

THE AMERICAN BAR ASSOCIATION AND FEDERAL HABEAS CORPUS

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I

INTRODUCTION

The ABA explains its proposed moratorium on capital punishment in part on the ground that recent decisions rendered by the Supreme Court and legislation enacted by Congress limit the ability of prisoners under sentence of death to challenge their sentences in the federal courts.¹ According to the ABA, the Supreme Court has placed numerous hurdles in the path of prisoners who apply to the federal courts for a writ of habeas corpus, claiming that their convictions were obtained or their sentences were imposed in violation of federal law. Congress, for its part, has added even more barriers in Title I of the Anti-Terrorism and Effective Death Penalty Act of 1996.² The ABA contends that the Court's decisions and the new Act establish restrictions on habeas that are at odds with ABA policies on point, promulgated in 1990.³

My assignment is to evaluate the ABA's claims touching federal habeas in death penalty cases. In Part II, I will offer a quick primer on the way in which prisoners under sentence of death invoke the federal courts' jurisdiction to consider their claims in habeas corpus proceedings. In Part III, I will trace the ABA's involvement in the national debate regarding habeas and the process by which the ABA developed the positions the moratorium is meant to promote. In Part IV, I will take those positions in turn and compare them to what the Court and Congress have wrought.

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Readers should know that I contributed to the report that accompanies the resolution adopted by the House of Delegates. I would like to thank Josh Perlman for help with this article.

1. See American Bar Ass'n, Report No. 107, at 2, 11-12 (1997), *reprinted in Appendix*, 61 LAW & CONTEMP. PROBS. 219, 220, 227-29 (Autumn 1998) [hereinafter 1997 ABA Report]. The moratorium proposal is addressed to all jurisdictions that employ capital punishment, including the federal government. In the main, however, the death penalty is a matter of local criminal law policy. Accordingly, I will concentrate on prisoners in state custody.

2. Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (codified at 28 U.S.C. §§ 2244-2266 (Supp. II 1996)).

3. See American Bar Ass'n, Report No. 6, 115 REP. A.B.A. 591 (1990) [hereinafter 1990 ABA Report].

II

HABEAS CORPUS FOR DEATH ROW PRISONERS

A criminal defendant who is convicted and sentenced to death in state court cannot directly appeal to a federal district court.⁴ Yet a prisoner on death row can challenge his conviction or sentence indirectly by petitioning for a federal writ of habeas corpus. A federal district court can entertain a habeas petition if it alleges that state corrections officials are holding the applicant in custody in violation of "the Constitution or laws or treaties of the United States."⁵ In theory, a federal habeas corpus petition is an independent civil suit, in which the prisoner asks only that the federal court determine the validity of his current detention. In substance, a habeas action constitutes a collateral challenge to the prisoner's treatment in state court. When the prisoner claims that his detention violates federal law, the warden invariably responds that the prisoner's criminal conviction and sentence justify the custody about which he complains. That, in turn, places the validity of the conviction or sentence before the federal court for review.

Over the course of state proceedings, a criminal defendant usually has an opportunity to raise any federal objections he may have, and the state courts adjudicate claims of that nature routinely. State trial courts entertain federal claims during the trial and sentencing phases of a capital prosecution. Thereafter, a defendant who is convicted and sentenced to death can seek direct review in the state appellate courts and can typically pursue additional postconviction remedies within the state system. When a prisoner later applies for a federal writ of habeas corpus on the basis of claims the state courts previously rejected, the prisoner seeks, in substance, to relitigate those issues in a different forum. Alternatively, when a prisoner petitions for a federal writ of habeas corpus on the basis of claims that were not, but might have been, raised and adjudicated in state court, the prisoner attacks a conviction or sentence on grounds the state courts have not addressed.

Either way, the availability of federal habeas corpus as a sequel to state criminal prosecution can be a source of friction between the two systems. Over the years, the Supreme Court and Congress have fashioned a variety of mechanisms ostensibly meant to reconcile the states' interest in preserving valid criminal judgments, on the one hand, and the federal courts' responsibility for ensuring that prisoners' federal rights are respected, on the other. To its credit, the ABA has long been a source of constructive advice on where and how the balance should be struck.

4. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (explaining that the inferior federal courts have no appellate jurisdiction to review state court judgments for error).

5. 28 U.S.C. § 2241(c)(3) (1994). Commentators are divided over whether the Suspension Clause, U.S. CONST. art. I, § 9, cl. 2, provides a constitutional anchor for this jurisdiction. Compare Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605 (arguing the affirmative), with Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952) (arguing the negative). See generally LARRY W. YACKLE, FEDERAL COURTS 419-22 (1999).

III

THE FORMULATION OF ABA POLICY

Early on, the ABA focused primary attention on improving the adjudication of federal claims in state court. In 1968, the Advisory Committee on Sentencing and Review, chaired by Simon Sobeloff, prepared guidelines for state postconviction procedures. That effort led to the *ABA Standards for Criminal Justice: Postconviction Remedies*.⁶ Those early standards prescribed numerous ways in which the states might enhance their capacity to determine federal claims. At that time, no jurisdiction imposed the death penalty routinely, so the standards made no attempt to address the special problems that capital litigation would later entail. Nevertheless, two of the 1968 recommendations are pertinent to the more recently developed ABA policies regarding death penalty cases that I will take up in Part IV.

First, the ABA endorsed the Supreme Court's general rule that state prisoners should exhaust state court opportunities for litigating federal claims before they press those claims in federal court.⁷ The rationale that drives the "exhaustion doctrine" is plain enough. If the state courts give federal issues sound and thoughtful treatment on the merits, federal habeas corpus examination of those same issues later may often be unnecessary. In most instances, the state courts can identify and correct genuine errors for themselves. Even when the state courts reach erroneous judgments on federal claims, they may establish an evidentiary record that makes subsequent federal habeas consideration more efficient.⁸

Second, the ABA urged the states to make their postconviction remedies available for the adjudication of claims that escaped attention in prior state proceedings. Here again, the thinking is straightforward. Even if a prisoner missed an opportunity to advance a federal claim at trial or on direct review, it makes sense for the state courts to address the claim in state postconviction proceedings. The states have a legitimate interest in the regularity of their processes and, on that basis, may be tempted to preclude a prisoner from litigating a claim at the postconviction stage if he might have advanced it previously. The ABA recognized, however, that there may be any number of reasons why a prisoner defaulted at earlier stages. In any event, according to the ABA, the value of reaching a decision on the merits of a federal claim outweighs any countervailing state interest in efficient litigation.

The ABA acknowledged that in some instances a prisoner's procedural default at trial or on appeal may fairly be the basis for refusing to allow him to

6. See AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 22 (1986) [hereinafter ABA STANDARDS]. I reviewed this history in Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 366-68 (1987-88).

7. The Court adopted the "exhaustion doctrine" in *Ex parte Royall*, 117 U.S. 241 (1886). Congress later codified the idea in 28 U.S.C. § 2254 (b)-(c) (1994).

8. See generally Larry W. Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983).

litigate a claim in state postconviction proceedings. But the ABA insisted that those circumstances are narrow. Under the ABA's postconviction standards, a prisoner may suffer forfeiture for procedural default in prior proceedings only if he is guilty of an "abuse of process."⁹ That means that the prisoner must have been aware of the claim in time to advance it earlier, but nonetheless must have "deliberately or inexcusably" failed to raise it.¹⁰

In the wake of its standards for state postconviction proceedings, the ABA turned its attention to improving federal habeas corpus. In 1981, the House of Delegates adopted a resolution formally endorsing a range of reforms meant to streamline and expedite the processing of habeas cases, but opposing bills then pending in Congress would have curtailed the availability of the writ.¹¹ Thereafter, the ABA routinely provided expert advice to congressional committees attempting to resolve thorny procedural problems that undermine efficiency.¹² At the same time, various ABA Sections (particularly the Section on Individual Rights and Responsibilities and the Section on Criminal Justice) monitored developments in the field.¹³ The ABA also commissioned empirical studies¹⁴ and, on occasion, filed *amicus curiae* briefs on habeas corpus issues before the Supreme Court.¹⁵

In 1989, the Criminal Justice Section obtained a grant from the State Justice Institute to fund a thorough investigation of the problems attending federal habeas corpus litigation in death penalty cases. The Section named a special ten-member task force to carry out the study, which, in turn, named a reporter, Ira

9. ABA STANDARDS, *supra* note 6, at § 22-6.1.

10. *Id.* At the time the ABA framed this view of the matter, the Supreme Court had articulated the same "abuse of process" standard for use by the federal district courts in habeas corpus. See *Fay v. Noia*, 372 U.S. 391, 438 (1963) (holding that a state prisoner would be barred from raising a federal claim in federal habeas only if he had "deliberately bypass[ed]" a previous opportunity to advance the claim in state court). If, then, the states adopted a less generous rule for default cases, they risked carving themselves out of the picture. See Note, *State Criminal Procedure and Federal Habeas Corpus*, 80 HARV. L. REV. 422, 434 (1966).

11. See American Bar Ass'n, Report to the House of Delegates (May 1981) (opposing S. 653, S. 2216 & H.R. 4898).

12. See, e.g., *Habeas Corpus Issues: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong. 445-528 (1991) (testimony of John Curtin, Jr. and James S. Liebman on behalf of the ABA); *Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953 & H.R. 3584 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 176-204 (1990) (testimony of James S. Liebman and Ira P. Robbins on behalf of the ABA). I offered testimony on behalf of the ABA in 1995. See *Federal Habeas Corpus Reform: Eliminating Prisoners' Abuse of the Judicial Process: Hearing on S. 653 Before the Senate Comm. on the Judiciary*, 104th Cong. 190-99 (1995).

13. In 1986, the ABA formed the Death Penalty Postconviction Representation Project to recruit volunteer attorneys to handle death penalty cases. That project has not only located effective legal representation for indigent prisoners who might otherwise have gone without, but has also generated significant empirical evidence regarding the way the system functions.

14. See, e.g., SPANGENBERG GROUP, ABA STUDY: AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POST-CONVICTION DEATH PENALTY CASES (1993).

15. See, e.g., Brief of the ABA as *Amicus Curiae*, *McFarland v. Scott*, 512 U.S. 849 (1994) (No. 93-6497); Brief of the ABA as *Amicus Curiae*, *Wright v. West*, 505 U.S. 277 (1992) (No. 91-542); Brief of the ABA as *Amicus Curiae*, *Sawyer v. Smith*, 497 U.S. 227 (1990) (No. 89-5809).

P. Robbins, to prepare a preliminary assessment. The task force held public hearings at selected sites around the country in order to elicit views and proposals from knowledgeable individuals and groups,¹⁶ then issued a report and recommendations in the autumn of 1989. The Criminal Justice Section's governing council approved those recommendations with modifications, and the House of Delegates adopted them as modified in February 1990.¹⁷

Before the task force, no similar study of habeas corpus in capital cases had ever been attempted.¹⁸ Certainly, nothing of the kind has been done since.¹⁹ The only competitor is the contemporaneous work conducted by an *ad hoc* committee of the Judicial Conference of the United States, appointed by Chief Justice Rehnquist in 1988 and chaired by former Justice Powell. Assisted by a reporter, Albert Pearson, Justice Powell and his panel of five federal judges worked *in camera*, invited no testimony from others, and simply published a report and recommendations reflecting their own judgment about what should be done.²⁰ Both the ABA task force recommendations and the Powell Committee report received attention in Congress,²¹ but, in the end, only a version of the latter found its way into the 1996 Act.²²

The ABA participated actively in the debates that swirled through Washington while the 1996 Act was under consideration. As it ultimately emerged from Congress, that Act amends longstanding statutes that previously ensured access to the federal courts for the enforcement of federal constitutional rights.

16. I helped prepare the submission filed by the American Civil Liberties Union and gave oral testimony before the task force in Atlanta on August 31, 1989.

17. See 1990 ABA Report, *supra* note 3, at 38-41.

18. Two earlier studies addressed habeas corpus in general, with no special attention to capital cases. See PAUL R. ROBINSON, AN EMPIRICAL STUDY OF FEDERAL HABEAS CORPUS REVIEW OF STATE COURT JUDGMENTS (1979); David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321 (1973). My own empirical work also focused on noncapital cases—and then only in the Southern District of New York. See Richard Faust, Tina Rubenstein & Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 27 N.Y.U. REV. L. & SOC. CHANGE 637 (1991). Professor Smith has also done valuable empirical research on the attitudes of the participants in the habeas process. See, e.g., Christopher E. Smith, *Federal Habeas Corpus Reform: The State's Perspective*, 18 JUST. SYS. J. 1 (1995). There is a 1988 publication of the Department of Justice, but that is a policy statement only. See U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON FEDERAL HABEAS CORPUS REVIEW OF STATE JUDGMENTS (1988). It does not focus on capital habeas cases and does not purport to report on investigations. I offered a critique of that document in Larry W. Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REFORM 685 (1990).

19. There is one more recent study, VICTOR E. FLANGO, HABEAS CORPUS IN STATE AND FEDERAL COURTS (1994), but it does not report data that can be the basis for policy prescriptions.

20. See AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, REPORT AND PROPOSAL (1989) [hereinafter AD HOC COMMITTEE REPORT], reprinted in *Habeas Corpus Legislation: Hearings on H.R. 4737, H.R. 1090, H.R. 1953 & H.R. 3584 Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary*, 101st Cong. 45-68 (1990). For a discussion of the Powell Committee report, see Larry W. Yackle, *The Habeas Hagnoscope*, 66 S. CAL. L. REV. 2331, 2367-73 (1993).

21. For an extensive discussion, see *Habeas Corpus Reform: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong. (1989 & 1990).

22. For an explanation of the Powell Committee's influence on the Act, see YACKLE, *supra* note 5, at 428 n.62.

It makes important changes in Chapter 153 of the U.S. Code (28 U.S.C. §§ 2241-2255), and also creates a new Chapter 154 (28 U.S.C. §§ 2261-2266), which is addressed exclusively to death penalty cases. The Act's amendments to Chapter 153 apply to both capital and noncapital cases in all states. Incorporating a recommendation of the Powell Committee, Chapter 154 applies only to capital cases arising in states that provide indigent death row inmates with competent lawyers to represent them in state post-conviction proceedings.²³

The ABA sponsored numerous public discussions of these issues, hoping to stimulate more effective reform efforts.²⁴ In the end, however, the ABA concluded that only a proposed moratorium on the death penalty would focus sufficient public attention on the failings of the current system for adjudicating prisoners' federal claims.

IV

THE 1990 STANDARDS

The task force recommendations fall into eight general categories.²⁵ I want to take them up seriatim in this section, rearranging them in an order that facilitates exposition.²⁶

A. Representation by Counsel

The ABA recommends that

the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants/appellants/petitioners, as well as to provide sufficient resources for investigation, expert witnesses, and other services, at all stages of capital punishment litigation. The [ABA] Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases should govern the appointment and compensation of counsel.

Other contributors to this symposium examine in some detail the extent to which criminal defendants now receive acceptable professional representation

23. The Act specifies a variety of tests that states must meet to invoke Chapter 154. At this writing, no state has succeeded. The mechanisms in many states have been conceded to be, or formally held to be, inadequate. See, e.g., *Ashmus v. Calderon*, 123 F.3d 1199 (9th Cir. 1997), *rev'd on other grounds*, 118 S. Ct. 1694 (1998) (finding the California system to be insufficient); *Death Row Prisoners v. Ridge*, 106 F.3d 35 (3d Cir. 1997) (accepting the state's concession that its system for providing counsel to indigent prisoners was inadequate).

24. See, e.g., Symposium, *Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523 (1996); Symposium, *Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163 (1997).

25. The explicit recommendations I quote below can be found in 1990 ABA Report, *supra* note 3, at 591-93.

26. I do not mean this article as a thoroughgoing examination of either the voluminous case law on point or the many provisions of the 1996 Act. For discussions organized around the latter, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) [hereinafter, Yackle, *Habeas Primer*]; Larry W. Yackle, *Developments in Habeas Corpus*, Parts I-III, CHAMPION, Sept./Oct. 1997, at 14, Nov. 1997, at 16, Dec. 1997, at 16.

at trial, in capital sentencing proceedings, and on appeal.²⁷ I will speak only to the provision of counsel in federal habeas corpus proceedings. On that score, the evidence is mixed.

The federal government does provide counsel to indigent death row inmates who wish to file habeas corpus petitions in federal court. A section of the Anti-Drug Abuse Act of 1988²⁸ entitles indigent prisoners to counsel at government expense and specifies minimal qualifications, compensation, and support services.²⁹ Under that section, a prisoner is entitled to at least one attorney who has been admitted to practice in the relevant court of appeals for at least five years and who has at least three years of experience handling felony cases. The district court fixes counsel's fees, as well as the fees for investigators and experts, in an amount the court considers "reasonably necessary."³⁰ The Supreme Court has held, moreover, that a district court has authority not only to appoint counsel, but also to stay the prisoner's execution for a reasonable time while counsel prepares an appropriate petition.³¹

On first blush, the 1988 Act may appear to comply with the ABA's recommendation. The only departure is that counsel are not appointed and compensated according to the ABA's own standards. Yet the differences between the relatively spare statutory provisions and the more ample ABA standards can be considerable.³² The ABA has been at pains to develop standards that promise the kind of expertise needed in capital representation. By overlooking those standards, Congress has plainly failed to address one of the most serious flaws in the current framework. Moreover, it is far from clear what the 1988 Act actually delivers. I am aware of no reliable data regarding the actual implementation of the existing provisions on counsel and thus cannot say whether indigent death row prisoners systematically receive quality representation in federal habeas proceedings.³³

27. See, e.g., Leigh B. Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61 LAW & CONTEMP. PROBS. 193 (Autumn 1998); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125 (Autumn 1998).

28. Pub. L. No. 100-690, § 7001(b) (1988), 102 Stat. 4382, 4388 (codified at 21 U.S.C. § 848(q) (1994)).

29. See 21 U.S.C. § 848(q)(B)(6) (1994).

30. *Id.*

31. See *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994).

32. The task force report originally tracked the § 848(q) provision in this respect, but the Criminal Justice Section substituted the reference to the ABA Standards on point. The change prompted one member of the task force, Judge Donald Stephens, to note a formal dissent. See, e.g., Letter from Donald W. Stephens, Resident Superior Court Judge, to Sheldon Krantz, Chair, Criminal Justice Section (Dec. 18, 1989), reprinted in Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 251 (1990). It appears, however, that Judge Stephens questioned the wisdom and practicality of asking the states, rather than the federal government, to meet the ABA's prescriptions. Other task force members offered more fundamental misgivings. See, e.g., Malcolm M. Lucas, *Minority Report of the ABA Task Force*, reprinted in Robbins, *supra*, at 195 (expressing doubt that the states should be required to satisfy even the § 848(q) standards).

33. I doubt it.

B. The Exhaustion Doctrine

The ABA recommends that

[t]he federal courts should adopt rules designed to facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions.

This recommendation presupposes the exhaustion doctrine. Moreover, it addresses a perennial problem with one feature of that doctrine: the so-called “total exhaustion” rule announced in *Rose v. Lundy*.³⁴ In that case, the Court held that a district court should ordinarily dismiss all claims advanced in a multiple-claim habeas corpus petition if the prisoner has failed to exhaust state remedies with respect to any single claim. The idea is to encourage prisoners to aggregate all their claims in a single petition in order to avoid piecemeal federal litigation.

The “total exhaustion” rule posits a prisoner who has multiple claims, at least one of which is not yet ripe for federal adjudication, and presents that prisoner with a choice. On the one hand, he can accept dismissal of all his claims without prejudice, proceed to state court with the claim that requires further consideration there, and return to federal court only when state remedies have been exhausted with respect to all his claims. On the other, he can drop any claim that is not yet ready for federal adjudication and press on in federal court with those that are.

Both options have their attendant costs. The first postpones federal consideration of claims that are ready for federal habeas review and thus may squander a current chance to obtain federal relief. The second avoids that problem, but only at the cost of discarding a claim that is not yet ready for federal consideration. While *Lundy* itself left the question open, more recent decisions hold that a prisoner who withdraws a claim in order to proceed with others will probably lose that claim forever.³⁵ If he later exhausts state remedies with respect to the claim and tries to return with it to federal court, his new petition will be considered “successive” and thus will be turned away unless it meets the (extremely strict) standards for applications in that category.³⁶ That is what the ABA means by “the problem of procedurally forced successive petitions.”

The ABA task force proposed a sensible means of implementing *Lundy* in capital cases: A district court should issue an order instructing counsel to review all the records in the case, to identify all possible claims, and then to make an explicit decision (on the record) whether to postpone consideration of all claims while state remedies are exhausted regarding claims that are not yet ripe, or to abandon claims of that kind in order to proceed with claims that are

34. 455 U.S. 509 (1982); see *id.* at 522 (Blackmun, J., concurring) (using the “total exhaustion” phrase).

35. See, e.g., *Jones v. Estelle*, 722 F.2d 159, 167-69 (5th Cir. 1983).

36. See *infra* notes 81-84 and accompanying text.

ready for federal habeas adjudication.³⁷ In the latter instance, according to the task force, the prisoner should be held to his deliberate strategic decision and thus should not be permitted to raise the abandoned claim in a later federal petition.³⁸

Inasmuch as this second ABA policy takes the exhaustion doctrine and *Lundy* as its premise, one might expect that current law would not be at variance.³⁹ On examination, however, the new Act introduces innovations that plainly depart from the ABA's recommendations.

First, a new provision, 28 U.S.C. § 2254(b)(2), permits a federal court to *deny* relief "on the merits," despite a prisoner's failure to exhaust state remedies. Courts have taken that provision to establish a discretionary authority to sacrifice the values ordinarily associated with exhaustion (comity and federalism) to the competing goals of speed and efficiency.⁴⁰

Second, § 2254(b)(2) not only neglects the task force proposal for implementing *Lundy*, but actually undermines the policies that *Lundy* fosters. Under that new provision, a district court can summarily reject "unexhausted" claims it regards as insubstantial on the merits and pass on to the "exhausted" claims in the petition.⁴¹ Accordingly, the ABA's recommendation that prisoners should lose only claims they deliberately abandon has not been implemented.

Third, yet another provision in the new Act appears to adopt the Powell Committee's recommendation that exhaustion be dispensed with entirely once

37. See 1990 ABA Report, *supra* note 3, at 612.

38. One would have thought that a prisoner who deliberately drops a known claim in these circumstances would nonetheless be entitled to advance that claim later in the rare case in which the prisoner can meet the stringent standards for filing a second federal petition. That, after all, is what the Supreme Court decisions on point hold. Yet the task force proposed that a prisoner who withdraws a claim necessarily should be understood to deliberately waive any later opportunity to advance it. See *id.* at 613.

39. I have argued that the exhaustion doctrine has become too rigid in recent years and that it should be relaxed in aid of flexibility. See Yackle, *supra* note 8. Yet the ABA has not taken that position. The task force made "no recommendation regarding the substantive standards for assessing when exhaustion is required and what constitutes exhaustion." 1990 ABA Report, *supra* note 3, at 612.

40. See *Hamil v. Ferguson*, 937 F. Supp. 1517, 1523 n.1 (D. Wyo. 1996). Under another new provision, § 2254(b)(3), a federal court may not infer waiver of the exhaustion requirement from a state's silence on the question. That provision bears on *Granberry v. Greer*, 481 U.S. 129 (1987), in which the Supreme Court held that a federal habeas court may overlook a prisoner's failure to exhaust if the respondent does not raise the exhaustion point seasonably. Cf. *Liegakos v. Cooke*, 106 F.3d 1381 (7th Cir. 1997) (explaining that under § 2254(b)(3) a district court can reject a frivolous "unexhausted" claim on the merits but cannot infer a waiver of the ordinary exhaustion requirement from the respondent's silence and on that basis reach and dispose of a nonfrivolous claim on the merits).

41. See *Hoxsie v. Kerby*, 108 F.3d 1239, 1242-43 (10th Cir.), *cert. denied*, 118 S. Ct. 126 (1997). I hasten to say that § 2254(b)(2) does not bar courts from dismissing entire petitions as *Lundy* contemplates, though I think it clearly discourages that familiar course of action. See *Duarte v. Hershberger*, 947 F. Supp. 146, 150 (D.N.J. 1996) (finding dismissal of a "mixed" petition appropriate for the reasons given in *Lundy*). Some courts may adopt the practice the ABA task force recommends. Elsewhere, however, prisoners may forfeit claims that they do not actually mean to abandon—if they drop those claims from an initial petition in the mistaken expectation that they will be free to advance them in some future petition.

a death-sentenced prisoner files a federal petition.⁴² Under 28 U.S.C. § 2264(a), a district court entertaining an application from a death row prisoner must determine at the threshold whether federal adjudication is foreclosed because a claim was not presented in state court.⁴³ If the court determines that a claim is not precluded because of default, the next section, § 2264(b), instructs the district court to consider the claim “properly before it” in light of three specified paragraphs of § 2254, covering various aspects of litigation in cases in which state prisoners challenge their convictions or sentences collaterally. Importantly (or so it would seem), the paragraph that codifies the exhaustion doctrine, § 2254(b), is not listed. One available inference is that § 2264(b) jettisons the exhaustion requirement in the interests of speeding capital cases into the federal courts.⁴⁴

If this is what the new Act means, then district courts in capital cases controlled by § 2264 are no longer either obliged or permitted to enforce the exhaustion requirement, even if the state asks that the state courts be given the chance to consider a prisoner’s claims.⁴⁵ That would mark a significant departure both from ABA policy and from preexisting law. The exhaustion doctrine does require time, but it does so in order to give state courts an opportunity to pass on a prisoner’s federal claims before a federal court takes them up in habeas corpus. That opportunity, in turn, serves the interests of federalism and comity in the federal structure.

C. Procedural Default in State Court

The ABA recommends that

[s]tate appellate courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly raised at trial and on appeal.

On the initial state post-conviction application, state post-conviction courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly preserved at trial or on appeal.

Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

The first two paragraphs of this recommendation are addressed to state courts. They revive in this different context the basic message the ABA originally advanced in its 1968 standards for state postconviction remedies.⁴⁶ If adopted, they would have the state courts reach the merits of federal claims

42. See AD HOC COMMITTEE REPORT, *supra* note 20, at 29-30.

43. In the main, § 2264 deals with the consequences of procedural default in state court. I will return to the questions implicated in that respect in a moment.

44. See YACKLE, *supra* note 5, at 436.

45. In sharp contrast, the ABA task force suggested that the states be *encouraged* to waive the exhaustion requirement in death penalty cases. See 1990 ABA Report, *supra* note 3, at 614.

46. See *supra* notes 6-10 and accompanying text.

notwithstanding default. That, in turn, would reduce the incidence of cases in which the federal courts must decide whether to consider claims the state courts declined to adjudicate because of default.

The third paragraph goes to whether, or the extent to which, a federal district court should reinforce state procedural law by refusing to examine a claim the state courts found to be precluded.⁴⁷ The ABA recommends the “deliberate bypass” rule the Supreme Court used in the 1960s.⁴⁸ Since then, however, the Court has changed its approach to default cases dramatically. The Court’s current framework can be extremely complicated: If there is a state procedural rule requiring a prisoner to raise a federal claim in a particular way or at a particular time; if the prisoner failed to comply with that rule; if, for that reason, the state courts refused or would refuse to consider the claim in later state proceedings; and if the resulting state disposition of the claim would constitute an adequate and independent state ground of decision that would foreclose direct review in the Supreme Court of the United States—then a federal habeas court will also refuse to consider the claim, unless the prisoner shows “cause” for having failed to raise the claim properly in state court and “actual prejudice” resulting from the default⁴⁹ or the prisoner demonstrates that the federal error that went uncorrected in state court “probably” led to the conviction of an innocent person.⁵⁰

These judicially crafted standards differ from the ABA’s recommendation in virtually every detail. Prisoners routinely forfeit the opportunity to advance federal claims in federal court, whether or not they were aware of those claims in time to raise them in state court and may genuinely have “waived” them. Typically, prisoners are simply saddled with the procedural defaults committed by their lawyers and are never able to recover. Because of counsel’s defaults, many federal claims go without judicial attention either in state court or in federal court later.

The new Act contains two provisions on the implications of procedural default in state court: an amendment to § 2254, applicable to both capital and noncapital cases, and a new § 2264, which applies in death penalty cases in states that have invoked Chapter 154. If anything, those new provisions are even more draconian than the Court’s standards.

Under § 2254(e)(2), federal evidentiary hearings on constitutional claims are sharply circumscribed. A prisoner whose lawyer failed to develop the facts in state court can obtain a federal hearing only on a showing that (A) the claim rests either on a “new” rule of “constitutional” law that “the Supreme Court” has made “retroactively applicable to cases on collateral review” or on a “factual predicate” that could not have been discovered previously by the exer-

47. See *Coleman v. Thompson*, 501 U.S. 722, 730 (1991); *County Court v. Allen*, 442 U.S. 140, 148 (1979).

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

49. *Wainwright v. Sykes*, 433 U.S. 72 (1977).

50. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

cise of “due diligence,” *and* (B) “the facts . . . would . . . establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty.”⁵¹

Under 28 U.S.C. § 2264(a), a federal court is typically restricted to claims that were not only “raised” but were “decided on the merits” in state court. Taken literally, that appears to mean that a federal court is unable to consider claims that were not the subject of default in state court at all—claims that were pressed on the state courts but were nevertheless ignored in the ultimate disposition.⁵²

Moreover, the circumstances in which § 2264(a) allows a federal court to overlook default are quite narrow: (1) state authorities prevented the prisoner from presenting a claim to the state courts; (2) the claim rests on a “new [f]ederal right that is made retroactively applicable;” or (3) the claim’s factual predicate could not have been discovered previously by the exercise of due diligence. Those categories track some, but not all, of the circumstances in which the Supreme Court has permitted a federal court to consider a claim that was not, but might have been, raised in state court. Conspicuously missing is the Court’s rule that a prisoner need not have a good reason for default in state court, if he shows that he is probably innocent.⁵³

Clearly, neither the Court’s standards nor § 2254(e)(2) and § 2264(a) comport with the ABA’s recommendations regarding default.

D. Filing Deadlines

The ABA recommends that

[a] one-year limitations period should be employed as a substitute mechanism to move the case toward reasonably prompt completion, but only with adequate and sufficient tolling provisions to permit full and fair consideration of a petitioner’s claims in state court, federal court, and the United States Supreme Court. The sanction for failure to comply with the time requirements should be dismissal, except that the time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner’s ineligibility for the death penalty.

This recommendation represents something of a concession to critics who insist that federal habeas proceedings are needlessly time consuming. The new Act responds to those concerns with new filing deadlines that are considerably more strict than anything the ABA recommends. Accordingly, in this way, too, existing law rejects ABA policy.

In 28 U.S.C. § 2244(d), which is applicable to both capital and noncapital cases, the Act requires a prisoner attacking a state conviction to file in federal

51. I have analyzed this new provision elsewhere. See Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135 (1996).

52. Mark Tushnet and I have argued that courts should read the new Act to avoid this extraordinary implication. See Mark V. Tushnet & Larry W. Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

53. See *supra* text accompanying note 50.

court within one year. In a section of Chapter 154, applicable only to capital cases in states that meet the standards for invoking that chapter, the Act establishes a filing period that is only half as long. Most of the prisoners affected have no lawyers to help them meet these stringent new timing requirements. The deadlines will thus close the federal courts to prisoners who may have meritorious claims but cannot marshal those claims soon enough.⁵⁴

The general one-year period established by § 2244(d)(1) runs from the latest of several events: (A) the date on which the “judgment” becomes “final by the conclusion of direct review or the expiration of the time for seeking such review”; (B) the date on which an unconstitutional state impediment to filing an application is removed; (C) the date on which the “constitutional right” asserted is “initially recognized by the Supreme Court”—if the right “has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review”; or (D) the date on which the facts underlying the prisoner’s claim or claims can be discovered “through the exercise of due diligence.” Once the one-year period begins to run, § 2244(d)(2) tolls it while a “properly filed” application for state post-conviction relief is pending.⁵⁵

Under the special filing deadline for capital cases established by § 2263(a), prisoners have 180 days in which to file in federal court, running from “final [s]tate court affirmance . . . on direct review or the expiration of the time for seeking such review.” Under § 2263(b), the 180-day period is tolled while prisoners seek *certiorari* in the Supreme Court after their convictions have been affirmed on direct review in state court, while a “first” application for state post-conviction relief is pending in state court, and for an additional period, not to exceed thirty days, on a showing of “good cause.”⁵⁶

Neither the general one-year deadline in § 2244 nor the 180-day deadline for capital cases in § 2263 comports with the ABA’s recommendations. Both operate far more ruthlessly than the ABA thinks is appropriate; both thus contemplate that prisoners’ claims will be cut off without “full and fair” consideration on the merits. Neither makes any exception for cases in which prisoners advance claims of innocence or ineligibility for a capital sentence. In cases of that kind, as in all others, § 2244 and § 2263 shut the federal courts’ doors, whoever comes knocking and whatever may be the nature or merits of the claims presented.

54. The Act also prescribes timetables for federal court action on petitions. For example, in capital cases arising in states that have invoked Chapter 154, § 2266 establishes 120-day timetables for district and circuit court action on habeas petitions—subject to 30-day extensions. The demand for speed threatens to compromise the courts’ ability to adjudicate prisoners’ claims properly.

55. In most cases, the filing period will begin to run when the judgment becomes “final” by the “conclusion of direct review.” The states have divergent appellate schemes for criminal cases, and the proper construction of § 2244(d)(1)(A) may depend, accordingly, on the peculiarities of each state’s law.

56. The filing period established by § 2263 appears to omit the safety-valve exceptions contained in the general filing deadline provision, § 2244(d)(1), inasmuch as § 2263 makes no express mention of state interference with a prisoner’s ability to file a timely federal petition, newly recognized rights, or newly discovered evidence. Mark Tushnet and I have argued that courts should read at least some of those safeguards into the statute, to avoid arbitrary and even unconstitutional results. See Tushnet & Yackle, *supra* note 52.

E. Stays of Execution Pending Federal Adjudication

The ABA recommends that

unless the state courts grant a stay of execution, the federal courts, in preservation of their habeas corpus jurisdiction, should grant a stay of execution to run from the initiation of state post-conviction proceedings through the completion of the initial round of federal habeas corpus proceedings, and should be empowered to do so.

This recommendation has much in common with a similar proposal by the Powell Committee. The basic idea is plain enough. In capital cases, there is always the danger that the prisoner will be executed before his claims can be fully considered in federal court. Accordingly, a lawyer who accepts responsibility for representing a prisoner on death row must make it the first order of business to obtain a stay of execution. The Powell Committee suggested that a death row prisoner should automatically be entitled to a federal stay until the federal courts have disposed of an initial federal petition. If a stay is available without any special showing that a claim has merit, lawyers and judges can be freed from the eleventh-hour emergency litigation that now occurs when a state sets an execution date before the federal courts have had time to act. Here again, the new Act has other plans.

Initially, § 2262(a) incorporates the “automatic stay” idea, borrowing some of the very language the Powell Committee used. Yet § 2262(b)(3) discontinues a stay if the prisoner files a federal petition that fails to make “a substantial showing of the denial of a [f]ederal right.” That standard does not appear demanding in the abstract. Yet its very existence *as a standard* means that lawyers and courts will continue to wage emergency litigation over stays of execution. The issue will no longer be whether a stay should issue in the first instance, but whether a stay that issued automatically should be maintained.

Moreover, § 2262(b)(3) and § 2262(c) state that if a prisoner’s claim is rejected, no other federal court can thereafter issue a stay, unless the prisoner meets the additional standards for filing a second or successive petition established by § 2244(b). The Powell Committee contemplated that a stay would continue through all the stages of federal adjudication—the district, circuit, and, of course, Supreme Court levels. Yet § 2262(b)(3) rescinds a stay if the prisoner is “denied relief in the district court *or* at any subsequent stage of review.”⁵⁷ The disjunctive “or” in that passage suggests that the district court’s action is sufficient in itself to terminate a stay. Then, under the unqualified provision of § 2262(c), it appears that “no” other federal court can issue a new stay, even to permit appellate review of the district court’s judgment.⁵⁸

57. 28 U.S.C. § 2262(b)(3) (Supp. II 1996) (emphasis added).

58. Taken literally, the provision thus threatens to deprive the Supreme Court itself of jurisdiction—a questionable enterprise. *Cf. Felker v. Turpin*, 518 U.S. 651, 658-62 (1996) (reading a different provision of the new Act in a way that avoided such a constitutional issue).

F. Adjudication of the Merits

The ABA recommends that

[t]he standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new rule would undermine the accuracy of either the guilt or the sentencing determination.

This recommendation presupposes the conventional understanding that a federal habeas court has the duty and responsibility to adjudicate a federal claim on the merits, provided it is presented in a proper procedural posture, and to award relief if the court concludes that it is valid. Proceeding from that premise, the recommendation attends to the special case in which a prisoner rests his claim on a new rule of law that was not available to the state courts when they passed on the claim some time previously.

I must say (with the benefit of hindsight) that in this instance the ABA's recommendations are outdated. This proposal was drafted before the Supreme Court elaborated its own approach to the "new rule" issue and, unfortunately, mistook the really important consideration. The ABA policy assumes that the only rules in question are genuinely new interpretations of the Constitution in the sense of sharp breaks from the past, stated at the level of "pure" legal doctrine. The policy thus takes the question to be *which* "new rules" of that caliber should be available to prisoners seeking habeas corpus relief in federal court. The policy answers that "new rules" that go either to factual innocence or to the validity of a death sentence should be enforceable in habeas, even if other novel constitutional interpretations are not.

After the ABA's policy in this respect was forged, the Supreme Court unlimbered a quite different doctrinal framework. Under the construction of the habeas statutes announced in *Brown v. Allen*,⁵⁹ federal habeas courts exercise *de novo* judgment on the merits of prisoners' claims, treating state court decisions as, at most, persuasive precedent from another jurisdiction.⁶⁰ That makes theoretical sense, inasmuch as a habeas petition initiates an independent civil action, exempted both from ordinary preclusion rules and from the full faith and credit statute.⁶¹ Moreover, as a pragmatic matter, the *raison d'être* of habeas as a sequel to state court review is intelligible largely on that basis. If the federal courts were to defer to state court dispositions on the merits, the very existence of their authority to consider claims at all would be drawn into doubt.

As a formal matter, the Supreme Court continues to respect the *de novo* standard as appropriate and builds its procedural reforms on that premise.⁶² Attempts to curtail the substantive scope of the federal writ have been concentrated in Congress, where conservatives have repeatedly tried to enact the

59. 344 U.S. 443 (1953).

60. *See id.* at 458 (Frankfurter, J., concurring).

61. *See* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 998-1110, 1047-49 (1985).

62. *See* *Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991); *Wainright v. Sykes*, 433 U.S. 72, 81-85 (1977).

Reagan Administration's proposal to bar habeas relief on the basis of a claim that was "fully and fairly adjudicated" in state court.⁶³ Nevertheless, the Court's treatment of claims that rest on "new" rules of law arguably undercuts the principle in *Brown*. In *Teague v. Lane*,⁶⁴ a plurality of the Rehnquist Court held that "new rules" of constitutional law are no longer enforceable in habeas at all, save in two exceedingly narrow situations.⁶⁵ One of those situations suggests the ABA's concern that claims going to innocence should not be foreclosed. But the Court has yet to identify any "new rule" that is sufficiently critical to the truth-seeking process that it can be vindicated in habeas. Meanwhile, the Court has made it crystal clear that the real action within the *Teague* doctrine lies not in determining which "new rules" are available to prisoners, but rather in determining which "rules" are "new."

On first blush, *Teague* does not appear to threaten the scope of habeas seriously. While such conservative Justices are sitting, it is unlikely that the Court will announce many breaks with the past that bring *Teague's* holding into play. In *Teague* itself and in subsequent cases, however, the Court has elaborated an extremely expansive definition of what counts as "new" for habeas purposes. By those accounts, a rule is "new" if it "impose[s] a new obligation" on the government.⁶⁶ A decision in an individual case announces a "new" rule if the result was not "dictated" by prior precedents, but, instead, was previously "susceptible to debate among reasonable minds."⁶⁷ When lower courts have differed over a proposition of federal law, a "new" rule is created when a single, authoritative understanding emerges.⁶⁸ Finally, a "new" rule of law can be created in an evolutionary way, as older precedents are extended in a "novel setting."⁶⁹

Of course, if "new rules" are defined so expansively, and if their novelty makes them unavailable in habeas, the practical consequences are obvious. As the *Teague* doctrine's implications have become clear, the Court has been widely criticized in academic circles for simply contriving to find a way to circumnavigate *Brown*.⁷⁰ In effect, *Teague* means that a federal habeas court can no longer consider a claim if a previous state court decision on the merits was at all close to the mark. For if the state courts did not make a very serious error when they held against the prisoner, a district court will have to create a "new" rule of constitutional law in order to find for the prisoner later.

63. See Yackle, *supra* note 20, at 2357-64.

64. 489 U.S. 288 (1989).

65. Those two circumstances are: (1) where a "new" rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making power to proscribe," and (2) where the "new" rule inaugurates "new procedures without which the likelihood of an accurate conviction [would be] seriously diminished." *Id.* at 311, 313 (O'Connor, J.) (plurality opinion) (citations omitted).

66. See *id.* at 301 (O'Connor, J.) (plurality opinion).

67. *Butler v. McKellar*, 494 U.S. 407, 408 (1990) (plurality opinion).

68. See *Caspari v. Bohlen*, 510 U.S. 383, 393-96 (1994).

69. *Stringer v. Black*, 503 U.S. 222, 228 (1992).

70. See, e.g., James S. 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 (1990-91).

Occasionally, the Court appears to acknowledge that it is treating ordinary applications of legal principles to the facts of cases as the creation of wholly “new” rules of law. Indeed, the Court has explained that the very purpose of *Teague* is to “validate reasonable, good-faith interpretations of existing precedents made by the state courts.”⁷¹ Justice Thomas said in *Wright v. West*⁷² that, for his part, the *Teague* cases lead plainly (he thinks properly) to the conclusion that the federal courts must ordinarily defer to “reasonable” state court judgments on the merits.⁷³ Other Justices insist, however, that *Teague* controls only the availability of habeas corpus when the pertinent legal standard has actually changed. In her own opinion in *West*, Justice O’Connor insisted that a state court’s erroneous decision on a federal issue will not be allowed to stand on the ground that it is “reasonable.”⁷⁴

The new Act stirs this mixture still more. In 28 U.S.C. § 2254(d)(1), applicable to both capital and noncapital cases, the Act bars federal habeas relief on the basis of a claim that was previously “adjudicated on the merits” in state court, unless the state adjudication “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law as determined by the Supreme Court of the United States.”⁷⁵ Obviously, § 2254(d)(1) rejects the process-based approach to habeas sponsored by the Reagan and Bush Administrations.⁷⁶ Nothing in this new provision suggests that the federal habeas courts are to accept state court results, so long as the state courts employed “full and fair” procedures in adjudicating prisoners’ federal claims. Rather, § 2254(d)(1) plainly contemplates that the federal courts will examine the substantive outcomes the state courts produce. The precise effect that § 2254(d)(1) has on the federal courts’ function is, however, unclear.

Some observers will doubtless insist that § 2254(d)(1) does considerable damage to federal habeas as a vehicle for adjudicating claims previously rejected by the state courts. After all, this new section establishes a baseline rule that federal relief is no longer available, unless a case fits within one of two exceptions. Those exceptions, in turn, may be read narrowly. Some courts and commentators may construe the reference to state decisions that were “contrary” to “clearly established” federal law to reach only decisions based on a serious misapprehension of the abstract legal standard applicable to a prisoner’s claim. And they may construe the reference to state decisions that involved an “unreasonable application” of “clearly established” law to comprehend only cases in which the state courts correctly perceived the applicable

71. *Butler*, 494 U.S. at 414.

72. 505 U.S. 277 (1992).

73. *See id.* at 291.

74. *See id.* at 305 (O’Connor, J., concurring in the judgment).

75. In a second paragraph, § 2254(d) permits federal habeas relief if a prior state adjudication “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State proceeding.”

76. *See supra* text accompanying note 63.

legal principle, but then grossly miscalculated the impact of that standard on a particular case.

Reducing the federal courts' role so severely would be startling. But recall that Justice Thomas has taken the view that *Teague* and its progeny have already undermined *Brown v. Allen*, so that, in effect at least, the federal habeas courts must defer to "reasonable" state decisions applying constitutional standards to the circumstances of individual cases.⁷⁷ In this vein, § 2254(d)(1) may take up the question the Court left open in *Wright v. West* and side decisively with Justice Thomas rather than with Justice O'Connor.⁷⁸ Lower court decisions construing § 2254(d)(1) to date have been inconclusive,⁷⁹ and the Supreme Court has had no occasion to give this critical new provision an authoritative interpretation. In my own view, § 2254(d)(1) is most plausibly read as a choice of law rule, not unlike the *Teague* doctrine as Justice O'Connor and the full Court have developed it, which preserves the federal courts' responsibility and obligation to determine the merits of federal claims but limits the occasions on which they can award *relief*.⁸⁰

The point here, however, is that § 2254(d)(1) probably does not *expand* the writ's scope, at least to any really significant degree. Whatever precise interpretation the Court ultimately places on § 2254(d)(1), it seems inescapable that this new provision will fortify the *Teague* doctrine as that doctrine has developed since the ABA's policy was drafted. Inasmuch as the ABA's policy is addressed to an entirely different (and much narrower) conception of "new rules," there is no plausible direction for *Teague* and § 2254(d)(1) to take that can in any way approach the ABA's recommendation.

G. Appellate Review

The ABA recommends that

[t]he petitioner should have a right of appeal from denial of an initial federal habeas corpus petition without the need to obtain a certificate of probable cause.

This recommendation seeks to make the habeas litigation process faster and more efficient by relieving a death-sentenced petitioner of the burden of showing that the claims he wishes to press on appeal warrant appellate consideration. So far from adopting the ABA's proposal, the new Act not only preserves the requirement that prisoners obtain certificates in capital cases, but actually throws up even more barriers to appellate review. Under the amended version of § 2253, petitioners in capital and noncapital cases alike must obtain a certificate of "appealability" in order to proceed. And, in a departure from the

77. See *supra* notes 72-73 and accompanying text.

78. See *supra* notes 72-74 and accompanying text.

79. Compare *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (reading § 2254(d)(1) to restrict federal courts' authority to award relief with respect to claims they regard as meritorious), with *Mata v. Johnson*, 99 F.3d 1261, 1268 (5th Cir. 1996) (reading § 2254(d)(1) to "codif[y]" *Teague* insofar as *Teague* delineates "the scope of the Great Writ").

80. See YACKLE, *supra* note 5, at 460-70.

past, that certificate must “indicate which specific issue or issues” satisfy the standard for an appeal.

In this instance, too, the new Act rejects the ABA’s recommendation to simplify the process and chooses, instead, to make it more complex by adding another procedural issue for litigants and courts to address.

H. Second or Successive Applications

The ABA recommends that

[a] federal court should entertain a second or successive petition for habeas corpus relief if:

(a) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

(b) the facts underlying the claim would be sufficient, if proven, to undermine the court’s confidence in the jury’s determination of guilt on the offense or offenses for which the death penalty was imposed; or

(c) consideration of the requested relief is necessary to prevent a miscarriage of justice.

This recommendation addresses one of the most discussed, but least understood, features of federal habeas litigation: multiple applications for federal relief by the same prisoner. In yet another concession to habeas critics, this proposal abandons the more prisoner-friendly framework fashioned during the Warren Court period and substitutes standards more in keeping with the current Court’s thinking. Here again, however, the new Act is still less generous than the Court.

In an attempt to bring more order to habeas doctrine just under a decade ago, the Court said it would henceforth employ in this context the same doctrinal rules it uses in cases on procedural default in state court. The two situations are similar, of course, and in the interests of clarity and simplicity, the Court decided to ignore differences that had previously generated disuniformity. Just previous to the new Act, then, a prisoner could file a second or successive petition if he either met the “cause and prejudice” standards *or* demonstrated that the federal error that went uncorrected in a prior habeas proceeding had probably led to the conviction of an innocent person.⁸¹

If parts (a) and (b) of the ABA recommendation roughly reflect the “cause and prejudice” and “innocence” standards in the Court’s framework, as I think they do, then there is a substantial overlap between the ABA’s recommendation and the Court’s rules. Importantly, however, part (c) of the ABA proposal contemplates that second or successive petitions should also be entertained if they fall into a final category: cases in which a miscarriage of justice is threatened. The

81. See *McCleskey v. Zant*, 499 U.S. 467, 494 (1991); *Murray v. Carrier*, 447 U.S. 478, 496 (1986).

Supreme Court, for its part, makes provision only for cases in which a prisoner's guilt is drawn into question and recognizes no other basis for a miscarriage of justice in this context.⁸²

The new Act goes further. Under § 2244(b)(2), a claim raised for the first time in a second or successive habeas petition may be considered only if the prisoner shows either (A) that the claim rests on a "new" rule of "constitutional" law, "made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or (B) that the claim's "factual predicate" could not have been discovered earlier by the exercise of due diligence "and" that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."⁸³

These standards may appear similar to those the ABA and the Court would employ. Yet on close examination important differences appear. One is the conjunctive "and" between the first and second elements of paragraph (B). Both the ABA and the Court place a disjunctive "or" at the corresponding point in their frameworks. Where the ABA and the Supreme Court would allow a prisoner who adduces evidence of innocence to file a second or successive application even if he cannot demonstrate "cause," the new Act demands that a prisoner must show *both* that he may be innocent *and* that he could not have advanced his claim previously. Another difference appears in the Act's description of the showing of innocence that is required. The ABA would demand only evidence that undermines confidence in the conviction; the Court would demand evidence showing "probable" innocence. The Act, by contrast, allows a prisoner to file a second or successive application only if he presents "clear and convincing evidence" that would have persuaded any "reasonable factfinder" of his innocence.⁸⁴

I will not belabor the point. In this last instance, as in all the others, current law, certainly as it is controlled by the new Act, rejects the relevant ABA recommendations in important respects, and, as a result, prisoners under sentence of death will be denied access to the federal courts for the adjudication of their federal constitutional claims.

V

CONCLUSION

Neither the Supreme Court nor the 1996 Act embraces the ABA's policy prescriptions for federal habeas corpus. By contrast, there appears to be a pat-

82. See, e.g., *McCleskey*, 499 U.S. at 489; *Carrier*, 477 U.S. at 496.

83. In addition, under § 2244(b)(3), a prisoner who wishes to file a second or successive petition must first obtain authorization from a three-judge panel of court of appeals judges. See 28 U.S.C. § 2244(b)(3)(B) (Supp. II 1996); see also *Felker v. Turpin*, 518 U.S. 651, 657 (1996) (describing the "gatekeeping" mechanism in § 2244(b)(3)).

84. The Supreme Court has used a similar standard on occasion, but only with respect to challenges to the validity of a death sentence, not attacks on the accuracy of a criminal conviction itself. *Compare Sawyer v. Whitley*, 505 U.S. 333 (1992), with *Schlup v. Delo*, 513 U.S. 298 (1995).

tern in just the other direction. The new Act appears unerringly to seek out ABA recommendations in order to reject them in favor of ever more restrictive rules.

AFTERWORD

I have devoted the lion's share of my academic and professional attention to the writ of habeas corpus. I do not mind saying that I have been rewarded many times over. The writ has profound significance for individual liberty in the United States, for the rights that citizens may assert against governmental coercion, and for the institutional arrangements that form American constitutional democracy. The writ has been at the center of our efforts to define the role of the federal courts, to balance judicial, legislative, and executive power within the national government, and to orchestrate the relations between the national government and the states. No one who explores the writ's rich history and studies its crucial modern functions can fail to appreciate this splendid, fluid, and dramatically effective instrument for holding governmental power in check.

I first came to the controversy over capital punishment not because the death penalty is itself my field of interest or expertise, but because prisoners contesting death sentences typically advance their claims through the vehicle that habeas provides. I scarcely regret that habeas serves prisoners under sentence of death just as it does prisoners serving terms of imprisonment. Yet I do lament that in the current atmosphere habeas is so intimately linked with capital punishment. It seems, at times, that the one is taken to be merely the analogue of the other. Proponents of the death penalty seem to regard federal habeas corpus as no more than a delaying tactic. They square off with opponents of capital punishment in a debate over the availability of federal habeas corpus in precisely the way they do in a forthright debate over the death penalty itself. That equation is tragically wrong-headed. It is as though habeas exists only for death penalty cases and no longer tests the validity of human incarceration more generally. I am afraid we are losing sight of the writ's place in the legal culture at large. And we will be the poorer for it.

I suspect that we as a society may be working out our ambivalence about capital punishment in the way we often wrestle with deeply troubling and divisive substantive issues: by submerging our anguish in a demand for satisfying process. At least, then, we can be sure that if anyone does suffer the death penalty, he or she will be guilty of a capital crime and eligible for a capital sentence under applicable law. It may be that the proponents of the death penalty perceive this, too, and thus redouble their criticisms of habeas for the very reason that careful federal adjudication of capital cases may mask some lack of resolve where executions are concerned. I should have thought, though, that everyone who attends to these matters would share this much common ground—namely, a commitment that, whatever we do in capital cases, we must be sure to convict and punish with scrupulous accuracy.

I dearly hope that the country so treasures the *institution* of habeas corpus that the writ will survive any pressures the death penalty controversy brings to bear. Yet I must confess that I have doubts. We have contrived to allow the vexing (but presumably transitory) debate over capital punishment to blind us to the writ's enduring value and significance as a restraint on governmental power. And I cannot put aside the fear that in some dreadful future we will look back on this battle over the death penalty and lament that one of its casualties was the great writ of liberty.

I hasten to say that I only fear the future I have just described. I do not predict it. Neither the Supreme Court's recent decisions nor the 1996 Act's statutory revisions dismantle the federal habeas system.* Habeas corpus survives intact and may prove resilient.

We may yet muddle through.

* By contrast, Congress, for its part, disapproved a proposed amendment to the 1996 Act that would have done even more damage. When the bill was on the floor, the Senate debated and rejected an amendment by Senator Kyl that would have barred the federal courts from considering claims unless state court remedies were "inadequate or ineffective to test the legality of the person's detention." 141 CONG. REC. S7829 (daily ed. June 7, 1995). That amendment was widely considered to bear jurisdictional implications. See Yackle, *Habeas Primer*, *supra* note 26, at 398-401 (describing the debate on the Kyl amendment).