL 1815861, at *13 (M.D. Fla. Apr. 22, 2015); Baker v. Clarke, 95 F. Supp. 3d 913, 919 (E.D. Va.), *appeal dismissed*, 621 F. App'x 237 (4th Cir. 2015). This focus on prejudice has generated substantial confusion in the lower courts. There are arguably three different potential prejudice inquiries in the cause and prejudice standard that the Court articulated in *Martinez*: (1) the need to show a substantial claim of trial attorney ineffectiveness, (2) the need to show that the initial postconviction attorney's performance satisfied *Strickland*, and (3) the prejudice inquiry that is superimposed on all cause grounds before they will be permitted to allow a prisoner to bypass a procedural default. There is much confusion about the nature of these overlapping prejudice inquiries and what the standards for obtaining relief are. *See, e.g.*, Detrich v. Ryan, 740 F.3d 1237 (9th Cir. 2013) (en banc); Michael Ellis, *A Tale of Three Prejudices: Restructuring the* "Martinez *Gateway,*" 90 WASH. L. REV. 405 (2015). This confusion contributes to the diversion of attention away from a focus on the state's procedures.

257. 553 U.S. 723 (2008).

being held pursuant to 'the erroneous application or interpretation' of relevant law."[258] In that case, the Supreme Court engaged in a form of structural procedural adequacy analysis, considering not just one procedural rule but the entire scheme of procedural rules created by Congress to determine whether there was an adequate substitute for habeas.[259] Admittedly, the *Boumediene* Court considered the adequacy of a procedural *substitute* for habeas rather than the adequacy of a procedural scheme within the habeas framework. But the idea is similar.

Within the habeas framework itself, the federal courts regularly perform structural analyses of state practices in the exhaustion context. As noted earlier, exhaustion doctrine directs state prisoners to present their federal claims to state courts before seeking habeas review in federal court.[260] But the exhaustion requirement has a statutory exception under which a state prisoner need not go to the state courts first if there is either "an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the [prisoner]."[261] Call this the "futility exception."

Federal courts will not require habeas petitioners to waste time on ostensible state avenues for review which are, in reality, pointless. And when federal courts analyze claims of futility, they routinely adopt a structural approach that asks about the effectiveness of the state's corrective process overall, rather than just about the potential usefulness of that process to an individual petitioner.[262]

Consider, for example, how federal courts address claims by state prisoners that they should not be required to exhaust their federal claims due to excessive delays in the state court system. A number of federal courts have described excessive state court delays in processing cases to be "circumstances rendering [the] [state corrective] process ineffective to protect the rights of the prisoner."[263] In so doing, these federal courts have analyzed more than just one procedural rule or one instance of delay in the offending state. Rather, they have considered all of the state's filing rules, the state practices for appointing counsel, the funding for that counsel, and the length of typical filing delays.[264] In short, these federal courts examine the

258. *Boumediene*, 553 U.S. at 779 (quoting INS v. St. Cyr, 533 U.S. 289, 302 (2001)).

259. *See id.* at 771–92.

260. *See supra* notes 123–124 and accompanying text.

261. 28 U.S.C. § 2254(b)(1) (2012).

262. *See, e.g.*, Streater v. Jackson, 691 F.2d 1026 (D.C. Cir. 1982) (per curiam); Dorsey v. Stephens, Civil Action No. H-14-03138, 2014 WL 5821955, at *2 (S.D. Tex. Nov. 10, 2014) ("Case law excuses exhaustion if . . . the state proceedings have become a 'procedural morass offering no substantial hope of relief.'" (quoting Carter v. Estelle, 677 F.2d 427, 447 (5th Cir. 1982))); 2 HERTZ & LIEBMAN, *supra* note 201, § 23.4[a][ii] (collecting cases).

263. United States *ex rel.* Green v. Washington, 917 F. Supp. 1238, 1269 (N.D. Ill. 1996) (second alteration in original) (quoting 28 U.S.C. § 2254(b) (1996)) (collecting cases).

264. *See, e.g.*, *id.*; *see also* Harris v. Champion, 938 F.2d 1062 (10th Cir. 1991); Mathis v. Hood, 851 F.2d 612 (2d Cir. 1988).

entire structure of the state procedural system for processing cases to determine whether it would be appropriate to invoke the futility exception and waive the ordinary requirement of exhaustion. Not surprisingly, when one of these courts finds a systemic problem involving unacceptable delays, it often prescribes relief that is intended to help the state fix the systemic problem, rather than simply excusing one prisoner or group of prisoners from the exhaustion rules.[265]

There is no reason why federal habeas courts should adopt a structural perspective toward the futility exception but not toward the questions that might arise in cases of procedural default. The only difference between the two kinds of cases, after all, is one of timing. In the futility case, a petitioner who has not yet failed to comply with state rules asks the federal court to declare compliance with those state rules pointless; in the procedural default case, a petitioner who has already failed to comply with state rules asks the federal court to declare those rules unsound. Either way, the question is the adequacy of the procedural regime, and the doctrinal analysis should be similar.

Federal courts have long understood exhaustion and procedural adequacy doctrine to be doctrinal cousins.[266] As one court put it, "[A]t the very core of exhaustion doctrine is the requirement that state procedures be adequate and effective, for it is only because these procedures are adequate to vindicate federal constitutional rights that the forbearance of the federal courts from swift consideration of habeas corpus claims is justified."[267] When the Supreme Court spoke about the problems with Illinois's "procedural labyrinth" in the 1940s and '50s, it spoke in both exhaustion and adequacy terms.[268] If a criminal defendant opted for the wrong procedural writ, the lower court could deem the claim procedurally defaulted, which would raise an adequacy question—or the claim could be said to be unexhausted because the defendant had not yet filed the appropriate writ. The thin line

265. *Harris*, 938 F.2d at 1071 (remanding "for the district court to consider this petitioner's claims within the context of the systemic operations of the Oklahoma Appellate Public Defender's Office" and ordering the district court to "consider what relief is appropriate for this petitioner as well as such systemic relief, if any, as may be needed to prevent any ongoing constitutional violations that may be occurring as a result of the inability of the Oklahoma Appellate Public Defender's Office timely to prepare appeals for their indigent clients"); *see also Green*, 917 F. Supp. at 1282 (ordering respondents to submit "a concrete and detailed proposal setting forth means . . . to expedite the briefing of cases . . . [and] to provide for a continuing reduction in that backlog").

266. *See* Edwards v. Carpenter, 529 U.S. 446, 452 (2000) (recognizing "the inseparability of the exhaustion rule and the procedural default doctrine"); *see also* Carter v. Procunier, 755 F.2d 1126, 1131 (5th Cir. 1985) ("The requirement for exhaustion is based upon the assumption that the state remedies available to the petitioner are adequate and effective to vindicate federal rights."); Reitz, *supra* note 66, at 1365 (recognizing how the Supreme Court has "equated an abortive state proceeding with a failure to exhaust past state remedies").

267. Carter v. Estelle, 677 F.2d 427, 445 (5th Cir. 1982).

268. *See* Jennings v. Illinois, 342 U.S. 104 (1951); Young v. Ragen, 337 U.S. 235 (1949); Marino v. Ragen, 332 U.S. 561, 565, 568–70 (1947).

between exhaustion and adequacy argues in favor of courts adopting a similar approach, at least with respect to this commonly shared group of cases.

Returning to a structural approach to adequacy would also be consistent with the original purposes of procedural adequacy doctrine. As discussed above, procedural adequacy doctrine at its inception was designed to prevent states from using state procedural rules to prevent litigants from raising constitutional claims.[269] In the early twentieth century, when state courts were overtly distorting state procedural rules in the attempt to avoid federal constitutional claims, it made sense for the federal courts to focus on the individual procedural rules that the state judges manipulated.

Time has passed, and much hostility toward the exercise of federal constitutional rights in the criminal justice system has gone underground, but that does not mean that such hostility no longer exists. Moreover, the complexity of modern postconviction review and the incentives created by crushing docket burdens drive many state officials away from giving due attention to prisoners' opportunities to raise claims of constitutional violations and have those claims fairly adjudicated. As a result, the federal courts must expand their lenses and consider how states' procedural thickets might unduly burden federal rights.

The Supreme Court envisioned procedural adequacy as having structural dimensions when it put an end to Illinois's discriminatory practices. It should revive that focus to address structural problems that persist in the states today.

Conclusion

It is time to revive structural procedural adequacy doctrine and encourage federal courts to use this equitable tool to address ways in which state criminal justice systems systematically fail to enforce constitutional protections in criminal cases. Adequacy has historically served that function and is more appropriate than cause doctrine for addressing structural deficiencies in state procedures.

269. *See supra* Section II.A. Federal habeas review of state court criminal convictions itself was also created so federal courts could prevent states from systematically underenforcing federal constitutional guarantees. Congress first gave federal courts the statutory authority to review habeas petitions filed by state convicts in 1867, in response to a resolution of the House asking for legislation that would "enable the courts of the United States to enforce the freedom of the wives and children of soldiers of the United States . . . and also to enforce the liberty of all persons under the operation of the constitutional amendment abolishing slavery." Cong. Globe, 39th Cong., 1st Sess. 87 (1866) (statement of Rep. Shellabarger). It was clear that Congress anticipated that some states would deliberately attempt to violate or underenforce the Reconstruction Amendments or would seek to punish individuals who had fought with the Union regardless of their constitutional rights. Thus, much like procedural adequacy doctrine, federal habeas review was designed, in part, to combat states' systemic or deliberate attempts to violate litigants' federal rights.

Perhaps because it has been overshadowed by the recent focus on cause doctrine, procedural adequacy has failed to evolve in response to the structural changes in states' administration of criminal justice. If adequacy doctrine is to be an effective tool with which federal courts can examine state procedures and determine whether litigants are being given reasonable opportunities to present their federal claims, then the federal courts need to take a view of the state procedures that is broad enough to answer the question.

Rather than looking in each case only at the particular procedural rule that the petitioner is said to have violated, the federal courts should consider how that one rule is situated in the overall state procedural system and ask a larger question: Is the state system structured in such a way that this litigant will not have, in practice, a real opportunity to raise a federal constitutional claim? Unless the federal court is willing to look at the labyrinth, there is little chance that petitioners will ever find their way through it.