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### Judicial Reform of Habeas Corpus: The Advocates' Lament

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# JUDICIAL REFORM OF HABEAS CORPUS: THE ADVOCATES' LAMENT

CHRISTOPHER E. SMITH<sup>1</sup>

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## I. INTRODUCTION

Under the leadership of Chief Justice William Rehnquist, the U. S. Supreme Court has engineered significant changes in habeas corpus procedures.<sup>2</sup> Any change in law or public policy has consequences for the human beings whose lives come into contact with the changed law or policy. Critics have accused the Rehnquist Court of "dismantl[ing] access to federal habeas corpus review guaranteed by statute since 1867."<sup>3</sup> As a result, concerns have emerged regarding the consequences for potential petitioners whose claims can no longer be reviewed by federal judges.<sup>4</sup> Foremost among these concerns is the fear that an innocent person may be executed because there was no opportunity

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<sup>2</sup> See, e.g., Rudolph Alexander, Jr., *The Demise of State Prisoners' Access to Federal Habeas Corpus*, 6 CRIM. J. POL. REV. 55 (1992) (critique of Rehnquist Court's decisions that have curtailed state prisoners' access to federal court review of constitutional claims in habeas corpus proceedings).

<sup>3</sup> Margery Malkin Koosed, *Habeas Corpus: Where Have All the Remedies Gone?*, TRIAL (July 1993): 70-79.

<sup>4</sup> Alexander, *supra* note 2, at 65 ("[T]hese new decisions facilitate unfairness and injustices."); Koosed, *supra* note 3, at 72 ("[T]he Court essentially disincorporates those rights guaranteed to petitioners through the Fourteenth Amendment's Due Process Clause by tying relief to prejudice.").

for federal judicial review of a capital case.<sup>5</sup> While the fate of death row inmates is the most important consequence of habeas corpus reform, anecdotal reports on these controversial cases provide an incomplete picture of the impact of habeas reform. Judicial initiatives to reform habeas corpus affect people other than petitioners. Although the impact on officials within the justice system may appear less visible and compelling than the fate of death row inmates, an examination of other actors affected by habeas corpus reform sheds light on unrecognized consequences of the Rehnquist Court's decisions. This article examines the perspective of assistant state attorneys general, important actors in the habeas corpus process, toward the Supreme Court's habeas corpus reform.

### *A. The States' Attorneys*

Although assistant attorneys general represent the state in habeas proceedings and are key actors in post-conviction legal proceedings, they have received scant attention from scholars who study the justice system.<sup>6</sup> Whenever a habeas petition survives initial review by the U.S. district court and is served upon the state,<sup>7</sup> a state attorney must draft an answer to begin the process of justifying the petitioner's prosecution and conviction. State attorneys labor in relative obscurity and can never hope to receive the public recognition and career rewards bestowed on prosecutors who obtain trial court convictions in highly publicized criminal cases. Because habeas petitioners are so rarely successful,<sup>8</sup> states attorneys' jobs appear relatively easy. However, states attorneys face special pressures, including the fear that a guilty offender may go free if a state attorney does not apply meticulous care to each case. The fact that many habeas cases concern trials that occurred many years earlier

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<sup>5</sup>See Christopher E. Smith & Avis Alexandria Jones, *The Rehnquist Court's Activism and the Risk of Injustice*, 26 CONN. L. REV. 53, 66-75 (1993) (descriptions of capital cases with significant questions about the death row inmates' culpability for murder in which new Rehnquist Court decisions blocked federal habeas review of petitioners' claims).

<sup>6</sup>Scholars who study the justice system usually focus their research on judges or on interest groups that attempt to use the courts to advance policy preferences. See JOHN B. GATES & CHARLES A. JOHNSON (EDS.), *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* (1991) (collection of articles reviewing the state of contemporary research on the legal system).

<sup>7</sup>Because habeas corpus petitions are typically filed pro se by prisoners who may lack literacy skills, education, knowledge of law, and access to legal research materials, see Christopher E. Smith, *Examining the Boundaries of Bounds: Prison Law Libraries and Access to the Courts*, 30 HOWARD L. J. 27, 34-36 (1987), such petitions are especially susceptible to being returned to the petitioners due to technical defects or dismissed sua sponte for failing to state a valid claim. See Donald H. Ziegler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 176-187 (1972).

<sup>8</sup>For example, the most recent major study of habeas corpus found that petitions filed in federal courts are typically successful in less than one percent of cases. VICTOR E. FLANGO, *HABEAS CORPUS IN THE STATE AND FEDERAL COURTS* 62 (1994).

exacerbates this fear. If a successful petition results in a new trial, even a guilty defendant may go free if witnesses have died or evidence has been lost. In the adversary context of habeas proceedings, the work and effectiveness of assistant attorneys general are important elements in case outcomes.

In October 1994, researchers mailed survey forms to the Attorney General of each of the fifty states. The survey contained questions which emerged from an extended group interview with assistant attorneys general in one state. The mailing targeted assistant attorneys general responsible for handling habeas corpus cases in the federal courts of each state. Assistant attorneys general in twenty-seven states returned eighty-nine survey forms. The respondents represented states in every region of the country, including states which provided for capital punishment and states which did not. To encourage frank responses, the survey assured respondents that aggregate data analysis would protect anonymity. In addition to a few specific questions about the attorneys' perceptions of habeas corpus, the survey contained space for additional comments. These comments provided perspective on the attorneys' assessments of the consequences of recent developments in habeas corpus proceedings.

Reform efforts initiated by the U.S. Supreme Court's decisions concerning habeas corpus favor state interests by limiting habeas petitioners' access to federal courts. These judicial reforms ostensibly reduce the burdens placed on the state attorneys who must respond to habeas petitions. However, the results of this survey indicate the dissatisfaction many assistant attorneys general exhibit toward recent changes affecting habeas corpus. These attorneys believe, in particular, that many judicial officers in federal district courts do not comply with Supreme Court precedent involving habeas corpus.

## II. JUDICIAL REFORM OF HABEAS CORPUS

Federal statutes permitting federal<sup>9</sup> and state prisoners<sup>10</sup> to file post-conviction petitions raising constitutional claims for review by federal judicial officers govern habeas corpus proceedings. Because habeas corpus provides an additional, post-appeal opportunity for a state prisoner to challenge his or her conviction in a new forum, habeas corpus implicates issues of finality, comity, and the redundant expenditure of federal judicial resources.<sup>11</sup> In an effort to reduce these problems purportedly caused by the broad availability of habeas corpus,<sup>12</sup> William Rehnquist has sought to restrict

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<sup>9</sup>See 28 U.S.C. § 2255.

<sup>10</sup>See 28 U.S.C. § 2254.

<sup>11</sup>LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* 161 (1994). By contrast, Larry Yackle argues that efforts to limit habeas corpus stem not from these issues, but from opposition by political conservatives to the Warren Court's decisions expanding the definition of constitutional rights for criminal defendants. Larry W. Yackle, *The Habeas Hagscope*, 66 S. CAL. L. REV. 2331, 2352, 2356 (1993).

<sup>12</sup>Chief Justice Rehnquist is reported to believe that these problems burden the federal courts and should be corrected through significant reforms:

access to habeas corpus<sup>13</sup> as both an Assistant Attorney General for the Nixon Administration,<sup>14</sup> and later as the Chief Justice of the United States.<sup>15</sup> As Chief Justice, Rehnquist appointed retired Justice Lewis Powell to head a committee charged with making recommendations for reforming habeas procedures in capital cases. Without waiting for approval from the Judicial Conference of the United States, Rehnquist presented the Powell Committee's recommendations to Congress.<sup>16</sup> Rehnquist's precipitous action generated an unusual public rebuke from a majority of judges on the Judicial Conference.<sup>17</sup> Ultimately, Congress was unable to reach agreement on changes in habeas corpus procedures.<sup>18</sup>

Rehnquist and like-minded colleagues proceeded with reform despite the unwillingness of Congress to alter the statutes governing habeas corpus. Although statutory law governs habeas corpus, and therefore presumptively places habeas corpus under the control of Congress, the Supreme Court has altered habeas procedures through its judicial decisions.<sup>19</sup> In a series of decisions, the Supreme Court erected a variety of barriers to petitioners seeking post-conviction vindication of their federal constitutional claims. In *Teague v.*

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Rehnquist had become determined to change the [habeas corpus] system. It was chaotic, wasteful, and an abuse of the people's right to have laws enforced, he contended in a series of speeches . . . . Rehnquist was especially upset by inmates who strung out their cases by filing one habeas corpus petition after another. He wanted the law changed to give these inmates a one-time shot.

DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* 412-413 (1992).

<sup>13</sup>Rehnquist's earliest documented action to limit habeas corpus came in a memorandum entitled "Habeas Corpus Then and Now; Or, 'If I Can Just Find the Right Judge, Over These Prison Walls I Shall Fly . . .,'" which he prepared in the early 1950s in his capacity as law clerk to Justice Robert Jackson at the U.S. Supreme Court. Yackle, *The Habeas Hagioscope*, *supra* note 11, at 2343, n. 52.

<sup>14</sup>*Id.* at 2353-55.

<sup>15</sup>*Id.* at 2367-70.

<sup>16</sup>*Id.* at 2370, n.165.

<sup>17</sup>Linda Greenhouse, *Judges Challenge Rehnquist's Role on Death Penalty: An Extraordinary Move*, N.Y. TIMES, Oct. 6, 1989, at A1.

<sup>18</sup>Yackle, *The Habeas Hagioscope*, *supra* note 11, at 2371. However, with the assumption of congressional control by a new Republican majority after the 1994 elections, the House of Representatives has pushed forward legislation to streamline habeas procedures. See Katharine Q. Seelye, *House Approves Easing of Rules on U.S. Searches*, N.Y. TIMES, Feb. 6, 1995, at A1, A10.

<sup>19</sup>The Court has preserved aspects of habeas corpus in some cases, apparently because a full majority of justices does not support the most drastically suggested curtailment of the writ. See Yale L. Rosenberg, *The Supreme Court Reinforces Both Federal Habeas Corpus and Miranda*, 29 CRIM. L. BULL. 418 (1993).

*Lane*<sup>20</sup> and *Penry v. Lynaugh*,<sup>21</sup> the Court "significantly narrowed the scope of federal habeas by excluding claims based on 'new constitutional rules of civil procedure,' or rules that are announced after a defendant's conviction becomes 'final.'"<sup>22</sup> In *McCleskey v. Zant*,<sup>23</sup> the Court limited opportunities for filing successive petitions. In *Coleman v. Thompson*,<sup>24</sup> the Court turned state procedural defaults into forfeitures of federal claims. In *Brecht v. Abrahamson*,<sup>25</sup> the Court established stricter standards for determining whether trial court errors are substantial enough to justify granting relief. These and other Supreme Court cases have produced a "trend in the Court's decisions...to elevate technical performance above the substance in the evaluation of claims of federal rights violations."<sup>26</sup> As a result, the Court has created additional bases for state attorneys to prevail without federal judicial officers ever considering the merits of a petition. For example, a state attorney may prevail by simply asserting successive petitions or procedural default in state court.

### III. THE ADVOCATES' LAMENT

Despite benefitting from the Supreme Court's recent doctrinal changes affecting habeas corpus, assistant state attorneys general who handle such cases express deep dissatisfaction with habeas corpus. This dissatisfaction involves two central aspects. First, assistant state attorneys general in their adversarial posture as representatives of the state have little regard for the potential meritoriousness of the habeas petitions which absorb their working lives. The skepticism toward habeas petitions generates frustration regarding the amount of time assistant attorneys general spend responding to petitions perceived as worthless and doomed. Second, assistant attorneys general are frustrated by the perceived insubordination by lower court federal judicial officers who fail to comply with the Supreme Court's new doctrines.

#### A. Perceptions of Frivolousness

Anecdotal evidence contained in the attorneys' additional comments to the survey indicated frustration with the frivolousness of some habeas petitions and the significant amounts of time "wasted" in litigating these cases. A respondent characterized the entire concept of habeas corpus as a "federal

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<sup>20</sup>489 U.S. 288 (1989).

<sup>21</sup>492 U.S. 302 (1989).

<sup>22</sup>Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 166.

<sup>23</sup>499 U.S. 467 (1991).

<sup>24</sup>501 U.S. 722 (1991).

<sup>25</sup>507 U.S. 619 (1993).

<sup>26</sup>J. Thomas Sullivan, *A Practical Guide to Recent Developments in Federal Habeas Corpus for Practicing Attorneys*, 25 ARIZ. ST. L. J. 317, 317 (1993).

attempt[t] to interfere with state prosecutions"— a characterization which certainly constitutes a pejorative description of a legal action initiated by individuals and explicitly intended to provide a vehicle for vindication of constitutional rights. All respondents indicated that such cases were problematic. Some respondents criticized habeas corpus in the strongest possible terms:

"[I]f I would have to list the things about the law that make me want to take a different career path, habeas litigation would have to be near the top of the list."

"The costs associated with responding to habeas petitions are escalating. Almost all [petitions] are entirely frivolous, but the expense of providing the federal courts with copies of the state court records are quite substantial. Also, the amount of time spent on habeas petitions is substantial (especially for new attorneys unfamiliar with habeas law) and takes away from time that could be better spent on state appeals and other matters. 28 U.S.C. [sec.] 2254[, the federal statute governing federal review of state habeas cases,] should be repealed."

The survey questioned respondents about the number of cases each had handled in which the writ had been granted and the number of cases each had handled in which the respondents believed that the writ should have been granted. Tables 1 and 2 illustrate the responses to these questions. Consistent with findings from studies of habeas case outcomes,<sup>27</sup> petitioners rarely succeeded in the cases handled by the respondents. Over eighty percent of respondents had lost four or fewer of their cases, and thirty-seven percent had never seen a petitioner succeed.

Table 1 - Habeas Corpus Petitions Granted: Descriptive Assessment  
by Assistant State Attorneys General:

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Number of Cases Handled in Which Writ Was Granted

<u>Cases</u>	<u>Respondents (%)</u> [N=88]
0	33 (37.5%)
1	15 (17.0%)
2	13 (14.8%)
3	3 (3.4%)
4	7 (8.0%)
5	4 (4.5%)
6	1 (1.1%)

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<sup>27</sup>FLANGO, *supra* note 8, at 62; Richard Faust, et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 680 (1990-91); David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 334 (1973).

Table 1 continued

<u>Cases</u>	<u>Respondents (%)</u> [N=88]
7	1 (1.1%)
8	1 (1.1%)
9	2 (2.3%)
10	2 (2.3%)
>10	6 (6.8%)

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Table 2 - Habeas Corpus Petitions Granted: Normative Assessment  
by Assistant State Attorneys General:

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Number of Cases Handled in Which Assistant Attorney General Believes Writ  
Correctly Granted Or Should Have Been Granted

<u>Cases</u>	<u>Respondents (%)</u> [N=86]
0	51 (59.3%)
1	16 (18.6%)
2	7 (8.1%)
3	2 (2.3%)
4	1 (1.2%)
5	3 (3.5%)
6	1 (1.2%)
7	0 (0)
8	1 (1.2%)
9	1 (1.2%)
10	0 (0)
>10	3 (3.5%)

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Not surprisingly, given the adversarial structure of the American legal system, the states' advocates believed that even fewer writs were meritorious than the small number actually granted. Nearly sixty percent of respondents declared they had never opposed a meritorious petition and nearly ninety percent indicated they had participated in three or fewer cases in which the writ was or should have been properly granted. In light of the attorneys' near-consensus that meritorious petitions are exceedingly rare, if not non-existent, the respondents' frustration with the amount of work required for habeas corpus petitions is not surprising. One respondent indicated that habeas corpus cases involve special problems because no guarantee exists that difficult, old cases will not resurface for consideration:

Federal habeas petitions are troublesome because they often involve cases that are very old. Because the cases are old, it is often difficult to find witnesses and documents. I currently have a federal habeas case in which the petitioner was convicted in 1984.



Because of the attorneys' deep-seated dissatisfaction with habeas corpus, the frustration with judicial actions believed to improperly favor petitioners or otherwise disobey the Supreme Court's directives comes as no surprise.

### *B. Perceptions of Non-Compliance*

The survey addressed the issue of compliance by federal district court judges and magistrate judges<sup>28</sup> with the Supreme Court's habeas reform decisions. Obviously, the impact of judicially-initiated habeas reforms depends on the compliance of federal judicial officers. If the Supreme Court's new barriers limiting the number of habeas petitions and the consumption of federal judicial resources by the petitioners are to have the desired effect, judicial officers in the district courts must comply with the high court's intentions. Federal judicial officers are both the "interpreters" and "implementers" of the Supreme Court's habeas decisions affecting procedures and standards of review.<sup>29</sup> These officers are responsible for determining the meaning of the high court's decisions and implementing those decisions by ruling on habeas petitions brought to the federal district courts for review. If federal judges misinterpret<sup>30</sup> or intentionally subvert<sup>31</sup> the Supreme Court's decisions, the high court's policy goals remain unfulfilled. As indicated by Table 3, a majority of respondents (52.9%) believed that federal judicial officers do not comply with the Supreme Court's recent habeas corpus decisions. Table 3 includes only unequivocal endorsements of judicial officers as "yes" responses. Table 3 combines unequivocal negative responses with responses indicating some negativity, such as "usually," "most of them," and "generally," to indicate a lack of complete judicial compliance in the eyes of the assistant state attorneys general.

Table 4 shows that respondents' dissatisfaction with federal judicial officers' compliance with Supreme Court habeas corpus precedent was most pronounced in capital punishment states. While a majority of attorneys (56.5%) in such states complained about a lack of compliance, only a sizable minority (38.1%) in non-death penalty states had similar complaints about U.S. magistrate judges and district judges. The differences in responses may reflect

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<sup>28</sup>Prisoners' cases and Social Security appeals are two of the categories of cases most frequently delegated to U.S. magistrate judges by U.S. district judges for review and recommendation. Christopher E. Smith, *Assessing the Consequences of Judicial Innovation: U.S. Magistrates' Trials and Related Tribulations*, 23 WAKE FOREST L. REV. 455, 483 (1988) (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 36 (1986)).

<sup>29</sup>CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 29-105 (1984).

<sup>30</sup>*Id.* at 54 ("Conscientious judges frequently have to make their own best guesses about how to interpret a judicial policy and apply it to a particular set of circumstances not considered by a higher court.").

<sup>31</sup>*Id.* at 57 ("A lower court may refuse to accept a judicial decision because the judge believes the higher court lacks the right to make such a decision.").

the state attorneys' frustration with the closer judicial scrutiny of capital cases and the higher rate of success for habeas petitioners in such cases.<sup>32</sup>

**Table 3**  
**Perceptions of Assistant State Attorneys General About Federal**  
**Judicial Officers' Compliance with U.S. Supreme Court Decisions**  
**Concerning Habeas Corpus**

[N=85]

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"Do you believe that federal judicial officers (i.e., U.S. magistrate judges and U.S. district judges) are obeying the Supreme Court's recent decisions concerning successive petitions, procedural defaults in state courts, and other rules affecting habeas corpus cases?"

<u>Yes</u>	<u>No</u>
40 (47.1%)	45 (52.9%)

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**Table 4**  
**Perceptions of Assistant State Attorneys General About Federal**  
**Judicial Officers' Compliance with U.S. Supreme Court Decisions**  
**Concerning Habeas Corpus: Capital Punishment States and Non-Capital**  
**Punishment States**

[N=83]

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"Do you believe that federal judicial officers (i.e., U.S. magistrate judges and U.S. district judges) are obeying the Supreme Court's recent decisions concerning successive petitions, procedural defaults in state courts, and other rules affecting habeas corpus cases?"<sup>33</sup>

#### IN CAPITAL PUNISHMENT STATES

<u>Yes</u>	<u>No</u>
27 (43.5%)	35 (56.5%)

#### IN NON-CAPITAL PUNISHMENT STATES

<u>Yes</u>	<u>No</u>
13 (61.9%)	8 (38.1%)

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<sup>32</sup>Justice Stevens has said that petitioners in capital cases gain relief in 60 to 70 percent of cases while habeas petitioners in other cases succeed in fewer than 7 percent of other cases. *Murray v. Giarratano*, 492 U.S. 1, 23-24 (1989) (Stevens, J., dissenting).

<sup>33</sup>Note: The state affiliations of two respondents could not be identified due to the absence of a legible postmark.

### 1. The Compliance Problem

Interpretation and implementation allow for both intentional subversion of the appellate courts' objectives and good faith misinterpretations of the judicial policy makers' intentions.<sup>34</sup> Many of the respondents to the survey characterized U.S. district judges and magistrate judges as deliberately defeating the Supreme Court's objectives through interpreting and applying precedents in habeas cases. One respondent stated this viewpoint forthrightly: "Any rules [the district judges and magistrate judges] don't like, they ignore." Other respondents echoed this viewpoint in describing how judicial officers in the U.S. district courts evaded the Supreme Court's decisions concerning exhaustion of state court remedies, procedural default, successive petitions, and deference to state court findings:

"[The] [f]ederal court is not dismissing petitions with unexhausted claims, but is rather staying them pending state court exhaustion."

"Some [federal judicial officers] ignore the rules all together—others address the merits despite a procedural default."

"Presumption of correctness of state court fact finding is seldom respected."

"Judges avoid *Teague* by finding not a new rule or one of two exceptions."

"The federal district court generally does not require the petitioner to make a showing that state remedies have been exhausted, rather than ordering the petitioner to make the showing, the magistrate judge issues an order to show cause to the state requiring an attorney to file a motion to dismiss and to copy pages and pages of state court documents. This is very time consuming for state attorneys, especially in cases where it is clear that state remedies have not been exhausted because there is a direct appeal pending in the state appellate courts."

"Judges . . . avoid procedural default (*Coleman*) by interpreting state court order[s] as intertwined with federal law."

"Where [the federal judges] go astray is in ordering evidentiary hearings in cases in which there are state court findings (supported by evidence) against the petitioner, where the petitioner has produced no record evidence besides his own self-serving allegations in support of

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<sup>34</sup>For example, a most egregious example of lower court disobedience occurred in *Jaffree v. James*, 544 F. Supp. 727 (1983), *aff'd in part and rev'd in part*, *Jaffree v. Wallace*, 713 F.2d 614 (11th Cir. Ala. 1983), *aff'd* *Wallace v. Jaffree* \*2, 472 U.S. 38 (1985), in which a U.S. district judge asserted that the Supreme Court's jurisprudence on organized prayer in the public schools had erroneously distorted the true meaning of the First Amendment. The court of appeals and the U.S. Supreme Court overturned his decisions. PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 357-367 (1988).

his claims or ... where the evidence of guilt was so overwhelming that the lack of prejudice was clear as a matter of law."

Some respondents blamed federal courts of appeals for leading or even forcing the district courts to disobey the Supreme Court's precedents. As described by one respondent:

The U.S. Court of Appeals for the 9th Circuit routinely disobeys U.S. Supreme Court decisions re: harmless error, procedural default, and nonretroactivity (*Teague v. Lane*). As a general matter, however, the 9th Circuit will follow U.S. Supreme Court cases on abuse of writ and successive petitions. The 9th Circuit judges seem to be convinced that the Supreme Court's habeas jurisprudence is just wrong, and the judges (or several of them) have taken it upon themselves to find ways of making an end run around the Supreme Court's decisions. As a result, the U.S. District Courts often feel compelled by 9th Circuit precedent to do the same.

*a. The Advocates' Perspective and the Judicial Role*

The foregoing comments paint a picture of lower court judges exploiting the fragmentation of judicial power in order to subvert judicial policies with which these judges disagree. However, consideration of attorneys' comments from the *judicial officers' perspective* suggests other reasons which explain the failure to fully implement the Supreme Court's habeas decisions. A survey of U.S. magistrate judges concerning habeas corpus reform indicated that many of these judicial officers, who frequently bear primary responsibility for these cases, find examination and dismissal of habeas petitions on the merits quicker and easier than proceeding with a long, drawn-out analysis of procedural issues.<sup>35</sup> Because dismissal of petitions based on the merits of the claims reflects the judicial officers' self-interest, the possibility of this dismissal forces the state attorneys to address the merits despite Supreme Court doctrines which indicate that the state should prevail on procedural grounds. Moreover, judicial officers believe that they best fulfill their judicial role<sup>36</sup> by responding directly

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<sup>35</sup>Christopher E. Smith, *Judicial Policy Making and Habeas Corpus Reform*, 7 CRIM. JUST. POL. REV. 91, 105 (1995).

<sup>36</sup>Research on judicial decision making has shown that "judges' decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do." James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7, 9 (1983). In deciding what they *ought* to do, judges are guided by their conception of the appropriate judicial role. This role is "a pattern of behavior determined by the judge's expectations, the normative expectations that others have for the judge, and other factors which inform the judge's conception of a judicial officer's function in the judicial system." CHRISTOPHER E. SMITH, *COURTS, POLITICS, AND THE JUDICIAL PROCESS* 144 (1993). Thus in examining habeas corpus petitions, judicial officers may decide that their role demands that they examine the merits of a claim, even if the Supreme Court's habeas doctrines present procedural grounds that ostensibly preclude review on the merits.

to the merits of a petitioner's claim rather than seemingly avoiding substantive issues through dismissal on technical grounds.

State attorneys complain about judicial officers addressing the merits of petitions as if such conduct represented simple insubordination:

The magistrate judges routinely require the state to brief both issues such as procedural default, exhaustion, etc. AND the merits, even when the state has a valid non-merits defense.

However, the attorneys do not seem to recognize that district court judicial officers do not view themselves as simply obedient subordinates of Supreme Court justices. In contrast, self-interest and aspirations to fulfill individual visions of proper judicial roles also shape the actions of federal judicial officers. For example, lower court judicial officers may wish to advance their own policy preferences that favor expansive interpretation and protection of criminal defendants' rights through the habeas corpus process.<sup>37</sup> Lower court judges may also protect themselves against reversal on appeal by deciding each petition on all possible grounds. For example, a correct decision on the merits may avoid reexamination of the entire case if an appellate court disagrees with the judicial officers' review of procedural issues.

With respect to the influence of judicial role, it must be remembered that both U.S. district judges and U.S. magistrate judges view themselves as authoritative judicial officers and they may chafe at limitations imposed by the Supreme Court that purport to prevent them from deciding cases as they see fit. U.S. district court judges, like justices of the Supreme Court, are appointed by the President, confirmed by the Senate, and sworn to uphold the Constitution. Procedural barriers that block review of habeas corpus petitions may clash with district court judges' sworn obligations to uphold the Constitution and with their self-image as judges who "embod[y] the federal court."<sup>38</sup> Similarly, U.S. magistrate judges view themselves as authoritative judicial officers<sup>39</sup> and have

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<sup>37</sup>Research on judicial decision making has found that judicial officers' policy preferences are a primary influence over their decision making. With respect to the U.S. Supreme Court, for example,

[J]ustices' policy preferences, which can be summarized in ideological terms, are perhaps the most important factor influencing their behavior . . . . [D]ifferences among the justices stem chiefly from their preferences, and the basic direction that most justices take on the Court seems to reflect the attitudes about policy issues that they bring to the Court.

LAWRENCE BAUM, *AMERICAN COURTS: PROCESS & POLICY* 298-300 (2d. ed. 1990).

<sup>38</sup>CHRISTOPHER E. SMITH, *UNITED STATES MAGISTRATES IN THE FEDERAL COURTS: SUBORDINATE JUDGES* 118 (1990).

<sup>39</sup>U.S. magistrate judges are quite open about their self-identification as authoritative judicial officers rather than mere subordinates to U.S. district judges:

At an annual training conference for magistrates from three federal circuits, one magistrate addressed his colleagues about the potential for obtaining litigants' consent for magistrate-supervised trials through the use of the title "judge." He concluded his remarks by

worked diligently to obtain salary, status, authority, and title commensurate with their sense of importance.<sup>40</sup> Their assertions of judicial authority by examining the merits of habeas petitions may also reflect a desire to both prove themselves as authoritative judicial officers and fulfill their sworn obligations to uphold the Constitution. While the views expressed by state attorneys reflect frustration with the actions of district court judicial officers, these views may not describe simple, intentional subversion of Supreme Court policies so much as the district court judges' self-images and self-interest.

In a related example, the adversarial posture of the states' attorneys coupled with their interest in rapid dismissal of habeas petitions clashes with, and ignores, the judicial officers' sense of special responsibility for handling the cases of *pro se* litigants with great care:

Federal district courts put [the] burden on [the] state to prove [the] correctness of state court judgments, ignore technical arguments and essentially hold the hand of inmates through habeas corpus proceedings.

From the attorneys' perspective, this judicial action indicates intentional noncompliance with Supreme Court policy directives. However, the roots of this noncompliance are understandable for more complex reasons than simple insubordination. Judicial officers may perceive their noncompliance as fulfilling their obligation to uphold the Constitution and protecting citizens' right of access to the courts by taking special care with such petitions.<sup>41</sup>

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shaking his head with an expression of sad disbelief, saying "there are still [district] judges out there who won't allow magistrates to be called 'judge.'" Whereupon a magistrate, from a district noted for its conflicts between judges and magistrates, yelled from the audience, "No kidding!" Although the magistrates at the conference laughed in commiseration with their colleague, the emphasis given to the subject by the speaker and the abrupt interjection by the magistrate in the audience indicated the heartfelt importance for which title and other aspects of status have for subordinate judicial officers. As another magistrate said in an address to the conference, "if we are not judicial officers, then I don't know who is."

Christopher E. Smith, *The Development of a Judicial Office: United States Magistrates and the Struggle for Status*, 14 J. LEGAL PROF. 175, 182-83 (1989).

<sup>40</sup>Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L. REV. 163, 174-98 (1992).

<sup>41</sup>Such feelings are evident, for example, in an opinion by a district court judge which criticized the Supreme Court's decision in *Bounds v. Smith*, 430 U.S. 817 (1977), for giving correctional officials the option of providing law libraries alone instead of legal assistance as the means of fulfilling prisoners' right of access to the courts.

In this court's view, access to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. The bulk and complexity [of law] have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special tools, such as computer research systems of FLITE, JURIS, LEXIS, and WESTLAW. To expect untrained

The judicial officers' noncompliance usually produces precisely the same result as compliance with technical rules, namely dismissal of the petition. For example, the following complaint reflected sentiments that appeared in many of the respondents' survey forms:

Judges will sometimes ignore procedural rules and skip straight to denying on the merits—sometimes without benefit of [the state's] brief.

Some assistant attorneys general remarked that judicial officers seem surprised when state attorneys complain about such noncompliance. In effect, the judicial officers seem to say "What are you upset about? After all, you won the case." While judicial officers may seek both to spare themselves the work of reading procedural histories and to fulfill their judicial role conception by addressing the merits, state attorneys view such situations very differently. From the attorneys' perspective, judicial officers inappropriately lend legitimacy to prisoner petitions by addressing the merits. Assistant attorneys general believe the Supreme Court has declared that procedural deficiencies make petitions unworthy of substantive evaluation and they strongly prefer that the message be conveyed to prisoners: you do not deserve to have your frivolous claims reviewed. Ironically, while previous research indicated the risk of insufficient district court review,<sup>42</sup> the state attorneys paint a picture of judicial officers who scrutinize habeas petitions too closely and carefully.

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laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of constitutional duty. Access to full law libraries makes about as much sense as furnishing medical services through books like: "Brain Surgery Self-Taught," or "How To Remove Your Own Appendix," along with scalpels, drills, hemostats, sponges, and sutures. *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982).

<sup>42</sup>See Shapiro, *supra* note 27, at 337-38.

The adjudication of habeas corpus applications lies at perhaps the lowest visibility level of any of the processes of the federal district courts. This is particularly true with respect to petitions filed pro se and where no lawyer is later appointed. Decisions are generally unreported (and the option, of course, is that of the judge himself), and there is small likelihood that the case will reach the appellate level. When these factors are combined with the inherent repetitiveness and frequent inarticulateness of petitions, the exercise of habeas corpus jurisdiction becomes a strong test of judicial sensitivity . . . . [M]y study of the records left me convinced that the range of performance on this test could not have been much wider.

. . . . At one end of the spectrum of judicial sensitivity was the judge who rarely wrote an opinion, whose dismissals gave at best only a slender indication of the basis for his actions, and who—when receiving a referred case back from a magistrate—invariably adopted the recommendation without comment within a day or two of submission.

*Id.*

The clash of perspectives, roles, and expectations between state advocates and judicial officers, which creates frustration and dissatisfaction in assistant attorneys general, has been generated by the Supreme Court's emphasis on procedural reforms. The high court sought to create new bases for dismissing petitions by focusing attention on technical procedural rules. Unfortunately, by using their policy-making authority to direct attention away from the merits of habeas petitioners' claims, the Supreme Court has inadvertently heightened conflict between state attorneys and district court judicial officers and has set the stage for what appears to be widespread noncompliance.

### *b. Capital Cases*

Another element of the clash between state attorneys and judicial officers concerns the extra care and additional noncompliance applied by judges in capital cases. This theme arose frequently in respondents' comments on the survey forms:

"In regards to exhaustion, the federal courts are sometimes willing to liberally construe the claims presented in state court to find the claims had been exhausted. This is especially true in capital cases."

"The [N]inth [C]ircuit [C]ourt of [A]ppeals has often defied precedent on matters relating to procedural default and the rule that federal courts may not address issues of state law. This is especially true in capital cases."

"Courts usually apply procedural bar but in some cases, especially in death cases, willfully ignore the [procedural] bar [rules]."

"In capital cases, Death Penalty Resource Centers are ignoring all of the [rules and precedents] to create lengthy record/pleadings to create delay and support their own office's expansion. Because they are capital cases, the courts are refusing to sanction this conduct, which only leads the attorneys to greater abuse and delay."

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See also Christopher E. Smith, *United States Magistrates and the Processing of Prisoner Litigation*, 52 FED. PROBATION 13, 15 (Dec. 1988).

[M]agistrates and their staffs are very accustomed to, and, in fact, expect to find grounds to dismiss [prisoners'] cases. This expectation derives from experience, but if it is unchecked, it can lead magistrates to review prisoners' cases with a different approach than that applied to other kinds of tasks. Most notably, some magistrates appear to review prisoners' cases by asking the questions, "How can I dismiss this case?," rather than considering, "Does this complaint contain a valid constitutional claim?" As a practical matter, this initial focus may not have any effect upon the eventual outcomes, namely the significant number of dismissals. However, this approach exacerbates the risk that claims may go unrecognized because the magistrates' reviews are not beginning with the appropriate questions for providing thorough, considered judgments.

*Id.*



The judicial officers' noncompliant behavior in such cases frustrates the expectations of assistant attorneys general, who see the Supreme Court's policy decisions as mandating dismissals on procedural grounds and precluding the legitimization of habeas petitions through review on the merits. Again, the judicial officers' noncompliance is understandable for more complex reasons than simply willful insubordination. As described by Hoffmann:

Because they are only human, the Justices (or at least most of them), along with most of the judges in the lower federal courts, pay much closer attention to the outcomes in capital cases than they do in other criminal cases....[T]hese cases consistently receive far closer federal scrutiny than noncapital criminal cases, even in a relatively conservative era and almost regardless of the particular federal judge's ideological or jurisprudential views. And whenever a judge finds a capital case in which he or she believes an injustice is about to be done, the judge is naturally inclined to do whatever is in his or her judicial power (and maybe even a few things that arguably are not) to rectify the perceived injustice.<sup>43</sup>

The weight of responsibility for affecting life and death decisions can understandably lead district and circuit court judges to utilize their judicial powers to make careful decisions about capital cases. The procedural focus of the Rehnquist Court's policy-making has unintentionally, but effectively, pushed federal judges toward noncompliance.

#### IV. JUDICIAL REFORM AND HABEAS CORPUS

The frustration evident in state attorney complaints is understandable when their role as advocates is contrasted with the judicial role assumed by U.S. district judges and U.S. magistrate judges. The assistant attorneys general expect to benefit from the Supreme Court's decisions which provide additional ammunition in the form of procedural defenses for prisoner adversaries who represent the state. By contrast, the human decisionmakers beneath black robes in federal district courts may find their perspectives shaped and their decisions influenced by other concerns such as protecting constitutional rights as a fulfillment of the judicial oath, avoiding reversal and reexamination of cases, and providing careful consideration of pro se and death row petitioners' claims. This clash of perspectives which generates attorney frustration may stem from the Supreme Court's attempt to steer something that may be unsteerable, namely judicial officers' attention away from the merits of claims and toward technical compliance with a myriad of procedural rules.

These consequences of judicially-initiated habeas corpus reform are consistent with critics' descriptions of flawed judicial policy-making concerning other issues. Because judges are not experts on policy issues, some

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<sup>43</sup>Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 IND. L. J. 817, 821-822 (1993).

critics label judges unable to accurately anticipate the consequences of their policy-shaping decisions.<sup>44</sup> Although this criticism of judicial policy-making may be no less true of policy-making by other branches of government,<sup>45</sup> the criticism is a key issue in assessing the capacity of courts to produce good public policy.<sup>46</sup> Ironically, while such perceived weaknesses of judicial policy-making cause critics to admonish federal judges to keep their noses out of such policy issues as school desegregation,<sup>47</sup> prison reform,<sup>48</sup> and other issues about which judges lack expertise, habeas corpus is an entirely different issue. Habeas corpus concerns court-centered issues of justice, rights, and legal procedures that are presumably within the ambit of Supreme Court justices' special expertise as experienced lawyer-judges. It appears, however, that the justices may lack a comprehensive understanding of the way in which lower court judges' interests, self-image, and judicial role conceptions could undercut the high court's intentions and thereby generate additional frustrations for the states' attorneys, whose raised expectations about reduced workloads and easy victories remain less-than-completely fulfilled.

Unlike institutions in other branches of government, the Supreme Court remains relatively detached from other institutions and segments of society, and this detachment helps to reinforce the Court's image as neutral, non-political, and independent.<sup>49</sup> Unfortunately, such detachment can also adversely affect actions taken by Supreme Court justices, indicating that the Court does not understand the functioning of the society it shapes and the lives of the citizens it impacts.<sup>50</sup> In this instance, the justices have demonstrated their

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<sup>44</sup>See DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 52 (1977) ("[t]he courts suffer from an unusual poverty of resources to minimize the incidence of unintended consequences in advance and especially to detect and correct them once they occur.").

<sup>45</sup>See Stephen L. Wasby, *Arrogation of Power or Judicial Accountability: Judicial Imperialism Revisited*, 65 *JUDICATURE* 208, 208-219 (1981).

<sup>46</sup>CHRISTOPHER E. SMITH, *COURTS AND PUBLIC POLICY* 49 (1993).

<sup>47</sup>See, e.g., LINA A. GRAGLIA, *DISASTER BY DECREE, THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOL* (1976) (critique of judicial interventions in school systems that use court-ordered busing as a remedy).

<sup>48</sup>See, e.g., Daniel J. Popeo & George C. Smith, *Court Supervision of Prisons Is Unnecessary*, in *CRIMINAL JUSTICE: OPPOSING VIEWPOINTS* 389-395 (1987) (arguments favoring judicial deference to administrative officials in decisions concerning management of prisons).

<sup>49</sup>RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* 6-7 (1994).

<sup>50</sup>For example, in 1989 Chief Justice Rehnquist led a highly-publicized effort to gain salary increases for all federal judges. In publicizing the need for raises through a report issued by the Judicial Conference and a press conference, the Chief Justice and his colleagues in the third branch made arguments which indicated that they did not understand that their salary and status were far above those of most other citizens:

[A federal judge] prominently quoted by the judges' committee advocating pay raises, said, "The long term financial sacrifice for my family is too much. I cannot sentence them to a lifetime of

detachment from the judicial officers in the lower federal courts by elevating and encouraging unfulfilled expectations possessed by assistant state attorneys general while inadvertently pushing U.S. district judges and magistrate judges to avoid complete compliance with the Supreme Court's new habeas corpus precedents. Such consequences appear to place the Supreme Court on equal footing with legislatures, whose judicial reform statutes have been thwarted by decisions of lower court judges.<sup>51</sup> These consequences simultaneously raise questions about whether contemporary judicial reform of habeas corpus represents careful, measured deliberations about important policies and procedures or precipitous actions by a Court majority intent upon sharply limiting petitioners' access to habeas corpus.<sup>52</sup> In order to be effective, any judicial reform must be based on careful consideration of probable consequences in light of an accurate understanding of how the justice system actually works, including the roles and interests of lower court officials affected

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genteel poverty." For anyone earning at least \$89,500 annually, a sum that is over four times greater than that of the median salary for full-time American workers, to speak of living in poverty is outrageous. This characterization not only ignores the fact that millions of Americans are unemployed, homeless, and lacking medical insurance, but it bespeaks an absence of sensitivity to the harsh realities of life in American society and undeniably privileged position enjoyed by citizens who receive the relatively high salaries of federal judges. [emphasis supplied]

Christopher E. Smith, *Federal Judicial Salaries: A Critical Assessment*, 62 TEMPLE L. REV. 849, 864 (1989).

<sup>51</sup>When legislatures attempt to impose sentencing reform, bail reform, or other initiatives upon the judicial branch, the fragmentation of the judicial system permits judges within individual courthouses to thwart implementation of changes that they do not support. See MALCOLM FEELEY, COURT REFORM ON TRIAL (1984).

<sup>52</sup>Because justices' decisions are motivated significantly by their personal policy preferences, see *supra* note 37 and accompanying text, and Chief Justice Rehnquist has long sought through not-always-careful means to change habeas corpus, see *supra* note 17 and accompanying text, there is a risk that some justices are myopically pursuing habeas corpus reform with the motives and tactics attributed by Yackle to critics of habeas corpus over the course of the past thirty years:

It was no accident that *Gideon v. Wainwright*, 372 U.S. 335 (1963)] and *Fay v. Noia*, 372 U.S. 391 (1963)] were handed down the same day: The writ of habeas corpus was the procedural analogue of the Warren Court's substantive interpretations of the Constitution—providing federal machinery for bringing new constitutional values to bear in concrete cases.

... More recent opposition [to habeas corpus] springs, however, from a different source: a conservative reaction to the Warren Court's criminal procedure decisions. It is because the current criticism of the writ is basic, substantive, and ideological that proposals advanced for change are insufficient (to critics) if they promise merely to expedite or streamline habeas litigation, but would not abolish the writ altogether.

Yackle, *The Habeas Hagioscope*, *supra* note 11, at 2349.

by the reform.<sup>53</sup> If reforms are motivated simply by legislators' or appellate court judges' political values and policy preferences, reforms are much less likely to achieve their desired objectives.<sup>54</sup> It may very well be the case that the Supreme Court's judicial habeas corpus reforms have impaired the possibilities for effective reform by misapprehending the nature and power of lower court judges' interests and role perceptions. As a result, the lamentations of the states' attorneys are likely to continue.

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<sup>53</sup>See e.g., CANDACE MCCOY, *POLITICS AND PLEA BARGAINING* (1993) (study of plea bargaining reform in California demonstrating how the elimination of plea bargaining for certain cases in Superior Court simply moved plea bargaining to an earlier stage of the justice process in the lower level Municipal Court).

<sup>54</sup>Reforms aimed at components of the criminal justice system, particularly if they emanate from a national institution, are frequently ineffective because their underlying political intentions can do no more than produce symbolic benefits for the politically-motivated policy makers rather than practical benefits for the social problem being addressed. See, e.g., STUART SCHEINGOLD, *THE POLITICS OF STREET CRIME* 182 (1991) ("National political leaders tend to be distanced from the real world of criminal process . . . . With crime an abstraction and the consoling message of the myth of crime and punishment at their disposal, there is simply no motivation to face up to the costs of structural responses.").

