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The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate

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The national debate regarding federal habeas corpus for state prisoners is fueled in the main by ideology. To some, the authority of the federal courts to entertain constitutional challenges to state criminal convictions is the embodiment of all that was *right* about the Warren Court and the vision that Court offered of a meaningful system of American liberty, underwritten by independent federal tribunals willing and able to check the coercive power of government. By this account, the Bill of Rights is the protean source of safeguards for individual freedom — commanding generous, imaginative, and insightful elaboration by federal courts at all levels. Because the Supreme Court sits atop a large system and accepts only a few dozen cases each year, it can scarcely shoulder sole responsibility for giving effect to constitutional law. The lower federal courts, receiving habeas corpus petitions from prison inmates, provide the indispensable machinery for maintaining and invigorating individual rights on a daily basis.[1] To others, by contrast, federal habeas is a constant irritant — an expensive, time-consuming, and redundant enterprise that frustrates law enforcement and needlessly injects the federal courts into matters better left to the states. By this second account, habeas is the paradigm of all that was *wrong* with the Warren Court — namely that Court's asserted failure to appreciate the societal threat posed by crime and its palpable distrust of the states and state courts.[2] Between these extremes, there is little common ground. The two camps assign radically different values to the interests at stake in the debate — law enforcement, local authority, individual liberty, federal oversight.

Unfortunately, the ideological debate over habeas has not often been informed by hard evidence about the actual workings of the system under current arrangements. We mean to fill that gap in this Article. We here offer an

1. *See* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895 (1966). Readers should know that Professor Yackle has advanced views along these lines in his own prior work. *E.g.*, Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

2. *E.g.*, U.S. Department of Justice, Office of Legal Policy, Report to the Attorney General on Federal Habeas Corpus Review of State Judgments (1988), *reprinted in* 22 U. MICH. J.L. REF. 901 (1990). *But see* Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REF. 685 (1990) (responding to the OLP report).

empirical study of habeas practice, sponsored by the State Justice Institute[3] and undertaken by the Institute of Judicial Administration at New York University.[4] Using conventional social science techniques, we examined actual case files to build a data base from which to generalize. We presented a preliminary report on our findings at a session of the Fortunoff Criminal Justice Colloquium at NYU in April 1990.[5] We present our final results and analysis here.[6]

Our purpose was to collect reliable data on a range of matters touching the conduct of the habeas jurisdiction, to analyze that data rigorously, and to draw impartial conclusions. We have concentrated on the matters over which others have divided ideologically, and which have generated reform proposals in the Congress. We hope that our work can inform consideration of those proposals.

This is not the first empirical study of its kind. Professor Shapiro analyzed habeas corpus cases filed in the District of Massachusetts from July 1969 through June 1972.[7] Six years later, Professor Robinson conducted a more ambitious study under the auspices of the Justice Department.[8] Our project is, however, the most recent, sustained, and rigorous examination of actual habeas corpus cases, and the first calculated to obtain reliable data on the way in which habeas doctrine may affect the work of the federal district courts.

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3. The State Justice Institute is a federally funded entity, established by the State Justice Institute Act of 1984, 42 U.S.C. §§ 10701, 10702 (1988), to award grants in aid, cooperative agreements, and contracts to state and local courts, nonprofit organizations, and others — for the purpose of improving the administration and quality of justice in the state courts. The Institute's budget was approximately $10 million in fiscal year 1988. State Justice Institute, Funding Program Guideline for Fiscal Year 1988, 53 Fed. Reg. 6494 (1988).

4. The Institute of Judicial Administration (IJA) is a non-profit charitable corporation associated with the New York University School of Law. Founded by Arthur T. Vanderbilt in 1952, IJA sponsors research and education programs promising improvements in the judicial system and provides services to the American Bar Association, the Federal Judicial Center, and similar organizations. In cooperation with the ABA, the Institute developed the ABA Standards for Criminal Justice and for Juvenile Justice.

5. Professor Chester Mirsky chaired the colloquium, usually directed by Professor James B. Jacobs. Professor Graham Hughes of New York University and Professor James S. Liebman of Columbia joined Professor Yackle in a panel discussion of our preliminary results.

6. Another recently completed study, also sponsored by the State Justice Institute, was conducted by a special task force of the American Bar Association's Criminal Justice Section. That study focuses exclusively on death penalty habeas litigation. The ABA task force held a series of public hearings at locations around the country and took testimony from lawyers, judges, and other knowledgeable and interested organizations and individuals. The task force report is scheduled for independent publication, but some materials are included in American Bar Association, Criminal Justice Section, Report to the House of Delegates (1990) [hereinafter ABA Recommendations]. The ABA's inquiry into death penalty habeas corpus was guided by an extremely thorough memorandum by the task force reporter, Professor Ira P. Robbins. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U.L. REV. 1 (1990).

7. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973).

8. P. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (1979).

Our introduction elaborates on the ideological debate, identifies six aspects of habeas corpus doctrine that have been its focus, and notes the reform proposals that have been offered with respect to each. Part I sketches the background of these doctrinal issues and articulates the precise questions for which we hope to provide answers. Part II describes our empirical research into the habeas work of an illustrative federal court, the United States District Court for the Southern District of New York, during two three-year periods. We describe our methodology in some detail, so that our study may be replicated in other parts of the country or for different time periods. Part III reports the results of our inquiries, analyzes those results, and relates the data to those aspects of habeas corpus practice under examination. Our conclusion sets forth our views with respect to current reform proposals.

INTRODUCTION

In recent years, the executive branch of the national government has led the campaign against habeas corpus for state prisoners. The Nixon administration advocated limitations on the habeas jurisdiction.[9] Both the Reagan and Bush administrations have advanced proposals promising even more drastic restrictions — a statute of limitations, a stiff forfeiture rule regarding procedural default in state court, and a range of other measures.[10] Most important, the Reagan/Bush plan would foreclose federal consideration of claims that were "fully and fairly adjudicated" in state court.[11] This last pro-

9. S. 567, 93d Cong., 1st Sess. (1973); *see* 110 CONG. REC. 2224 (Jan. 26, 1973) (Richard Kleindienst, Attorney General, to Emanuel Celler, Chair, House Committee on the Judiciary, June 21, 1972) (explaining that the Nixon administration's bill would limit claims in habeas to those going to the reliability of the fact-finding and appellate processes).

10. For the Reagan administration's bill, see *Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter *Hearings on S. 2216*]. *See generally* Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983) (offering a section-by-section critique). Ultimately, the Reagan habeas corpus program was added to the President's Comprehensive Crime Control Act in the 98th Congress. S. 829, 98th Cong., 1st Sess. (1983). It was reported out of committee as a separate bill, S. 1763, and passed by the full body. S. 1763, 98th Cong., 1st Sess., 130 CONG. REC. S1854-72 (1984). The House of Representatives did not act on it, and it died at the end of the session. The Bush administration revived the essentials of the Reagan plan in the President's Violent Crime Act of 1989. H.R. 2709, 101st Cong., 2d Sess. (1989); *see Hearings on H.R. 4737 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 2d Sess. (1990), at 279 [hereinafter *Hearings on H.R. 4737*] (testimony of Paul L. Maloney, Deputy Assistant Attorney General). A Republican substitute for H.R. 4737, offered in the House Judiciary Committee in the summer of 1990, also reproduced the Reagan/Bush plan. Senator Thurmond introduced the same program independently. S. 88, 101st Cong., 1st Sess. (1989); *see also* H.R. 3119, 101st Cong., 1st Sess. (1989); H.R. 3918, 101st Cong., 1st Sess. (1989); H.R. 4079, 101st Cong., 2d Sess. (1990) (also incorporating the plan). All pending bills reflecting the Reagan/Bush scheme died at the end of the 101st Congress. Bills embracing the same proposals have been introduced in the current Congress. S. 635, 102d Cong., 1st Sess., 137 CONG. REC. S3192 (daily ed. Mar. 13, 1991); H.R. 1400, 102d Cong., 1st Sess., 137 CONG. REC. H1669 (daily ed. Mar. 12, 1991).

11. Senator Graham of Florida once offered a related bill, including elements of the Reagan/Bush plan apart from the provision that would discard habeas in favor of "full and fair"

posal appears to envision a process model for federal habeas corpus: the federal courts would not routinely reexamine the outcomes the state courts reach regarding federal claims, but rather would appraise the process by which the state courts arrive at their results. The federal courts would themselves address the merits only if the state courts fail to adjudicate federal claims in a procedurally acceptable fashion. Proponents of this model have explained, however, that "full and fair adjudication" within the meaning of the plan would include an element of substantive judgment: the federal courts would be free to award relief on the merits if the results reached in state court overstep the bounds of reason.[12]

If the "full and fair adjudication" standard were adopted, at the very least the federal courts would be precluded from awarding relief unless the state courts were not merely wrong, but *unreasonably* wrong. More likely, the federal courts' hands would be tied entirely. The "full and fair adjudication" formulation is a term of art in the law of federal jurisdiction, with an accepted usage and meaning. In the case law on issue preclusion under the full faith and credit statute, for example, state adjudication is deemed "full and fair" unless it is so devoid of reason and integrity as not to be entitled to respect as judicial action at all.[13] If this familiar formulation were written into the habeas corpus statutes, the Court would almost certainly construe it to mean what it means elsewhere.[14] The result would be the effective elimination of habeas corpus as a postconviction remedy for state prisoners.

The Supreme Court has also aligned itself with the writ's critics in recent years. The Justices now commanding the Court have shifted demonstrably away from the Warren Court's positions regarding criminal procedure and, in habeas corpus as in related contexts, this Court has restricted access to the

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state court litigation. S. 271, 101st Cong., 1st Sess., 135 CONG. REC. S812 (daily ed. Jan. 31, 1989); *see also* H.R. 1090, 101st Cong., 1st Sess. (1989) (incorporating S. 271).

12. On the "process model" for habeas corpus, see Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963). *See* Yackle, *supra* note 1, at 1014-19 (criticizing Professor Bator's view). For the proponents' explanation, see S. REP. NO. 226, 98th Cong., 1st Sess. 25 (1983):

> A State adjudication would not be full and fair in the intended sense if the determination arrived at did not meet a minimum standard of reasonableness. Specifically, the determination must reflect a reasonable interpretation of Federal law, a reasonable view of the facts in light of the evidence presented to the State court, and a reasonable disposition in light of the facts found and the rule of law applied.

The Senate Judiciary Committee apparently drew this substantive sense of "full and fair adjudication" from Justice Department testimony. *Hearings on S. 2216*, *supra* note 10, at 16 (testimony of Jonathan C. Rose, Assistant Attorney General) (describing the substantive element of "full and fair adjudication" in almost precisely the terms appearing in the committee report).

13. 28 U.S.C. § 1738 (1988); *cf.* Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) (stating that state court litigation is "full and fair" in the preclusion context unless it is so flawed as to violate the due process clause).

14. *See* West Virginia Univ. Hosp. v. Casey, 111 S. Ct. 1138 (1991) (taking this approach to statutory construction when Congress employs terms with an established usage).

federal forum for the adjudication of federal rights.[15] Early on, the Court largely excluded fourth amendment exclusionary rule claims from the writ — by means of a device that, in retrospect, anticipated the approach that Presidents Reagan and Bush have advocated for habeas corpus claims generally.[16] Primarily, however, the Justices have erected procedural barriers to the federal forum. Indeed, the Chief Justice has harshly condemned the very availability of habeas corpus as a procedural vehicle for constitutional litigation.[17] While Chief Justice Rehnquist thinks proposals to jettison habeas corpus in favor of "full and fair adjudication" in state court are premature, he is adamant that the system of postconviction review now in place is flawed and, indeed, "verges on the chaotic" in its handling of capital cases.[18] Other Justices are also on record with doubts of their own.[19]

Six aspects of habeas corpus doctrine and practice have attracted particular attention. We will briefly mention four here and elaborate on them in due course. First, the "exhaustion doctrine," which calls on state prisoners to pur-

15. Court observers debate the nature and extent of the current Court's departures from the Warren Court's thinking. *Compare* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980) (contending that no fundamental restructuring has occurred) *with* Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983) (insisting that Seidman and others fail to recognize significant ideological departures). All agree, however, that since the mid-1970s the Court has been more skeptical of constitutional claims in criminal procedure cases: simply put, criminal defendants tend to lose in the Supreme Court more often than they did previously. *E.g.*, Chase, *The Burger Court, the Individual, and the Criminal Justice Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518 (1977) (arguing that the Court has effected dramatic doctrinal change); Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977) (recognizing important shifts but emphasizing the perpetuation of baseline values); *see also* Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977) (detailing the use of equitable restraint to restrict access to the federal forum). *See generally* Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1 (1985) (warning that the Court's recent decisions undermine the ability of the federal courts to reach federal questions).

16. Stone v. Powell, 428 U.S. 465, 494 (1976) (barring federal habeas review unless prisoners were denied an opportunity for "full and fair adjudication" in state court).

17. *E.g.*, Sumner v. Mata, 449 U.S. 543, 543-544 (1981) (complaining that in federal habeas corpus a "single federal judge may overturn the judgment of the highest court of a State"); Snead v. Stringer, 454 U.S. 988, 993-994 (1981) (Rehnquist, J., dissenting) (observing that "[i]t is scarcely surprising that fewer and fewer capable lawyers can be found to serve on state benches when they may find their considered decisions overturned by the ruling of a single federal district judge on grounds as tenuous as these").

18. Remarks of the Chief Justice at the American Law Institute Annual Meeting 6, 13 (May 15, 1990) (on file with the authors) (explicitly referring to Senator Thurmond's version of the "full and fair adjudication" proposal); *see supra* note 10.

19. *E.g.*, Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (opinion of White, J.) (insisting that the federal habeas jurisdiction is "secondary and limited" and that the federal district courts are not "forums in which to relitigate state trials"); Engle v. Isaac, 456 U.S. 107, 126-28 (1982) (opinion of O'Connor, J.) (insisting that habeas corpus "degrades the prominence of the trial itself" and frustrates "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights"); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 501 (1973) (Blackmun, J., concurring) (complaining that the "common-law scholars of the past hardly would recognize" the modern postconviction writ).

sue state court opportunities for litigating federal claims before seeking federal habeas corpus relief, has elicited complaints from habeas corpus defenders and critics alike. Defenders charge that the exhaustion doctrine is too complex for petitioners to understand, and too rigid to be justified as a mere rule of timing. Critics insist that an unforgiving exhaustion doctrine is essential to ensure that the state courts have an initial opportunity to pass on federal claims and ascribe responsibility for any resulting inefficiencies to prisoners who fail to present clearly articulated federal claims to the state courts.

Second, the current rule that habeas corpus petitions are timely so long as the petitioner is in custody evokes complaints from habeas critics, who contend that the absence of a fixed time limit within which habeas petitions must be filed permits prisoners needlessly to delay federal litigation. State authorities are thus said to be prejudiced in their ability either to respond to prisoners' claims or to reprosecute if federal relief is awarded. Third, the rule allowing habeas petitioners to seek federal habeas corpus relief on more than one occasion elicits the charge, again from habeas critics, that prisoners file second or successive petitions in order to subvert the habeas process for illegitimate ends. Fourth, the rule that petitioners have no absolute right to counsel, either in state collateral proceedings or in federal habeas corpus, prompts complaints from habeas defenders. Here the charge is that undereducated prison inmates cannot represent themselves competently and thus may be denied the relief they deserve — and would receive if they had professional advocates to advance their claims. Habeas critics respond that prisoners are supplied with lawyers at trial and on direct review and that professional representation is unnecessary thereafter.

Recently, the Court has reformulated the exhaustion doctrine and the rules regarding successive petitions — apparently to meet the charges that habeas critics have laid against those aspects of the habeas jurisdiction.[20] Contemporaneously, the Judicial Conference of the United States and Congress have adopted formal rules pertaining to the timing of federal petitions and the involvement of counsel.[21] Nevertheless, the pressure for still more changes continues to build, particularly with respect to capital cases. Two years ago, Chief Justice Rehnquist complained of "delay" in death penalty habeas corpus litigation and appointed an ad hoc committee of the Judicial Conference to investigate.[22] That committee of five senior federal judges, chaired by former Justice Powell, presented a report to the full Judicial Conference in September 1989.[23] The Powell Committee recommends, among other things, that prisoners on death row should be encouraged to exhaust state collateral proceedings as a means of vindicating federal claims in advance of federal habeas corpus,

20. *See infra* Part I(A), (C).

21. *See infra* Part I(B), (D).

22. AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT ON HABEAS CORPUS IN CAPITAL CASES, 45 CRIM. L. REP. (BNA) 3239, 3239-41 (Sept. 27, 1989) [hereinafter POWELL COMMITTEE REPORT].

23. *Id.* at 3239.

that Congress should establish a statute of limitations for habeas petitions in the district courts, and that, in most instances, the federal courts should decline to entertain second or successive petitions from the same prisoner. On the matter of counsel, the Powell Committee recommends that the states should be asked to provide lawyers for state collateral proceedings in exchange for the procedural advantages they obtain in the committee's package — *e.g.*, the statute of limitations.[24] With respect to procedural default in state court, the Powell Committee recommends enactment of the stiff forfeiture rule proposed by the Reagan and Bush administrations.[25] Meanwhile, the American Bar Association has published a parallel set of recommendations, departing from the Powell Committee in several respects.[26] Bills have been introduced in Congress, incorporating various aspects of the Powell Committee and ABA recommendations.[27]

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24. In the waning hours of the 100th Congress, the Senate wrote a reference to the Powell Committee into the Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7323, 102 Stat. 4181, 4467 (1988). The chair of the Senate Committee on the Judiciary, Senator Biden, was instructed to introduce a habeas corpus reform bill within fifteen legislative days following receipt of the committee report from the Chief Justice. When the committee filed its report with the Judicial Conference a year later, the Conference tabled it for consideration at its next scheduled meeting in March 1990. The Chief Justice nevertheless sent the committee report to Senator Biden immediately, explaining that he interpreted the Anti-Drug Abuse Act to contemplate submission of the report — with or without action by the Judicial Conference. Statement of the Chief Justice (Oct. 5, 1989). Fourteen members of the Conference then joined in a letter to L. Ralph Mecham, Secretary to the Judicial Conference, asking Mr. Mecham to approach Senator Biden and Congressman Brooks, chair of the House Judiciary Committee, to request that no action be taken on the committee report until the judges could be heard in hearings. Letter from Donald A. Lay, et al. to Ralph Mecham (Oct. 4, 1989) (on file with authors); *see* Greenhouse, *Judges Challenge Rehnquist Action on Death Penalty*, N.Y. Times, Oct. 6, 1989, at A1, col. 3. Senator Biden asked Chief Justice Rehnquist whether, in these circumstances, the Chief Justice meant by early submission of the report to invoke the fifteen-day time limit specified in the Act. The Chief Justice declined to change his position. Letter from William Rehnquist to Joseph R. Biden, Jr. (Oct. 11, 1989) (on file with authors); *see* Greenhouse, *Rehnquist Renews Request to Senate*, N.Y. Times, Oct. 12, 1989, at A21, col. 1. Senator Biden then found himself obliged to review the committee report promptly and to present a bill. *Hearings on S. 1757 Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989).

When the full Judicial Conference considered the committee report in March, the judges who had joined in the letter to Mr. Mecham the previous fall offered amendments to make habeas corpus more accessible to capital petitioners. Most of the amendments were disapproved by a narrow margin. In two instances, the Chief Justice himself cast negative votes in order to produce ties and defeat amendments he opposed personally. *Hearings on H.R. 4737*, *supra* note 10, at 122 (testimony of Judge Oakes); *id.* at 127 (statement of Judge Lay); Greenhouse, *Vote is a Rebuff for Chief Justice*, N.Y. Times, March 15, 1990, at A16, col. 1. The Conference adopted two amendments, one encouraging the provision of qualified attorneys at all stages of capital litigation, the other permitting second or successive petitions raising claims touching the appropriateness of death sentences. Administrative Office of the United States Courts, News Release (March 14, 1990) [hereinafter News Release] (on file with authors); *see also* Letter from William Rehnquist to Jack Brooks (April 6, 1990) (forwarding the Conference's approved amendments to the House Judiciary Committee) (on file with authors).

25. *See supra* note 10 and accompanying text.

26. ABA Recommendations, *supra* note 6.

27. On October 16, 1989, Senator Biden introduced a habeas corpus reform bill patterned after, but differing from, the Powell Committee report. S. 1757, 101st Cong., 1st Sess., 135 CONG. REC. S13,474 (daily ed. Oct. 16, 1989); *see also* H.R. 3584, 101st Cong., 1st Sess., 135

With respect to two other aspects of habeas doctrine, the Supreme Court has taken it upon itself to effect significant doctrinal innovations that dwarf even the Powell Committee's recommendations in their potential capacity to close federal court house doors to habeas petitioners. Speaking for a plurality in *Teague v. Lane*,[28] Justice O'Connor announced that the Court intends to discard the Warren Court's approach to the "retroactivity" question in habeas

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CONG. REC. H7983 (daily ed. Nov. 2, 1989); H.R. 4002, 101st Cong., 2d Sess., 136 CONG. REC. H364 (daily ed. Feb. 7, 1990) (tracking S. 1757). Later that day, Senator Thurmond introduced a bill tracking the Powell Committee report verbatim. S. 1760, 101st Cong., 1st sess., 135 CONG. REC. S13,480 (daily ed. Oct. 16, 1989). Senator Biden's bill was incorporated into Title II of S. 1970, an omnibus crime bill. S. 1970, 101st Cong., 2d Sess., 136 CONG. REC. S6805 (daily ed. May 23, 1990). Prior to debate, Senator Biden agreed to amendments negotiated with Senator Graham of Florida and Senators DeConcini and Bryan. Those amendments were accepted by unanimous consent as floor debate on habeas corpus opened on May 23, 1990, and prevailed over a substitute amendment offered by Senators Specter and Thurmond that evening.

The Specter/Thurmond substitute was drafted hurriedly in the midst of discussions on the floor and was never considered in committee. In addition to its own innovations, the substitute tracked parts of Senator Thurmond's original bill, S. 1760, 101st Cong., 1st Sess., 135 CONG. REC. S13,480 (daily ed. Oct. 16, 1989), and also reflected aspects of Senator Graham's views. On reconsideration the following morning, the substitute was adopted by a narrow margin (52-46). 136 CONG. REC. S6882 (daily ed. May 24, 1990).

In the House of Representatives, Rep. Kastenmeier originally introduced a bill, H.R. 4737, 101st Cong., 2d Sess., 136 CONG. REC. H2045, E1396-98 (daily ed. May 7, 1990), incorporating many of the ABA's recommendations as well as the ideas reflected in the full Judicial Conference's amendments to the original Powell committee report. *See* News Release, *supra* note 24. *See generally Hearings on H.R. 4737, supra* note 10; *see also* H.R. 5505, 101st Cong., 2d Sess. (1990) (combining the Reagan/Bush plan discussed above and the Powell Committee recommendations). Before the full House Judiciary Committee, Rep. Kastenmeier offered a substitute for H.R. 4737, which reflected changes negotiated with Rep. Hughes, chair of the Subcommittee on Crime. The committee adopted the substitute and included it as title 13 of H.R. 5269, another omnibus crime bill. H.R. 5269, 101st Cong., 2d Sess. (1990). The House Rules Committee initially proposed a rule that would have allowed only one amendment to title 13 — a proposal offered by Rep. Hughes himself and Rep. Butler Derrick. After a heated exchange with Republican leaders, the House defeated that rule. When the Rules Committee returned with an alternative rule, one permitting both the Hughes/Derrick amendment and a substitute amendment offered by Rep. Hyde (containing the original Powell Committee report verbatim), the House rejected both title 13 and the Hughes/Derrick amendment in favor of Rep. Hyde's substitute.

In the end, the controversy surrounding the habeas corpus titles in the Senate and House omnibus crime bills proved too intense to permit a negotiated settlement. Two days before the end of the 101st Congress, the conferees on the two bills dropped both titles from consideration. Houston, *Conferees Strip Death Penalty From Crime Bill*, L.A. Times, at A1, col. 5. A conference report limited to other measures was then adopted. Berke, *Congress Adjourns*, N.Y. Times, Oct. 29, 1990 at A1, col. 4.

In the first session of the 102d Congress, Senator Biden reintroduced his original plan for death penalty cases, coupled with a proposal that would overrule Teague v. Lane, 489 U.S. 488 (1989), and Butler v. McKellar, 110 S. Ct. 1212 (1990), in both capital and noncapital cases. S. 618, 102d Cong., 1st Sess., 137 CONG. REC. S3044 (daily ed. Mar. 12, 1991). *See infra* notes 28-34 and accompanying text. Senator Graham has introduced a variant of the plan he previously negotiated with Senator Biden. S. 620, 102d Cong., 1st Sess., 137 CONG. REC. S3080 (daily ed. Mar. 12, 1991). And Senator Specter has offered a bill identical to that which passed the Senate last year. S. 19, 102d Cong., 1st Sess. (1991). In the House, Rep. Hughes has reintroduced the Hughes/Derrick plan. H.R. 18, 102d Cong., 1st Sess. (1991).

28. 489 U.S. 488 (1989).

corpus.[29] In the future, Justice O'Connor explained, habeas petitioners may neither rely upon nor contend for "new rules" of constitutional law, except in extremely narrow circumstances.[30] In more recent cases,[31] a slim majority of the Justices has elaborated on *Teague* and, in the process, has excited predictions that *Teague* and subsequent cases will prove not to be about applying genuine charges in the law retrospectively at all. Rather, *Teague* and its progeny may ultimately curb, and curb drastically, the substantive scope of the federal habeas jurisdiction.[32] Indeed, *Teague* threatens to enact the Reagan/

29. Prior to the 1960s, the Court followed the common law practice, which assumed that current interpretations of the law would apply to any pending case — irrespective of the means by which the case came to be before the court. Yet when the Court began interpreting the Constitution in innovative ways, there was pressure to apply its new precedents only to cases not yet begun when the new decisions were handed down and thus to deny their "retroactive" effect on criminal judgments already in place. The Warren Court responded by admitting a limited exception to the common law practice for new decisions marking a "clear break with the past." Desist v. United States, 394 U.S. 244, 248 (1969). If such a decision did not protect against convicting the innocent, and if its application to cases already completed would upset reliance interests and disrupt the administration of justice, the Court denied its benefits to prisoners whose convictions and sentences were already final. The classic illustration is the establishment of the fourth amendment exclusionary rule for state prosecutions in Mapp v. Ohio, 367 U.S. 643 (1961). Because that rule clearly departed from past precedent, and did not advance the accuracy of criminal judgments but rather promised to disrupt settled arrangements, the Court extended the exclusionary rule only to future cases. Linkletter v. Walker, 381 U.S. 618, 636-39 (1965). Thus was born the "retroactivity" issue, which had to be faced whenever the Court announced a new principle of constitutional law. The vehicle for deciding whether a new decision fell within the exception to the common law practice was typically federal habeas corpus. Since habeas petitioners had to negotiate various time-consuming procedural barriers on their way to federal court, they were in a position to rely on newly recognized theories (established after their convictions and sentences became final on direct review) and thus to present for decision the question whether a new decision would be available only prospectively. There was no serious argument about the retroactive effect of a decision unless it constituted a genuine shift in thinking, and when that was true the Court made a judgment about "retroactivity" on a case-by-case basis. For example, in *Johnson v. New Jersey*, the Court limited its decision in Miranda v. Arizona, 384 U.S. 486 (1966), to prospective application only. 384 U.S. 719, 732-34 (1966). Gideon v. Wainwright, 372 U.S. 335 (1963), also marked a sharp departure from precedent and thus presented the Court with a serious "retroactivity" question. In that instance, the Court regarded the right to counsel as sufficiently vital to fairness to warrant its application to cases already final. Pickelsimer v. Wainwright, 372 U.S. 2 (1963).

30. The two exceptions are *extremely* narrow: cases in which petitioners' behavior cannot validly be made criminal and cases in which the new rule goes fundamentally to the reliability of the fact-finding process such that, without it, "the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. While Justice O'Connor professed to embrace the approach to retroactivity advocated by Justice Harlan (dissenting during the Warren Court years), *see* Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion of Harlan, J.); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), she conceded that the Court's new analysis departs from Justice Harlan in critical respects. *Id.* at 312-13 (merging Justice Harlan's notion of "fundamental" claims with the Court's own concern for claims going to the reliability of the fact-finding process). Dissenting in Butler v. McKellar, 110 S. Ct. 1212 (1990), Justice Brennan explained that the Court's definition of a "new rule" also departs dramatically from Justice Harlan. *Id.* at 1223-24 (Brennan, J., dissenting); *see infra* note 32.

31. Sawyer v. Smith, 110 S. Ct. 2822 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990).

32. *See generally* Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165. The crucial aspect of the Court's new approach is

Bush "full and fair adjudication" program (or, indeed, an even more restrictive scheme) by indirection.[33] That prospect has prompted some members of

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the description of a "new rule," defined in *Butler* as any understanding of the law that could reasonably have been debated previously. 110 S. Ct. at 1217. Taken literally, this definition would include not only genuine changes in the law, but *most* claims raised in habeas corpus — namely, ordinary analogies to similar (yet reasonably distinguishable) precedents and fact patterns. A prisoner who relies on a decision handed down *after* his or her sentence became final would be required to demonstrate that that case *had* to be decided as it was in light of precedents in place *before* his or her sentence became final. For if the case could have gone the other way, if reasonable judges could have decided it differently, then it established a "new rule" that, except in narrow circumstances, cannot be applied to the case at bar. Similarly, a prisoner who simply advances an argument, not grounded in any particular recent precedent, would be required to show that the argument *must* be accepted by any reasonable judge considering it in light of precedents in place when the prisoner's sentence became final. For if a reasonable judge could reject the argument, the prisoner is seeking the establishment of a "new rule," which, again, cannot be applied to the prisoner's case save in extraordinary circumstances. *See generally* G. HUGHES, THE DECLINE OF HABEAS CORPUS 10-14 (Occasional Paper No. 8, Center for Research in Crime and Law, N.Y.U. School of Law, 1990); Berger, *Justice Delayed or Justice Denied — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1701-02 (1990); Liebman, *More Than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 577-95 (1990-91).

Justice Brennan has explained that the Court's definition of a "new rule" departs radically not only from previous, majority-supported precedents, but also from the position that Justice Harlan took in his dissents in point:

> This court has never endorsed such a cramped view of the deterrent purpose of habeas review: we have always expected the threat of habeas to encourage state courts to adjudicate federal claims 'correctly,' not just 'reasonably.' . . . And . . . 'correct' adjudication has always been thought to require courts to exhibit 'conceptual faithfulness' to the principles underlying our precedents and thereby to anticipate reasonably foreseeable applications of those principles. . . .
>
> Indeed, even Justice Harlan . . . believed that federal review is appropriate when a state court fails to presage reasonably forseeable applications of established constitutional principles *beyond* the precise factual settings of prior precedent. . . . Justice Harlan would not have held . . . [that a rule is 'new'] unless he could 'say with . . . *assurance* that this Court would have ruled differently' (i.e., in the State's favor) at the time [the prisoner's] conviction became final. . . . In contrast, the majority embraces the opposite presumption; it holds . . . [a rule] to be 'new' because it cannot say with assurance that the Court could *not* have ruled in favor of the State at that time. Thus the Court's holding today is unfaithful even to the purported progenitor of its position.

Butler, 110 S. Ct. 1212, 1222-24 (1990) (Brennan, J., dissenting) (quoting Desist v. United States, 394 U.S. 244, 264 (1969) (Harlan, J. dissenting)) (citations and footnote omitted) (emphasis in original).

33. Given the exhaustion doctrine, the typical habeas corpus case is one in which the petitioner raises a federal claim that, by hypothesis, was previously rejected by the state's highest court. *Teague* then appears to bar the claim if reasonable judges, viewing the claim in light of the precedents in existence at the time of the state court decision, could disagree over its merit. If reasonable minds could differ over the claim, then it seeks the establishment of a "new rule" that cannot be announced in habeas corpus. Said another way, if reasonable minds could differ over the claim when the prisoner presented it to the state courts, then the prisoner was even then seeking the establishment of a "new rule." That was perfectly appropriate in the context of direct review, but is inadmissible later in federal habeas corpus. In habeas, the prisoner can succeed only by demonstrating that reasonable minds, passing on the claim in light of then-existing precedents, could *not* have disagreed and *had* to have found the claim meritorious. Thus when the state court rejected the claim, it must have acted unreasonably. *Teague* thus

Congress to include provisions that would overrule *Teague* in their more general habeas corpus bills.[34]

The Court's second dramatic innovation is its abandonment of the Warren Court's rule regarding the effect to be accorded procedural default in state court. Herein lies an aspect of habeas corpus doctrine as vexing as it is esoteric. In the leading case, *Fay v. Noia*,[35] the Warren Court instructed the federal district courts to treat federal claims on the merits despite petitioners' failure to raise those claims in state court at the time and in the manner prescribed by state law, unless it appeared that prisoners knowingly waived state processes.[36] By contrast, the current Court largely bars the federal adjudication of claims that might have been, but were not, raised seasonably in state court. In *Wainwright v. Sykes*,[37] the Court held that petitioners forfeit federal adjudication of such claims unless they bring their cases within narrow exceptions to a general rule. The *Sykes* rule regarding default represents a manifest departure from *Noia*, threatening to introduce a form of claim preclusion into federal habeas corpus.[38] To date, habeas corpus proponents have been unable

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plainly parallels the Reagan/Bush initiative, according to which a federal habeas corpus petitioner must not only establish that the state court that rejected his or her claim was wrong, but was *unreasonably* wrong. *See supra* note 13 and accompanying text. Moreover, since the mere fact that the state court rejected a claim is itself evidence that reasonable minds could disagree regarding that claim, prisoners may find it virtually impossible to meet the standard of proof fixed by *Teague*. By this account, the Court's analysis threatens to transform habeas corpus for state prisoners into a sanity test to be applied to the state judges who passed on a prisoner's federal claim.

34. Senator Biden's original bill, S. 1757, contained a section apparently meant to restore the Court's prior "retroactivity" analysis in death penalty cases. The compromise he worked out with Senator Graham deleted that section. The Republican substitute that passed the Senate last year contained an ambiguous provision on the *Teague* issue. *See supra* note 27. The bill approved in the 101st Congress by the House Judiciary Committee, H.R. 5269, *see supra* note 27, included a more explicit *Teague* provision that would have applied both to capital and to noncapital cases. The Hughes/Derrick substitute attempted a compromise by overruling *Butler*'s definition of a "new rule," *see supra* note 32, but embracing *Teague*'s standards for deciding when "new rules" can be applied in habeas. The House, however, defeated both H.R. 5269 and the Hughes/Derrick substitute in favor of the Hyde substitute containing the Powell Committee report. The Powell Committee was silent with respect to the law applicable in habeas cases. The ABA recommends that "[t]he standard for determining [retroactivity] should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination." ABA Recommendations, *supra* note 6, at 4. *But see Hearings on H.R. 4737*, *supra* note 10, at 176-79 (testimony of Professor Liebman) (explaining that the provision in H.R. 4737 and retained in H.R. 5269 was consistent with the ABA's position). In the current Congress, Rep. Hughes has once again advanced the compromise that he and Rep. Derrick offered last year. H.R. 18, 102d Cong., 1st Sess. (1991). Senator Biden, meanwhile, has incorporated the provision in H.R. 5269, 101st Cong., 2d Sess. (1990), into his new bill. S. 1241, 102d Cong., 1st Sess. (1991). A proposed amendment to S. 1241, offered by Senator Graham of Florida, also includes the provision regarding *Teague* borrowed from last year's House bill, H.R. 5269. *See* Amendment No. 379.

35. 372 U.S. 391 (1963).

36. *Id.* at 439.

37. 433 U.S. 72 (1977).

38. *See* Yackle, *supra* note 1, at 1057.

to overrule the Court legislatively.[39] Recent initiatives touching default either would work a rough peace with *Sykes*[40] or would establish an even less charitable forfeiture standard.[41]

In sum, the fierce ideological debate regarding habeas corpus for state prisoners continues apace. Habeas corpus actually commands attention in the public press — signalling, perhaps, a new recognition of the significance of this previously obscure and arcane feature of federal jurisdiction.[42] This project provides solid and timely data on the very aspects of habeas doctrine that have attracted attention — the exhaustion doctrine, the timing of federal petitions after state court litigation, successive petitions, the typical absence of professional representation, and, most prominently, the rules governing the effect to be given procedural default in state court. While the very recent development in *Teague* promises to be important, we have not, of course, been able to study any effects flowing from that case and its progeny.

I.
BACKGROUND

The federal courts have jurisdiction to entertain habeas corpus petitions from state prisoners claiming they are held in custody in violation of federal law.[43] In most instances, applicants for federal habeas relief are prison inmates, serving sentences imposed after criminal conviction in state court. Habeas corpus petitions thus constitute collateral attacks upon state criminal judgments, calling into question the validity of those judgments as a basis for incarceration. Over the course of state proceedings, criminal defendants usually have an opportunity to raise federal complaints about their treatment, and the state courts adjudicate such issues routinely.[44] In cases in which state courts have sustained defendants' convictions on the merits, the state courts, by hypothesis, have concluded that none of the federal claims raised under-

39. *See Hearings on S. 1314 Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary*, 95th Cong., 2d Sess. (1978).

40. We count the House Judiciary Committee's proposal in H.R. 5269 this way. *See Hearings on H.R. 4737, supra* note 10, at 458-65 (statement of Professor Yackle). *Contra id.* at 304-06 (testimony of Mr. Maloney).

41. *See supra* note 10 and accompanying text.

42. Most recent press accounts and editorials focus on the developments in *Teague* or Chief Justice Rehnquist's advocacy of restrictive legislation for death penalty cases. *E.g.*, Marcus, *On Death Row, How Many Appeals are Enough?*, Wash. Post, June 9, 1990, at A1 (*Teague*); Wicker, *Lobbying for Death*, N.Y. Times, May 21, 1990, at A21, col. 5 (Rehnquist); Greenhouse, *Rehnquist Urges Curb on Appeals of Death Penalty*, N.Y. Times, May 16, 1990, at A1, col. 4, A18, col 3. (Rehnquist); *Let There Be No Wrongful Execution*, Atlanta Const., Mar. 10, 1990, at A-16 (*Teague*); Greenhouse, *Rehnquist Renews Request to Senate*, N.Y. Times, October 12, 1989, at A21, col. 1 (Rehnquist). *See generally* Wallace, *The Great Writ at the Crossroads*, THE CHAMPION 45 (March 1990); Friedman, *Rights, Reforms and the Chair*, Chicago Trib., May 31, 1990, at 27, zone C.

43. 28 U.S.C §§ 2241, 2254(a) (1988).

44. Defendants may put federal defenses to state trial courts before, during, and after trial-level proceedings. They may ask state appellate courts to review trial court determinations for error, and they may then seek state postconviction relief in both trial-level and appellate courts.

mines the validity of the conviction. Accordingly, when convicts later present the same claims to the federal courts in habeas corpus, they seek, in substance, to relitigate federal issues already determined against them in state court. Alternatively, when petitioners present the federal courts with claims that were not, but might have been, raised and adjudicated in state court, they attack state judgments on grounds the state courts have not addressed.

As we have explained, the very existence of the habeas jurisdiction has always been and remains controversial. Still, Congress has retained the statutes on which the federal courts' authority rests, and the Supreme Court has repeatedly confirmed its longstanding view that the lower federal courts have power to relitigate issues previously adjudicated in state court.[45] Objections to the federal courts' authority find expression in flank attacks on the writ—in criticisms of specific habeas doctrines and the way they are believed to operate. We, too, focus on individual doctrines and rules, albeit with full knowledge of the great ideological debate that lies seething just beneath the surface.

A. The Exhaustion Doctrine

Pursuant to the exhaustion doctrine, established by the Supreme Court in 1886,[46] state prisoners are encouraged to seek state court remedies for their federal claims before presenting those claims in a petition for federal habeas relief. The exhaustion doctrine is not a jurisdictional bar and may be relaxed in circumstances justifying immediate federal adjudication.[47] Ordinarily, however, potential federal petitioners are required first to present their claims in state court — clearly and in the manner contemplated by state law. Postponing federal adjudication creates delay, of course, but that delay is justified on two grounds: earlier federal intervention would disrupt orderly state processes in criminal cases and would deny the state courts the opportunity to participate in the development and enforcement of federal rights.[48]

At the outset, the exhaustion doctrine was only a rule of prudence guiding the exercise of the federal courts' jurisdiction in habeas corpus. Simply put, the federal courts were disinclined to "wrest [a] petitioner from the custody of . . . State officers"[49] before the state courts had been given a fair chance to respond to the prisoner's federal claims. By the middle of this century, the exhaustion doctrine had hardened into a general (though still nonjurisdictional) "rule" that federal adjudication should be put off in favor of prior state court litigation[50] — a rule set in statute form as part of the general revision of

45. *E.g.*, Brown v. Allen, 344 U.S. 443 (1953) (underscoring the federal habeas jurisdiction); *see also* Wainwright v. Sykes, 433 U.S. 72 (1977) (opinion of Rehnquist, J.) (reaffirming *Brown*).

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

47. *Id.* at 251-53.

48. *See* Robb v. Connolly, 111 U.S. 624, 637 (1884).

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

50. *E.g.*, Darr v. Burford, 339 U.S. 200, 207-08 (1950).

the Judicial Code in 1948.[51]

Even then, the exhaustion doctrine was applied flexibly. In *Frisbie v. Collins*,[52] Justice Black's opinion explained that the "general rule" contemplating exhaustion was not "rigid" and, indeed, that the district courts were free to "deviate from it" in appropriate cases, subject to appellate review.[53] The attitude reflected in *Frisbie* set the tone for the exhaustion doctrine for the next twenty years. The codification in 1948 was understood to permit the flexibility that Justice Black insisted was appropriate,[54] and the Warren Court never signalled any tightening of the exhaustion doctrine's requirements.[55]

In the early 1970s, by contrast, the Supreme Court began handing down decisions that rendered the exhaustion doctrine a more significant impediment to prompt federal adjudication. Standards for exhaustion became much more stringent — signalling to the federal district courts that they should require state prisoners to be scrupulous in presenting their federal claims to the state courts in a clear and proper manner.[56] The refurbished exhaustion doctrine retained its nonjurisdictional character,[57] but the likelihood that a petitioner's failure to seek relief in state court would bring routine dismissal plainly increased.[58]

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51. 28 U.S.C. § 2254 (1988):

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

52. 342 U.S. 519 (1952).

53. *Id.* at 521.

54. *E.g.*, Wainwright v. Sykes, 433 U.S. 72, 80 (1977) (reading the statute merely to incorporate the previously existing doctrine fashioned by the Court).

55. In *Noia*, by contrast, the Warren Court explicitly eschewed the contention that habeas petitioners must seek certiorari review in the Supreme Court itself in order to exhaust *state* judicial remedies. Fay v. Noia, 372 U.S. 391, 435 (1963).

56. *E.g.*, Picard v. Connor, 404 U.S. 270 (1971) (dismissing a habeas application on the ground that the petitioner had not articulated his claim clearly enough in state court); *see* Pitchess v. Davis, 421 U.S. 482, 486-87 (1975) (per curiam) (citing *Picard* for the proposition that the exhaustion of state remedies is a firm prerequisite to federal habeas corpus consideration of federal claims).

57. Strickland v. Washington, 466 U.S. 668, 679 (1984).

58. *E.g.*, Duckworth v. Serrano, 454 U.S. 1 (1981) (per curiam) (insisting on exhaustion even where the prisoner was clearly entitled to relief on the merits). The Court's tough stance with respect to exhaustion continues. *E.g.*, Anderson v. Harless, 459 U.S. 4 (1982) (per curiam) (finding petitioner's exhaustion inadequate notwithstanding his effort to place the substance of his claim before the state courts); Rose v. Lundy, 455 U.S. 509 (1982) (holding that the district courts should ordinarily dismiss a petition containing multiple claims in its entirety if state remedies have not been exhausted with respect to a single claim); *see* Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983). *But see* Granberry v. Greer, 481 U.S. 129 (1987) (apparently permitting state officials to concede or waive compliance with the exhaustion doctrine); Vasquez v. Hillery, 474 U.S. 254 (1984) (finding it unnecessary to send a prisoner back to state court to

Complaints about the efficacy and costs of the exhaustion doctrine have spawned contrasting proposals for reform. Concerned that exhaustion can delay federal review in habeas corpus, the Reagan and Bush administrations have proposed that the district courts be given authority to *ignore* the availability of state remedies when claims are frivolous and can be dismissed summarily on the merits.[59] In order to expedite the federal treatment of claims on the merits in capital cases, Senators Thurmond and Specter offered a bill in the 101st Congress that would have released death row prisoners from any obligation to pursue state collateral remedies. This year, Senator Specter is back with a proposal that would force prisoners to choose between state postconviction remedies and federal habeas corpus. Under his plan, the one would no longer follow the other.[60] By contrast, the Powell Committee would foster the exhaustion of state postconviction remedies in capital cases by tolling a proposed statute of limitations while state collateral relief is being sought, and by encouraging the states to supply counsel for state postconviction proceedings.[61]

Our objective was to evaluate the district court's use of the exhaustion doctrine before and after the Supreme Court began to tighten the doctrine as a device for screening cases out of the federal forum. Our data indicate that the district court received petitions primarily from prisoners who had made some attempt to exhaust state remedies before seeking federal habeas corpus relief, that the pursuit of state court remedies accelerated after the Supreme Court reformulated the exhaustion doctrine, but also that, in both periods, the district court routinely dismissed nearly half the petitions it received for failure to meet the exhaustion doctrine's demands.[62]

B. The Timing of Federal Petitions

The timing of federal habeas petitions after state court conviction has long fired debate between critics and defenders of federal habeas corpus for state prisoners. Critics, on the one hand, suspect that prison inmates do not pursue relief as soon as they might and that habeas corpus litigation is thus needlessly drawn out, time-consuming, and inefficient. Since there is no explicit statute of limitations for habeas petitions,[63] critics charge that petitioners are free to sit on their rights and attack their convictions and sentences years later, by which time the record is stale, evidence and witnesses may be

press factual matters developed in a federal evidentiary hearing). *See generally* Note, *The Federal Interest Approach to State Waiver of the Exhaustion Requirement in Federal Habeas Corpus*, 97 HARV. L. REV. 511 (1983); Note, *State Waiver and Forfeiture of the Exhaustion Requirement in Habeas Corpus Actions*, 50 U. CHI. L. REV. 354 (1983).

59. *See supra* note 10 and accompanying text.

60. On the Thurmond/Specter bill, see *supra* note 27. For the new Specter proposal, see 137 CONG. REC. 8661-65 (June 26, 1991).

61. POWELL COMMITTEE REPORT, *supra* note 22, at 3241, 3244.

62. *See infra* Part III(C)(2)(a).

63. *See* Vasquez v. Hillery, 474 U.S. 254, 265 (1986); United States v. Smith, 331 U.S. 469, 475 (1947) (stating that habeas corpus petitions may be filed "without limit of time").

unavailable, and, if relief is awarded, the state may be unable to conduct another trial.[64] Defenders of habeas corpus, on the other hand, resist the charge that federal collateral litigation is especially beset by delay attributable to strategic behavior by prison inmates.[65]

In the 1960s, the federal habeas courts occasionally met concerns about delayed petitions by holding prisoners to good faith pursuit of relief under the common law doctrine of laches,[66] by taking the passage of time into account in judging the credibility of supporting witnesses,[67] and by holding tardy petitioners to an exacting standard of proof.[68] New habeas corpus rules, promulgated in 1977, gave the federal district courts explicit authority to dismiss unduly delayed petitions on a showing of prejudice to the state's ability to respond to prisoners' claims. Rule 9(a) served not so much to change prior law on the treatment of tardy petitions as to clarify the permissible scope within which the district courts should operate.[69] Upon its adoption, the courts developed a series of conventions for handling cases in which undue delay is asserted.[70]

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64. *E.g.*, Vasquez v. Hillery, 474 U.S. at 280 (Powell, J., dissenting); Spalding v. Aiken, 460 U.S. 1093 (1983) (Burger, C.J.) (statement regarding certiorari) (citing the same concerns in support of a call for a statute of limitations to govern federal habeas corpus).

65. *E.g.*, Resnik, *Tiers*, 57 So. CAL. L. REV. 837, 929-30 (1984) (insisting that events that some would insist are predicates to prisoners filing troublesome habeas petitions are frequently occurrences that could not possibly have been within prisoners' knowledge).

66. *E.g.*, Desmond v. United States, 333 F.2d 378 (1st Cir. 1964).

67. *E.g.*, Parker v. United States, 358 F.2d 50, 53-54 (7th Cir.), *cert. denied*, 386 U.S. 916 (1965).

68. *E.g.*, United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).

69. Rule 9(a):

> Delayed Petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

R. GOV. § 2254 CASES IN U.S. DIST. CTS. 9(a); *see* Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977) (describing the purpose of Rule 9(a) and the political maneuvering that preceded its adoption).

70. The respondent must initially charge unreasonable delay by way of an affirmative defense to a habeas petition. Marks v. Estelle, 691 F.2d 730, 734 (5th Cir. 1982) (confirming that the respondent bears the burden to raise Rule 9(a) in the first instance), *cert. denied*, 462 U.S. 1121 (1983); McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982) (borrowing from the civil rules governing summary judgment to fashion a procedure for Rule 9(a) contentions). Next, the district court determines whether any delay ascribable to the prisoner was unreasonable — typically by asking the petitioner to complete a form prepared for the purpose. Hill v. Linahan, 697 F.2d 1032, 1034-35 (11th Cir. 1983) (using the pre-printed form); Mayola v. Alabama, 623 F.2d 992, 999 (5th Cir. 1980) (recognizing that delay must have been unreasonable), *cert. denied*, 451 U.S. 913 (1981). If unreasonable delay has occurred, the court must decide whether the delay has prejudiced the state's ability to respond to the prisoner's claims. Aiken v. Spalding, 684 F.2d 632 (9th Cir. 1982), *cert. denied*, 460 U.S. 1093 (1983). The respondent must make a particularized showing of prejudice. Bowen v. Murphy, 698 F.2d 381, 383 (10th Cir. 1983). Finally, the court must allow the prisoner to demonstrate that any such unreasonable delay, prejudicial to the state, still should not require dismissal under Rule 9(a) — because the petitioner was unaware of a claim, and could not have become aware of it by the exercise of

Notwithstanding Rule 9(a), critics continue to worry that habeas corpus litigation is freighted with delay. The Reagan/Bush plan, for example, would establish a one-year statute of limitations for all habeas petitions from state prisoners.[71] In death penalty cases, the pressure for measures that expedite proceedings has become intense. The Chief Justice has declared that ordinary incentives for prompt litigation do not operate in capital cases: a death row prisoner, according to Chief Justice Rehnquist, "does not need to prevail on the merits in order to accomplish his purpose; he wins temporary victories by postponing a final adjudication."[72] On this ground, the Powell Committee recommends a six-month statute of limitations for capital cases,[73] the ABA proposes a one-year statute for such cases,[74] and, in their own initiative, Senators Thurmond and Specter have recommended that habeas petitions in capital cases be dismissed if filed more than sixty days after the conclusion of direct review.[75]

Previously available data left the factual basis for concerns about delay in some doubt. Professor Robinson's study focused on cases litigated prior to the adoption of Rule 9(a) and thus reports nothing regarding the effect, if any, that rule may have had.[76] Our new data, covering cases both before and after 1977, *can* speak to the influence of Rule 9(a). The data indicate that the district court in New York was not presented with an excessive number of tardy habeas petitions in either period, but that, after 1977, more petitions were filed promptly after conviction than had been previously.[77]

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reasonable diligence, before the prejudice arose. Ford v. Superintendent, 687 F.2d 870 (6th Cir. 1982), *cert. denied*, 459 U.S. 1216 (1983). *See generally* L. YACKLE, POSTCONVICTION REMEDIES § 114 (1981 & Supp. 1990) (collecting additional precedents).

71. *See supra* note 10 and accompanying text. The idea of a statute of limitations was originally offered by a special task force, appointed by Attorney General Edwin Meese to study violent crime. The task force proposed a three-year statute, running (with exceptions) from the date of the criminal judgment in state court. ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT, RECOMMENDATION 42 (1981). The proposal for a one-year statute (running from the conclusion of state appellate and collateral proceedings) is included in bills introduced in the Congress.

72. Remarks of the Chief Justice at the American Bar Association Mid-Year Meeting 15 (Feb. 6, 1989). *But see* Yackle, *supra* note 2, at 707-08 (contending that death row prisoners *do* have incentives to pursue federal relief as soon as possible).

73. POWELL COMMITTEE REPORT, *supra* note 22, at 3244. The Justice Department has endorsed the six-month statute urged by the Powell Committee. Letter from Carol T. Crawford to Joseph R. Biden 5 (Nov. 15, 1989) (on file with authors) (insisting that six months is time enough). For an argument that the six-month limitation is unconstitutional, see Mello & Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990-91).

74. ABA Recommendations, *supra* note 6.

75. *See supra* note 27.

76. P. ROBINSON, *supra* note 8; *see* Yackle, *supra* note 2, at 711-12 (noting the difficulties of relying on Professor Robinson's data to judge conditions after the adoption of Rule 9(a)).

77. *See infra* Part III(C)(2)(b).

C. Successive Petitions

Until this year, the formal law governing second or successive habeas petitions from the same prisoner had remained constant for a quarter century. Both the controlling statute, 28 U.S.C. § 2244(b), and the applicable rule, Rule 9(b), were read to codify previous guidelines established by the Warren Court in *Sanders v. United States*.[78] It was understood that ordinary preclusion doctrine was formally inapplicable to habeas corpus.[79] Yet prisoners who filed more than one petition for federal relief faced substantial barriers to adjudication on the merits. Petitioners presenting the same claim in a second or successive petition had to persuade the court either that the claim had not

78. 373 U.S. 1 (1963). With respect to successive petitions presenting claims actually raised previously, the Court said that controlling weight could be given to the denial of relief in prior proceedings only if the "same ground" was determined unfavorably in the prior proceeding, the determination was "on the merits," and "the ends of justice would not be served by reaching the merits" again. *Id.* at 15. With respect to successive petitions raising new claims, the Court said that dismissal was appropriate only if prisoners could be said to have "abused" the federal process by deliberately withholding claims, subjecting the federal courts to "needless piecemeal litigation, or . . . proceedings whose only purpose is to vex, harass, or delay." *Id.* at 17-18. Congress then enacted section 2244(b) in 1966:

> When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244(b) (1988).

Despite minor differences between *Sanders* and section 2244(b), the 1966 statute was uniformly read to embrace the Court's previously established rules. Paprskar v. Estelle, 612 F.2d 1003, 1005 n.11 (5th Cir.), *cert. denied*, 449 U.S. 885 (1980); Sinclair v. Blackburn, 599 F.2d 673, 675 (5th Cir. 1979), *cert. denied*, 444 U.S. 1023 (1980). Rule 9(b) of the Rules Governing Section 2254 Cases, adopted in 1977, was also slightly different from *Sanders*:

> Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

R. GOV. 2254 CASES IN U.S. DIST. CTS. 9(b); *see* Clinton, *supra* note 69 (describing the formative work behind the new rule). The Supreme Court itself originally said that Rule 9(b), too, incorporated *Sanders*. *E.g.*, Rose v. Lundy, 455 U.S. 509, 521 (1982). In time, however, the Court edged toward tighter controls on successive petitions. *E.g.*, Kuhlmann v. Wilson, 477 U.S. 436 (1986) (holding that successive petitions raising claims previously rejected should usually be dismissed in the absence of a colorable showing of factual innocence); Woodard v. Hutchins, 464 U.S. 377 (1984) (Powell, J., concurring) (approving summary dismissal for abuse because a capital petitioner had not explained his failure to raise a claim in a prior petition). Of course, the petitions in this study could not have been influenced by developments after 1981.

79. Smith v. Yeager, 393 U.S. 122, 124-25 (1968); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 263 n.4 (1954); *see* Yackle, *supra* note 1, at 1047-49 (treating the conventional rationale for the exemption from preclusion).

been determined on the merits in the prior proceeding or that the "ends of justice" would be served by taking it up again. Petitioners pressing new claims omitted from prior petitions had to refute the charge that they had "abused the writ" by failing to raise the claims at the earliest practicable time.[80] Formally, the test for an "abuse of the writ" was the personal waiver standard borrowed from *Fay v. Noia*.[81] Beginning in the 1980s, however, some decisions in the circuits and occasional references in the Supreme Court itself implied that "abuse" could be found more easily — by inferring deliberate strategy from the mere failure to raise a claim in an initial petition or by imputing counsel's knowledge to the petitioner.[82] Particularly in death penalty

80. Sanders v. United States, 373 U.S. 1, 15-17 (1963); *see supra* note 78 (discussing § 2244(b) and Rule 9(b)). *See generally* Williamson, *Federal Habeas Corpus: Limitations on Successive Applications from the Same Prisoner*, 15 WM. & MARY L. REV. 265 (1973) (reviewing the decision in *Sanders*). In Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986), a plurality opinion by Justice Powell indicated that the "ends of justice" required a federal court to reach the merits of a successive claim only if the prisoner "supplements his constitutional claim with a colorable showing of factual innocence." That factual innocence standard was entirely new in *Kuhlmann* and thus could not have influenced the treatment of petitions in this study — except to the extent the more expansive definition of the "ends of justice" in use prior to *Kuhlmann* may have taken account of evidence going to factual innocence in a less explicit manner. *Cf. Kuhlmann*, 477 U.S. at 476 (Stevens, J., dissenting) (allowing that a "colorable showing of innocence" might be considered as one of several factors relevant to the "ends of justice" issue). The lower courts are divided over the authority of the plurality position in *Kuhlmann*. *Compare* McDonald v. Blackburn, 806 F.2d 613, 622 n.9 (5th Cir. 1986) (accepting Justice Powell's limitation of the "ends of justice" to a showing of factual innocence), *cert. denied*, 481 U.S. 1070 (1987) *with* Jones v. Henderson, 809 F.2d 946, 952 (2d Cir. 1987) (noting the division within the Court and holding that other factors may properly be considered in making the "ends of justice" determination). *Cf.* Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) (per curiam) (sidestepping an opportunity to decide whether a showing of innocence is necessary), *vacated*, 489 U.S. 836 (1989). Different panels within the same circuit are also apparently in conflict. *Compare* Branion v. Gramly, 855 F.2d 1256, 1260 (7th Cir. 1988) (following the *Kuhlmann* plurality), *cert. denied*, 490 U.S. 1008 (1989) *with* Jacks v. Duckworth, 857 F.2d 394, 400 (7th Cir. 1988) (reading all the opinions in *Kuhlmann* to mean only that a showing of factual innocence may be taken into account — along with other factors), *cert. denied*, 489 U.S. 1017 (1989).

81. Sanders v. United States, 373 U.S. 1, 17-18 (1973):

> We need not pause over the test governing whether a second or successive application may be deemed an abuse by the prisoner of the writ or motion remedy. The Court's recent opinions in *Fay v. Noia* . . . and *Townsend v. Sain* . . . deal at length with the circumstances under which a prisoner may be foreclosed from federal collateral relief. The principles developed in those decisions govern equally here.

Many lower court decisions held that the merits should be reached in the absence of actual waiver on the part of the prisoner. *E.g.*, Bass v. Wainwright, 675 F.2d 1204, 1208 (11th Cir. 1982); Ferranto v. United States, 507 F.2d 408, 408-09 (2d Cir. 1974). The original draft of Rule 9(b) as it came from the Judicial Conference would have omitted any reference to an "abuse of the writ" and, perhaps, the linkage to the waiver standard in *Noia*. That draft would have allowed dismissal if a petitioner's failure to raise a claim in a prior petition was "not excusable." The ostensible departure excited controversy in Congress, where the "abuse" standard was reinserted. The committee report accompanying the finished product expressly confirmed that Rule 9(b) was meant to codify *Sanders*. H.R. REP. NO. 1471, 94th Cong., 2d Sess. 5 (1976); *see* Clinton, *supra* note 69 (recounting the legislative history in some detail).

82. *E.g.*, Jones v. Estelle, 722 F.2d 159 (5th Cir.), *cert. denied*, 466 U.S. 976 (1983). In Rose v. Lundy, 455 U.S. 509 (1982), for example, Justice O'Connor asserted on behalf of a plurality that petitioners who withdraw "unexhausted" claims from a current petition in order to obtain immediate treatment of "exhausted" claims on the merits risk dismissal under Rule

cases, in which it was feared that condemned prisoners might litigate their claims piecemeal in order to postpone final resolution of their cases, the courts often refused to reach the merits of claims that were or might have been put forward previously.[83]

Earlier this year, the Court abandoned incrementalism respecting successive petitions and substituted revisionism. In the teeth of *Sanders* and the congressional embrasure of the waiver standard in section 2244(b) and Rule 9(b), the Court held that a habeas petition raising a claim that might have been, but was not, presented in a prior petition can and should be dismissed without a showing by the state that the previously omitted claim was deliberately withheld. In an explicit effort to bring symmetry to habeas corpus doctrine generally, the Court held that the "cause-and-prejudice" standards that govern cases in which prisoners fail to raise claims in *state* court will henceforth govern as well cases in which petitioners fail to present claims in initial *federal* habeas petitions.[84] The consequence of this radical turnabout is that multiple petitions from a single prisoner are now all but banished from federal

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9(b) if and when they exhaust state remedies with respect to the "unexhausted" claims now being withdrawn and file later petitions raising those claims. While the withdrawal of known claims already in a current petition is surely deliberate, there is a substantial question whether such an action (driven by the prisoner's understandable desire to litigate other claims while they are fresh) should be taken as a waiver within the meaning of the *Sanders* and *Noia* decisions. A majority of the Justices declined to join Justice O'Connor on this point. *Id.* at 520-21 (plurality opinion); *see* Rault v. Butler, 826 F.2d 299, 309 (5th Cir.) (ascribing counsel's thinking to the prisoner), *cert. denied*, 483 U.S. 1042 (1987); Stephens v. Kemp, 721 F.2d 1300, 1303 (11th Cir. 1983) (purporting to employ the bypass standard but insisting that the prisoner explain why he had not raised a claim in previous habeas proceedings), *cert. denied*, 469 U.S. 1043 (1984).

83. In Stephens v. Kemp, 464 U.S. 1027 (1983), in which the Court granted a stay of execution, Justice Powell argued in a dissenting opinion that a second or successive petition should be dismissed for abuse unless the prisoner gave reasons for failing to raise a claim in a prior application. *Id.* at 1030 (Powell, J., dissenting, joined by Burger, C.J., and O'Connor & Rehnquist, J.J.). According to Justice Powell, the petitioner abused the writ if he intentionally withheld a claim *or* was guilty of "inexcusable neglect." *Id.* In Woodard v. Hutchins, 464 U.S. 377 (1984), Justice Powell obtained a five-vote majority for the view that an abuse could be found in the absence of "affirmative evidence" of a waiver, so long as the prisoner was represented by counsel in prior habeas proceedings and failed adequately to explain why claims were not raised earlier. *Id.* at 379 (Powell, J., concurring, joined by Burger, C.J., and Blackmun, O'Connor & Rehnquist, J.J.). Justice Powell's conclusion arose from concerns that successive petitions were becoming increasingly widespread and problematic:

> A pattern seems to be developing in capital cases of multiple review in which claims that could have been presented years ago are brought forward — often in a piecemeal fashion — only after the execution date is set or becomes imminent. Federal courts should not continue to tolerate — even in capital cases — this type of abuse in the writ of habeas corpus.

Id. at 380. The "inexcusable neglect" rule advocated by Justice Powell had been squarely rejected in Sanders v. United States, 373 U.S. 1 (1973), where Justice Harlan had urged it in dissent. *Id.* at 29. Nevertheless, that standard gradually took hold, at least in capital cases, and without a formal change in section 2244(b) and Rule 9(b), long understood to codify the *Sanders* guidelines. *E.g.*, *In re* Shriner, 735 F.2d 1236 (11th Cir. 1984). *But see* Witt v. Wainwright, 470 U.S. 1039, 1043-44 (1985) (Marshall, J., dissenting) (insisting that the bypass rule remained in place). *See* Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371 (1985) (following these developments).

84. McCleskey v. Zant, 111 S. Ct. 1454 (1991).

habeas corpus.[85]

Even this further judicial barrier to the federal forum has not been enough to silence critics calling for ever more Draconian restrictions on second and successive petitions. The Attorney General has informed the Senate Judiciary Committee that the Bush administration would find it insufficient even if the Congress were to codify the Court's new decision.[86] To protect against multiple petitions, Mr. Thornburgh insists on the Powell Committee's recommendation, namely that second and successive petitions in death penalty cases should be dismissed unless new claims go to petitioners' guilt or innocence of the offense for which capital punishment was imposed.[87] Other proposals have been advanced and no doubt will return for consideration.[88] The ABA would not insist that a new claim always undermine confidence in the prisoner's factual guilt and would, in any case, permit consideration of new claims if necessary to prevent a "miscarriage of justice."[89]

Our data regarding successive petitions illuminate the debate over prisoners' ability to abuse their access to federal habeas corpus by filing multiple applications for relief. On the basis of this study, we conclude that repetitive habeas corpus litigation is not a serious problem, at least in any quantitative sense.[90]

D. Participation of Counsel

While defendants in serious criminal cases enjoy a constitutional right to

85. We will not pause for a critique of *McCleskey*. Suffice it to say that there *is* a powerful case to be made against the Court's work, which in all candor amounts to tendentious disregard of both precedent and statutory materials. *See id.* at 1477 (Marshall, J., dissenting).

86. Statement of Dick Thornburgh, Attorney General, before the Committee on the Judiciary, U.S. Senate (Apr. 18, 1991).

87. Specifically, the Powell Committee proposes that, once a district court and the circuit court have rejected claims contained in an initial petition from a prisoner on death row (and provided that the Supreme Court, if asked, has done nothing to upset that judgment), no federal court should have authority to grant relief to the prisoner, unless the petitioner raises a new claim not previously presented in either state or federal court. If such a claim is raised, the merits still should not be treated unless: (1) the claim was omitted because of state action in violation of federal law, (2) the claim is based on a new Supreme Court decision with retroactive effect, or (3) the claim depends upon facts that could not have been discovered earlier by the exercise of reasonable diligence. If the claim meets one of these standards, it still should not be considered, according to the Powell Committee, unless the facts undergirding the claim, if proved, would undermine confidence in the prisoner's factual guilt. POWELL COMMITTEE REPORT, *supra* note 22, at 3243. After reviewing the Powell Committee report, the entire Judicial Conference took the view that successive petitions should be allowed if a prisoner's claim goes either to guilt or innocence of the underlying offense *or* the appropriateness of the death penalty. News Release, *supra* note 24. The Judiciary Committee bill in the House in the 101st Congress, H.R. 5269, adopted the Judicial Conference's amendment to the Powell Committee report, but otherwise tracked Powell precisely. *See supra* note 27.

88. Senators Biden and Graham, for example, would permit second or successive petitions to be considered if prisoners show a sufficient reason for failing to raise a claim previously and the claim goes *either* to factual guilt *or* the validity of a death sentence. *See supra* note 34.

89. ABA Recommendations, *supra* note 6, at 47-48. It is fair to say that in this respect the ABA borrows from Senator Biden's original bill, S. 1757. *See supra* note 27.

90. *See infra* Part III(C)(2)(c).

counsel at trial and on direct appeal as of right,[91] there is no similar blanket constitutional entitlement to professional representation thereafter — on certiorari in the Supreme Court[92] or in state collateral proceedings.[93] Nor is there a general right to counsel in federal habeas corpus, though due process may demand counsel in special circumstances.[94] Three years ago, Congress established a statutory right to counsel in death penalty habeas cases.[95] Yet in ordinary habeas actions, petitioners can look only to occasional prisoner assistance organizations, which offer legal advice and counsel to indigents on a private basis.[96] The supply of legal services by that means scarcely meets the demand, however, and the pursuit of postconviction relief, in either state or federal court, is in the main a pro se affair.

The value of counsel at all stages hardly can be denied. Lawyers can provide prisoners with the professional advice and assistance essential to effective access to the judicial system. Counsel can investigate cases, distinguish plausible claims from frivolous claims, delineate promising legal issues, and draft pleadings that set forth the factual allegations on which those issues depend. Lawyers can make good use of discovery and other pre-trial techniques in order to prepare claims for a hearing. At the hearing, they can present prisoners' claims in the most appealing light, interrogate favorable witnesses to draw out desirable testimony, and cross-examine adverse witnesses to limit the damaging effects of their evidence. And throughout the process, counsel can prepare professional briefs and memoranda that zealously advocate prisoners' claims.[97]

Of course, most state courts and all federal district courts have discretionary authority to furnish counsel for indigents and may well do so when prisoners' claims, prepared pro se, show facial merit.[98] Rule 8(c) of the habeas corpus rules, which became effective in 1977 along with Rule 9, underscores

91. Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing the general sixth amendment right to counsel at trial in felony cases); Douglas v. California, 372 U.S. 353 (1963) (relying on the due process and equal protection clauses for the right to counsel on first appeal as of right).

92. Ross v. Moffitt, 417 U.S. 600 (1974).

93. Murray v. Giarratano, 492 U.S. 1 (1989) (capital cases); Pennsylvania v. Finley, 481 U.S. 551 (1987) (noncapital cases).

94. Norris v. Wainwright, 588 F.2d 130 (5th Cir.) (repeating the general rule that counsel need not be appointed), *cert. denied*, 444 U.S. 846 (1979); Dillon v. United States, 307 F.2d 445, 446-47 (9th Cir. 1962) (discussing the occasional due process dimension).

95. 21 U.S.C. § 848(q) (1988).

96. *See generally* American Bar Association Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363 (1974).

97. *See generally* Comment, *Right to Counsel in Criminal Post-Conviction Review Proceedings*, 51 CALIF. L. REV. 970 (1963). *Cf.* Cardarelli & Finkelstein, *Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States*, 65 J. CRIM. L. & CRIMINOLOGY 91, 100 (1974) (reporting that 90% of prison administrators in the United States acknowledge that legal services for prisoners serves institutional interests as well).

98. 28 U.S.C. § 1915(d) (1988) (authorizing the district courts to request that lawyers represent indigents in any federal proceeding); 18 U.S.C. § 3006A(a)(2)(A) (1988) (authorizing fees for attorneys furnished to indigents in habeas corpus). *But see* Mallard v. United States District Court, 490 U.S. 296 (1989) (holding that an unwilling lawyer may decline a request to serve).

the district courts' power to supply counsel at any stage and requires an appointment if a hearing is scheduled in federal court.[99] Beyond the limited step taken in Rule 8(c), however, little has been done to provide lawyers in noncapital federal habeas proceedings. The Powell Committee recommends only that the states be encouraged to supply counsel in *state* collateral proceedings; the ABA also concentrates attention on the availability and performance of attorneys in state court. The Bush administration not only would fail to extend counsel services, but would repeal the statutory right to counsel in death penalty cases in federal court enacted only three years ago.[100]

We included in our questionnaire numerous questions about the participation of counsel (in both state and federal court), the means by which counsel was supplied, and the timing of counsel's involvement (before or after the petition was filed in federal court) — this last in hopes of mapping the effect, if any, of Rule 8(c) on the likelihood of the appointment of counsel by the district court after an initial appraisal of pro se petitions. Our data show that professional representation is the single best predictor of success in federal habeas corpus.[101]

E. Procedural Default in State Court

The chief current criticism of federal habeas corpus for state prisoners is not that prisoners ask the state courts to consider claims that prisoners intend ultimately to present to the federal courts anyway, but just the opposite — that prisoners fail to offer claims to the state courts and then present them for the first time in the federal forum. At first glance, federal habeas corpus petitions pressing claims that might have been, but were not, raised in state court would seem to be less troublesome than petitions seeking relitigation. The federal courts are not asked to second-guess the state courts, but to address issues on which the state courts have not spoken. Yet petitions raising new claims have ignited significant controversy. Many observers worry that litigation over the validity of state criminal judgments can be complicated and pro-

99. Rule 8(c):

> Appointment of counsel; time for hearing. If an evidentiary hearing is required the judge shall appoint counsel for a petitioner who qualifies for the appointment of counsel under 18 USC § 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 USC § 3006A at any stage of the case if the interest of justice so requires.

R. GOV. § 2254 CASES IN U.S. DIST. CTS. 8(c).

100. On the Powell Committee plan, see POWELL COMMITTEE REPORT, *supra* note 22, at 3241. On the ABA program, see ABA Recommendations, *supra* note 6. The crime bills that passed the House and the Senate seriatim in the 101st Congress contained amendments that would have repealed the statutory right to counsel in capital cases. Those provisions were deleted from the bill that was ultimately adopted — only to be revived in the Bush administration's initiative in the 102nd Congress. S. 635, 102d Cong., 1st Sess., 137 CONG. REC. S3192 (daily ed. Mar. 13, 1991).

101. *See infra* Part III(C)(2)(d).

longed by the federal courts' willingness to entertain issues that petitioners failed to raise in state court.

The basis of this concern is straightforward. All states offer criminal defendants opportunities to raise federal claims during the proceedings against them at the trial court level, on appeal in the state appellate courts, or in state postconviction proceedings. In order to make the best use of such opportunities, state law often demands that defendants assert claims in a manner calculated to frame issues properly and at the most advantageous time for effective adjudication. For example, so-called "contemporaneous objection" rules typically require defendants to object to the admission of unconstitutional evidence at the time the evidence is offered by the prosecution. Trial judges then address objections immediately, when the underlying events are recent, and thereby avoid constitutional error by excluding evidence actually found to be inadmissible. If claims regarding the admissibility of evidence are raised later, the state courts' ability to determine them may be impaired, the chance to avoid error in the first instance certainly lost. State law often exacts a Draconian penalty for failure to comply with contemporary objection rules. Litigants who commit procedural default, *i.e.*, fail to raise claims properly and seasonably, are not permitted to assert those claims in later proceedings in state court. If the federal courts are willing to entertain such claims despite petitioners' failure to comply with state contemporaneous objection rules, the state policies served by those rules may be compromised.

The federal courts clearly have jurisdictional power to ignore default in state court and proceed to the merits.[102] The occasion calls for a rule delimiting the circumstances in which the federal courts should *exercise* their power. It is well settled that the federal courts can be flexible in habeas corpus. They may decline to exercise jurisdiction in reliance on equitable notions with which the writ has been associated historically — namely the proposition that applicants' improper conduct with respect to litigation may disentitle them to the relief they seek.[103] Moreover, explicit language in the relevant statutes authorizes the district courts to dispose of habeas petitions "as law and justice require."[104]

Yet neither equity in general nor the habeas statutes in particular specify the rule the federal courts should employ in deciding whether to consider claims the state courts failed to address. The Supreme Court has grappled with the problem in a series of decisions over the last half century and by all

102. Fay v. Noia, 372 U.S. 391, 438 (1963); *see* Smith v. Murray, 477 U.S. 527, 533 (1986) (recognizing that the federal habeas courts have "power to look beyond state procedural forfeitures").

103. United States *ex rel.* Smith v. Baldi, 344 U.S. 561, 573 (1952). There are other manifestations of the federal courts' well settled authority to decline jurisdiction. *E.g.*, Younger v. Harris, 401 U.S. 37 (1971) (insisting that the federal courts should rarely enjoin pending state proceedings); Railroad Comm. of Tex. v. Pullman Co., 312 U.S. 496 (1941) (establishing another abstention doctrine). *See generally* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

104. 28 U.S.C. § 2243 (1988).

accounts has vacillated. The matter is difficult, primarily because of the many considerations that rightly bear on its resolution. More is at stake than visiting occasional penalties on abusive suitors. On the one hand, the enforcement of the Bill of Rights in any forum is at risk if *both* the federal courts and the state courts refuse to treat claims because of procedural default. On the other, legitimate state interests in the orderly conduct of judicial business are undermined if criminal defendants ignore state procedures for raising federal claims and are nevertheless able to preserve those claims for future litigation in federal habeas corpus.[105]

Two quite different rules, announced by the Supreme Court at different times and enforced by the lower federal courts in different periods, have dominated the field. In *Fay v. Noia*[106] in 1963, the Court declared that the federal forum should be denied to habeas applicants only if their procedural defaults in state court could "fairly be described as the deliberate by-passing of state procedures."[107] This was a waiver rule. Petitioners were not refused access to

105. Rules regarding the effect the federal courts should give to procedural default in state court should not be confused with the exhaustion doctrine, which is only concerned with state remedies available at the time federal relief is sought and not with remedies that might have been available previously if the prisoner had chosen to pursue them. *See supra* Part I(A). It seems to follow even from the expectation that current state remedies be exhausted that account must be taken of previous procedural default. If potential federal petitioners were allowed to avoid state court remedies simply by failing to invoke them at the appropriate time, the exhaustion doctrine would be frustrated. Petitioners could disregard prescribed procedures for presenting federal claims to the state courts until those courts decline, for that reason, to consider them — and then shift to the federal forum with an argument that, state remedies being no longer available, the federal courts should reach the merits. In cases of that kind, available and effective state remedies *have* been exhausted, and the exhaustion doctrine itself provides no basis for dismissal. Still, if the exhaustion doctrine is not to be circumvented, the federal courts must arguably contend with the procedural default that rendered state remedies unavailable.

Yet the sense in which any procedural default rule can be considered an enforcement mechanism for the exhaustion doctrine depends upon the way the exhaustion doctrine is understood in the first instance. To the extent the exhaustion doctrine ensures that the state courts share a role in making and enforcing federal constitutional law, a procedural default rule that encourages timely state court litigation furthers the doctrine's purpose. But to the extent that exhaustion only postpones federal adjudication until state court processes are complete so as to avoid a conflict with pending state court proceedings, a procedural default rule that encourages litigants to press claims in state court is beside the point.

106. 372 U.S. 391 (1963).

107. *Id.* at 439. The petitioner in *Noia* and two co-defendants, Caminito and Bonino, had been convicted of murder and sentenced to life imprisonment. The only evidence against each was his confession, the only serious defense that the confessions had been coerced. *Id.* at 394-95. The co-defendants appealed directly to the New York appellate courts. Although neither obtained relief immediately, Caminito eventually succeeded in subsequent federal habeas corpus proceedings and Bonino in further state proceedings in the wake of Caminito's federal judgment. By the time of Justice Brennan's opinion, both co-defendants were at liberty and were unlikely to face further prosecution. *Id.* at 395 & n.1. Noia, for his part, failed to seek timely direct review in state court, explaining that he feared the death penalty should he be successful on appeal and then face re-trial. *Id.* at 397 n.3. After Caminito and Bonino obtained relief, however, Noia asked the New York state courts for a writ of error coram nobis. The state courts denied relief on procedural default grounds; Noia had not, but might have, sought direct review in a timely fashion — as had his co-defendants. *Id.* at 316 n.3. In subsequent federal habeas proceedings, state's attorneys stipulated that Noia's confession, too, had been coerced,

federal habeas corpus for defaults of any kind, but only for the knowing and intentional relinquishment or abandonment of opportunities to adjudicate their federal claims in state court.[108] The "deliberate bypass" rule announced in *Noia* provided guidance to the lower federal courts for the next fifteen years.[109]

Plainly, the Warren Court's purpose in *Noia* went well beyond a desire to do justice in the particular case at bar. To ensure that habeas corpus would supply enforcement machinery for new principles of constitutional law, it was essential that the federal district courts entertaining petitions from state prisoners should be free to cut through procedural snarls and reach prisoners' claims. Together with *Townsend v. Sain*[110] and *Sanders v. United States*,[111] decided at the same time, *Noia* confirmed federal habeas corpus as a general postconviction remedy for state prisoners challenging their custody on federal grounds.[112]

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but contended that federal relief should be unavailable because the state courts' refusal to upset his conviction rested on adequate and independent state grounds. *Id.* at 396 & n.2. Accordingly, when the Supreme Court held that Noia's default did not pose a barrier to federal habeas corpus, the Justices allowed relief to be granted to a prisoner whose conviction was concededly invalid.

108. *Id.* at 438-39.

109. Not to say that *Noia* did not come under pressure almost immediately. It was one thing to employ the bypass rule in cases in which the default occurred on appeal in state court. At that stage, the state interests in cutting off claims were diminished. There was no longer any question of avoiding error in the first instance, and the evidentiary trail was already cold. Moreover, at the appellate stage there was time for reflection. Convicts could reasonably be consulted about tactical choices at hand and could participate in decisions — for example, the decision whether to seek appellate review at all in *Noia* itself. Accordingly, it was realistic to make an exception for personal decisions to forego state court opportunities for litigation. In cases in which the default occurred at trial, by contrast, the bypass rule was more unruly. At that stage, state interests in the timely assertion of claims were more pronounced. It *was* often possible to avoid constitutional error entirely or, at least, to treat claims in a more timely fashion. The bypass rule threatened those interests inasmuch as counsel often could not consult readily with the defendant during trial. Tactical choices had to be made in the heat of the moment. The kinds of default typically occurring at trial would therefore rarely meet the personal waiver standard, and the federal courts would thus be open — their availability for the litigation of claims arguably undercutting state interests in orderly state court processes. *See* Wainwright v. Sykes, 433 U.S. 72, 92 (1977) (Burger, C.J., concurring) (insisting again that *Noia* "was never designed for, and is inapplicable to, errors — even of constitutional dimension — alleged to have been committed during trial"); Henderson v. Kibbe, 431 U.S. 145, 158 (1977) (Burger, C.J., concurring) (arguing that, for these reasons, the bypass rule should not apply to mid-trial default); *see also* White, *Federal Habeas Corpus: The Impact of Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67 (1972). At the Fortunoff Colloquium, Professor Hughes recalled that Justice Brennan himself, in Henry v. Mississippi, 379 U.S. 443 (1965), retreated from the requirement of a personal waiver by the defendant in the heat of trial. G. HUGHES, *supra* note 32, at 5.

110. 373 U.S. 293 (1963) (setting forth guidelines for fact-finding in habeas corpus).

111. 373 U.S. 1 (1963) (establishing standards for successive federal applications).

112. *See generally Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970). Against this background, the deliberate bypass rule announced in *Noia* was a narrow exception to the general expectation of federal adjudication on the merits. In the opinion itself, Justice Brennan presented the bypass rule as part and parcel of traditional equitable

In a series of decisions culminating in *Wainwright v. Sykes*[113] in 1977, the Court jettisoned the bypass rule and replaced it with an altogether different instruction to the federal district courts. Then-Justice Rehnquist's opinion for the Court held that, in most cases, habeas petitioners should be barred if they committed procedural default in state court and, for that reason, were denied state court adjudication of federal claims in circumstances that would also foreclose direct review in the Supreme Court. No demonstration of a voluntary and intelligent *waiver* would be necessary; under *Sykes*, petitioners would *forfeit* state court opportunities for litigation — and federal habeas corpus into the bargain.[114] Exceptions were recognized to avoid a "miscarriage of justice,"[115] but those exceptions were circumscribed. The federal habeas courts could overlook default in state court only if prisoners demonstrated "cause" for their failure to comply with state procedures and "prejudice" flowing from the federal wrong that went uncorrected in state court.[116] The burden of showing both "cause" and "prejudice" was on the petitioner.[117]

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standards for the conduct of litigation — particularly when litigants seek an extraordinary writ. Fay v. Noia, 372 U.S. 391, 438 (1963).

113. 433 U.S. 72 (1977).

114. *See* L. YACKLE, *supra* note 70, at 332 n.78 (citing Dix, *Waiver in Criminal Procedure: A Brief for a More Careful Analysis*, 55 TEX. L. REV. 193 (1977)) (pleading for care in distinguishing waiver from forfeiture). The *Sykes* approach to procedural default cases had substantial appeal on the facts of the particular case at bar. The petitioner had failed to object seasonably to the introduction of inculpatory statements allegedly obtained from him in violation of *Miranda*. He also had omitted that claim from his brief on direct review. When he raised it for the first time in state postconviction proceedings, the state courts refused to treat the merits on procedural grounds. *Sykes*, 433 U.S. at 75, 85-86. Without question, the procedural basis of the decision was sufficient to bar direct review in the Supreme Court. On those facts, the price of adherence to the deliberate bypass rule was readily apparent. The state interests served by contemporaneous objection rules, *see id.* at 88, and the ostensible impossibility of showing a personal waiver in the midst of trial, *see id.* at 98 (Burger, C.J., concurring), combined to support a new, substitute rule foreclosing federal treatment of the merits without a demonstration of waiver.

115. *Sykes*, 433 U.S. at 90-91.

116. *Id.*

117. *Id.* The "cause" and "prejudice" ideas had appeared initially in Davis v. United States, 411 U.S. 233 (1973), a case involving an attack on a federal conviction and thus implicating Rule 12 of the Federal Rules of Criminal Procedure. In *Davis*, the Court drew upon Rule 12 for the "cause" standard and on precedents for the "prejudice" test, but twisted the latter into an additional barrier to postconviction litigation. *Id.* at 245. *See* Seidman, *supra* note 15, at 461-63. Next, in Francis v. Henderson, 425 U.S. 536, 542 (1976), the Court imported the cause-and-prejudice rubric into federal habeas corpus for state prisoners. *See also* Estelle v. Williams, 425 U.S. 501 (1976) (a companion case to *Francis*). Many observers found *Davis* a curious reach beyond Rule 12 and *Francis* an extraordinary leap from *Noia*. *E.g.*, P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1546 (3d ed. 1988) (complaining that *Francis* "completely ignored" *Noia*); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050, 1056 n.2 (1978) (arguing that *Francis* "seemed to overrule, or at least sharply to limit" *Noia*); Seidman, *supra* note 15, at 463 (pointing out that the precedents on which *Francis* relied had regarded "prejudice" as sufficient to excuse *lack* of "cause"). Looking back on the line of procedural default cases since the early 1970s, the Court itself has acknowledged that the cause-and-prejudice rule has a questionable pedigree. Murray v. Carrier, 477 U.S. 478, 496 (1986).

The literature on the shift from *Noia* to *Sykes* is voluminous. *See, e.g.*, Friedman, *A Tale of*

The new terminology used in *Sykes* was expressly left to be defined gradually,[118] but the Court made it unmistakably clear that the cause-and-prejudice formulation would cut off many more claims than the bypass rule ever had.[119] Indeed, *Sykes* was in substance the mirror image of *Noia*. While *Noia* provided the standard, habeas corpus examination of the merits of federal claims was routine; adjudication was refused only when a very good reason was shown for closing the federal forum. That reason was the petitioner's demonstrated waiver of state processes. Now, under *Sykes*, forfeitures for procedural default were to be routine, unless there was a very good reason to reach the merits despite default in state court — unless, that is, "cause" and "prejudice" were shown. By the Court's most recent account, a petitioner can show "cause" only by proving up some objective impediment to the timely presentation of a claim in state court. The only examples the Court has offered are cases in which the factual or legal basis of a claim was not reasonably available when the case was in state court and cases in which counsel's performance was constitutionally ineffective. In the latter instance, "cause" is demonstrated not because counsel's performance was so dismal that she ceased to be the client's agent, but because responsibility for constitutionally deficient proceedings can be ascribed to the state and is thus external to the defense.[120]

Two Habeas, 73 MINN. L. REV. 247 (1988); Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663 (1985); Rosenberg, *Jettisoning* Fay v. Noia*: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work to Do*, 31 STAN. L. REV. 1 (1978). On procedural default and related state-federal court issues generally, see Brilmayer, *State Forfeiture Rules and Federal Review of State Criminal Convictions*, 49 U. CHI. L. REV. 741 (1982); Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965); Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128 (1986); Resnik, *supra* note 65; Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187; Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981 (1982).

118. 433 U.S. at 87. A bit later, the Court said in Engle v. Isaac, 456 U.S. 107, 135 (1982), that "cause" and "prejudice" would "take their meaning from the principles of comity and finality." In United States v. Frady, 456 U.S. 152 (1982), the Court said that the "prejudice" question is whether the constitutional error the prisoner complains of "so infected the entire trial that the resulting conviction violates due process." Id. at 169. *But see* L. YACKLE, *supra* note 70, § 87 (Supp. 1990) (faulting the *Frady* opinion for running the "prejudice" idea with respect to procedural default into the merits of underlying claims).

119. 433 U.S. at 87 (stating that the cause-and-prejudice rule was "narrower" than the bypass rule). The Court did not expressly overrule *Noia* in *Sykes*. Indeed, Justice Rehnquist said he had no occasion to say whether the deliberate bypass rule might still apply to "the facts there confronting the Court." *Id.* at 88 n.12. The Court again pretermitted the issue in Murray v. Carrier, 477 U.S. 478, 486 (1986), where the petitioner had failed to assert a particular claim on appeal along with others. Finally, in Coleman v. Thompson, 111 S. Ct. 2546 (1991), the Court overruled *Noia* explicitly, invoking the cause-and-prejudice test in a case in which the default was a total failure to appeal — as was the situation in *Noia*.

120. Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991); *see also* Adams v. Dugger, 489 U.S. 401 (1989); Amadeo v. Zant, 486 U.S. 214 (1988); Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986). *See generally* Yackle, *The Misadventures of State Post-conviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 379 (1987-88).

Here again, the Court's selection of a rule for procedural default cases suggests a frank balance of values. Conventional wisdom has it that the Court as it has been reconstituted in recent years remains unconvinced that the federal courts are essential to the enforcement of federal claims in criminal cases. The Justices now sitting may weigh, more heavily than did the Warren Court, the state interests in protecting judgments once approved in state court. Perhaps most important, this Court may wish to avoid interjurisdictional conflicts of the kind that can occur when, and if, the federal courts prove willing to treat claims the state courts declined to consider. On this level, *Sykes* appears to have been meant forthrightly to dilute the flow of federal habeas corpus petitions — simply to bar claims for procedural reasons unrelated to the merits. That, after all, is the essential meaning of a forfeiture rule. An individual loses something of value, a claim or an opportunity to assert a claim, not out of personal choice but in light of competing interests judged to be of greater value and importance.[121]

Our chief objective in this study was to appraise the effect, if any, of the move from *Noia* to *Sykes*. When the bypass rule was in play, arguments from state's attorneys that habeas petitions should be dismissed for default were generally supposed to be rejected: habeas petitioners were to be permitted to litigate federal claims in federal court notwithstanding the state courts' refusal

121. *See* Dix, *supra* note 114 (elaborating on the difference between waiver and forfeiture). An alternative thesis is available. The Court charged in *Sykes* that *Noia* encouraged "sandbagging" in state court. Knowing full well that procedural default would cut off later state court opportunities for litigation, defense counsel might nonetheless "take their chances on a verdict of not guilty in a state trial court," intending "to raise their constitutional claims in a federal habeas court if their initial gamble did not pay off." 433 U.S. at 89. Justice Rehnquist contended that such deliberate manipulations threatened to deprive the trial stage of state proceedings of its rightful place as a "decisive and portentous event" and to make of state trial a mere "tryout on the road" to authoritative adjudication in federal habeas corpus. *Id.* at 90. If, however, petitioners who failed to raise federal claims appropriately lost further chances to litigate in both state and federal court, they would be discouraged from sandbagging and, instead, would press claims in both forums. By this account, Justice Rehnquist did not mean to persuade the states to relax procedural default rules and, in that way, to bring about adjudication on the merits in both state and federal court. Far from it, he offered the more rigid approach to default in *Sykes* to reinforce state forfeitures. His target was not the states but criminal defendants, who might be encouraged to comply with state procedural requirements. In the end, however, the result would be the same: adjudication on the merits in both systems. Indeed, if this scheme worked, the result would be an advance over the *Noia* regime. For by hypothesis, if state contemporaneous objection rules served their purpose, state court adjudication would take place at the optimal time and place — not later when procedural defaults were overlooked or forgiven.

On the other hand, if the rationale was not simply to bar claims in habeas (and thus to avoid the costs of collateral adjudication in federal court), but to discourage sandbagging, no significant departure from *Noia* would seem to have been necessary. Even under the bypass rule, litigants who knowingly and deliberately withheld claims for tactical advantage and saved them for federal court were not entitled to habeas relief. All that can be said in favor of the move to a forfeiture standard by which to contend with sandbagging is that it relieved state's attorneys of the burden of actually establishing deliberate maneuvers in individual cases. If the evil is truly sandbagging, not everyone would agree that the state *should* be freed of responsibility to show that evil by evidence.

to entertain them. Under the cause-and-prejudice rule, arguments for dismissal were generally supposed to be accepted: habeas applicants were to be denied federal adjudication of federal claims if the state courts declined to consider them because of procedural default. Our purpose was to determine whether the district court used the bypass and cause-and-prejudice rules in this way. The data show that the court did so use the two rules and, accordingly, that the argument that default in state court should foreclose federal habeas corpus adjudication became a much more potent weapon in the hands of state's attorneys after 1977.[122]

II.
THE RESEARCH PLAN
A. Origins

This project has roots in a conference on federal habeas corpus, sponsored by the Institute of Judicial Administration at the New York University School of Law in March 1988.[123] Invited guests included judges, lawyers, and academicians from around the country. The three principal speakers, Graham M. Hughes,[124] Frank J. Remington,[125] and Professor Yackle, addressed a variety of current issues, paying particular attention to procedural default.[126] A wide-ranging panel discussion of habeas, chaired by Judith Resnik,[127] completed the program. Contemporaneous with the conference, the State Justice Institute solicited funding proposals for studies of federal habeas corpus, and an award was made for this project in September 1988.[128] John A. Blackmore, then-Director of Special Projects at IJA, was initially named project director. In January 1989, Ms. Rubenstein, Blackmore's successor, assumed primary administrative responsibility, with overarching superintendence of the project in the hands of Margaret L. Shaw, Director of IJA. Professor Yackle was named principal investigator and Mr. Faust the data analyst. Three other participants in the colloquium were named to an advisory committee: Hon. Bernard S. Meyer,[129] Hon. Harold J. Rothwax,[130] and Professor Remington.

122. *See infra* Part III(C)(2)(f).

123. The conference was made possible by grants from the John Ben Snow Memorial Trust, the United States Steel Foundation, the Edith C. Blum Foundation, and the estate of Bertha Alexander.

124. Professor of Law, New York University.

125. Mortimer M. Jackson Professor of Law, University of Wisconsin.

126. Edited versions of the talks later appeared as a symposium issue in the *Review of Law & Social Change*. *See* Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321 (1987-88); Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339 (1987-88); Yackle, *supra* note 120.

127. Orrin B. Evans Professor of Law, University of Southern California.

128. State Justice Institute, Funding Program Guideline for Fiscal Year 1988, 53 Fed. Reg. 6494 (Mar. 1, 1988).

129. Meyer, Suozzi, English & Klein, New York State Court of Appeals, retired Justice.

130. Acting Justice, New York State Supreme Court, First Judicial District; Judge, New York Court of Claims.

B. Research Design

1. Arrangements

We focused our attention on the work of a single, illustrative federal district court, the United States District Court for the Southern District of New York.[131] We chose the Southern District because it is a large and busy court[132] which receives a significant number and variety of habeas corpus petitions — most from prisoners confined and convicted within the state of New York.[133] New York, in turn, maintains a fully developed set of procedural rules under which would-be federal habeas corpus petitioners may lose state court opportunities for litigation. For example, New York law includes a contemporaneous objection rule, specifying that criminal defendants who fail to raise federal claims properly and seasonably at the trial-court level may not press those claims on direct review.[134] Moreover, pursuant to New York law, prisoners who fail to raise claims on direct review may be barred from postconviction relief,[135] and prisoners who neglect claims in initial postconviction motions may be foreclosed in subsequent collateral proceedings.[136] These rules are subject to exceptions, as are similar rules in other states, but their routine enforcement in the run of cases ensures that procedural default issues arise in federal habeas petitions addressed to the Southern District.[137] Data generated from New York should therefore be typical, such that authorities in other states can learn from our results and replicate our methodology.[138]

131. Early on, the project also contemplated a parallel study of cases in the District of Massachusetts. Those plans were abandoned, primarily because the procedural default rules operating in Massachusetts during the periods under study were not fully developed. Accordingly, it was not at all clear that habeas petitions filed in Boston would provide an appropriate test of the operation of the federal rules to be examined. We sought no substitute for the District of Massachusetts because of the logistical difficulties and limited resources.

132. During the periods under study, the Southern District of New York was served by more than thirty active district judges.

133. The Southern District has jurisdiction to entertain applications for habeas relief on behalf of prisoners confined within the district or prisoners confined elsewhere but challenging convictions rendered against them in state courts sitting within the district. 28 U.S.C. § 2241(d) (1988).

134. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 1983).

135. *Id.* § 440.10(2)(c).

136. *Id.* § 440.10(3)(c).

137. *E.g.*, Johnson v. Metz, 609 F.2d 1052, 1055-56 (2d Cir. 1979) (recognizing that § 440.10(2)(c) might cut off a prisoner's opportunity to obtain state postconviction relief and indicating that such a procedural bar would require the federal district court to invoke federal rules regarding the effect of procedural default in state court on the availability of federal habeas corpus). *See generally* L. YACKLE, *supra* note 70, at 48-61 (reviewing New York's system of procedural default rules).

138. We needed and obtained help from court officials and the authorities responsible for housing and maintaining the case files we wished to study. Chief Judge Charles L. Brieant readily approved the project. Letter from Chief Judge Brieant to Larry W. Yackle (June 27, 1988) (on file with authors). The district executive, Clifford P. Kirsch, provided critical advice and support. The district pro se clerk, Lois Bloom, and the chief records clerk, Rosemary Fugnetti, were extraordinarily helpful to our staff at Foley Square. Case files themselves were located at the Federal Records Center, Bayonne, New Jersey. There, Mitchell Lustgarten and Robert Morse cooperated fully and enthusiastically. Mr. Lustgarten's assistants retrieved case

Ms. Rubenstein recruited three NYU law students to collect data in the summer of 1989, using the questionnaire reproduced in the Appendix.[139] Before work began, we lectured the students on basic habeas corpus law and procedure. The purpose of the training was not to develop sophistication. Instead, we hoped to give our team members enough grounding to render the project intelligible to them, but to avoid any thoroughgoing treatment that might invite students to exercise substantive judgment on the meaning of the materials they examined. Theirs was, and was intended to be, an intelligent, but nonetheless routine, ministerial collection of discrete data. When questions arose, students sought guidance from us. The questionnaire proved to be comprehensive in most respects, and few questions from students required adjustments.

We adopted three conventions to facilitate data collection. First, we instructed students to piece together the procedural history of cases from whatever materials appeared in the files, but to rely primarily on orders and opinions rendered by the court and documents filed by attorneys. Second, we instructed students to record the uncontested statements petitioners made in documentary materials lodged with the court. Although there was no feasible means of verifying such statements, we felt warranted in accepting prisoners' allegations of fact, which were made under penalty of perjury and which often concerned matters about which litigants had no reason to be misleading. Third, in the interest of accuracy, we instructed students to resolve doubts regarding data by recording "NA" — not available.

We collected data from the official files of cases handled by the court during two periods — 1973-1975, when the bypass rule provided the doctrinal guidance for procedural default cases, and 1979-1981, when the cause-and-prejudice rule provided the standard.[140] These two three-year periods produced an ample number and variety of cases to generate reliable generalizations. In the first period, the district court denominated 838 cases as habeas corpus actions brought by state prisoners; in the second period, 582 such cases were opened. We anticipated that many cases in each period were deemed frivolous and thus were dismissed summarily. Moreover, inasmuch as most petitioners were unrepresented, we expected that the documentary record in many files would be thin. Accordingly, we thought it both prudent and feasible to be more exhaustive than is normal for studies of this kind. To ensure that our sample was sufficient, we examined half the case files in each period—

files efficiently, so that project staff could examine them in a private room provided for the purpose.

139. The students were Thomas J. Faughnan, Nicholas L. Kondoleon, and Anne McNeill Carley. They rendered extraordinary service.

140. We would have preferred to study the results under two procedural default rules applied during the same time periods and under identical circumstances. That was not possible because the prevailing rule at any time was a matter of federal law and thus applicable everywhere. However, we believe that by mapping the tendencies noted in the text, we drew significant inferences without the explicit comparisons available only through rigorously controlled experiments.

taking every other case in order.[141]

We chose the three-year time periods with care to maximize our ability to examine the habeas doctrines identified for study. We gave first priority to the shift from *Noia* to *Sykes*.[142] We thought it essential to give both the state courts and the district court considerable time after the establishment of either procedural default rule to become aware of the rule and its implications, and to conform their behavior to it. While on that reasoning we might have begun collecting data on the effect of the bypass rule as early as 1965, we instead waited until 1973 — for two reasons. First, the provision of the New York Criminal Procedure Law containing New York's explicit requirement that federal claims be raised on direct review and in initial postconviction applications was not approved until 1971. Although prior to that time procedural forfeitures at the postconviction stage were probably common, we thought it best to wait for the relative clarity of a later period. Second, prior to and during 1972, some federal district courts permitted state prisoners to challenge state criminal convictions collaterally by way of actions pursuant to 42 U.S.C. § 1983, as well as by way of petitions for the writ of habeas corpus. Early in 1973, the Supreme Court decided that habeas corpus was the exclusive federal remedy in almost all cases.[143] By waiting to begin our study until 1973, we hoped to avoid the confusion that existed before the Supreme Court's decision.

To be sure, by waiting until 1973 to begin data collection, we may have affected our comparison of the district court's handling of exhaustion doctrine issues before and after the Court's shifts with respect to that doctrine, which began in the early 1970s. In the main, however, we thought it safe to assume that the new Supreme Court decisions on exhaustion also required time to be assimilated into daily practices at the district court level. Accordingly, the exhaustion doctrine seems likely still to have appeared more malleable in 1973-1975 than it did in 1979-1981, after the rigidity of the Court's new decisions clearly would have registered below. Moreover, so long as we terminated the first three-year period in 1975, we were sure to capture a body of cases handled prior to the adoption of Rule 9(a) in 1977 and thus were in a position to compare the treatment of timing issues in those cases to the handling of similar questions in cases opened in a three-year period after the promulgation of Rule 9(a). In a like manner, by placing the 1977 adoption of Rule 8(c) precisely mid-way between our two three-year periods, we hoped to achieve a clear comparison of the district court's practices regarding the appointment of counsel before and after the explicit authority that rule

141. In order to retrieve the official files at Bayonne, we needed four distinct identifying numbers for each — the case number assigned by the court, a Federal Records Center number, an "accession" number, and a box number. Two New York University law students obtained those numbers from the district court records kept by the clerk. Ms. Fugnetti and her staff also provided us with complete and accurate lists of numbers that greatly facilitated our work.

142. *See supra* notes 106-21 and accompanying text.

143. Preiser v. Rodriguez, 411 U.S. 475 (1973).

established.[144]

We began the second time period in 1979 primarily to avoid cases opened in 1982, the year in which the Supreme Court adopted the "total exhaustion" rule in *Rose v. Lundy*.[145] Previously, the general practice in the federal courts had been to demand exhaustion only with respect to individual claims. In cases in which prisoners raised multiple claims in a single application, some claims might be found ripe for adjudication while others were dismissed for want of exhaustion. In *Lundy*, however, the Court held that *all* claims raised by a habeas corpus petitioner in a single application were subject to dismissal if the exhaustion doctrine had not yet been satisfied with respect to *any*.[146] We anticipated that this dramatic change in the exhaustion doctrine led to a great many more summary dismissals than previously occurred in the enforcement of that doctrine. In order to maximize our ability to obtain data regarding procedural default, we made 1981 the last year for which we collected data.

The 1981 cut-off date was not without its own costs. First, we surrendered the opportunity to study the effects, if any, of the *Lundy* decision itself. Second, by beginning our second three-year period as early as 1979, we knowingly collected data on cases in which the trial in state court occurred prior to the Court's decision in *Sykes* — before criminal defendants or their attorneys could have been influenced by the cause-and-prejudice rule to comply with state contemporaneous objection rules in state court.[147] Neither of these sacrifices was painful. The first was critical to our intention to make procedural default the major focus of the study. The second was consistent with our purpose to examine and evaluate not the incentives that either *Noia* or *Sykes* may have been meant to establish for the litigation of federal claims in state court, but rather the federal district court's handling of federal petitions in light of the habeas doctrines in place at the relevant time. Since *Sykes* was plainly known to the district judges serving the Southern District by 1979, that year was a fit beginning point for our second three-year period.

Moreover, the 1979 threshold for the second period comported neatly with our plans regarding the examination of the exhaustion doctrine, the timing of habeas petitions, and the participation of counsel. By 1979, the district court would clearly have comprehended the message embodied by the Court's rigid restatements of the exhaustion doctrine. And in cases opened in that year, two years after the adoption of Rule 9(a) and Rule 8(c), we expected to encounter the effects, if any, of those rules.[148]

144. Inasmuch as Rule 9(b), also promulgated in 1977, was understood merely to incorporate the rules governing successive petitions previously established in Sanders v. United States, 373 U.S. 1 (1963), *see supra* note 78 and accompanying text, we did not consider the effective date of that rule in fixing the beginning and ending dates for the periods we would study.

145. 455 U.S. 509 (1982). On *Lundy* see Yackle, *supra* note 58, at 424-31.

146. *Lundy*, 455 U.S. at 522.

147. *See supra* note 121.

148. Here again, we note that the 1977 adoption of Rule 9(b) was not understood to change the rules governing successive petitions. *See supra* note 78 and accompanying text.

Finally, we thought it essential to avoid *very* recent case files — however much we desired this study to illuminate current practices. The case listings provided to us collected files *opened*, not *closed*, during the periods under study. Accordingly, if we attempted to examine more recent cases, we risked coming upon cases still active — in the district court itself or on appeal. By concluding our study with files opened in 1981, we avoided active cases, further proceedings in which might have affected data retrieval or even the reliability of data.

2. Focus on Federal Litigation

Optimally, we hoped to generate results that would shed light on actual habeas practice, particularly any effects on the district court's handling of procedural default issues occasioned by the shift from *Noia* to *Sykes*. We designed our questionnaire accordingly.[149] It may be that the Supreme Court meant to influence litigational behavior in state court. For example, the *Noia* bypass rule may have been intended to encourage state authorities to relax state requirements that federal claims be raised in particular ways and at particular times.[150] The cause-and-prejudice rule, for its part, may have aspired to reinforce such state procedural requirements — either to effectuate an end

149. At a minimum, we intended to mark any change in the rate of procedural default dismissals between the two three-year periods under study. At a more refined level, however, we also measured any change in the rate of procedural default contentions by state's attorneys (whether successful or not), hearings on procedural default arguments, investigations of subissues within procedural default arguments (*e.g.*, the existence of "deliberate bypass," "cause," or "prejudice"), and showings by petitioners of the requisites for avoiding dismissal for procedural default (*e.g.*, "cause" and "prejudice"). Data regarding these matters promised to reveal both the details of procedural default analysis under the regimes of the two rules and the transaction costs of implementation.

150. The genuine impact of the *Noia* decision on the orchestration of litigant behavior would have attached not to this limited (bypass) exception to federal treatment of the merits, but to the predicate holding that the federal courts would routinely be open to federal claims despite prisoners' procedural default in state court. Justice Brennan may have hoped that the federal courts' willingness to entertain claims on the merits would encourage the states to relax procedural barriers in their own courts. If the states responded favorably, the state courts would reach the merits of federal claims more routinely. In some cases, they would award relief and thus obviate either direct review in the Supreme Court or collateral adjudication in habeas corpus. In other cases, they would deny relief, but in so doing would either dissuade petitioners from pressing on to the federal forum or, at least, provide a good record on which the federal courts could rely.

Justice Brennan's subsequent opinion for the Court in a direct review case, Henry v. Mississippi, 379 U.S. 443 (1965), helps make the point. The Court in *Henry* remanded to the Mississippi Supreme Court in order that that court might reexamine its earlier decision to forego the merits of a federal claim because of procedural default. Hinting heavily at the result the Court hoped would be reached on the issue, Justice Brennan reminded the state court that federal habeas corpus would be available if state litigation were denied on any basis short of deliberate bypass. *See also* Case v. Nebraska, 381 U.S. 336, 344-45 (1965) (Brennan, J., concurring) (listing the benefits of state court adjudication on the merits); *cf. Henry*, 379 U.S. at 457 (Harlan, J., dissenting) (charging that the remand order indicated a dilution of the adequate state ground doctrine on direct review). Some states reacted affirmatively to the Warren Court's challenge; most, however, declined. *See* Yackle, *supra* note 120, at 377-78 (describing developments in the states in the wake of *Noia*).

to litigation or, by some accounts, to encourage petitioners to comply and to obtain state court adjudication on the merits consistent with orderly state process.[151] In this study, however, we made no attempt to examine any effects the two rules may have had on state court proceedings.[152]

We monitored the door to the federal court house in order to study the actual operation of the exhaustion doctrine, any delays associated with habeas practice, the successive petition phenomenon, the participation of counsel, and, of course, the effect of the governing procedural default rule on the district court's work.[153] We did not attempt to assess the way in which state criminal cases were processed in state court, with the rules governing the possibility of postconviction habeas corpus in the background.

III.
RESULTS AND ANALYSIS

A. Cases in the Sample

We collected data from a total of 585 case files, representing just under

151. *See supra* note 121.

152. An examination of the effectiveness of the two rules actually to create such incentive structures would demand an appraisal of the behavior of participants in state court and at all stages of proceedings. A project of that kind would require an enormous investment of time and effort. It would be necessary to examine thousands of state criminal prosecutions in an illustrative jurisdiction, to explore litigants' compliance with state requirements for raising federal claims and state court responses to any failure so to comply, and then to measure the extent to which the procedural default rule then being employed by the federal habeas courts may have affected the behavior of actors. Yet there are many reasons why litigants, or more precisely their lawyers, may meet state standards for invoking federal claims or, instead, fail to raise such claims in the manner prescribed by state law. Those reasons range from a deliberate choice (brilliant or misguided) to forego claims in hopes of obtaining some perceived tactical advantage, through innocent ignorance or oversight, and on to an unprofessional failure to represent a criminal defendant effectively. The availability of federal habeas corpus after state court proceedings are completed may be only a minor factor in the mix, if it is a factor at all. At any rate, before any actor's behavior could be ascribed to his or her attention to the applicable procedural default rule in habeas corpus, it would be necessary to explore the circumstances in some significant body of illustrative cases — probably resorting to field interviews with lawyers and judges. An undertaking of that magnitude and ambition awaits another study.

153. In order to attach significance to the raw number of habeas corpus petitions filed during the two time periods, we also took account of any contemporaneous change in the population of persons positioned to apply for habeas relief in the Southern District. Inasmuch as habeas corpus is restricted to convicts attacking custody in the hands of state authorities, the population of prison inmates and parolees in and from state courts within the Southern District was the best (albeit rough) gauge of any important shift.

Occasional habeas petitions are received from petitioners held in custody in other jurisdictions but entitled nonetheless to pursue habeas relief in the Southern District — for example, a prisoner currently serving a sentence imposed by a court in another state but attacking a New York state sentence scheduled to be served after completion of the current term. Then, too, some New York state prisoners and parolees convicted in Manhattan may nonetheless choose to seek habeas corpus relief in another federal district in the state of New York, *e.g.*, the Eastern District serving Brooklyn. That district court may, but need not, transfer such an action to the Southern District. 28 U.S.C. § 2241(d) (1988). The number of cases in either of these categories is probably small, and there is no reason to think that their incidence was different for one of our time periods as opposed to the other.

half the files designated by court personnel as habeas actions in the two time periods. As indicated in Table 1, the number of cases in the first period was sizeable (340), with cases spread fairly evenly among the three years. In the second time period, however, the number of cases was substantially smaller (245), with cases distributed unevenly.

Our data do not account for the decline in the number of cases between the two periods. The possibility of classification errors by court personnel must be considered, though it is unlikely that mistakes were made at the rate (and in the direction) required to produce the disparity we observe. Suffice it to say, it would be necessary that court personnel overlooked a great many habeas actions that should have been designated as habeas cases in 1979-1981.[154] It is also possible that state prisoners simply filed far fewer habeas actions in the Southern District in 1979-1981 than in 1973-1975. This would be in keeping with the national trend as it appears in the annual reports prepared by the Administrative Office of United States Courts.[155] Those reports count a total of 23,253 habeas corpus petitions from state prisoners in fiscal years 1973-1975, but only 21,944 in fiscal years 1979-1981 — a diminution on the order of 5.6%.[156]

The reason for the decline is unclear. It is not, of course, that the number of potential habeas applicants dwindled between the two periods. By contrast, the ranks of New York state convicts who were in a position to file habeas

154. Inasmuch as we are confident that the cases in our sample were properly classified as habeas actions, we discount any concern that court personnel might have misclassified nonhabeas cases as habeas actions in the first period, bloating the figure for 1973-1975 and thus contributing to the disparity from the other direction.

155. It seems probable that the decline in the number of habeas petitions in our sample reflects prisoner attitudes about the value of habeas litigation. Supreme Court decisions after the early 1970s made it more difficult for prisoners both to obtain federal habeas treatment of their claims and, when the federal forum was open, to win relief on the merits. Knowledgeable observers speculate that those developments discouraged prisoners from filing habeas petitions at all. *E.g.*, Resnik, *supra* note 65, at 947-48. Commenting on the preliminary findings in this study at the Fortunoff Colloquium, *see supra* note 5 and accompanying text, Professor Liebman specifically identified the shift from *Noia* to *Sykes* as the likely source of diminished expectations regarding the efficacy of petitions for federal habeas relief.

156. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 207 table 24 (1975) (showing annual figures for all federal district courts in the 1973-1975 period); ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 149 table 24 (1985) (showing annual figures for all district courts in the 1979-1981 period). The decline in the filing rate we observe in New York exceeds the national figure noted in the text. The national trend does not, then, fully explain the precipitous drop in the New York numbers. Of course, the figures in the text are only as reliable as the primary numbers reported to Washington by district executives, and we have seen in this study that some amount of mislabeling undoubtedly occurs. Here as elsewhere, however, there is no reason to think that errors across the country rendered the general data made available by the Administrative Office unreliable for our own modest purposes. Inasmuch as the figures in the Administrative Office reports are for fiscal rather than calendar years, they do not neatly track the time periods covered in our study. Yet because we attempt no specific correlations between national totals and our own, the loose fit is unimportant. There is no reason to think that, if national figures were available according to calendar year, they would reflect a different trend.

TABLE 1

NUMBER OF CASES IN SAMPLE

	1973-74	1979-81	Total
1973	132		132
1974	106		106
1975	102		102
1979		141	141
1980		25	25
1981		79	79
Total:	340	245	585

petitions in the Southern District *increased* sharply between 1973-1975 and 1979-1981. At the end of the fiscal year 1973, 10,513 inmates convicted in counties within the Southern District were imprisoned in New York's major penal institutions. At the end of the fiscal year 1981, the number of New York prisoners convicted in those counties was 20,429 — an increase of 94%.[157] This, too, was in keeping with the national trend. There were 181,396 prisoners in all state penal institutions in 1973, 196,105 in 1974, and 216,462 in 1975, reflecting a 19% increase within that period.[158] By 1979, the number of such prisoners had reached 271,295, and in 1980 and 1981 the figures were 285,667 and 322,972, respectively[159] — showing a 19% increase within the 1979-1981 period as well and a 78% increase between the bookend years of our study, 1973 and 1981.[160]

The distribution of confirmed habeas cases within the 1979-1981 period probably *is* explained by administrative error, there being no self-evident alternative explanation for the erratic shifts we observe (from 141 down to 25 and back up to 79). Two possibilities suggest themselves. One is that, here again, court personnel may have misclassified habeas cases and counted them in some other category — particularly in 1980. The other is that court officers misdated cases and thus counted many files actually opened in 1980 as though

157. Figures provided by Henry C. Donnelly, Director of Program Planning, Research and Evaluation Division, New York Department of Correctional Services.

158. P. LANGAN, J. FUNDIS & V. SCHNEIDER, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAR END 1925-86, at 12 table 1 (1988).

159. *Id.* at 12-13.

160. In addition to inmates of the state's prisons and jails, probationers, *see* Cervantes v. Walker, 589 F.2d 424, 425 n.1 (9th Cir. 1978), parolees, *see* Jones v. Cunningham, 371 U.S. 236 (1963), persons serving suspended sentences, *see* Walker v. North Carolina, 262 F. Supp. 102, 104-05 (W.D.N.C. 1966), *aff'd per curiam*, 372 F.2d 129 (4th Cir.), *cert. denied*, 388 U.S. 917 (1967), and even persons on bail after conviction, *see* Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist., 411 U.S. 345, 349 (1973), are eligible to apply for federal habeas relief. Their numbers also increased substantially in New York between the two periods.

they had been opened in 1979 or 1981.[161] Nothing in our study helps to choose between these explanations, to assign weights to them if both operated, or, for that matter, to exclude other possibilities. Again in this context, however, there is no reason to think that administrative errors occurred nonrandomly so as to undermine the reliability of the data. Importantly, for example, inasmuch as our study attached significance not to the particular year of a case, but only to its place within a three-year period, counting errors that mistakenly assigned 1980 cases to 1979 or 1981 are inconsequential for our purposes.

Finally, we should add that as we examined files of cases identified in court records as habeas actions, we occasionally found cases that had been misclassified. It was necessary to discard entirely thirty-five cases that had been mistakenly listed as habeas corpus applications from state prisoners.[162] This was to be expected. Because collateral litigation is typically conducted pro se, it is often difficult to classify petitions accurately without the clarity provided in other contexts by professionally prepared documents.[163] Of greater significance, perhaps, is the possibility that some cases that court personnel should have classified as habeas actions by state prisoners were mistakenly misdirected to other categories and thus did not come to our attention. Still, there is no reason to think that classification mistakes were nonrandom so as to skew the data.

B. Unavailable Information

Within the confirmed habeas corpus case files we examined, the particular information sought in the study was often unavailable. This, too, we anticipated. The files in habeas corpus cases are notoriously thin — because the initial petition is typically prepared pro se; because the state is rarely asked to respond unless the court first determines that the petition shows merit; and because in many instances a basis for summary disposition can be identified on the face of the petition (so that the file need not be supplemented by other documents that might provide information).

161. It is also possible, of course, that court personnel misallocated cases between the three-year period, 1979-1981, and other years — 1978 or 1982, for example. Indeed, a consistent pattern of mistaken dating that undercounted cases in the 1979-1981 period and overcounted cases in other years would help to explain the steep decline we observe in the filing rates between our two three-year periods. As to the distribution of cases within the second period, however, it is more likely that case files actually opened in 1980 were misassigned to bordering years, 1979 and 1981, rather than leapfrogged over those years and beyond the period under study.

162. Twenty-seven of the discarded cases were collateral attacks on federal convictions or sentences, four were extradition cases, and three were removal cases. In one further instance, there was insufficient information in the file to identify the case as a habeas action by a state prisoner.

163. It is extremely unlikely that our team either incorrectly classified some of the thirty-five discarded cases or retained cases that should have been discarded. It would have been quite difficult to overlook the true nature of a case as we went through the file seeking answers to the questions on our questionnaire, almost all of which were geared to habeas corpus litigation.

Files in our second time period tended to be more complete. Under a rule of court promulgated in 1977, prisoners were required to use forms provided by the court for initial petitions.[164] Those forms, in turn, requested much of the data in which we were interested. Still, undereducated prison inmates often failed to provide all the information requested on the forms, and the clerk often accepted incomplete forms when the data that were included were sufficient for the court's purposes. Files in the earlier period were more sparse, forms not having been used at that time. The best sources of information were memoranda prepared by law clerks and orders and opinions issued by the court. But since most petitions were dismissed summarily, neither the clerks nor the court always provided discursive statements useful to our team.

A sizeable rate of "not available" (NA) entries in blanks on a questionnaire can cause difficulties in a study of this kind. In some instances, indeed, the percentage of "NA" entries is sufficient to render results useless. Such entries effectively reduce the size of the sample, and, worse, the reductions may operate nonrandomly. In the case of federal evidentiary hearings, for example, the "NA" response rate was 96%. The data gleaned from cases that *did* provide *some* information on whether a hearing was held may be unrepresentative, inasmuch as those cases are likely to have been cases in which a hearing was, in fact, conducted. Accordingly, in the tables and discussion to follow, we omit reference to questionnaire inquiries for which the "NA" response rate was 30% or higher: namely the year of last state court ruling, the year of collateral review, all questions regarding counsel in state court, the type of counsel in federal court, all questions regarding hearings in federal court, and all questions touching the focus of attention in federal court.

C. Results by Time Period

Table 2 sets forth our basic results, with separate figures for the two time periods. Reviewing this key table, we want, first, to offer general observations about the data and, second, to identify differences over time that are statistically significant (in the strict sense that they are unlikely to turn on sampling error).

TABLE 2

CHARACTERISTICS OF CASES IN THE TWO TIME PERIODS

	1973-75	1979-81	Total
	(%)	(%)	(%)
Convicting court:			
Bronx	25	26	25
Brooklyn, S.I.	9	7	8
Manhattan	42	44	43

164. R. GOV. 2254 CASES IN U.S. DIST. CTS. 2(c). For a copy of the form, see *id.* app. ("Model Form for Use in Application for Habeas Corpus under 28 U.S.C. § 2254").

Westchester	5	11	8
Other[1]	18	10	14
Total %	100	100	100
No.	292	215	507
Years between conviction and federal petition:			
0	11[2]	6	9
	27[3]	18	45
1	15	14	15
	36	29	65
2	17	23	20
	41	53	94
3	25	25	25
	60	49	109
4	5	13	9
	11	32	43
5	7	7	7
	17	13	30
6	5	4	5
	12	8	20
7	4	2	3
	9	5	14
8	2	0	1
	5	0	5
9	1	0	1
	3	0	3
10	2	0	1
	5	1	6
>10	8	5	7
	19	12	31
Total %	100	100	100
No.	245	220	465
Offenses:[4]			
Assault	10	11	11
Drugs*	14	8	12
Homicide	29	28	29
Robbery*	26	36	30
Weapons	16	16	16
Other[5]	33	22	55
Total %	100	100	100
No.	340	245	585
Conviction by:			
Plea of guilty	28	28	28
Trial	72	72	72
Total %	100	100	100
No.	270	213	483
Sentence:			
1-5 years	19	16	17
6-10	19	19	19
11-15	18	17	17
16-20	8	7	7
>20	36	41	39
Total %	100	100	100
No.	220	211	431

Direct review in state court:*			
No	32	13	24
Yes	68	87	76
Total %	100	100	100
No.	281	218	499
Collateral review in state court:*			
No	58	66	62
Yes	42	34	38
Total %	100	100	100
No.	269	206	475
Forma pauperis in federal court:			
No	12	14	12
Yes	88	86	88
Total %	100	100	100
No.	306	213	519
Prior federal petition:			
No	80	85	82
Yes	20	15	18
Total %	100	100	100
No.	280	208	488
Counsel before federal petition:*			
No	85	86	86
Yes	15	14	14
Total %	100	100	100
No.	324	234	558
Counsel after federal petition:*			
No	80	88	83
Yes	20	12	17
Total %	100	100	100
No.	248	187	435
Judge:			
Bonsal	6	1	4
Brieant	5	4	5
Carter	6	2	4
Connor	2	5	3
Duffy	6	4	5
Lasker	3	6	4
Lowe	0	5	2
MacMahon	6	7	7
Metzner	5	0	3
Pollack	6	5	6
Tenney	6	0	3
Ward	6	2	5
Weinfeld	5	5	5
Other[6]	42	50	46
Total %	100	100	100
No.	338	243	581
Claims:[7]			
Appeal denial*	3	8	5
Bail*	11	3	8
Coerced confession	4	5	5
Double jeopardy	2	3	3

Due process*	40	49	44
Self-incrimination	5	6	5
Search and seizure	12	17	14
Guilty plea*	8	13	10
Ineffective assistance*	16	29	22
Sentencing	14	14	14
Speedy trial*	13	6	10
Other[8]	17	14	15
Total %	100	100	100
No.	340	245	585
Number of claims per case:			
One	65	48	58
Two	18	29	23
Three	12	18	14
Four	3	4	3
Five	1	1	1
Six	1	0	0
Total %	100	100	100
No.	340	245	585
Petition dismissed:			
No	3	4	3
Yes	97	96	97
Total %	100	100	100
No.	340	245	585
Claim dismissed without an answer:			
No	78	77	77
Yes	22	23	23
Total %	100	100	100
No.	331	235	566
Respondent arguments:			
Exhaustion	36	34	35
Procedural default*	3	9	6
Successive petition	7	3	5
Total %	100	100	100
No.	340	245	585
Basis or bases for denial:[9]			
Merits	47	46	50
Exhaustion	46	42	44
Procedural default*	2	7	4
Successive petition	6	2	4
Other[10]	18	17	17
Total %	100	100	100
No.	340	245	585
If default, stage occurred:*			
Trial	86	33	48
Direct review	14	56	44
Collateral review	0	11	8
Total %	100	100	100
No.	7	18	25

*Differences over time significant at .10 or better.

[1] Dutchess, Nassau, Orange, Queens, Rockland, Suffolk, and Sullivan Counties.

[2] Figures in this line are percentages.
[3] Figures in this line are numbers of cases.
[4] Results exceed 100% because some petitioners had been convicted of multiple offenses.
[5] Bribery, burglary, conspiracy, larceny, grand larceny, kidnapping, perjury, possession of stolen property, sex offenses.
[6] Bauman, Broderick, Cannella, Frankel, Gagliardi, Goettel, Griesa, Gurfein, Haight, Knapp, Leval, Motley, Owen, Palmieri, Pierce, Sand, Sofaer, Sprizzo, Stewart, Sweet, Tyler, Werker, and Wyatt — no one of whom received more than 4% of the court's cases in either three-year period.
[7] Results exceed 100% because some petitioners asserted multiple claims.
[8] Including *inter alia* claims that the jury had been improperly selected and claims of prosecutor misconduct — neither of which was alleged often or showed a statistically significant shift between the two three-year periods.
[9] Results exceed 100% because some petitions were dismissed on multiple grounds.
[10] Including *inter alia* want of custody, lack of jurisdiction, mootness, and pleading errors.

1. General Observations

The pool of habeas corpus petitions and petitioners examined in this study comports with the general expectations knowledgeable observers might have had. Most habeas applicants had been convicted in busy state trial courts in populous areas (43% from Manhattan, 25% from the Bronx). They had been found guilty of a wide array of criminal offenses, usually by trial (72%) rather than a plea of guilty (28%). Most prisoners were serving substantial sentences for their crimes (83% exceeded five years). Only a handful (12%) could afford to pay the filing fee in federal court. Prisoners raised a variety of federal claims, just over half falling within "incorporated" Bill of Rights categories and the rest (44%) grounded in due process generally. Most petitioners (58%) asserted only one claim; almost none (4%) pressed more than three in a single petition. Petitions were distributed widely among the judges serving the court. Rarely (17% of the cases) did one of those judges find a claim sufficiently promising to warrant the appointment of counsel for further development. In most instances (78%), the state failed to file an answer. Virtually all claims were ultimately denied, about half (44%) for failure to exhaust state remedies and a full half on the merits, although multiple bases of denial were not uncommon.

2. Data Analysis: Herein of Differences Over Time

We now begin an analysis of the data in Table 2, focusing on the aspects of habeas corpus practice of primary interest in this study. Initially, we observe what may be a surprising, albeit modest *increase* (from 3% to 4%) in the success rate of habeas corpus petitions between the two periods under study. We had expected to find that during a period in which the *Sykes* default rule operated (1979-1981) the pool of claims treated on the merits would diminish and, accordingly, that we would see a *decline* in the percentage of cases in which the district court awarded relief. In fact, we observe that the general success in habeas cases over the two periods went up, not down.

This turn of events seems to have been possible because the court reduced its reliance on doctrines other than procedural default as a basis for refusing to adjudicate the merits. Importantly, the percentage of cases in which petitions were dismissed on the basis of the exhaustion doctrine and the successive petition rules both apparently declined (from 46% to 42% and from 6% to 2%, respectively). As we expected, only the rate of dismissals on the basis of default increased (from 2% to 7%). These figures are consistent with a scenario we did not anticipate but, on reflection, is entirely plausible. The federal district court in New York may have taken the shift to *Sykes* seriously and thus felt compelled to use default as a ground for dismissing claims more often than it had previously. Yet the court may have made up the difference by reducing its reliance on other procedural barriers to the merits: the exhaustion doctrine and the successive petition rules. Accordingly, the general success rate actually increased.

Our data do not conclusively demonstrate that this is what actually happened at Foley Square. For one thing, it is not clear that these three habeas corpus doctrines would have allowed the various judges handling habeas cases the flexibility needed to orchestrate the docket so neatly.[165] More important, the data on the changes over time in the general success rate in habeas and the rates of exhaustion and successive petition dismissals are not statistically significant[166] by the conventional standard on which we rely: .10 or better. Each approaches that mark, however, and for that reason it is worthwhile to reflect on this possible explanation for the direction of apparent shifts. From this point onward, we concentrate on changes over time that *are* statistically significant, including the increased reliance on procedural default as a basis for denying habeas corpus relief after *Sykes* displaced *Noia* as the doctrinal reference point.

a. The Exhaustion Doctrine

The data in Table 2 indicate that most prisoners in New York do at least attempt to exhaust state remedies, primarily by way of direct review in state court; yet they often fail to satisfy the exhaustion doctrine and thus suffer dismissal on that basis. Most federal petitioners in both time periods (68% in the first period and 87% in the second) had taken direct appeals in state court.

165. The doctrine itself would have governed the extent to which a particular doctrine applied to a case, leaving the judge concerned with only limited room in which to maneuver. And, of course, some of what elbow room there was would have cut across different cases. We scarcely mean to suggest that the district court sacrificed some individual petitioners to the *Sykes* rule and then compensated by relaxing the exhaustion and successive petition standards in cases involving *other* prisoners. The court would not take with its "default" hand (from some prisoners) and give with its "exhaustion" and "successive petition" hands (to other prisoners) simply to retain an overall success rate. The sceniaro we have in mind contemplates that the court increased its use of default as a basis for dismissal in cases in which it previously would have rested on the exhaustion doctrine or the successive petition rules. Default thus may have become the dismissal ground of choice in cases in which the court had a choice.

166. *I.e.*, not explainable by sampling error.

Moreover, the increase in the percentage of prisoners pursuing direct review (29% between the two periods) is statistically significant. This shift is particularly noteworthy, since the percentage of cases settled by plea in state court remained constant. If, of course, prosecutors dispose of criminal charges by plea, appellate review is typically obviated. It is possible, but unlikely, that state trial courts made or appeared to make more errors warranting appeal in the late 1970s — even in the perception of defendants in the dock. A more likely explanation for the increase in the rate of appeals is that petitioners in the second period took the obligation to exhaust state remedies more seriously than did petitioners in the first period and used direct review in state court as a ready vehicle. Because prisoners would have been assisted by counsel on appeal in state court,[167] they may have been advised of the Court's new rigidity regarding the exhaustion doctrine that began during the early 1970s. Accordingly, prisoners who planned to seek federal habeas relief may have responded by pursuing state appellate remedies before filing federal petitions.[168]

The lower rates at which state collateral remedies were pursued in both periods (42% and 34%, respectively) are not surprising and are probably explained by the lack of counsel at that stage.[169] Moreover, the incidence of postconviction proceedings was very likely related to the rate at which direct review was obtained, since prisoners who take direct appeals in state court and satisfy the exhaustion doctrine in that way are not obliged also to pursue col-

167. Douglas v. California, 372 U.S. 353 (1963).

168. Professor Barry Friedman reminds us that criminal defendants convicted at trial have a powerful incentive to appeal to the state appellate courts — in order to obtain at least that chance for relief even if federal habeas is not anticipated. Letter from Barry Friedman to Larry W. Yackle (July 11, 1990) (on file with authors). That incentive existed in both periods, however, and does not explain the difference we observe over time. At the Fortunoff Colloquium, *see supra* note 5 and accompanying text, Professor Liebman suggested that the appearence of *Sykes* in 1977 may also have influenced petitioners to seek direct review in state court at an increased rate so as to avoid dismissal on the basis of default for having neglected that opportunity for state court litigation.

At this point, our data only support an inference that prisoners may have been moved to take direct appeals from their criminal convictions at least in part by a perception that the Supreme Court's recent cases suggested that appeal would be helpful in gaining a footing in federal habeas corpus. Since we focus on the practices of the federal district court, rather than litigants in state court, we make no claim to have established that the change in the Court's exhaustion doctrine cases actually influenced prisoners' litigation in state court. Nor do we assert that prisoners who took appeals successfully satisfied the exhaustion doctrine in that way. The mere taking of a direct appeal has never been sufficient in itself to meet the Court's demands. Rather, the exhaustion doctrine asks petitioners to identify each of their federal claims for the state courts with particularity and to press those claims vigorously in the manner contemplated by state law and practice. Other data from this study indicate that, indeed, petitioners routinely failed to satisfy the exhaustion doctrine by pursuing either state appellate or collateral remedies. The state argued want of exhaustion in 36% of the cases filed in 1973-1975 and in 34% of the cases in 1979-1981. And petitioners' failure to meet the exhaustion doctrine resulted in dismissal of 46% of claims in 1973-1975 and 42% of claims in 1979-1981. However, further analysis suggests that at least some prisoners seeking appellate review in state court *did* tend to satisfy the exhaustion doctrine by that means. *See infra* text accompanying note 218.

169. *See supra* note 93 and accompanying text.

lateral relief on the same grounds.[170] A high rate of appeals is thus consistent with a relatively low rate of collateral proceedings. The reason for the 8% decline in the rate at which collateral remedies were invoked is unclear. Without professional representation after direct review, prisoners may have been less able to recognize that the Court's cases called for collateral proceedings as well as appellate review; the absence of counsel may then explain why the rate of postconviction proceedings did not increase together with the rate of appeals. Moreover, an increased focus on exhaustion is consistent with a decline in collateral proceedings — if prisoners and their lawyers at least *meant* to satisfy the exhaustion doctrine on direct appeal (at an increasing rate between the two periods). It is possible, then, that greater attention to exhaustion accounts both for the increase in the rate of appeals and for the concomitant decline in the rate of collateral attacks we observe.

The sobering numbers regarding exhaustion in Table 2, however, are those showing the rates at which habeas petitions were dismissed for want of exhaustion (46% and 42%, respectively, in the two periods). These figures indicate that, however many prisoners may have attempted to satisfy the exhaustion doctrine, either by taking direct appeals or by pursuing state collateral relief, nearly half were turned away in the end for having failed to meet the doctrine's requirements. It is quite possible, even probable, that petitioners or their lawyers understood from recent Supreme Court decisions that it would be helpful to seek some sort of post-trial review in state court. Full appreciation of the exhaustion doctrine's intricacies, and thus success in satisfying that doctrine by any particular mechanism, was evidently something else again.

In sum, the data undercut the charge that would-be federal habeas corpus petitioners fail routinely to use available state court appellate and collateral remedies. Yet the data demonstrate vividly that many petitioners are unsuccessful in satisfying the exhaustion doctrine by those means. Presumably, this is because prisoners do not raise or fully articulate the federal claims they later wish to present in federal court or, when they do litigate their federal claims properly in state court, they do not press those claims as far as necessary through the state court system. We conclude, accordingly, that the district court found the exhaustion doctrine to be a major barrier to the adjudication of federal claims from state prisoners.[171]

170. Brown v. Allen, 344 U.S. 443, 447 (1953) (holding that a prisoner who has given the state courts a fair opportunity to treat a claim on direct review need not seek collateral relief as well, "based on the same evidence and issues already decided by direct review").

171. Professor Robinson drew the same conclusion based on data from his earlier study. *See* P. ROBINSON, *supra* note 41 (finding that "37% of all petitions filed were denied for failure to exhaust state remedies"). Professor Friedman suggests that busy federal judges may have seized upon the exhaustion doctrine as a convenient basis for dismissing pro se petitions that otherwise would have consumed much more time. Letter from Barry Friedman to Larry W. Yackle (July 20, 1990). Neither Friedman nor we propose, however, that the court dismissed petitions on exhaustion grounds without just cause. The complexity of the doctrine is the critical feature that invites failure to comply and, therefore, easy dismissals.

b. The Timing of Federal Petitions

The data in Table 2 regarding the timing of federal petitions should assuage concerns that habeas corpus petitions are typically delayed. The large majority of petitioners in both time periods filed federal habeas petitions within five years after conviction in state court (73% and 81%, respectively). Inasmuch as the petitioners in question were required to exhaust state appellate and collateral remedies within that five-year period,[172] it appears from the data that most applicants pressed their federal claims in both state and federal court promptly after conviction. Knowledgeable observers estimate that five years may be consumed in the exhaustion of state remedies alone, particularly if state collateral relief is sought[173] — as it was in over a third of our cases.[174] Given the further time required for preparing claims, marshalling evidence, and orchestrating legal arguments for presentation in federal court, we think it fair to say that most of the habeas corpus petitions appraised in our study were filed seasonably.

The data demonstrate an acceleration in the timing of petitions between the two periods (from 73% to 81%, still focusing on cases in which the petition was filed within five years). This change *may* have been caused by the adoption of Rule 9(a) in 1977. However, we hesitate to draw dramatic conclusions on the point. Since most of the petitions filed in either time period had been filed within five years, the small number of petitions remaining (the filing periods for which ranged from six to more than ten years) presents little basis for comparison. It is also noteworthy that while very few 1979-1981 petitions attacked state judgments that had been obtained six, seven, and eight years

172. Recall that the "NA" response rates to our questions regarding the last state court ruling on a prisoner's claims and the year of collateral review were high, making it imprudent to draw inferences with respect to the time prisoners took to file in federal court after state court proceedings were concluded. *See supra* Part III(B). Even if our returns with respect to the date of the last state court ruling had been more complete, we would not have been able to confirm that, in any particular case or generally, the time between that date and the date of filing in federal court was uniformly relevant to the popular charge that prisoners sit on their rights. To fit data on the last state ruling to the question of delay in federal habeas corpus, we would have to assume that the precise claim sought to be raised in federal court was presented to the state courts in that most recent state proceeding and, moreover, that the claim had to be so presented in satisfaction of the exhaustion doctrine. Only in cases of that kind could it be said that the interim between such a state court proceeding and federal filing is the time period for which the prisoner is responsible. All cases, of course, do not fit that model. Consider, for example, a prisoner who exhausted state remedies with respect to claim *A* by raising that claim on direct review in 1977. Then, the prisoner sought state collateral review on claim *B*, satisfying the exhaustion doctrine with respect to that claim in 1979. Next, the prisoner files a federal habeas corpus petition in 1980, pressing claim *A*. In such a case, the petitioner should scarcely be applauded for seeking federal relief promptly after the last state court ruling, which had nothing to do with the claim in issue. Or consider a case in which a prisoner discovers a new claim and immediately files for federal relief. He satisfies the exhaustion doctrine by demonstrating that the state courts would not hear the claim at this time. Such a prisoner should scarcely be faulted for delay — simply because the last actual state court ruling in his or her case (involving other claims, of course) was issued years earlier.

173. *E.g.*, Clinton, *supra* note 69, at 27.

174. *See supra* text accompanying note 169.

earlier (4%, 2%, and 0%, respectively), and while almost no 1979-1981 petitions attacked judgments that had been obtained nine or ten years prior, a full 5% of the petitions filed in that period challenged convictions or sentences that were eleven or more years old. On the one hand, this 5% figure may be misleading. It is merely an artifact of grouping petitions filed at many different times under one statistical heading for examination. On the other hand, policy-makers may well think it important that the cumulation of petitions filed more than ten years after conviction is so high. The 5% figure indicates that if Rule 9(a) had any effect at all, it discouraged petitions in the middle range, but not those attacking *very* old convictions, some (but extremely few) of which were obtained when the Warren Court was still sitting. Cases of that kind, of course, are precisely the cases that arouse concerns that habeas corpus is used by unscrupulous prisoners to reopen cases after many years and thus to undermine the finality of state judgments.

We read the data another way. In the first and principal body of cases, those in which petitions were filed within five years after conviction, the time between conviction in state court and the filing of a federal petition *is* of great importance. These are cases, we think, in which would-be federal habeas corpus petitioners present their federal claims to the state courts as they wind their way through state direct and collateral review, prepare those same claims for presentation in federal habeas corpus, and then file petitions seeking habeas relief — on those same claims. Policy-makers are and should be concerned that prisoners in this category proceed expeditiously from conviction to federal petition. However, in cases in which prisoners challenge convictions more than a decade old, we suspect that the relevant baseline is not the conviction at all, but the identification of a claim not previously known to the petitioner. These may be cases in which new facts come to light, or in which new (and retroactively applicable) decisions are rendered — sometimes years after conviction. And it is then, and only then, that prisoners are in a position to seek federal habeas corpus relief. If petitions in this second category are to be deemed tardy, it must be because the prisoners concerned have delayed unnecessarily after learning of the basis of a claim, not merely after conviction.

Rule 9(a) plainly contemplates cases of this second kind and authorizes dismissal if the state is prejudiced by delay after prisoners knew or should have known of the basis of their claims. Accordingly, in those 1979-1981 cases in which conviction was had more than eleven years prior, Rule 9(a) probably brought summary dismissal. If not, then prisoners were able to show either that the claim in question had only recently been discovered or that the state had not suffered prejudice.

In sum, our data fairly show that delay in the filing of habeas corpus petitions is not a serious, systemic problem. Most petitions are filed within a reasonable time after conviction in state court; comparatively few petitions are filed later, but then the explanation may be that the basis of a claim was not discovered previously — rendering the time between conviction and federal

filing irrelevant. Extraordinary delays of the kind that have excited critics' concerns are, in any event, extremely rare and are thus not a proper basis for general law reform efforts. The data do not isolate a single reason for an apparent acceleration in the preparation and filing of applications between the two periods under study. Yet the appearance of Rule 9(a) in 1977 is a likely influential factor.[175]

c. Successive Petitions

The data in Table 2 should also mitigate concerns regarding second or successive petitions from the same prisoner. First, relatively few prisoners (in either of our time periods) had filed prior petitions in federal court (20% in 1973-1975, 15% in 1979-1981). This alone indicates that successive petitions do not present a serious quantitative problem. The extremely low rate at which successive petition arguments were made by state's attorneys in either of our periods (7% and 3%, respectively) and the equally low rate at which claims were denied on this ground in either period (6% and 2%, respectively) underscore this conclusion. These data indicate that some prisoners did file more than one habeas petition, but that state's attorneys saw fit to raise the issue in only a fraction of those cases.[176] When the state did complain, the court was almost always prepared to dismiss pursuant to section 2244(b) and Rule 9(b).[177] In almost all other cases, dismissal was also the result — albeit on different grounds.[178]

Second, the nearly significant decline between the two periods under study, both in the rate of successive petition arguments and in the rate of dismissals on this ground, suggests that the comparatively high rate of such

175. Our returns regarding the timing of federal petitions in the 1973-1975 period are also consistent with results obtained by Professor Robinson, who reported an average time between conviction and habeas petition of 1.5 years. P. ROBINSON, *supra* note 8, at 4.

176. Inasmuch as state authorities were not necessarily aware of the prior petitions that prisoners had filed, it is probable that some failures to argue for dismissal on this ground reflect only ignorance. At the Fortunoff Colloquium, *see supra* note 5 and accompanying text, Professor Barbara Underwood, formerly of the Kings County District Attorney's Office, stated that in her experience state's attorneys avoided successive petition arguments because such arguments would not be well received by the bench. We report in the text only the numbers our study has generated and our own interpretations of the data.

177. This, we think, is a fair inference from the facts — showing the rate of successive petition dismissals tracking the rate of successive petition arguments very closely. We cannot say on the basis of our study that the very cases in which the state argued for dismissal on successive petition grounds were the cases in which the court ultimately dismissed on that basis. That conclusion is, however, virtually irresistible. The state had the burden to plead "abuse of the writ," Sanders v. United States, 373 U.S. 1, 17 (1963), and while it is possible that the court might have occasionally raised the point sua sponte, *e.g.*, Daniels v. Blackburn, 763 F.2d 705, 707 (5th Cir. 1985), it is far more likely that the court merely acted on arguments presented to it.

178. This follows, of course, from the extremely low success rate for habeas petitions in either period. There is no sound basis for concerns that petitioners in serious numbers actually obtained relief on the merits after coming to federal court more than once. If prisoners filing mulitiple petitions were not thwarted by section 2244(b) or Rule 9(b), they almost always lost out for want of exhaustion, on the merits, or for some other reason.

arguments and dismissals in previous years itself may have discouraged prisoners from seeking habeas relief more than once. Inasmuch as the formal controlling law remained constant, this explanation appears likely. We cannot say that the data establish that the very stringency of existing rules discouraged repetitive filings; the ostensible decline in the percentage of prisoners who had filed a prior petition (from 20% to 15%) was not steep enough to discount sampling error. In any case, a decline would not necessarily reflect petitioners' growing pessimism about the chances of avoiding dismissal under section 2244(b) or Rule 9(b). In this instance, of course, prisoners would not typically have had counsel to advise them regarding controlling doctrine.[179] The data are, however, consistent with this explanation. If section 2244(b) and Rule 9(b) did cause a reduction in the rate of successive petitions over the periods covered in this study — well before the Supreme Court began to tighten standards in practice — then any current concern that the habeas corpus jurisdiction generates a flood of repetitive claims from incorrigible prison inmates is unfounded.

d. Participation of Counsel

Most petitioners filed their habeas corpus petitions pro se. Petitions filed through counsel accounted for only 15% of the cases in our first time period, 1973-1975, and 14% of the cases in our second period, 1979-1981. This we expected. Most habeas petitioners are indigent,[180] and, again, there is no blanket right to the appointment of counsel to assist in the preparation of collateral litigation (in either state or federal court).[181] Accordingly, we anticipated that very few petitioners in this study would have counsel prior to the initiation of federal habeas proceedings, but that more would be represented after initial filing — when the federal court, acting pursuant to Rule 8(c), assigned counsel for those whose claims showed promise. The data, by contrast, show that the involvement of counsel did not increase significantly upon the filing of a petition. The percentage of cases in which petitioners had counsel before filing in the two periods (15% and 14%, respectively) approximated the percentage of cases in which petitioners had counsel after filing (20% and 12%, respectively).

Probing *within* the figures on the participation of counsel *after* filing, the data indicate that petitioners in the first time period, 1973-1975, were more likely to have counsel after filing their habeas petitions (20%) in federal court than petitioners in our second period, 1979-1981 (12%). This, we did not expect. Indeed, in the wake of Rule 8(c) and the encouragement of counsel appointments that rule carried, we predicted movement the other way. It is possible that the state criminal proceedings that preceded federal petitions in

179. *See supra* note 94 and accompanying text.

180. In this study, 88% of the petitions filed in 1973-1975 and 86% of those in 1979-1981 were in forma pauperis.

181. *See supra* notes 93-94 and accompanying text.

1979-1981 were typically less vulnerable to serious constitutional challenge — so that federal judges genuinely found colorable claims in a lower percentage of cases. In this vein, the higher rate of direct appeals in state court conceivably allowed state appellate courts to correct federal errors that otherwise might have attracted attention in federal court.[182]

It is more likely, however, that federal judges examining petitions in the second period were simply harder to convince that claims had sufficient merit to warrant the appointment of counsel. The explanation for that, in turn, may have been the widely held perception that the substantive law applicable in habeas cases was changing during this critical period.[183] If district judges in New York understood new decisions rejecting constitutional claims as evidence of a sea change, they may have used a tighter mesh to screen applications for habeas relief. Accordingly, they may have found the appointment of counsel appropriate on fewer occasions.

e. Other Variables

Some data regarding other variables show statistically significant shifts over time. For example, the changes we observe regarding the offenses of which habeas applicants had been convicted are significant in some instances: the percentage of prisoners convicted of robbery increased appreciably between the two periods under study (from 26% to 36%), while the percentage of prisoners convicted of drug offenses declined (from 14% to 8%). However, we hesitate to focus on these differences. Since the identification of a petitioner's offense was often irrelevant to his or her federal claims and other issues of interest to the district court, prisoners may not have taken care to report complete and accurate "offense" information. Moreover, there is no apparent theoretical explanation for the increase in the percentage of petitions from prisoners convicted of robbery. The diminution in the percentage of habeas petitioners convicted of drug offenses may be related to the Supreme Court's 1976 decision in *Stone v. Powell* largely to eliminate fourth amendment exclusionary rule claims from the purview of federal habeas corpus.[184] Since the principal evidence in drug cases is often contraband seized by the police in the field, petitioners convicted of those offenses may be expected to raise fourth amendment claims more often than petitioners convicted of other crimes, the detection of which may rely less heavily on search and seizure. It is plausible, then, to explain the reduction in habeas petitions from prisoners convicted of drug offenses on the ground that the Court's effort to restrict the flow of fourth amendment claims to federal court after 1976 was effective.

The incidence of some claims increased between the two periods under study. Claims identified by our team as general due process contentions covered a wide field, perhaps too wide to justify inferences from the data. Pressed

182. *See supra* note 168 and accompanying text.
183. *See supra* note 15 and accompanying text.
184. 428 U.S. 465 (1976); *see supra* note 16 and accompanying text.

to explain the increase in the rate of such claims (up from 40% to 49%), we can offer only that petitioners, too, may have perceived that it was becoming more difficult to succeed with specified claims tied to the Bill of Rights. Accordingly, they may have tended (a bit more often than previously) to cite only the due process clause and thus to ground their habeas actions in general appeals for ad hoc justice. Contemporaneous decisions from the Supreme Court invited such an approach, perhaps as a reaction to the Warren Court's penchant for announcing general rules for the resolution of cases en masse.[185] It seems unlikely, however, that undereducated prison inmates proceeding pro se were influenced by what, to them, would have been subtle doctrinal innovations.

The increase in the rate of claims regarding denial of appeal (from 3% to 8%) may be associated with the greater use of direct review prior to federal habeas proceedings.[186] A larger percentage of prisoners took direct appeals in state court; thus more were thwarted in the pursuit of appellate review and couched complaints about appeal as independent federal claims for relief. The upturn in attacks on pleas of guilty (from 8% to 13%) cannot be explained as a function of an increase in the rate of such pleas, since that rate remained constant. We note that this shift (with respect to claims about pleas) comports with the increase in the incidence of claims that counsel rendered ineffective assistance in state court (up nearly 100% — from 16% to 29%). We would expect such a parallel development, since attacks on pleas of guilty are often put forward as complaints that petitioners were ineffectively represented as they considered the guilty plea option.[187]

Any assumed linkage between attacks on guilty pleas and complaints about counsel is the more vexing in that it undercuts an independent explanation for the increased rate of ineffective assistance claims — an explanation of greater interest to this study. It is plausible to contend that petitioners were more likely to charge ineffective assistance in our second period because, in the wake of *Wainwright v. Sykes* in 1977, other substantive claims for relief were threatened with dismissal unless petitioners could demonstrate cause for pro-

185. In the line-up and photo-identification cases, for example, the Supreme Court's decisions in the mid-1970s abandoned the sixth amendment framework established by the Warren Court, *e.g.*, United States v. Wade, 388 U.S. 218 (1967) (requiring counsel at most pre-trial line-ups), and substituted a more flexible approach. *E.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977) (holding that in suggestive identification cases the admissibility of testimony should be determined on a case-by-case basis by weighing the corruptive effect of the suggestive procedure against an array of factors touching the reliability of the identification); United States v. Ash, 413 U.S. 300 (1973) (drastically limiting the circumstances in which the sixth amendment required counsel); Neil v. Biggers, 409 U.S. 188 (1972) (permitting the use of a suggestive show-up if the identification appeared to be reliable in light of the totality of the circumstances); *see* Grano, Kirby, Biggers, and Ash, *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974) (same); Pulaski, Neil v. Biggers: *The Supreme Court Dismantles the Wade Trilogy's Due Process Protection*, 26 STAN. L. REV. 1097 (1974) (offering a critical appraisal).

186. *See supra* note 168 and accompanying text.

187. *E.g.*, McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

cedural default regarding those claims. One way to establish cause was to show that default was the result of counsel's neglect.[188] Early on, most federal courts took the view that counsel's unintentional failure to raise a claim seasonably and properly might constitute cause, even if the lapse did not in itself render counsel's performance ineffective in the sixth amendment sense.[189] Yet it seems likely that in attempting to explain any default appearing in the record petitioners may have blamed counsel in terms fairly suggesting an independent sixth amendment claim.[190] If, in fact, ineffectiveness claims were generated by *Sykes*, then we might conclude that this effect upon habeas corpus proceedings can be ascribed to the change in the applicable procedural default rule. The data we have are consistent not only with this proposition, but with others as well. We hasten to note, for example, that the substantive standards governing counsel's performance at trial appeared at least to get a boost from Supreme Court decisions beginning in 1970.[191] Allowing time for would-be habeas petitioners to recognize the apparent advantageous change in the law and put it to work in litigation, it is at least possible that the increased incidence of sixth amendment claims between our two periods reflects greater hopes among prisoners with respect to such claims in the wake of favorable decisional law. Here again, however, we find it unlikely that many unrepresented prison inmates would have been able to follow the Court's doctrinal course and act in response.

The incidence of both speedy trial claims and claims about bail declined between the two periods under study (from 13% to 6% and from 11% to 3%, respectively). It is likely that speedy trial claims appeared particularly uninviting after a major decision from the Supreme Court in 1972.[192] Because claims with respect to bail are rarely pertinent to collateral attacks on criminal

188. *See* Harris v. Spears, 606 F.2d 639, 644 (5th Cir. 1979) (holding that the failure of counsel to comprehend the importance of procedural requirements is adequate cause and not a tactical maneuver).

189. *E.g.*, Jurek v. Estelle, 593 F.2d 672, 683 n.19 (5th Cir. 1979), *cert. denied*, 450 U.S. 1001 (1981). *See generally* Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981 (1982). More recently, the Supreme Court has held that counsel error must have constituted ineffective assistance in order to support a finding of cause. Murray v. Carrier, 477 U.S. 478, 488 (1986).

190. *Compare* Goodwin v. Balkcom, 684 F.2d 794, 808-10 n.17 (11th Cir. 1982) (noting that a petitioner's complaints against his lawyer went not to the establishment of cause, but to an independent sixth amendment claim), *cert. denied*, 460 U.S. 1098 (1983) *with* Marks v. Estelle, 691 F.2d 730, 734-35 (5th Cir. 1982) (recognizing that a prisoner's allegations about his attorney's behavior were addressed to the question of cause, not to a claim of ineffective assistance), *cert. denied*, 462 U.S. 1121 (1983).

191. McMann v. Richardson, 397 U.S. 759 (1970) (discarding the traditional "farce" or "mockery" standards and insisting that defense counsel must perform "within the range of competence demanded of attorneys in criminal cases"); *see* Rosenberg, *supra* note 117; Tague, *supra* note 117. The current standard is given in Strickland v. Washington, 466 U.S. 668, 687-96 (1984). As a matter of fact, the *Strickland* test has turned out to be no more stringent than the "mockery" test it replaced.

192. Barker v. Wingo, 407 U.S. 514 (1972) (adopting another ad hoc balancing test for speedy trial claims and rejecting such a claim on that standard notwithstanding that the petitioner's trial had been delayed five years); *see* Uviller, Barker v. Wingo: *Speedy Trial Gets a Fast*

convictions, their appearance in the habeas petitions examined in this study is largely inconsequential. The diminution in the rate at which they were asserted between our two periods is therefore unexplained but unimportant.

f. Procedural Default in State Court

The data regarding procedural default are of primary concern in this study. At the outset, we note that default issues were raised by the state in only a small fraction of cases during either period under examination (3% in 1973-1975, 9% in 1979-1981). This alone may be significant, suggesting that procedural default is not, as a quantitative matter, an important factor in the handling or disposition of the run of habeas petitions. Yet the temptation to marginalize default in the current debate over habeas corpus should be resisted for at least two reasons. First, there is a close relationship between procedural default arguments (the rate of which was low in this study) and exhaustion doctrine arguments (the rate of which was quite high). In cases in which the extent of a prisoner's litigation in state court is questionable, a state's attorney hoping to avoid the merits of a federal claim in habeas will often argue initially that the prisoner has not exhausted state remedies with respect to the claim and will turn to a procedural default contention only if the exhaustion argument fails.[193] Accordingly, the large number of exhaustion arguments reflected in the data, many of them successful, may mask inchoate procedural default arguments that never were reached.[194] Second, state's attorneys may press procedural default arguments most vigorously when a claim shows promise and might be sustained if treated on the merits. At least, it would seem, facially weak claims might be disposed of more efficiently by engaging them on the merits rather than attempting to avoid them by developing a procedural default defense.[195] However rare default arguments may be, then, their significance for the vindication of federal rights may be pronounced.

Passing on to differences over time with respect to procedural default issues, we note that the rate of default arguments by state's attorneys increased between our two periods (from 3% in 1973-1975 to 9% in 1979-1981) and

Shuffle, 72 COLUM. L. REV. 1376 (1972) (reading *Barker* as largely unfavorable to defendants with speedy trial claims).

193. *Cf.* Spearmen v. Greer, 592 F. Supp. 69, 70 (S.D. Ill. 1984) (explaining the way in which exhaustion and procedural default arguments are made in tandem). *See generally* Friedman, *supra* note 117, at 310-11 (describing these patterns); Yackle, *supra* note 120, at 380-81 (same).

194. *See, e.g.*, Domaingue v. Butterworth, 641 F.2d 8, 14 (1st Cir. 1981) (affirming dismissal under the exhaustion doctrine and noting the availability of a default argument should the prisoner return to state court and be turned away for failure to raise his claim in previous state court proceedings).

195. *Cf.* Granberry v. Greer, 481 U.S. 129 (1987) (recognizing that state authorities may wish to waive the exhaustion requirement in order to allow the federal court to deal with the merits without further delay); County Court of Ulster County v. Allen, 442 U.S. 140 (1979) (reaching a federal claim despite an apparent default in state court where the state courts overlooked the default and treated the merits of the claim).

that the rate at which the district court sustained such arguments, and thus dismissed, also increased (from 2% to 7%). Of course, our research plan contemplated no results regarding the rate of compliance with state procedural rules in state court.[196] The data *do* speak to the effect of the shift from the bypass rule to the cause-and-prejudice formula on the handling of procedural default issues in *federal* court. In our second period, state's attorneys were more likely to seek dismissal on procedural default grounds and also more likely to win dismissal on those grounds. The change from *Noia* to *Sykes*, then, is consistent with a decided increase in the rate at which procedural default contentions were put forward in federal court and successfully precluded the adjudication of federal claims there.[197]

In our view, the most likely explanation for these results is that they confirm the conventional wisdom regarding *Wainwright v. Sykes*. That decision generated default arguments and dismissals in federal court in order to preserve the state interests associated with finality.[198] By this account, the forfeiture rule established by *Sykes* in 1977 encouraged state's attorneys to press for dismissal on this procedural ground and, in turn, encouraged the district court to dismiss for default in cases in which, under the waiver rule, the court would have reached the merits.[199]

The last significant difference over time regarding procedural default reflected in Table 2 may be pertinent in this respect. In 1973-1975 cases in which federal relief was denied on default grounds, the stage of state proceedings at which default was said to have occurred was typically the trial stage (86%) or the appellate stage (14%). Never was default said to have occurred in state collateral proceedings. By contrast, in comparable 1979-1981 cases, the percentage of cases in which default was determined to have occurred at trial plummeted to 33%, the percentage of cases in which default was said to have occurred on appeal rose to 56%, and the figure for collateral review was 11%. Generally, then, when the federal court addressed procedural default in our first period it concentrated on trial behavior, probably on compliance with the state contemporaneous objection rule, and occasionally on prisoners' failure to appeal or to raise particular claims on appeal. In our second period,

196. *See supra* Part II(B)(2).

197. Despite this increase in the rate of default contentions, Table 2 shows that the general success rate for habeas petitions remained roughly constant between the two periods. Indeed, the rate of petition dismissals dropped slightly, albeit the difference is not statistically significant by our standards. *See supra* text accompanying note 166.

198. *See supra* text accompanying note 121.

199. It is at least possible that the cause-and-prejudice rule influenced lawyers to comply with state procedural rules, that the rate of default in state court declined in consequence, that the state courts reached the merits in more cases, but that, still, the rate of procedural default arguments and dismissals increased. It is at least possible, indeed, that the diminution in the number of habeas petitions between our two time periods reflects an increase in compliance with state procedures, a consequent increase in state court corrections of federal error, and thus a decline in prisoners' felt need to seek relief in the federal forum. Yet there are no data, in our study or elsewhere, to prove that any such patterns developed in and between the periods under study.

however, the court focused much more often on the appellate stage and, in a new development entirely, held prisoners accountable for their behavior in postconviction litigation. Recall, in this vein, that the rate at which state collateral relief was sought actually declined in our second period.[200]

The increase in dismissals for default on appeal may be merely a function of the increased use of appeal, perhaps as a vehicle for meeting the exhaustion doctrine.[201] It is more likely that state's attorneys reacted to the shift to a tougher procedural default rule by studying the most accessible state court papers (appellate briefs and collateral petitions), identifying omissions, and then pressing default arguments in federal court.[202] The federal court, then, may have tended to sustain such arguments and thus to dismiss for default committed comparatively late in state court proceedings.[203] Indeed, it is quite likely that the increased use of state appeals to satisfy the exhaustion doctrine only provided more opportunities for procedural default in state court and thus more occasions for dismissal on default grounds. Moreover, the increased sensitivity to default issues in 1979-1981 may have prompted more dismissals for default at the postconviction stage, even as use of state collateral procedures declined.

D. Variables Correlating with Outcome

To explore the data in greater depth, we now correlate our results with outcomes — the award of habeas corpus relief in federal court, the denial of relief on grounds other than procedural default, and the denial of relief because of default in state court. In Table 3, we present only correlations that are statistically significant.

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200. *See supra* text accompanying note 169.

201. *See supra* text accompanying notes 167-68.

202. Professor Maria L. Marcus has noted that busy state's attorneys may find it much easier to skim briefs and petitions than to work their way through lengthy trial records. Letter from Maria L. Marcus to Larry W. Yackle (June 19, 1990) (on file with authors).

203. The Supreme Court itself did not flatly hold the cause-and-prejudice formulation applicable to defaults on appeal until Murray v. Carrier, 477 U.S. 478, 491 (1986), albeit the point was assumed for purposes of the decision in Reed v. Ross, 468 U.S. 1 (1984). Yet the Second Circuit came to this conclusion earlier, in Forman v. Smith, 633 F.2d 634 (2d Cir. 1980), and, more importantly, the Southern District had done so almost immediately after *Sykes*. *See* Frazier v. Czarnetsky, 439 F. Supp. 735 (S.D.N.Y. 1977).

TABLE 3

OUTCOMES IN FEDERAL COURT BY DETERMINANTS*

	Outcome in Federal Court				
		—Dismissed for—			
	Granted	Other	Proc. Def.	Total %	Total No.
Direct review in state court*					
No	2	97	1	100	119
Yes	3	90	7	100	380
Collateral review in state court*					
No	3	94	3	100	292
Yes	2	90	9	100	183
Counsel before petition in federal court*					
No	1	95	4	100	477
Yes	17	79	4	100	27
Counsel after petition in federal court*					
No	1	94	5	100	363
Yes	21	71	7	100	24
Forma pauperis*					
No	14	83	3	100	65
Yes	2	94	5	100	454
Claims:					
Due process*					
No	3	94	2	100	328
Yes	3	90	7	100	257
Prosecutor misconduct*					
No	3	93	3	100	526
Yes	0	86	14	100	59
Search and seizure*					
No	4	93	4	100	502
Yes	0	90	10	100	83
Number of claims per case*					
One	4	96	1	100	339
Two	4	87	9	100	134
Three	0	92	8	100	83
Four	0	80	20	100	20
Five	20	80	0	100	5
Six	0	100	0	100	2
Claim dismissed without an answer*					
No	4	91	5	100	455
Yes	0	98	2	100	130
Respondent arguments:					
Procedural default*					
	3	36	61	100	33

*Relationships between two variables significant at .10 or better.

The data with respect to direct and collateral review in state court show a relationship between the pursuit of state relief by those means and dismissals

in federal court on the basis of procedural default. The rate of procedural default dismissals was very low (1%) in cases in which petitioners failed to appeal directly in state court and almost as low in cases in which petitioners failed to pursue state postconviction remedies (3%). Yet in cases in which appeals were taken or collateral relief was sought, the rate of default dismissals increased (to 7% and 9%, respectively).

The most likely explanations for these relationships are straightforward. When prisoners failed to pursue state appellate and collateral remedies, their federal petitions tended to be dismissed under the exhaustion doctrine before the federal court considered default as a ground for dismissal.[204] By contrast, when prisoners did pursue state and collateral relief, they tended to survive the exhaustion doctrine, but then to fall victim to dismissal for procedural default. State appeals and postconviction proceedings seem to have provided opportunities either for default itself or for state court determinations that procedural default had been committed previously. For example, it was probably common that prisoners who took appeals in state court failed, for some reason, to raise federal claims in their briefs. Later, when prisoners attempted to assert those claims in state collateral proceedings, the state postconviction courts probably refused to consider the claims because of default on appeal. Next, in federal habeas corpus, those state court determinations of default produced dismissals on the basis of *Wainwright v. Sykes*.[205] This is why, in our view, the use of appellate and collateral remedies in state court predicts default dismissals later in federal court.[206]

The data regarding the participation of lawyers for petitioners in federal court demonstrate a relationship between the involvement of counsel and success on the merits. In cases in which counsel was not involved prior to filing, the success rate for prisoners proceeding pro se was de minimus (1%), the rate of dismissals for reasons other than default was very high (95%), and the rate of default dismissals was quite low (4%). When counsel was involved prior to filing, by contrast, the rate of success on the merits increased (from 1% to 17%), the rate of nondefault dismissals fell (from 95% to 79%), and the rate

204. Panel discussion with Professor James S. Liebman at the Fortunoff Colloquium. *See supra* note 5.

205. 433 U.S. 72 (1977); *see* text accompanying notes 113-17.

206. *See* Yackle, *supra* note 120, at 379-81. Another view is not sustained, namely that an increased use of direct and collateral review in state court should predict federal treatment on the merits — the pursuit of state relief suggesting compliance with state procedural rules, the absence of state court default, and thus a reduction in default dismissals in habeas. *See supra* note 121.

Table 3 does not demonstrate that petitioners unable to pay the filing fee in federal court have measurably greater difficulty with procedural default. Rather, ability to pay correlates with success on the merits. Petitioners forced to proceed in forma pauperis were much less likely to be awarded relief (2%) than those with sufficient funds (14%). These results track our returns regarding the participation of counsel in federal court. Petitioners able to pay the filing fee probably were also able to retain counsel to prepare their petitions; thus both the avoidance of the forma pauperis format and the availability of a professional advocate tracked with success on the merits, as might be expected.

of dismissals for default remained constant (at 4%). The presence of counsel prior to filing thus appears to predict success on the merits and does not affect the rate of dismissals for default. These results may be misleading, however, for reasons we will suggest below.[207]

The pattern with respect to cases in which counsel was involved after filing is somewhat similar. Again, the rate of success on the merits was minimal (1%) when no counsel was involved. The rates of dismissal on nondefault and default grounds were about the same (94% and 5%, respectively). When counsel participated after filing, the success rate on the merits increased (from 1% to 21%), and the rate of nondefault dismissals declined (from 94% to 71%).

However, the participation of counsel after filing also correlated with a modest increase in the rate of default dismissals (from 5% to 7%). Recall that cases in which counsel appeared only after an initial petition had been filed were probably those in which the district court saw sufficient merit in a claim or claims to warrant the appointment of a lawyer.[208] Prosecutors asked to meet federal claims already identified by the court as potentially meritorious may have tended to raise procedural barriers to the treatment of the merits rather than risk a judgment for the prisoner. At the very least, there was an incentive in such cases to seek out and put forward procedural default arguments, perhaps more readily than otherwise would have been the case. While our data do not demonstrate this explanation conclusively, our observations are consistent with this account.

Other factors shown by Table 3 to influence the rate of procedural default dismissals warrant little discussion. The only claim shown to correlate with the rate of default dismissals is prosecutorial misconduct.[209] Petitioners asserting such misconduct were much more likely to suffer dismissal for default than those raising other claims. The explanation for these results may be a tendency to hold criminal defendants accountable for defense counsel's failure to object to the behavior of prosecutors during trial, since, under New York law, complaints regarding the state's arguments must be presented contemporaneously.[210] While the number of claims in a single petition produces a significant effect, that effect is erratic and thus suggests no theoretical explanation. The increase in the rate of default dismissals where relief was

207. *See infra* text accompanying note 213.

208. *See supra* text accompanying note 98.

209. Because general due process claims cover much ground, we recognize nothing significant in the results with respect to that claim. Nor do we draw conclusions regarding search and seizure claims, in light of Stone v. Powell, 428 U.S. 465 (1976) (barring federal habeas review of fourth amendment exclusionary rule claims unless prisoners were denied an opportunity for "full and fair" adjudication in state court).

210. *See supra* note 134 and accompanying text. This may indicate that the failure to comply with procedural rules in state court predicts an increase in the rate of dismissals in federal court on procedural default grounds. We would not push this point far, however, inasmuch as other claims, not shown by the data to be related to the rate of default dismissals, were also subject to the contemporaneous objection rule.

denied only after an answer by the state is unremarkable. We might have expected that the district court would rule on procedural default grounds primarily in cases in which the state responded to petitions and pressed such a basis for denying relief. The data showing that the rate of default dismissals increased with the rate of default arguments by state's attorneys make the same point. As might have been expected, the district court dealt with default arguments when and if they were presented in court.

E. The Award or Denial of Habeas Corpus Relief: Multivariate Regression Analysis

Table 4 shows the results of a multivariate regression analysis[211] of our variables for predicting the outcome in federal habeas corpus.

TABLE 4

PREDICTORS OF THE AWARD OF HABEAS RELIEF: MULTIVARIATE REGRESSION ANALYSIS

Predictors[1]	Beta*
Years from conv. to petition	−.02
Guilty plea rather than trial	.01
Sentence	.00
Direct review in state court	−.03
Collateral review in state court	−.02
Counsel before petition	−.03
Counsel after petition	.32*
Forma pauperis	−.10*
Prior petition	−.03
Multiple claims	.02
Exhaustion argument	−.07*
Proc. default argument	−.05
Successive petition argument	.00
Petition filed in second period[2]	.06*
MULTIPLE R	.38
MULTIPLE R^2	.15

*Beta (standardized regression coefficient) significant at .05 or better.

[1] We omit some variables from this table, including the offense or offenses committed by prisoners, the claims presented in federal court, and the judges to whom petitions were assigned.

[2] Reflecting the shift from the bypass test as well as other doctrinal changes.

211. Multivariate regression analysis measures the effects of independent variables (here, the factors about which our questionnaire acquired information) on a dependent variable (here, the award of federal habeas corpus relief). The beta, or standardized regression coefficient, shows the effect of each predictor variable on the dependent variable after removing the effects of the other predictor variables.

The data in Table 4 demonstrate that petitioners' inability to pay the filing fee in federal court predicts failure in habeas corpus (beta = −.10),[212] and underscore that the participation of counsel after initial filing predicts success most strongly (beta = .32). The positive coefficient for counsel after initial filing seems surprising, given the mildly negative beta for counsel prior to the initiation of federal habeas proceedings (−.03).[213] However, the explanation is straightforward. The analysis captured by Table 4 is more powerful than the analysis in Table 3, which does not isolate the independent effects of the participation of counsel before, as opposed to after, initial filing. The analysis reflected in Table 4 indicates that the participation of counsel prior to filing relates to success on the merits primarily because it strongly correlates with counsel's involvement after filing. It now seems plain that it is the participation of counsel at the later stage, usually appointed by the court to develop facially plausible claims, that predicts success on the merits. Plainly, the success rate for prisoners for whom counsel are appointed is high not because their assigned lawyers are so clever, but because the appointment of counsel reflects the court's preliminary judgment that their claims are promising.

The beta regarding the predictive value of the shift from cases filed in our first period to cases filed in our second period shows a slight positive correlation (beta = .06). On first blush this, too, seems puzzling. We constructed our two time periods in hopes of capturing the effects of the shift from the *Noia* bypass rule to the *Sykes* cause-and-prejudice rule for addressing procedural default in state court. The inauguration of a less forgiving default rule would seem likely to generate more dismissals on default grounds, in cases in which claims are meritorious and frivolous alike, and thus to produce a smaller field of cases in which the merits can be reached and, perhaps, relief awarded. This should particularly be true if we are correct that state's attorneys seek refuge in default arguments when they seriously fear losing on the merits.[214] Moreover, the remaining field should be composed primarily of cases in which no default occurred in state court and, accordingly, in which the state courts have typically considered and rejected prisoners' claims.

It is tempting to say that the very rigidity of the *Sykes* rule accounts for its correlation with the award of habeas relief. The *Noia* bypass rule had nothing to do with the merits of prisoners' underlying claims and permitted the federal court to reach the merits even in cases in which claims were frivolous. Under *Sykes*, by contrast, prisoners could obtain federal review on the merits only by showing both cause and *prejudice*. The distance between the latter and success on the merits has never been great.[215] Perhaps we should not be surprised, then, that prisoners who survived the forfeiture standard for default

212. *See supra* note 206.

213. Compare the indication from the data collected in Table 3. *See supra* text accompanying note 207.

214. *See supra* text accompanying note 208.

215. *See supra* note 118. We hesitate to suggest that district judges might have thought (as we do) that state's attorneys were inclined to resort to default arguments when prisoners' claims

were able to obtain relief at an accelerated rate—the application of the cause-and-prejudice rule operating as a rough screening device for identifying promising claims. The difficulty with this account, however, is that it does not explain why the district court awarded relief in a larger proportion of its full habeas case load in 1979-1981 as against 1973-1975 — as indicated in, although not statistically demonstrated by, Table 2. The positive coefficient in Table 4 is consistent with that tentative result.[216]

Here again, it appears that the district court's behavior with respect to other procedural barriers to the merits, at least some of which also saw change between the two periods under study, combined with its handling of the shift from *Noia* to *Sykes* to produce a slightly inclined success rate in habeas corpus over time. The .06 coefficient in Table 4 does not, then, suggest that *Sykes* and *Sykes* alone actually increased prisoners' chances of obtaining federal relief on the merits. From Table 2, we know that the dismissal rate for default increased from 2% to 7% after the announcement of the forfeiture rule. The coefficient here merely underscores (in a statistically significant way) the apparent increase in the habeas success rate noted earlier and explainable by reference to a variety of factors experiencing change over time. For example, the use of standard forms for habeas corpus petitions in the second period may have illuminated meritorious claims for federal court consideration — perhaps enough to account for some or all of the increase in the rate of successful claims.

Table 5 shows the results of a multivariate regression analysis of a set of factors as predictors of the *denial* of habeas corpus relief on any of four grounds — procedural default, prior petition as a bar, lack of exhaustion, and the merits.

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appeared otherwise sound, and thus looked closely (and sympathetically) at the merits of claims when *Sykes* was cited. We have no data to support this hypothesis.

216. Recall in this vein that Table 2 indicates that the court appointed counsel after initial filing (presumably to develop facially plausible claims) at a *reduced* rate in 1979-1981. We have explained that phenomenon on the ground that it was harder to persuade the court in that second period that claims were potentially meritorious. *See supra* text accompanying note 183.

TABLE 5

PREDICTORS OF FOUR GROUNDS FOR THE DENIAL OF RELIEF
MULTIVARIATE REGRESSION ANALYSIS

	Proc. Def. Denial	Successive Pet. Denial	Exhaustion Denial	Merits Denial
Predictors[1]	Beta*	Beta	Beta	Beta
Years from conv. to petition	.00	−.05	−.12*	.04
Guilty plea rather than trial	−.01	.00	−.03	−.01
Sentence	−.02	.00	−.05	.02
Direct review	.03	−.02	−.26*	.32*
Collateral review	.02	−.03	−.04	.03
Counsel before petition	.11	−.08	−.02	−.12
Counsel after petition	−.06	.00	−.10	.11*
Forma pauperis	.13*	−.04	.00	.05
Prior petition	−.06	.21*	.05	−.05
Multiple claims	.10*	.00	.06	.15*
Exhaustion argument	−.07	−.04	.47*	−.10*
Proc. default argument	.65*	−.04	−.02	.00
Successive petition argument	−.01	.62*	−.04	−.07
Petition filed in second period[2]	.01	−.01	.00	−.02
MULTIPLE R	.69	.75	.63	.43
MULTIPLE R^2	.47	.56	.40	.18

* Beta (standardized regression coefficient) significant at .05 level or better.

[1] We omit some variables from this table, including the offense or offenses committed by prisoners, the claims presented in federal court, and the judges to whom petitions were assigned.

[2] Reflecting the shift from the bypass test as well as other doctrinal changes.

The data in Table 5 demonstrate the predictive force of a number of factors. Somewhat surprisingly, longer periods of time between conviction and the initiation of federal habeas corpus proceedings predict a lower rate of dismissals for failure to exhaust state remedies (beta = −.12). Two explanations are likely. First, after a period of years, it may be that the district court was persuaded that the state courts were no longer open to prisoners' claims and thus that state remedies were unavailable. Second, petitions attacking comparatively old judgments in state court may often have relied on retroactive changes in the law since conviction. With respect to distinctive claims of that kind, the exhaustion doctrine may have been comparatively easy to satisfy — such that federal dismissals on exhaustion grounds were diminished.

The betas in Table 5 regarding the predictive value of direct review in state court for the denial of relief on exhaustion grounds (−.26) and on the merits (.32) fortify our earlier inference that direct review is related to prisoners' attempts to satisfy the exhaustion doctrine. We noted previously the in-

creased incidence of appellate review in the 1979-1981 period over the 1973-1975 period, but could say nothing about whether the district court found the exhaustion doctrine satisfied by state appellate proceedings.[217] The correlation shown in Table 5 between direct appeals and the rates at which relief was denied for want of exhaustion or on the merits indicates that the court did tend to find the exhaustion doctrine satisfied by direct review in state court — although half the petitions filed still failed to pass muster.[218]

The calculations in Table 5 show that petitioners' inability to pay the filing fee in federal court correlates with an increase in the rate of default dismissals (beta = .13). In our view, the explanation for this is that indigent petitioners proceeding pro se probably found the intricacies of the relevant law difficult to master and thus fell victim to dismissal for default more often than prisoners able to afford the filing fee and, presumably, counsel. There is no necessary conflict between this explanation and our earlier account of why the rate of default dismissals appears to increase with the participation of counsel *after* initial filing.[219] That account is based on the likelihood that the district court tended to appoint counsel (after initial filing) when claims appeared to have merit and that state's attorneys, at that stage, found it advisable to expend the resources necessary to mount a default defense in order to avoid the merits and, perhaps, the award of relief. At the initial stage of a pro se filing, by hypothesis no professional has yet made even a cursory appraisal of a prisoner's pro se claim on the merits.

Other ostensibly significant coefficients in Table 5 warrant little attention. It was only to be expected, of course, that the denial of relief on exhaustion and procedural default grounds would correlate with arguments on those grounds by state's attorneys (beta = .47 and .65, respectively). The strong positive beta linking the existence of prior petitions with dismissals of successive applications is equally self-evident (beta = .62). The indications that the presence of multiple claims in a single petition predicts both procedural default dismissal (beta = .10) and denial on the merits (beta = .15) is not necessarily problematic. It may often have been the case that the district court, reviewing several claims at once, found one subject to dismissal for default and another simply without merit. At a minimum, it is safe to say, multiple claims lay the predicate for multiple dispositions.

The beta for the effect of the change from cases initiated in 1973-1975 and those begun in 1979-1981 on dismissals for procedural default is insignificant

217. *See supra* note 168 and accompanying text.

218. No similar correlation appears with respect to the pursuit of postconviction relief in state court. Recall that the incidence of collateral litigation actually declined between the two periods. *See supra* text accompanying note 169. The figures in Table 6 below indicate that prosecutors tended to raise procedural default arguments in cases in which prisoners had sought state collateral relief (beta = .19), suggesting that postconviction proceedings in state court were more useful to state authorities seeking an authoritative statement that a prisoner had forfeited further state court opportunities for litigation than to petitioners seeking a vehicle for exhausting state remedies.

219. *See supra* text accompanying note 208.

(beta = .01). This may seem surprising at first glance, since Table 2 shows that the increase in the rate of default dismissals (from 2% to 7%) was significant. The explanation is straightforward. The beta here reflects the predictive value of the timing of habeas cases in isolation from all other predictors — including, importantly, whether state's attorneys argued for dismissal on the basis of default. Understandably, the predictive value of default arguments is very high with respect to default dismissals (beta = .65). Yet a figure showing the predictive value of the mere shift in time between the two periods under study without regard for whether the state asserted default more often in the second period is virtually worthless. We would not expect the introduction of the *Sykes* rule alone to be associated with an increase in default dismissals, since state's attorneys must actually take advantage of the new default rule in arguments before the court. As soon as the predictive value of default arguments is brought into the picture, as it is in Table 6, we see that *Sykes* does predict an increase in default dismissals.

TABLE 6

PREDICTORS OF THREE ARGUMENTS FOR THE DENIAL OF RELIEF MULTIVARIATE REGRESSION ANALYSIS

	Proc. Def. Argument	Successive Pet. Argument	Exhaustion Argument
Predictors[1]	Beta*	Beta	Beta
Years from conv. to petition	.03	.03	−.08*
Guilty plea rather than trial	.03	−.03	−.02
Sentence	.00	−.01	.05*
Direct review in state court	.04	.02	−.23*
Collateral review in state court	.19*	.05*	.04
Counsel before petition	−.11*	.06*	−.05*
Counsel after petition	.21*	−.14*	.02
Forma pauperis	−.02	−.02	−.07*
Prior petition	−.09*	.44*	.03
Multiple claims	.13*	.06*	.26*
Petition filed in second period[2]	.12*	−.08*	.01
MULTIPLE R	.31	.50	.35
MULTIPLE R^2	.10	.25	.12

* Beta (standardized regression coefficient) significant at .05 level or better.

[1] We omit some variables from this table, including the offense or offenses committed by prisoners, the claims presented in federal court, and the judges to whom petitions were assigned.

[2] Reflecting the shift from the bypass test as well as other doctrinal changes.

Finally, Table 6 presents a multivariate regression analysis of the same

factors as predictors of three arguments typically available to the respondent in federal habeas corpus: procedural default, prior petition as a bar, and failure to exhaust state remedies.

Table 6 confirms many inferences drawn previously. Both a lapse of time between conviction and federal filing and the pursuit of state appellate relief predict a decline in the rate at which state's attorneys argued for dismissal on exhaustion grounds (beta = −.08 and −.23, respectively). The use of state postconviction remedies predicts an increase in default contentions (beta = .19). The existence of a prior petition predicts a reduction in the rate of default arguments (beta = −.09), but, of course, an increase in the rate of arguments on successive petition grounds (beta = .44). Multiple claims in a single petition predict increases in the rates of both default and exhaustion doctrine arguments (beta = .13 and .26, respectively). A number of other correlations are modest and probably unimportant.[220]

On reflection, the ostensibly inconsistent numbers for the participation of counsel before and after federal filing are not surprising. Where petitioners had professional assistance in the preparation of their petitions, it might have been expected that they would be better able to cover or explain away procedural default and thus head off arguments from state's attorneys from that direction (beta = −.11). Our account of the *increase* in the rate of default arguments occasioned by the involvement of counsel *after* filing (beta = .21) follows our previous analysis: state's attorneys may be encouraged to raise default arguments when the court appoints counsel to develop facially promising claims.[221]

The correlation between the participation of counsel after initial filing and a reduced rate of successive petition arguments by state's attorneys (beta = −.14) is not difficult to explain. If we are correct that the district court tended to appoint counsel to develop facially plausible claims, it is not a long next step to suggest that those claims tended not to be raised in second or successive petitions from the same prisoner — the kind of case in which the court was unlikely to be sympathetic. Rather, the court may have been inclined to identify merit in claims presented for the first time by prisoners who had never sought federal relief before. By this account, it would follow that state's attorneys would have had successive petition arguments only rarely in cases in which counsel was appointed by the court.

Table 6 shows that the filing of a federal petition in our second time period (when *Sykes* had been introduced) as opposed to the first (when *Noia* was still in place) predicts an increase in the incidence of procedural default argu-

220. *E.g.*, coefficients linking the length of sentence prisoners received and exhaustion doctrine arguments (beta = .05); linking collateral review in state court and successive petition contentions (beta = .05); linking the participation of counsel before filing and successive petition and exhaustion arguments (beta = .06 and −.05, respectively); linking forma pauperis petitions and exhaustion arguments (beta = −.07); and linking multiple claims and successive petition complaints (beta = .06).

221. *See supra* text accompanying note 208.

ments by state's attorneys (beta = .12). This is what we might have expected, given the data in previous tables. We think our study demonstrates that the standard announced in *Sykes* and applied in the Southern District of New York in 1979-1981 *did* have an influence on the district court's handling of habeas corpus petitions. The Supreme Court's adoption of the forfeiture rule for procedural default cases encouraged state's attorneys to seek dismissal in federal court on default grounds in a significantly larger proportion of cases. And in a correspondingly higher percentage of cases, state's attorneys succeeded with such arguments, *i.e.*, the rate of procedural default dismissals also increased significantly — as shown in Table 2.

CONCLUSION

We have attempted in this project to supply empirical evidence to a national debate that is typically driven by ideology alone. We have examined actual cases handled by the United States District Court for the Southern District of New York during two three-year periods, chosen to maximize our ability to study the court's treatment of a series of matters that consistently attract attention in the debate over the federal courts' habeas corpus jurisdiction: the exhaustion doctrine, the timing of federal petitions, second or successive petitions from the same prisoner, the participation of counsel in federal court, and, most important, the effect given to procedural default in state court.

With respect to the exhaustion doctrine, our data indicate that petitioners do typically attempt to exhaust state remedies for federal claims before seeking federal habeas corpus relief, but that those efforts are very often unsuccessful. The dismissal rate on exhaustion doctrine grounds is nearly fifty percent. Observers who have criticized the exhaustion doctrine for excessive complexity and rigidity may, then, be vindicated by practical experience in the field. It is entirely likely, in our view, that petitioners suffer dismissal not because they make no attempt to comply with the exhaustion doctrine, but because their attempts simply fall short of the mark.

Any of three proposals for altering the exhaustion doctrine now under discussion might offer some relief, although each would bring its own difficulties close behind. The Reagan/Bush proposal[222] that the exhaustion doctrine should simply be suspended in any case in which a petitioner's claim can be summarily denied on the merits would, to be sure, spare prisoners (and other participants) the burden of complying with the exhaustion doctrine in what is probably a sizeable number of cases. However, the effective elimination of the exhaustion requirement in a one-sided fashion could skew analysis of the merits.[223] The Thurmond/Specter plan[224] to except state postconviction proceedings from the exhaustion requirement would also mitigate prisoners' apparent

222. *See supra* text accompanying note 59.
223. *See* Yackle, *supra* note 10, at 637.
224. *See supra* note 60 and accompanying text.

difficulties — also by the brute force of eliminating the exhaustion doctrine itself in relevant instances. Yet that course would contemplate surrendering entirely the value to be gained by allowing the state courts an initial opportunity to pass on common constitutional claims.[225]

The Powell Committee's recommendation[226] to encourage the states to provide counsel to death row prisoners pursuing state postconviction relief, and the ABA's proposal[227] for more and better legal representation at all stages of state capital proceedings, offer a different approach. Those plans would not, of course, reduce the sheer number of exhaustion doctrine dismissals simply by reducing the circumstances in which exhaustion is required or the number of proceedings to which prisoners must repair. Rather, the Powell Committee and ABA proposals promise to facilitate compliance with the exhaustion doctrine as it is currently understood by providing indigent prison inmates with professional legal assistance. Our data do not demonstrate that the introduction of competent counsel in key state proceedings would necessarily produce a reduction in the rate of exhaustion doctrine dismissals. In our view, however, a program of that kind would constitute an intelligent reform, consistent with what our study does clearly demonstrate: prisoners without counsel often cannot cope with the exhaustion doctrine's complexities.

The data regarding the timing of federal petitions after conviction in state court indicate that prisoners do not typically sit on their rights. Allowing time for the pursuit of appellate and collateral relief, our report that most prisoners file their federal habeas corpus petitions within five years after conviction should calm concerns of that kind. Particularly since Rule 9(a) may already have expedited federal petitions, there is now no compelling reason to establish a fixed statute of limitations for noncapital habeas actions.[228] A one-year statute of the kind proposed by the Reagan and Bush administrations[229] would bar federal adjudication in relatively few cases. Those cases, moreover, would likely be instances in which petitioners challenge older convictions on the basis of newly discovered facts or retroactively available changes in the law — instances in which Rule 9(a) would permit late filing so long as petitioners do not postpone litigation unnecessarily to the prejudice of the states con-

225. By ejecting state postconviction proceedings from the field, the Thurmond/Spector plan would, as a matter of law, restrict the usual requirement that state remedies be exhausted to the pursuit of trial and appellate relief and, as a practical matter, channel whatever fact-finding is now undertaken in state collateral proceedings and the initial adjudication of some claims into the federal court. Claims that counsel performed ineffectively at trial or, certainly, on appeal would, for example, be removed from state court altogether. *Cf.* Yackle, *supra* note 120, at 371-72 (proposing not that state postconviction remedies be eliminated but that petitioners be released from an obligation to exhaust them before approaching the federal courts in habeas).

226. *See supra* text accompanying notes 24 and 61.

227. *See supra* note 6.

228. Capital cases may present a different constellation of incentives. Yet we hasten to add that we have no data (and know of none) to support the suspicion that death row prisoners deliberately postpone litigation.

229. *See supra* note 71 and accompanying text.

cerned. In our view, the use of a rigid, jurisdictional bar in cases of that kind would not serve the interests of justice or, for that matter, litigational efficiency.

Our data regarding second or successive petitions from the same prisoner demonstrate that repetitive habeas corpus litigation is not the quantative problem that habeas critics may suppose. Petitioners file more than one petition comparatively rarely, and, when they do, state's attorneys often fail to object under existing rules limiting multiple filings. Moreover, the rates of successive filings and arguments are declining, indicating that the problems they present are not growing, but diminishing in their importance to the federal courts' workload.[230]

Our results with respect to the participation of counsel in federal court clearly show that the availability of professional representation is the single most important predictor of success in federal habaes corpus. On the basis of our results, we think it is now clear, if it was not previously, that the federal habeas corpus jurisdiction would be substantially improved if indigent petitioners were supplied with competent legal counsel. The data show that prisoners' chances of success would be increased, and we are confident that the efficiency of federal litigation would also be enhanced. Congress has already enacted legislation providing counsel in death penalty cases;[231] we think similar legislation should be enacted with respect to noncapital cases.

Finally, regarding the primary focus of our project, the data show that the shift from the waiver standard, announced by the Warren Court in *Fay v. Noia*,[232] to the forfeiture standard, established by the reconstituted Court in *Wainwright v. Sykes*,[233] has resulted in a significant increase in the incidence of default arguments by state's attorneys and the rate of default dismissals. This result is scarcely surprising to anyone experienced in the field or, indeed, anyone with a passing acquaintance with the opinions and doctrines in point. Yet we have now demonstrated by empirical evidence what previously was accepted on intuition. We conclude, accordingly, that the *Sykes* formulation already closes the federal courts to constitutional claims irrespective of the merits and that the proposals for even further rigidity in procedural default doctrine now under discussion threaten to foreclose even more petitions that might well be meritorious. The choice between the enforcement of federal rights in the federal forum and the countervailing values associated with the forfeiture rule could hardly be more stark. For our part, the preservation of a robust federal jurisdiction in habeas corpus, able to deal with federal claims on the merits in most instances, is more than worth the price exacted by it.

230. Here again, we should note that, in some minds, capital cases are different also with respect to second or successive petitions. The Powell Committee and ABA recommendations for tighter successive petition rules are limited to death penalty cases. *See supra* note 87 (Powell Committee); *supra* note 89 and accompanying text (ABA recommendations).

231. *See supra* note 95 and accompanying text.

232. 372 U.S. 391 (1963).

233. 433 U.S. 72 (1977).

APPENDIX

QUESTIONNAIRE

1. Year: _____ ID No. _____[1]
2. FRC # _____ Case # _____ Box # _____ Acc # _____[2]

PART I. STATE PROCEEDINGS

3. Convicting court: _____
4. Year of conviction: _____
5. Year of last state court ruling: _____
6. Offense(s):

a. [ ] Homicide		f. [ ] Weapons	
b. [ ] Robbery		g. [ ] Other_____	
c. [ ] Drugs		h. [ ] Other_____	
d. [ ] Rape		i. [ ] Other_____	
e. [ ] Theft		j. [ ] NA	

7. 1 [ ] Trial 2 [ ] Guilty plea 9 [ ] NA
8. Longest sentence: 1 [ ] 1-5 2 [ ] 6-10 3 [ ] 11-15 4 [ ] 16-20 5 [ ] >20 9 [ ] NA
9. Direct review: 1 [ ] No 2 [ ] Yes 9 [ ] NA
10. Collateral: a. 1 [ ] No 2 [ ] Yes 9 [ ] NA
    b. If yes, year of _____
11. Counsel: a. Trial: 1 [ ] No 2 [ ] Yes 9 [ ] NA
    If yes, 1 [ ] Ret[3] 2 [ ] LAS[4] 3 [ ] Priv[5] 9 [ ] NA
    b. Direct review: 1 [ ] No 2 [ ] Yes 9 [ ] NA
    If yes, 1 [ ] Ret 2 [ ] LAS 3 [ ] Priv 9 [ ] NA
    c. Collateral: 1 [ ] No 2 [ ] Yes 9 [ ] NA
    If yes, 1 [ ] Ret 2 [ ] LAS 3 [ ] Priv 9 [ ] NA
12. Forma Pauperis: 1 [ ] No 2 [ ] Yes 9 [ ] NA
13. Prior Petition: 1 [ ] No 2 [ ] Yes 9 [ ] NA
14. Counsel:
    a. Before petition: 1 [ ] No 2 [ ] Yes 9 [ ] NA
    If yes, 1 [ ] CJA[6] 2 [ ] Ret 3 [ ] FD[7] 9 [ ] NA
    b. After petition: 1 [ ] No 2 [ ] Yes 9 [ ] NA
    If yes, 1 [ ] CJA 2 [ ] Ret 3 [ ] FD 9 [ ] NA

15. Judge: _____

16. Claim(s): A [ ] Ineffective assistance (1)
B [ ] Invalid guilty plea (2)
C [ ] Coerced confession (3)
D [ ] Prosecutor misconduct (4)
E [ ] Fourth amendment (5)
F [ ] Fifth amendment (6)
G [ ] Double jeopardy (7)
H [ ] Denial of appeal (8)
I [ ] Improperly selected jury (9)
J [.] Other (10) [specify: _____]
K [ ] Other (11) [specify: _____]
L [ ] Other (12) [specify: _____]
M [ ] NA

PART III. CLAIMS SECTION[8]

1. Claim No. _____

2.	Dismissed:	1 [ ] No	2 [ ] Yes	9 [ ] NA
	If yes, without an answer:	1 [ ] No	2 [ ] Yes	9 [ ] NA
3.	Exhaustion argument:	1 [ ] No	2 [ ] Yes	9 [ ] NA
4.	Successive pet. argument:	1 [ ] No	2 [ ] Yes	9 [ ] NA
5.	Procedural def. argument:	1 [ ] No	2 [ ] Yes	9 [ ] NA

6. If no relief, basis of denial:
A [ ] Exhaustion D [ ] Successive petition
B [ ] Merits E [ ] Other [specify: _____]
C [ ] Procedural default F [ ] NA

7. If procedural default, stage of state proceedings:
1 [ ] Trial 2 [ ] Direct review
3 [ ] Collateral review 9 [ ] NA

8.	Hearing:	a. Held	1 [ ] No	2 [ ] Yes	9 [ ] NA
		b. On merits	1 [ ] No	2 [ ] Yes	9 [ ] NA
		c. On habeas issues other than procedural default	1 [ ] No	2 [ ] Yes	9 [ ] NA
		d. On default	1 [ ] No	2 [ ] Yes	9 [ ] NA
9.	Focus on:	a. Bypass	1 [ ] No	2 [ ] Yes	9 [ ] NA
		Found	1 [ ] No	2 [ ] Yes	9 [ ] NA
		b. Cause	1 [ ] No	2 [ ] Yes	9 [ ] NA
		Found	1 [ ] No	2 [ ] Yes	9 [ ] NA

c. Prejudice	1 [	] No	2 [	] Yes	9 [	] NA
Found	1 [	] No	2 [	] Yes	9 [	] NA

[1] Each case file was given an identification number for this project, in addition to the four numbers used officially to identify and retrieve case files.

[2] These numbers, the Federal Records Center number, the case number, the box number, and the accession number, were obtained from the court.

[3] Retained counsel.

[4] Legal Aid Society.

[5] Counsel assigned by the court from a list of private attorneys.

[6] Counsel appointed pursuant to the Criminal Justice Act. 18 U.S.C. § 3006A.

[7] Counsel provided by the Federal Public Defender.

[8] A separate claims section was prepared for each claim presented.