

NOTE

COUNTERFACTUAL CONTRADICTIONS: INTERPRETIVE ERROR IN THE ANALYSIS OF AEDPA

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Courts routinely engage in counterfactual analysis—considering what might have been, had things been different—in a variety of legal contexts (such as determining causation for tort claims and establishing damages). But in the last two Terms, the Supreme Court has issued several opinions restricting the use of counterfactual reasoning in the context of federal habeas corpus review of state criminal convictions (under § 2254(d) of the Antiterrorism and Effective Death Penalty Act, or AEDPA). Specifically, the Court has refused to consider what state courts might have done if presented with a slightly different set of facts or law. This practice leaves a group of petitioners without redress for acknowledged constitutional violations.

*This Note presents a novel framework for categorizing the modes of counterfactual reasoning in which courts engage. It then analyzes the Court’s decision in *Cullen v. Pinholster* and related opinions, examining them for possible explanations for the Court’s departure in habeas cases from its usual practice of accepting the need for counterfactuals. It concludes that the Court has given no clear reason why it should depart from the usual background principle that counterfactual reasoning is a valid method of analysis. Finally, it proposes a more coherent scheme for addressing counterfactuals in habeas proceedings.*

INTRODUCTION.....	204
I. VARIETIES OF COUNTERFACTUAL SPECULATION	207
A. <i>Hard and Soft Counterfactuals</i>	208
B. <i>Counterfactuals in the Law</i>	210
1. <i>Counterfactual speculation in criminal appeals: harmless error</i>	212
2. <i>Counterfactual speculation on habeas</i>	215

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3. <i>Refusal to speculate</i>	217
II. COUNTERFACTUAL SPECULATION UNDER AEDPA.....	218
A. <i>Early Applications</i>	219
B. <i>A Change in Direction: Cullen v. Pinholster</i>	222
1. <i>Textual arguments</i>	223
2. <i>Arguments from precedent</i>	225
3. <i>Appeal to background principles</i>	227
C. <i>The Change Takes Hold: Greene v. Fisher</i>	228
III. CAN THE DEPARTURE BE JUSTIFIED?	230
A. <i>Hard/Soft?</i>	231
B. <i>Inherent in the Situation?</i>	234
IV. A MORE COHERENT APPROACH.....	236
CONCLUSION.....	238

INTRODUCTION

Imagine you are buying a home. The seller provides you with a certificate stating that the property has been inspected for termites and that none were found. You move in. Two weeks later, you discover that the place is crawling with termites, requiring expensive repairs and substantially reducing the value of the house. (The certificate, it turns out, was a fake.) If you had known about the termites at the time of the purchase, you certainly would not have purchased this house. Although a court might award you the costs of extermination and possibly even the difference between the value without the termites and the value with, what you most want is to undo the transaction. After all, no rational person would have made the deal knowing what you know now. Courts sometimes grant this remedy, undoing a contract where there has been, for example, fraud or duress.¹ And what if the sale could not be reversed? You might wish the court would just give you a new house, with all the features you wanted—and without the termites. After all, if there exists a comparable and termite-free house, you almost surely would have bought it to begin with if you'd known what you know now. All of these possible remedies involve counterfactual speculation; to compensate you, either with damages, by undoing the contract, or by giving you the new house, the court will have to assess what *would have been*, absent the defendant's wrongdoing.

The analysis supporting this type of remedy—assuming that a decisionmaker would have made the rational choice had he had all the relevant information at the time—is precisely what the Supreme Court has just interpreted the federal habeas corpus statute to forbid. Though real estate contracts are a far cry from habeas corpus, the bedrock principle is the same: a need for considering what would have happened if things had gone a little differently.

1. See, e.g., *Cherry v. Crispin*, 190 N.E.2d 93, 95 (Mass. 1963) (affirming order rescinding a house sale contract due to the seller's fraudulent representation regarding lack of termite damage).

Specifically, the Supreme Court has recently held that in federal court review of state court convictions under 28 U.S.C. § 2254, the state court decision to uphold a conviction must be judged as of the time the decision was made, regardless of what information becomes available thereafter. In *Cullen v. Pinholster*,² the Court grappled with the situation in which new evidence was brought forth in a federal hearing properly held after the state court issued its decision. How was the federal court to evaluate the state court's decision when the state court hadn't heard all the evidence? It could not be done, the Court concluded, because "[i]t would be strange to ask federal courts to analyze whether a state court's adjudication . . . unreasonably applied federal law to facts not before the state court."³ Last Term, the Court addressed a similar question concerning a change in the law between the state court's and federal court's review of the case, and similarly concluded that the change was irrelevant in considering the state court's resolution of a case, regardless of the fact that standard retroactivity principles would make that new law part of the body of law applicable to that petitioner.⁴ In other words, subsequently obtained information, no matter how compelling or legally relevant, cannot be brought to bear in evaluating the state court's decision. The defendant is stuck with the state court's decision, even if it was made based on what the reviewing court now knows to be an incomplete or erroneous understanding of the facts or law. The federal court must refuse to consider what the state court would have done had it been fully informed.

In several recent cases, this refusal has left a defendant without recourse for what the Court acknowledges is a violation of his rights. For example, in *Greene v. Fisher*, nobody disputed that a codefendant's testimony at trial violated the defendant's rights under the Confrontation Clause as interpreted by *Gray v. Maryland*, nor that *Gray* should apply to his case under the retroactivity rule of *Teague v. Lane*.⁵ But due to a quirk in timing, the state court never applied *Gray*. Because a remedy would require counterfactual speculation about what a state court would have done if it had applied *Gray*, the federal court could not correct the problem,⁶ even though any court faced with the facts of the case would almost certainly have granted relief. The defendant is thus still in prison, even though his trial violated his rights under the Confrontation Clause.

This now-forbidden analysis is a type of counterfactual speculation. That is, it would ask the court to consider what *would have* happened in some alternate situation, but did not actually happen. Though it is, of course, impossible

2. 131 S. Ct. 1388 (2011).

3. *Id.* at 1399.

4. *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011).

5. *Id.* at 43-44 (citing *Gray v. Maryland*, 523 U.S. 185, 192-97 (1998); *Teague v. Lane*, 489 U.S. 288, 304-05 (1989)).

6. *Id.* at 44.

to be certain of what would have happened had things been different,⁷ courts are constantly considering this question in a wide range of legal and factual contexts, including inquiries into causation, damages, harmless error, severability of statutes, Seventh Amendment jury trial inquiries, and rational basis review, to name a few. Much of our legal system depends on counterfactual reasoning, and though some courts and scholars have expressed discomfort with the idea,⁸ it does not appear to be going anywhere any time soon. The legal scholarship concerning counterfactual reasoning has thus far been concentrated in tort law and, to a lesser extent, civil remedies.⁹

This Note analyzes and evaluates the Court's treatment of counterfactual reasoning in interpreting the federal habeas corpus statute. The standard analytical approaches to federal habeas review of state convictions have focused on the constitutional or federalism concerns associated with federal habeas review;¹⁰ no one has analyzed the role of counterfactual speculation as an important principle in appellate review of criminal convictions or in habeas corpus. This Note provides the first formal framework for characterizing counterfactual inquiries and then applies it to expose the inconsistency in the Court's treatment of those inquiries in the habeas context.

No discussion of federal habeas corpus law can proceed without discussion of the major shift in 1996 when Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA).¹¹ AEDPA is a complex, poorly drafted statute that is impossible to interpret logically and consistently.¹² Its text, read as a

7. See Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 7-14 (1992).

8. See, e.g., John Leubsdorf, *Remedies for Uncertainty*, 61 B.U.L. REV. 132 (1981).

9. See, e.g., Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harmful*, 4 SOC. PHIL. & POL'Y 145 (1986); Leubsdorf, *supra* note 8; Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283 (2003); Waldron, *supra* note 7.

10. See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (discussing the role of adequate state process in federal habeas review, pre-AEDPA); John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259 (2006) (evaluating AEDPA); Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507 (1993) (discussing justifications for relitigation of federal claims in state criminal proceedings, pre-AEDPA); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (considering the interplay between judge-made law and subsequently enacted statutes); see also Evan Caminker, *Allocating the Judicial Power in a "Unified Judiciary"*, 78 TEX. L. REV. 1513 (2000) (considering the constitutional place of statutes like AEDPA that purport to limit the judicial power).

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

12. See, e.g., LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS 57 (2003) ("AEDPA is notorious for its poor drafting. The Act is replete with vague and ambiguous language, apparent inconsistency, and plain bad grammar."); see also Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 492 (2007) ("[W]hen confronted with [28 U.S.C. § 2254(d)]'s ambiguous language, intermediate federal

whole, is irresolvably ambiguous.¹³ Such statutes require the Court to look to background principles, against which the statute was drafted, to determine its meaning. But in the case of AEDPA, the Court's choice of background principles has been both incomplete and incorrectly applied. It has ignored norms surrounding the use of counterfactuals completely, and it has mis-weighted the traditional concerns of federalism and finality, both by overstating the degree to which its decisions will serve these values and by failing to consider the essential countervailing concern of remedying serious constitutional error. A proper approach to counterfactual analysis will be both more coherent and consistent with the Court's jurisprudence in other areas and more fair to criminal defendants whose rights were violated during the trial process.

This Note will proceed in four parts. Part I will consider counterfactual speculation generally, analyzing the different forms it can take with regard to what is actually true and actually known. This brief theoretical aside is necessary for the discussion of actual uses of counterfactuals in the law that will follow, so that we can distinguish among the types of guesses courts are willing and unwilling to make. I will also consider various areas of the law in which courts engage in different forms of counterfactual thinking, beginning with a broad look, then narrowing to the treatment of counterfactuals in criminal law and habeas corpus review specifically. Part II will take a largely descriptive look at the role that counterfactual speculation has played in habeas corpus review to date, beginning with the first cases interpreting AEDPA and continuing through last Term's decision in *Greene*. Part III will consider possible justifications for the inconsistencies in the treatment of counterfactuals in the habeas context not addressed by the Court, concluding that they cannot justify the departure. Part IV will endeavor to suggest a more coherent approach. Rather than refusing to speculate in habeas cases based on the counterfactual nature of the inquiry, courts should, as they do in other areas of law, base their willingness to credit a counterfactual on how likely the alternate outcome would be, accepting highly likely alternate outcomes and rejecting those that would have been unlikely.

I. VARIETIES OF COUNTERFACTUAL SPECULATION

Not all counterfactual speculation is alike. The practice can be divided into categories according to what is known, how likely each outcome is, and what is

appellate courts will often stake out positions based on varied readings of congressional intent.”).

13. See, e.g., James S. Liebman, *An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 426 (2001) (“AEDPA complicates review, first, because of its poor drafting. AEDPA’s opaque language has proliferated conflicting interpretations, requiring the Supreme Court to grant certiorari to resolve a conflict in interpretation at least fourteen times since AEDPA’s adoption in 1996, nine of them in capital cases.”).

actually possible. I will not undertake an extensive analysis of the philosophical role of counterfactual thinking in life or in law, nor of the philosophical distinctions among the different types; that work has been done elsewhere.¹⁴ Rather, here, I will seek merely to describe and classify, to permit examination of courts' different treatment of counterfactual thinking in different situations.

Most broadly, we can divide the realm of counterfactual considerations into what we might call a "hard counterfactual"—regarding things that definitely did not happen—and a "soft counterfactual"—regarding things that may or may not have happened, though we cannot know whether they did or not. I will consider each of these in turn. This discussion will allow us to analyze courts' treatments of counterfactuals in different areas of the law with greater precision.

A. *Hard and Soft Counterfactuals*

Hard counterfactuals are what we most naturally think of when we hear the term "counterfactual." These are the situations that *did not occur*. That is, there is no possibility that they actually happened; instead, we might consider how things *would have* been different if they *had* occurred.

Let us pause a moment for clarity's sake; it would be easy to trip over the merely linguistic did / did not distinction in the way a hard counterfactual is stated. The key point here is the certainty, not whether the event being discussed is described in terms of that which happened or that which did not. If Driver A ran a red light and hit Driver B's car, the counterfactual could be phrased two ways. First, we could ask what would have happened if Driver A had stopped at the red light—which he did not, and we know he did not, which is what makes this a hard counterfactual. Alternatively, we could ask what would have happened if Driver A had not run the red light—which he did; we know he did, so asking what would have happened if he had not is a hard counterfactual. I will generally phrase my counterfactuals like the former, in the affirmative rather than the negative, for the sake of clarity, but bear in mind that the two are interchangeable.

When considering the things that *might have* happened but definitely did not, there are infinite possibilities. Because it is impossible to be certain about what would have happened in the absence of any one event, every counterfactual possibility will come with a degree of probability. That is, how likely is the counterfactual? It could be nearly certain, or it could be possible but wildly unlikely, or anywhere in between. If Driver A had stopped at the red light, he almost certainly would have missed Driver B's car. However, there is a remote possibility that B would have stalled in the middle of the intersection, and

14. See, e.g., Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 556-60 (1962); Leubsdorf, *supra* note 8; Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1803-07 (1985).

Driver A wouldn't have seen Driver B, and would have hit Driver B anyway after the light turned green. Still, most of us would think it all but certain that Driver A would have missed Driver B if Driver A had stopped at the red light.

Though the question of likelihood is in reality a continuous spectrum, for present purposes, it will suffice to divide the hard counterfactuals into two categories: the likely and the unlikely. Thus, we have hard-likely, or the counterfactual that definitely didn't happen but probably would have if things had been different, and the hard-unlikely, the thing that definitely didn't happen, but probably wouldn't have anyway.¹⁵

Conceptually separate from the hard counterfactual is the situation in which we are uncertain of what actually happened. I call these "soft" counterfactuals, though, of course, in a sense, they may not be *counterfactual* at all. Rather, the soft counterfactual entails treating as certain what is merely one possibility among several. Consider, for example, a baseball game in which the umpire sneezes at just the wrong moment and does not see the pitch. The umpire then must make a call: ball or strike? Either call will, in a sense, be a counterfactual, since it entails treating as certain an event the occurrence of which is actually uncertain. A soft counterfactual is, in short, an assumption, and the reason it is counterfactual is that one proceeds as though a fact is known, when in reality, it is not.

Like hard counterfactuals, soft counterfactuals can be broken down according to probability. There are soft-likely counterfactuals (imagine a pitcher who throws curveball strikes so often that the umpire feels safe in calling a strike, having recognized the pitch as a curveball, though he never actually saw it cross the plate), and soft-unlikely counterfactuals (I never looked up at the sky last night to see the moon, so it's possible that there was a lunar eclipse occurring, but eclipses are very rare, so I feel quite comfortable in assuming that there was no eclipse).

In sum, counterfactuals can be divided into four categories: hard-likely, hard-unlikely, soft-likely, and soft-unlikely. The hard counterfactuals are those that definitely did not happen; the soft are those that may have, but there is no way to know. All of the instances of counterfactual analysis by courts that we will consider can be classified according to these criteria, and sorting them in this way will help us to see what courts and legislatures are really doing when they allow and disallow various types of review.

15. There is no bright line between likely and unlikely; how any given possibility gets classified will depend on the standards for likelihood being applied. These standards are something akin to a standard of proof. Thus, a counterfactual might be considered likely only if it meets the "beyond a reasonable doubt" test, or the "more likely than not" test. It doesn't particularly matter what the standard is for the sake of an abstract discussion of classification, but in future discussions where counterfactuals are classified as likely or unlikely, bear in mind that making this determination depends on the application of a standard.

B. *Counterfactuals in the Law*

Courts apply these various types of counterfactual reasoning in a range of contexts. Surveying these contexts will give us a sense of the background principles against which Congress drafted and passed AEDPA.

As scholars have recognized, the law is full of exercises in counterfactual speculation.¹⁶ At the most basic level, the causation inquiry at the heart of any action for negligence involves counterfactual thinking.¹⁷ Similarly, remedies doctrine often involves considering the position in which a plaintiff *would have* been *if* she had not been injured.¹⁸ Courts must also engage in counterfactual evaluation when interpreting wills that cannot be implemented exactly as written under the *cy pres* doctrine,¹⁹ and even when making determinations concerning severability in statutes.²⁰ The Seventh Amendment analysis of whether a jury trial is required entails counterfactual reasoning about whether a given suit would have been brought in law or equity in the late eighteenth century.²¹ Even some Justices' beloved practice of considering what the Founders would have done faced with a given situation entails a counterfactual.²² All of these

16. See, e.g., Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 345-48 (1992).

17. See, e.g., *Rinaldo v. McGovern*, 587 N.E.2d 264, 266 (N.Y. 1991) (finding that a golfer's failure to shout "fore" after a mishit shot was not a cause of plaintiff's injuries because even if the golfer had shouted, plaintiff would not have heard or had time to react); see also Wright, *supra* note 14, at 1804 ("[A]s legal and nonlegal philosophers have noted, the necessary-condition criterion and its implicit counterfactual assertions are part of the very meaning of causation.").

18. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 746 (1974) ("But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.").

19. See, e.g., *In re Estate of Elkins*, 32 A.3d 768, 778 (Pa. Super. Ct. 2011) ("The key is approximating the express direction of the testator as nearly as possible by transferring the funds to an institution that the decedent would have wished to receive the funds had the decedent been aware of the situation that occurred following his demise.").

20. See, e.g., *INS v. Chadha*, 462 U.S. 919, 934 (1983) ("This legislative history is not sufficient to rebut the presumption of severability raised by § 406 because there is insufficient evidence that Congress would have continued to subject itself to the onerous burdens of private bills had it known that § 244(c)(2) would be held unconstitutional.").

21. See *Pernell v. Southall Realty*, 416 U.S. 363, 373-74 (1974) ("Had Southall Realty leased a home in London in 1791 instead of one in the District of Columbia in 1971, it no doubt would have used ejectment to seek to remove its allegedly defaulting tenant. And, as all parties here concede, questions of fact arising in an ejectment action were resolved by a jury.").

22. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 746-47 (2008) ("In none of the cases cited do we find that a common-law court *would or would not have* granted, or refused to hear for lack of jurisdiction, a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant, under a standard like the one the Department of Defense has used in these cases" (emphasis added)); see also ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 161-87 (1990) (defending originalist analysis requiring consideration of what the Founders would have believed regarding situations they could not have considered).

inquiries represent hard counterfactuals—an inquiry into what would have been, but definitely was not. These are commonplace legal questions without which adjudication as we know it would not be possible. Courts do this day in and day out. The point is not to catalog the full list of substantive areas in which courts routinely use counterfactual reasoning—there are plenty more—but rather to observe that the practice sweeps across divergent areas of the law.

Courts also regularly use soft counterfactuals. Consider, for example, rational basis review under the Fourteenth Amendment. Often, a court is not presented with Congress's unequivocal reason for treating groups differently, but must consider what Congress *might* have had in mind, and evaluate this motivation for rationality.²³

Though different courts have different attitudes toward counterfactuals, ranging from the cavalier²⁴ to the uncomfortable and avoidant,²⁵ the process itself does not seem to give courts great difficulty. This may in part be due to the fact that so much counterfactual work is actually delegated to juries. Some scholars have been heavily critical of the use of speculation in assigning liability or calculating damages,²⁶ and courts sometimes display hesitation or discomfort with the speculative nature of the analysis.²⁷ But even if courts seem uncomfortable with the idea, they still conduct counterfactual analysis quite regularly, as illustrated by the range of cases just discussed. The fact remains

23. See, e.g., *Mathews v. De Castro*, 429 U.S. 181, 188 (1976) (“Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married.”); *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (“The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose—a goal—which the enacting government body *could* have been pursuing. The *actual* motivations of the enacting governmental body are entirely irrelevant.”).

24. See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 32-33 (1981) (“While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the presence of counsel for Ms. Lassiter could not have made a determinative difference.”).

25. One commentator has termed this practice “counterfactual dread” and discusses a range of ways in which courts recast their standards to make them sound less counterfactual. See Strassfeld, *supra* note 16, at 348. The methods include using substantial-factor instead of but-for causation, and phrasing questions in terms of an objective reasonable person instead of the actual person in question, both of which, Strassfeld points out, obscure but do not eliminate the counterfactual nature of the inquiry. *Id.* at 353-61.

26. See, e.g., Leubsdorf, *supra* note 8, at 132 (criticizing counterfactual-based remedies doctrine as “oversimplified”).

27. See, e.g., *McInturff v. Chi. Title & Trust Co.*, 243 N.E.2d 657, 661 (Ill. App. Ct. 1968) (“[D]amages cannot be assessed upon mere surmise and conjecture as to what possibly happened to cause an injury . . .”); see also James A. Henderson, Jr., *A Defense of the Use of the Hypothetical Case to Resolve the Causation Issue—The Need for an Expanded, Rather than a Contracted, Analysis*, 47 TEX. L. REV. 183, 197 (1969) (discussing the relative difficulties courts face in using counterfactual analysis in duty analysis and causation analysis in tort law).

that the practice is pervasive in American law, and though it may be conceptually unsettling, it is necessary to our legal system as we know it. This is because our system of substantive law requires answers to questions for which absolute proof is never possible. We often require, for example, a finding of but-for causation in tort law, without which there is no liability, but of course, there is no way to conclusively prove such a thing.²⁸ We also require an examination of the rightful position to construct many kinds of remedies, which cannot be accomplished without reference to “a hypothetical or future world” in which no wrong occurred.²⁹ To eliminate counterfactual reasoning from our legal process, we would need a radical change in many areas of our substantive laws, a shift from accommodating the acknowledged limitations of proof to allowing relief only where absolute certainty is possible.³⁰ That shift could be made, but the resulting system would be quite foreign to us, and would almost surely be inadequate in its ability to rectify wrongdoing.

Even more relevant to a consideration of the treatment of counterfactual reasoning in habeas corpus under AEDPA is the more specific area of courts’ treatment of counterfactuals in criminal cases. The Subparts that follow consider the counterfactual thinking involved in harmless error analysis generally, and in habeas corpus review of state court judgments specifically. Finally, I will consider areas of criminal law in which courts have deemed it inappropriate to speculate.

1. *Counterfactual speculation in criminal appeals: harmless error*

Since the early twentieth century, the American legal system has had a rule that a conviction will not be reversed due to an error in the trial process that had no effect on the outcome.³¹ Deciding whether an error is harmless entails considering what would have happened at trial if the error had not occurred: would the defendant have been convicted anyway, or would he have been acquitted? These are hard counterfactuals; trials are well documented, and we almost

28. Wex S. Malone, *Ruminations on Cause-in-Fact*, 9 STAN. L. REV. 60, 67 (1956) (“But at other times the same [but-for] test demands the impossible. It challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs. He is invited to make an estimate concerning facts that concededly never existed.”).

29. See Leubsdorf, *supra* note 8, at 133.

30. See, e.g., *id.* (“I will also question the traditional assumption that the function of a remedy is to put the plaintiff in a position he would have occupied had there been no violation There are alternative ways to conceive of remedies that could enable us to relieve plaintiffs without succumbing to fantasy”).

31. See *Chapman v. California*, 386 U.S. 18, 22 (1967) (“All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for ‘errors or defects which do not affect the substantial rights of the parties.’” (quoting 28 U.S.C. § 2111)); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 82-84 (1988) (collecting historical sources).

always have a record of precisely what was said and done. We could view harmless error analysis as simply a type of causation analysis: did the error cause the outcome?

Since we can never be certain of what would have happened absent an error, the harmless error inquiry can be framed in terms of the *likelihood* of a different outcome. That is, at a certain point along the likely-unlikely continuum, the court will deem the alternative outcome of acquittal sufficiently unlikely as to proceed as though it were not possible at all, and leave the conviction in place despite the error. The level of likelihood required for reversal of the conviction varies depending on the nature of the error, and also on the procedural posture of the case under review. I will discuss the various types of error here, assuming they are raised on direct review; the difference between direct and collateral review will be discussed in the next Subpart.

When the error is not constitutional, but rather involves the violation of a rule or statute, a court considering a direct appeal must ask whether the error had “substantial and injurious effect or influence in determining the jury’s verdict.”³² Some courts have phrased the test differently,³³ but the different phrasings of the nonconstitutional harmless error test seem to have no substantive impact on the analysis. Though this test is not phrased in terms of likelihood that the outcome would have been different (one could imagine something that is similar to the “more likely than not” standard), in practice, courts consider what would have been before the jury absent the error and weigh this against the evidence as it was presented.³⁴ If the evidence would have been quite strong anyway, courts generally find that there was no substantial and injurious effect, but if the case was close, courts more often find that there *was* such an effect. This test, while vague, seems to be flexible by design, allowing courts to assess the realistic likelihood of a different result in a fact-specific manner.³⁵ Thus, harmless error review of nonconstitutional errors fits into the

32. *United States v. Lane*, 474 U.S. 438, 449 (1986) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)) (performing harmless error review where there was a violation of Rule 8(b) of the Federal Rules of Criminal Procedure, concerning joinder).

33. *See, e.g., United States v. Thompson*, 287 F.3d 1244, 1253 (10th Cir. 2002) (“The defendants do not allege that an indictment improperly sealed under Rule 6(e)(4) violates a constitutional right. This court thus applies the standard for nonconstitutional errors, which are harmless unless the error had a substantial influence on the outcome of the proceeding or leaves one in grave doubt as to whether it had such effect.”).

34. *See Lane*, 474 U.S. at 450 (“In the face of overwhelming evidence of guilt shown here, we are satisfied that the claimed error was harmless.”); *see also Glasser v. United States*, 315 U.S. 60, 67 (1942) (“In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt.”).

35. *See Kotteakos*, 328 U.S. at 761 (“That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights;

category of hard-likely counterfactual analysis (though just how likely seems to vary by case).

Where the error is a constitutional one, rather than a violation of rule or statute, the court must deem it harmless beyond a reasonable doubt to sustain the conviction.³⁶ For instance, in *Chapman v. California*, the prosecutor violated the defendant's Fifth Amendment rights by repeatedly making inappropriate references to her decision not to testify, and the Court found that the error was not harmless beyond a reasonable doubt.³⁷ In other words, if the court or the defendant can generate some plausible scenario in which the error might have changed the outcome, it will reverse, even if the scenario is unlikely to have actually happened. Thus, in determining the effect of a constitutional error at a criminal trial, courts will credit a hard-unlikely counterfactual.

There are, of course, other concerns bearing on the question of whether and how to perform harmless error analysis. In particular, courts and commentators have been concerned about the ultimate purpose of trials and of the rights we assign to defendants, and how harmless error analysis interacts with these interests.³⁸ But what is significant here is that courts seem to have no trouble performing the counterfactual analysis once they have decided it is appropriate in any given context. The analysis itself is simple: the reviewing court looks at the evidence presented and the trial as it unfolded, and considers, in a fact-specific way, what the trial would have been like absent the challenged element.³⁹ Though courts have at times appeared troubled by the idea that the fact of harmlessness should prevent reversal,⁴⁰ they have generally taken for granted that it is appropriate to assess what a court below would have done under different circumstances and to use this determination to uphold convictions.⁴¹

and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another.”).

36. See *Chapman*, 386 U.S. at 24. Prior to *Chapman*, it was thought that constitutional error was never susceptible to harmless error review. See *Stacy & Dayton*, *supra* note 31, at 82-83 & n.16.

37. *Chapman*, 386 U.S. at 19, 24.

38. See, e.g., *Stacy & Dayton*, *supra* note 31, at 80-82.

39. See, e.g., *United States v. Wilson*, 605 F.3d 985, 1025 (D.C. Cir. 2010) (considering the impact of a statement “in the context of the whole trial,” and concluding its admission was harmless); *United States v. Thompson*, 287 F.3d 1244, 1255-56 (10th Cir. 2002) (reviewing the evidence in the record and concluding that an error was not harmless).

40. See, e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (“The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.”).

41. See, e.g., *Neder v. United States*, 527 U.S. 1, 19-20 (1999) (“A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, ‘become in effect a second jury to determine whether the defendant is guilty.’ Rather a court, in typical

Indeed, over the last fifty years, the trend has been to *expand* the class of cases in which harmless error analysis applies,⁴² which necessarily entails an *increase* in the use of counterfactual reasoning.

2. Counterfactual speculation on habeas

The above analysis concerns what courts do with claims of error on direct review. For a good part of our history, the analysis was the same on collateral review, but this changed in 1993, when the Supreme Court decided *Brecht v. Abrahamson*.⁴³ In *Brecht*, the Court held that the *Chapman* “harmless beyond a reasonable doubt” standard did not apply on habeas, but rather, even in cases of constitutional error, the habeas court could grant relief only if it found the error *unlikely* to be harmless, satisfying the “substantial and injurious effect” standard from *Kotteakos v. United States*.⁴⁴ Thus, courts reviewing constitutional trial errors on habeas, like courts reviewing nonconstitutional errors on direct review, must credit hard-likely counterfactuals, but not hard-unlikely counterfactuals.

Three things are worth noting about *Brecht*. First, the change in the standard was made by the Court, without input from Congress. (The same is true regarding the distinction between constitutional and nonconstitutional error on direct review, though the requirement of harmless error review in the first instance came from Congress.) Indeed, the *Brecht* Court discussed the fact that Congress has been silent on the issue, even considering but failing to enact a fairly strict harmless error test for habeas, and proceeded to decide the issue itself.⁴⁵ This independent action by the Court is in contrast to the more constrained decisions the Court has faced in considering the role of counterfactual analysis under AEPDA, as discussed below.

Second, the decision in *Brecht* represents the Court’s direct engagement with the question of how a federal court should consider what a state jury (or judge, in the case of a bench trial) would have done given different circum-

appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. . . . We thus hold that the District Court’s failure to submit the element of materiality to the jury with respect to the tax charges was harmless error.” (citation omitted)).

42. See, e.g., *Rose v. Clark*, 478 U.S. 570, 579 (1986) (“Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis.”); 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 855 (3d ed. 2004) (“Until 1967 it had been supposed that errors of constitutional dimension could never be regarded as harmless error. The decision that year in *Chapman v. California* made it clear that this is not the case.” (footnote omitted)).

43. 507 U.S. 619 (1993).

44. *Id.* at 637-38 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

45. *Id.* at 632-33.

stances.⁴⁶ Indeed, the Court, having decided to apply the *Kotteakos* standard, went on to consider all the evidence presented and to decide whether the jury would have reached the same result anyway, ultimately concluding that it would have.⁴⁷ It thus represents the Court's explicit acknowledgment that federal habeas courts *must* sometimes consider counterfactuals involving state court decisions.

Third, the opinion reflects the Court's continued commitment to the idea that collateral review is fundamentally different from direct review (even before AEDPA). Though the Court had previously treated the two contexts differently in many respects, including for purposes of retroactivity analysis⁴⁸ and Fourth Amendment violations,⁴⁹ *Brecht* reflects a clear willingness to draw a line based on the *purpose* of the review, not just on its practical consequences.⁵⁰ The Court's concerns for federalism and finality take center stage in its reluctance to overturn convictions that were probably accurate, if not secured in strict compliance with the Constitution.

Of course, under the post-AEDPA version of 28 U.S.C. § 2254, most claims of trial error will be assessed only under § 2254(d)'s extremely deferential standard for review of claims adjudicated on the merits by state courts. Thus, rather than themselves applying some habeas-specific standard, federal courts simply review the state courts' application of the relevant standard for reasonableness.⁵¹ Only upon finding that the state court's performance was

46. The analysis also applies in federal habeas review of federal court convictions under 28 U.S.C. § 2255. *Brecht* itself, however, involved a state court conviction, reviewed under § 2254, and as this Note is primarily concerned with § 2254, I will not consider the separate issue of review of federal convictions.

47. *Brecht*, 507 U.S. at 638-39.

48. See *Teague v. Lane*, 489 U.S. 288, 305-10 (1989).

49. See *Stone v. Powell*, 428 U.S. 465, 481-82 (1976).

50. See *Brecht*, 507 U.S. at 635 (listing three reasons for distinguishing collateral review from direct review—(1) states' interest in finality, (2) federalism, and (3) commitment to trial as the primary venue—while rejecting petitioner's argument based on practical consequences).

51. Currently, § 2254 authorizes relief in these situations only where the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d) (2011). Thus, if the state court applied the wrong standard—for instance, too strict a harmless error test for a constitutional error—the "contrary to" prong might be satisfied. Claims not adjudicated on the merits in the state courts can now only be reached on federal habeas if they satisfy the "cause" and "prejudice" test of *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)—meaning that the court cannot even hear the claim without finding (1) that there was a good reason for failing to raise the claim and (2) "prejudice," a term that has remained annoyingly open-ended. See 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.3[b]-[c] (6th ed. 2011) (citing a variety of open-ended formulations). Still, there seems to be at least some agreement that the *Kotteakos* standard is the right one to use for prejudice. See *id.* Theoretically, if the *Sykes* test was satisfied, the reviewing federal court would then determine whether there was in fact an error, and would then apply the *Kotteakos* "substantial and injurious effect" test, but the relevance of this second analysis is surely sharply decreased if the court must already have found prejudice to hear the claim at all.

poor enough to violate § 2254(d)'s extremely deferential standard would the habeas court proceed to the *Brecht* analysis.⁵² Such findings are (and presumably were meant to be) rare.

3. *Refusal to speculate*

There is a class of cases that the Supreme Court has declared is never subject to harmless error review. In 1991, the Court drew a line between “trial error” and “structural defect” and held that the latter requires automatic reversal.⁵³ In other words, for a “structural defect,” a reviewing court will not engage in the counterfactual harmless error analysis. The prototypical structural error is the presence of a biased judge.⁵⁴ If the judge is biased, “[t]he entire conduct of the trial from beginning to end is obviously affected,”⁵⁵ and the court cannot assess the impact of any one element. Another error that the courts have deemed to be structural is denial of counsel of choice, where “[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.”⁵⁶ The conventional explanation for this practice of automatic reversal is that it is impossible to do counterfactual analysis for errors that infected the entire trial process—that such errors “defy analysis by ‘harmless-error’ standards.”⁵⁷ Accepting this explanation, we see that the Court has acknowledged that there are some situations where the counterfactual is simply unknowable,⁵⁸ and thus should not be pursued.

There are, however, also some claims that are exempt from harmless error review where a court might be *able* to venture a guess as to what would have happened, but still refuses. Courts seem to do this because they have decided that reversal is necessary for some other reason. Examples include *Batson* claims, where one of the parties eliminated prospective jurors from the panel on the basis of race,⁵⁹ though without obvious effect on the actual outcome of the

52. See *Fry v. Pliler*, 551 U.S. 112, 119-22 (2007).

53. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

54. The classic case involving the presence of a biased judge is *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.”).

55. *Fulminante*, 499 U.S. at 309-10.

56. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

57. *Fulminante*, 499 U.S. at 309.

58. This may be for any number of reasons, including the secrecy of jury deliberations or the pervasive nature of an error, which makes it impossible to know where to even begin imagining the counterfactual. See Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 STAN. L. REV. 727, 734-37 (2012).

59. See *Batson v. Kentucky*, 476 U.S. 79, 83, 100 (1986).

trial, and *Faretta* claims, where a defendant was not allowed to represent himself (though might actually have had a *better* outcome than had he been able to).⁶⁰ In both cases, there is some other societal value—racial equality, or a defendant’s autonomy—being protected, and that need is strong enough to override the usual practice requiring a showing of actual prejudice for reversal.

In all of these “no-harmless-error” situations, the court gives defendants the benefit of assuming that there was an adverse effect. In other words, if harmless error analysis is impossible, courts always assume the error was harmful and reverse the conviction, though it would be theoretically possible to do the opposite. The Court does this of its own accord; there is no statutory home for the structural error rule.⁶¹

Aside from the structural error cases, there is an entirely separate class of cases in which the Supreme Court refrains from speculating about what the court below might have done: cases in which the Court grants, vacates, and remands (GVRs). The prototypical GVR occurs when a case is pending on direct review, and the Supreme Court decides another case bearing on it in the interim. Rather than applying the new law itself and engaging the counterfactual about what the court below would have done, the Court will often send the case back for an actual determination by the lower court given the changed law.⁶² Rather than determining what the lower court would have done, the Court actually lets the “would-have-done” play out in reality. Where possible, this outcome seems obviously preferable to an appellate court considering what a lower court would have done, since it allows actual certainty to take the place of the uncertainty inherent in counterfactual analysis.

To summarize, federal courts can and do engage in counterfactual analysis, even when reviewing state court convictions, seemingly without trouble or handwringing. Further, they can and do refuse to engage in that analysis in some situations, without specific direction from Congress. In these situations, the proper outcome has always been either automatic reversal or pursuit of certainty. Congress legislated against this backdrop when it revised the habeas laws in 1996.⁶³

II. COUNTERFACTUAL SPECULATION UNDER AEDPA

Having surveyed the theoretical possibilities for counterfactual speculation and the broad strokes of its application in law generally, in criminal law, and in habeas corpus specifically, I will now trace the Court’s interpretation of AEDPA with a focus on how it has treated the concept of counterfactuals along

60. See *Faretta v. California*, 422 U.S. 806, 807-08 (1975).

61. See, e.g., *Fulminante*, 499 U.S. at 306-12 (deriving the structural error rule from the Court’s precedent, without reference to any statutory authority).

62. See *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (per curiam).

63. See *infra* Part II.B.1.

the way. Specifically, this Part will review the Court's treatment of a specific type of counterfactual speculation: federal courts in habeas proceedings considering how state appellate courts might have acted.

A. *Early Applications*

The Court's first major interpretation of § 2254 came in the 2000 case *Terry Williams v. Taylor*.⁶⁴ In this case, the Court examined a lower federal court's treatment of a state court's adjudication of a claim of ineffective assistance of counsel.⁶⁵ The inquiry was straightforward: did the district court properly apply § 2254(d)'s new provision allowing relief only on a finding that the state court decision was contrary to, or an unreasonable application of, clearly established federal law?⁶⁶ The case's main contribution was to establish that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law."⁶⁷ All of this has very little to say about the propriety of counterfactual speculation. There is some degree of counterfactual thinking involved in the *Strickland* inquiry itself,⁶⁸ and in evaluating the state court's evaluation of the *Strickland* claim the Court must also consider the prejudice of counsel's performance, but there is nothing about this inquiry that is unique to federal habeas. In other words, the most basic inquiry under § 2254(d) does not require any counterfactual thinking by the federal court with regard to the action of the state appellate court.

Two years later, the Court issued its first AEDPA decision directly addressing counterfactual reasoning by a federal habeas court concerning the actions of a state court. In *Early v. Packer*, the Ninth Circuit had directed a district court to grant the writ in part because the state intermediate appellate court (the last court to hear the claim at issue) had not cited any federal law in its opinion rejecting petitioner's claim, but had instead dismissed both the state and federal claims with reference only to state court precedent.⁶⁹ The Supreme Court, in a brief per curiam opinion, said that AEDPA "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them."⁷⁰ In other words, where the state court does not specify whether or how it applied federal law, the habeas court will assume not only that it *did* apply such law, but also that it did so correctly (or at least not unreasonably), as long as nothing in the opinion renders this conclusion impossible.

64. 529 U.S. 362 (2000).

65. *Id.* at 390.

66. *Id.* at 367.

67. *Id.* at 410.

68. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defining the standard for ineffective assistance of counsel).

69. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam).

70. *Id.*

This is a classic soft counterfactual.⁷¹ We do not know whether the state court considered the relevant federal law, but the reviewing court must treat it as though we *do* know. Though not phrased in the language of counterfactuals, the Court's direction that habeas courts credit these soft counterfactuals is clear. Whether these counterfactual scenarios—involving correct application of the relevant federal law—are likely or unlikely may vary from state to state, court to court, case to case. In *Packer*, at least, citation to overlapping state law made correct application of federal law somewhat more likely, perhaps, than it might have been without such a citation. But regardless of likelihood, the requirement is always the same, and the Court does not seem troubled by the counterfactual nature of this exercise. Indeed, the Court barely says anything about it, and the entire opinion occupies a mere nine pages of the U.S. Reports.

It should perhaps have come as no surprise, then, that the Court blessed a similar vein of counterfactual thinking nine years later in *Harrington v. Richter*,⁷² a case in which there was not just an absence of citation to federal law, but an absence of any opinion at all. In *Richter*, the California Supreme Court had summarily denied Richter's state habeas petition (which, for capital cases, is filed directly in the state supreme court, thus leaving summary denial as the only state court response to Richter's petition).⁷³ The chief question before the Court was whether § 2254(d) could be applied to this summary denial given that there was no opinion to examine in applying the "contrary to or unreasonable application of" standard.⁷⁴ The Court, in a seven-Justice opinion by Justice Kennedy⁷⁵ citing *Packer* among other cases, held that "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning."⁷⁶ What the habeas petitioner must do, and this is where it gets interesting for our purposes, is show that "there was no reasonable basis for the state court to deny relief."⁷⁷ In other words, the habeas court must determine what theories "could have supported" the decision,⁷⁸ an inquiry that requires the habeas court to consider all the possible, rather than actual, explanations for the state court's decision. This is another classic soft counterfactual. The court cannot know what the state court's reasoning was (if, indeed, the court engaged in any reasoning at all), so it must *speculate*.

From here, there are two directions the Court might have gone. It might have directed habeas courts to determine what the most *likely* explanation for

71. See *supra* Part I.A. Think of the sneezing umpire.

72. 131 S. Ct. 770 (2011).

73. *Id.* at 783.

74. *Id.* at 784.

75. Justice Kagan was recused, and Justice Ginsburg wrote an opinion concurring in the judgment. See *id.* at 770.

76. *Id.* at 784.

77. *Id.*

78. *Id.* at 786.

the state court's decision was—in other words, directing the court to credit any soft-likely counterfactual. This would have been consistent with the Court's treatment of soft counterfactuals in other contexts, such as considering the intent of a statute when there is no legislative history. But instead, the Court chose to require crediting *any* explanation for the state court's decision that would render it reasonable, and thus sustainable under AEDPA.⁷⁹ In other words, if there is an explanation for the outcome that would render it reasonable, no matter how unlikely it is that the state court actually followed that path, the habeas court must assume that it did. Though this may seem extreme, and may, as recent research has shown,⁸⁰ require endorsing a very *unlikely* soft counterfactual, it is consistent with the Court's attitude toward counterfactual speculation as a general matter—acceptance of the practice, despite its potential weaknesses.

There are, however, hints of inconsistency and incoherence lurking in the *Richter* opinion. While blessing the unlikely counterfactuals in the state's favor, the Court dismissed Richter's claim that the members of the state court may not have agreed on a theory for rejecting his petition as "pure speculation,"⁸¹ a comment that is both ironic, given the Court's primary holding in the case, and unhelpful, since it provides no reason why Richter's speculation in his own favor must be rejected, while the habeas court must continue to speculate in the state's favor. The mere fact of speculation cannot support this distinction as the Court suggested it can, since both the blessed and the condemned conclusions rely upon it. Presumably, the Court was motivated to give the state far more credit than the petitioner by the traditional comity and federalism concerns raised in habeas cases; the Court invoked these concerns in a later part of the opinion, in which it considered the Ninth Circuit's decision that the state court was unreasonable.⁸² But the Court never clearly discussed why these concerns justify treating speculation as necessary when it favors the state and unwarranted when it favors the petitioner, nor did it consider the factors that might motivate speculation in the petitioner's favor—namely, protection of his constitutional rights.

79. *Id.* at 784 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief.").

80. See Matthew Seligman, Note, *Harrington's Wake: Unanswered Questions on AEDPA's Application to Summary Dispositions*, 64 STAN. L. REV. 469, 505-06 (2012) (examining California summary denials).

81. *Richter*, 131 S. Ct. at 785.

82. See *id.* at 787 ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions.").

B. *A Change in Direction: Cullen v. Pinholster*

This problem resurfaced later in the same Term, with the Court's decision in *Cullen v. Pinholster*.⁸³ The question at issue was whether a federal habeas court that properly holds an evidentiary hearing⁸⁴ may then consider newly presented evidence in evaluating claims previously adjudicated by the state court *without* that evidence under § 2254(d)(1). The holding, boiled down, is “that evidence later introduced in federal court is irrelevant to § 2254(d)(1) review.”⁸⁵ In other words, the federal habeas court may *not* consider the reasonableness of the outcome given the facts now known after the hearing authorized by statute, but must rather consider the state court's decision only in light of the information it *actually* had. Considering the counterfactual—what the state court would have done if that evidence had been before it—is not allowed. And presumably, it is not allowed even if it is extremely convincing, such that a state court faced with the new evidence would have been all but certain to grant relief, making *Pinholster* a decision that forbids crediting the hard-likely counterfactual.

The facts of *Pinholster* illustrate the problem well. Scott Pinholster was convicted of first-degree murder and sentenced to death in a proceeding at which his appointed counsel, who had not realized he would be required to present mitigation evidence, presented only one mitigation witness, the defendant's mother.⁸⁶ With new counsel, Pinholster then filed a state habeas petition, which included documentation and declarations from experts suggesting that he suffered from mental illness, but the state summarily denied the petition.⁸⁷ A federal district court then granted Pinholster an evidentiary hearing, at which two psychiatrists testified that he likely had organic brain damage,⁸⁸ a fact that could have made for persuasive mitigation evidence. In light of this evidence, the district court granted habeas relief for counsel's failure to investigate and present this evidence at sentencing, a decision which was affirmed by the en banc Ninth Circuit.⁸⁹ The Supreme Court reversed. Although there was now convincing evidence that Pinholster may have had brain damage, which his counsel had neither investigated nor presented to the jury at sentencing—a failing which surely rendered counsel ineffective—there was nothing the federal

83. 131 S. Ct. 1388 (2011).

84. Under AEDPA, a federal habeas court may only hold a hearing and take new evidence under very narrowly specified circumstances, requiring either a change in the applicable constitutional law or a factual predicate that the petitioner could not have discovered through reasonable diligence. *See* 28 U.S.C. § 2254(e)(2) (2011).

85. *Pinholster*, 131 S. Ct. at 1400.

86. *Id.* at 1395-96.

87. *Id.*

88. *Id.* at 1397.

89. *Id.*

courts could do. Because the state court had not heard the testimony of the two psychiatrists, its decision could not be considered unreasonable.

Lest we think that the Court had not conceived of its holding as implicating counterfactual reasoning, note the following observation from the majority opinion: “It would be strange to ask federal courts to analyze whether a state court’s adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.”⁹⁰ It is unclear what the Court really means here, because in one sense, this would not be strange at all. It asks courts to do something entirely ordinary: to imagine that things had gone a little differently, and consider whether the outcome as it actually happened can stand. In this light, conducting the analysis that Pinholster requested would have been very much like garden-variety harmless error review. He was simply asking the Court to credit a hard-likely counterfactual. Yet the Court held that such reasoning would be forbidden by the statute.

Because this result forbids a type of reasoning that is not only generally allowed but also widely applied in a range of contexts, the opinion requires close scrutiny to determine what, in the Court’s view, justifies this departure. In what follows, I will consider each of the opinion’s reasons for its holding in some detail to demonstrate that the Court takes advantage of AEDPA’s textual ambiguities to pursue its preferred set of background principles in ways which are both incorrect, in that its decision does not serve the interests it purports to, and incomplete, in that it ignores both the countervailing interests in remedying violations of defendants’ constitutional rights and the norm of counterfactual acceptance.

1. *Textual arguments*

The *Pinholster* Court provided one primary textual reason for holding that § 2254(d)(1) allows examining only what was before the state court: it refers “in the past tense, to a state-court adjudication that ‘resulted in’ a decision that was contrary to, or ‘involved’ an unreasonable application of, established law.”⁹¹ In other words, the Court says, “[t]his backward-looking language requires an examination of the state-court decision at the time it was made.”⁹²

There are at least two possible objections to this argument. The first, raised by Justice Sotomayor in her dissenting opinion in *Pinholster*, is that the neighboring provision (d)(2), which also uses the past tense language, specifies that it applies “in light of the evidence presented in the State court proceeding,” where (d)(1) does not.⁹³ If simply using past tense verbs were sufficient to so limit the record, that phrase in (d)(2) would be entirely superfluous. This argu-

90. *Id.* at 1399.

91. *Id.* at 1398.

92. *Id.*

93. *Id.* at 1415 (Sotomayor, J., dissenting) (quoting 28 U.S.C. § 2254(d)(2)).

ment convinced the en banc Ninth Circuit,⁹⁴ but not a majority of the Supreme Court.

A second argument, not presented to the Court in *Pinholster* (though later rejected by the Court in another case, *Greene v. Fisher*, discussed below⁹⁵), is that the use of past tense does not necessarily tie the analysis to any particular period of time. One could easily say that a state court adjudication “resulted in” a decision that was contrary to clearly established federal law as of the time the federal district court considered the claim, or given evidence that later came to light about that decision at the time it was made. That is, the past tense requires only that the result was unreasonable as of some time prior to the present moment of consideration of the petition, which could be at the time of the original state court proceeding, as the Court assumes, but could also be at some later, but still past, time, such as when the evidence became known.

Past tense aside, there is another textural/structural argument against the Court’s reading. Section 2254(e)(2), also added by AEDPA, permits federal courts to hold evidentiary hearings under certain conditions. Under the Court’s reading, though, the fruits of these hearings would almost never be available for actual use, rendering the provision almost meaningless. They could not be used in any claim that had been adjudicated on the merits in state court, yet AEDPA’s exhaustion provisions require every claim to be presented to the state courts first.⁹⁶ Only claims that the state court refuses to hear, but which can somehow overcome a procedural default, would be heard by the federal court without § 2254(d)’s restrictions. Thus, it would only be the exceedingly rare claim that could benefit from an evidentiary hearing. As Justice Alito points out in his separate opinion in *Pinholster*, this reading “gives § 2254(e)(2) an implausibly narrow scope and will lead . . . to results that Congress surely did not intend.”⁹⁷ Thus, the Court’s reading of the text of § 2254(d)(1) is simply not credible when placed in the context of the entire statutory scheme.

In sum, the Court gave a textual reason for refusing to consider whether the state court’s decision would have been reasonable given what we now know, but it was not an obvious or irrefutable one. The text leaves some ambiguity about whether Congress specifically intended to forbid engaging the counterfactual in this context. And given the strong background norm that counterfactual reasoning is permitted, the Court should not assume this norm has been displaced absent a clear indication that Congress intended to do so.⁹⁸

94. See *Pinholster v. Ayers*, 590 F.3d 651, 666 (9th Cir. 2009) (en banc), *rev’d sub nom.* *Cullen v. Pinholster*, 131 S. Ct. 1388.

95. See *infra* Part II.C.

96. See 28 U.S.C. § 2254(b)(1)(A) (2011).

97. *Pinholster*, 131 S. Ct. at 1411 (Alito, J., concurring in part and concurring in the judgment).

98. *Cf.*, e.g., *Holland v. Florida*, 130 S. Ct. 2549, 2561-62 (2010) (holding that AEDPA’s limitations provision did not abolish the equitable tolling that had been available

2. Arguments from precedent

The longest section of the *Pinholster* Court's opinion dealing with the interpretation of § 2254(d)(1) is its analysis of its previous interpretations of this and related provisions. The opinion walks through a series of five cases and purports to find in them a suggestion that what is required of a federal habeas court is a determination as to whether the state court opinion was reasonable at the time it was issued, rather than at the time of review. The section begins by saying that so limiting the review "is consistent with our precedents interpreting that statutory provision."⁹⁹ On closer inspection, however, none of the cases cited actually says anything about the question at hand. They may be consistent with the outcome the Court arrived at, but most if not all of them would be equally consistent with the opposite outcome, for the simple reason that none of them addressed the question of which information may be brought to bear on the evaluation of the state court's disposition of the case.

The Court first cited *Lockyer v. Andrade*,¹⁰⁰ which discussed whether certain precedents were "clearly established federal law" based on how consistent they were with each other—not based on what facts, or even what law, was before the state court at what time. A subsequent citation to *Terry Williams v. Taylor* made the same point.¹⁰¹ But these opinions are quoted selectively, and do not, when read in context, suggest anything about the question of counterfactuals. An extended quotation from *Pinholster* clearly demonstrates that the quotations pulled from previous precedents do not add much, without the present opinion's push in the right direction:

Our cases emphasize that review under § 2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of "the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. *Williams v. Taylor*, 529 U.S. 362, 405, 406 (2000) (*Terry Williams*).¹⁰²

An attentive reader will note that the language that actually supports the point the Court is trying to make here does not come from the previous opinions, but is rather added as context for quotations that were discussing other aspects of the statute.

before because "prior law" allowed such tolling and the amendments were "silent as to equitable tolling").

99. *Pinholster*, 131 S. Ct. at 1399.

100. *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)).

101. *Id.* (citing *Terry Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

102. *Id.* (alterations in original) (parallel citations omitted).

The next two cases cited concern the rules for holding an evidentiary hearing under § 2254(e)(2): *Schriro v. Landrigan*¹⁰³ and *Michael Williams v. Taylor*.¹⁰⁴ These cases are relevant, as the issue in *Pinholster* centered around the interaction of subsections (e)(2) and (d)(1). Both cases said, in short, that in a claim for which relief was barred under (d)(1), there was no need for a hearing under (e)(2). As the Court noted, these cases are consistent with a rule that even where there is a hearing, the evidence could not enter into the (d)(1) inquiry. But as with the cases discussed above, they could also be consistent with the opposite view. Claims can fail under (d)(1) for reasons other than the available facts; *Schriro* and *Michael Williams* could just as easily mean that if the court applied the wrong law, such that the petition must be granted anyway, or if there is simply no possible set of facts that would render a particular claim viable under (d)(1), there is no need for a hearing.

Specifically, *Schriro* discussed the possibility that a state court record might *refute* an allegation, rather than being ambiguous or silent on a given factual issue,¹⁰⁵ an aspect which the *Pinholster* Court ignored. This decision leaves wide open the question of whether a hearing could be held, and its results applied, when there *was* a possibility of relevance, as in *Pinholster*. And the only affirmative suggestion the *Pinholster* Court made about *Michael Williams*¹⁰⁶ comes from one sentence at the end of the *Michael Williams* opinion: “The Court of Appeals rejected this claim on the merits under § 2254(d)(1), so it is unnecessary to reach the question whether § 2254(e)(2) would permit a hearing on the claim.”¹⁰⁷ The claim at issue, it turns out, was a *Brady* claim based on nondisclosure of a witness’s plea agreement,¹⁰⁸ and the state court record included two reliable affidavits “stating unequivocally that [the witness] had no agreement.”¹⁰⁹ Further, the Fourth Circuit noted that even if there *was* suppressed evidence, there was no way for Williams to make the showing of materiality that would be required for relief.¹¹⁰ *Michael Williams* thus says exactly the same thing as *Schriro*: that there is no need for a hearing when what the court already knows makes relief impossible, regardless of what might be discovered. Neither opinion says anything about what to do when the court has insufficient factual information about a claim to know one way or the other. These opinions, then, would be consistent with either outcome in the *Pinholster* case.

103. 550 U.S. 465 (2007).

104. 529 U.S. 420 (2000).

105. *Schriro*, 550 U.S. at 474.

106. *See Pinholster*, 131 S. Ct. at 1400.

107. *Michael Williams*, 529 U.S. at 444.

108. *See Michael Williams v. Taylor*, 189 F.3d 421, 428-29 (4th Cir. 1999) (referencing claim under *Brady v. Maryland*, 373 U.S. 83 (1963)), *rev'd in part*, 529 U.S. 420.

109. *Michael Williams*, 189 F.3d at 428.

110. *See id.* at 429.

Finally, the *Pinholster* Court discussed *Holland v. Jackson*, a case which the en banc Ninth Circuit had thought supported allowing the use of the new evidence.¹¹¹ In *Holland*, the Court assumed without deciding that § 2254(d)(1) would not apply if there were new evidence produced in a properly held federal hearing, in the process of holding that the hearing in that case was actually improper.¹¹² This opinion provides perhaps the strongest evidence yet that neither interpretation is clearly compelled: if it were obviously wrong, the Court never would have made the assumption, and if it were obviously right, the Court would not have been so cautious in its articulation of the position, nor would it have taken the opposite view in an actual holding in *Pinholster*.

The strongest thing that can be said of these five cases—and indeed, the strongest thing the *Pinholster* Court ventured to say—is that they are *consistent* with the result. This consistency cannot, on its own, justify choosing any given outcome, and especially one that departs from a traditional aspect of appellate review and leaves violations of constitutional rights unremedied, unless it is the *only* outcome consistent with precedent.

3. *Appeal to background principles*

Perhaps realizing that neither the text nor the precedents are especially persuasive, the *Pinholster* Court proceeded to consider the broad principles of habeas review. Most prominently, the Court was concerned that allowing a consideration of the new evidence would violate the spirit of federalism, stating, simply and briefly, that “Congress’ intent [was] to channel prisoners’ claims first to the state courts,” and that “[i]t would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*.”¹¹³ The Court did not explain this argument further, and did not elaborate on why it thought that considering the new evidence is tantamount to *de novo* review of the entire case (rather than just of the new evidence itself).

It is, of course, correct that federalism was a major concern voiced by Congress in enacting AEDPA. And it is clear that if allowing some counterfactual thinking here would significantly empower the federal courts to run roughshod over state court opinions, it would present a problem for habeas law generally. What is not clear is how allowing the consideration of new evidence,

111. *See* *Cullen v. Pinholster*, 131 S. Ct. 1388, 1400 (2011) (citing *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam)).

112. *Holland*, 542 U.S. at 653 (“Where new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer. Assuming, *arguendo*, that this analysis is correct and that it applies where, as here, the evidence does not support a new claim but merely buttresses a previously rejected one, it cannot support the Sixth Circuit’s action.” (citation omitted)).

113. *Pinholster*, 131 S. Ct. at 1398-99.

which the federal habeas court heard only after satisfying the stringent standards of § 2254(e)(2), violates the federalism norm, as the Court asserted that it would.

The review that would result would not be *de novo*, as the federal court would still be considering the reasoning of the state court, and would still be obliged to leave intact a judgment that identified and applied the correct law, if such a judgment could reasonably be maintained given the new evidence. In other words, a reviewing court would not be asking what it thought the correct outcome should be, given all the new evidence; it would rather be verifying whether the existing outcome could reasonably be reached, given what is now known. This is not *de novo* review. Indeed, it continues to entail significant deference.

Further, there are other core constitutional values at stake. Habeas petitions often allege serious violations of defendants' constitutional rights. Habeas is not an exercise in protecting states' autonomy at all costs. Indeed, if that were the goal, there would be no habeas review at all. Instead, courts must balance federalism interests with defendants' constitutional rights. Yet in its analysis, the Court makes no mention of the fact that, after the evidentiary hearing, it was apparent that Pinholster's counsel failed to investigate and present a crucial fact, and was thus not functioning as the counsel guaranteed him by the Sixth Amendment. In the face of textual ambiguity, then, the Court imported a background principle, but it failed to apply that principle properly to the question at hand.

C. *The Change Takes Hold: Greene v. Fisher*

The following Term, the Court faced a related question: what to do when the applicable law has changed following the last state court adjudication of the case. In *Greene v. Fisher*,¹¹⁴ the petitioner's Confrontation Clause claim was decided in the state court under *Bruton v. United States*,¹¹⁵ which specified how the prosecution could and could not use statements from nontestifying codefendants. After the last state court opinion, but before the case was "final" for retroactivity purposes under *Teague v. Lane*,¹¹⁶ the Supreme Court decided *Gray v. Maryland*, which altered the Confrontation Clause law in a manner very likely to be favorable to the petitioner.¹¹⁷ The petitioner proposed that the

114. 132 S. Ct. 38, 42-43 (2011).

115. 391 U.S. 123 (1968).

116. 489 U.S. 288 (1989). *Teague* holds that habeas petitioners are entitled to the benefit of all decisions that come down before their petitions for certiorari on direct review are denied or the time to file such petitions has expired. *Id.* at 304-05. Finality thus refers to the denial of a petition for certiorari on direct review, or the expiration of the time to file such a petition.

117. *See* 523 U.S. 185, 195 (1998) (holding that the introduction of a nontestifying codefendant's statements implicating the defendant would violate the Confrontation Clause

federal habeas court should consider the state court's disposition of the case in light of the law that would apply under *Teague*, including all decisions that came down before traditional finality—in other words, that the court should consider the hard-likely counterfactual.

In a short, unanimous opinion by Justice Scalia, the Court declined, holding that “[t]he reasoning of *Cullen* [*v. Pinholster*] determines the result here.”¹¹⁸ Specifically, the Court referred to its reading of the text of § 2254(d)(1) in *Pinholster*, which required federal courts to “focu[s] on what a state court knew and did.”¹¹⁹ This continued focus on the actual conditions at the time of the state court's decision cements the Court's commitment to excluding hard-likely counterfactuals from the § 2254(d)(1) analysis, even in the face of inconsistency with other long-standing habeas rules, such as the *Teague* retroactivity principle. Though there were plausible differences between the two cases—facts and law are often treated differently in appellate review, for example—the Court maintained that § 2254(d)(1) requires a look at the actual (or, in the case of *Richter*, the possible). It does not permit a consideration of a would-have, no matter how likely.

It is worth pausing here for a moment to note that these issues are not merely technical oddities. In both *Pinholster* and *Greene*, a petitioner with a colorable constitutional claim that had never been heard in light of all the relevant information was precluded from obtaining federal habeas relief. In *Pinholster*, the petitioner's securing of an evidentiary hearing became a Pyrrhic victory when the Court forbade the *use* of any of that hard-won information to obtain relief. The majority had some vague suggestions for how information from a hearing could be useful—it might be possible, for instance, that a claim presented in light of that information could be considered a slightly different claim from that already adjudicated, thus freeing the petitioner from the restrictions of § 2254(d)(1).¹²⁰ But it is difficult to imagine that the Court would parse things so finely, considering a *Strickland* claim raised on a slightly different factual basis to be a different claim not subject to AEDPA deference. Indeed, the oral argument in *Pinholster* devoted eight transcript pages to the question of what would constitute a new claim and whether or not such a claim would be procedurally barred.¹²¹ But in the end, the opinion treats the ineffective assistance claim being brought with the new evidence as if it were the same

even when the prosecution replaces the defendant's name with blank spaces, the word “delete,” a symbol, or other similarly obvious alteration).

118. *Greene*, 132 S. Ct. at 44.

119. *Id.* (alteration in original) (quoting *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011)).

120. *Pinholster*, 131 S. Ct. at 1404 n.10 (“Though we do not decide where to draw the line between new claims and claims adjudicated on the merits, Justice Sotomayor's hypothetical involving new evidence of withheld exculpatory witness statements may well present a new claim.” (capitalization altered) (citations omitted)).

121. Transcript of Oral Argument at 17-24, *Pinholster*, 131 S. Ct. 1388 (No. 09-1088).

claim the state court heard before that evidence was known, without discussion.¹²² The *Pinholster* rule is likely to preclude the use of new evidence in the vast majority of claims, since the exhaustion requirement forces all claims into state courts first, thus producing, in most cases, an adjudication on the merits to which § 2254(d) must be applied, a point recognized by the Chief Justice at argument.¹²³ It is possible that state courts will then consider the new evidence and treat it appropriately under federal law. But if they do not, defendants with good claims could be entirely shut out.

Greene left a defendant similarly bereft. The Court took a paragraph in its otherwise terse opinion to note that “Greene’s predicament [was] an unusual one of his own creation,”¹²⁴ based on the fact that he did not file a petition for certiorari on direct review or raise his Confrontation Clause claim in state postconviction proceedings. But Greene, like many indigent defendants, did not have counsel in the period following dismissal of his petition for review by the Pennsylvania Supreme Court,¹²⁵ and had no way of knowing that he should have filed such a petition himself, nor had he the requisite skill to do so unassisted. And Pennsylvania’s postconviction procedures seemed to forbid the presentation of a claim that had already been adjudicated on direct review. In forbidding the federal court to consider what a state court would have done with the new case, AEDPA essentially cuts off unrepresented defendants’ access to a body of law that, under *Teague v. Lane*, applies to them. In sum, the *Pinholster* and *Greene* rules have the potential to keep meritorious claims from ever being adjudicated, leaving defendants whose constitutional rights were violated to serve life sentences (like Greene) or face execution (like Pinholster) without ever having the opportunity to advance all relevant facts and law before a court.

III. CAN THE DEPARTURE BE JUSTIFIED?

Taking all the changes in the last two Terms together, we can map the Court’s treatment of counterfactual reasoning in different situations as follows, with the brackets identifying cases where counterfactual reasoning is not allowed:

122. *Pinholster*, 131 S. Ct. at 1402 (majority opinion) (“Section 2254(d) applies to Pinholster’s claim because that claim was adjudicated on the merits in state-court proceedings.”).

123. Transcript of Oral Argument at 19, *Pinholster*, 131 S. Ct. 1388 (No. 09-1088) (“Chief Justice Roberts: I suppose—I suppose the Federal court can send it back to the State court for exhaustion. Mr. Bilderback: If—if that’s—if that’s an appropriate remedy.” (capitalization altered)).

124. *Greene*, 132 S. Ct. at 45.

125. See Brief for Petitioners at 6, *Greene*, 132 S. Ct. 38 (No. 10-637), 2011 WL 2470854 (“Following the Pennsylvania Supreme Court’s dismissal, petitioner’s appointed attorney mailed him a letter advising him that his representation was at an end.”).

TABLE 1

	Hard	Soft
Likely	Tort cases—causation <i>Kotteakos / Brecht</i> [<i>Pinholster / Greene</i>]	Severability Statutory interpretation / Congressional intent
Unlikely	<i>Chapman</i>	<i>Richter</i>

It is clear, then, that there is nothing inherent about counterfactual analysis that makes it distasteful to the Court, nor is there anything about habeas, or even AEDPA, that makes counterfactual reasoning generally inappropriate. Each of the four types of counterfactual analysis has been approved, including approval in the habeas context.

In the preceding two Parts, I have identified and evaluated the reasons provided by the Court for its holding that federal habeas courts may not consider a counterfactual in reviewing state court judgments. I found that those reasons did not justify the departure from the general principle that counterfactuals are acceptable. In light of the text and precedent cited by the Court in *Pinholster* and reiterated in *Greene*, either outcome might have been justified. Further, the Court's appeal to the background norm of federalism was incomplete in its failure to consider the countervailing interests in protecting rights, and inaccurate in its assumption that a counterfactual would actually significantly impinge on states' sovereignty.

In this Part, I will consider other possible justifications, not cited by the Court, for the departures in *Pinholster* and *Greene* from the norm regarding counterfactuals. I conclude that while the Court's reading of § 2254(d) is logically conceivable as a matter of statutory interpretation, there exists no good reason to discard the general presumption that counterfactual analysis is permissible. Accordingly, a full consideration of the balance between federalism and guarantee of rights, along with the norms surrounding the use of counterfactuals, requires the opposite results in *Pinholster* and *Greene*, and perhaps also in *Richter*.

A. *Hard/Soft?*

One possible explanation for the discrepancy is the difference between hard and soft counterfactuals. This difference could explain the inconsistency between *Richter*, where the Court allowed—indeed, required—counterfactual analysis, and *Pinholster/Greene*, where such analysis is forbidden. This explanation has both intuitive and textual appeal. On closer inspection, however, it becomes clear that the *Richter* holding is intensely problematic, and accordingly, any appeal to its simplicity is misguided.

Intuitively, there is a difference between the hard and the soft counterfactual. It makes some amount of sense to draw a line between the two, to allow even the slightest possibility that a given speculation reflects the truth of what actually happened to justify its acceptance. In other words, there is a difference between the possible and the impossible. This intuitive understanding then gives rise to a textual argument: if, as the *Pinholster* Court asserts, the statute's "backward-looking language requires an examination of the state-court decision at the time it was made,"¹²⁶ a point which is certainly debatable but is not entirely without foundation, then a hard counterfactual would be precluded. One could not consider something that was definitely *not* so at the time the decision was made. But a soft counterfactual would not be precluded; a court could, consistent with the command to be "backward-looking," take a wildly unlikely yet possible scenario concerning what the state court did and assume its truth, and then proceed to analyze the decision assuming that scenario was true.

This intuitively appealing explanation turns out to create more problems than it solves. Specifically, allowing the soft counterfactual here calls into question exactly what is being analyzed under AEDPA: Is it the state court's *opinion*? Its *reasoning*, whether stated or not? Or is it merely the outcome of the case, the simple grant or denial of relief?

We now know that it cannot be the opinion itself; if it were, summary denials would not be reviewable under AEDPA, and the *Richter* Court unequivocally held that they are.¹²⁷ And if it were simply the outcome of the state proceeding that mattered, federal courts would never engage with the state court opinion as written, which they do all the time, and indeed must do, else they would be tasked with a monumental amount of research and record review for every habeas petition they received in making an independent assessment of the outcome.

Further, a reliance on the simple outcome does not explain why the § 2254(d) analysis is not applicable in the case where the state court never reached the second prong of a two-pronged test, but a federal court determines that the second prong is essential.¹²⁸ For example, if a state habeas court hears a *Brady* claim¹²⁹ and determines that the concealed evidence was not actually exculpatory, thus failing to reach the question of materiality, a federal court reviewing this determination will consider this first prong under § 2254(d). But if

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

127. *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011).

128. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.").

129. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that the prosecution has a duty to turn over all exculpatory evidence to the defense; a defendant can secure reversal on a showing of two things: first, that exculpatory evidence was withheld, and second, that that evidence was material. *Id.* at 87.

the state court's analysis *fails* this test—if it *was* contrary to, or an unreasonable application of, clearly established federal law—then the federal court assesses the materiality prong *de novo*. If the question were simply whether the *outcome* is supportable under a reasonable application of federal law, there would be no reason for this practice, since the federal court could consider not what the proper resolution of the materiality prong is, but whether there is any way consistent with a not-unreasonable application of federal law that the state court could have reached its outcome of denying relief.

Thus, the item being reviewed cannot be the opinion, and it cannot be the outcome. In that case, what is it? The Court has never given a clear answer. *Richter* further raises a related problem that does not seem to have been anticipated by the Court: when there *is* an opinion that contains faulty (or, for AEDPA purposes, unreasonable) analysis, must the Court ignore the actual opinion and determine whether the result is supportable under any reasonable theory, whether or not the state court actually used that theory? The *Richter* opinion could be read to require this type of analysis:

Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.¹³⁰

“[A]s here” could mean “where there is no opinion,” though this reading would, of course, give state courts a huge benefit if they choose not to write opinions, since they could get credit for theories they had never even considered. There is no principled reason why a silent state court should get such a massive benefit of the doubt, where a diligent state court putting down its reasons in a carefully reasoned opinion gets no such benefit, and indeed, such a rule would give states every incentive to issue summary denials to avoid reversal.

The alternative, then, is that state courts should get this benefit whether or not they write opinions. That is, the federal habeas court should ignore opinions, and give the state court credit for any reasonable explanation for its outcome, whether or not the court actually relied on that reasoning. The great irony is that this, of course, requires crediting a hard counterfactual, in cases where there is an opinion that offers an unreasonable explanation for the outcome, but where a reasonable explanation exists. Such a reading would be inconsistent with *Greene* and *Pinholster*, which, as explained above, prohibit the use of a hard-likely counterfactual. And even leaving the inconsistency aside, this reading would give states a shocking amount of leeway. Perversely, it would also create something akin to *de novo* review—precisely what the Court has guarded against in its interpretations of AEDPA.

130. *Richter*, 131 S. Ct. at 786.

One commentator, Matthew Seligman, has proposed a partial theory of review under *Richter* that preserves some coherence.¹³¹ Under Seligman's proposal, rather than crediting any reasonable explanation that exists "in the air,"¹³² habeas courts should overturn convictions where the state court's procedural rules make it clear that the court could not have considered the relevant facts in ruling on the petitions.¹³³ Thus, in situations where the state's procedures forbid examining new evidence but the type of claim presented, by its nature, demands extra-record evidence (such as a *Strickland* ineffective assistance of counsel claim or a *Brady* withheld evidence claim), the federal habeas court may *not* assume that the state court acted reasonably. Though not phrased in terms of counterfactuals, this analysis does actually turn on whether the "reasonable" explanation is, or is not, a hard counterfactual. If the reasonable explanation is a hard counterfactual, the state court gets no credit for it; the court could not possibly have relied on that reasonable explanation.

Seligman's proposal has the virtue of consistency. Like *Greene* and *Pinholster*, it refuses to credit hard counterfactuals concerning actions of state courts, regardless of who (the state or the petitioner) gets the benefit. It also provides a path by which we might treat summary and fully reasoned dispositions differently without giving states a windfall, should courts choose not to write opinions. But the theory is limited in that it suggests one group of claims that must be reversed without providing a coherent general theory for how to analyze claims when there is no opinion. And, of course, it is not the law. But if the Court is serious about the hard/soft distinction, Seligman's proposal may provide the beginnings of a way forward. As it stands, however, the Court draws no coherent distinctions between hard and soft counterfactuals, and seems instead to draw its distinctions based on who would get the benefit. If it favors the state, credit the counterfactual. If it favors the petitioner, though, the counterfactual cannot be considered.

B. *Inherent in the Situation?*

One might also justify this departure by appealing to the special nature of the habeas context. After all, the Court has, for decades, been adamant that there are special considerations surrounding federal court review of state convictions. In particular, it could be argued that counterfactual analysis is uniquely inappropriate where a federal court is reviewing a state court decision, where the review is of the decision of a judge rather than a jury, or where the review is of an appellate court's decision rather than the findings of a trial court. I will discuss each of these in turn, concluding that these features cannot explain the

131. See Seligman, *supra* note 80.

132. Cf. FREDERICK POLLOCK, *THE LAW OF TORTS* 455 (11th ed. 1920).

133. See Seligman, *supra* note 80, at 499-500.

departure, as there are situations where each feature is generally compatible with counterfactual speculation in some slightly different context.

First, consider the possibility that the norm of permitting counterfactual analysis simply does not apply where federal courts are reviewing state convictions. This proposition is quickly defeated by a brief survey of the Court's habeas jurisprudence. Specifically, the standard applied explicitly to habeas review of state convictions in *Brecht v. Abrahamson* allows for counterfactuals.¹³⁴ As discussed above in Part I.B.2, *Brecht* prescribes the standard for harmless error review when a federal court finds error in a state court's criminal proceeding. Harmless error review entails a counterfactual, and a hard counterfactual at that. Further, the Court has been clear that *Brecht* continues to apply post-AEDPA.¹³⁵ So it cannot be the mere fact of federal review that makes hard counterfactuals inappropriate.

Another possibility is that the type of harmless error review usually performed on appeal involves considering what a *jury* would have done—not what the court, or the judge, would have done. The classic rhetoric of harmless error is certainly jury-centered.¹³⁶ But this is a matter of convenience, not an important distinction between judges and juries, because an appellate court can, of course, perform harmless error review in exactly the same way when the case was tried to a judge, not a jury.¹³⁷

Finally, there is the possibility that the review of a state appellate court's decision, rather than the conduct of a trial, renders counterfactual speculation inappropriate. It is difficult to draw comparisons on this point between habeas and other areas of law, since the vast majority of the time on direct review, even a second-level appellate court reviewing the action of an intermediate appellate court is essentially reviewing the action of the trial court. On habeas, in contrast, the opinions being reviewed generally come from state postconviction courts, which, at least in most states, are originally filed in appellate courts. The issues in these collateral proceedings are not the same as those at trial, so the habeas court cannot look to the trial court's work, the way an appellate court on direct review can. In other words, on habeas review, there is often no lower opinion in the equation—there is only the state court that issued the habeas decision, and the federal court reviewing it. Thus, if we are unable to find another place where the law allows counterfactual analysis in a higher appellate court's review of a lower appellate court's decision, it may well be because that

134. 507 U.S. 619, 637-38 (1993).

135. See *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007).

136. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (“[T]he risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.”).

137. See, e.g., *United States v. Poole*, 640 F.3d 114, 119-20 (4th Cir.) (performing harmless error review in an appeal from conviction after a federal bench trial), *cert. denied*, 132 S. Ct. 255 (2011).

situation rarely arises, at least not without the complicating presence of an even lower opinion.

There is, however, the fact that we allow federal habeas courts to do harmless error analysis for claims that actually fail § 2254(d)'s very permissive test. That is, if a federal habeas court finds that the state court applied entirely the wrong federal law in its analysis, it does not then automatically grant habeas relief. Instead, it must perform a harmless error analysis, considering what would have happened without the mistaken reasoning.¹³⁸ Again, this situation is tricky because one could see the harmless error analysis as actually applying to the original trial court's error, not the state appellate court's error in its postconviction review. The two merge, since if the state appellate court had recognized the error and conducted the proper analysis, the outcome might have been different—but only if the error at trial had not been harmless. And in this sense, it looks exactly like standard appellate review.

This head-spinning detour is merely intended to illustrate that there is no actual difference, in terms of what type of court is reviewing what type of opinion, between federal habeas review and other review. Accordingly, the distinction cannot justify departure from norms concerning the use of counterfactuals.

In sum, neither the federalism issue, nor the judge/jury issue, nor the trial/appellate issue can adequately explain why counterfactual reasoning should be treated differently on federal habeas. The possibility remains that there is something in the sum of these three conditions that arises where no individual condition triggers the change, but I have yet to come across any explanation for why this should be so. In *Greene* and *Pinholster*, the Court has left acknowledged constitutional violations unremedied and departed from a norm of permitting counterfactual analysis. In the face of ambiguous text and precedents, the Court appealed to background federalism norms, which cannot justify the departure, nor can any other conceivable distinction not cited by the Court in these two opinions. It appears, then, that a Court which has often been hard on criminal defendants has simply taken the opportunity presented by a poorly drafted statute to impose pro-state norms, without fairly considering the full range of relevant background principles necessary to come to a principled conclusion about the meaning of AEDPA.

IV. A MORE COHERENT APPROACH

In enacting AEDPA, Congress was insufficiently attentive to the particular oddities that the statute would produce. The statute does not speak clearly, and

138. See, e.g., *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (“Even if our precedent were to establish squarely that the prosecution’s use of the Peebles report violated Penry’s Fifth Amendment privilege against self-incrimination, that error would justify overturning Penry’s sentence only if Penry could establish that the error had substantial and injurious effect or influence in determining the jury’s verdict.” (internal quotation marks omitted)).

the Court's reading has produced anomalous results. *Richter* has shown us the danger of unbridled counterfactual speculation in all types of federal habeas review,¹³⁹ and *Greene* and *Pinholster* have illustrated the injustices that can arise from forbidding them. Clearly, a line must be drawn, and its current position is unsatisfactory. What, then, would a more thorough consideration of the relevant principles yield?

My primary purpose here has not been to propose a specific reform to habeas law. But considering current practice through the lens of counterfactuals does provide a new tool for addressing the vexing questions raised by AEDPA. Courts should acknowledge the prevalence of counterfactual analysis, and should apply it responsibly, endeavoring to strike a careful balance between respecting state judgments and protecting defendants' rights. Perhaps the best axis to use here is not the hard/soft one, but rather the likely/unlikely one. Such an approach would take into account the defendant's interest in a remedy for true deprivation of rights (a state court is likely to grant relief if the facts or law suggest a constitutional problem), while leaving intact judgments that were probably correct, even given the new information. It would allow a federal court to defer to a state court where possible, thus protecting the federalism norm, but give states the benefit of the doubt in considering what they probably would have done if they could have, a practice that preserves both the federalism and counterfactual norms while protecting defendants' rights. Crediting likely but not unlikely counterfactuals thus engages the background principles more accurately and completely.

This approach would flip the results in *Richter* (where it is unlikely that the state court actually engaged in a reasoned analysis at all), in *Pinholster* (where the evidence produced at the hearing created strong grounds for a *Strickland* claim), and in *Greene* (where the state court would almost certainly have given relief under *Gray*, where it could not do so under *Bruton*).¹⁴⁰

The obvious objection to this system is that it requires federal courts to strike out into the territory of guessing, both about what they think state courts actually did, and about the merits of a claim, such that they can guess what state courts *would have* done. (Query whether this would turn into an inquiry into what state courts *should have* done—an inquiry that threatens to rob AEDPA of its stringent standard of review.) This objection is less worrisome than the current regime, for two reasons.

First, habeas cases requiring counterfactual reasoning are either already rare or reasonably avoidable. If state courts want to receive deference, they should give some indication of their reasoning, or at least make it clear, through their processes, that petitions are being given due consideration. Part of what makes the *Richter* scenario a soft-unlikely counterfactual is the procedure by which California issues its "postcard denials," often very shortly after the

139. See *supra* Part II.A.

140. See *supra* Part II.

submission of petitions.¹⁴¹ This is preventable—the state courts could give the petitions more careful consideration. Crediting only the likely counterfactuals would not necessarily mean that states would have to write opinions for every denial, but rather that the process by which the petitions are considered and responded to would need to include indicia of care and reliability. If indeed the processes are reliable, and thus deserving of deference from federal courts, the counterfactuals faced by federal courts without written opinions to assess would cease to be unlikely. But if the state courts provide only cursory review, the counterfactual of meaningful review and justified denial would be unlikely, and would thus not receive credit from federal courts. And this would all be to the good—we should not shy away from a federal habeas system that requires states to give due consideration to federal claims.

And of course, the *Pinholster* and *Greene*-type claims are already rare. A *Greene* claim only arises when a relevant decision from the Supreme Court comes down in a very small window between the last state court opinion and finality, and when that decision actually raises a realistic prospect that the petitioner is entitled to relief. These claims are so rare that the Third Circuit referred to the *Greene* case itself as a “perfect storm.”¹⁴² And *Pinholster* claims only arise where there has been an evidentiary hearing properly held under § 2254(e)(2), which, the *Pinholster* dissent notes, occurs “in 0.4 percent of noncapital cases and 9.5 percent of capital cases.”¹⁴³ Thus, the extent to which this system would require federal courts to assess the likelihood of a given state court action is actually quite small, and is not significantly different from the kind of analysis both state and federal courts do all the time in considering claims of harmless error, causation, and many other legal questions.

CONCLUSION

In the last two Terms, the Supreme Court has taken a wrong turn in its habeas jurisprudence. AEDPA is a complex and ambiguous statute, which places great importance on the Court’s treatment of background principles to fill in the gaps. In *Pinholster* and *Greene*, the Court relied on an incomplete and inaccurate assessment of these principles to displace a well-settled norm of adjudication. Counterfactual analysis is a bedrock component of American legal practice; the Court should not assume that Congress intended to set it aside in this context without a clear indication or solid justification. The Court’s insistence, without any clear reasoning, that federalism norms demand this departure is a mistake. A careful consideration of the statute and the background norms

141. See Seligman, *supra* note 80, at 502 & n.155.

142. *Greene v. Palakovich*, 606 F.3d 85, 97 (3d Cir. 2010), *aff’d sub nom. Greene v. Fisher*, 132 S. Ct. 38 (2011).

143. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1413 (2011) (Sotomayor, J., dissenting) (citing NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 35-36 (2007)).

reveals that it is entirely possible to engage counterfactual analysis of state court reasoning thoughtfully and responsibly, continuing to give deference to the states while providing remedies for clear violations of constitutional rights.

As it continues to interpret AEDPA in future cases, the Court should keep its broader practices and principles in mind. In the meantime, we are left to wonder what the Court might have done had it fully considered its holdings in the context of counterfactual analysis.

