



ESSAY

The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law

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Abstract. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year statute of limitations for an inmate to file for federal habeas review after the completion of the direct appeal and the state collateral review process. Because AEDPA's statute of limitations is complex, many petitioners for federal habeas miss the deadline and, with it, their opportunity to have criminal convictions (including death penalty convictions) reviewed in federal court. This Essay examines the law that governs when and how the statutory deadline might be tolled should a habeas petitioner miss it due to his lawyer's errors. The Essay first looks at the *Holland v. Florida* doctrine, which outlines a petitioner's avenue to equitable relief when his lawyer has failed to meet the AEDPA deadline. The Essay argues that ever since the Supreme Court decided a similar but technically unrelated issue in *Maples v. Thomas*, lower courts have unjustly restricted the relief offered in *Holland* to instances in which a lawyer completely severs her agency relationship with her client. The Essay then analyzes the lawyer-client relationship under an equitable theory of agency law to argue that postconviction clients are too often burdened with the mistakes of their lawyers when courts adhere to a formalistic

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application of agency doctrine. The Essay proposes an alternative, basic negligence standard for determining when a postconviction client ought to suffer the burden of his lawyer’s errors. This standard would better align the law of postconviction relief with the fundamental principles of agency law that undergird the lawyer-client relationship.

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Introduction

Few areas of American law are more procedurally complicated, ethically challenging, or jurisprudentially flawed than that governing the habeas review of capital convictions.¹ The degree of complexity both in the law's design and in the ways in which it has failed is truly astounding, encompassing everything from racial injustice to cutting-edge DNA technology; from the tensions among truth, justice, and finality to the practical shortcomings of our system of indigent defense. No observer could possibly tackle this web of issues globally; instead, we propose to focus on one problem that may, in both its persistence and abstruseness, reflect the failings of habeas law more broadly, as well as say something about the values of our system of legal representation. At the very heart of this problem is the relationship between the lawyer and her client, the basic unit that grounds all of American law.

Our focus is the statutory deadline to seek federal habeas review of state court convictions—more specifically, the common law that governs when and how that deadline might be tolled should a habeas petitioner miss it due to his lawyer's error. The federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)² establishes this statutory deadline;³ and the standard a

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1. Habeas corpus is a civil action through which detainees can seek relief from unlawful imprisonment or from any other form of illegal detention (such as unconstitutional pretrial detention or deportation proceedings). *See generally* 39 AM. JUR. 2D *Habeas Corpus* §§ 28-84 (West 2015) (detailing the many circumstances under which habeas is available). Federal courts have long viewed the writ of habeas corpus as the central mechanism with which they can protect individual rights against “arbitrary and lawless state action,” *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969), and the right to the writ is preserved in the Suspension Clause of the U.S. Constitution, U.S. CONST. art. I, § 9, cl. 2. Modern federal courts use habeas corpus predominantly to provide postconviction relief to state and federal prisoners. *E.g.*, *Peyton v. Rowe*, 391 U.S. 54, 59 (1968) (“[Habeas corpus’s] major office in the federal courts since the Civil War has been to provide post-conviction relief.”). A federal court reviewing a habeas corpus petition will decide whether the petitioner’s custody violates the U.S. Constitution or laws of the United States; its purpose is not to relitigate the entire case. *See Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (“The court does not review a judgment, but the lawfulness of the petitioner’s custody *simpliciter*.”). In general, detainees can seek federal habeas corpus review only after they have exhausted all alternative avenues of relief, including direct appeals and state collateral review. *Boumediene v. Bush*, 553 U.S. 723, 793 (2008) (“[F]or prudential reasons this Court has required exhaustion of alternative remedies before a prisoner can seek federal habeas relief.”); *Rose v. Lundy*, 455 U.S. 509, 510 (1982) (holding that federal district courts may only consider the merits of habeas claims that have been exhausted in the state courts). Though the Supreme Court continues to trumpet the fact that “the Framers considered the writ a vital instrument for the protection of individual liberty,” *Boumediene*, 553 U.S. at 743, the effectiveness and proper scope of habeas corpus has been a subject of much controversy throughout the twentieth century, *see infra* Part I.A. Recently, both statutory and judicial law have drastically restricted prisoners’ access to habeas corpus relief. *See infra* Part I.A.
 2. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).
 3. 28 U.S.C. § 2244(d) (2014).

petitioner must meet to toll the deadline has been defined by a collection of judicial decisions, primarily the Supreme Court's decisions in *Holland v. Florida*⁴ and *Maples v. Thomas*.⁵ Our goal is to examine how this standard has been applied by the lower courts, to explicate the principles that animate the standard, and to develop a theory that better aligns the standard with those principles. Because of the standard's deep roots in the lawyer-client relationship, our study of the standard's inner workings will also shed light on the American system of legal representation more generally.

The standard, which requires a habeas petitioner to show that he "pursu[ed] his rights diligently" and that "some extraordinary circumstance" prevented timely filing,⁶ has come to be defined by an agency theory of the relationship between lawyer and client.⁷ The lawyer is her client's agent. As such, the lawyer must follow her client's directives; similarly, the client is held constructively responsible for his lawyer's errors.⁸ This basic formula, what we call the "formalist agency regime," has come to dominate legal thinking about the relationship between lawyers and clients.⁹ It also has blinded courts to the complexities of that relationship and to the importance of context in evaluating how that relationship actually functions in any particular case.¹⁰ Based on our analysis of the principles undergirding agency law—through which we develop what we call the "principled agency approach"—we conclude that the agency theory of the lawyer-client relationship ought to give rise to a unique legal standard in the postconviction context. Indeed, courts' strict formalist understanding of the agency idea has led, in many cases, to profoundly unjust results for prisoners seeking federal habeas review of their convictions when their lawyers negligently mishandled their habeas petitions.

Consider a prisoner waiting in a cell on death row for his execution date to arrive.¹¹ He has attempted to petition for a writ of habeas corpus to seek constitutional review of his conviction, thereby assuring that every avenue of

4. 560 U.S. 631 (2010).

5. 132 S. Ct. 912 (2012).

6. *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

7. See *infra* Parts I.B, I.C; see also *Maples*, 132 S. Ct. at 922 ("[T]he attorney is the prisoner's agent . . ."); *Holland*, 560 U.S. at 656 (Alito, J., concurring in part and concurring in the judgment) ("[T]he mistakes of counsel are constructively attributable to the client . . .").

8. *Holland*, 560 U.S. at 656 (Alito, J., concurring in part and concurring in the judgment).

9. See *infra* Part II.C.

10. This is explained further in Part II.C, which analyzes how the formalist agency regime—and the remedies it offers—fails to account for the particular harms caused by a negligent agent in the context of criminal trials and, more severely, in the postconviction context.

11. The following set of facts is closely abstracted from *Smith v. Commissioner, Alabama Department of Corrections*, 703 F.3d 1266 (11th Cir. 2012) (per curiam), in which the Eleventh Circuit declined to toll a missed deadline despite egregious lawyer misconduct.

justice has been pursued before the state can administer a lethal injection. He has no money and little access to any sort of useful information. Yet he has been able to establish contact with a team of law students who operate a clinic seeking to aid clients in exactly his position. The clinic, overburdened by its work with a huge number of similarly situated clients, secures professional representation for the inmate. The out-of-state lawyer they identify finds local counsel to complete the legal team.

The out-of-state and local lawyers assume responsibility for their new client's habeas petition. Soon, the two lawyers stop communicating with one another and with their client. Meanwhile, the local counsel, who has a history of substance abuse and is on probation for his own legal and ethical misdeeds, neglects to pay a required filing fee by the AEDPA deadline. Within months, the out-of-state counsel renounces his responsibility for the case, and the local counsel, overwhelmed by depression and addiction, commits suicide. The amount of time that has elapsed since the missed deadline continues to grow. No reasonable person could conclude that these lawyers pursued their client's best interests; yet, because of the missed deadline, the court dismisses the prisoner's habeas petition. Under the current standard, this inmate would most likely have no mechanism by which to seek a remedy for his lawyers' failure to pay the filing fee in a timely manner. He would not be able to toll the deadline.¹²

Such outcomes are shockingly common.¹³ Based on our analysis of agency law, our assessment of the relationship between lawyer and client, and our

12. As of February 2016, Ronald Bert Smith Jr. was still on death row. *Alabama Inmates Currently on Death Row*, ALA. DEPT OF CORRECTIONS, <http://www.doc.state.al.us/DeathRow.aspx> (last updated Feb. 2, 2016). A federal court has never reviewed Smith's death sentence on the merits.

13. Since Congress passed AEDPA in 1996, lawyers for at least eighty petitioners sentenced to death have missed the statute's one-year filing deadline for federal habeas review. See Ken Armstrong, *Death by Deadline, Part One*, MARSHALL PROJECT (Nov. 15, 2014, 4:30 PM), <https://www.themarshallproject.org/2014/11/15/death-by-deadline-part-one>. The deadline was tolled for only one-third of those petitioners, leaving two-thirds of them never having had their capital convictions reviewed by a federal court. *Id.* As of November 15, 2014, sixteen of those inmates had been executed. *Id.* Further, capital cases represent only a fraction of petitions that are foreclosed by AEDPA's statute of limitations. As of February 2016, Westlaw has categorized 2886 federal district court opinions as citing the headnote, based on *Holland v. Florida*, that the "[o]ne year statute of limitations on petitions for federal habeas relief by state prisoners is subject to equitable tolling in appropriate cases." A random sample of hits suggests that a vast majority of these cases have rejected prisoners' petitions to toll the one-year statute of limitations in order to receive federal habeas review; in fact, it is hard to find a case in which courts granted equitable tolling based on the *Holland* standard. See, e.g., *Sallie v. Chatman*, 34 F. Supp. 3d 1272, 1289 (M.D. Ga. 2014) (finding that despite the fact that petitioner's lawyers "did little to find suitable replacement counsel, and even less to help [petitioner] determine the federal habeas filing deadline," the lawyers' withdrawal from the case did not amount to an "extraordinary circumstance" under *Holland* (footnote omitted)); *Carlisle v. United States*, No. 5:10-cv-8018-SLB-HGD, 2013 WL 5328422, at *14 (N.D. Ala. Sept. 20, 2013) ("[Petitioner] is not entitled to equitable tolling
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application of these ideas to the postconviction equitable tolling context, we propose a new tolling standard—one that would permit prisoners in positions similar to that described above to seek and receive federal constitutional review of their state court convictions, despite the failings of their lawyers.

The Essay proceeds in five parts. Part I examines the legal background on AEDPA's filing deadline, explaining the current law on tolling the AEDPA deadline and its grounding in the courts' rigid application of agency law to the lawyer-client relationship; this Part focuses specifically on AEDPA itself and the tolling standard enunciated in *Holland* and confused by the federal courts of appeals after *Maples*. Part II then analyzes the deeper principles undergirding agency law and how those principles ought to shape an agency theory of the relationship between lawyer and client. Part III continues that analysis by examining the origins and evolution of the agency theory of the lawyer-client relationship. Part IV then reviews the "extraordinary circumstance" prong of the current equitable tolling standard and proposes it be replaced by a negligence standard. Part V finally assesses the "diligence" prong of the standard and proposes that prong be eliminated altogether.

I. Federal Habeas Corpus, AEDPA's Statute of Limitations, and the *Holland v. Florida* Doctrine of Equitable Tolling

A. AEDPA and the Origins of the Problem

Congress passed AEDPA amid a longstanding debate regarding the purpose, scope, and effectiveness of federal habeas review.¹⁴ Proponents of the

of the one-year statute of limitations for filing his § 2255 motion."); *Blount v. Biter*, No. SACV 12-00865 VBF (AN), 2012 WL 3150943, at *6-8 (C.D. Cal. Aug. 2, 2012) (denying petition for equitable tolling since alleged lawyer negligence and petitioner's limited access to a prison library did not amount to extraordinary circumstances under *Holland*); *Walker v. Hobbs*, No. 5:10CV00128 SWW/JTR, 2012 WL 551024, at *5 (E.D. Ark. Feb. 3, 2012) ("Even if the Court assumes that Petitioner could satisfy the *Holland* standard of 'serious attorney misconduct,' he cannot demonstrate that he acted diligently in pursuing federal habeas relief."), *report and recommendation adopted*, 2012 WL 550563 (E.D. Ark. Feb. 21, 2012).

14. Debates about the scope of federal habeas corpus have flared up repeatedly throughout the twentieth century. One notable moment occurred in the mid-twentieth century, when over a fifteen-year period the volume of federal habeas corpus petitions filed annually by state prisoners increased five-fold—to 660 petitions filed in the year 1955. Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 51 (1956). Then, in 1955, a bill designed to limit the jurisdiction of federal courts to review state prisoners' habeas petitions nearly became law, passing in the House but dying in the Senate. *Id.* at 50-51. In the aftermath of this upheaval, judges, practitioners, and scholars debated the proper scope of federal habeas, citing concerns (among others) for federalism, due process, and the finality of convictions. See, e.g., Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 453-62, 521 (1963) (arguing that a state has a legitimate interest in finality and that undermining it hinders effective law

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statute saw AEDPA as an important legislative step culminating more than twenty years of Supreme Court decisions limiting inmates' access to federal habeas review.¹⁵ These advocates believed that federal courts were flooded with frivolous habeas petitions coming years after convictions, which rarely were successful in obtaining relief.¹⁶ AEDPA was a victory for those who long

enforcement, but concluding that “[t]he existence, notorious and oft-exhibited, of grave inadequacies in the states’ criminal procedures, both original and postconviction, makes the federal habeas corpus jurisdiction a present necessity”); Pollak, *supra*, at 51 (discussing the concern of states’ attorneys general in increased federal scrutiny of state convictions); Comment, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98, 99-100 (1958) (“State officers resent having a lower federal court overturn a conviction affirmed by their highest tribunals, and take offense at attacks on the integrity of their judges and themselves.” (footnote omitted)). For an illuminating analysis of twentieth-century debates regarding the scope of federal habeas review, the evolution of judicial doctrine on the matter, and the rise of conservative critiques of federal habeas review that culminated in AEDPA, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 706-28 (2002).

15. See, e.g., Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 12 (2009) (“[F]rom the 1970s through the 1990s, the Supreme Court made it more difficult for state prisoners to obtain habeas relief in two ways: by narrowing the grounds on which courts can grant relief and by barring petitioners who fail to follow a variety of somewhat complicated rules from obtaining review of their claims.” (footnote omitted)); John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 269-70 (2006) (“In numerous cases decided between 1976 and 1996, . . . a majority of the Court embraced draconian applications of the procedural default doctrine and definitions of new and old rules, which made it very difficult for habeas petitioners to prevail. Thus, by the time Congress finally passed habeas ‘reform’ legislation, . . . the Supreme Court had dramatically reshaped the writ of habeas corpus.” (footnotes omitted)); Kimberly A. Thomas, *Substantive Habeas*, 63 AM. U. L. REV. 1749, 1759-61 (2014) (showing that from the 1970s to the 1990s, the Burger and Rehnquist Courts raised the procedural hurdles facing inmates applying for federal habeas review, and that Congress knowingly further reduced federal courts’ habeas jurisdiction by passing AEDPA).

16. This argument for limiting the scope of federal habeas review most famously originates with Justice Jackson, who wrote in 1953 that “[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones.” *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the result). Since then, commentators who would limit the scope of habeas, including members of Congress who passed AEDPA, have relied on this argument in some form. See, e.g., 141 CONG. REC. 15,062 (1995) (statement of Sen. Hatch) (“There were 2,976 inmates on death row as of January 1995. . . . There are multiple frivolous appeals in almost every one of these almost 3,000 death row cases. If they lose on one, they conjure up another one, and then they conjure up another one, and they conjure up another one”); Stevenson, *supra* note 14, at 728 (describing the proponents of AEDPA in the Senate debates leading up to the passage of AEDPA as complaining of the “abusive gamesmanship of capital prisoners”); Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513, 1515 (1997) (reviewing congressional debates preceding the passage of AEDPA, including Senator Hatch’s remarks that AEDPA would “stop the frivolous appeals that have been driving people nuts throughout this country and subjecting victims and families of victims to unnecessary pain for year after year after year” (quoting 141 CONG. REC. 14,524 (1995) (statement of Sen. Hatch))). Notably, the claim that federal habeas corpus review rarely

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argued for limits on federal habeas review in order to ensure the finality of criminal convictions.¹⁷ With AEDPA, Congress both required federal courts to employ a stringent standard of review for state convictions and created, for the first time, a one-year statute of limitations period for filing petitions for writs of habeas corpus in federal court.¹⁸

The statute, however, did not settle debates about the proper role of federal habeas review. AEDPA's critics continue to assert that federal habeas corpus must be expanded to protect the rights of defendants,¹⁹ or to protect the balance of power between federal and state courts in adjudicating questions of federal constitutional law.²⁰ Further, they point to the fact that, though

provides relief to petitioners persisted well after AEDPA passed. *E.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793 (2009) (arguing that federal habeas rarely secures the rights of state defendants in all but capital cases and merely wastes resources as a result).

17. *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 558 (1998) (“AEDPA’s central concern [is] that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.”); Stevenson, *supra* note 14, at 728-29 (describing how AEDPA was a victory for congressional opponents of federal habeas corpus review who long complained of the lack of finality in capital sentences and provided them “the result they had been seeking for years—the dramatic curtailment of federal habeas corpus”). Considering two predecessor versions of AEDPA pending in both houses of Congress, Michael O’Neill, a recent Special Counsel to the Senate Judiciary Committee, noted that “lawmakers and scholars seeking to reform habeas practice contend that it has been misused, that it serves to prevent the imposition of just punishment, contributes to the mismanagement of judicial resources, and creates uncertainty within the criminal justice system as it undermines principles of finality.” Michael O’Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 SETON HALL L. REV. 1493, 1494 (1996). O’Neill concluded that the bill properly balanced “the procedural protections afforded defendants against the need for maintaining the integrity and finality of the decisions of our state courts.” *Id.* at 1547.
18. *See* 28 U.S.C. §§ 2244(d)(1), 2263; Stevenson, *supra* note 14, at 702-03 (“[AEDPA] establishes a statute of limitations for habeas petitions [for] the first time . . . and . . . alters the standard of habeas corpus review in ways that appeared to call for greater deference to state court rulings on legal issues and mixed questions of fact and law.”).
19. *See, e.g.*, John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 471-79 (2011) (arguing that habeas corpus review still serves as an important protection for prisoners whose rights have been violated, and that, consequently, federal review should be bolstered by, among other things, eliminating AEDPA’s one-year statute of limitations); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 89-91 (2012) (arguing that though habeas claims that lead to overturned convictions are rare, federal habeas remains a central safeguard of constitutional criminal procedure); Stevenson, *supra* note 14, at 783-88 (considering mechanisms by which to broaden the grounds upon which federal habeas can be granted in the wake of AEDPA, focusing especially on eliminating AEDPA’s procedural bars); Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 594-95 (2009) (arguing that equitable tolling is central to the protections of habeas corpus, which, in turn, are central to the rights of the accused).
20. *See, e.g.*, Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753 (2013) (arguing that Congress cannot strip a federal court’s jurisdiction to review habeas

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overturned convictions are rare in federal habeas in general, they are less rare in capital cases.²¹ For example, of the twelve Texas death row inmates who have been exonerated since 1987, five of them found this extensive relief as a result of federal habeas corpus proceedings.²²

While avoiding explicit entanglement with these debates, the Supreme Court expanded access to federal habeas corpus in *Holland v. Florida*²³ and *Maples v. Thomas*.²⁴ In each case, the Court established exceptions to AEDPA's strict procedural bars to federal habeas review. Both cases, moreover, granted relief to petitioners based upon failings of their lawyers to adequately assert the petitioners' rights.²⁵ These exceptions to AEDPA's procedural bars are therefore grounded in the workings of the lawyer-client relationship.

This Essay argues for further expansion of federal habeas review, not by weighing in on the vast discourse surrounding the proper scope of federal habeas, but based upon a more modest ideological precept: that if the Court views federal habeas review as important enough to grant equitable relief to some petitioners wronged by their lawyers' errors, then it ought to do so on a principled basis. And if the framework the Court uses to provide for such relief is based in agency law, then the Court ought to use a consistent and coherent application of that framework. The remainder of the Essay defends and expands on that proposition.

B. *Holland* and *Maples*

The Supreme Court's decision in *Holland* outlines the most accessible avenue to relief for clients whose lawyers have committed errors in the postconviction context—particularly lawyers who have missed the AEDPA filing deadline for the federal habeas petition. Under AEDPA, defendants have

claims for which that court has personal jurisdiction over the incarceration of the inmate).

21. Note that even critics of federal habeas in general often view the process as an important protection for inmates on death row. See Hoffmann & King, *supra* note 16, at 818-23 (arguing for the abolition of federal habeas for most noncapital appeals, but for its robust preservation for death row inmates).
22. Armstrong, *supra* note 13.
23. 560 U.S. 631, 649 (2010) (tolling AEDPA's one-year statute of limitations where the petitioner pursued his rights diligently and "extraordinary circumstances" prevented timely filing).
24. 132 S. Ct. 912, 917, 927 (2012) (lifting the bar to federal habeas review for a defaulted state habeas claim where the procedural default was due to attorney abandonment).
25. *Id.* at 924 ("[A] client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him."); *Holland*, 560 U.S. at 652-53 (listing all of the ways in which the petitioner's lawyers failed him and holding that these failings amounted to extraordinary circumstances warranting equitable relief).

only one year to file for federal habeas review after they have completed their direct appeal.²⁶ In *Holland*, the Eleventh Circuit held that a lawyer's gross negligence on its own, absent a finding of "bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part," could never warrant equitable tolling of the AEDPA statute of limitations.²⁷ The Supreme Court, however, overturned the Eleventh Circuit's decision, stating that its "standard [was] too rigid."²⁸ The Court instead held that a defendant is entitled to equitable tolling of the deadline if he "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing."²⁹

The *Holland* Court emphasized that its holding was rooted in principles of equity; the Court observed that in questions of equity there is a need for "flexibility,"³⁰ and thus the equitable tolling question must be assessed by courts on a factual, "case-by-case" basis.³¹ The Court did not define "equity," but it seems reasonable to assume that the traditional distinction between decisions at law and those in equity animated its decision; whereas decisions at law formally apply a rule, "equity regards as done that which ought to be done."³² When courts apply principles of equity, they use more flexibility in considering a question of justice, just as the *Holland* Court did in granting the habeas petitioner access to federal habeas review in that case.³³ A provision for "equitable tolling" of AEDPA's statute of limitations does not appear anywhere in the statutory text, but the Court deemed such tolling necessary to spare a criminal defendant from unjustly suffering the harm of his lawyer's grievous misconduct.

Since *Holland*, however, some lower courts have moved away from an equity-based analysis in evaluating a habeas petitioner's entitlement to

26. 28 U.S.C. § 2244(d)(1) (2014). Note that the AEDPA statute of limitations is tolled during the pendency of state collateral review. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

27. *Holland v. Florida*, 539 F.3d 1334, 1339 (11th Cir. 2008) (per curiam), *rev'd*, 560 U.S. 631 (2010).

28. *Holland*, 560 U.S. at 634.

29. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

30. *Id.* at 650 (quoting *Holmberg v. Armbrrecht*, 327 U.S. 392, 396 (1946)).

31. *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)).

32. JONATHAN GARTON, *MOFFAT'S TRUSTS LAW: TEXT AND MATERIALS* 136 (6th ed. 2015) (italics omitted) (citing *Walsh v. Lonsdale* (1882) 21 Ch. D. 9 (Eng.)).

33. *Holland*, 560 U.S. at 650 (noting that, when identifying circumstances that require equitable tolling, a court should employ "flexibility" and "avoid[] 'mechanical rules'" (quoting *Holmberg*, 327 U.S. at 396)).

equitable tolling. Rather, Justice Alito's *Holland* concurrence,³⁴ which instead relied on a formalist application of agency law, has become the more predominant approach to equitable tolling of the AEDPA statute of limitations.³⁵ In his concurrence, Justice Alito declared that the *Holland* majority's fluid approach was impractical,³⁶ and relying instead on the law of agency, he asserted that the AEDPA statute of limitations should be tolled only when a lawyer's abandonment has severed the lawyer-client relationship.³⁷ The abandonment test is a derivation of formal agency law; it burdens the principal-client with his agent-lawyer's errors unless the agency relationship did not formally exist at the time of the error.³⁸ Justice Alito's concurrence thereby limits relief to those habeas petitioners for whom the lawyer-client relationship was completely severed—a narrow set of circumstances not likely to embrace many instances in which a lawyer misses the AEDPA filing deadline.

In *Maples v. Thomas*, the Court considered when a lawyer's misconduct allows a petitioner to claim "cause" for a procedural default of a state habeas claim in order to lift the bar to federal habeas review that would otherwise ensue.³⁹ Relying heavily on formal agency law, and citing Justice Alito's *Holland* concurrence, the *Maples* Court reasoned that a lawyer's errors are generally constructively attributable to the client.⁴⁰ However, when a lawyer abandons her client, the lawyer's errors can no longer be attributed to the

34. In the text of this Essay, we will refer to Justice Alito's concurrence in part and concurrence in the judgment simply as a "concurrence."

35. See *infra* Part I.C.

36. *Holland*, 560 U.S. at 657-58 (Alito, J., concurring in part and concurring in the judgment) (characterizing the majority's approach as a gross negligence test and concluding that "allowing equitable tolling in cases involving *gross* rather than *ordinary* attorney negligence would not only fail to make sense in light of our prior cases; it would also be impractical in the extreme").

37. *Id.* at 659 (reasoning that the petitioner's AEDPA deadline ought to be tolled because it constituted a case of abandonment, where the "litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word"). Justice Alito recently reiterated this position in his dissent to *Christeson v. Roper*, where, citing to *Holland*, he wrote: "These facts show nothing more than attorney error and thus fall short of establishing the kind of abandonment that is needed for equitable tolling under our precedent." *Christeson v. Roper*, 135 S. Ct. 891, 897 (2015) (Alito, J., dissenting) (citing *Holland*, 560 U.S. at 651-52)).

38. *Holland*, 560 U.S. at 659 (Alito, J., concurring in part and concurring in the judgment).

39. *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012).

40. The Court reasoned that though a postconviction attorney's procedural errors are generally attributable to a client, attorney abandonment is an exception to that rule. *Id.* at 922-23. Consequently, the Court limited the inquiry in *Maples*'s case to the question "whether *Maples* has shown that his attorneys of record abandoned him, thereby supplying the 'extraordinary circumstances beyond his control' necessary to lift the state procedural bar to his federal petition." *Id.* at 924 (citation omitted) (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring in part and concurring in the judgment)).

client because the agency relationship is severed.⁴¹ Under *Maples*, only after his lawyer abandons him can a petitioner claim cause for a state procedural default and subsequently pursue his federal habeas claim.⁴² Applying this reasoning to the facts at hand, the *Maples* Court held that abandonment constitutes an “extraordinary circumstance[] quite beyond [the client’s] control.”⁴³ Here the Court adopted its “extraordinary circumstances” language from *Holland* and applied it to the different procedural question raised in *Maples*.

The Court has thus presented two different tests for resolving two different procedural questions. Under *Holland*, a petitioner must satisfy two prongs (diligence and extraordinary circumstances) to toll AEDPA’s one-year deadline for federal habeas review. Under *Maples*, a petitioner must show extraordinary circumstances to prove “cause” for a procedural default of a state habeas claim to lift the ensuing bar on federal habeas review. To make matters more confusing, “extraordinary circumstances” is defined differently in each case: the *Holland* Court opted for an equity-based test that requires a case-by-case analysis, whereas the *Maples* Court adopted Justice Alito’s formalist agency theory to define extraordinary circumstances exclusively as attorney abandonment.

Though *Holland* and *Maples* laid out different tests to resolve different procedural questions, many lower courts, not surprisingly, have intermingled the two tests. Some circuit courts, following Justice Alito and the *Maples* Court, have decided that only instances of total attorney abandonment can satisfy the “extraordinary circumstance” prong of the *Holland* test.⁴⁴ This restriction misreads the relationship between *Holland* and *Maples*; it assumes that the Court in *Maples* revised the standard set forth in *Holland*, when in fact the two cases address different questions, and each therefore ought to have no direct bearing on the meaning of the other.⁴⁵ The restriction thus unfairly and

41. *Id.* at 922-23 (recognizing that in cases of abandonment the lawyer has “severed the principal-agent relationship, [meaning] an attorney no longer acts, or fails to act, as the client’s representative”).

42. *Id.* at 924.

43. *Id.* at 927.

44. See *infra* notes 49-57, 61 and accompanying text.

45. To be sure, the *Maples* Court relied on *Holland*, finding it “instructive.” *Maples*, 132 S. Ct. at 923. Noting that the Court saw “no reason . . . why the distinction between attorney negligence and attorney abandonment should not hold” in both the context of equitable tolling and the context of a state procedural default, *id.* at 924 n.7, the Court cited the *Holland* analysis, and particularly Justice Alito’s concurrence, in explicating the concept of abandonment and reaching its conclusion that “under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him,” *id.* at 924. This is unsurprising, as the *Holland* decision provided an apt analogy for contemplating the grave consequences of attorney misconduct with respect to postconviction procedure, and the Alito concurrence especially provided the theoretical underpinning for the abandonment idea. But by no means did *Maples* reverse engineer the majority holding in *Holland* to conclude, as the Eleventh Circuit has, see *infra* notes 49-57 and accompanying text, that only attorney abandonment

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incorrectly denies justice to habeas petitioners who have missed the filing deadline due to a lawyer error that might be egregious but that does not amount to true abandonment—a situation that ought to be governed by *Holland*'s more flexible test. Subpart C describes in greater detail the confusion displayed by those federal circuit courts that have interpreted the *Holland* standard.

C. The Circuit Courts' Confusion on *Holland*

As noted above, the lower federal courts have demonstrated confusion about the proper application of *Holland* after the Court decided *Maples*. Some circuits have held that abandonment constitutes one of a variety of possible extraordinary circumstances for the purposes of the *Holland* equitable tolling test,⁴⁶ while others have held that, since *Maples* was decided, abandonment represents the exclusive form of extraordinary circumstance warranting equitable tolling of the AEDPA statute of limitations.⁴⁷ In short, the lower courts have exhibited a significant amount of variation about how best to implement the flexible *Holland* test (perhaps lending credence to Justice Alito's argument in his *Holland* concurrence that the majority did not provide enough interpretive guidance to the lower courts⁴⁸). Our purpose here is not to present a comprehensive overview of the law of equitable tolling after *Holland* and *Maples*. Rather it is to demonstrate the problems plaguing the courts' divergent applications of the *Holland* equitable tolling test.

One example is the Eleventh Circuit, which has substituted the *Maples* abandonment test for the flexible *Holland* test. As summarized above, in *Smith v. Commissioner, Alabama Department of Corrections*, the petitioner's local postconviction counsel, C. Wade Johnson, was addicted to methamphetamine and involved in his own legal troubles while representing Smith, eventually

could constitute an extraordinary circumstance in the equitable tolling context. For the Court to do so would have been a significant exercise in judicial overreach, breaching basic tenets of justiciability; equitable tolling was not at issue in *Maples* and so it is hard to understand why the Court would have altered its previous ruling on the issue. Moreover, the Eleventh Circuit's interpretation misreads the case law. Since *Maples*, the Court has continued to recognize the distinction between these two lines of precedent. For example, recently in *Christeson v. Roper*, 135 S. Ct. 891 (2015), the Court characterized the *Holland* holding as requiring "serious instances of attorney misconduct," *id.* at 894 (quoting *Holland*, 560 U.S. at 652)—not exclusively abandonment—and described *Maples* as a "similar" (but not identical) context, *id.* The Court has never held that only cases of abandonment can give rise to extraordinary circumstances for the purposes of the equitable tolling analysis.

46. See *infra* notes 58-60 and accompanying text.

47. See *infra* notes 49-57, 61 and accompanying text.

48. See *Holland*, 560 U.S. at 655 (Alito, J., concurring in part and concurring in the judgment) ("Although I agree that the Court of Appeals applied the *wrong* standard, I think that the majority does not do enough to explain the *right* standard.").

committing suicide soon after he missed the AEDPA filing deadline.⁴⁹ Smith's out-of-state counsel, William Massey, never sought *pro hac vice* status and so was ineligible to file the motion for his client in Alabama.⁵⁰ The Eleventh Circuit held that, even though Johnson's conduct might have amounted to abandonment, Massey's did not, since, from his point of view, there was sufficient local counsel representing Smith.⁵¹ The court took this position despite the fact that there was no evidence Massey ever communicated with either Smith or with Johnson to ensure a timely filing.⁵² Thus, in light of its conclusion that Smith's lawyers never completely abandoned him, the Eleventh Circuit held that his AEDPA filing deadline should not be equitably tolled.⁵³

To the extent that *Smith* left any ambiguity in the Eleventh Circuit's position, the appellate court soon clarified its interpretation of the Supreme Court's jurisprudence. In *Cadet v. Florida Department of Corrections*,⁵⁴ the question whether anything short of abandonment (including gross negligence) could qualify for equitable tolling was squarely presented. The answer was a resounding no. "It is the Supreme Court," Chief Judge Carnes, writing for the panel majority, opined, "that has insisted that 'the essential difference' is not between simple negligence and egregious negligence, but instead between negligence 'however egregious' and abandonment."⁵⁵ Thus, rejecting the concurrence's suggestion "that adopting an abandonment standard . . . contravenes *Holland's* rejection of rigid, mechanical, per se rules in the equitable tolling context,"⁵⁶ the *Cadet* majority held that, "[i]n light of the

49. 703 F.3d 1266, 1272 (11th Cir. 2012) (per curiam); see also *supra* notes 11-12 and accompanying text.

50. *Id.* at 1273.

51. *Id.* at 1274 ("Smith has made no allegations that Massey, on or before October 2, 2002, when Smith's AEDPA limitations period expired, was aware of Johnson's significant personal and professional troubles such that Massey should have known that Johnson effectively was incompetent to represent Smith and that Massey was in effect Smith's only lawyer.").

52. See *id.*

53. *Id.*; cf. *Ryder v. Sec'y, Dep't of Corr.*, 521 F. App'x 817, 820 (11th Cir. 2013) (per curiam) ("The district court properly found that none of Ryder's attorney's challenged conduct rose to the level of abandonment and, thus, did not warrant equitable tolling."); *Hutchinson v. Florida*, 677 F.3d 1097, 1110 (11th Cir. 2012) ("More recently in *Maples*, the Court held that a lawyer's conduct that constitutes abandonment of his death row inmate client will also provide the necessary basis for equitable tolling of the federal habeas filing deadline." (citation omitted)).

54. 742 F.3d 473 (11th Cir. 2014).

55. *Id.* at 481 n.1 (quoting *Maples v. Thomas*, 132 S. Ct. 912, 923 (2012)).

56. *Id.* at 481 n.2; see also *id.* at 486 (Wilson, J., concurring) ("Despite the majority's assessment to the contrary, *Maples v. Thomas* did not 'recast' *Holland's* holding. . . . [T]he standard for equitable tolling set forth in *Holland*—that conduct by counsel must be considered on a case-by-case basis under the principles of equity—was not disturbed." (citation omitted)).

Supreme Court's *Maples* decision, . . . attorney negligence, however gross or egregious, does not qualify as an 'extraordinary circumstance' for purposes of equitable tolling; abandonment of the attorney-client relationship . . . is required."⁵⁷

Some circuits, however, have not relied on an agency framework or required abandonment for a habeas petitioner to show extraordinary circumstances warranting relief. For example, in *Nickels v. Conway*, the Second Circuit held that the appropriate standard is not whether the lawyer abandoned her client, thereby severing the agency relationship, but rather a more fact-based assessment of the egregiousness of the lawyer's conduct.⁵⁸ The Second Circuit is not alone in parting ways with the Eleventh Circuit's restrictive characterization of the Supreme Court's jurisprudence.⁵⁹ Other circuit courts have similarly interpreted the *Holland* test more broadly than the *Maples* abandonment test.⁶⁰ However, even within the Second Circuit, the law on this point is confused. While in *Nickels* the Second Circuit held that the *Holland* test is not restricted to abandonment, in *Rivas v. Fischer* it held that "in order to rise to the level necessary to constitute an 'extraordinary circumstance' for purposes of tolling § 2254's limitation period, attorney

57. *Id.* at 481 (majority opinion).

58. 480 F. App'x 54, 56-57 (2d Cir. 2012) (citing *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003)) (equating the abandonment test with a finding of severe negligence and holding that, whatever the test is called, an extraordinary circumstance occurred where a lawyer misled his client into believing that timeliness was not relevant and failed to file a habeas petition despite his client's repeated requests); *see also* *Dillon v. Conway*, 642 F.3d 358, 364 (2d Cir. 2011) (holding that where an inmate repeatedly asked his lawyer for assurances that the lawyer would file his habeas petition on time—specifically asking that the lawyer not wait until the last day to file the petition—and the lawyer subsequently missed the deadline by one day, the lawyer's conduct rose above "garden variety" negligence and constituted extraordinary circumstances warranting a tolled deadline); *Salas v. United States*, No. 14-CV-1915, 2015 WL 260574, at *2 (E.D.N.Y. Jan. 20, 2015) ("Whether 'extraordinary circumstances' justify equitably tolling the limitations period is a highly case-specific inquiry." (citing *Nickels*, 480 F. App'x at 56)).

59. In *Luna v. Kerman*, 84 F.3d 640 (9th Cir. 2015), for instance, the Ninth Circuit cited and rejected the Eleventh Circuit's *Cadet* decision, expressing skepticism that "the [Supreme] Court intended to hold in *Maples* that attorney misconduct falling short of abandonment may no longer serve as a basis for equitable tolling." *Id.* at 648-49. It concluded that, unless and until the Court "explicitly overrule[d] *Holland*," the Ninth Circuit's "cases holding that egregious attorney misconduct of all stripes may serve as a basis for equitable tolling remain good law." *Id.* at 649; *see also* *Manning v. Epps*, 688 F.3d 177, 184 & n.2 (5th Cir. 2012) (identifying abandonment as one possible type of extraordinary circumstance).

60. *See, e.g., Manning*, 688 F.3d at 184 & n.2; *Towery v. Ryan*, 673 F.3d 933, 936 (9th Cir. 2012) (per curiam) (presenting the *Holland* "egregious misconduct" standard and the *Maples* "abandonment" standard as alternatives).

negligence must be so egregious as to amount to an effective abandonment of the attorney-client relationship.”⁶¹

None of the lower courts have formulated a principled rule by which to define the extraordinary circumstances necessary for relief under *Holland*. Rather, the courts have either limited *Holland* to cases of abandonment⁶² or have applied unclear standards based on some measure of the egregiousness of the lawyer’s misconduct.⁶³ The first approach—limiting relief to cases of abandonment—is highly problematic. As argued above, this approach is in tension with the *Holland* Court’s reasoning, yields highly inequitable results such as those in the *Smith* case,⁶⁴ and (as this Essay will show) contravenes the core principles of agency law that it professes to apply. The latter approach—applying a loose standard dependent on the egregiousness of the lawyer’s conduct—similarly fails to distinguish those clients who deserve federal court review from those who do not, and ultimately restricts habeas relief to an inappropriately narrow class of cases.⁶⁵

61. 687 F.3d 514, 538 (2d Cir. 2012) (citing *Holland v. Florida*, 560 U.S. 631, 651-54 (2010)). *Rivas v. Fischer* is not an outlier case in the Second Circuit; the Second Circuit has since relied on this precedent, and some district courts have adopted the abandonment standard from this case as opposed to the broader *Nickels* standard. *See, e.g.*, *Martinez v. Superintendent of E. Corr. Facility*, 806 F.3d 27, 31 (2d Cir. 2015) (citing to *Rivas* for the statement of law that while most attorney errors do not constitute an extraordinary circumstance under *Holland*, effective abandonment does); *Whitted v. Martuscello*, No. 11 CV 1222(VB), 2014 WL 1345920, at *5 (S.D.N.Y. Apr. 3, 2014) (holding that the petitioner was not entitled to equitable tolling since he failed to show attorney abandonment).

62. *See supra* notes 49-57, 61 and accompanying text.

63. *See supra* notes 58-60 and accompanying text.

64. For further analysis of the inequities that result from strict application of the abandonment standard, see *Hutchinson v. Florida*, 677 F.3d 1097, 1104-11 (11th Cir. 2012) (Barkett, J., concurring in the result only). In her concurrence in the result only, Judge Barkett analyzed the myriad reasons why incarcerated death row petitioners might miss their federal habeas deadlines through no fault of their own, including: that appointed counsel in these cases often lack expertise to handle the highly technical work of postconviction representation, *id.* at 1104-05; that because of the realities of death row incarceration, including restricted access to phones or the Internet, inmates have a limited ability to communicate with their lawyers, *id.* at 1105-06; and the fact that most death row inmates are minimally educated, often mentally ill or illiterate, lack access to a library, and are generally ill equipped to supervise their legal representation, *id.* at 1106-07. Judge Barkett therefore reasoned that “none of the key assumptions underlying the application of an agency relationship to a death-sentenced client and his lawyer are valid in the post-conviction context.” *Id.* at 1104. The judge further concluded: “Under this reality, I question whether strict adherence to the principle that a death row inmate must bear the consequences of his lawyer’s negligence is fair or just.” *Id.* at 1111.

65. *See infra* Part IV.A (arguing that, whether a lawyer misses a deadline because of “garden variety” negligence or because of more egregious error, the client ought not bear such risk, because in either circumstance the client will bear the burden of his lawyer’s mistake and will not have an adequate remedy against his lawyer to recuperate the loss).

The Supreme Court left the lower courts with two contrasting and problematic options for considering when to toll a client's habeas deadline. On the one hand, the *Holland* majority's "fluid" equity test for equitable tolling is unclear. Justice Alito's critique might be on point; the majority in *Holland* did not provide guidance about what forms of lawyer misconduct would actually constitute an extraordinary circumstance.⁶⁶ On the other hand, reading the *Maples* abandonment test into the *Holland* test—as the Eleventh Circuit has done—is problematic in two ways: First, it is unprincipled in that it imports a formalist agency-based regime into a test that was rooted in equity and so was meant to be flexible. Second, it seems to yield highly restrictive and patently unjust results, in that it leaves petitioners like Smith without any remedy or access to constitutionally adequate habeas review.

The agency framework may be the correct approach to the question of when to attribute the misdeeds of a lawyer to her client in the postconviction context because it provides a more rigorous analytical template for courts to apply than the majority outlined in *Holland*; at the very least, we recognize that this is the unequivocal direction the law has taken and therefore ought to be the focus of our inquiry. However, the principles undergirding agency law—what we call the "principled agency approach"—are not captured and are not given effect by the limited abandonment doctrine. In fact, restricting relief to those cases in which abandonment has occurred, or to those cases evincing circumstances a court deems sufficiently "egregious," contravenes the core principles of agency law. Instead, we undertake an in-depth investigation of the roots of agency law to assess the situations in which an equitable test should indeed attribute the misdeeds of a lawyer-agent to her client-principal. This is the sort of inquiry the courts have neglected to perform. And what we find is that, because a client (particularly an incarcerated client in the postconviction context) is a unique sort of principal with almost no control over his agent-lawyer, and similarly because a lawyer is a unique agent (with unusually specialized expertise and a profound responsibility for the well-being of her client-principal) a principled agency approach would rarely, if ever, weigh in favor of shifting the cost of a missed deadline from a lawyer to her client.

II. Agency and Its Application to the Lawyer-Client Relationship

A. Agency Generally

As defined by the *Restatement (Third) of Agency*, "agency" is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise

66. *Holland*, 560 U.S. at 655 (Alito, J., concurring in part and concurring in the judgment).

consents so to act.”⁶⁷ The definition contains several critical elements that inform the analysis of missed filing deadlines in federal habeas.

The *Restatement’s* basic definition bears parsing. First, an agency relationship is fundamentally a “fiduciary relationship.” The *Restatement* groups an agent’s fiduciary duties to a principal into two large categories: duties of loyalty and duties of performance.⁶⁸ The duty of loyalty includes the positive duty that an agent act exclusively for the principal’s benefit as well as the negative duty that an agent refrain from behaviors (such as acting on behalf of an adverse party or acting in competition with the principal) that might compromise the agent’s ability to act exclusively for the principal’s benefit.⁶⁹ Duties of performance complement the positive element of the duty of loyalty. For example, agents must “act with the care, competence, and diligence normally exercised by agents in similar circumstances.”⁷⁰ Furthermore, “[i]f an agent claims to possess special skills or knowledge, the agent has a duty to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.”⁷¹ One additional duty of performance that is of profound relevance to the relationship between lawyer and client is the agent’s duty to provide information to the principal when the agent reasonably believes that the principal would want the information or the information is material to the agent’s other duties to the principal.⁷² As a fiduciary, the agent’s duties of loyalty and performance to the principal constrain all of the agent’s subsequent actions.⁷³

The second critical element of an agency relationship is the agent’s assumed responsibility to act “on the principal’s behalf.”⁷⁴ While this may seem to overlap with the fiduciary obligations of loyalty and care—and it largely does—it also suggests another vital concept, without which agency law would lose its defining purpose: agents act such that principals need not. In other

67. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. LAW INST. 2006).

68. *Id.* § 8.01 cmts. a, b (outlining the sections of the *Restatement* that define an agent’s duties of loyalty and stating that “[t]he general fiduciary principle complements and facilitates compliance with duties of performance that the agent owes to the principal”); see Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1052 & n.10 (2007).

69. RESTATEMENT (THIRD) OF AGENCY §§ 8.01-.06.

70. *Id.* § 8.08.

71. *Id.*

72. See *id.* § 8.11; see also, e.g., *Jackson Nat’l Life Ins. v. Receconi*, 827 P.2d 118, 133 (N.M. 1992) (noting that agents owe principals a duty “to disclose any fact that might affect [the] principal’s interests”).

73. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. b. It is also worth noting that the conception of agency as a fiduciary relationship, premised on the basic duties of loyalty and performance, has ancient roots and is reflected in a range of ancient legal systems, from Hammurabi’s laws to Islamic Sharia law. See TAMAR T. FRANKEL, *FIDUCIARY LAW* 79-96 (2011).

74. RESTATEMENT (THIRD) OF AGENCY § 1.01.

words, as their principals' representatives, agents are vested with the power to affect their principals' legal rights and obligations by commission of their own acts, without their principals' direct participation.⁷⁵ This point is again pertinent to our analysis, for, as we will show, though lawyers are employed to act as their clients' agents—and are employed to do so precisely because the client would struggle to navigate independently the esoteric legal system—in the habeas context, courts still require clients to demonstrate independent diligence in pursuing their own rights, a profoundly unjust and unwarranted requirement. Part V will explain further how the diligence requirement undermines this very core element of agency law—namely, that agents act so that principals need not.

Despite its centrality to the law of agency, the fact that agents act without their principals' immediate involvement may seem to be in tension with the idea that agents act solely for their principals' benefit. Without the principal present to direct his agent's actions, what might compel the agent to act only on the principal's behalf? This tension necessitates the third element of the *Restatement's* definition—that an agent act “subject to the principal's control.”⁷⁶ In practice, the requirement entails two kinds of constraints: First, agents can only perform those functions that they reasonably believe their principals have authorized.⁷⁷ And second, principals assume a duty to supervise, and thus to “control[,]” their agents' conduct.⁷⁸

An agent's authority is usually defined by contract and is then referred to as the agent's “actual authority,”⁷⁹ though courts also recognize other forms of authority, such as “apparent authority”⁸⁰ and “inherent authority,” in the absence of an explicit agreement.⁸¹ While the precise scope of an agent's actual

75. See *id.* § 1.01 cmt. c; see also 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY 1-2 (2d ed. 1914) (“[T]he word ‘agency’ . . . denotes an actor, a doer Thus, we speak of an agency, or more frequently of an agent, which acts or operates for a person.”). Like the duties of loyalty and performance, this tenet of agency law is an ancient one. See FRANKEL, *supra* note 73, at 79 (arguing that ancient as well as modern societies function best when relationships of dependence are made possible by laws that regulate such relationships).

76. RESTATEMENT (THIRD) OF AGENCY § 1.01.

77. See *id.* § 2.01 (describing an agent's actual authority); *id.* § 2.03 (describing an agent's apparent authority).

78. *Id.* § 7.05(1) (“A principal who conducts an activity through an agent is subject to liability . . . if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.”).

79. *Id.* § 2.01 & cmt. c.

80. See *id.* § 2.03. Apparent authority arises when a principal holds an agent out to third parties as having a certain degree of authority. *Id.* § 2.03 cmt. e.

81. See RESTATEMENT (SECOND) OF AGENCY § 8A (AM. LAW INST. 1958). Inherent authority was traditionally a messy doctrine that seems to have functioned as something of a catchall for determining the scope of an agency relationship when authority and control did not suffice. See *id.* § 8A cmt. a (“[T]here are situations in which the principal

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authority (like that of the duty of loyalty) varies from one agency relationship to the next, all agents are generally authorized to pursue their principals' interests in one way or another. Furthermore, all agents' fiduciary duties, such as the duty of loyalty, externally constrain their authority—for example, by default no agent is authorized to compete against his principal, unless the principal affirmatively waives this duty.⁸² By contrast, a principal's ability to control an agent once the agency relationship has been established can be tricky to define in general terms and is usually determined by the facts of a particular case.⁸³

The foregoing concepts—fiduciary duty, representation, authority, and control—help define the fundamental principles of agency law: agents carry with them their principals' legal rights and obligations and act according to their principals' wishes. Working only toward the principal's goals, within the range of the principal's reasonably understood intentions, and subject to the principal's control, an agent essentially renders a principal legally present where the principal is otherwise factually absent.⁸⁴

is made liable because of an act done or a transaction entered into by an agent even though there is no tort, contract or restitutional theory upon which the liability can be rested. A principle which will explain such cases can be found if it is assumed that a power can exist purely as a product of the agency relation.”). The term is not used in the *Restatement (Third) of Agency*. Marc I. Steinberg & Matthew D. Bivona, *Disney Goes Goofy: Agency, Delegation, and Corporate Governance*, 60 HASTINGS L.J. 201, 219 (2008) (“The *Restatement (Third) of Agency*, adopted in 2005, declines to use the term ‘inherent authority’ because it considers such authority to be covered by other doctrines (such as respondeat superior.”); Chad P. Wade, Note, *The Double Doctrine Agent: Streamlining the Restatement Third of Agency by Eliminating the Apparent Agency Doctrine*, 42 VAL. U. L. REV. 341, 353 (2007) (“[T]he *Restatement Third* only recognizes actual and apparent authority, while incorporating incidental and inherent authority into several other sections.”).

82. See RESTATEMENT (THIRD) OF AGENCY §§ 8.01, 8.04, 8.06 (describing an agent's fiduciary duty of loyalty, including the duty not to compete against the principal, and outlining the principal's power to consent to agent conduct that would otherwise violate the duty of loyalty).
83. Compare *Hoover v. Sun Oil Co.*, 212 A.2d 214, 216 (Del. Super. Ct. 1965) (holding that a parent company was not liable for a tort committed by a franchise of the company because the facts indicated an insufficient degree of control), with *Humble Oil & Ref. Co. v. Martin*, 222 S.W.2d 995, 997-99 (Tex. 1949) (holding that a parent company was liable for a tort committed by a franchise of the company because the facts showed a sufficient degree of supervision by the parent company to indicate it effectively controlled the franchise). Note that the question of a principal's control frequently arises in determining whether it should ultimately be liable for a tort committed by an agent. See RESTATEMENT (SECOND) OF AGENCY § 216 cmt. a (“[L]iability is normally based upon the fact that the tort is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to control his servant or other agent.”).
84. “Factually absent” does not necessarily mean “physically absent”—a client, for example, may be sitting beside his lawyer in the courtroom while the lawyer acts as an agent—but only that the principal is not in fact acting. When the agent acts, the principal is acting as a matter of law.

These concepts also help to elucidate a more fundamental definition of agency law as a legal mechanism through which a principal earns all those benefits and bears all those costs—but no more than those benefits and costs—that are within the lawful scope of the agency relationship. We define the lawful scope of the agency relationship as either the extent of the agent’s authority limited by his fiduciary duties to the principal, or the extent of the principal’s ability to control the agent, whichever is greater. When the agent incurs costs or benefits on the principal’s behalf as a result of conduct within the scope of the agency relationship, these costs and benefits ought to redound to the principal; when the agent incurs costs and benefits as a result of conduct constructively outside the scope of the agency relationship, these costs and benefits ought to redound to the agent. This distribution of costs and benefits is the fundamental principle that agency law is designed to protect. We call it the “principled agency approach.”

Finally, when circumstances have distributed such costs and benefits incorrectly, agency law provides for a system of liability that properly redistributes losses according to the dictates of the principled agency approach. This system begins with the premise that any loss or benefit that arises from an agent’s action is initially imputed directly to the principal.⁸⁵ An agent’s liability then grows naturally out of the structure of the agency relationship: when an agent’s conduct occurring outside the lawful scope of the agency relationship—that is, conduct either beyond the agent’s authority (including the general requirements of his fiduciary duties) or beyond the principal’s ability to control—proximately causes the principal to bear a loss, then the principal may sue the agent to recover that loss.⁸⁶ If the agent’s conduct occurred within the scope of the relationship, however, then the principal cannot sue the agent and must bear the loss.

The mechanics of this system are thus clear: any benefits or losses that are within the scope of the agency relationship—defined as the range of the agent’s authority and other duties to the principal, or the range of the principal’s effective control over the agent, whichever is greater—accrue to the principal. Conversely, any benefits or losses (and especially losses, since this is a system of

85. *See, e.g.,* *Stockwell v. United States*, 80 U.S. 531, 548 (1871) (“[T]he tortious act of the agent is the act of his principals, if done in the course of his agency, though not directly authorized.”); *Koval v. Simon Telelect, Inc.*, 693 N.E.2d 1299, 1304 (Ind. 1998) (“Because the principal puts the agent in a position of trust, the principal should bear the loss.”).

86. *See, e.g.,* RESTATEMENT (THIRD) OF AGENCY § 8.08 cmt. b (“[A]n agent is subject to liability to the principal for all harm . . . caused the principal by the agent’s breach of . . . duties. . . . The agent’s liability includes an obligation to indemnify the principal . . .”). This section of the *Restatement* specifically addresses liability resulting from an agent’s breaching the duty of care, competence, and diligence; other sections defining other duties establish a similar mechanism for indemnification with respect to an agent’s violation of those duties. *See, e.g., id.* § 8.02 cmt. e (describing the application of a similar system when the agent breaches the fiduciary duty of loyalty by acquiring a material benefit from a third party as a result of the agent’s position).

indemnification) arising from conduct outside the scope of the agency relationship—meaning conduct both beyond the agent’s authority (as constrained by his other duties to the principal), and also beyond the principal’s ability to control the agent—do not ultimately accrue to the principal and instead accrue to the agent. Liability thus restores the proper distribution of benefits and costs between the parties, and as a result the principal’s circumstances are ultimately undistorted by the agent, as if the agency relationship had never existed and the principal had acted on his own behalf from the beginning. This is the essence of the principled agency approach.⁸⁷

The foregoing discussion represents only a broad overview of agency law, a legal field about which scholars have written treatises numbering in the thousands of pages. Nevertheless, the basic outline of agency law, and more importantly the principled agency approach that underlies it, should be clear. Furthermore, this theory provides the relevant background to understanding the nature of the relationship between lawyers and clients. As the courts have come to understand them, lawyers are agents and clients are principals. Normally, formalist agency doctrine describes this relationship rather well. Sometimes, however, it does not. In certain cases, the formalist agency regime governing the relationship between lawyers and clients fails to adhere to the values underlying the principled agency approach. Costs accruing outside the lawful scope of the agency relationship are imposed on the client undeservedly, and inappropriately narrow avenues to indemnification leave the client without a remedy by which to seek proper redistribution of those costs. The following Subpart explores this problem in greater detail.

B. Agency and the Relationship Between Clients and Lawyers

As noted above, the Supreme Court held in *Maples* that “the attorney is the prisoner’s agent.”⁸⁸ While we disagree with how courts have implemented this theory in the postconviction context, we nonetheless agree that the law of agency presents a convenient lens through which to understand the structure of the lawyer-client relationship and the corresponding legal principles by which it is generally governed. Under the construct of agency law, the client is

87. In a sense, our theory utilizes the same concept as abandonment. The abandonment theory holds that when a lawyer has abandoned his client, every lawyer’s act, negligent or otherwise, occurs outside the scope of the agency relationship because there is no agency relationship. No act or omission by the lawyer can be attributed to the client. Our theory merely notes a basic tenet of agency law: that even when an agency relationship still exists, certain agent acts nevertheless continue to fall outside the agency relationship and so should not, after indemnification, be attributed to the principal. The goal of our Essay is to explain how this generally accepted principle ought to be operationalized in the postconviction context.

88. *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012); see also 2 *MECHEM*, *supra* note 75, at 1726 (“The relation of attorney and client is a relation of agency, and, in its general features, is governed by the same rules which apply to other agencies.”).

the principal and the lawyer is the agent; the client authorizes the lawyer to make legal decisions on his behalf, and the lawyer thereby substantively determines the client's consequent legal status. At least superficially, then, the relationship very much assumes the structure of a traditional agency relationship.

The most important consequence of characterizing the lawyer-client relationship as one of agency is the notion that "the principal bears the risk of negligent conduct on the part of his agent."⁸⁹ As applied to the relationship between lawyer and client, this fundamental tenet of formalist agency doctrine means that a client must bear the consequences of his or her lawyer's negligence in the course of a representation. The client's remedy against the lawyer under such a circumstance is indemnification by the lawyer: the client can sue for malpractice, provided he can prove a breach of duty, causation, and damages.⁹⁰ The elements of a malpractice claim map cleanly onto the principled agency approach in that those losses proximately caused by a lawyer's breach of duty are, tautologically, outside the lawful scope of the agency relationship—they are by definition beyond the lawyer's authority and the client's ability to control the lawyer's conduct. When a lawyer's negligence causes the client losses for which monetary compensation is appropriate, the system of indemnification usually functions at least passably well: agency law is able to redistribute more or less correctly the costs and benefits between lawyer and client. But as this Essay demonstrates, the entire story is neither so neat nor so fair.

Before outlining precisely how agency law fails in the postconviction context, however, we note that lawyers are not only subject to a negligence standard of liability; they are also subject to a standard of professional conduct. This standard hews to the codes of professional responsibility adopted in nearly every U.S. jurisdiction.⁹¹ These codes are generally quite similar to each

89. *Maples*, 132 S. Ct. at 922.

90. See 1 RONALD E. MALLIN & ALLISON MARTIN RHODES, *LEGAL MALPRACTICE* § 1:1 (West 2016) ("There is agreement that attorneys . . . should not be treated differently than other professionals, such as doctors or dentists, who are similarly subject to a suit for malpractice."); *id.* § 1:7 ("Even if there was a negligent error, many lawsuits fail because of the lack of provable damage. A cause of action that would not have succeeded even if competently prosecuted cannot result in malpractice liability for failing to prevail.")

91. See *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Feb. 2, 2016). Note that technically these codes establish *professional* standards of conduct that determine eligibility for bar membership and thus do not have legally dispositive force in establishing a lawyer's fiduciary duties. But they do serve as strongly persuasive evidence in fiduciary breach cases. See, e.g., *Mirabito v. Liccardo*, 5 Cal. Rptr. 2d 571, 573 (Ct. App. 1992) ("[The rules of professional conduct], together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client.")

other, following the American Bar Association's Model Rules of Professional Conduct, which describes with specificity a lawyer's special fiduciary duties.

The rules and corresponding duties reinforce the prevailing norm that lawyers serve their clients and ought to work only to further their clients' interests; they bolster the duty of loyalty, and are thus in accord with our view of the principled agency approach. These special duties include a duty of competence, which requires that a lawyer act with "the legal knowledge, skill, thoroughness and preparation necessary for the representation,"⁹² and a duty of diligence, which requires that a lawyer "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."⁹³ The Model Rules of Professional Conduct also firmly constrain a lawyer's discretion to represent the client while operating under a conflict of interest, and even go so far as to protect the integrity of a lawyer's relationship with a former client.⁹⁴ They are thus entirely consistent with, and indeed underline, the notion that all costs incurred beyond the lawful scope of the lawyer-client agency relationship ultimately ought to redound to the lawyer. And again, when the client's loss is easily compensable, this system most often works well; when the client's loss is not of such a nature, however, the system fails. It is the latter category of circumstances on which we must focus.

C. The Failure of the Formalist Agency Regime

As this discussion has already suggested, the ability of the formalist agency regime to properly govern the lawyer-client relationship—its ability to distribute costs and benefits appropriately between principal and agent—is, under current law, severely undermined in the postconviction context when the lawyer has committed anything less than a very egregious error, typically abandonment. This Subpart will describe this phenomenon.

We can analyze the circumstance of a lawyer's error in terms of the values embedded in the principled agency approach that the formalist doctrine attempts—but here fails—to protect. When a lawyer commits an error in the civil context, the malpractice action effectively redistributes costs and benefits between principal and agent such that the client no longer bears losses appropriately attributable to his lawyer's error. This is because the losses a client might bear as a result of a lawyer error in the civil context are almost always monetary. Malpractice indemnification thus makes the client whole through simple repayment.

92. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2013).

93. *Id.* r. 1.3 cmt. 1.

94. *See id.* r. 1.7, 1.9 (addressing these restrictions).

In the context of a criminal trial and appeal, however, the remedy of malpractice falls short and thus the formalist system falters. This is because where the client's loss is that of liberty, the only truly fair remedy for a lawyer's error is a new trial or appeal pursuant to a Sixth Amendment ineffective assistance of counsel claim.⁹⁵ Monetary indemnification through a malpractice action cannot make whole a client who is incarcerated due to his lawyer's error. The ineffective assistance remedy, however, eludes all but the luckiest of criminal defendants thanks to the strict standard articulated in *Strickland v. Washington*.⁹⁶ Under that standard, a criminal defendant not only must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," but he also must show prejudice.⁹⁷ The former is at least as difficult to show as negligence, as evidenced by the fact that, in most jurisdictions, any prior dismissal of an ineffective assistance of counsel claim results in the collateral estoppel of any subsequent malpractice claim regarding the same representation.⁹⁸ As a consequence, many clients who may be feeling the very significant cost of a lawyer's mistake—a criminal conviction and sentence—must nevertheless bear that cost without compensation. Agency law and the parallel ineffective assistance doctrine utterly fail to appropriately⁹⁹ distribute losses between the client and his agent, the attorney.

95. Although ineffective assistance of counsel is a constitutional doctrine and is applicable only in the criminal context, it serves a similar function as the civil malpractice action, which is governed by state law. In fact, malpractice suits remain a viable option for some criminal defendants whose criminal lawyers have erred—though not in many jurisdictions. *See infra* note 101. Nevertheless, in our view, money damages simply cannot compensate for a lawyer's mistake in the criminal arena. In a formalist sense, then, agency law as an independent doctrine (and its attendant allowance only for money damages) actually fails egregiously here; but because the ineffective assistance doctrine has developed alongside it as a matter of constitutional law, the failure at least appears to be functionally less egregious.

96. 466 U.S. 668 (1984).

97. *Id.* at 687.

98. *See* JOHN M. BURKOFF & NANCY M. BURKOFF, *INEFFECTIVE ASSISTANCE OF COUNSEL* § 1:10 (West 2015) ("[A] majority of (but not all) appellate courts considering the issue have concluded that a prior determination that defense counsel was *not* ineffective *does* have a collateral estoppel effect on subsequent legal malpractice proceedings.>").

99. An "appropriate" loss for the client to bear might, for example, be a criminal sentence for a crime the client actually did commit or could not have successfully defended against. As described in note 95 above, the doctrine on ineffective assistance of counsel is not actually rooted in agency law; instead, it derives from constitutional law. *See, e.g., Strickland*, 466 U.S. at 687 (holding that an ineffective assistance of counsel claim first "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"). This may partly explain why it so insufficiently compensates clients who bear losses as a result of lawyer errors. Nevertheless, because agency law itself provides only money damages, the ineffective assistance doctrine is the only mechanism available to make whole a criminal defendant who has been aggrieved by his lawyer's error. This problem thus
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The situation is analogous but worse in the postconviction context: when a lawyer error during postconviction proceedings results in a poor outcome for a client, the available avenues for relief are even narrower. For instance, when a lawyer misses a deadline, he has clearly acted outside the lawful scope of the agency relationship. The client would not have authorized the lawyer to act negligently (and of course a lawyer who acts negligently also breaches his fiduciary duty of care and his professional responsibility under the jurisdiction's applicable rules); and furthermore the client, possibly sitting on death row, could not reasonably have controlled the lawyer's conduct. Thus, the losses stemming from the missed deadline are outside the relationship's lawful scope, and so the client ought not bear the consequences.

Despite the inherent unfairness of this approach, the formalist agency regime has come to dominate courts' understanding of equitable tolling, and, as a result, the avenues for relief have come to be extremely limited. This is because, again, the formalist agency regime itself is geared towards providing only monetary indemnification, an entirely useless remedy to a convicted prisoner who may be sitting on death row. Otherwise, the formalist agency regime can provide truly adequate relief (namely, equitable tolling of the deadline) only if the client can show attorney abandonment, or lawyer neglect so egregious and so profound that no agency relationship could properly be said to have existed at the time of the missed deadline.¹⁰⁰ Indeed, if the lawyer was not in fact functioning as the client's agent, then the lawyer's error in missing the deadline cannot be attributed to the client. But if the lawyer was still functioning as the client's agent as a general matter—if the lawyer had not wholly abandoned her client—and the missed deadline was instead the result of a single, merely negligent failure (falling outside the scope of the agency relationship), then the formalist doctrine requires that the lawyer's errors be attributed to her client-principal. And then the aggrieved client's only recourse is to seek grossly insufficient monetary indemnification via a malpractice suit.¹⁰¹

only underscores the failure of operative doctrine to align properly with the principled agency approach that should define the lawyer-client relationship in any context.

100. *See supra* Part I.C.

101. In most jurisdictions, postconviction prisoners, similar to criminal defendants, can in fact bring malpractice suits only once they have successfully navigated habeas or otherwise had their underlying convictions overturned. *See, e.g., Steele v. Kehoe*, 747 So. 2d 931, 933 (Fla. 1999) (“[W]e find that we should follow the majority rule and hold that a convicted criminal defendant must obtain appellate or postconviction relief as a precondition to maintaining a legal malpractice action.”); *Berringer v. Steele*, 758 A.2d 574, 597 (Md. Ct. Spec. App. 2000) (“Public policy considerations prompt us to align ourselves with those jurisdictions that have imposed appellate, post conviction, or habeas relief, dependent upon attorney error, as a predicate to *recovery* in a criminal malpractice action, when the claim is based on an alleged deficiency for which appellate, post conviction, or habeas relief would be available.”); *Noske v. Friedberg*, 670 N.W.2d 740, 745 (Minn. 2003) (“Our holding today is a recognition that as long as a

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This is entirely unfair, and entirely inconsistent with the principled agency approach. As a response, we propose reforms to current doctrine that might bring it more into line with its animating principles. Granted, this means parting from the letter of formal agency law with its emphasis on money damages in favor of a more equitable system that provides avenues to other forms of relief. But then that is entirely the point—the very doctrine at issue is *equitable* tolling, and “[e]quity regards as done that which ought to be done.”¹⁰² Therefore, it is the principles underlying agency law, and not formalist agency law itself, that must determine the postconviction prisoner’s avenues to relief.

In the following Parts, this Essay will propose reforms to the current law on missed habeas deadlines. Specifically, the proposal focuses on further expanding the kinds of relief toward which *Holland* gestures first by suggesting that negligent lawyer misconduct ought to meet the “extraordinary circumstance” prong of the test, and second, by suggesting that the diligence prong ought to be eliminated altogether. Quite simply, equitable relief is necessary since the legal relief offered by the formalist agency regime—money damages—is fundamentally inequitable for a postconviction prisoner and fundamentally inconsistent with the principled agency approach. Only equitable relief can cure the unfair loss the client has been forced to bear—in this context, the inability to air a habeas claim in federal court as a result of the missed deadline.

III. *Link v. Wabash Railroad* and the Erosion of the Agency Theory in the Civil Context

Before outlining the proposal in detail, it is instructive to summarize the genesis of the idea that clients must bear the risk of loss for their lawyers’

valid criminal conviction is in place a legal malpractice cause of action based on a defense counsel’s ineffective assistance cannot withstand a . . . motion to dismiss.”); *Stevens v. Bispham*, 851 P.2d 556, 561 (Or. 1993) (en banc) (“[I]t is inappropriate to permit a person who has been convicted of a criminal offense to assert in the courts a claim for legal malpractice in connection with that conviction unless and until the person has challenged successfully the conviction through the direct appeal or post-conviction processes now provided by Oregon law, or the person otherwise has been exonerated of the offense.”); *Gibson v. Trant*, 58 S.W.3d 103, 116 (Tenn. 2001) (“[W]e hold that a criminal defendant must obtain post-conviction relief in order to maintain a legal malpractice claim against his defense lawyer.”). Moreover, in other jurisdictions “a convicted criminal who files a legal malpractice claim against his or her defense counsel must allege and prove that he or she is innocent of the underlying crime.” *Rodriguez v. Nielsen*, 609 N.W.2d 368, 374 (Neb. 2000); see also *Ang v. Martin*, 114 P.3d 637, 642 (Wash. 2005) (en banc) (“[P]roving actual innocence, not simply legal innocence, is essential to proving proximate causation, both cause in fact and legal causation.”). This sort of catch-22 only magnifies the inequity of the doctrine as it presently operates.

102. GARTON, *supra* note 32, at 136 (italics omitted). This is a common refrain.

mistakes because those lawyers act as their clients' agents. Not only does the original legal context in which this idea arose bear little resemblance to the postconviction context, but also courts have already begun to depart from the formal strictures of the agency framework in that original context. Yet they continue to adhere to it in the postconviction context, where it makes even less sense. This demonstrates the even more compelling need to reform the latter.

Link v. Wabash Railroad,¹⁰³ decided by the Supreme Court in 1962, is the seminal case responsible for the modern-day understanding of lawyers as their clients' agents,¹⁰⁴ and it continues to represent that doctrine's harshest application.¹⁰⁵ The case does not concern equitable tolling, but it parallels what we see as the flaw in the Court's tolling jurisprudence. In *Link*, the Court affirmed the dismissal of a civil plaintiff's case for want of prosecution even though the lawyer—not the plaintiff-client—was responsible for the error.

The facts of the case are as follows: A plaintiff sued in federal court, seeking to recover for personal injuries stemming from an automobile accident.¹⁰⁶ More than six years after the plaintiff brought suit, the court scheduled a pretrial conference to be held on a particular date at 1:00 PM in Hammond, Indiana, and notified counsel for each side.¹⁰⁷ Although the morning prior to the conference the plaintiff's counsel confirmed that he would be at the hearing the next day, at 10:45 AM on the day of the scheduled hearing, the plaintiff's counsel telephoned the judge's secretary to tell him that he was otherwise engaged in Indianapolis and would be unable to attend the hearing that afternoon.¹⁰⁸ The court, frustrated that plaintiff's counsel did not appear, *sua sponte* reviewed the case history, found that the plaintiff's lawyer had not stated any reasonable excuse for his nonappearance, and dismissed the action "for failure of the plaintiff's counsel to appear at the pretrial, for failure to prosecute this action."¹⁰⁹

103. 370 U.S. 626 (1962).

104. See, e.g., Stephen White, *The Universal Remedy for Attorney Abandonment: Why Holland v. Florida and Maples v. Thomas Give All Courts the Power to Vacate Civil Judgments Against Abandoned Clients by Way of Rule 60(b)(6)*, 42 PEPP. L. REV. 155, 160-61 (2014); see also Gomez v. City of N.Y., 805 F.3d 419, 424 (2d Cir. 2015); Choice Hotels Int'l, Inc. v. Grover, 792 F.3d 753, 754 (7th Cir.), cert. denied, 136 S. Ct. 691 (2015); Chira v. Lockheed Aircraft Corp., 634 F.2d 664, 667 (2d Cir. 1980); Mutuelle Generale Francaise Vie v. Life Assurance Co. of Pa., No. 87-cv-10014, 1988 WL 139415, at *5 (N.D. Ill. Dec. 19, 1988).

105. See, e.g., Wendy Zorana Zupac, *Mere Negligence or Abandonment?: Evaluating Claims of Attorney Misconduct After Maples v. Thomas*, 122 YALE L.J. 1328, 1362 (2013) (contrasting *Link* with cases in which "[s]ubsequent courts have . . . injected flexibility into the Supreme Court's 'mechanical rule'"); see also *infra* notes 120-21 and accompanying text.

106. *Link*, 370 U.S. at 627.

107. *Id.*

108. *Id.* at 627-28.

109. *Id.* at 628-29 (quoting unfiled decision of the district court).

The Supreme Court affirmed the lower court's dismissal of the suit.¹¹⁰ Justice Harlan's majority opinion rejected "the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct impose[d] an unjust penalty on the client."¹¹¹ Instead, he invoked the idea that has since developed into the formalist agency regime, explaining that "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"¹¹² Harlan cited several rationales for this principle: (1) because the plaintiff "voluntarily chose this attorney as his representative in the action," he could not "now avoid the consequences of the acts or omissions of this freely selected agent";¹¹³ (2) the client had a remedy against the lawyer in the form of a malpractice action for dismissal of the suit;¹¹⁴ and (3) "keeping th[e] suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant."¹¹⁵

In his dissent, Justice Black reacted to what he, by contrast, saw as the majority's undue (and unfair) quickness to "visit the sin of the lawyer upon his client," commenting that "there [was] no justification, moral or legal, for [the district court's] punishment of an innocent litigant for the personal conduct of his counsel."¹¹⁶ Throughout his dissenting opinion, Black used language that resonates with the problems we have identified in utilizing the formalist agency regime in postconviction litigation. For example, although Black disagreed that the plaintiff's lawyer was solely responsible for the six-year delay as a matter of fact, he noted that, even assuming this was the case, it seemed "contrary to the most fundamental ideas of fairness and justice to impose the punishment . . . upon the plaintiff who . . . was simply trusting his lawyer to take care of his case as clients generally do."¹¹⁷ To illustrate that such an outcome, stemming from a formalistic rather than a realistic application of

110. *Id.* at 636.

111. *Id.* at 633.

112. *Id.* at 634 (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).

113. *Id.* at 633-34.

114. *See id.* at 634 n.10 ("[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice.").

115. *Id.* (emphasis omitted). These rationales often do not apply in the postconviction context: the lawyer is likely government appointed, there is no equitable malpractice remedy available, and the opposing party is the government, which is much better suited to bear the cost of keeping the case alive than is a private defendant in a civil case. *See infra* Parts IV-V.

116. *Id.* at 637 (Black, J., dissenting) (quoting *Link v. Wabash R.R.*, 291 F.2d 542, 548 (7th Cir. 1961) (Schnackenberg, J., dissenting)).

117. *Id.* at 643.

agency law, ignored “the practicalities and realities of the lawyer-client relationship,” Black gave the hypothetical example of a lawyer who asked for the court to dismiss her client’s case:

There surely can be no doubt that if the plaintiff’s lawyer had gone into court without authority and asked the court to dismiss the case so as to bar any future suit from being filed, this Court would repudiate such conduct and give the plaintiff a remedy for the wrong so perpetrated against him. Or had the trial judge here, instead of putting an end to plaintiff’s substantial cause of action, simply imposed a fine of several thousand dollars upon the plaintiff because of his lawyer’s neglect, I cannot doubt that this Court would unanimously reverse such an unjust penalty. The result actually reached here, however, is that this Court condones a situation no different in fact from either of those described above.¹¹⁸

Finally, Justice Black attacked the majority’s conclusion that dismissal was warranted in order to clear the district court’s docket and remove congestion. He noted that not only did the lower court accomplish exactly the opposite by spurring litigation over the dismissal, but also it “undercut[] the very purposes for which courts were created—that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties.”¹¹⁹

In the end, we would argue that Justice Black was correct in concluding that *Link’s* holding “[was] not likely to stand out in the future as the best example of American justice.”¹²⁰ Over time, lower courts have eroded the case’s import considerably, and “[d]espite the bold and broad language of the *Link* opinion, the agency theory no longer enjoys unanimous support” in civil cases involving procedural default.¹²¹ For example, the Third Circuit has “increasingly emphasized visiting sanctions directly on the delinquent lawyer, rather than on a client who is not actually at fault” in nonhabeas civil cases.¹²² The Sixth Circuit has also, “[s]ubsequent to *Link*, . . . discouraged involuntary dismissals without prior notice [to the client],”¹²³ and the Fourth Circuit has recognized that “[w]hen the party is blameless and the attorney is at fault, . . . a

118. *Id.* at 646.

119. *Id.* at 648.

120. *Id.* at 649.

121. William R. Mureiko, Note, *The Agency Theory of the Attorney-Client Relationship: An Improper Justification for Holding Clients Responsible for Their Attorneys’ Procedural Errors*, 1988 DUKE L.J. 733, 737 & n.27; see also Douglas R. Richmond, *Sanctioning Clients for Lawyers’ Misconduct—Problems of Agency and Equity*, 2012 MICH. ST. L. REV. 835, 847-48 (“[C]ourts wisely appear to be retreating from the holding in *Link* and, when possible, attempting to address litigation misconduct by lawyers and clients separately rather than treating them as unitary when imposing sanctions.”).

122. *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 807 (3d Cir. 1986) (reinstating a civil rights discrimination case dismissed by the trial court due to negligence by the plaintiff’s lawyer and requiring that any consequent losses suffered by the defendant be reimbursed by the neglectful lawyer).

123. *Rogers v. City of Warren*, 302 F. App’x 371, 376 (6th Cir. 2008) (applying a more lenient test than *Link* in determining whether to dismiss a case based on lawyer neglect).

default judgment should ordinarily be set aside.”¹²⁴ Other federal courts have marginalized the case by distinguishing it on its facts. For example, in *Gutting v. Falstaff Brewing Corp.*¹²⁵ and *Jackson v. Baden*,¹²⁶ the Eighth and Fifth Circuits, respectively, held that *Link* was not controlling where the lawyer’s conduct was not so egregious as to be “inexcusable”¹²⁷ or was merely “negligent . . . rather than ‘intentional’ or ‘contumacious.’”¹²⁸ And state courts have not hesitated to reject it on state law grounds.¹²⁹

Collectively, these courts have replaced what they see as *Link*’s inequitable and formulaic holding with more flexible and equitable frameworks to govern procedural default cases, similar to what we advocate in the postconviction context. For example, the Third Circuit now examines six factors to determine whether to dismiss a plaintiff’s case for want of prosecution:

(1) the extent of the party’s personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.¹³⁰

Further, in *Dunbar v. Triangle Lumber & Supply Co.*, the Third Circuit created a procedural requirement of client notice before a district court can dismiss for want of prosecution.¹³¹

Other circuits have applied similar rubrics, also reasoning that dismissal is a harsh sanction that ought to be used sparingly.¹³² Under this line of

124. *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 811 (4th Cir. 1988) (per curiam).

125. 710 F.2d 1309, 1315 (8th Cir. 1983) (extending the period of time for answering the defendant’s request for admissions because the lawyer’s neglect was not so severe as to warrant dismissal).

126. No. 96-30037, 1996 WL 460130, at *3 (5th Cir. Aug. 1, 1996) (per curiam) (holding that a sanction as harsh as dismissal should be used sparingly).

127. *Gutting*, 710 F.2d at 1315.

128. *Jackson*, 1996 WL 460130, at *3.

129. See, e.g., *Dimon v. Mansy*, 479 S.E.2d 339, 348 (W. Va. 1996) (“We believe the time has arrived to disassociate the civil practice in this State with the position taken in *Link* . . .”).

130. *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 868 (3d Cir. 1984); see also, e.g., *In re Asbestos Prods. Liab. Litig.* (No. VI), 718 F.3d 236, 246 (3d Cir. 2013); *Bull v. UPS, Inc.*, 665 F.3d 68, 80 (3d Cir. 2012).

131. 816 F.2d 126, 129 (3d Cir. 1987) (noting that the clerk of court should have provided the client with notice of the hearing on the defendant’s motion to dismiss, and remanding back to the lower court because, while the lawyer’s neglect was sufficient to warrant the sanction of dismissal, the trial court did not fully apply the *Poulis* test and the client bore no responsibility for the failure to prosecute).

132. See, e.g., *Mulbah v. Detroit Bd. of Educ.*, 261 F.3d 586, 589 (6th Cir. 2001) (applying a four-part balancing test to determine that the district court abused its discretion by dismissing the case); *Alexander v. Local 496, Laborers’ Int’l Union of N. Am.*, 177 F.3d

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reasoning, the greater “the lawyer’s disregard of his obligation toward his client” relative to the client’s own fault, the more the circumstances dictate that any sanctions should be imposed directly on the lawyer rather than on the client through dismissal of the case.¹³³ This means that, where a lawyer is completely to blame for a particular failure, courts consider it unjust to sanction the client (in effect) for the lawyer’s failings through dismissal of the case. For example, where the delinquent lawyer has a record of “disinterest and incompetence” regarding this plaintiff, such as by failing to communicate with the client, the court may more easily deduce that a client “played no role in the derelictions of” his counsel¹³⁴ and so should not bear its consequences. Precisely the same logic should hold in habeas matters.

Thus, in the civil procedural context at least, a variety of federal courts have endorsed something similar to our principled agency approach. Errors that really do begin and end with the lawyer—errors that occur outside the lawful scope of the agency relationship—redound to the lawyer and not to the client. An appropriate distribution of costs and benefits between the lawyer and client therefore ensues. Functionally speaking, the principled agency approach has largely replaced the formalist agency regime in the want-of-prosecution context despite the fact that the formalist regime was first developed precisely there.

Although courts have continually moved away from *Link* and recognized the inequities of the formalist agency approach in the context of nonhabeas civil cases, the agency theory for which it stands continues to be strictly applied in the context of equitable tolling in habeas cases. Yet the infirmities

394, 404 (6th Cir. 1999) (“Defendants suggest that [*Link*] supports their proposition that the knowledge of a litigant’s counsel is imputed to the litigant. However, there are exceptions to this rule when, as here, equity requires such.” (citation omitted)); *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 424 (7th Cir. 1998) (refusing to apply *Link* to the facts of the case); *Dodson v. Runyan*, 86 F.3d 37, 40 (2d Cir. 1996) (listing factors that include “[1] the duration of the plaintiff’s failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party’s right to due process and a fair chance to be heard, and [5] whether the judge has adequately assessed the efficacy of lesser sanctions” (alterations in original) (quoting *Alvarez v. Simmons Mkt. Research Bureau, Inc.*, 839 F.2d 930, 932 (2d Cir. 1988))); *Velazquez-Rivera v. Sea-Land Serv., Inc.*, 920 F.2d 1072, 1076 (1st Cir. 1990) (“[T]his misconduct is insufficient to warrant the extreme sanction of dismissal.”); *Foley v. United States*, 645 F.2d 155, 157 (2d Cir. 1981) (concluding “the district court abused its discretion in denying the plaintiffs’ motion to vacate the dismissal” where the lawyer’s errors did not approach “inexcusable neglect”); *see also* *Smith v. Wilcox Cty. Bd. of Educ.*, 365 So. 2d 659, 661 (Ala. 1978) (“The general rule, of course, is that a court has the inherent power to act *sua sponte* to dismiss an action for want of prosecution. However, since dismissal with prejudice is a drastic sanction, it is to be applied only in extreme situations.” (citation omitted)).

133. *Dodson*, 86 F.3d at 40.

134. *Daniels v. Loizzo*, 175 F.R.D. 459, 462 (S.D.N.Y. 1996).

that courts have identified in *Link*'s reasoning apply with even greater force in determining whether to equitably toll AEDPA's one-year statute of limitations. Parts IV and V thus elaborate on our proposed revision of current equitable tolling doctrine, so as to bring that doctrine more into line with the principled (and indeed equitable) agency approach underlying it.

IV. The "Extraordinary Circumstance" Prong of the *Holland* Test: Implementing a Negligence Standard

Holland requires that in order to be entitled to equitable tolling, a petitioner must be able to show that "he has been pursuing his rights diligently" and that "some extraordinary circumstance stood in his way" that prevented a timely filing.¹³⁵ As we have indicated above, many courts have determined that only attorney abandonment can meet the extraordinary circumstance requirement.¹³⁶ But the abandonment standard is both highly inequitable and fundamentally inconsistent with the principled agency approach. While we will also argue that any kind of diligence requirement is profoundly unfair and inconsistent with the principled agency approach, we begin with our proposed reform of the "extraordinary circumstance" standard¹³⁷ because it elucidates in a finer-grained way how exactly the principled agency approach would operate in the equitable tolling context, and because our analysis of the diligence prong to some extent depends on and follows from our analysis of the extraordinary circumstance prong. In this Part, we begin by explicating exactly why the formalist agency regime—and the resultant doctrine that only attorney abandonment merits equitable tolling—is fundamentally inappropriate by comparing the elements of an equitable tolling claim to those of a malpractice claim in the civil context. We then suggest why a negligence standard for equitable tolling would be practicable, addressing a number of potential counterarguments.

A. The Reasons for a Negligence Standard

A key point in the structure of the formalist agency regime is that the client has a remedy against the lawyer through a malpractice suit for those losses incurred as a result of lawyer conduct falling outside what we have defined as the lawful scope of the agency relationship. In *Link*, the Supreme Court stated in a footnote that, "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is

135. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

136. See *supra* notes 49-57 and accompanying text.

137. And we do so in spite of the fact that the *Holland* Court listed this prong of the test second.

against the attorney in a suit for malpractice.”¹³⁸ Since then, virtually every court that has employed the agency theory to bar a client’s relief in a civil action has consoled itself by reiterating the maxim that the continued availability of the malpractice remedy means that a court’s “decision does not leave a client without remedy against the negligent attorney,”¹³⁹ and the client “has not necessarily forfeited his ‘day in court’ solely by reason of his lawyer’s misconduct.”¹⁴⁰ But as we have discussed, the monetary damages available in a malpractice action (even if such an action is actually available) are grossly inadequate to compensate for a criminal conviction and any attendant deprivation of liberty.

Compounding this reality is the fact that, even in the civil context, a malpractice suit may sometimes provide inadequate protection under the principled agency approach. Courts’ widespread departure from *Link* in all but the equitable tolling arena has been largely motivated by resounding criticism of the premise that a malpractice suit actually provides an adequate remedy for a client aggrieved by her lawyer. Scholars have recognized that, even in the typical civil case, “malpractice suits are notoriously difficult to prosecute” and “will also usually involve additional expense, . . . inconvenience and delay.”¹⁴¹ There are also concerns that the client will be unable to fund another lawsuit—particularly where “the mere passage of time may have insuperably increased the second attorney’s difficulties in building a case from ground zero.”¹⁴² Furthermore, “[t]he discouraged [client] may not even be aware of this possible

138. *Link v. Wabash R.R.*, 370 U.S. 626, 634 n.10 (1962).

139. *Universal Film Exchs., Inc. v. Lust*, 479 F.2d 573, 577 (4th Cir. 1973) (“Our decision does not leave a client without remedy against the negligent attorney. Lawyers are not a breed apart. Where damages are inflicted upon innocent clients by other professionals, such as doctors or dentists, the remedy is a suit for malpractice.”); *see also, e.g., Pryor v. U.S. Postal Serv.*, 769 F.2d 281, 289 (5th Cir. 1985) (“While we are sympathetic to the plight of a client prejudiced by his attorney’s inadvertence or negligence, the proper recourse for the aggrieved client, as the Supreme Court noted in *Link*, is to seek malpractice damages from the attorney.”); *Inryco, Inc. v. Metro. Eng’g Co.*, 708 F.2d 1225, 1235 (7th Cir. 1983) (“The idea that a default judgment may penalize the innocent and let the guilty lawyer go free is tempered by the fairly common knowledge that a viable avenue for relief exists for truly deserving litigants. Just as with other professionals, a remedy for an attorney’s professional negligence is a suit for malpractice.”); *Titus v. Mercedes Benz of N. Am.*, 695 F.2d 746, 757 n.4 (3d Cir. 1982) (“The client’s recourse for perceived legal malpractice lies in an action against his attorney.”); *Schwarz v. United States*, 384 F.2d 833, 835-36 (2d Cir. 1967) (“Unfortunately, it may be that plaintiff has a meritorious cause of action and will be denied his day in court. This does not, however, require reversal. As the Supreme Court pointed out in footnote 10 in the opinion in *Link*, if the attorney’s conduct was substantially below what is reasonable under the circumstances, the client’s remedy is a suit for malpractice.” (citation omitted)).

140. *Sexton v. Uniroyal Chem. Co.*, 62 F. App’x 615, 621 (6th Cir. 2003).

141. John E. Tice, Comment, *The Demise (Hopefully) of an Abuse: The Sanction of Dismissal*, 7 CAL. W. L. REV. 438, 448-49 (1971); *see also, e.g., Richmond, supra* note 121, at 856-57.

142. Tice, *supra* note 141, at 449.

remedy, or may be unaware of the usually short statute of limitations” for malpractice claims.¹⁴³

Outside the habeas arena, courts have echoed the concerns of these scholars, some even holding that, although an aggrieved client generally “should be compelled to seek redress by action against the attorney[,] . . . he should not be required to pursue this course, *if the remedy in the end, would be either doubtful or inadequate.*”¹⁴⁴ In particular, the Third Circuit has noted “that [the] remedy [of malpractice] does not always prove satisfactory” because “[i]t may be difficult for the client to obtain and collect a judgment for damages,” and because “public confidence in the administration of justice is weakened when a party is prevented from presenting his case because of the gross negligence of his lawyer.”¹⁴⁵ Courts have been particularly receptive to such arguments, for instance, where a lawyer is “judgment-proof,”¹⁴⁶ where a large amount of loss would be suffered in the interim,¹⁴⁷ and where the client has suffered harm that cannot be adequately compensated with compensatory damages (such as loss of the right to appeal).¹⁴⁸ As this range of examples

143. *Id.*

144. *Amco Builders & Developers, Inc. v. Team Ace Joint Venture*, 666 N.W.2d 623, 630 (Mich. 2003) (quoting *Loree v. Reeves*, 2 Mich. 133, 137 (1851)).

145. *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 808 (3d Cir. 1986).

146. *Tolbert v. Busiedlik*, No. 99 C 6599, 2001 WL 293118, at *1 (N.D. Ill. Mar. 23, 2001) (reaching the merits of plaintiff’s amended complaint despite the fact that the case was initially dismissed due to plaintiff’s lawyer’s failings, for to dismiss the case due to the lawyer’s errors would be particularly unfair where plaintiff’s lawyer was judgment-proof, lacking malpractice insurance or any significant assets).

147. In *Community Dental Services v. Tani*, for instance, the Ninth Circuit rejected the district court’s argument that the client’s “remedy for his counsel’s gross negligence was not relief from the default judgment but rather a separate action for malpractice.” 282 F.3d 1164, 1171 (9th Cir. 2002). Noting that “such an action . . . [was] an insufficient remedy to justify foreclosing the possibility of relief under Rule 60(b)(6),” the court explained:

Relief from a malpractice action often comes after substantial delay, if at all, and it increases the amount of litigation in our courts. Additionally, there is no guarantee that money damages obtained in a malpractice action that results in a verdict years later will serve to alleviate the consequences of the default judgment. . . . Also, of importance, the “remedy” of a malpractice action does not address the critical issue of the court’s order barring [the plaintiff] from using the name under which he has been operating his business for a number of years. . . . A malpractice action cannot restore retroactively the intangible business benefits that ensue from the continued use of a name that has previously identified a business to the public. Thus, relief under Rule 60(b)(6) may often constitute the only mechanism for affording a client actual and full relief from his counsel’s gross negligence—that is, the opportunity to present his case on the merits.

Id. at 1171-72 (citation omitted).

148. For example, this issue has surfaced in the context of parental rights. Where a parent lost her right to appeal the outcome of a termination proceeding due to her errant lawyer, one court recognized that “a civil malpractice action against” a mother’s attorney is not available as a “meaningful remedy for the loss of her right to appeal.” *See People ex rel. A.J.*, 143 P.3d 1143, 1149 (Colo. App. 2006). In another case, a court recognized that money damages in an awarded malpractice action would not “provide an apt remedy in the context of a termination case, where the effect of counsel’s

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demonstrates, courts have already begun to recognize implicitly in the civil context that the malpractice action does not always accord with the principled agency approach in the sense that too often it leaves a client to bear losses incurred by conduct of his lawyer occurring outside the lawful scope of the agency relationship.

All of these concerns that plague the malpractice remedy on the civil side apply with even greater force in the habeas context. Most obvious is the concern that the right lost—the petitioner’s opportunity to protect his liberty interest—cannot possibly be compensated by mere money damages. This reality is compounded by all of the difficulties that characterize any malpractice suit, as well as by the crucial fact that a malpractice remedy is virtually unavailable to the vast majority of habeas petitioners because most jurisdictions bar former criminal defendants from bringing malpractice claims unless and until their convictions have been overturned.¹⁴⁹ If malpractice liability—what proponents of the formalist agency regime consider its saving feature—represents at best an uncertain remedy in the civil context, it utterly fails to carry its weight in the postconviction context. For the civil litigant, a malpractice claim constitutes a difficult though not impassable route to a proper redistribution of costs and benefits between lawyer-agent and client-principal; for the habeas petitioner it constitutes no remedy at all.

For these reasons, the formalist agency regime should not govern postconviction equitable tolling. Because a lawyer’s negligence almost certainly

deficiencies may result in the irrevocable loss of the parent-child relationship. Monetary damages are wholly inadequate in termination cases given the nature and severity of the interests involved.” *In re K.L.*, 91 S.W.3d 1, 11 (Tex. App. 2002) (footnote omitted).

149. Kevin Bennardo, *A Defense Bar: The “Proof of Innocence” Requirement in Criminal Malpractice Cases*, 5 OHIO ST. J. CRIM. L. 341, 341-42, 342 nn.2-4 (2007). Moreover, some jurisdictions have perversely required a convicted defendant to establish “actual innocence,” as opposed to “legal innocence.” *Id.* at 342 & n.3. See generally Christopher Scott Maravilla, *Monday Morning Lawyering: Proximate Cause and the Requirement of Actual Innocence in a Criminal Defense Malpractice Action*, 16 WIDENER L.J. 131 (2006) (discussing such requirement). Often, however, the habeas petition being filed in federal court is based on grounds having nothing to do with a denial that the habeas petitioner has committed the crime in question. See, e.g., *Spencer v. United States*, 773 F.3d 1132, 1143 (11th Cir. 2014) (en banc) (“Spencer argues no new factual basis for reversing his sentence. He presents instead an argument of legal innocence. Even if we were to agree with Spencer that he is ‘innocent’ as a career offender, that legal innocence falls far short of *factual* innocence . . .”), *cert. denied*, 135 S. Ct. 2836 (2015); *Pitts v. Norris*, 85 F.3d 348, 351 (8th Cir. 1996) (“Pitts’s argument is one of legal innocence. He has presented no new evidence establishing his factual innocence.”); *Selsor v. Kaiser*, 22 F.3d 1029, 1034-35 (10th Cir. 1994) (explaining that the petitioner’s double jeopardy claim was “meritorious,” but was one only of “legal” rather than “actual innocence”).

falls outside the scope of the agency relationship,¹⁵⁰ the client should not bear the resultant cost. But under current doctrine, a lawyer's negligence could only ever give rise to an action for legal malpractice, and this remedy is both nearly impossible for a habeas petitioner to secure and grossly inadequate to compensate for the loss he bears. As a result, the losses stemming from the lawyer's misconduct—that is, lawyer conduct occurring constructively outside the lawful scope of the agency relationship—are ultimately and unfairly borne by the client. The formalist agency regime thereby upends the very purpose of agency law itself: to render the agent invisible, or nondistortive, as if the principal were acting on his own.

The only equitable remedy for a client aggrieved by his lawyer's negligent failure to meet the AEDPA deadline is for the deadline to be tolled: tolling, unlike a malpractice action, would truly compensate the client for his loss and would be much simpler for the client (and the court) to effectuate. The client would gain the only result he sought—the opportunity to air his habeas claims and thus have his conviction reviewed in federal court—and he would be able to do so without having to institute another action. Ultimately, a tolling remedy would function to protect the principled agency approach: the client would not bear any loss stemming from lawyer conduct occurring outside the scope of the agency relationship, and the lawyer would again be rendered legally invisible. It is, we concede, a remedy at equity rather than at law; it is not the remedy formal agency doctrine would normally recommend. But this is not inappropriate. We view *Holland's* focus on “equitable” tolling as significant. Courts should permit equity to do its work in this arena, correcting the injustices that sometimes arise at law, and maintaining coherence between the principles that animate the law and the actual case outcomes that arise under it. Whether this means dropping the “extraordinary circumstance” requirement or interpreting it much more broadly,¹⁵¹ a lawyer's mere

150. Except in the rarest cases, no client would authorize his lawyer to miss the deadline, and as discussed in Part V below, a lawyer's negligent conduct is well beyond a postconviction prisoner's ability to control.

151. We recognize that one objection to our proposal might charge that lawyer negligence does not amount to the sort of “extraordinary circumstance” the *Holland* Court had in mind—that there is nothing “extraordinary” about negligence. But this objection is oblique to our argument for a number of reasons. First, it may not be disingenuous to characterize as extraordinary a prisoner's deprivation of his opportunity to air his habeas claims as a result of his lawyer's error. Such an outcome could yield a grave miscarriage of justice if in fact the prisoner has a cognizable constitutional claim that will go unheard. But more importantly, our argument does not depend on characterizing missed deadlines as “extraordinary circumstances.” Rather, we argue that current equitable tolling doctrine, as enunciated in *Holland* and developed by the lower federal courts, is incoherent, particularly if agency law is to be the guiding framework. Ultimately this should be unsurprising: the *Holland* majority did not intend its ruling to be predicated on an agency interpretation of the lawyer-client relationship. That understanding has only crept into equitable tolling doctrine since *Holland*, and particularly after *Maples*. See *supra* Part I. So the poor fit between the

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negligence in missing an AEDPA deadline ought to provide a basis for equitable tolling. Only tolling can protect the tenets of the principled agency approach in this context.

B. Implementing a Negligence Standard

As compared to the “extraordinary circumstance” standard, a negligence standard is both normatively preferable and practically achievable. In fact, such a standard would not depart radically from the standard courts regularly apply in the context of various kinds of claims—indeed, it would entail making a showing of approximately the same elements required for a successful malpractice claim. A suit for legal malpractice has four legal elements: duty, breach, causation, and damages.¹⁵² Except in the most outlier cases, the first two elements (duty and breach) will easily be met where a petitioner seeks equitable tolling of AEDPA’s statute of limitations due to his lawyer’s negligence. Courts repeatedly have recognized a lawyer’s “duty to pay attention to filing deadlines and not to let one go by in any pending case without doing whatever needs to be done.”¹⁵³ As one court explained, when a lawyer undertakes to represent a client, that undertaking “include[s], of course, the duty of investigating the facts, formulating a litigation strategy and filing

language of the *Holland* test and the rules demanded by a principled application of agency law really just reflects the fact that *Holland* has become outdated. Our purpose is not to argue that lawyer negligence does, according to some objective standard of reasoning, constitute an “extraordinary circumstance”; rather our purpose is to argue that if agency law is to be the prevailing framework in this area, then lawyer negligence ought to merit equitable tolling. Whether we continue to call this prong of the test the “extraordinary circumstance” prong or something else (such as the “lawyer error” prong) represents a formality that is somewhat beside the point.

It may also be useful for us to point out that even if lawyer negligence merits an equitable tolling remedy, this does not mean that every missed deadline will merit tolling. Indeed, not every missed deadline will result from lawyer negligence. Sometimes a missed deadline might fall squarely within the scope of the agency relationship, such as where the client directs his lawyer to take no action, or where the client refuses to cooperate. In those cases, the consequences of the missed deadline ought to be felt by the client. But where lawyer negligence is truly the only cause, the client ought not to be burdened and the court should grant equitable tolling.

152. See, e.g., *Benton v. Nelsen*, 502 N.W.2d 288, 291 (Iowa Ct. App. 1993); DAN B. DOBBS ET AL., *DOBBS’ LAW OF TORTS* § 724 (West 2015); Jeffrie D. Boyesen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 308, 310 (2011). This standard is the analog to that which must be shown to bring an ineffective assistance of counsel claim: there, the defendant must show that the lawyer’s performance fell below an “objective standard of reasonableness” (the equivalent of duty and breach) and a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (the equivalent of causation and damages). See *Strickland v. Washington*, 466 U.S. 668, 686, 694 (1984).

153. *Cameron v. Wash. Metro. Area Transit Auth.*, 649 A.2d 291, 294 (D.C. 1994).

within a reasonable time any action necessary to effectuate recovery.”¹⁵⁴ The obligation to file a timely petition is intertwined with a lawyer’s fiduciary duties, including those of competence, diligence, and communication. A lawyer who neglects to observe a deadline not only fails to act with “reasonable diligence and promptness in representing a client,”¹⁵⁵ but also “fail[s] to exercise . . . ordinary reasonable skill.”¹⁵⁶ Indeed, some courts have gone so far as to consider the failure to comply with a deadline so obviously a breach of a lawyer’s duty of care that it is among the few types of malpractice claims for which courts have not required the presentation of expert testimony.¹⁵⁷

While our proposal for equitable tolling smoothly incorporates rough equivalents to the duty and breach requirements of a malpractice claim, it is arguably more problematic with respect to causation and damages. A critic of our approach might argue that the proposed remedy provides the habeas petitioner with a windfall because it exempts him from the prejudice requirement that constitutes the causation and damages elements of a malpractice claim. In the civil context, a former client cannot automatically collect against a lawyer who missed a deadline. Rather, he must prove prejudice, or a “case within a case”—in other words, he must prove that he would have prevailed in the underlying action.¹⁵⁸ Otherwise—if he was

154. *Passanante v. Yormark*, 350 A.2d 497, 500 (N.J. Super. Ct. App. Div. 1975).

155. MODEL RULES OF PROF’L CONDUCT r. 1.3 (AM. BAR ASS’N 2013).

156. *McCoy v. Feinman*, 785 N.E.2d 714, 718 (N.Y. 2002) (quoting *Darby & Darby, P.C. v. VSI Int’l, Inc.*, 739 N.E.2d 744, 746 (N.Y. 2000)).

157. When bringing a case for legal malpractice, “plaintiff[s] must present expert testimony establishing the standard of care unless the attorney’s lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge.” *Hamilton v. Needham*, 519 A.2d 172, 174 (D.C. 1986) (quoting *O’Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982)); see also 5 RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 33.16, at 110 (5th ed. 2000) (noting that expert testimony may not be required when “the evidence of negligence is so patent and conclusive that reasonable persons can reach only one conclusion”). Many courts have recognized a failure to meet a deadline to be squarely within the common knowledge exception. See, e.g., *First Union Nat’l Bank v. Benham*, 423 F.3d 855, 867-68 (8th Cir. 2005) (Bye, J., concurring in part and dissenting in part) (“Although I take no great joy in noting this, missing a statutory deadline is the classic example of when a lawyer’s lack of care and skill is so obvious the trier of fact can find negligence as a matter of common knowledge.”); *Kaempe v. Myers*, 367 F.3d 958, 966 (D.C. Cir. 2004) (“Examples of attorney actions (or failures to act) that fall within the ‘common knowledge’ exception include: allowing the statute of limitations to run on a client’s claim”); *Barth v. Reagan*, 546 N.E.2d 87, 90-91 (Ill. App. Ct. 1989) (“Expert testimony has been held to be unnecessary in Illinois . . . in cases where the attorney has failed to comply with the statute of limitations”). But see, e.g., *Carranza v. Fraas*, 763 F. Supp. 2d 113, 123 (D.D.C. 2011) (“[E]xpert testimony may be required to establish the appropriate standard of care even when the failure to meet a deadline appears to be an obvious case of professional negligence.”).

158. See, e.g., *Env’tl. Network Corp. v. Goodman Weiss Miller, L.L.P.*, 893 N.E.2d 173, 177 (Ohio 2008); *Kituskie v. Corbman*, 714 A.2d 1027, 1030 (Pa. 1998); *Haberer v. Rice*, 511 N.W.2d 279, 285-86 (S.D. 1994); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING

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destined to lose the case anyway—he cannot show that his lawyer’s error was a but-for cause of his loss. For example, a client whose lawyer missed a deadline for an appeal in an ordinary civil case may succeed only if he can prove that had his lawyer filed the appellate paperwork on time, he would have won his appeal on the merits. If his appeal would have failed anyway, then the client has suffered no loss stemming from his lawyer’s error. Otherwise, the client would be entitled to a windfall when, as a matter of public policy (as well as the principled agency approach), he ought to be compensated only for the damage caused by his lawyer’s misconduct.

When one maps the civil standard onto the postconviction context, however, it becomes readily apparent that, while it is appropriate to apply the duty and breach elements of a malpractice claim to a criminal proceeding, it is inequitable to do the same with respect to the causation and damages elements. The objection would be valid if we were arguing that the aggrieved client should be entitled to an acquittal as a result of the missed deadline. This would be a windfall result, as it assumes that the client would have prevailed on habeas, which cannot be known without a full habeas hearing. But when moving for the deadline to be tolled, the client seeks to vindicate the right to seek relief, not the right to relief itself. The aggrieved client simply wants the opportunity to file his habeas paperwork and thereby to be placed in the position he would have occupied had his lawyers complied with their ethical and professional obligations to act with competence, diligence, and reasonable care—had his lawyers not engaged in conduct outside the lawful scope of the agency relationship, beyond either their authority or the client’s ability to control. Because this result has no bearing on the ultimate merits of the underlying habeas claim, there is nothing inconsistent about dropping the prejudice requirement in the postconviction context.

Moreover, it would be incongruous to require habeas petitioners to prove the merits of their claims when civil malpractice litigants need not necessarily do so. The civil litigant can, for example, base a claim on types of harm other than pure monetary damages when seeking relief. For example, he may base a claim for compensatory or punitive damages on any emotional distress inflicted by the lawyer’s misconduct. Indeed, in disciplining lawyers for untimely filings, courts have recognized that significant emotional harm often stems from missed deadlines.¹⁵⁹ This view is in accord with the American Bar

LAWYERS § 53 cmt. b (AM. LAW INST. 2000) (“The plaintiff must . . . prevail in a ‘trial within a trial.’”); LAWRENCE J. FOX & SUSAN R. MARTYN, RED FLAGS: A LAWYER’S HANDBOOK ON LEGAL ETHICS § 8.06(b), at 243 (2005) (explaining the “case within a case” requirement). *But see, e.g.,* *Jenkins v. St. Paul Fire & Marine Ins.*, 422 So. 2d 1109, 1115 (La. 1982) (Dennis, J., dissenting) (noting that some “jurisdictions . . . have abandoned the case within a case requirement in favor of more modern rules”).

159. For example, in disciplining an attorney for several missed deadlines, the Supreme Court of Washington noted that “[p]rolonged delay and procrastination reflects poorly on the profession, and may harm the interests of clients and others,” *In re Johnson*, 618
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Association's Model Rules of Professional Conduct, which state that, "[e]ven when the client's interests are not affected in substance [by procrastination], . . . unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness."¹⁶⁰

Furthermore, by requiring that a habeas petitioner prove the underlying merits of his constitutional claim in order to secure equitable tolling, the courts would create an inefficient procedural redundancy because the very remedy the client seeks is a renewed opportunity to air his habeas claims. If courts were to impose a "case within a case" requirement for a tolling claim, then any client who successfully secures tolling (and, consequently, the opportunity to present his habeas claims for actual adjudication on the merits) would then be effectively guaranteed a habeas victory because proof of such victory was a necessary precondition to the tolling remedy. Similarly, were the client unable to show prejudice, he would not secure tolling and would thus never present his habeas claims for actual adjudication; but the client would not be damaged thereby because he would know prospectively that his habeas claims were destined to fail. The prejudice requirement would thus render any equitable tolling inquiry entirely moot.¹⁶¹ The same is not true of civil malpractice actions because, in such suits, clients seek the damages they would have received as a result of the underlying action; they do not seek merely the opportunity to re-air their underlying claims.

Critics conceding this rationale for a limited prejudice requirement might secondarily argue that our proposal would nevertheless enable the client to secure a windfall because it makes the tolling remedy, which protects only an equitable interest, easier to attain than an ineffective assistance of counsel claim, which protects a constitutional right. Such a distinction is disingenuous, however. The legal standard we articulate here is no more lenient than that established in *Strickland* to prove ineffective assistance—rather, as we have already demonstrated, the mechanisms are quite parallel. Instead, the real distinction between the two remedies consists not of the legal standard either demands, but of the kinds of facts the claimant must prove in either circumstance. To show breach, the client seeking tolling needs only prove that his lawyer missed the filing deadline—essentially a per se breach—whereas the precise nature of "ineffective assistance" will vary widely among cases, and the facts needed to prove "that counsel made errors so serious that counsel was not

P.2d 1322, 1323 (Wash. 1980) (en banc) (citation omitted), and, in a similar case, the Oregon Supreme Court concluded that "because the accused [lawyer] failed to act in his client's behalf and resisted her repeated attempts to contact him, . . . the client suffered actual injury in the form of anxiety and frustration," *In re Schaffner*, 939 P.2d 39, 41 (Or. 1997) (en banc).

160. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 3.

161. Alternatively, courts might require the existence of a nonfrivolous legal claim with a chance of success, such as they do in access-to-the-courts claims. See *Christopher v. Harbury*, 536 U.S. 403, 415-16 (2002); *Lewis v. Casey*, 518 U.S. 343, 352-53 (1996).

functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment”¹⁶² might be difficult to marshal. Similarly, to show causation and damages, the client seeking tolling need prove nothing additional—the missed deadline is the direct cause of the bar to habeas that the petitioner seeks to have lifted. By contrast, prejudice in an ineffective assistance inquiry would likely be very difficult to demonstrate, requiring the plaintiff to prove his case within a case.¹⁶³ A negligence standard for equitable tolling is therefore no more “lenient” than the constitutional standard for ineffective assistance; the client who seeks tolling merely pursues a significantly less disruptive remedy than the client who seeks a new trial as a result of a successful ineffective assistance of counsel claim.

Third, critics might object that the remedy we suggest imposes an undue burden on the opposing party (here, the state or federal government). Indeed, another reason courts have historically cited for the merits of the formalist agency approach is the fact that, regardless of fault, someone must always bear the burden of mistakes, and it is inequitable to place that burden on the blameless opponent. In other words, “[w]hile it may seem harsh to make [clients] answer for their attorney’s behavior, any other result would punish [the opposing party] for the inaction of her opponents’ lawyer.”¹⁶⁴ As the argument goes, if one party is better suited to bear that risk, it is the client himself, particularly where he may resort to a malpractice suit to secure a remedy.¹⁶⁵

In civil cases, it might be logical that frequently the fairest allocation of risk requires a client (rather than the opposing party) to bear the burden of his lawyer’s mistake because the client may attempt to seek indemnification through a malpractice action. The criminal context—including the postconviction context—is different, however. When a lawyer commits a negligent mistake in the latter context, the client pays the price of the mistake with his liberty (or at least with a missed opportunity to defend his liberty through a habeas claim)—a cost that (we assert) cannot be recompensed through money damages. Moreover, in the criminal context, the opposing party is always the State. Because “the State . . . is responsible for the denial [of effective assistance] as a constitutional matter,” it logically “must bear the cost of any resulting default and the harm to state interests that federal habeas review entails.”¹⁶⁶ These costs are also fairly insubstantial; they include little more than the cost of requiring a judge to hear another motion by the

162. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

163. *See id.*

164. *Inman v. Am. Home Furniture Placement, Inc.*, 120 F.3d 117, 118-19 (8th Cir. 1997).

165. *See id.* at 119 (“Defendants are better suited to bear this risk. If they were truly diligent litigants who were misled and victimized by their attorney, they have recourse in a malpractice action.”).

166. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991).

petitioner and a government lawyer to oppose that motion.¹⁶⁷ Imposing the risk of loss on the defendant would require the party with the most to lose to pay potentially the highest conceivable price for the mistake. The government is therefore much better positioned to bear the risk of negligent lawyer error. By contrast, in the context of a civil suit, the “blameless” party has no obligation to ensure his or her opponent has competent counsel and may face significant financial and other hardships from any undue delay.

Finally, critics might object that our proposal renders the deadline itself meaningless: if every lawyer who misses the AEDPA filing deadline is considered negligent as a matter of law, and if every negligent filing error is equitably tolled, then the statute of limitations will always be tolled when a filing deadline is missed. As such, the deadline will be no deadline at all. We agree that this would be contrary to public policy—the law imposes statutes of limitations for a reason and we do not intend to suggest that AEDPA’s one-year statute of limitations ought to be functionally written out of the law by a reformed equitable tolling doctrine. Instead, we argue that there are a few possible theoretical approaches by which courts could balance the need for practicable procedure with the value of justice to postconviction defendants—there are ways to ensure that equitable tolling doctrine is both consistent with the principled agency approach and respectful of the statute of limitations.

Perhaps the most obvious approach would be to shift the “sanction” that functions to preserve the meaningfulness of the statute of limitations from the client to the malfasant lawyer. Under current doctrine, when the statute of limitations runs as a result of lawyer error, a sanction is imposed on the petitioner, as he loses his opportunity for habeas review. Instead, defense lawyers could be sanctioned for failure to meet the statutory deadline since they are the ones who effectively have the power to comply, and it is, after all, their job to do so. Negligent lawyers could face a range of court-imposed sanctions and professional disciplinary measures.¹⁶⁸ This would function to

167. An additional cost the government may bear is the increased possibility that a person who actually committed a crime will be ultimately acquitted. But this cost is remote: there are so many procedural steps between tolling the federal habeas deadline and acquittal (namely, the actual habeas hearing and a possible retrial followed by appeal) at which the petitioner who committed a crime would likely lose, that this cost is unlikely to materialize frequently. And if it does, it is a cost necessary to protect access to habeas, which under the current regime is too often unfairly denied. Indeed, this is a cost the government already bears as a result of all the protections criminal defendants receive. Our proposal would not add to it in any significant measure.

168. *See, e.g.,* *Reyes v. City of Glendale*, 313 F. App’x 68, 70 (9th Cir. 2009) (“[L]ess drastic sanctions [than dismissal of the plaintiff’s action] were readily available, including a sanction personally against the lawyer who repeatedly flouted the court’s directives”); *Miller v. City of Phx.*, 197 F. App’x 624, 624 (9th Cir. 2006) (“[D]istrict courts have inherent powers to impose sanctions on attorneys, including monetary fines and attorney’s fees”); *Smith v. United States*, 834 F.2d 166, 171 (10th Cir. 1987) (“When imposing sanctions for a party’s failure to comply with pretrial deadlines, the trial court is to consider, insofar as practical, where the fault lies for noncompliance.

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preserve the meaningfulness of the statutory deadline—there would still be consequences for having missed it—but those consequences would, in our view, be significantly fairer than a complete bar to habeas review, and they would be suffered by the appropriate party, the lawyer.¹⁶⁹

Thus, regardless of the egregiousness of the lawyer’s misconduct, it seems problematic to place the burden of filing timely habeas petitions on defendants in postconviction proceedings. Once an incarcerated convict has a lawyer handling his case, the convict’s ability to monitor the case, actively communicate with his lawyers, or in any meaningful way control the filing of his petitions is quite limited.¹⁷⁰ Only a system that places the burden entirely on the lawyer, and thus does not attribute the costs of the lawyer’s error to the prisoner, could possibly result in an equitable outcome. And indeed, only such a system would be consistent with the principled agency approach underlying the formal doctrine.

V. The “Diligence” Prong of the *Holland* Test

The consequences that stem from the question of which party ought to bear the burden of making a timely filing are made even starker by the “diligence” requirement of the *Holland* equitable tolling test. In *Holland*, as in cases before it, the Court held that a defendant is entitled to equitable tolling of the deadline if he shows both “that some extraordinary circumstance” stood in his way, preventing timely filing, and “that he has been pursuing his rights diligently.”¹⁷¹ We identify here why the “diligence” prong is grossly unfair and reflects a profound misunderstanding of the nature of the agency relationship between lawyer and client in the postconviction context. Indeed, unlike the extraordinary circumstance requirement, which we argue ought to be relaxed

The impact of any sanction should then be directed at the lawyer or the party depending upon who is at fault.”).

169. In addition, the view that our proposal would render the statute of limitations meaningless, permitting lawyers to miss deadlines at whim, makes a crucial assumption about the integrity of those who practice law, and particularly those who engage in indigent defense. While this is ultimately an empirical question beyond the scope of our Essay, we think this assumption is unwarranted: most lawyers hold themselves to rigid ethical standards (and if they do not, the bar does). Most lawyers take compliance seriously. Certainly they want to act zealously in their clients’ interests, but not at the expense of willfully ignoring statutes of limitations and other requirements of law just because there is no attendant “punishment.” Most lawyers want to comply with the law because they believe they are required to—they believe it is the right thing to do. We are therefore unconcerned that our proposal might erode the effectiveness of the statute of limitations.

170. See, e.g., *Hutchinson v. Florida*, 677 F.3d 1097, 1111 (11th Cir. 2012) (Barkett, J., concurring in the result only).

171. *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

to embrace a negligence standard, we believe that the diligence requirement should be eliminated from the test entirely and that any less significant revision would be manifestly inconsistent with the principled agency approach.

Under current doctrine, the diligence requirement prevents petitioners from obtaining federal habeas review even in cases of attorney abandonment if the petitioner cannot additionally prove that he pursued his rights using “reasonable diligence.”¹⁷² This requirement of reasonable diligence “depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court,”¹⁷³ and “can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction.”¹⁷⁴ There is no set formula as to what particular action will qualify. Rather, “courts should take into account all the circumstances confronting the petitioner before deciding whether he has exercised reasonable diligence.”¹⁷⁵

Despite the seemingly flexible nature of this inquiry, courts have imposed the diligence requirement rigidly.¹⁷⁶ In *Hutchinson v. Florida*, for example, the Eleventh Circuit held that, though the petitioner implored his lawyers to file a timely postconviction petition on his behalf, he did not meet the diligence requirement because of his “lengthy delay in filing his [own] *pro se* federal habeas petition.”¹⁷⁷ This seems patently unfair: the circuit court required the

172. *Id.* at 653 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996)).

173. *Schriro v. Landrigan*, 550 U.S. 465, 488 n.7 (2007) (Stevens, J., dissenting) (quoting *Williams v. Taylor*, 529 U.S. 420, 435 (2000)).

174. *Johnson v. United States*, 544 U.S. 295, 308 (2005).

175. 17B CHARLES ALLAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4268.2, at 461 (3d ed. 2007).

176. The Federal Reporter is strewn with dissenters’ protests of their colleagues’ harsh, unforgiving, and often impractical applications of this rule. For instance, in *Schlueter v. Varner*, Judge Ambro, in dissent, eloquently explained that “it blink[ed] reality” to suggest that the prisoner in that case could be expected to exercise the “supreme diligence” that his colleagues in the majority appeared to require. 384 F.3d 69, 83 (3d Cir. 2004) (Ambro, J., dissenting). And, likewise, dissenting in *Fue v. Biter*, Judge Bybee explained the absurdity of the majority’s approach to the diligence requirement, necessitating that “prisoners . . . pursue a ‘steady stream of correspondence’ with the California Supreme Court to verify that the court has followed its own rules.” No. 12-55307, 2016 WL 192000, at *6 (9th Cir. 2015) (Bybee, J., dissenting) (citation omitted) (quoting *id.* at *2 (majority opinion)).

177. *Hutchinson v. Florida*, 677 F.3d 1097, 1103 (11th Cir. 2012) (holding that petitioner’s delay of several years in filing a placeholder *pro se* petition did not constitute reasonable diligence); *see also id.* (Barkett, J., concurring in the result only); *Sanders v. Tilton*, 475 F. App’x 118, 120 (9th Cir. 2012) (holding similarly); *Galloway v. Sec’y, Dep’t of Corr.*, No. 3:13cv63, 2014 WL 204420, at *5 (N.D. Fla. 2014) (holding that the petitioner’s attempts to contact his lawyer did not meet the *Holland* diligence standard); *Hunter v. United States*, Nos. 3:10-cv-343, 3:06-cr-64(1), 2013 WL 4780918, at *2-4 (E.D.

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petitioner to file a pro se petition despite the fact that he had obtained professional legal representation to file a petition on his behalf.¹⁷⁸ The notion that a client must perform his lawyer's work for him to avoid burdens created by his lawyer's mistakes is also highly problematic given the expertise required to adequately perform the functions of a lawyer. It also reflects a deep misunderstanding of the principles vindicated by the principled agency approach. We will argue that the principled agency approach justifies the contrary rule, that a lawyer's negligent failure to meet the AEDPA deadline always falls outside the lawful scope of the agency relationship. This rule already requires of the habeas petitioner all the diligence a court might equitably demand, making any additional diligence requirement both unnecessary and unfair.

A. The Inherent Unfairness of the Diligence Requirement

AEDPA is extraordinarily complex, notorious for befuddling even the most experienced lawyers.¹⁷⁹ Illustrating the profound difficulties posed by the statute, the Ninth Circuit recognized in one case that “[e]ven with the benefit of legal training, ready access to legal materials and the aid of four years of additional case law, an informed calculation of [the prisoner’s] tolling period evaded both [the petitioner’s] appointed counsel and the expertise of a federal magistrate judge.”¹⁸⁰ One commentator has noted that because of these complexities, “if the petitioner is obligated to personally comply with technical requirements of the AEDPA, the statutory guarantee of counsel is meaningless.”¹⁸¹ And as another has pointed out, the Supreme Court itself has reviewed AEDPA’s limitations period many times since the law’s enactment, making it obvious that “[b]ecause of [AEDPA’s] complicated requirements, prisoners are virtually compelled to entrust their case to an attorney in order

Tenn. 2013) (holding that the petitioner did not plead his efforts to contact his lawyer with sufficient specificity to satisfy the diligence requirement).

178. *Hutchinson*, 677 F.3d at 1103 (Barkett, J., concurring in the result only) (“The majority’s suggestion that Hutchinson should have filed a placeholder pro se habeas petition is simply not logical when Hutchinson was represented by lawyers who were assuring him that his claims were being pursued.”).

179. See, e.g., Marni von Wilpert, Comment, *Holland v. Florida: A Prisoner’s Last Chance, Attorney Error, and the Antiterrorism and Effective Death Penalty Act’s One-Year Statute of Limitations Period for Federal Habeas Corpus Review*, 79 FORDHAM L. REV. 1429, 1435 (2010) (“AEDPA’s procedural requirements are so complicated that they are sometimes misunderstood even by attorneys, let alone pro se prisoners.”).

180. *Lott v. Mueller*, 304 F.3d 918, 923 (9th Cir. 2002).

181. Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 396 (2005); see also von Wilpert, *supra* note 179, at 1435 (“[C]ommentators have found that, in general, pro se petitioners cannot successfully navigate the complex habeas corpus procedures.”).

to navigate the federal habeas corpus system.”¹⁸² *Holland’s* diligence requirement ignores these widely shared concerns about the statute.

The barriers to understanding imposed by AEDPA’s complexity are compounded by circumstances that compromise habeas petitioners’ research abilities. According to the National Legal Aid and Defender Association, “[v]irtually all habeas corpus petitioners are prisoners. Many are illiterate, ignorant, and confused. Some are retarded, mentally ill, insane, or physically incapacitated. To them, the legal system is an unintelligible morass. Indeed, concepts of by-pass, forfeiture, waiver, and exhaustion, as well as underlying substantive claims, are complicated ideas.”¹⁸³

Even assuming a fully intellectually capable and competent client, the barriers imposed by the four prison walls are virtually insurmountable. “Besides the difficulties in obtaining information about the prisoner’s specific case, often times prisoners have a hard time finding information about the law and AEDPA’s statute of limitations in the first place.”¹⁸⁴ In addition to the fact that communication with lawyers is difficult, “prison libraries are often deficient and prisoners’ access to these libraries can be severely restricted.”¹⁸⁵ So the kind of diligence courts have required petitioners to prove¹⁸⁶ can be nearly impossible to exercise for all but the most fortunate postconviction prisoners.

As with the extraordinary circumstance requirement, a comparison to the relevant law on civil malpractice is instructive in exposing the basic incoherence of the diligence requirement. A lawyer may point to his former client’s own conduct in defending himself against a civil claim for malpractice if the former client “unreasonably behave[d],”¹⁸⁷ such as when the client failed to follow the lawyer’s advice or instructions, or omitted or misrepresented material facts.¹⁸⁸ Courts should not find that clients can “be held contributorily

182. von Wilpert, *supra* note 179, at 1435-36.

183. *The Habeas Corpus Reform Act of 1982: Hearing on S. 2216 Before the S. Comm. on the Judiciary, 97th Cong.* 198 (1982) (statement of Phylis Skloot Bamberger, Attorney in Charge, Appeals Division, Federal Defender Services Unit, Legal Aid Society of New York).

184. von Wilpert, *supra* note 179, at 1468.

185. *Id.*

186. *See* cases cited *supra* note 177.

187. Tery Yancey, *Contributory Negligence in Attorney Malpractice Actions*, 17 J. LEGAL PROF. 351, 355 (1992) (“[C]lients should be held contributorily negligent only where the clients have unreasonably behaved, such as where a client actively interferes with the attorney’s handling of the case; or, where the client has made some unreasonable omission, such as where the client withholds or fails to provide important information to his attorney in the underlying matter.” (footnotes omitted)).

188. 3 RONALD E. MALLIN & ALLISON MARTIN RHODES, LEGAL MALPRACTICE § 22:2 (West 2016) (“Assertions of contributory negligence usually fall within five factual patterns: (1) the failure of the client to supervise, review or inquire concerning the subject of the attorney’s representation; (2) the failure of the client to follow the attorney’s advice or

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negligent for failure to perform the attorney's functions."¹⁸⁹ There is, in other words, no diligence requirement for civil litigants bringing malpractice suits like that articulated in *Holland* for habeas petitioners, whose ability to act with diligence is relatively limited.

Instructive here is *Theobald v. Byers*,¹⁹⁰ the "seminal case in defining the contributory negligence defense in attorney malpractice cases."¹⁹¹ In that case, the plaintiffs had retained the defendants, their lawyers, to prepare a note and chattel mortgage in connection with a loan.¹⁹² The defendants failed, however, to have the chattel mortgage properly acknowledged or recorded, resulting in the mortgage's invalidity and relegating plaintiffs to the position of unsecured creditors when the debtors filed for bankruptcy.¹⁹³ The plaintiffs then sued the defendants for legal malpractice.¹⁹⁴ In response, the defendant-lawyers asserted that the plaintiffs were contributorily negligent for failing to ask the defendants whether the mortgage should be acknowledged or recorded and for failing to arrange for the mortgage's recordation and acknowledgment, and the trial court agreed.¹⁹⁵

The appellate court quickly reversed the trial court's finding of contributory negligence.¹⁹⁶ The court explained that the plaintiffs could not be held contributorily negligent "solely because of their failure to themselves perform the very acts for which they employed [the defendants]."¹⁹⁷ As the court noted,

[c]learly the value of an attorney's services in connection with a transaction of th[at] nature consists largely of his superior knowledge of the necessary legal formalities which must be fulfilled in order for a document to be valid in the eyes of the law. If laymen such as [the plaintiffs] were already familiar with the requirements to be met in order to attain the legal status of secured creditors, it would seem likely that there would be a considerable decrease in the demand for attorneys' services.¹⁹⁸

instructions; (3) the failure of the client to provide essential information; (4) the client's active interference with the attorney's representation or failure to complete certain tasks regarding the subject matter; and (5) the failure of the client to pursue remedies to avoid or mitigate the effect of an attorney's negligence.").

189. Yancey, *supra* note 187, at 352; *see also id.* ("[A]n obedient client should not be found contributorily negligent where the very acts which are being labelled negligent are those which the attorney was initially hired to avoid.").

190. 13 Cal. Rptr. 864 (Dist. Ct. App. 1961).

191. Yancey, *supra* note 187, at 353.

192. *Theobald*, 13 Cal. Rptr. at 865

193. *Id.*

194. *Id.* at 864.

195. *Id.* at 867.

196. *See id.*

197. *Id.* at 866.

198. *Id.* at 866-67.

In other words, the very reason that the clients hired the lawyers was to ensure that their loan would be secured, and thus if they were to be charged with the knowledge, capability, or responsibility of doing so themselves, there would have been no reason to hire a lawyer to provide the service in the first instance.

Similarly, courts have refused to consider a client's lack of diligence in determining whether to enter a default judgment due to lawyer error. Indeed, courts have expressly disclaimed that such an obligation exists, and have actively encouraged clients not to act as "supervisors" of their lawyers:

Clients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. The legal profession knows no worse headache than the client who mistrusts his attorney. The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are the cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites. He does know this much: that several years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel.¹⁹⁹

Most pertinently, courts have not expected clients to understand even simple statute of limitations requirements. In *Daley v. County of Butte*, for instance, in reversing a dismissal for want of prosecution, the California District Court of Appeal noted that "it is unrealistic to expect a lay person to know of statutory deadlines and two-year dismissal statutes" and stated that a client is "entitled to expect fulfillment of [a lawyer's] professional obligations."²⁰⁰

Ultimately we are aware of no case outside the habeas context in which a court has placed an affirmative duty of diligence on the client such that he is responsible for ensuring that papers are timely filed.²⁰¹ In fact, clients have been held contributorily negligent for failing to inquire about the case's progress only in those cases in which the client was clearly on notice that the lawyer would not be able to comply with the deadline, yet took no action. For example, in *Levin v. Weissman*, a client brought a legal malpractice claim after his lawyer failed to file appellate briefs, despite the client's knowledge during the pendency of the appeal that his lawyer had been hospitalized for a

199. *Daley v. Cty. of Butte*, 38 Cal. Rptr. 693, 700-01 (Dist. Ct. App. 1964).

200. *Id.* at 701.

201. Commentators too have remarked on the absurdity of any such diligence requirement, even when dealing with civil cases. See, e.g., Richard Scott Novak, Note, *Attorney Malpractice: Restricting the Availability of the Client Contributory Negligence Defense*, 59 B.U. L. REV. 950, 960-62 (1979) ("[T]he fundamental nature of the lawyer's duty is to act as the client's alter ego; he does for the client that which the client would do for himself were he equipped with the lawyer's expertise. . . . Permitting the client to be found negligent for making errors that require legal expertise to avoid negates the lawyer's duty to use reasonable care in representing the client's legal interests.")

stroke.²⁰² The court held that “the jury could have concluded as it did that while [the lawyer] may have acted negligently, any damages to [the client] were the product of [the client’s] own acts or inaction.”²⁰³ Otherwise, the diligence requirement of *Holland* is a unique feature of the equitable tolling context that courts have roundly rejected in every other analogous area of law.

The courts in the foregoing cases seem to recognize, if implicitly, that under the principled agency approach—or even under a more formalist rendition of agency law—the principal can only ever be required to exercise *reasonable* control over his agent;²⁰⁴ to require complete control would eviscerate the purpose of agency. And when the principal is a client and the agent is a lawyer, reasonable control does not extend very far because of the highly specialized nature of the lawyer’s work. All principals entrust their agents with their legal rights and obligations; clients, by necessity, entrust their lawyers with their rights and obligations more completely than the principal in virtually any other agency relationship. This does not mean a client has no duty to supervise his lawyer—surely a client like that in *Levin* who is on notice that his lawyer is unable to act as such, or that his lawyer intends to behave aberrantly, ought to manage the situation to the extent he is able (perhaps by securing new counsel). But this duty ought not extend to directing a lawyer who is otherwise conducting himself normally to file a petition before the statutory deadline. This would upend the lawyer-client relationship in any context. To the extent *Holland* imposes a diligence requirement that goes beyond the normal (minimal) level of supervision clients are expected to exercise over their lawyers, that requirement ought to be eliminated.

B. The Diligence Requirement Fails to Accord with the Principled Agency Approach to the Lawyer-Client Relationship

For the foregoing reasons, the Supreme Court should abandon the diligence requirement from the *Holland* equitable tolling test. It is unfair and inequitable because it fails to take account both of the extremely difficult circumstances faced by postconviction prisoners and of the essential role of the lawyer as an advocate specially trained to navigate complex legal procedures.²⁰⁵ We would like to conclude our argument by suggesting that

202. 594 F. Supp. 322, 330 (E.D. Pa. 1984), *aff’d mem.*, 760 F.2d 258 (3d Cir. 1985).

203. *Id.*

204. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 7.05(1) (AM. LAW INST. 2006) (“A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent’s conduct if the harm was caused by the principal’s *negligence* in selecting, training, retaining, *supervising*, or otherwise *controlling* the agent.” (emphasis added)).

205. This Essay takes no position on the justifiability of these circumstances. It merely critiques the *Holland* test, which fails to recognize them by imposing on habeas petitioners duties that most cannot reasonably fulfill.

eliminating any additional diligence requirement represents the only way to bring equitable tolling doctrine into line with the principled agency approach. Furthermore, this line of reasoning reveals the deep linkage between our recommendations with respect to the extraordinary circumstance requirement and our recommendations with respect to the diligence requirement.

We interpret the diligence requirement as an effort by the courts to preserve the agency character of the relationship between lawyers and clients.²⁰⁶ This interpretation imports the logic of the principled agency approach, in the sense that any lawyer error should be imputed directly to the client if the error occurred within the scope of the agency relationship—within either the range of the lawyer’s authority or the client’s ability to control the lawyer, whichever is greater.²⁰⁷ The diligence prong functions to isolate egregious lawyer misconduct with respect to the “control” test for the scope of the agency relationship: if the client was diligently pursuing his rights, then any lawyer error that occurs despite the client’s diligence must be effectively beyond the client’s ability to control. Only such lawyer errors will merit tolling because only such lawyer errors are effectively outside the scope of the agency relationship.

Of course, the problem with the diligence requirement under this interpretation is that it ignores the relationship between the “control” test and the “authority” test for the scope of the agency relationship. The scope of the relationship is defined by whichever is greater: the range of the agent’s authority (limited by the agent’s fiduciary duties) or the range of the principal’s ability to control the agent. In the postconviction context, the range of the lawyer’s authority will essentially always be substantially greater than the range of the client’s ability to control the lawyer. This is true for all of the same reasons that render the diligence requirement so grossly inequitable, namely that postconviction prisoners have almost no capacity to control their lawyers.²⁰⁸ Consequently, any lawyer action (such as missing the AEDPA deadline) that is beyond the lawyer’s authority will also inevitably be beyond the range of the client’s control, and so will always be outside the scope of the agency relationship. Such conduct should therefore always yield a remedy, regardless of the client’s diligence. Our argument in Part IV that lawyer negligence should merit equitable tolling takes account of the minimal diligence—the minimal level of control over their lawyers—postconviction prisoners are capable of exercising.

No diligence should be required for a client to receive equitable tolling. This is the inequity of the diligence requirement stated in terms of the

206. Of course, at the time of the *Holland* decision, agency law was not the overriding framework governing equitable tolling doctrine. But the diligence requirement seems to have been adopted by the lower courts to this agency-reinforcing end.

207. See *supra* notes 76-87.

208. See *supra* Part V.A.

principled agency approach. A tolling standard that requires no diligence on the part of the client is both principled, in that it accords with the principled agency approach, and just, in that it would permit prisoners to seek habeas review of their convictions in the face of any form of negligent lawyer error.

Conclusion

The doctrine of equitable tolling, as it pertains to the AEDPA deadline to seek federal habeas review, requires substantial revision. Prisoners ought to be able to toll the deadline for a negligent lawyer's failure to file a timely habeas petition. Furthermore, the prisoner's entitlement to relief should not turn on any requirement that the client was diligent. This is true both as a matter of principle—a deeper understanding of the values that animate agency law and structure the lawyer-client relationship demands it—as well as a matter of justice, for the sake of those prisoners whose convictions will never be reviewed through no fault of their own.

Ultimately, the proposals outlined here express something profound about the lawyer-client relationship. This is a relationship that, in practice, is more than a mere reflection of formalistic rules. It is instead a matter of service, and as such it is a relationship that must be committed to the ethical dimension of legal consequences. Incarceration is not a formalistic concept. This Essay thus argues strenuously that it is insufficient for the relationship between lawyers and clients to be governed by formalisms that do not take into account the more urgent meaning of what it is to serve a client in desperate need. The principled agency approach attempts to respond to the pressing realities of the lawyer-client relationship in postconviction litigation; the proposals outlined here attempt to rectify the flawed results that flow from a formalistic and inequitable rendering of the law in this, an admittedly narrow but particularly illustrative context. But the real solution lies in a fundamental reconception of the role of the lawyer as a more general matter: only when our society values effective legal counsel on par with the practical need for such counsel will the system of indigent defense, and of legal representation more broadly, come into line with its loftiest ideals.