

# PROCESS MATTERS: SPECIALIZATION IN FEDERAL APPELLATE REVIEW OF NONCAPITAL SECTION 2254 CASES

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## ABSTRACT

*This Note assesses the need for specialized review in the federal circuit courts of noncapital habeas cases brought by state prisoners under 28 U.S.C. § 2254. It first argues that the complexity of federal habeas law, the substantial disuniformity between circuits, the conflicting visions proffered by the Warren Court's habeas jurisprudence and Congress's recent statutory enactments—together with the greatest stakes possible at issue, liberty—are all factors warranting the creation of a national court of appeals that would hear only habeas cases. Recognizing, however, that creating such a court is a low priority for Congress at best and simply unfeasible at worst, this Note also makes another recommendation for injecting specialized review into appellate adjudication. Specifically, the circuit courts' use of line staff attorneys to screen petitions can be much improved by creating a career staff attorney position dedicated solely to review of noncapital § 2254 cases. A formal position will attract better candidates, have lower rates of turnover, and concentrate experience and expertise to the benefit of judges and litigants.*

## INTRODUCTION

In response to the recent statutory and judge-made restrictions on federal habeas review,<sup>1</sup> scholars have suggested widely diverging proposals for its reformation. Some have advocated for process reforms, such as creating a constitutional right to counsel in

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1. For a brief history of the Great Writ, see *infra* Part I.A.1.

postconviction proceedings<sup>2</sup> or a national court of appeals for the direct review of all federal- and state-court convictions that would lessen the pressure on collateral relief.<sup>3</sup> Others have advanced proposals for replacing current law and starting anew with more focused legislation<sup>4</sup> or approaching the writ from a different perspective.<sup>5</sup> Two scholars have proposed eliminating federal habeas review for all but two categories of noncapital cases, arguing that because the chances of success are so low for these claimants, it is more useful to devote these resources to ensuring fair process at the state level.<sup>6</sup>

Few scholars, however, have looked at the mechanisms by which federal courts process and decide habeas claims as a means to ensure greater accuracy and improve efficiency in their adjudication.<sup>7</sup> This

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2. See, e.g., Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219 (2012).

3. Clement F. Haynsworth Jr., *Improving the Handling of Criminal Cases in the Federal Appellate System*, 59 CORNELL L. REV. 597, 598 (1974). Specifically, then-Chief Judge Haynsworth of the Fourth Circuit offered the following:

My own modest proposal is essentially abandonment of primary reliance upon collateral review of federal questions arising in criminal prosecutions and the substitution of an efficient system for prompt direct review . . . requir[ing] the creation of a new national court of appeals to review convictions in the federal and state judicial systems.

*Id.* (footnote omitted). His proposal was based largely on concerns stemming from the burgeoning federal dockets and the changes wrought in the writ by the Supreme Court in the previous decade. *Id.* at 597–98, 600–02.

4. See, e.g., Brian M. Hoffstadt, *How Congress Might Redesign A Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947, 950–1040 (2000) (discussing how Congress can narrow the scope of the writ by limiting the substantive claims to those underlying the purpose of federal habeas review rather than by setting up procedural hurdles).

5. See, e.g., Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 WASH. & LEE L. REV. 85, 86 (2012) (arguing that the more important purpose of federal habeas review of state-court convictions is “ensuring that the state court process is fundamentally fair,” not overturning wrongful convictions).

6. Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 819–821, 823–24 (2009). For one response to this argument, see John H. Blume, Sheri Lynn Johnson & Keir M. Weyble, *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 435 (2011).

7. There has been some scholarship evaluating case-management practices in individual federal district courts. See generally, e.g., Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475 (2002) (reviewing the response by the Eastern District of New York to a rise in the number of pro se claims); Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445 (1992) (analyzing the value of the Civil Justice Reform Act of 1990).

Any discussion of the processing of habeas corpus claims by the federal courts of appeals, however, has been in the context of evaluating their mechanisms for processing all

Note seeks to explore this proposition in relation to noncapital habeas claims brought by state prisoners in federal courts of appeals under 28 U.S.C. § 2254. It focuses on federal review of noncapital state convictions because these make up the majority of habeas appeals.<sup>8</sup> This Note also focuses on appellate review for three reasons. First, the practices of the federal district courts are too varied for suitable analysis and comparison.<sup>9</sup> Second, as petitioners seeking to file second or successive petitions must request certificates of appealability from circuit courts—the grant or denial of which is not reviewable on certiorari to the Supreme Court<sup>10</sup>—the appellate courts enjoy a special role, quite literally acting as guards to the courthouse and to justice.<sup>11</sup> Lastly, because the Supreme Court “grants certiorari in only a fraction of the habeas cases entertained by the lower federal courts,” the appellate courts are courts of last resort for many litigants.<sup>12</sup> Due to the heightened stakes—liberty, not mere property, and the potential to correct decades-long injustices—it is particularly important that they decide these cases accurately.

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claims and has focused on the perceived inequities of these mechanisms. *See, e.g.*, WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS* 4, 12, 103–04, 182 (2012) (discussing the role of the Warren Court’s expansion of federal habeas review in increasing federal courts’ caseloads and leading to the development of case-management practices, including limited publication, hiring of staff attorneys, and denial of oral arguments, all of which have resulted in the “screen[ing] out of the traditional process those cases that are the least likely to draw the attention of any powerful observer,” including “habeas corpus cases”); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 *STAN. L. REV.* 1435, 1444–64 (2004) (tracing the origins of “unpublication” to “the federal judiciary’s anxiety about floods of civil rights and *pro se* prisoner postconviction appeals litigation in the 1960s”). Recently, while responding to critiques of federal appellate case-management practices, Professor Marin Levy suggested that for some types of cases, staff attorney review, if specialized, could in fact be beneficial to litigants. Marin K. Levy, *Judging Justice on Appeal*, 123 *YALE L.J.* 2386, 2410–11 (2014) [hereinafter Levy, *Judging Justice*] (reviewing RICHMAN & REYNOLDS, *supra*); Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 *GEO. WASH. L. REV.* 401, 443–44 (2013) [hereinafter Levy, *Judicial Attention*].

8. *See infra* notes 83–84 and accompanying text.

9. *Compare, e.g.*, Bloom & Hershkoff, *supra* note 7, at 495–97, with Dayton, *supra* note 7, at 466–69 (describing how the Eastern District of New York and the Eastern District of Virginia, respectively, manage their *pro se* docket).

10. 28 U.S.C. § 2244(b)(3) (2012).

11. *Felker v. Turpin*, 518 U.S. 651, 657 (1996).

12. John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 *CORNELL L. REV.* 259, 288 (2006).

This Note proceeds in three parts. Part I argues that noncapital habeas claims are suitable for specialized review<sup>13</sup> because the substantive law of habeas corpus exhibits the characteristics that have been used to justify specialized review in other areas of law. Part II analyzes the advantages and drawbacks of one form that specialized review can take—a specialized court, such as the United States Tax Court or the Court of Appeals for the Federal Circuit, featuring adjudication by expert judges. This Part closes by assessing the feasibility of such a court, determining that due to political differences, it is unlikely that such a court would ever be created by Congress. As a result, the final Part presents an alternate form of specialized review—review undertaken by staff attorneys with subject-matter expertise in habeas law. It outlines a proposal to structure such review and addresses arguments against such review. This Note concludes that specialized review by staff attorneys can ensure that habeas petitions receive the attention, time, and care they deserve without overburdening the appellate court.

#### I. NONCAPITAL HABEAS CLAIMS ARE SUITABLE FOR SPECIALIZED REVIEW

When the federal court system experiences an exponential increase in caseload, scholars often respond by proposing specialized courts with sole jurisdiction over particular types of cases or areas of law.<sup>14</sup> The burden placed on the federal courts' dockets by habeas petitions is well known and accounted for.<sup>15</sup> This Part establishes that there are additional factors that justify creating a specialized appeals

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13. My use of this term is limited to the idea that at some point after a claim is filed, it is evaluated by someone with expertise in habeas corpus. Thus it includes both specialized processing mechanisms (the screening and reviewing of claims by expert staff attorneys) and specialized adjudication (adjudication by expert judges).

14. See, e.g., Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745, 745 (1981) (suggesting a "trial-level specialist as an option in difficult cases"); Stephen J. Safranek, *Curbing the Fees of the Class Action Lawyers in Light of City of Burlington*, 41 WAYNE L. REV. 1301, 1337–39 (1995) (proposing a specialized court to hear class-action cases). For an argument against specialized appellate judges, see Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 777–89 (1983).

15. See, e.g., *infra* notes 20–21, 91 (discussing "abuse" of the Great Writ); see also *infra* notes 83–84 and accompanying text (reporting the percentage of the federal appeals courts' caseload composed of § 2254 and § 2255 habeas petitions).

court to hear only habeas petitions: (1) complexity; (2) a need for uniformity and coherence;<sup>16</sup> and (3) a special concern for accuracy.

### A. Complexity

This Section begins with a brief history of the writ of habeas corpus and introduces the various sources of law that govern it. It then reviews the maze-like complexity that is the hallmark of modern federal habeas law.

1. *The History of the Great Writ.* Much of the restrictive nature of federal habeas review is recent. Though, historically, the Great Writ of Liberty was only granted “sparingly,”<sup>17</sup> Congress expanded it in 1867 by permitting federal review of state-court convictions.<sup>18</sup> Access to the writ was expanded again in the 1950s and 1960s, this time by the Supreme Court.<sup>19</sup> Notably, both expansions came at a time when there was danger of state courts under-enforcing federal rights, first after the Civil War and then during the civil rights movement.

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16. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1116–17, 1120 (1990). Professor Richard Revesz provides a thorough review of the literature that identifies complexity, uniformity, and coherence as factors justifying specialized review. *Id.* at 1116–20. He also discusses two other reasons: the desire to remove adjudicative functions from administrative agencies to specialized courts and the “sharp increase in the volume of litigation” that occurred in the 1980s. *Id.* at 1118, 1120. The first reason is “exclusive to the administrative context,” *id.* at 1115, and is consequently not included here. Revesz’s second reason is less persuasive today in light of the recent decline in federal appellate filings. See ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS—SUMMARY (2015), <http://www.uscourts.gov/file/18451/download> [<http://perma.cc/K4RC-APZA>] (showing a declining trend in overall number of appellate filings since 2010 for all circuits except for the D.C. Circuit and the Fifth Circuit, which have seen filings increase by 2.1 and 1.2 percent, respectively); see also *Federal Judicial Caseload Statistics 2014*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014> [<https://perma.cc/5BCQ-4BW5>] (reporting a 15 percent decline in total appeals court filings since 2005).

17. Lynn Adelman, *Federal Habeas Review of State Court Convictions: Incoherent Law But an Essential Right*, 64 ME. L. REV. 379, 381 (2011); see also Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 64–66 (2012) (noting that the Judiciary Act of 1789 “empowered all federal judges to grant the writ” and “provided for factual and legal review of detention of federal prisoners”).

18. Blume et al., *supra* note 6, at 440 & n.23.

19. See *id.* at 440 & nn.24–28 (providing an overview of the Supreme Court decisions of these two decades that “ushered in the modern era of federal habeas corpus,” and “set the high-water mark for habeas review of state court judgments”); Blume, *supra* note 12, at 262–63 & nn.18–19 (noting the cases that prompted debate of habeas petitions).

With the writ's latest expansion, however, came a flood of petitions.<sup>20</sup> This flood promoted a perception that the writ was being "abused," as litigants sometimes waited years before filing a petition or filed successive petitions attacking the same conviction.<sup>21</sup> Soon thereafter, the Court began rolling back these expansions, creating procedural barriers to the writ itself and limiting the substantive constitutional rights that formed the bases for claims.<sup>22</sup> In 1995, however, Congress still perceived abuse of the writ to be a significant problem.<sup>23</sup> Consequently, it enacted the Antiterrorism and Effective Death Penalty Act of 1996<sup>24</sup> (AEDPA).<sup>25</sup>

AEDPA did far more than the Court had already done to restrict federal habeas review, including imposing a one-year statute of limitations<sup>26</sup> and requiring federal courts to be deferential to the findings and conclusions of state courts.<sup>27</sup> Although both are considered "major provisions" of AEDPA,<sup>28</sup> the latter has drawn the most attention. By requiring such deference AEDPA changed the

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20. See Jane A. Gordon, Comment, *Pleading Rule 9 of the Rules Governing Habeas Corpus: Sua Sponte Departure from Precedent and Congressional Intent*, 38 EMORY L.J. 489, 489 (1989) ("In the single decade between 1954 and 1963, the number of habeas corpus petitions filed annually in federal court increased 352%, and by 1963 habeas corpus petitions comprised 3.3% of the total federal caseload."). By 1976, it comprised 6 percent of the total federal caseload. *Id.*

21. See *id.* at 489–90 (discussing Congress's passage of the Rules Governing Habeas Corpus in 1976 and the purpose behind the enactment of rules 9(a), which addressed delayed petitions, and 9(b), which addressed successive petitions, mainly, to curb these "abuse[s] of the writ").

22. See Blume et al., *supra* note 6, at 440–41 (discussing, in brief, the limitations imposed on federal habeas review of state-court convictions by the Burger and Rehnquist Courts); Blume, *supra* note 12, at 265–70 (providing a more detailed accounting of the cases that reshaped federal habeas review).

23. *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 623 Before the S. Comm. on the Judiciary*, 104th Cong. 2 (1995) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary) ("This abuse of habeas corpus litigation, particularly in those cases involving lawfully imposed death sentences, has seriously eroded the public's confidence in our criminal justice system, drained State criminal justice resources, and taken a dreadful toll on victims' families.").

24. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2241–2266 (2012)).

25. See Blume, *supra* note 12, at 259–60 (describing what the enactment of AEDPA meant to its supporters).

26. 28 U.S.C. § 2244(d)(1) (2012).

27. See *id.* § 2254(d) (restricting the grant of habeas corpus only to state-court proceedings that were contrary to or an unreasonable application of "clearly established federal law" or were "based on an unreasonable determination of the facts").

28. Adelman, *supra* note 17, at 384.

nature of the relationship between federal and state courts,<sup>29</sup> undermining the very purpose of federal habeas review of state-court convictions.<sup>30</sup> Moreover, the Court's interpretations of AEDPA's provisions have been largely restrictive, further narrowing federal habeas review.<sup>31</sup>

2. *Resulting Complexity.* An area of law can be complex because the legal doctrines or statutes are intricate or simply numerous,<sup>32</sup> or because of the “technical nature of the facts.”<sup>33</sup> The complexity in modern federal habeas review is of the former nature. It derives from many judge-made legal doctrines of federal and state origin that interact with an intricate federal statutory scheme. The result, according to some, is an “incoherent” body of law<sup>34</sup> that produces “mind-numbingly complicated and confusing litigation.”<sup>35</sup>

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29. *E.g.*, Blume, *supra* note 12, at 260, 272 (referring to § 2254(d) as the “centerpiece” of AEDPA and describing how it prevents federal courts from “overturning . . . the state court apple cart”).

30. *See* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 946 (1998) (agreeing with then-Senator Biden's comments on § 2254(d) during a Senate debate that the provision was “directly contrary to the purpose of habeas corpus” in that it prevented federal courts from “grant[ing] a claim that was adjudicated in State court proceedings”). Justin Marceau argues that the more important purpose of federal habeas review of state-court convictions is “ensuring that the state court process is fundamentally fair,” not that it results in the overturning of wrongful convictions. *See* Marceau, *supra* note 5, at 86. This purpose is also undermined by § 2254(d), however, as deference does not equate with a critical review of the state-court process.

31. *See* Marceau, *supra* note 5, at 106–24 (detailing two 2011 Supreme Court cases that narrowly interpret § 2254(d) to restrict access to habeas corpus); *see also* White v. Woodall, 134 S. Ct. 1697, 1706 (2014) (reasoning that “[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent” even to contexts where the precedent should have controlled). *But see generally* Justin F. Marceau, *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071 (2014) (arguing that three recent cases point to a shift in the Supreme Court's focus from guilt/innocence to ensuring fair procedures which has the potential to increase the chances of a successful habeas corpus claim). For an argument that the Court's restrictive interpretations of AEDPA result from its own institutional interests, *see* Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 52–63 (2015).

32. *See* Revesz, *supra* note 16, at 1117 & n.31 (“The classic example of a legally complex field is tax law.”).

33. *Id.* at 1117–18 (offering patent law as an example).

34. Adelman, *supra* note 17, at 384.

35. Jordan Steiker, *Opinion Analysis: Innocence Exception Survives, Innocence Claim Does Not (Updated)*, SCOTUSBLOG (May 29, 2013, 11:06 AM), <http://www.scotusblog.com/2013/05/opinion-analysis-innocence-exception-survives-innocence-claim-does-not> [<http://perma.cc/J84H-V85V>].

Federal habeas law has also been described as maze-like because of its many procedural checkpoints,<sup>36</sup> that overcoming these hurdles requires familiarity with state and federal legal doctrines as well as state and federal statutes only adds to the complexity.<sup>37</sup> To describe this complexity in another way, a single case may raise questions of both federal and state law, require an understanding of the legal doctrines at issue, *and* demand knowledge of which legal doctrines are superseded by statute and which doctrines serve as exceptions to the same statute—all before reaching the merits of the substantive claims.

Because federal courts operate with limited judicial resources, judicial efficiency is critical to ensuring that courts can meet the obligations of a burgeoning caseload.<sup>38</sup> Of course, efficiency must not come at the expense of accuracy. Yet a trade-off between these goals is unavoidable when a particular area of law features heightened complexity: either too little time is being spent to fully develop or understand the issues, or too much time is being spent at the expense of other cases.<sup>39</sup> Expertise can help resolve, or at least ease, this tension because it ensures efficiency without diminishing accuracy.<sup>40</sup>

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36. Even prior to AEDPA's passing, "[s]imply navigating through the procedural maze of habeas practice . . . [was] a formidable task." John H. Blume & David P. Voisin, *An Introduction to Federal Habeas Corpus Practice and Procedure*, 47 S.C. L. REV. 271, 272 (1996).

37. *See id.* at 273 n.2 (describing the need to exhaust all claims in state court before proceeding to federal court).

38. *See* James F. Holderman & Halley Guren, *The Patent Litigation Predicament in the United States*, 2007 U. ILL. J.L. TECH. & POL'Y 1, 4 (noting that volume and diversity "demand constant attention to efficiency, without which the caseload would burgeon beyond the capability of any one judge to provide justice as is necessary in each case").

39. Federal District Court Judge James Holderman wrote:

I do not have the luxury of spending the time to learn more about a specific area of the law than necessary to resolve a particular case or a particular issue that may need resolution. . . . Because of the constant press of the rest of our caseload, we often find it difficult to devote the time that, in a perfect world, would be devoted to any case, let alone a complex patent case.

*Id.* at 4–5.

40. *See* Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1676 (2009) ("[M]ore expert judges, who know more about the field in which they are deciding cases, are more likely to get decisions right."); Holderman & Guren, *supra* note 38, at 5–6 (noting that the Federal Circuit's high rate of reversal of district court decisions is partially due to the fact that district court judges are generalists by "trade and training"); *see also* *Court of Appeals for the Federal Circuit: Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 97th Cong. 42–43 (1981) (statement of the Hon. Howard T. Markey, C.J., Court of Customs and Patent Appeals) ("[I]f I am doing brain surgery every day, day in and day out, chances are very good that I will do your brain surgery much quicker . . . than someone who does brain surgery once every couple of years.").

Consequently, expertise is most suitable, even necessary, when a disproportionate amount of judicial resources are required to decide a particular class of cases because of their heightened complexity.

*B. Uniformity and Coherence*

Uniformity is critical to ensuring predictability of law, and forum shopping is the symptom that can diagnose its absence or shortage. For example, one of the driving forces behind the creation of the Court of Appeals for the Federal Circuit was the need for uniformity among circuit courts' decisions involving patent law.<sup>41</sup> Specifically, the differing rates at which circuit courts found patents to be valid and infringed led to "rampant" forum shopping.<sup>42</sup> This in turn made it difficult for lawyers to "counsel technology developers or users" and created a legal environment that disincentivized investment in research and development.<sup>43</sup>

Although forum shopping is not a concern with habeas petitions,<sup>44</sup> perceptions exist that certain circuits are friendlier than others to habeas claims brought by state prisoners. For example, the Ninth Circuit, deemed the most "liberal circuit in the land," often receives greater scrutiny by the Supreme Court with respect to habeas claims.<sup>45</sup> The Eleventh Circuit, on the other hand, has been criticized for its "conservative" approach to habeas claims with some suggesting that it "artificially depresses the overall success rate" of habeas claims.<sup>46</sup> These perceptions are supported by one analysis which followed noncapital § 2254 cases from July 1, 2005 to September 30, 2009 as they proceeded from federal district courts through appellate

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41. Revesz, *supra* note 16, at 1116–17.

42. Rochelle Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 7 (1989).

43. *Id.*

44. Section 2254 petitioners may file in the district in which they were convicted or in which they are imprisoned. Whatever the choice, for the majority of prisoners, both districts will be in the same state and thus under a single circuit court's jurisdiction. 28 U.S.C. § 2241(d) (2012).

45. Robert Barnes, *Supreme Court Reversals Deliver a Dressing-Down to the Liberal 9th Circuit*, WASH. POST, Jan. 31, 2011, at A13 (noting that an "opinion granting habeas" by Judge Reinhardt, "widely considered to be the nation's most liberal appeals court judge," "gets extra scrutiny"). *But see* Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 4–9 (2009) (arguing that the Ninth Circuit is not that liberal considering its restrictive holding in *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002), a habeas case involving Guantanamo Bay detainees that had arguably stronger statutory and case law support for a favorable holding for the detainees).

46. Blume et al., *supra* note 6, at 452 n.92.

courts.<sup>47</sup> It found that there was “substantial variation” in the success rates<sup>48</sup> of habeas petitions among the circuits, from 1.66 percent in the Eleventh Circuit to 22.85 percent in the Sixth Circuit.<sup>49</sup>

Although the federal appellate courts may be as valuable laboratories for experimentation as state courts and legislatures are,<sup>50</sup> the vast difference between the Eleventh and Sixth Circuits’ success rates is problematic. This gap cannot be explained by a few different legal rules, but rather must result from a difference in approach entirely. This reveals the source of the disuniformity: a lack of coherence in federal habeas review. Coherence requires a single vision of an area of law.<sup>51</sup> A single vision or purpose guides federal courts in the development of the law and minimizes the likelihood of contradictory legal interpretations and inconsistent legal rules.<sup>52</sup> One cause of the disuniformity in the patent system, for example, was a lack of agreement on whether the courts should “impose[] difficult burdens on patentees, or light ones on infringers.”<sup>53</sup> The Federal Circuit resolved this split by “articulat[ing] rules that are consistent with the underlying philosophy of patent law.”<sup>54</sup>

Similarly, the values that underlie federal habeas review are often at cross purposes from one another because the modern system in fact reflects two competing visions. The first is the Warren Court’s ideal in which the ultimate goal is fairness; the other is Congress’s version in which the ultimate goal is finality. Thus, though the modern system tries to ensure that state-court proceedings are fair and protect the federal rights of individuals, it counterintuitively limits the opportunities available to seek collateral review and correspondingly limits the opportunities available to examine state-

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47. *Id.* at 452 & nn.91–92.

48. *Id.* at 452 n.92. The authors coded success as instances in which the court of appeals affirmed a district court decision to grant relief on the merits without remanding for additional proceedings or reversed a district court decision to deny the same. *Id.* at 452 n.91.

49. *Id.* at 452 n.92.

50. See Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 441 n.215 (2007) (“Scholars have debated whether or not it is beneficial to allow legal issues to ‘percolate’ in the lower courts, thereby producing a divergence of approaches which may then inform the Supreme Court’s ultimate resolution of an issue.”).

51. Revesz, *supra* note 16, at 1117.

52. See *id.* (“Coherence . . . demands not only that the legal rules of a statutory scheme be consistent but also that they reflect a unitary vision of that scheme.”).

53. Dreyfuss, *supra* note 42, at 7.

54. *Id.* at 8.

court proceedings for unfairness.<sup>55</sup> Whether an individual places greater value on fairness or finality has been aligned with the liberal-conservative spectrum; this measurable party-line delineation underscores the depth of the divide between these competing visions:

Conservatives view habeas corpus as the vehicle that guilty people use to escape convictions and sentences. They emphasize the importance of finality and urge limiting the availability of habeas corpus to those who can make a colorable showing of their innocence. Liberals see habeas corpus as an essential protection against individuals being held in violation of the Constitution and laws of the United States. They argue that habeas corpus does not exist solely to free innocents who were wrongfully convicted; it serves to assure that no person is imprisoned because of an infringement of his or her constitutional rights.<sup>56</sup>

When a particular circuit court's jurists emphasize one value over the other, interpretations of the same doctrines or statutory provisions will differ across circuits and create disuniformity. Petition outcomes will, accordingly, diverge along the same lines as the different interpretations.<sup>57</sup> For example, one of the most litigated provisions of AEDPA is § 2254(d)(1) which precludes habeas relief absent a showing that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."<sup>58</sup> Under *Williams v. Taylor*,<sup>59</sup> "unreasonable application" requires an "objectively unreasonable" standard of review.<sup>60</sup> One analysis of twenty-two Supreme Court decisions between 2000 and 2010 applying the "unreasonable application" test in capital cases noted that the "liberal bloc" of justices, composed of Justices Ginsburg, Breyer and Stevens, "found the [state courts'] decisions to be an 'unreasonable

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55. See *supra* Part I.A.1.

56. Erwin Chemerinsky, *Thinking about Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 750 (1987) (footnotes omitted).

57. See, e.g., *Whiteside v. United States*, 775 F.3d 180, 189–90 (4th Cir. 2014) (en banc) (Gregory, J., dissenting) (describing how concerns about fairness led him to decide in favor of the petitioner whereas concerns about finality led the majority to decide in favor of the government).

58. 28 U.S.C. § 2254(d)(1) (2012); see also Daniel J. McGrady, Comment, *Whose Line Is It Anyway?: A Retrospective Study of the Supreme Court's Split Analysis of § 2254(d)(1) Since 2000*, 41 SETON HALL L. REV. 1599, 1612 n.84 (2011) (reviewing twenty-two Supreme Court decisions since 2000 that have applied the "unreasonable application" test in a capital context).

59. *Williams v. Taylor*, 529 U.S. 362 (2000).

60. *Id.* at 409.

application' of the law 53–64% of the time.”<sup>61</sup> In contrast, the “conservative bloc,” composed of Justices Scalia, Thomas, Rehnquist, Roberts, and Alito, found an unreasonable application of the law in only 4–14 percent of cases.<sup>62</sup> This large disparity suggests these blocs of the Court have different interpretations of “objectively unreasonable” that hew to the liberal–conservative divide identified above: the liberal or fairness-minded Justices are imposing a more exacting review on the state courts, whereas the conservative or finality-minded Justices are imposing a less stringent review.<sup>63</sup> Thus the standard of review imposed has less to do with the law than with the vision held by the justices of the purpose and role of habeas corpus in the criminal justice system. The lack of coherence therefore largely leaves the outcome of a particular habeas petition to the luck of the draw that the majority of the panel assigned to review it are fairness-minded as opposed to finality-minded.

### C. Accuracy

A special concern for accuracy exists in federal habeas review because the consequences from errors in individual cases are more broadly harmful than in other areas of law, primarily because these errors disrupt the conception of courts as guarantors of justice.

The need for accuracy, that the appeals court reaches the *right* decision, is two-fold, as it is critical to both its functions: the development of law and the correction of errors in individual cases.<sup>64</sup> Errors made by circuit courts while performing the first function are typically only realized years later, when a defect in a legal rule eventually emerges or the legal rule is modified or overturned by the Supreme Court.

Errors in individual cases are defined by the Supreme Court as “erroneous factual findings or the misapplication of a properly stated rule.”<sup>65</sup> Whereas the costs associated with the first kind of error

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61. *Id.* at 1602, 1615–16. This percentage was calculated for each Justice and the range reflects the different rates at which each Justice found an unreasonable application. *Id.* at 1616 & n.115.

62. *Id.* at 1602, 1615–16.

63. *See id.* at 1602–03, 1615–16 (suggesting that the liberal bloc applies something closer to a “de novo” standard of review while the conservative bloc applies something closer to “blind deference”).

64. Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 649 (1988).

65. SUP. CT. R. 10.

impact the public, government, and industries in addition to individual litigants,<sup>66</sup> the costs associated with the second kind are typically limited to the parties involved. In the habeas context, however, these errors are more broadly harmful, imposing significant costs on the prisoner, the legal system, and the public.

At stake in any habeas petition is not property but liberty. The strongest action the State can take against an individual is to imprison him. The procedural safeguards in the American criminal justice system, from the right to an attorney to holding the prosecution to the “beyond a reasonable doubt” burden of proof, stand as a testament to this great power of the State and the need to exercise it judiciously and accurately. Errors in this context are thus of the kind gravest. There is a reason the writ of habeas corpus is also known as the “Great Writ of *Liberty*”: it is a fundamental safeguard of personal freedom,<sup>67</sup> one that the Framers valued enough to write into the Constitution.<sup>68</sup> Incorrectly denying this relief frustrates the very purpose of the writ as the wrongful restriction on liberty continues. This is injustice redoubled; the American legal system has failed this person, not once, but twice. Moreover, because the Supreme Court rarely grants certiorari to correct such errors,<sup>69</sup> the appellate court’s incorrect decision is typically permanent.<sup>70</sup> As a consequence, the wrongfully convicted stand to lose decades of their lives.

Additionally, because innocence cases tend to draw public attention, courts can come under great scrutiny when they decide them.<sup>71</sup> As representatives of the criminal justice system, judges are in

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66. See Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2189 (2014) (describing the costs associated with changes in constitutional law).

67. See *Smith v. Bennett*, 365 U.S. 708, 712 (1961) (describing the writ as “the highest safeguard of liberty”).

68. U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”); Chemerinsky, *supra* note 56, at 748.

69. See SUP. CT. R. 10 (“A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”).

70. Barring, of course, a grant to file a second or successive petition under sections 2244(b)(2)(A) or 2244(b)(2)(B).

71. See, e.g., Lisa Marcus, *Anatomy of a Wrongful Conviction Case*, CRIME REPORT (June 30, 2011, 12:38 AM), <http://www.thecrimereport.org/archive/2011-06-anatomy-of-a-wrongful-conviction-case> [<http://perma.cc/E6HC-ULQG>] (describing the defense attorney’s belief that “widespread press coverage of the case” was partially responsible for the judge’s decision to hold a hearing).

a position to restore faith that justice will ultimately prevail.<sup>72</sup> Erroneously failing to grant relief, however, erodes the public's confidence in the criminal justice system just as much as convicting the innocent or convicting without the guarantees of due process does.<sup>73</sup> If the public is convinced that an innocent man is in prison, it expects a stampede to justice; the years-long, decades-long delays do not jive with American society's understanding of the purposes and workings of the criminal justice system.<sup>74</sup> The errors and subsequent delays to correct those errors challenge the belief that bureaucracy belongs to only the other two branches of government.

Finally, none of the four primary values underlying the criminal justice system—retribution, deterrence, rehabilitation, and incapacitation<sup>75</sup>—are served when the innocent are wrongfully convicted and these errors go uncorrected. The wrongfully convicted individual has done nothing to warrant retribution, nor will he be deterred, rehabilitated, or incapacitated from future wrongdoing any more than he was before his conviction. Moreover, when courts erroneously deny relief to an innocent, they perpetuate the myth that the guilty person is behind bars. In reality, that person “go[es]

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72. See Hans Sherrer, *The Complicity of Judges in Wrongful Convictions*, PRISON LEGAL NEWS, Aug. 2004, at 1, 1 (noting that “judges are often thought of by lay people and portrayed by the news and other broadcast media, as impartial, apolitical men and women who possess great intelligence, wisdom, and compassion, and are concerned with ensuring that justice prevails in every case”).

73. *Justice for All: Convicting the Guilty and Exonerating the Innocent: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 1 (2012) [hereinafter *Justice for All Hearing*] (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary); see also Michael Hewlett & Arika Herron, *Federal Court Rejects Calvin Michael Smith's Appeal*, WINSTON-SALEM J. (July 29, 2013, 2:09 PM), [http://www.journalnow.com/news/local/federal-court-rejects-kalvin-michael-smith-s-appeal/article\\_065242e0-f87a-11e2-b981-0019bb30f31a.html](http://www.journalnow.com/news/local/federal-court-rejects-kalvin-michael-smith-s-appeal/article_065242e0-f87a-11e2-b981-0019bb30f31a.html) [<http://perma.cc/K42R-RZLT>] (“The Rev. Carlton Eversley of Dellabrook Presbyterian Church called Eagle’s ruling a ‘tragic injustice, another case of an innocent person being railroaded.’”).

74. See *Compensating the Wrongfully Convicted*, INNOCENCE PROJECT (June 4, 2015, 10:40 AM), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/compensating-the-wrongly-convicted> [<http://perma.cc/HAF4-W73Y>] (noting that even the wrongfully convicted who have DNA evidence available to exonerate them spend “on average, more than 14 years behind bars”); see also Carol J. Williams, *Relief Delayed for Prisoners Wrongfully Convicted*, L.A. TIMES (Aug. 21, 2011), <http://articles.latimes.com/print/2011/aug/21/local/la-me-judge-delays-20110822> [<http://perma.cc/7KUS-4KUF>] (reporting on a judge’s years-long delay to rule on meritorious habeas petitions and the tragic death of one of the prisoners waiting for relief).

75. JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW* 21 (7th ed. 2012).

unpunished, free to murder or rape or rob again.”<sup>76</sup> So not only are these values not being served with respect to the wrongfully convicted, they are also not being served with respect to the actually guilty.

In conclusion, the heightened complexity of federal habeas law requires expertise to resolve the tension between accuracy and efficiency; the competing visions of the writ lead to inconsistent legal principles and disuniformity, where certain judges and courts are more likely to grant relief than others; and the broadly harmful costs associated with wrongful convictions and failing to correct them in collateral proceedings require a special attention to accuracy. These factors justify specialized review of habeas petitions by a national court of appeals.

## II. A SPECIALIZED COURT

This Part proceeds by first offering some specifics on the form a specialized court for habeas corpus should take. It then discusses the benefits and drawbacks of a specialized court and concludes that, due to the political realities, it is ultimately unlikely that such a court would ever be created. Part III consequently offers an alternative mechanism for injecting specialization into federal habeas review.

### A. *What Should This Specialized Court Look Like?*

The specialized court should be a single, national Article III court of appeals that has complete jurisdiction over all federal habeas appeals, including capital and noncapital § 2254 and § 2255 petitions, to the exclusion of other intermediate courts of appeals. It should also be the only court that is capable of granting certificates of appealability to second or successive petitions.

This court should have jurisdiction beyond just noncapital § 2254 petitions for two reasons. First, the governing law is largely the same. Federal prisoners seeking habeas relief file a motion under 28 U.S.C. § 2255 while state prisoners seeking habeas relief in federal courts file a motion under § 2254.<sup>77</sup> In *Davis v. United States*,<sup>78</sup> the Supreme

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76. See Marcus, *supra* note 71 (pointing out that wrongful conviction investigations are “an attempt to serve law and order” upon those who have escaped punishment, rather than “an assault by soft-on-crime bleeding hearts”).

77. Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 95 (2012).

78. *Davis v. United States*, 417 U.S. 333 (1974).

Court stated that “§ 2255 was intended to mirror § 2254 in operative effect.”<sup>79</sup> As a result, most courts read the provisions together<sup>80</sup> and precedents under either “may generally be used interchangeably.”<sup>81</sup> Though capital cases do raise some additional issues, these are largely procedural and typically arise at the very beginning and at the very end of the case.<sup>82</sup> Consequently, they stand to benefit just as much from a specialized forum as noncapital cases do.

Second, in the twelve-month period ending on March 31, 2014, 5406 noncapital § 2254 habeas appeals arising from the federal district courts were commenced in the federal courts of appeals, accounting for 13.03 percent of all appeals.<sup>83</sup> Including capital § 2254 cases and capital and noncapital § 2255 cases, this percentage increases to 15.82 percent.<sup>84</sup> This relatively minimal increase of 2.79 percent in the specialized court’s caseload suggests that the benefits of including these cases within its jurisdiction<sup>85</sup> outweigh any potential costs.<sup>86</sup>

Additionally, only the specialized court should have authority to grant a certificate of appealability (COA) to second or successive petitions. This approach would reduce the likelihood of two problematic scenarios. The first is one in which a circuit court grants a COA to a petitioner for a reason that the specialized court later finds to be incorrect or insufficient under the law. In the second, a circuit court denies a COA when one should have been granted. In the former case, there is an unnecessary expenditure of judicial resources by both the circuit court that granted the COA and the district court that then heard and ruled on the second or successive petition. In the second case, the specialized court would be unable to hear the second

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79. *Id.* at 344.

80. Russell, *supra* note 77, at 96.

81. 3 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & CATHERINE T. STRUVE, FEDERAL PRACTICE AND PROCEDURE § 623 (4th ed. 1998).

82. *See generally* KRISTINE M. FOX, FED. JUDICIAL CTR., CAPITAL § 2254 HABEAS CASES: A POCKET GUIDE FOR JUDGES (2012), [http://www.fjc.gov/public/pdf.nsf/lookup/cap2254hab.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cap2254hab.pdf/$file/cap2254hab.pdf) [<http://perma.cc/8AVM-X6UK>] (providing an overview of the issues judges can expect to see in capital § 2254 cases).

83. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 2014—TABLE B-7 (2014), <http://www.uscourts.gov/file/9789/download> [<http://perma.cc/P3VV-QQ9J>] (reporting 5406 noncapital § 2254 cases). This number does not include second or successive petitions which are tracked as part of a separate miscellaneous category by the Administrative Office of the U.S. Courts.

84. *Id.* The individual numbers for these appeals are as follows: 982 noncapital § 2255; 7 capital § 2255; 172 capital § 2254. *Id.*

85. *See infra* Part II.B.

86. *See infra* Part II.C.

or successive petition because under § 2244(b)(3) the decision to grant or deny a COA to a second or successive petition by a circuit court cannot be appealed. Therefore, only the specialized court should have jurisdiction to decide whether a litigant can file a successive or second habeas petition.

*B. The Benefits of a Specialized Court*

The factors most strongly justifying specialized review correspond to its greatest benefits. Complexity requires expertise; that expertise yields accuracy as well as efficiency.<sup>87</sup> Increased accuracy means a lower likelihood of errors denying meritorious petitioners relief and the costs associated with such errors.<sup>88</sup> Establishing a specialized court to correct errors in the criminal justice system would also help restore some of the public's lost confidence by serving as a signal to the public that the criminal justice system, including federal courts, takes wrongful convictions seriously and wants to see these injustices corrected.<sup>89</sup>

This court would also reduce the caseloads of the other courts of appeals. Although the impact on each circuit will vary depending on what proportion of its docket consists of habeas appeals, the net benefit will be that judges—on both the specialized court and the other courts of appeals—will have more time to consider the cases on their dockets and produce higher quality opinions.<sup>90</sup>

Lastly, judges have expressed frustration with the frivolity of the majority of habeas petitions.<sup>91</sup> Although a single specialized court would not yield a higher concentration of successful petitions (ones in which the court of appeals granted or affirmed relief on the merits outright), it would present an increased number of successful petitions *before a single panel*, which could reduce some of this frustration.<sup>92</sup> A hypothetical helps illuminate the point: Assume there

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87. *See supra* Part I.A.

88. *See supra* Part I.C.

89. *See supra* notes 71–74 and accompanying text.

90. *See supra* note 40.

91. *See, e.g.*, FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 52 (1990) (noting the “oft raised contention that the federal courts are subjected to unnecessary and overwhelming numbers of successive habeas corpus petitions and evidentiary hearings in non-death penalty cases brought by state prisoners”); *infra* text accompanying note 155.

92. *Cf.* Blume et al., *supra* note 6, at 452 & nn.91–92 (examining the number of noncapital § 2254 cases in which the federal appellate courts granted or affirmed relief on the merits

are one thousand § 2254 petitions in a given year in the country spread evenly across the circuits. If only ten of them are successful, each circuit may see only one of these ten in that year. Moreover, a particular judge could go many years without presiding over a single successful petition. But if one specialized court reviewed all one thousand § 2254 cases, it would also see all ten successful petitions. And although the concentration of successful petitions overall (1 percent) would not change, the judges on the specialized court would be more likely to preside over at least one, and possibly more, successful petitions in a given year. Even if a judge on the specialized court did not preside over a successful case herself, she would be in greater proximity to all ten successful decisions than a judge on a regional circuit court. Closer proximity to successful petitions will reduce the frustrations engendered by frivolous appeals because the successful petitions will serve as a reminder of the great stakes and importance of the work—of courts, of justice—to the petitioner, his family, his community, and the public at large.<sup>93</sup>

### C. *The Drawbacks of a Specialized Court*

Although federal habeas law needs coherence, it is unlikely that a specialized court would make much headway in achieving this goal. In the first instance, just as with the current generalized circuit courts, the makeup of the judicial panels that preside over a particular case in the specialized court will have some impact on the outcome.<sup>94</sup>

A second drawback is that a single court may make it difficult and expensive for attorneys representing petitioners to investigate and litigate these claims. Attorneys who represent prisoners are typically local and either work on a pro bono basis or are court-appointed.<sup>95</sup> The circuit courts currently have various methods for appointing qualified attorneys who are familiar with federal habeas

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between July 1, 2005 to September 30, 2009 and the “substantial variation” in success rates among the circuits, from 1.66 percent in the Eleventh Circuit to 22.85 percent in the Sixth Circuit); *infra* Part III.C.4.

93. See John Rudolf, *LaMonte Armstrong's Long Road to Freedom After Wrongful Conviction*, HUFFINGTON POST (July 2, 2012, 6:57 PM), [http://www.huffingtonpost.com/2012/07/02/lamonte-armstrong-wrongfully-convicted\\_n\\_1644714.html](http://www.huffingtonpost.com/2012/07/02/lamonte-armstrong-wrongfully-convicted_n_1644714.html) [<http://perma.cc/7V2Y-68Z7>] (reporting the comment of the presiding judge that “freeing Armstrong was likely the ‘closest to knowing I’m doing justice, in my career, I will ever experience’”).

94. See *supra* Part I.B.

95. See FOX, *supra* note 82, at 3–5 (discussing the process for appointing an attorney to a pro se litigant and the various private and public groups that provide representation on a volunteer basis).

review, including having a selection committee, working with the local federal defender's office, or maintaining a list of qualified attorneys. A specialized court, located in one part of the country, will have limited information about the qualifications of attorneys outside its geographic location and, consequently, will have trouble developing a roster of attorneys around the country on whom it can call to provide prisoners with representation.<sup>96</sup> Alternatively, if the specialized court sources its attorneys from local groups well known to it, these groups will face considerable expense when they represent clients located in other states. These attorneys will have limited ability to investigate the claims because it would require long trips to find and interview witnesses, explore new investigative avenues, and collect evidence. This level of expense is unlikely to be sustainable for the majority of groups privately and publicly funded and could result in these groups taking on fewer clients. This scenario could even result in a backlog as the court waits for willing and qualified attorneys to become available.

Political imbalance provides a third objection—a single court could come to be dominated by judges who think alike on a particular area of law and who would transform the court into a tool for enacting radical change in the field.<sup>97</sup> Because of the likelihood that the judge who values fairness will grant relief in the same case in which a judge who values finality will deny relief,<sup>98</sup> appointing judges to the specialized court is likely to be difficult. Political actors who believe that the law should value finality will want to appoint like-minded judges; the same is true for those who value fairness. A long, drawn-out fight over nominations not only means that the court itself could become politicized, it also suggests that the long-term goal of bringing coherence to federal habeas law will be difficult, perhaps even impossible, to achieve.<sup>99</sup>

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96. *See id.* (noting the difficulty of finding qualified attorneys and describing the use of local groups to source the roster list).

97. *See* FED. COURTS STUDY COMM., *supra* note 91, at 11 (noting, with regard to specialized courts in general, “the danger of political imbalance (e.g., a criminal court dominated by one end or the other of the spectrum that runs from the extreme ‘law and order’ position to extreme solicitude for the rights of criminal defendants)”).

98. *See supra* Part I.B.

99. *See* RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 4–6 (2005) (arguing that “Supreme Court nominations have become public pitched battles involving partisans, ideological groups, single-issue groups, and the press” and now increasingly resemble presidential elections); *id.* at 4, 34–35 (noting the use of “litmus tests” by presidents and interests groups in identifying acceptable nominees and the criticism that such

A final drawback is the isolation of specialized courts from other areas of law. Generalist judges benefit from “the cross-fertilization of ideas,” which can occur when they “look[] at cases from one field and realize[] how an earlier decision in which [they] participated from a different field may suggest a creative answer to the problem.”<sup>100</sup> Accordingly, specialization carries the “danger of tunnel vision.”<sup>101</sup> This danger may be especially great in the habeas context: because the writ’s presence in American law dates back to the Founding,<sup>102</sup> many of the common-law doctrines applicable to it are also applicable to other areas of law and vice versa.<sup>103</sup>

#### D. Feasibility

The creation of this specialized court is, unfortunately, unlikely. Judges may not be willing to agree that a specialized court is needed to hear these cases<sup>104</sup> and Congress, in its current and seemingly permanent climate of partisan gridlock, is unlikely to come to agreement over what kind of review is warranted for habeas corpus litigation.<sup>105</sup> Even without these obstacles, the substantial potential for

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tests result in the corruption of the nominating process); cf. Eric Black Ink, *Something Changed: Picking a Supreme Court Justice Is Now a Partisan Battle*, MINNPOST (Nov. 26, 2012), <https://www.minnpost.com/eric-black-ink/2012/11/something-changed-picking-supreme-court-justice-now-partisan-battle> [http://perma.cc/9V6H-RJWS] (arguing that the public controversy after *Roe v. Wade* made abortion a focus of Supreme Court nominations but “[l]uckily for *Roe* supporters, the new partisan norms of appointments did not take full effect immediately after the ruling, or *Roe* would likely have been reversed by now”).

100. Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997).

101. FED. COURTS STUDY COMM., *supra* note 91, at 11.

102. See *supra* note 68 and accompanying text.

103. See, e.g., *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). There the Court held that § 2244(d) “is subject to equitable tolling,” *id.* at 2560, a conclusion partially based on a previous decision that a “nonjurisdictional federal statute of limitations is normally subject to a ‘rebuttable presumption’ in favor ‘of equitable tolling,’” *id.* at 2561 (quoting *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96 (1990)). The Court went on to say that “[i]n the case of AEDPA, the presumption’s strength is reinforced by the fact that ‘equitable principles’ have traditionally ‘governed’ the substantive law of habeas corpus, for we will ‘not construe a statute to displace courts’ traditional equitable authority absent the ‘clearest command.’” *Id.* (citations omitted).

104. For example, Judge Lynn Adelman notes, “But, in truth, while some federal courts are overburdened, most are not, and addressing habeas petitions is not particularly onerous.” Adelman, *supra* note 17, at 382.

105. Compare *Justice for All Hearing*, *supra* note 73, at 1–3 (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary) (“In the coming weeks, I expect the Judiciary Committee to take up the reauthorization of the Justice for All Act, which will include . . . new protections for victims of crime [and] funding for State and local governments for DNA

politicization of the court and the consequences of a political imbalance are enough to make this an unattractive option for those who favor an expanded writ and for those who favor a limited one.

Although the creation of a national court of appeals that hears only habeas petitions is unlikely, the benefits of specialized review can still be achieved, and without the above drawbacks, by employing expert staff attorneys to screen and evaluate habeas claims. This solution would ensure that judges are in the best position possible when adjudicating habeas claims. The next Part addresses this form of specialized review.

### III. SPECIALIZED STAFF REVIEW

For the last forty-odd years, federal appellate courts have employed staff attorneys to keep up with growing caseloads and to ensure the efficient allocation of scarce judicial resources. This Part argues that by modifying current practices regarding staff attorneys, courts can generate even more efficiency and accuracy in adjudicating habeas corpus claims. After explaining why specialized staff attorneys should be used to review habeas petitions, this Part details the appeals courts' current practices, the problems and inefficiencies created by these practices, and the modifications needed to refine the system to achieve the best results. This inquiry demonstrates that specialization of staff attorneys alleviates most of the concerns raised by scholars on the circuit courts' use of staff attorneys.

#### A. *Staff Attorneys and Habeas Corpus*

Staff attorneys are unlike judicial law clerks in that they serve the whole court and not an individual judge.<sup>106</sup> Federal appellate courts

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testing.”), *with id.* at 3–4 (statement of Sen. Chuck Grassley, Ranking Member, S. Comm. on the Judiciary) (“We do not have the resources at the federal level to provide funding to States to review every single criminal case after each case has exhausted all appellate remedies, nor should we interfere with the day-to-day intricacies of State criminal justice.”). Even the idea of the now-lauded Court of Appeals for the Federal Circuit was controversial and strongly objected to by judges and scholars. *See, e.g.,* Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425, 425 (1951) (arguing against specialized courts, in particular a specialized court for patent cases).

106. Timothy E. Gammon, *The Central Staff Attorneys' Office in the United States Court of Appeals, Eighth Circuit: A Five Year Report*, 29 S.D. L. REV. 457, 458 (1984). These clerks are also different from career chamber clerks, who serve individual judges in their chambers.

began hiring staff attorneys in the early 1970s.<sup>107</sup> Since then, their purpose has not changed: staff attorneys help judges manage their caseloads by screening cases for nonargument review<sup>108</sup> and preparing memorandums and draft dispositions for cases on the nonargument track. Because judges typically devote less time to cases on the nonargument track,<sup>109</sup> not all cases are suitable for nonargument review. As Marin Levy identified, there are two categories of cases best suited for nonargument review: The first includes cases that “raise issues that the court sees frequently,” as the court’s familiarity reduces the need for oral argument.<sup>110</sup> The second category is composed of cases “that are least likely to have errors upon arrival at the appellate courts,” either because they are “patently frivolous” or because they have already “undergone . . . a meaningful layer of review.”<sup>111</sup> When reviewed by non-expert staff attorneys, habeas cases do not fully belong to either of these categories.

1. *Frequently Arising Issues.* Review of habeas petitions typically follows a pattern of inquiry. Before reaching the merits of a case, the federal court must be sure that the petition has been properly presented.<sup>112</sup> This entails deciding the following procedural questions for § 2254 petitions: (1) whether the petitioner is still in state custody; (2) whether the petition is timely; (3) whether the petition is successive; and (4) whether the petitioner exhausted all available state remedies for all claims raised.<sup>113</sup> If the court reaches the merits of the case, it must determine whether the state court decided the claim

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107. *Id.*; see *Jones v. Superintendent*, Va. State Farm, 465 F.2d 1091, 1095 (4th Cir. 1972) (“Two very able young lawyers with prior concentrated academic or practical experience in this field serve as our habeas clerks and as advocates for the appellants.”).

108. Briefly, cases sorted for nonargument review are decided without oral arguments, typically on the basis of briefs alone, though they may receive some additional treatment depending on the circuit. See generally LAURAL HOOPER, DEAN MILETICH & ANGELIA LEVY, FED. JUDICIAL CTR., CASE MANAGEMENT PROCEDURES IN THE FEDERAL COURTS OF APPEALS (2011); RICHMAN & REYNOLDS, *supra* note 7.

109. See Levy, *Judicial Attention*, *supra* note 7, at 416 (“[C]ases that receive less judicial attention at the outset tend to receive less judicial attention throughout the entire decisionmaking process.”).

110. *Id.* at 431–33.

111. *Id.*

112. At the screening stage, this would include an assessment of jurisdictional defects. HOOPER ET AL., *supra* note 108, at 18.

113. FOX, *supra* note 82, at 6–10. Though Fox’s guide is tailored to the adjudication of capital habeas cases, “the provisions of 28 U.S.C. § 2254 apply equally to capital and non-capital habeas cases.” *Id.* at 1. The same is true of § 2244(b) (successive petitions) and § 2244(d) (timeliness). See *supra* notes 77–81 and accompanying text.

on the merits. If so, to find that the petitioner should be granted relief the court must decide either that (a) the petitioner overcame § 2254(d)(1) by demonstrating that the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (b) the petitioner overcame § 2254(d)(2) by demonstrating that the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."<sup>114</sup> If the state court did not decide the claim on the merits, then § 2254(d)(1)–(2) are inapplicable and the federal court conducts de novo review.

At first glance, that the same questions must be answered in a particular order for each petition suggests that habeas petitions may indeed belong to this first category of cases, in which the same issues arise again and again. Answering any one of these questions in practice, however, is a laborious process. Each one raises sub-issues and requires knowledge and application of different sources of law and a thorough review of the factual record to resolve them fully.<sup>115</sup> Moreover, pro se petitions, which comprise more than 90 percent of all noncapital habeas petitions,<sup>116</sup> present additional challenges. Most are handwritten, prepared without legal assistance, and only partially complete, requiring staff attorneys to first determine whether such petitions actually even constitute an appeal.<sup>117</sup> The heightened factual and legal complexity coupled with the challenges related to pro se appeals means that habeas petitions require a more individualized inquiry and do not neatly fit into this category.

2. *Low Likelihood of Having Errors Upon Arrival at the Appellate Courts.* Habeas appeals also have characteristics that place them within the second category of cases, in which the likelihood of error upon arrival at the appellate courts is low. Identifying the "patently frivolous"<sup>118</sup> appeals, such as those "brought by individuals

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114. FOX, *supra* note 82, at 12–14.

115. See *supra* Part I.A; see also, e.g., FOX, *supra* note 82, at 9–10 (noting that determining whether a petitioner has exhausted all state remedies requires "an examination of state post-conviction law").

116. Joseph L. Hoffman & Nancy J. King, Opinion, *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, at WK8.

117. FED. JUDICIAL CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 115–16 (Sylvan A. Sobel ed., 2d ed. 2007).

118. Levy, *Judicial Attention*, *supra* note 7, at 432.

who vent their frustrations in the words of a filed complaint”<sup>119</sup> and those that clearly lack merit,<sup>120</sup> is unlikely to be difficult or prone to error, especially with the meaningful layer of review provided by the district court.<sup>121</sup>

Meritorious cases, however, present another story. John Blume, Sheri Lynn Johnson, and Keir Weyble reported two significant findings from their “ongoing monitoring of court of appeals dispositions” in habeas cases: (1) out of 126 cases in which the district court granted relief on the merits and which the State appealed, “60 were affirmed and 66 were reversed” by the courts of appeals, a reversal rate of 52.38 percent; (2) “of the 791 district court denials of relief, 697 were affirmed and 94 were reversed,” a reversal rate of 13.49 percent.<sup>122</sup> The high reversal rates suggest that, despite the meaningful layer of review provided by the district courts, some habeas petitions still contain errors upon arrival at the appellate courts. Nonargument review may be inappropriate then because non-expert staff attorneys may not be able to identify quickly and accurately the material errors, incorrect applications of law, or novel issues requiring judicial attention.<sup>123</sup> Additionally, any memos or draft dispositions provided to judges for the purposes of deciding these cases would be inadequate at best and incorrect at worst.

3. *Does Review by Specialized Staff Attorneys Change This Analysis?* If specialized staff attorneys with expert knowledge in federal habeas law are charged with review of habeas petitions, the nonargument track becomes more suitable.

Expert knowledge of federal habeas increases both accuracy and efficiency. One can gain expert status by earning technical degrees or

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119. Holderman & Guren, *supra* note 38, at 4; *see, e.g.*, *Sumbry v. Davis*, 179 F. App’x 519, 520–21 (10th Cir. 2006) (deciding that an Indiana prisoner’s appeal lacked merit and noting it was the “third meritless attempt” to file by a “promiscuous as well as a frivolous filer,” who files petitions and appeals all over the country). The Administrative Office of the U.S. Courts reported that a single inmate in an Arizona state prison “filed more than 5,400 petitions in both the District of Arizona and the Middle District of Tennessee” in the year ending March 31, 2014. *Federal Judicial Caseload Statistics 2014*, *supra* note 16.

120. *Sumbry*, 179 F. App’x at 521.

121. *See Levy, Judicial Attention*, *supra* note 7, at 432 (noting that “patently frivolous” appeals “present issues that are, on their face, so absurd that it is extremely unlikely that a district court would err in resolving them in the first instance, particularly compared to the chance of error that exists in nonfrivolous cases”).

122. Blume et al., *supra* note 6, at 452 & n.91. This is a narrow subset of all the cases reviewed by the authors.

123. For a review of the efficiency and accuracy benefits of expertise, *see supra* Part I.A.2.

credentials or by possessing significant legal experience in the particular field.<sup>124</sup> With regard to habeas corpus, there is no LL.M.<sup>125</sup> or special bar exam<sup>126</sup> that can indicate expert knowledge. Thus experience, gained through constant and prolonged exposure, is not simply the best way but also the only way to gain status as an expert on habeas corpus.

Non-expert staff attorneys are generalists, just like the judges they serve.<sup>127</sup> When faced with a new case, both must re-familiarize themselves with the area of law and the particular issues raised by the case.<sup>128</sup> Constant and prolonged exposure, however, ensures a certain level of immersion that does not require renewing familiarity. New knowledge builds on older knowledge, and frequent engagement without interruption minimizes the opportunities to forget.<sup>129</sup> Immersion also helps with the added challenges of pro se filings. For example, a staff attorney can learn the most common defects and advise these petitioners on how to correct their filings.<sup>130</sup>

Expert review also ensures that material errors and novel issues are caught early in the screening process and that the cases are set on the appropriate track.<sup>131</sup> It also allows judges to rely on the knowledge of specialized staff attorneys and gives them confidence that the staff attorneys' briefings and draft opinions offer correct, fully developed

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124. See George C. Beighley Jr., *The Court of Appeals for the Federal Circuit: Has It Fulfilled Congressional Expectations?*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 671, 676 (2011) (listing the problems in patent law necessitating the creation of the Federal Circuit).

125. For example, one can get an LL.M. in tax law. *Taxation LL.M.*, GEORGETOWN LAW, <http://www.law.georgetown.edu/academics/academic-programs/graduate-programs/degree-programs/taxation/> [<http://perma.cc/8KN3-UF2C>].

126. For example, prior to practicing before the U.S. Patent and Trade Office, individuals must pass a Registration Examination. See *Becoming a Practitioner*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/ip/boards/oed/prct-new/index.jsp> [<http://perma.cc/6AV5-HDSX>].

127. See Levy, *Judicial Attention*, *supra* note 7, at 437 (noting that “while pro se prisoner cases may raise some repeating claims—often about the conditions of imprisonment—the more general category of pro se appeals includes claims from all areas of law”).

128. See Holderman & Guren, *supra* note 38, at 4 (reflecting on the diversity of the federal docket and noting the “challenge of learning or renewing [his] acquaintance with each specific area of the law in which [he] must become adept to resolve each case”). The adage “use it or lose it” is also applicable.

129. See *supra* Part I.A.

130. See HOOPER ET AL., *supra* note 108, at 70, 96, 108 (describing the different practices of the First, Third, and Fourth Circuits in giving “direction” to pro se litigants, including phone conversations, in-person meetings, and permitting informal briefing).

131. Levy, *Judging Justice*, *supra* note 7, at 2410–11 & n.127.

analyses.<sup>132</sup> Because the very purpose of staff attorneys is to ease the judges' workload, it is important that judges not feel the need to redo a staff attorney's work in every instance. Whereas frequent mistakes by non-expert staff attorneys will significantly disrupt this relationship, the rare mistake by the expert staff attorney is unlikely to do so.

Although screening and developing of habeas cases for nonargument adjudication is fraught with problems when performed by non-expert staff attorneys, such practices can materially benefit judges when performed by expert staff attorneys well versed in federal habeas law.

### B. *The Current System*

Screening mechanisms developed by the circuit courts vary, but no court currently has formal positions for staff attorneys specializing in federal habeas review of noncapital state-court convictions.<sup>133</sup> Although all circuits screen pro se cases for nonargument review as an initial matter,<sup>134</sup> with the exception of the Tenth<sup>135</sup> and Second

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132. See Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 331–32, 353 (2011) (describing how in the Fourth Circuit, where there is some de facto specialization of staff attorneys, “judges may also decide to request that the case be written up more fully with a memorandum, or even calendared, though the latter is rarely done”).

133. See generally HOOPER ET AL., *supra* note 108 (describing the different case-management practices at the circuit courts, including the specialized positions that currently exist in the staff attorney offices). Specifically, the First Circuit has no formal designations, but its line staff attorneys “may develop informal temporary specialties in new or discrete areas.” *Id.* at 62. The Fifth Circuit has two assistant case managers who handle all litigation involving nondirect, pro se appeals from prisoners and one “generalist/capital case manager” who, in part, “handles all aspects of death penalty litigation.” *Id.* at 110. The Sixth Circuit has a death penalty unit and takes advantage of expertise acquired by staff attorneys in particular areas by assigning cases “according to their expertise.” *Id.* at 121. The Ninth Circuit has a “pro se unit.” *Id.* at 181. The Tenth Circuit has attorneys that “specialize in screening cases for jurisdictional defects.” *Id.* at 189. The Eleventh Circuit has three specialized units organized not by subject matter but by task: “The Jurisdiction Unit assists the court in the initial review of all appeals filed for the purpose of determining appellate jurisdiction. The Issue Tracking Unit tracks and catalogs relevant legal issues. The Motions Unit processes certain substantive motions.” *Id.* at 203.

The use of specialized death penalty attorneys or units is notable because it suggests that federal appellate courts already recognize the benefits of specialization in this area of law. Considering also the overlap between capital and noncapital habeas corpus, see *supra* notes 77–82 and accompanying text, creating positions for staff attorneys who specialize in noncapital habeas corpus is highly feasible. Some courts may not even require new hiring, but only reorganizing of current staff.

134. *Id.* at 51, 64, 89, 101, 111, 122, 137, 152, 181, 204–05 (describing the screening of pro se cases by the circuit courts).

Circuits,<sup>136</sup> pro se appeals cover a wide spectrum of law<sup>137</sup> and provide little chance for specialization in habeas review.<sup>138</sup> Each circuit should create, at minimum, one formal position for an expert staff attorney who specializes in habeas corpus. Courts with smaller caseloads could use this staff attorney's expertise in both capital and noncapital habeas cases.<sup>139</sup> If the court's workload is large enough to justify both a noncapital and capital habeas attorney, it should have both.

Federal appellate courts also currently employ supervisory staff attorneys as career attorneys whereas "line staff attorneys" typically serve two- to three-year terms.<sup>140</sup> When staff attorneys opt to stay longer, some circuits expressly limit the number of years they can serve.<sup>141</sup> The problem with short-term employment is that the first year is spent scaling the learning curve so that courts end up serving as mere training grounds for these attorneys.<sup>142</sup> This means that courts reap for only a little while the benefits from the training provided to these attorneys and the expertise gained from their experience. The specialized staff attorney position, therefore, should be a career position as that will ensure that courts retain the benefits of experience and expertise gained over time.

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135. The Tenth Circuit's judges form screening panels and most pro se cases are decided by those panels or routed for argument or nonargument review. *Id.* at 198.

136. The Second Circuit only screens pro se prisoner appeals for nonargument. If the pro se appeal survives initial review, it is placed on the argument panel's calendar unless the litigant is incarcerated. *Id.* at 75.

137. *See supra* note 127.

138. Although the majority of pro se appeals are prisoners' petitions, HOOPER ET AL., *supra* note 108, at 38, this is a very broad category covering capital and noncapital habeas corpus, motions to vacate sentences, civil rights and prison condition claims, and others. *See supra* note 83 (breaking down the composition of "prisoner petitions" arising from federal district courts).

139. *See supra* notes 77–81 and accompanying text.

140. *See* HOOPER ET AL., *supra* note 108, at 12. The Fifth and Tenth Circuits have changed this practice recently to permit career positions to be offered to "specific" line staff attorneys. *Id.*

141. *Id.* at 12 n.9 ("For example . . . the Ninth Circuit has a five-year limit.").

142. *See* Elizabeth Olson, *Corporations Drive Drop in Law Firms' Use of Starting Lawyers, Study Finds*, N.Y. TIMES: DEALBOOK (Oct. 10, 2014, 12:25 PM), <http://dealbook.nytimes.com/2014/10/10/corporations-drive-drop-in-law-firms-use-of-starting-lawyers-study-finds> [<http://perma.cc/KX22-BKM7>] (reporting that corporations are foregoing the services of entry-level lawyers who cost less but bill more time than senior-level associates with greater experience).

C. *Concerns About the Use of Staff Attorneys*

Scholars have heavily criticized the use of staff attorneys and other case-management practices.<sup>143</sup> The criticisms surrounding staff attorneys are that they (1) lack the requisite experience to do the job,<sup>144</sup> (2) are unlikely to possess the “paradigmatically elite academic qualifications” of chamber clerks,<sup>145</sup> (3) are “dissatisfied with the tasks assigned them,”<sup>146</sup> and (4) “share the court’s frustration and distaste for” the “unmeritorious appeals” of “indigent prisoners.”<sup>147</sup> These arguments lack force, however, when the staff attorney position is a career post for a staff attorney with an expertise in habeas corpus.

1. *Inexperience.* When term-limited line staff attorneys are responsible for reviewing all noncapital habeas corpus claims, their inexperience and lack of expertise risks generating inefficiency and error.<sup>148</sup> The constant turnover ensures that the position is more often inhabited by someone with inexperience rather than experience. By changing just one of these term-limited positions into a permanent post, courts and litigants alike can benefit from the expertise staff attorneys will gain through immersion in habeas corpus.

2. *Elite Qualifications and Job Satisfaction.* Many jobs are capable of fulfilling basic needs, such as offering job stability and guaranteeing a safe work environment and fair work practices. But few are capable of fulfilling higher-order needs, such as offering prestigious job assignments, job titles that reflect status and expertise, and challenging work.<sup>149</sup> Better-qualified candidates will have their

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143. See Levy, *Judicial Attention*, *supra* note 7, at 420 (providing an overview of the scholarly response to case-management practices).

144. See Pether, *supra* note 7, at 1492.

145. Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1, 27 (2007). Chamber clerks are hired by judges individually to assist only them and typically for a one- to two-year period.

146. See Pether, *supra* note 7, at 1492.

147. *Id.* at 1462. A final criticism of the practice arises from the concern that judges will come to rely too heavily on staff attorneys and fail to check for errors in staff attorney work product. *Id.* at 1492. Even should this happen, the likelihood of errors in work product prepared by expert staff attorneys can be assumed to be lower than the likelihood of errors in work product prepared by non-expert staff attorneys. See *supra* Part III.A.3.

148. See *supra* Parts III.A.1–2.

149. See Robert Tanner, *Motivation—Applying Maslow’s Hierarchy of Needs Theory*, MANAGEMENT IS A JOURNEY, <https://managementisajourney.com/motivation-applying-maslows-hierarchy-of-needs-theory> [<http://perma.cc/R3H9-MCYK>] (discussing psychologist

pick of jobs that satisfy basic needs and, consequently, will be attracted to jobs that can satisfy their higher-order needs as well.<sup>150</sup> Although it is unlikely that a career position with a court will draw the elite young lawyers who serve judges in their chambers, a specialized and permanent position offers job security, as well as the prestige associated with identification as an “expert” in a particular area of law. Thus, it is more likely to draw better-qualified candidates than a term-limited line staff attorney position.

Moreover, term-limited line staff attorneys perform the most frustrating tasks like searching for jurisdictional defects and drafting summary dispositions for patently frivolous appeals.<sup>151</sup> Specialized staff attorneys, on the other hand, would handle more complex appeals as they will be able to efficiently and accurately identify material errors or novel issues and prepare memos or draft dispositions for cases in which familiar, but difficult, issues arise.<sup>152</sup> As specialized staff attorneys gain in experience, they will be charged with greater responsibilities which will increase their job satisfaction.<sup>153</sup>

3. *Frustration and Distaste for Unmeritorious Appeals.* Judges are concerned about the significant consumption of scarce judicial resources that attends adjudication of frivolous appeals.<sup>154</sup> Justice Jackson best explained this frustration: “It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.”<sup>155</sup> Although this comment could be applied generally, Justice Jackson was referring to habeas petitions specifically. Considering the low rate at

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Abraham Maslow’s theory that humans are driven to satisfy five basic needs and applying the theory to the employment context).

150. *See id.* (arguing that “[w]ith [basic] needs satisfied, an employee will want his higher level needs of esteem and self-actualization met”).

151. *See Pether, supra* note 7, at 1492.

152. *See* HOOPER ET AL., *supra* note 108, at 62 (describing the First Circuit’s practice of assigning “difficult circumstances and emergencies” to the “most experienced [staff] attorneys”); *supra* Part III.A.3.

153. *See* N.K. JAIN, 2 ORGANISATIONAL BEHAVIOUR 565 (2005) (listing “mentally challenging work” as one of the “more important factors conducive [sic] to job satisfaction”).

154. *See* Levy, *Judicial Attention, supra* note 7, at 438 (“Given the courts’ perception of pro se appeals, the nonargument treatment of these cases can be understood as part of a larger attempt to allocate less judicial attention to classes of cases that are thought to have a higher percentage of frivolous claims.”).

155. *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

which federal courts grant habeas relief today,<sup>156</sup> it is no surprise that this frustration continues. The judges' delegation of this work to staff attorneys raises the concern that staff attorneys will only come to share in this frustration.<sup>157</sup>

The rising rate of exonerations suggests that this may be fast becoming an outdated concern, if it is not one already. In particular, a fundamental shift has occurred since 1953 when Justice Jackson voiced his concern: it is no longer a question of *if* there is a needle, but *how many*. Since the first use of DNA to exonerate an innocent in 1989<sup>158</sup> and the founding of the Innocence Project in 1992 by Barry Scheck and Peter Neufeld,<sup>159</sup> it has become imprinted in the public consciousness that the criminal justice system does not always work, that it in fact fails some people spectacularly.<sup>160</sup>

Demonstrating this shift is the increase in the number of public and private organizations committed to uncovering wrongful convictions. These include wrongful conviction clinics working out of law schools, local branches of the Innocence Project, state commissions and agencies, such as the Florida Innocence Commission and the North Carolina Innocence Inquiry Commission, and a host of media allies.<sup>161</sup> As more organizations litigate or expose claims of

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156. Looking at a sample size of over 2000 cases, a study found that only 0.8 percent of noncapital habeas corpus claims are granted after appellate review. Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 310 (2012).

157. See Pether, *supra* note 7, at 1462 (articulating this concern).

158. *Fact Sheets – DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) [<http://perma.cc/KX22-BKM7>].

159. *About the Innocence Project*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about> [<http://perma.cc/J2DW-GSPE>].

160. Adam Serwer, *Americans Think the Criminal Justice System is Racist*, BUZZFEED NEWS (Sept. 23, 2014, 12:34 PM), <http://www.buzzfeed.com/adamserwer/blacks-whites-criminal-justice-survey#.hg7Q1j5Kgr> [<http://perma.cc/5PJ2-NF8P>]; *Browse Cases – Detailed View*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [<http://perma.cc/NZ77-JXTZ>].

161. See *Innocence Network Member Organizations*, INNOCENCE NETWORK, <http://innocencenetwork.org/members> [<https://perma.cc/DM43-GZVN>] (listing members in all fifty states, including law-school clinics); *Criminal Justice Reform Commissions: Case Studies*, INNOCENCE PROJECT (Mar. 1, 2007, 12:00 AM), <http://www.innocenceproject.org/news-events-exonerations/criminal-justice-reform-commissions-case-studies> [<https://perma.cc/4QQ8-L25M>] (listing various commissions and agencies set up by state legislatures and courts to inquire or act on wrongful convictions). Consider also the ten years spent by the documentarians of *Making a Murderer* to report on Steven Avery's case, *Over 10 Years, 2 Filmmakers Documented the 'Making' of a Murderer*, NPR (Jan. 12, 2016, 2:54 PM), <http://www.npr.org/2016/01/05/461908092/over-10-years-two-filmmakers-documented-the-making-a-murderer> [<https://perma.cc/461908092/over-10-years-two-filmmakers-documented-the-making-a-murderer>].

innocence, and on a wider basis than just DNA-based exonerations, it is likely that courts and staff attorneys will also start to see a corresponding uptick in meritorious claims.

One new addition to this list of organizations underscores the fundamental pivot that Americans have made in their conceptions about wrongful convictions: the establishment of Conviction Integrity Units (CIUs) in district attorneys' offices. Prosecutors and law enforcement have long maintained an attitude of outright denial or refusal to even consider innocence.<sup>162</sup> But in 2006, the District Attorney for Dallas County, Craig Watkins, set up the nation's first Conviction Integrity Unit.<sup>163</sup> Its purpose? Review past convictions and identify wrongful convictions of the actually innocent.<sup>164</sup> In its first four years, the Unit reviewed 300 cases "and led to the exoneration of 25 wrongfully convicted prisoners."<sup>165</sup> During the past few years, more prosecutors' offices around the country have established these units,<sup>166</sup> and they are looking for more than just DNA-based exonerations.<sup>167</sup> These units demonstrate a marked change in how prosecutors perceive wrongful convictions, not only accepting that miscarriages of justice may have occurred, but actively seeking them out to correct them.

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cc/QX8W-2CAM], or the year spent by the producers of the podcast *Serial* to investigate Adnan Syed's case, *Serial: Ep. 01 – The Alibi* (Oct. 3, 2014), <https://serialpodcast.org/season-one> [<https://perma.cc/8CNC-D67V>].

162. See Sue Russell, *Why Can't Law Enforcement Admit Their Mistakes?*, SALON (Oct. 21, 2012, 10:00 AM), [http://www.salon.com/2012/10/21/why\\_cant\\_law\\_enforcement\\_admit\\_their\\_mistakes](http://www.salon.com/2012/10/21/why_cant_law_enforcement_admit_their_mistakes) [<http://perma.cc/FHQ8-5E7A>] (describing prosecutors' and law enforcement officials' refusal to let go of "their long-held certainty about a suspect's guilt" even when presented with significant evidence to the contrary).

163. *Justice for All Hearing*, *supra* note 73, at 4.

164. *Id.* 'Actually innocent' cases are a subset of wrongful convictions in which evidence conclusively establishes that the convicted person did not commit the crime. They do not include, for example, cases where the evidence was ultimately found to be insufficient to support a conviction, but neither did it prove innocence. See *infra* note 167.

165. *Id.*

166. CTR. FOR PROSECUTOR INTEGRITY, CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM 2–5 (2014) (discussing the sixteen CIUs currently established in district attorneys' offices around the country).

167. See Matthew McKnight, *No Justice, No Peace*, NEW YORKER (Jan. 6, 2015), <http://www.newyorker.com/news/news-desk/kenneth-thompson-conviction-review-unit-brooklyn> [<http://perma.cc/45VS-KR3L>] ("They're not simply looking at wrongful convictions in cases in which a person can prove his or her innocence. They're also looking at cases where they may be innocent—we don't know—but, definitely, the conviction has no integrity," Peter Neufeld, the cofounder of the Innocence Project, told me.)

But even a single exoneration is enough for some to know that the work is worthwhile. In 2012, North Carolina Superior Court Judge Joe Turner oversaw the release of LaMonte Armstrong, who had spent nearly seventeen years in jail for a murder he did not commit. At the hearing, Judge Turner said that freeing Armstrong was the “closest to knowing I’m doing justice, in my career, I will ever experience.”<sup>168</sup>

### CONCLUSION

Habeas petitioners and federal courts of appeals both stand to gain significant benefits from the specialized review of habeas claims. These benefits include accuracy, efficiency, correcting injustice and restoring liberty, and renewing public confidence in the criminal justice system. The creation of a specialized court of appeals would require congressional leadership and approval, which is unlikely in light of the competing visions for the scope of federal habeas review. Review by specialized staff attorneys, however, is an option that courts can implement today with little additional cost. Not only would such review increase the efficiency of the courts’ handling of noncapital § 2254 claims, it would also promote accuracy in identification of novel issues and material errors. Moreover, specialization among staff attorneys minimizes or eliminates many of the criticisms lobbed at appellate courts’ use of them.

The minimal changes recommended in this Note—establishing at least one formal post for a staff attorney who will be responsible for primarily reviewing noncapital § 2254 claims, and turning it into a career position as opposed to a two- to three-year term-limited position—could have a strong positive impact on the likelihood that wrongfully convicted prisoners will see justice. At any rate, these changes will ensure that courts give habeas petitions the due care and attention they require.

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168. *See supra* note 93.