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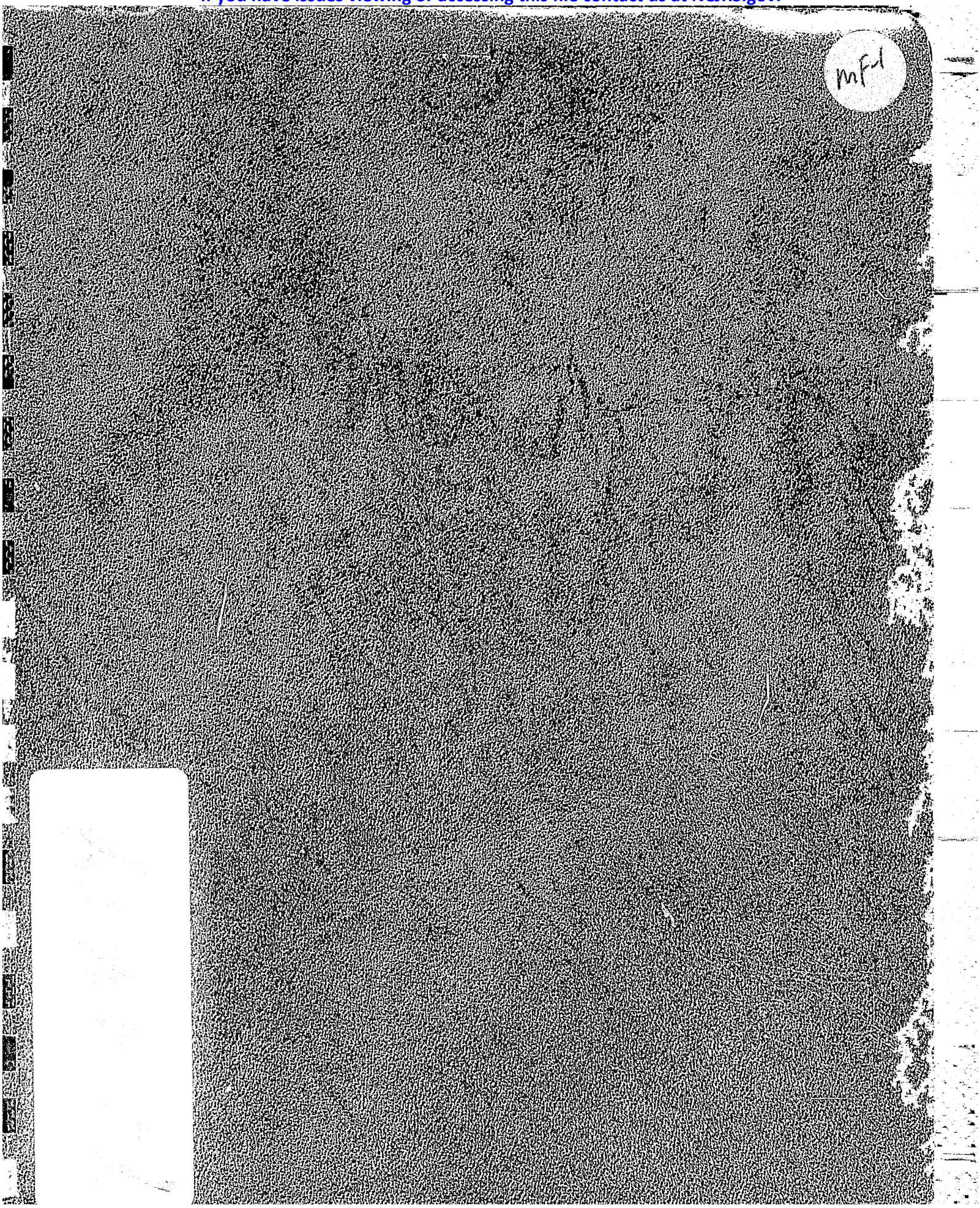

TWO STUDIES

IN

JUDICIAL FEDERALISM

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PART ONE: PUBLIC INTEREST LITIGATION STUDY

I. Preliminary Considerations

The first difficulty in studying "public interest litigation" is finding an operational definition for the kinds of legal action covered by this popular term. Everyone senses that there is something rather novel about the kind of litigation practiced by Ralph Nader or the Environmental Defense Fund. But there is surprisingly little agreement about where the novelty lies or about just what features of this novel form of litigation allow us to identify it as such.

Thus, for example, an article appearing in the Yale Law Journal in 1981--after a decade of debate about "public interest law"--noted the failure of "public interest lawyers to develope an adequate theoretical justification for their work."[1] But the same article conceded that "it is difficult to identify the unique features of public interest litigation." And despite its theoretical focus, the article ded not attempt to improve upon its initial definition of "PIL" as "the activity of a non-profit, tax-exempt group" in "providing legal representation to otherwise unrepresented interests in...proceedings involving questions of important public policy."

Definitions of this sort beg a great many questions. Why the restriction to "non-profit, tax-exempt groups"? It has long been customary for commercial law firms to offer unpaid assistance to widows and orphans or charitable institutions *pro bono publico*, as old fashioned lawyers described it. It is not uncommon today, moreover, for commercial law firms to take up cases of sufficient policy importance to receive attorney's fees from the

government for their efforts. Thus, for example, the Washington law firm of Rauh, Silard, Lichtman, which normally does take cases for profit, has been repeatedly reimbursed by the government for representing black parents in a long-running class action suit against the Department of Education. If the definitional focus is placed upon the "important questions of public policy" involved, however, it would be hard to distinguish Ralph Nader's activities from the selective Supreme Court practice of Daniel webster in the early decades of the 19th century.

A seemingly more precise definition was offered in 1979 by the economist-lawyer team of Burton Weisbrod and Joel Handler in their Public Interest Law, still the most detailed and ambitious survey of "public interest law" organizations that has appeared.[2] Weisbrod and Handler concede that limiting the term to non-profit law firms is an "arbitrary" restriction. The essential element in "public interest litigation," they maintain, is that it must "have a sizable collection consumption or external benefit component," that is, it must "bestow significant external efficiency or equity benefits--benefits that are not [exclusively] reaped by the [litigating] organization or its members." But the apparent precision of this defintion evaporates as soon as one tries to apply it.

On the one hand, people notoriously disagree over the "benefits" of public policy decisions and consequently over the "benefits" of "public interest law" suits. The proposed "Westway" highway construction project in New York City, for example, was stalled for years by legal challenges brought by citizens groups. It was finally blocked altogether by a federal judge because of ostensible defects in the required "environmental impact statement for the project, which was held to have given insufficient attention to the effects of the project on striped bass in the Hudson River. But no one claims that the convenience of the fish was worth billions of dollars. Whether the litigation that halted this multi-billion dollar project really conferred net efficiency or

equity benefits on anyone, then, is a matter of much dispute, turning on differing perceptions of the merits of the highway project, itslef. On the other hand, seemingly private or self-interested suits are often perceived as conferring definite benefits on others, sometimes even on "the public" at large. Any case that moves through several appeals and clarifies the law can serve as a precedent helping third parties to grasp more clearly their own rights and responsibilities under the law. To cite a particularly dramatic example: The National Industrial Recovery Act, centerpiece of the early New Deal, was declared unconstitutional by the Supreme Court in a case brought by an obscure Kosher poultry business in Brooklyn, protesting fines imposed on it under this act. The Schechter Brothers may have been motivated entirely by their own interests but "significant sexternal benefits" were surely anticipated from their victory--and this is presumably why Cravath, de Gersdorff, Swain, one the leading Wall Street law firms of the day, contributed extensive legal assistance to the suit at no cost to the Schechter poultry business.

Whether we define "PIL" by the motives of the initiating parties, then, or the results obtained for others, there are insuperable difficulties in isolating genuine "public interest" suits from the vast mass of "ordinary" court actions. There is no available maens for culling all the likely or probable "public interest" cases from any court's docket. And there is no agreed or smoothly operational formula for determining, even after close examination, which cases do reflect the right motives or the right results for classification as genuine "public interest" cases.

For the purposes of this study, then, we have taken an artificially clear and convenient definition, treating "public interest" cases as those brought by self-declared "public interest" groups, certified as such for tax purposes with the Internal Revenue Service. We began with a list of 112 such groups, prepared by the Alliance For Justice, a clearinghouse for information on the activities of ongoing "public interest law" organizations. And the universe of

"public interest cases" in this study is limited to cases that we were able to trace to the efforts of organizations on this list.

We think this is a sensible and defensible approach, because it provides a convenient mechanism for identifying a large sample of "public interest cases" without requiring us to engage in controversial case-by-case assessment of the benefit secured or of the motives of those involved. Within this sample, we have attempted further refinements in classification, to distinguish cases focused on discrete individual rights from cases based on broader claims. But for the present, we wish to stress two broad justifications for our initial, definitional approach--apart from the operational convenience of this approach.

First, controversy about "public interest law" does seem to have focused, for the most part, on the activities of these established "public interest law" organizations. Whether or not older cases might be identified in retrospect as "public interest law" cases, there was no serious debate about the phenomenon before 1968. And we think that is because there were few ongoin, established organizations devoted to "public interest law" before 1968--at least if that term is associated with suits directed at broad public concerns rather than the individual rights of individual clients. Thus a survey conducted by Weisbrod and Handler in the late 70s found that of 72 "public interest law" organizations they could identify at that time, only four had existed before 1968.[3] The proliferations of such organizations in the early 1970s can be traced, in part, to the relaxation of standing barriers and other procedural constraints on access to the courts for unconventional legal challenges, which was the major trend, particularly in federal courts, in the late 1960s and early 1970s.[4] The proliferation of these groups can also be traced to statuatory changes in this period, providing tax exemptions, attorney's fees and other financial aids to "public interest law" practice.[5] To the extent that controversy about "public interest law" still focuses on the

desirablity of these changes, the most natural focus for statistical research is the work of organizations most directly affected by these changes.

There is also a second justification for focusing our study on the cases brought by these organizations. The lawyers in these organizations are, so to speak, full-time professionals in "public interest law." Their work is therefore likely to be most influential with judges and their methods most inspirational for amateur or part-time "public interest law" activists. We cannot establish the validity of this assumption beyond cavil or question, but it seems a reasonable assumption, for which other studies have indeed provided substantiating evidence.[6] Looking at cases brought by "public interest law" organizations, then, seems a useful means of gaining perspective on the larger patterns in successful or substantial "public interest law" challenges.

We do want to be clear at the outset, however, about the limitations of our research strategy. By focusing on the activities of established "public interest law" organizations, we exclude cases brought by commercial firms--even those cases, like the Rauh, Silard, Lichtman suit against the Education Department, that might well be regarded as classic examples of "public interest" litigation.[7] We also exclude cases brought on behalf of indigent clients by the Legal Services Corporation. We even exclude cases brought by *ad hoc* citizens groups organized for particular litigational objectives--such as the groups that organized to block New York's "Westway Project." Many cases of the preceeding descriptions may have entered our samples anyway because one of the established "public interest organizations" on our list became involved at some stage of the litigation. But the converse is also true: many cases may not appear in our sample, even though the principal legal strategists were actually lawyers from established "public interest law" organizations on our list. Such cases would not enter our sample if the involvement of these lawyers or their organizational affiliation was not explicitly noted in the cases or in accounts of the cases.

We have no way of knowing how many cases that others might consider "public interest law" cases have been excluded from our samples. And this is one of several reasons why our data must be analyzed with caution. But we do think there are several reasons, at least, why our results do offer a useful perspective on "public interest law" practice over the past decade.[8]

II. Publicity and Choice of Forum

One hypothesis we wished to test in this study was that greater publicity for suits in federal court might be encouraging "public interest law organizations" (PILOs) to direct their efforts into federal (as opposed to state) forums.[9] This is a very plausible notion, since it seems reasonable to assume that "public interest" advocates desire publicity both to build political support for their immediate policy objectives, and to enhance their own organizational fund-raising efforts. In fact, however, we found little evidence to support this hypothesis and much evidence casting doubt on it.

Our first attempt to assess this hypothesis--with several others discussed below--was by a direct survey of all the "public interest law" organizations on the list supplied by the Alliance For Justice. After initial telephone contacts, we mailed detailed questionaires to every organization on the list in the summer of 1984. The results were disappointing for survey purposes, however. More than half of the organizations refused to cooperate, pleading time pressures or internal policies against disclosing their operating procedures to outsiders. Most others, while expressing a general willingness to cooperate, claimed that they did not keep sufficiently detailed summary records to respond to our questions about the breakdown of their cases between state and federal jurisdictions and the extent to which cases filed in one jurisdiction could have been brought in another jurisdiction. The chief results appear in Table I.1, broken down by organizational issue focus.

TABLE I.1

SURVEY RESPONSES ON CHOICE OF JURISDICTION

	ACTUAL % CASES IN FEDERAL CRT.	% FED CASES WHERE POSSIBLE STATE JURISDIC.	ACTUAL % CASES IN STATE COURT	% STATE CASES WHERE POSSIBLE FED. JURISDICTION
ENVIRONMENTAL				
Sierra Club LDF	95%	0%	5%	0%
1000 Friends of Oregon	0%	--	100%	1%
Conservation Law Fund of New Engl.	95%	5%	5%	0%
CONSUMER				
Ariz. Center for Public Interest	5%	0%	95%	10%
Public Advocates (S.F., Cal.)	25%	0%	75%	50%
Legal Action Center (N.Y.)	33%	66%	66%	5%
Legal Services for Elderly (N.Y.)	75%	0%	25%	0%
CIVIL RIGHTS				
Santa Clara Bar Association (CA)	25%	0%	75%	50%
Puerto Rican LDF (N.Y.)	95%	0%	5%	0%
Native American Rights Fund (Col.)	98%	--	2%	0%
ACLU Children's	55%	0%	45%	0%

Rights Proj. (N.Y.)				
Const'l Litig. Clinic (N.J.)	60%	67%	40%	20%
Women's Justice Center (Mich.)	60%	"few"	40%	"few"
Southern Legal Counsel	33%	75%	67%	10%
Lawyer's Comm. for Civil Rts. (D.C.)	100%	0%	0%	---
MISC.				
Nat'l Org. for Reform of Marijuana Laws	87%	100%	13%	100%

For the most part, only rather small organizations were willing to respond to our survey because only at small organizations--as we discovered--was there a single person with an informed overview of all the organization's litigation activities who was willing to take the trouble to complete our rather detailed questionaire. We would not place much weight on the results from this very limited sample. Nonetheless, the results are suggestive.

The fact that only three of the sixteen responding organizations claimed to have had a significant range of choice when filing in state jurisdictions--and the added fact that of these only two (Public Advocates and Santa Clara Bar Association, both in California) did frequently choose state jurisdictions--may suggest that state jurisdictions look less attractive to "public interest" groups. But only four of the sixteen claimed to have any significant choice when filing in federal jurisdictions. The overwhelming majority (75% of responding organizations) claimed to have

no significant range of choice.

Claims that there are no significant choices in jurisdiction may be misleading in many cases: they may simply mean that once the claim has been conceptualized to fit a particular federal or state statute, the choice of forum follows inevitably. One might, then, push the question further back and ask why the organization is inclined to conceptualize cases in these terms or take the kinds of cases that are most readily conceptualized in these terms. But one cannot pursue such questions very far before they become rather silly, or at least unanswerable in questionnaires about legal strategy. There is not much point in speculating about why the Native American Rights Fund pursues Indian treaty claims rather than other sorts of claims that might be more readily pursued in state courts. Whatever the ultimate organizational motivations, our survey suggests that most "public interest" law organizations specialize in particular kinds of cases and the choice of jurisdiction then follows almost inevitably from this specialization. The survey we made of reported decisions (described below) does suggest that certain types of case specializations lend themselves more to state filings--at least in some states--then others. But our probings for such correlations in our questionnaire did not reveal any patterns worth reporting here, given the limited size of the sample.

For the record, we can report that the Santa Clara Bar Association and Public Advocates of San Fransisco both gave similar reasons for prefering state to federal filings when they had a choice of jurisdiction and chose the former. Both cited "more favorable judges" as the most important reason, followed by "faster disposition" and "possibility of fee award" (for Santa Clara) and "broader remedial powers" (for Public Advocates). We did not ask

directly whether greater publicity opportunities played a role--for fear of giving offense and discouraging response--and neither of these organizations, for what it is worth, volunteered this response. NORML seems to have misunderstood our questionnaire and offered as its only reason for preferring state to federal filings that "we would be filing in federal court and didn't want to be thrown out for [not?] already filing" [in state court]--which seems to indicate that NORML files in state courts when it feels it must do so to satisfy exhaustion of state remedy requirements. In other words, it files in state courts when it feels it has no choice.

Of the organizations claiming to prefer federal jurisdictions when they have a choice, the Legal Action Center (N.Y.), the Constitutional Litigation Clinic (N.J.) and NORML (D.C.) agreed that "more favorable judges" was the most important factor in this preference. Southern Legal Counsel (Fla.) volunteered "law better developed" and "defendant more responsive to federal litigation" as its principal reasons--the sorts of reasons that other respondents may have regarded as leaving them no significant choice but to file in federal jurisdictions. Again, for what it is worth, no respondent volunteered "great publicity opportunities" as a reason for preferring federal filings.

These results are hardly very conclusive. But their overall implication--that opportunities for publicity are less important than other aspects of organizational strategy in determining choice of jurisdiction--is confirmed by our other findings, relying on different approaches.

* *

Our next effort to assess this hypothesis yielded a larger sample--but still suggested similar conclusions. We looked for stories about "public interest law" organizations in major national newspapers between 1978 and 1983. But this turned out to be a somewhat frustrating research effort because most newspapers are not well-indexed. Bell & Howell maintains an index covering, among other papers, the Chicago Tribune, the Los Angeles Times, the San Fransisco Chronicle, and the Wall Street Journal. But the index is not sufficiently detailed for research efforts of this kind: almost none of the organizations we sought to track had separate index entries and our efforts to locate stories about them under special topic entries-- "civil rights," "environmental regulation," etc.--undoubtable missed many stories worth counting. Using the much more detailed New York Times index, we found 187 stories about the activities of organizations on our list during this period. We found 78 stories from the Washington Post index. With the Bell & Howell index we found only 135 stories for the four remaining newspapers. Even allowing for the more detailed coverage provided by the Times and the Post, the much smaller number of stories culled from other papers suggests that the available tracking techniques for these sources were rather imperfect. We cannot be sure how many stories mentioning our organizations were overlooked. But the direction of the sampling bias seems clear: it is likely to have overstated the proportion of stories dealing with the most conventional (hence the most readily indexed) policy "causes." With all its imperfections, at any rate, the major findings of this

survey were substantially confirmed by our other methods

Our major finding is that "public interest" organizations do not depend on the drama of court battles to gain publicity for their causes. This is evident in Table I.2, comparing the distribution of stories about federal cases, state cases, and non-litigation activities. The higher proportion of stories about state cases in the other papers largely reflects the relatively extensive coverage of cases in California state courts in the LA Times. But as the survey of cases below suggests, California state courts do have considerably more "public interest" filings than state courts anywhere else.

TABLE I.2

DISTRIBUTION OF STORIES BY SITE AND SOURCE

Site	NY Times	Wash. Post	4 Other Papers	Total
Fed. Court	87 (47%)	26 (46%)	28 (36%)	141 (44%)
State Ct.	15 (8%)	2 (3%)	21 (27%)	38(12%)
Non-Jud.	85 (45%)	29 (51%)	26 (36%)	142 (44%)

Note: Percentage figures in parentheses indicate proportion of stories from same source about articles at that site, that is, percentage of each column down.

TABLE I.3

DISTRIBUTION OF STORIES BY ISSUE AND SOURCE

	Civ. Rights	Consumer	Environ.	Gov. Acct.	Free Sp. & Relig.	Other
NY Times	37 (20%)	17 (9%)	21 (11%)	18(10%)	35(19%)	59(32%)
Wash Post	9 (16%)	7 (12%)	14 (25%)	9 (16%)	8 (14%)	10(19%)
4 Other papers	23 (30%)	6 (8%)	5 (7%)	11 (14%)	8 (10%)	24(31%)
TOTAL	69 (21%)	30 (9%)	40 (13%)	38 (12%)	51 (16%)	93(29%)

Note: Percentage figures in parentheses again refer to proportion of stories from same source in this table; that is, percentage of each row across.

Table I.3 compares coverage of PILO activities by issue area. The closely paralled breakdowns among the different news sources suggests that, for all its spottiness, the sampling of stories from regional papers was not unrepresentative. The only sizable discrepencies are the greater attention to "civil rights" issues in the regional papers (30% of their stories, compared with 20% in the Times and 16% in the Washington Post) and the somewhat reduced attention to free speech and freedom of religion cases. It seems likely that these differences reflect genuinely greater interest in school integration issues in regional papers and less interest in

more abstract issues like free speech But it is possible that these discrepencies are simply artifacts of the sampling process.

Of the total number of stories reporting on actual cases in Table I.2, about 21% deal with state cases. In the next section of this report, we describe our findings from a survey of reported cases in which the groups on our list took part. The proportion of state to federal cases in that survey is almost identical. As we explain below, there are a number of reasons why the figures generated by our survey must be treated quite cautiously. Nonetheless, the close correspondence between the proportion of state cases in that survey of reported decisions and this survey of news stories is highly suggestive. And what it suggests, of course, is that a major "public interest" suit in a state court is no more or less likely to receive newspaper coverage than such a suit in a federal court.

In order to test the reliability of these findings, however, we developed a more intensive sampling of news stories, using the *Nexis* computer search service. *Nexis* is a word scanning system which will pick out every news story in which a given "key word" appears. It will scan AP dispatches as well as The New York Times and The Washington Post, but we decided to restrict our searches to the latter two newspapers because there is no easy way to determine where--or whether--any particular AP story has been picked up by the regional newspapers. The Times and the Post are not, to be sure, typical newspapers. But they are among the most politically influential and the most generous or conscientious in their coverage of detailed public policy disputes. It is reasonable to assume, then, that coverage in these newspapers is more important to most "public interest" organizations than coverage in regional papers.

We used *Nexis* to track down stories about the different organizations on our list, using the organization names as "key words" for the searches. Because the system mechanically picks out every mention of the "key words," it pointed us to many stories which were not about substantive issues or actions of the groups--but merely noted, for example, in a "society page" column, that a lawyer from one of these organization had been seen at a Georgetown cocktail party. For many of these organizations, such incidental mentions actually comprised the bulk of *Nexis* citations. Even after culling out such stray references, however, we still obtained a large number of stories about each of the groups we studied. We deliberately picked organizations of varying size and varying policy emphases, as follows.

TABLE I.4

DISTRIBUTION OF NEWS STORIES BY SITE FOR SELECTED ORGANIZATIONS

	Fed. Court	State Court	Non-Jud.
Environmental Groups			
Env'l Defense Fund	32 (28%)	0	82 (72%)
Nat'l Wildlife Fed.	29 (47%)	1 (2%)	32 (52%)
Conserv. Law Found.	5 (38%)	1 (8%)	7 (54%)
Subtotals	66 (35%)	2 (1%)	121 (64%)
Consumer Groups			
Center for Auto Safety	10 (7%)	1 (1%)	121 (92%)
Consumer Law Center	0	0	13 (100%)
Ctr. for Law & Soc. Policy	9 (21%)	0	19 (68%)
Subtotals	19 (11%)	1 (1%)	153 (88%)

Minority Advocacy Groups			
Children's Defense Fund	6 (21%)	0	22 (79%)
Mexican American LDF	6 (7%)	0	80 (93%)
Mental Health Law Project	17 (40%)	1 (2%)	25 (58%)
Lambda (Gay Rights) LDF	0	2 (50%)	2 (50%)
Subtotals	29 (36%)	3 (9%)	129 (80%)
Gov't Accountability			
Ctr. for Const'l Rights	12 (36%)	3 (9%)	18 (55%)

Note: Percentage figures in parentheses refer to proportions of all stories about that particular organization at given site; that is, percentage of each row across.

The main thing to notice in Table 1.4 is that every organization on the list received more than half of its coverage in connection with non-litigation activities. And this is not really surprising, whether one considers the matter from the organization's point of view or from the point of view of newspaper editors. Lawsuits are very time-consuming and expensive to undertake. Statements before congressional committees, petitions or filings before administrative agencies and general policy statements to the press--which are the most common sources of non-litigation stories--are usually very much quicker and cheaper to prepare. From the newspaper's point of view, moreover, a specific lawsuit is likely to seem technical and limited in its interest. A more general statement is easier to summarize and may often seem to be of more general interest.

Our hypothesis that greater publicity for federal cases might influence the choice of jurisdiction for "public interest" organizations presupposed that litigation was a powerful means of generating publicity. This may be true in particular cases but the presumption does not seem to be very strong or very sensible for most of the groups that we have looked at. The Center for Auto Safety, for example, has only three attorneys and does not engage in very much litigation. Nonetheless, it received more coverage in The New York Times and The Washington Post than any other organization we followed. All the organizations in the above list were cited at least twice--and most of them far more often--in stories whose major focus was not on a specific activity of that organization but on some larger policy development or controversy in a related field. In other words, the views of these organizations were often solicited by Times and Post reporters working on larger stories. It is tempting to suppose, therefore, that some degree of on-going litigation activity is neccesary to establish sufficient credibility with journalists to be consulted on more general stories. But even this hypothesis is refuted by the example of the Center for Auto Safety, which receives extensive publicity for its views though it engages in relatively little litigation.

Nor is the C.A.S. a special case. The Environmental Defense Fund is heavily oriented toward litigation, with a docket of hundreds of cases and a large staff of attorneys. As Table I.4 indicates, only slightly more than one-quarter of stories with substantial attention to EDF actually discussed specific cases (32 stories out of 114, or 28%). About an equal proportion of EDF stories--35 (31%)--took note of EDF's views in the context of a larger account of some ongoing environmental policy controversy. But a quite

substantial number of stories (27, i.e. 24%) reported EDF policy views in connection with some non-litigation activity initiated by the organization: testifying at congressional hearings (7), releasing an EDF study or report (7), petitioning or filing before an administrative agency (13). And another ten pieces were op-ed columns or lengthy letters to the editor expressing EDF viewpoints. There is no reason to assume, then, that the EDF needs so many case filings to establish its credibility as a journalistic source. On the contrary, the publicity an organization like the EDF receives for non-litigation activities probably enhances its credibility *with judges in the courts* as a "representative" of environmentalist constituencies.

What is true for the EDF and the C.A.S. seems to be true for all these other organizations, judging by the coverage they receive for non-litigation activities: They have simpler and equally effective alternatives to case-filings for generating publicity and establishing their credibility with journalists. This makes it seem far less plausible, on the face of things, that "public interest" organizations choose federal over state filing jurisdictions with an eye to publicity. As our initial questionnaire found (and our survey of cases below) environmental organizations are overwhelmingly inclined to pursue their cases in federal courts because they believe that suits against the federal government or suits under federal statutes like NEPA (requiring "environmental impact statements") will provide them with more policy leverage. The same is true, if to a somewhat lesser extent, for consumer organizations and "civil rights" organizations.

All the organizations in Table I.4--except for Lambda Legal Defense Fund--did receive far more coverage for federal than state cases (where

their litigation activities received coverage at all). But almost every one of these organizations did engage in far more federal than state litigation. The two exceptions are Lambda--which engages in more litigation in New York State courts, as its coverage (however scant) does indeed suggest--and the ACLU's Mental Health Law Project . MHLP estimates that about half its cases since 1978 have been brought in state courts and the official we spoke to there maintained that the Times and the Post were indeed inclined to give more emphasis to federal cases, especially compared with other newspapers.

To explore the coverage in regional newspapers we examined clipping files maintained by several middle sized organizations, three in Boston and one (the Center for Constitutional Rights) in New York City.

The Center for Constitutional Rights in New York City had clipped over a hundred articles about its activities from regional newspapers between 1980 and 1984. About 85% dealt with actual cases and of these, 79% were federal cases, 21% state cases. CCR lawyers confirmed that this reflected, more or less, the distribution of their cases between federal and state courts, even though only a small proportion of their cases were ever reported on. Because it depends entirely on foundation grants and individual private contributions for funding, CCR does maintain a press agent and issues press releases every time it files a new case. But the press agent noted that formal press releases have been less effective than personal contacts with journalists in securing coverage. He speculated that the tendency of journalists to regard federal cases as "more national in scope and less parochial" was somewhat counterbalanced by their interest

in "hot" or "sensational" state cases: CCR received extensive coverage, for example, of its suits in New York State courts on behalf of a "marital rape" victim and one of the assailant-victims of "subway vigilante" Bernard Goetz. CCR lawyers insist that legal strategy determines their choice of jurisdiction.

In Boston, we looked at press clippings maintained by the Conservation Law Foundation of New England--with similar results. The CLF had over a hundred clippings from Boston newspapers between 1980 and 1984, reporting on 55 different cases. Like CCR in New York, the CLF depends entirely on contributions from foundations and private citizens and is therefore eager for publicity. CLF also maintains a full-time press agent, who claims that about 90% of CLF litigation does receive some sort of newspaper notice or coverage. The Boston papers accurately reflect the breakdown of CLF activities: about 35% non-litigation and 65% litigation, with the latter about 95% federal cases and only 5% state cases. CLF lawyers also say legal strategy dictates their choice of jurisdiction and the press agent finds no greater difficulty in obtaining coverage for the handful of CLF suits in state courts.

But not all "public interest" organizations are eager for publicity. The Consumer Law Center in Boston does not retain a press agent and had clipped only another 18 articles from New England newspapers, beyond the 13 we found in the Washington Post and the New York Times in this period. Like the Post and the Times stories, all the clippings from regional papers dealt with non-litigation activities. Consumer Law Center lawyers engage in litigation and assist suits by other groups, though most of their effort involves techinical assistance (preparing legal manuals, conducting training

seminars, etc) not focused on particular suits. But almost all of their funding dervies from the federal government (through the Legal Services Corporation) and CLC is therefore eager to *avoid* publicity about its litigation activity. In this it has been quite successful.

The same is true for Massachusetts Correctional Legal Services, which recieves most of its funding from the state of Massachusetts. Almost half of MCLS activity is devoted to litigation and the seven MCLS cases covered in Boston newspapers between 1980 and 1984 were only a "very small percentage" of its cases, according to the person we spoke to there. All of these, as indeed all other MCLS cases, were filed in Massachusettes state courts. But MCLS is not at all eager for publicity about its suits on behalf of convicted criminals (usually relating to treatment in state prisons) for fear this may jeopardize its state funding. Consequently, like the federally funded Consumer Law Center, MCLS maintains no press agent, issues few statements to the press and has generally succeeded in maintaining a low profile.

* *

Even with more extensive samples it would be difficult to draw hard conclusions about the relative "publicity value" of federal as opposed to state filings. That is because state filings may, in fact, be inherently more modest or less newsworthy on the average than federal filings. If this is so--and our findings in the case survey below suggest that it is--the greater news coverage of federal as opposed to state cases would not show that any particular case would bring more publicity to the sponsoring organization if filed in federal court. It is nearly impossible to establish reliable research on the inherent significance or newsworthiness of cases, however, because judgements about such matters--ultimately political or editorial judgements--will vary from one observer to another. It is conceivable, then, that some organizations have actually received more publicity for comparably "newsworthy" cases in federal as opposed to state courts. But in the absence of such reliable controls on inherent newsworthiness, we are disinclined to make much of the slight tendency in our samples to devote greater newspaper coverage to federal over state filings. The slight discrepencies seem too easily accounted for by the assumptions that state filings have usually been more limited in their scope and therefore less newsworthy.

Nothing in our findings suggests that publicity is unimportant to PILOs. Publicity considerations may well influence decisions to pursue one kind of case rather than another. But we find no strong evidence to suggest that publicity considerations influence choice of jurisdiction, because: 1) Our questionnaire suggests that policy emphasis or issue focus dictates choice of jurisdiction for most organizations; 2) our surveys of news coverage in

national newspapers suggest that most organizations are quite able to generate publicity without resort to litigation; 3) our surveys of newscoverage "overall" suggest that state filings do receive coverage in rough porportion to their number in relation to overall "public interest" filings; 4) our more detailed surveys of news coverage of particular organizations do not show that federal cases receive greatly disproportionate coverage and the slight disproportions we did observe seem to be readily accounted for by the possibility that the actual federal filings involved were inherently more newsworthy than the state filings covered--or not covered--in these samples.

In sum, publicity may be important to many PILOs but it does not seem to play a significant role in influencing choice of jurisd ction. What does, then? In the section below we try to provide some answers.

III. Patterns of PILO litigation in federal vs. state courts

Generating an unbiased sample of "public interest" cases is extremely difficult. Much more difficult that it may seem--or than we ourselves initially supposed. As we noted at the outset of this report there is no commonly agreed conceptual definition and certainly no clear operational definition of what a "public interest" law suit is. Courts do not keep track of

"public interest" filings on a separate listing. Even if one had a clean operational definition, one could not readily distinguish the "public interest" filings from the rest by the limited information supplied on docket sheets. Picking out likely "suspects" from the case names or capsule summaries would yield erratic results because many PIL cases do not disclose their nature in the case name or capsule summary. One could only go through a limited number of courthouse records by this method, in any event, and the choice of courthouses to visit would undoubtedly bias the survey somewhat--though in unpredictable ways.

In the first section of this report, we explained our reasons for adopting a working definition of "public interest" litigation as those cases brought by self-avowed (and IRS certified) "public interest law organizations." This is, as we noted, an artificially restrictive classification in several respects but it is still a useful and convenient operational definition. As we noted in Section 2, above, our initial effort to survey the character of PILO filings by direct questionnaire was frustrated by the unwillingness or inability of most organizations to supply detailed characterizations of their cases. We then sought to develop our own data by requesting docket listings and annual reports from these organizations. Many organizations did respond but after much effort we found that these various case compilations could not be reduced to reliable statistical breakdowns. Different organizations responded with very different and largely incompatible reports: some sent glossy brochures describing only "highlights" of their casework (and then usually in vague terms), others sent quarterly or

semiannual "status reports" on pending cases, which mentioned all cases in particular intervals but provided no means of assessing long-term trends (or even results within the given interval). Our frustrations with this effort finally led us to adopt an altogether different approach.

The West Publishing Company offers a computerized word-scanning service which operates much like *Nexis* but covers all reported court opinions in the United States. West Publishing Co. is the principal reporting service for both state and federal court decisions. The service, called *Westlaw*, allowed us pick out every published opinion in which the name of at least one organization on our list was mentioned. As with our *Nexis* survey, we found that many of these *Westlaw* citations were misleading. Often organizations were simply mentioned in an opinion because some previous case with the organization's name had become a precedent. Often the organization's name happened to coincide with a phrase widely used in court opinions without any intention of referring to that organization. Finally, many organizations were named in footnotes acknowledging their *amicus* briefs and we decided to exclude these citations, as well, in order to concentrate on cases directly litigated by PILOs, themselves. After combing out all such extraneous references, we were able to build a data set with almost 1400 cases.

This is a sufficiently large sample to justify much confidence in the statistical patterns it discloses. but we should acknowledge some of its limitations before proceeding. First, it obviously excludes every case that is not connected with an organization on our list--even though, as we noted in

sec. 1, many cases litigated by commercial law firms or brought by *ad hoc* citizen's groups might well fall within some reasonable definition of "public interest" litigation. But as we also noted in sec. 1, it is reasonable to assume that established PILO's set the example for others and their activities are, at any rate, of special interest in themselves.

Secondly, our sample excludes many cases where one or more of our PILOs were extensively involved in the litigation but was not directly mentioned in the court opinion. Thus, for example, *Westlaw* found only 31 cases where the involvement of the NAACP Legal Defense Fund was directly acknowledged, though that organization has actually been responsible for hundreds of separate suits. We have no way of knowing how many cases that should have been in our sample of PILO cases were excluded in this way, but the direction of the resulting bias seems clear. It systematically understates the number of cases where a PILO is the guiding spirit but there is an actual named plaintiff other than the organization itself--as in Brown v. Board. As cases of this sort seem to be a larger proportion of state cases, this bias probably has produced an undercount of state cases in our overall sample. But even this is uncertain, given the much greater preference for federal litigation by almost all groups.

Finally, our survey technique obviously excludes a great many cases litigated by PILOs which simply never resulted in reported opinions. There is in some ways a serious defect though in other respects it may be an advantage. Most filings in most courts never come to a formal judgement on the merits and this is probably true of most PILO filings, too. Many suits are

filed as a pressure tactic in the full expectation that the opposing party will settle before the case comes to trial. Some suits may be filed without much investment of time or effort in the expectation that they will be dismissed on standing or ripeness or non-reviewability grounds. Other suits that are decided on summary grounds--even where the decision is in favor of the PILO or PILO-client--may go unreported precisely because there is not much of a contest or not much at stake. A survey of reported opinions thus assures a certain threshhold level of "seriousness" which makes statistical comparisons, in some ways, more meaningful and reliable. It is partly for this reason that a number of social science researchers have already adopted this survey technique. The absolute numbers involved may not be reliable indicators of actual, aggregate filings, but this survey does allow us to make useful comparisons between trends and patterns within various catagories.

Our catagories are derived from the most common definitions of "public interest law"--and the most common rationales for PILOs: the legal representation of "underrepresented interests." It is, of course, difficult to say which "interests" are "underrepresented" without establishing some clear baseline standard for adequate "representation." But the apologetic literature on "public interest" litigation commonly focuses on two catagories of "underrepresented interests": those "interests" that are vulnerable in the political process because they belong to "discrete and insular minorities" and those "interests" that are so diffuse and widely shared that they tend to lose out in political competition with norrower but better organized "interests." Thus we can divide PILOs between those that claim to speak for distinct

"client" groups, on the one hand, and those that claim to speak for broad public "causes", on the other. We have subdivided the "client" groups among three types of constituencies, which have some recognizable differences in legal and political standing: 1) racial and ethnic minorities ("colored people," "Native Americans," Hispanics, Asian-Americans, etc.) 2) non-racial "minorities" (women, homosexuals, ex-convicts) 3) the physically or mentally handicapped. We have subdivided "cause" organizations into two broad catagories: 1) "environmental" advocates, and 2) "consumer" advocates. These catagories are closely parallel to the self-identifications of organizations listed by the Alliance For Justice, which makes classification in these terms operationally reliable. They are also close enough to conventional political catagories to make them useful for descriptive purposes.

The ACLU acounts for such a large portion of our sample and its cases were sufficiently diverse that we decided to break out its cases separately. Finally, there were a number of groups with diverse or ambiguos concerns which we also determined to separate from our other classifications. The breakdown of groups and cases in these catagories is shown in Table I.5, along with their distribution between state and federal courts. (We have supplied a listing by individual groups in Appendix II.)

TABLE II.5

DISTRIBUTION OF PILOs AND CASES BY CATAGORY

CATAGORY	NO. OF GROUPS	TOTAL NO. CASES	NO. OF FED CASES	NO. OF STATE CASES
Consumer	8	171 (13%)	135 (13%)	36 (12%)
Environmental	12	380 (28%)	317 (30%)	63 (21%)
Racial/Ethnic Minorities	16	111 (8%)	87 (8%)	24 (8%)
non-racial Minorities	32	238 (17%)	178 (17%)	60 (20%)
Handicapped	9	41 (3%)	33 (3%)	8 (3%)
ACLU	1	345 (25%)	267 (25%)	78 (26%)
Other	19	81 (6%)	54 (5%)	27 (9%)
TOTAL		1376	1071	296

NOTE: Percentage figures in parentheses are the portion of total cases of that jurisdiction in that category; that is, percentage of each column down.

As noted earlier, our sampling method probably yields an overrepresentation of cases from "cause" PILO--consumer and environmental groups--because such cases are most likely to report the name of the sponsoring organization in published opinions. Thus the proportion of cases in each category (the percentage figures indicated in parentheses) cannot be treated as a reliable reflection of the actual distribution of cases, even reproted cases in which our sample of PILOs was involved: organizations representing minorities and the handicapped were undoubtedly involved in hundreds of cases which do not appear in this survey because names were not recorded in the published opinions.

Similarly, the overall distribution of cases between state and federal courts in this sample is misleading because most of the state cases are appelate decisions, while the federal cases are about evenly divided between district court and appellate court decisions. That, too, is an artifact of the sampling process: whereas formal opinions by federal district courts are

almost always reported, decisions by state trial courts are usually not published by the major reporting services. But, as we have also noted above, there is no more reliable statistical method of comparing caseloads both because no other statistics are available and because other means of generating such figures would obscure the difference between seriously litigated cases and mere pressure-tactic filings.

At all events, we think the main value of our sample lies in the comparisons it makes possible within catagories or within jurisdictions, where the various biases of our sampling technique ought to be operating in consistent and therefore largely discountable ways. With this in mind, the most striking finding in Table I.5 is the relative uniformity of the breakdown between catagories within each column. The matching percentages suggest that each category of PILO devotes approximately the same proportion of litigation to state cases as to federal cases--whether or not the actual proportion is 1 to 4 as these figures might suggest or closer to 1 to 2 as an estimate of the unreported state trial court decisions might suggest. The one exception is the environmental category and as we will see this is a consistent thread, whichever way one views the data. Environmentalist groups do seem to have a distinctly stronger preference for federal over state forums, compared with PILOs in other catagories. And, as we shall see, when looking to results, this is the only catagory of PILO litigation that fares notably less well in state forums.

But before turning to litigation results, it is useful to examine our initial finding that all catagories, except environmentalists, devote equal

proportions of effort to state and to federal litigation. Might this very interesting finding simply be an artificial or misleading consequence of the way we constructed the initial catagories? Table I.6 shows the distribution of cases in federal and state courts when grouped by the primary subject-matter of each case, rather than by our classification of sponsoring organizations.

TABLE II.6

DISTRIBUTION OF CASES BY SUBJECT MATTER

IN FEDERAL AND STATE COURTS

SUBJECT	TOTAL CASES	FED CASES	STATE CASES
Environmental Health/Safety	287 (21%)	247 (23%)	40 (14%)
Environmental æsthetic/recreational	126 (9%)	100 (9%)	26 (9%)
Consumer	40 (3%)	27 (3%)	13 (4%)
Political Process Gov't Accountability	229 (17%)	163 (15%)	66 (22%)
Civil Rights/ Discrimination	307 (22%)	287 (27%)	20 (7%)
Freedom of Information	35 (3%)	35 (3%)	0
Other	270 (20%)	159 (15%)	111 (38%)
Attorney's Fees	73 (5%)	53 (5%)	20 (7%)

NOTE: Percentage figures in parentheses are portion of cases with that subject matter in given jurisdiction; that is, percentage of column down.

Table I.6 confirms the disproportionate reliance of environmental groups on federal courts, at least in cases dealing with health and safety concerns. The relatively greater proportion of state cases dealing with "political process" and the smaller proportion dealing with "discrimination" points to one of the key differences between federal and state litigation patterns for the "constituency" (or "minority" representation) PILOs: in federal cases, these groups are more inclined to pursue direct discrimination cases whereas more of their state cases deal with "political process" claims. Overall, however, the distribution of cases among subjects does not suggest that our catagorizing of the groups in Table II.5 is highly contrived or altogether artificial. It merely reminds us that the mix of cases in any one category may conceal significant differences between the state and federal columns--differences we will explore in greater detail below.

If we return to the breakdown of cases by catagories of sponsoring organizations, we can observe another striking comparison between state and federal litigation by looking at case outcomes in each category. Table I.7 shows the breakdown of case outcomes for the various catagories of federal cases, while Table I.8 shows the same breakdown for state cases.

TABLE II.7

OUTCOME OF FEDERAL CASES BY SPONSORING PILOs

PILO CATAGORY	DISMISSED ON JURIS-DICTIONAL ISSUE	LOST ON MERITS	PARTIAL SUCCESS	FULL SUCCESS
ENVIRONMENTAL	12 (4%)	124 (39%)	72 (23%)	86 (27%)
CONSUMER	20 (15%)	51 (38%)	15 (11%)	39 (29%)
RACIAL MINORITIES	1 (1%)	16 (18%)	27 (31%)	41 (47%)
NON-RACIAL "MINORITIES"	19 (11%)	54 (30%)	30 (17%)	60 (34%)
HANDICAPPED	1 (2%)	5 (15%)	10 (30%)	15 (45%)
ACLU	6 (2%)	71 (26%)	66 (25%)	100 (37%)
OTHER	5 (9%)	20 (36%)	10 (18%)	12 (21%)

NOTE: Percentage figures in parentheses refer to portion of cases in that category decided in that way; that is, percentage of row across. Percentages do not add to 100% because cases settled by interim consent agreement between the parties are omitted. All "outcome" figures are from the point of view of the PILO involved.

TABLE II.8

OUTCOME OF STATE CASES BY SPONSORING PILO

PILO CATAGORY	DISMISSED ON JUR-ISDICTIONAL ISSUE	LOST ON MERITS	PARTIAL SUCCESS	FULL SUCCESS
ENVIRONMENTAL	11 (17%)	27 (43%)	[illegible]	15 (24%)
CONSUMER	2 (6%)	13 (36%)	4 (11%)	15 (42%)
RACIAL MINORITIES	1 (4%)	7 (29%)	1 (4%)	12 (50%)
NON-RACIAL "MINORITIES"	0 (0%)	20 (33%)	9 (15%)	28 (47%)
HANDICAPPED	0 (0%)	0 (0%)	2 (25%)	8 (75%)
ACLU	2 (3%)	20 (26%)	9 (12%)	36 (46%)
OTHER	1 (4%)	14 (52%)	2 (7%)	10 (37%)

NOTE: Percentage figures in parentheses and "outcome" figures as in Table I.7 above.

A comparison of the last column in Table I.7 with the last column in Table I.8 suggests that every PILO category has a better batting average in state than in federal courts--except environmentalists. If we combine the percentage figures in the last two columns and compare them with combined percentages from the first two columns--for stark win/loss comparisons--the results look similar, except that the groups representing "racial minorities" (and to a limited extent the ACLU) will seem to fare worse in state courts, along with environmentalists. These results are summarized for convenience in Table I.9 below.

TABLE II.9

WIN/LOSS RATES IN FEDERAL AND STATE COURTS

BY SPONSORING PILO

PILO CATAGORY	PERCENT "LOST" IN FED COURTS	PERCENT "LOST" IN STATE CRT.	PERCENT "WON" IN FED COURTS	PERCENT "WON" IN STATE CRT.
ENVIRONMENTAL	43%	60%	50%	40%
CONSUMER	53%	42%	40%	53%
RACIAL MINORITIES	19%	33%	78%	54%
NON-RACIAL MINORITIES	41%	33%	51%	62%
HANDICAPPED	17%	0%	75%	100%
ACLU	28%	29%	62%	58%
OTHER	45%	56%	39%	44%

NOTE: Percentage figures are derived from Tables I.7 and I.8 above and cannot be added either down or across.

On the face of things, these figures would suggest that all PILOs except those representing environmental "causes" or racial minority "constituencies" would do as well or better if they pursued all of their cases in state rather than federal courts. These results undoubtedly do explain why environmental organizations devote a disproportionate amount of effort to federal litigation, as we saw in Table I.5 and perhaps explain, as well, why there are a disproportionate number of "discrimination" cases in federal courts, as we saw in Table I.6. But why do other types of PILOs still seem to pursue most of their cases in federal courts? Or, to put the question more directly, if most PILO categories do as well or better in state courts, why aren't most PILO cases filed in state courts? Our survey provides several explanations.

The first and most obvious has to do with defendants--with the targets of PILO litigation. All the cases in our sample are civil cases, originated in the first instance by PILOs, themselves. (We omitted criminal cases, in other words, and the odd handful of cases where PILOs were originally defendents in sutis launched by government agencies or some other party). Where 49 percent of the federal cases in our sample were filed against a federal agency, none of the state cases were. More subtle differences in the targets of litigation reveal other differences between these catagories. Table I.10 shows the breakdown of defendents (or opposing parties in appeals) in federal cases by category of sponsoring PILO. Table I.11 shows the same breakdown for state cases.

TABLE II.10

OPPOSING PARTIES IN FEDERAL CASES BY PILO CATAGORY

PILO CATEGORY	FEDERAL AGENCY	STATE AGENCY	LOCAL AGENCY	BUSINESS	OTHER
ENVIRONMENTAL	246 (27%)	10 (3%)	9 (3%)	51 (16%)	4 (1%)
CONSUMER	103 (77%)	9 (7%)	3 (2%)	15 (11%)	4 (3%)
RACIAL MINORITY	20 (23%)	32 (36%)	27 (31%)	4 (5%)	5 (6%)
NON-RACIAL "MINORITIES"	52 (29%)	58 (32%)	31 (17%)	25 (14%)	13 (7%)
HANDICAPPED	8 (24%)	18 (55%)	3 (9%)	4 (12%)	0
ACLU	72 (27%)	91 (34%)	75 (28%)	22 (8%)	8 (3%)
OTHER	29 (52%)	11 (20%)	6 (11%)	6 (11%)	2 (6%)
TOTAL	530 (49%)	229 (21%)	156 (14%)	127 (12%)	36 (3%)

NOTE: Percentage figures in parentheses refer to percentage of cases from that PILO category with that defendent, that is, percentage of row across. Total figures are slightly higher than in previous tables of federal cases because cases with multiple defendents in different columns have been counted twice. Technically, then, percentage figures refer to percentage of all defendents rather than all cases but the differences in percentages calculated by actual case would be negligible.

TABLE II.11

OPPOSING PARTIES IN STATE CASES BY PILO CATEGORY

PILO CATEGORY	STATE AGENCY	LOCAL AGENCY	BUSINESS	OTHER
ENVIRONMENTAL	32 (51%)	20 (32%)	6 (10%)	5 (8%)
CONSUMER	22 (61%)	6 (17%)	7 (20%)	1 (3%)
RACIAL MINORITIES	11 (46%)	6 (25%)	5 (21%)	2 (8%)
NON-RACIAL "MINORITIES"	39 (66%)	12 (20%)	9 (33%)	2 (8%)

HANDICAPPED	2 (25%)	4 (50%)	0 (0%)	2 (25%)
ACLU	29 (37%)	41 (53%)	5 (6%)	3 (4%)
OTHER	13 (48%)	3 (11%)	9 (33%)	2 (7%)
TOTAL	148 (50%)	92 (31%)	36 (12%)	19 (6%)

NOTE: Percentage figures in parentheses as in Table I.10 above.

Table I.10 reveals one of the distinctive characteristics of the "cause"-related organizations (environmental and consumer) as compared to all the others: they are overwhelmingly preoccupied with suits against the federal government. And that is not surprising, because their concern with broad policy as opposed to particular constituencies naturally leads them to focus on litigation targets with the greatest policy leverage. Even many of their cases classified in Table I.10 as having "business" defendents are actually suits about government policy where the PILO has formally intervened on the side of a government agency to help defend an agency rule or policy under challenge by a regulated business firm. For the same reason, these "cause" organizations focus a disproportionate share of their litigation in state courts on direct state agencies--where policy leverage is greatest at the state level.

PILOs in other categories are not so consistent. Thus the ACLU and PILOs representing "racial minorities" and non-racial "minorities" spread their federal cases rather evenly among federal, state and local defendents, which might suggest that they are equally prepared to pursue rights-violations at whatever level they find them. The PILOs representing

the handicapped are most inclined to use the federal courts to sue state agencies, presumably because state agencies have the largest share of responsibility--or policy control--over the particular concerns of the handicapped; in other words, in their federal filings, PILOs representing the handicapped seem to operate more as "cause" organizations than immediate constituency organizations. In state filings, however, the disproportionate number of suits by handicapped PILOs against local organizations--if such small numbers are to be trusted--suggests that they are here operating more as "constituency" organizations, pursuing rights violations where they find them. The same explanation would seem to account for the similar pattern in ACLU state filings, disproportionately devoted to fining against local agencies. PILOs representing racial minorities and non-racial minorities show the opposite tendency, seemingly displaying a "cause" litigation pattern in their disproportionate focus on state agencies. And this seems consistent with the earlier finding that federal courts seem more sympathetic to direct discrimination cases.

Tables I.12 and I.13 put these patterns in better perspective by focusing on the character of the actual plaintiffs--rather than the defendent or opposing parties--in these cases. We have classified the plaintiffs in two different ways, displayed in parallel columns in these tables. First, by technical legal characteristics: whether the "plaintiff" (that is the PILO or its clients, which may be a respondent in an appeal by the losing party at the trial level) is a conventional or "Hohfeldian plaintiff" (suing over distince threats to his own liberty or property) or whether the claim relates to

non-divisable public benefits, so that the "plaintiff" is a mere vehicle to bring the issue into court (that is, a pure "public interest plaintiff"). Because the distinction is hard to apply in some cases, we have included a residual category of "ambiguous" suits. Next we have divided the cases among those where the sponsoring PILO is itself the named "plaintiff" (usually indicating that no conventional individual plaintiff was available), those where the sponsoring PILO is the exclusive representative of some conventional plaintiff(s), and those where the PILO has joined a coaliton of several parties suing together. The latter need not be a "coalition" of other PILOs or other organizations by that is almost invariably the pattern. Indeed because of the way we colated our cases in the computer, many of the "named plaintiff" cases may also involve a coalition of organizations.

TABLE II.12

CHARACTER OF "PLAINTIFFS" IN FEDERAL CASES BY PILO CATEGORY

PILO CATEGORY	HOHFELDIAN PLAINTIFF	PURE PUB INT PLAINTIFF	AMBIGUOUS	PILO PRIMARY NAMED PARTY	PILO EXCLUSIVE REP OF NAMED PRTY	PILO JOINED W/ OTHERS
Environmental	29 (9%)	265 (83%)	25 (8%)	216 (69%)	13 (4%)	85 (27%)
Consumer	17 (13%)	105 (78%)	12 (9%)	77 (57%)	29 (22%)	28 (21%)
Racial Minority	32 (36%)	35 (40%)	21 (24%)	9 (10%)	26 (30%)	53 (60%)
Non-Racial Minority	120 (67%)	36 (20%)	11 (20%)	5 (3%)	125 (70%)	12 (21%)
Handicapped	25 (76%)	6 (18%)	2 (6%)	0 (0%)	30 (91%)	3 (9%)
ACLU	213 (79%)	36 (13%)	19 (7%)	33 (13%)	217 (82%)	14 (5%)
Other	17 (30%)	28 (50%)	11 (20%)	6 (11%)	38 (68%)	12 (21%)

NOTE: Percentages add across each row on either side of the double line.

TABLE II.13

CHARACTER OF "PLAINTIFFS" IN STATE CASES BY PILO CATEGORY

PILO CATAGORY	HOHFELDIAN PLAINTIFF	PURE PUB INT PLAINTIFF	AMBIGUOUS	PILO NAMED PLAINTIFF	PILO EXCLUSIVE REP OF NAMED PLAIN.	PILO JOINED W/ OTHERS
Environmental	3 (5%)	53 (84%)	7 (11%)	58 (92%)	4 (6%)	1 (2%)
Consumer	10 (28%)	22 (61%)	4 (11%)	11 (31%)	15 (42%)	10 (28%)
Racial Minority	14 (58%)	8 (33%)	2 (8%)	0 (0%)	19 (83%)	4 (17%)
Non-Racial Minority	37 (62%)	17 (28%)	6 (10%)	2 (3%)	47 (78%)	11 (18%)
Handicapped	7 (88%)	0 (0%)	1 (13%)	0 (0%)	7 (88%)	1 (12%)
ACLU	52 (68%)	19 (25%)	6 (8%)	4 (5%)	70 (90%)	4 (5%)
Other	12 (44%)	13 (48%)	2 (7%)	0 (0%)	19 (70%)	8 (30%)

NOTE: Percentage figures in parentheses as in Table I.12 above.

Table I.12 again confirms the distinctiveness of the "cause" organizations--the environmental and consumer groups. No other categories come close to these categories in their high proportions of "pure public interest" cases or in their high proportion of cases where the sponsoring PILO is the named party. The "other" category comes closet in proportion of "pure public interest" claims (50%) and that is largely a reflection of the mixed issue focus of the organizations in this category, which often joined in cases that we classified as "environmental/safety" or "consumer" as well as bringing some "political process" cases where there we no distinct victims, hence no conventional or "Hohfeldian" plaintiff. At the opposite pole in the ACLU, which is the exclusive representative of an actual conventional plaintiff in some four-fifths of the federal cases in our sample.

The state court figures in Table I.13 are only similar at the opposite poles, but the center of gravity has shifted notably toward the ACLU pole. Environmental groups still bring most cases in their own names and almost nver represent conventional plaintiffs. The ACLU, at the opposite pole, still represents actual conventional plaintiffs in state cases and almost never sues in its own name or in coalitions with other groups. Whereas the other categories are spread between these poles in the federal sample, however, in the state sample the other categories are much more like the ACLU pattern. In the nature of environmental litigation, environmental organizations have little choice in how they formulate their cases--except to avoid state courts, as they do. But even "consumer" organizations are notably more prone to find some injured individual(s) to "represent" in state cases, suing in their own names only half as often as they do in the federal sample. They may not be able to find conventional plaintiffs with distinct individual claims to more state "consumer" protection but they are more apt to dress up their cases as if they were conventional suits. The same shift is apparent in cases brought by PILOs representing racial minorities. Both our samples for this category undoubtedly understate the proportion of cases brought in the name of discrete individuals, because organizational names are less likely to appear in reports of such cases. But the constrast between federal and state patterns in these cases probably does reflect real differences in strategy in different jurisdictions: though PILOs representing racial minorities usually do find some individual victims to lend their names to their suits. Their federal cases--at least in our sample--are less often about individualized

grievances than about broad policy claims where it is useful or sensible for a coalition of PILOs to join in the litigation (some 60% of our federal sample). In state cases brought by the PILO category, such coalitions are far more infrequent (17%), the bulk of the cases do claim to represent named individuals (83%) and only 41% of the state cases (compared with 64% of the federal cases) can possibly be construed to deal with "public interest" rather than individualized claims. PILOs representing non-racial minorities and the handicapped are already much closer to this pattern in the federal sample but still slightly more so in the state sample.

Two other comparisons confirm the pattern. Table I 14 shows the different objects or remedies sought by the various PILO categories in our federal sample, while Table I.15 shows the same breakdown for the state sample.

TABLE II.14

OBJECT OF FEDERAL CASES BY PILO CATEGORY

PILO CATEGORY	CANCEL OR POSTPONE SCHEDULED FUTURE ACTION	CEASE ONGOING CURRENT PRACTICE	AFFIRMATIVE REMEDY	DAMAGES
Environmental	77 (24%)	164 (52%)	60 (19%)	16 (5%)
Consumer	8 (6%)	90 (67%)	32 (24%)	5 (4%)
Racial Minorities	6 (7%)	51 (58%)	21 (24%)	10 (11%)
Non-racial Minorities	11 (6%)	67 (37%)	75 (42%)	26 (15%)
Handicapped	1 (3%)	20 (61%)	5 (15%)	7 (21%)
ACLU	8 (3%)	166 (62%)	51 (19%)	42 (16%)
Other	7 (13%)	24 (43%)	17 (30%)	8 (14%)
TOTAL	118 (11%)	582 (54%)	261 (24%)	114 (11%)

TABLE II.16

OBJECT OF STATE CASES BY PILO CATEGORY

PILO CATEGORY	CANCEL OR POSTPONE SCHEDULED FUTURE ACTION	CEASE ONGOING CURRENT PRACTICE	AFFIRMATIVE REMEDY	DAMAGES
Environmental	21 (33%)	39 (62%)	2 (3%)	1 (2%)
Consumer	2 (6%)	20 (56%)	7 (19%)	7 (19%)
Racial Minorities	4 (16%)	6 (25%)	4 (17%)	10 (42%)
Non-racial Minorities	9 (15%)	17 (63%)	6 (22%)	0 (0%)
Handicapped	1 (12%)	6 (75%)	1 (12%)	0 (0%)
ACLU	7 (9%)	50 (64%)	17 (22%)	4 (5%)
Other	4 (15%)	32 (54%)	12 (20%)	6 (10%)
TOTAL	48 (16%)	170 (57%)	49 (17%)	28 (9%)

Comparing the last two colums in each table, one can see that affirmative remedies were more often sought in state cases than federal cases for every category PILO, though the difference is not always as sharp as it is for PILOs representing racial minorities (42% of federal cases vs. 17% of state cases seeking affirmative remedies). Beneath these crude comparisons, we suspect, are greater differences in the scope and intrusiveness of the remedial orders issued by federal courts compared with state courts. The lesser reliance on affirmative injunctions corresponds to a notably greater reliance on damage payments, at least for PILOs representing racial minorities (42% of state cases, as opposed to 11% of federal cases where damage payments were sought) and consumer PILOs (19% of state cases, as opposed to 4% of federal cases). Somewhat to our surprise, the first column

in each table--suits to cancel or postpone scheduled future actions--does not show larger percentages for federal cases. We had supposed that the state sample would be significantly lighter on such cases because we assumed they would appear more "speculative" or political or non-justifiable to state judges--the "injury" at stake not yet having occured. But the failure of the data to show this pattern may simply indicate that our "object" categories were too crude to capture this effect.

Finally we can compare federal and state data with regard to the basis on which suits are decided. We divided our sample into four possibilities as shown in Tables I.17 and I.18 below.

TABLE II.17

BASIS FOR DECISION OF FEDERAL CASES BY PILO CATEGORY

PILO CATEGORY	U.S. CONST.	FED STATUTE	STATE CONST.	STATE STATUTE
Environmental	13 (4%)	301 (15%)	0 (0%)	2 (1%)
Consumer	5 (4%)	125 (93%)	1 (1%)	4 (3%)
Racial Minority	43 (49%)	45 (51%)	0 (0%)	0 (0%)
Non-racial Minority	45 (25%)	121 (68%)	2 (1%)	8 (4%)
Handicapped	1 (3%)	25 (78%)	2 (6%)	3 (9%)
ACLU	79 (30%)	137 (51%)	1 (1%)	48 (18%)
Other	14 (25%)	42 (75%)	0 (0%)	0 (0%)
TOTAL	200 (19%)	796 (14%)	6 (1%)	65 (6%)

NOTE: Percentage figures in parentheses refer to portion of cases from that category decided on that bases, that is, percentage of each row row across. Percentages do not always add to 100% because a small number of cases classified as decided on the basis of administrative rules have been omitted.

TABLE II.18

BASIS FOR DECISION OF STATE CASES BY PILO CATEGORY

PILO CATEGORY	U.S. CONST.	FED. STATUTE	STATE CONST.	STATE STATUTE
Environmental	2 (3%)	2 (3%)	3 (5%)	55 (87%)
Consumer	2 (6%)	1 (3%)	4 (11%)	29 (81%)
Racial Minorities	7 (29%)	1 (4%)	0 (0%)	16 (67%)
Non-racial Minor.	6 (10%)	9 (15%)	1 (2%)	43 (72%)
Handicapped	0 (0%)	0 (0%)	2 (25%)	6 (75%)
ACLU	31 (40%)	2 (3%)	7 (9%)	38 (49%)
Other	3 (11%)	2 (7%)	6 (22%)	16 (60%)
TOTAL	51 (17%)	17 (6%)	23 (8%)	203 (69%)

NOTE: Percentage figures in parentheses as in Table I.17 above.

The most striking finding that emerges from these two tables is that the groups which rely most heavily on federal constitutional claims in federal cases--PILOs representing racial minorities (49%) and the ACLU (30%)--continue to be the groups most reliant on federal constitutional claims even in state cases (29% for racial minority PILOs, 40% for the ACLU). This suggests that these categories take their cases to state courts in those states where they expect more sympathetic judges or quicker results and do not need to worry about the scope of remedial power. Conversely, environmental and consumer groups, which are most dependent on federal statutory claims in their federal cases, are also most dependent on state statutory claims in their state filings and presumably file only in those

states with particularly convenient or congenial statuatory provisions for litigation. No category seems to rely very much on state constitutional claims, with the possible exception of the handicapped and the miscellaneous "other" groups and even here the numbers are too small to be very reliable. Given that most state constitutions track the broad liberty and equality guarantees of the federal constitution--and some provide more detailed guarentees on issues of contemporary concern, like sexual equality--the relative pucity of state constitutional claims in our sample is particularly striking. It may be a reflection again of our sampling method--since state constitutional claims may most often be brought in the name of individuals without any acknowledgement of the sponsoring organization. Still the pattern in our sample is so dramatic that we suspect it does reflect (though perhaps to an exaggerated extent) the pattern that would appear in a larger or more reliable sample. And if so, it is plausible to see this pattern as confirming the dominant implication of our other comparisons: state judges are much less prone to assume an activist policy-making role, beyond the boundaries of conventional adjudication, than federal judges.

To sum up, then: If we simply compare win/loss scores, state courts seem to be at least as hospitable to "public interest" litigation as federal courts. but the appearance is deceptive. Environmental groups, bringing the kinds of cases that are hardest to disguise or reformulate as something other than "public interest" claims, do worse in state courts than in federal courts and tend, in fact, to avoid state courts more than other groups. Overall, more

state cases are about individual claims and more are brought in the name of individual victims rather than organizations. Fewer state cases involve affirmative remedies. Of course, cases with this abstract description can still have very dramatic consequences: it only required a single conventional plaintiff to overturn New York's criminal sodomy statute, thereby legalizing homosexuality in the state. But the fact that few state cases in our sample invoke state constitutional provisions suggests that state courts are generally more reluctant to accept novel constitutional claims even where a PILO bent on "law reform" might press the claim through a perfectly conventional or natural plaintiff. Thus the kinds of PILO cases brought in state courts are different, except for organizations like the ACLU which can adapt their federal claims to state jurisdictions when it is convenient to do so.

The difference in the kind of claims involved for most PILO categories may go far in explaining why PILO cases are more often found in federal courts: federal courts are simply more receptive--or offer more leverage--for the sorts of claims most PILOs seek to pursue.

The unstated assumption in this analysis, of course, is that PILOs file their cases where they have the best chance of winning. But we do not mean to suggest that this is the only consideration determining choice of forum.. Still less do we mean to suggest that individual "public interest law organizations" decide where to file particular cases on the basis of abstract comparisons between "state" and "federal" courts. On the contrary, our case survey confirms the indications from the earlier section of this study that

most organizations specialize in cases they find most appropriate to one forum or another. Thus the Environmental Defense Fund, the Natural Resources Defense Council and other national environmental organizations rarely file suits in state courts. The "environmental" cases in our state sample derive largely from regional organizations, like One Thousand Friends of Oregon, specializing in state claims in particular jurisdictions. Similarly, most of the "consumer" cases in our state sample derive not from the well-known Washington-based consumer advocacy organizations (like Ralph Nader's "Public Citizen") but from small regional groups, like the Arizona Center for Public Interest Law, specializing in the kinds of cases they can pursue effectively in their own state courts. But we can still ask why there are not more organizations filing more cases in the litigational "niches" made available in particular state courts.

The probable reason is that these niches are not very attractive to "public interest law organizations." On the one hand, they provide less policy leverage than suits seeking to enlist the broader remedial powers of federal courts or suits invoking the broader, more activist constructions which federal courts give to the federal constitution. On the other hand, the kinds of genuinely individual, client-centered suits that seem to be most successfully pursued in state courts can also be quite readily pursued by non-PILO lawyers--commercial lawyers bringing damage suits on a contingency fee basis, for example, or Legal Services Corporation lawyers operating well within the limitations imposed by the LSC charter and guidelines. We suspect that most state-centered PILOs operate where and as

they do because, like the Arizona Center for Public Interest Law, they receive direct state subsidies to pursue certain kinds of litigation. PILOs dependent on fund-raising from private individuals or from private foundations are far more likely to prefer federal filings where they can seem to have more policy impact.

These conclusions seem to be confirmed when the pattern evident in our overall state sample is disaggregated by state. We have broken our the cases in California, New Jersey and Oregon state courts because these were the three most heavily represented states in our sample. For the most part, the state courts that have attracted the most PILO litigation do not seem to treat these cases very differently or to have attracted particularly different kinds of cases from other state courts. Table I.19 compares overall results.

TABLE II.19

RESULTS OF STATE CASES BY STATE

STATE	DISMISSED ON JURISDICT. ISSUE	LOST ON MERITS	PARTIAL SUCCESS	FULL SUCCESS
California	2 (2%)	28 (29%)	15 (15%)	44 (45%)
New Jersey	1 (4%)	8 (26%)	2 (7%)	14 (50%)
Oregon	9 (20%)	17 (39%)	6 (14%)	11 (25%)
All Other	5 (1%)	48 (38%)	14 (11%)	54 (43%)

NOTE: Percentage figures in parentheses refer to portion of cases from that state decided in that way, that is, percentage of row across. Percentage figures do not add to 100% because cases settled without trial are omitted.

Comparing the percentage figures suggest that California and New Jersey courts are somewhat more hospitable to PILO claims--but only to a slight degree. Oregon courts look distinctly less sypmathetic but that is because such a disproportionate share of Oregon cases are environmental suits, which do less well in every jurisdiction. In fact, the converse is also true, as Table I.20 shows: California and New Jersey state courts have attracted a disproportionate share of those kinds of cases that do better in state courts, generally.

TABLE II.20

"PLAINTIFFS" IN STATE PILO CASES BY STATE

State	Hohfeldian Plaintiff	Pure Public Intrst Claim	Ambiguous	PILO Primary Named Party	PILO Exclu-sive Rep. of Named Prty.	PILO Joined w/ Others
California	53 (54%)	34 (35%)	11 (11%)	10 (10%)	75 (77%)	12 (12%)
New Jersey	15 (54%)	11 (39%)	2 (7%)	5 (18%)	21 (75%)	2 (7%)
Oregon	6 (14%)	36 (82%)	2 (5%)	38 (86%)	6 (14%)	0 (0%)
All Others	62 (49%)	51 (41%)	13 (10%)	22 (17%)	80 (63%)	24 (19%)

NOTE: Percentage figures in parentheses refer to portion of cases in that state with that kind of plaintiff (on either side of the double line), that is, percentage of each row across.

The California and New Jersey cases in our state sample are not even more likely to invoke state constitutional claims: only 7% of the California cases do so and 14% of the New Jersey cases, compared with 4% of the Oregon cases and 13% of all other state cases. What most distinguishes California is an unusual system for claiming attorneys fees in successful suits against the state government--a systen paralleling the federal statuatory provisions for federal litigation but rare in state litigation.[10]

More generous attorney fee provisions or more extensive subsidies to PILOs in other states would doubtless encourage more PILO litigation in state courts. But if federal courts tightened standing requirements and other barriers to "public interest litigation," this would almost surely not translate into a large shift of PILO activity to state courts. On the basis of our findings in this survey, we would expect the dominant result to be a large decline in PILO litigation.

NOTES

1. Note, "In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice," 90 YALE L.J. 1436 (1981)

2. Burton A. Weisbrod, Joel F. Handler, Neil K. Komesar, "*Public Interest Law, An Economic and Institutional Analysis*" (Berkeley: University of California Press, 1978). The definition cited in the text appears at p. 20-21.

3. Ibid., p. 62

4. The changes are well summarized in Stewart, "The Reformation of American Administrative Law," 88 HARV. L. REV. 1667 (1975)

5. See, e.g., "Environmental Policy Formation and the Tax Treatment of Citizen Interest Groups," 39 LAW &CONTEM. PROB. 21 and "Citizen Participation at Government Expense," 39 PUB. ADMIN. REV. 477 (1979)

6. This is one of the principal conclusions in Orr, "Standing to Sue: Interest Group Conflict in Federal Courts," 70 APSR 723 (1976)

7. See *Adams v. Richardson*, 480 F2d. 1159 (1973), which has continued under the name of every Secretary of Health, Eduction and Welfare (since 1980, every Secretary of Education) and continues to generate new rounds of litigation over the adequacy of federal enforcement of civil rights laws in seventeen southern and border states.

8. Reliance on published opinions is by now a standard technique in social science research on litigation trends, though it arguably risks some distortion by neglecting undecided cases or cases decided without opinions or cases unreported in the any major service. See, e.g., Wenner, *The Environmental Decade in Court* (1982) and Lake, *Environmental Reguation: The Political Effects of Implementation* (1982).

9. This is an hypothesis advanced by Weisbord, among others (see *Public Interest Law*, pp. 88-89) and not at all advanced as criticism.

10. See California Code of Civil Procedure, § 1021.5 at 14 Ann.Cal.Codes 51

APPENDIX ONE

Public Interest Organizations Covered in News Survey

Coverage of Federal Cases

American Civil Liberties Union
Aviation Consumer Action Project
Capital Legal Foundation
Center for Auto Safety
Center for Constitutional Rights
Center for Law in the Public Interest
Environmental Defense Fund
Food Research Action Center
Friends of the Earth
Mexican American Legal Defense Fund
Migrant Legal Action Project
NAACP Legal Defense Fund
Pacific Legal Foundation
Public Citizen
Public Interest Law Center of Philadelphia
Public Advocates
Southern Poverty Law Center
Women's Legal Defense Fund

Coverage of State Cases

American Civil Liberties Union
Center for Auto Safety
Center for Law in the Public Interest
Environmental Defense Fund
NAACP Legal Defense Fund
National Center for Youth Law
Pacific Legal Defense Foundation
Public Advocates

Women's Legal Defense Fund

Coverage of Non-Litigation Activity

American Civil Liberties Union
Aviation Consumer Action Project
Business and Profession People for the Public Interest
Center for National Policy Review
Center for Science in the Public Interest
Center for Auto Safety
Center for Constitional Rights
Center for Law in the Public Interest
Disability Rights Defense Fund
Environmental Defense Fund
Food Research Action Center
Friends of the Earth
Mexican American Legal Defense Fund
Mental Health Law Project
Migrant Legal Action Project
Mountain States Legal Foundation
NAACP Legal Defense Fund
National Council of Senior Citizens
National Consumer Law Center
Pacific Legal Foundation
Public Citizen
Pension Rights Center
Public Interest Law Center of Philadelphia
Public Advocates
Public Education Association
Southern Poverty Law Center
Women's Equity Action Center
Women's Legal Defense Fund

APPENDIX TWO

Public Interest Organizations Covered in Case Survey

A.C.L.U.
American Civil Liberties Union

Consumer Groups
Arizona Center for Law in the Public Interest
Center for Law in the Public Interest
Center for Science in the Public Interest
Consumers Union
Institute for Public Representation
Media Access Project
National Council of Senior Citizens
New York Lawyers for the Public Interest
Public Advocates
Public Citzen
Public Interest Law Center of Philadelphia

Environmental Groups
Conservation Law Foundation of New England
Environmental Defense Fund
Friends of the Earth

Lake Michigan Federation
Natural Resources Defense Council
Northwest Environmental Defense Center
National Wildlife Federation
Sierra Club Legal Defense Fund
Trustees for Alaska
One Thousand Friends of Oregon

Groups Representing Racial/Ethnic Minorities

Asian-American Legal Defense Fund
Advocates for Children of New York
Advocates for Basic Legal Equality
Asian Law Caucus

Children's Defense Fund
Chicano Education Project
Center for National Policy Review
Chicago Lawyers Committee for Civil Rights
Children's Rights Project
Education Law Center
Equal Rights Advocacy
Fair Housing Clinic
Juvenile Law Center of Philadelphia
Lawyers Committee for Civil Rights
Lawyers Committee for Civil Rights of Boston
Legal Services for Children
Mexican American Legal Defense Fund
Migrant Legal Action Project
NAACP Legal Defense Fund
Native American Rights Fund
National Committee Against Discrimination in Housing
National Council of Black Lawyers
Puerto Rican Legal Defense Fund
Rutgers Urban Legal Clinic
Southern Legal Council
Southern Poverty Law Center

Trial Lawyers for Public Justice

Groups Representing Non-racial Minorities

Bill of Rights Foundation
Center for Constitutional Rights
Coalition for Medical Rights for Women
Government Accountability Project
Gay Rights Advocates
Lambda Legal Defense Fund
Legal Services for the Elderly Poor
Massachusetts Legal Reform Institute
Rutgers Constitutional Litigation Clinic
Student Advocacy Center
Women's Justice Center
Women's Legal Defense Fund
Women's Law Project
Women's Rights Litigation Clinic
Women's Rights Project
Youth Policy and Law Center

Groups Representing the Handicapped

Carolina Legal Association for Mental Health
Developmental Disability Law Project
Disability Rights Center
Mental Health Law Project
National Association for the Deaf Legal Defense Fund
National Center for Law and the Deaf
Western Law Center for the Handicapped

Other Groups

Advocates, Inc.
Capital Legal Foundation
Florida Justice Institute
League of Women Voters
Michigan Legal Services
National Organization for the Reform of Marijuana Laws

Public Education Association
Pension Rights Center
Suburban Action Institute
San Francisco Legal Committee for Urban Affairs

PART TWO:

A COMPARATIVE VIEW OF HABEAS CORPUS

This study offers statistical evidence for three distinct claims about the habeas corpus jurisdiction of U.S. district courts. First, we offer evidence that some judges are more inclined than others to provide extended consideration to habeas petitions and some judges more inclined than others to rule favorably on habeas petitions. Second, we offer evidence that this variation is as great or greater than differences between judges on state appellate courts, reviewing criminal convictions from the same states. Third, we offer evidence that the variation among federal judges is attributable in some part to differences in the personal backgrounds -- and therefore, presumably, to differences in the personal attitudes or predispostions -- of the judges.

The initial section of this report (immediately following) seeks to put these findings in proper context by highlighting several key assumptions in the contemporary debate on federal habeas jurisdiction -- assumptions which our findings may call into question. The section that follows explains our statistical methodology. Ensuing sections review the data and findings

which support the conclusions cited above. We take them up in the report in the same order as we have outlined them here.

ASSUMPTIONS IN THE HABEAS CORPUS DEBATE

The Framers of the U.S. Constitution had such high regard for the writ of habeas corpus that, even before they had added a full Bill of Rights, the Framers included in the original text of the Constitution a prohibition against the suspension of the writ. Historically, the "great writ," as it was called, was regarded as the bulwark of civil liberty because it guaranteed the right of any person incarcerated by the government to challenge the legality of his detention in the ordinary courts. In this sense, habeas corpus is indeed an ultimate safeguard for the fundamental constitutional principle that "no person shall be denied ... liberty ... without due process of law."

But, of course, where due process *has* been accorded -- where, that is, the opportunity for a fair trial has been made available -- the Constitution does not prohibit incarceration as a form of punishment. Historically, therefore, resort to habeas corpus was actually rather rare in the United States: apart from wartime or extreme emergencies (when the Constitution

allows even the writ of habeas corpus itself to be suspended), government officials very rarely tried to imprison people without any opportunity for trial. Even where convicted individuals questioned the fairness or adequacy of the trial they had received, it was not necessary to seek redress by filing a petition for a writ of habeas corpus where state courts offered routine appellate procedures (as federal courts did, from the outset, in federal criminal cases). Because the Constitution makes the guarantee of due process a matter of federal law, anyone convicted in state courts could, in principle, obtain review of the conviction by the U.S. Supreme Court through direct appeal. For the most part, federal district courts had few occasions to exercise the writ of habeas corpus.[1]

This changed in the 1950s and 60s, when the Supreme Court for the first time authorized federal district courts to issue the writ on a routine basis to state prisoners complaining about inadequate trials at the state level.[2] In effect, the Supreme Court shared with the federal district courts its own authority to act as the ultimate guardian of due process in criminal justice. Trial convictions which had already been appealled (sometimes more than once) at the state level could now be appealled again to federal district courts through petitions for habeas corpus -- and if rejected, this appeal might be

pursued yet further in the federal courts of appeals before an attempt at a final appeal before the Supreme Court.

This use of habeas corpus has remained quite controversial, more so indeed than many other innovations in criminal justice launched by the Supreme Court in the post-war decades. Unlike other Court rulings on the rights of the accused, the enlargement of habeas corpus did not simply lay down new *standards* for state courts to follow or uphold in their own decisions. It rather established new *forums* of appeal in which to challenge the application of these standards. This imposed a new burden of responsibility on federal district judges, a burden that increased quite dramatically during the 1960s and 70s -- at least as measured by the number of habeas petitions filed each year. In 1961, state prisoners filed 1,020 habeas corpus petitions in U.S. district courts. By 1971 that figure had swollen to 8,372. The number of habeas petitions submitted by state prisoners to federal district courts remained over 7,000 each year throughout the 1970s (except for 1977 when the figure was slightly below this) and by 1982 the number of petitions had climbed back to 8,059.[3]

The burden on federal district courts was undoubtedly exceeded by the new burdens imposed on state prosecutors, now compelled to defend state

relief) and that almost half the petitions were screened by magistrates, thus greatly reducing the case burden on federal district judges, themselves.[5] Where the number of habeas filings each year has remained relatively constant since the early 1970s, moreover, the number of federal district judges has been expanded by more than one-third and as a proportion of overall civil filings, habeas petitions had indeed dropped from 10.4% in 1970 to 3.9% in 1982.[6] Even the extra workload for state prosecutors may be exaggerated, given that the overwhelming majority of petitions can, it seems, be successfully repelled with rather mechanical counterfilings. The occasional release of a dangerous criminal may be more than counterbalanced by the occasional granting of relief to persons improperly convicted.

The last claim is very hard to evaluate, however, because there is no simple means for determining whether federal judges are really more likely than state appellate judges to reach a fair or proper determination of whether due process has been fully observed. Much of the controversy over the federal habeas jurisdiction indeed seems to reflect, as much as anything else, an underlying resentment by some state officials against the routine review of state criminal judgements by federal judges. Since opportunities for appeal are already available at the state level--and state judges are

already required by the Constitution to uphold the federal due process standards declared by the U.S. Supreme Court--some state officials question the continuing logic of the system and have applauded Supreme Court decisions of the last ten years which have somewhat reduced the scope of federal habeas jurisdiction.[7] The Reagan administration has urged some further limitations on federal habeas jurisdiction over state prisoners.[9]

Those who argue for maintaining broad access to federal habeas review insist that federal judges provide an important additional safeguard for due process. The argument need not rest on the claim that federal judges are inherently more fair-minded or reliable than state judges. But claims about the superiority of federal forums are usually entwined in arguments for maintaining broad access for federal habeas review. The alternative argument -- that additional forums for appellate review are always worthwhile in themselves -- is too readily answered by the *reductio ad absurdam*: if five levels of review are appropriate, why not seven or twelve or twenty? Arguments about the superiority of federal judges are based almost entirely on anecdotal or highly subjective and impressionistic assessments, however. Or else, it is argued that federal judges must be more reliable because they have life tenure, while most state judges do not[10]

-- an argument that, if it could justify an expansion of federal habeas jurisdiction, would equally seem to justify the elimination of almost any federal deference to state court judgments.

There is certainly no easy way to test the claim that federal courts are more fair-minded, impartial or reliable than state judges and to this extent reliance on *a priori* or impressionistic arguments for the claim can hardly be faulted. But impressions differ: some observers claim that the professional quality of state judges, like the professional quality of state law enforcement officials generally, has improved quite considerably since the 1950s and 60s, as reapportionment, desegregation and large-scale population shifts have alleviated some of the worst sources of bias in state politics.[11] Abstract arguments, moreover, cut both ways: if state judges may be influenced by mechanisms of electoral accountability (which by now are rather indirect in most states), the life tenure of federal judges may provide more opportunity for them to give vent to personal biases. And presidents may be more concerned with the partisan, ethnic or ideological background of candidates for district court judgeships than with their professional qualities. There are, without question, many very capable and conscientious federal district judges, but few observers deny that there are also many

state judges who are extremely capable and conscientious, as there are undoubtedly a certain number of less worthy judges in both federal and state courts. The argument for extending federal review of state court judgments must, in the end, rely on characterizations of state judges as a whole and of federal judges as a whole.

We certainly do not claim to offer decisive evidence here on the relative professional merits of state and federal judges. Rather we have sought to test one -- possibly disputable --corrolary of the notion that federal judges are more professional or reliable, as a class, than state appellate judges in assessing the fairness of state criminal proceedings. If federal judges, as a class, exercise more professional detachment and devote more conscientious consideration to their cases than state judges, we might reasonably expect that federal decisions would show more uniformity of response from judge to judge than state decisions. In other words, as we expect that a more professional judiciary will display more consistency than a more politicized or undisciplined judiciary, we should expect federal judges to reach similar results among themselves more often than state judges -- if the federal judges, as a group, do indeed constitute a more professional (or less politicized and undisciplined) judicial corps. In fact, however, our study did

not find this to be so. While our various findings to the contrary are hardly conclusive evidence, one way or the other, they do suggest that the assumption of greater professional competence or discipline in federal judges is at least quite questionable.

MEASURING VARIATION IN HABEAS DECISIONS

The Administrative Office of the United States Courts maintains rough statistics on the character and disposition of habeas filings in the federal courts on a year to year basis. We considered a four year sample of these statistics, embracing district court filings between 1979 and 1982 (inclusive). The four year sample allowed us to gather a relatively large number of decisions for each individual judge (or rather, for many individual judges), while avoiding -- we hope -- any significant distortions that might result from considering individual decisional patterns over a more extended period of time. In other words, we assumed that each judge in the sample would have received more or less the same mix of cases in 1979 as in 1982 and that the judge's personal inclinations, degree of competence or conscientiousness, or overall outlook toward habeas review would not have changed significantly between 1979 and 1982. These assumptions, of

course, may be questioned. But we felt that the risk of distortion from changes over time was outweighed by the advantages of a larger sample -- and combining decisional results for a four year period obviously increased our sample of decisions per judge quite considerably.

As we assumed that each individual judge received approximately the same mix of cases from year to year within this period, so we also assumed that each judge received approximately the same mix of cases as all of his fellow judges within the same district. This assumption, too, may be questioned. It will seem more or less plausible, depending on how rigorously one chooses to define "the same." Ultimately, no two cases are exactly alike but there are an enormous number of differences or distinctions that might be drawn between cases. We have assumed that cases are distributed more or less randomly among judges within the same district and therefore that over a large enough number of cases, each judge will receive roughly the same share of peculiar or unusual or troublesome -- or ultimately of meritorious -- cases.

The plausiblity of any comparisons plainly rests on getting a high enough number of cases per judge. And this is the first difficulty we encountered with the A.O. data. Federal district judges are continually coming on and

going off the bench and the period 1979-1982 saw many new appointments each year, beyond the level of retirements, to accomodate a mandated expansion in the system. Thus many judges entered our sample with only one or two years' worth of cases because they retired in the course of 1979 or 1980 or were only appointed in 1981 or 1982. Then, too, the overall number of habeas petitions filed each year varies enormously from one federal judicial district to another. Many judges ruled on only a small number of petitions during the whole period of our sample because there were so few petitions filed in their districts. To accomodate small numbers, we resorted to statistical weighting devices, as explained below.

AO statistics report the ultimate "disposition" of each civil case in a code with four alternatives: judgement for 1) plaintiff, 2) defendant, 3)both, 4) unknown. In relation to habeas petitions, the "unknown" classification may occasionally reflect the uncertainty of docket clerks in the various district courts, though clerks we interviewed insisted that they always do report results in the first three classifications. The compilation of figures we received from the A.O. had high proportions of "unknown" results -- more in most districts than any one of the first three results -- because results are automatically classified this way when the decision is terminated at an

early stage. A separate code classifies each case according to "procedural progress at termination" and those marked as terminated 1) "before issue joined," or 2) "after motion decided but before issue joined," or 3) after "issue joined [when] no other [subsequent] court action" -- that is, all cases disposed of at a preliminary stage of consideration before judgment on the merits -- are marked as having "unknown" results. For habeas cases, almost all the "unknown results," therefore, reflect threshold dismissal of the petition on some basic procedural ground like "failure to exhaust state remedies."

Concentrating on those cases classified with one of the three initial "disposition" codes (that is, the "known" results), we grouped judgment "for plaintiff" (that is, the prisoner filing a habeas petition) with judgment "for both" as representing those results where petitioners had won anything at all from federal habeas appeals. Since prisoners may state several claims in several different petitions or lump various, (logically) unrelated claims in the same petition, the distinction between "judgment for plaintiff" and "judgment for both [plaintiff and defendent]" has no operational significance for evaluating habeas results. "Judgment for plaintiff" can mean many different things, depending on the nature of the petition but there is no

plausible rationale, in this context, for distinguishing "judgment for plaintiff" results from partial judgment for plaintiff results (that is, judgments marked as "for both" plaintiff and defendant on various issues in the same petition). We then divided the sum of cases "for plaintiff" and "for both" by the total number of cases each judge had decided (exclusive of those marked disposition "unknown) to find each judge's percentage of favorable habeas rulings. (Most of our results were calculated on this basis. We discuss the rationale for ignoring "undecided" cases in the next section and do provide computations based on "decided" as well as "unknown" cases in the section that follows.)

This figure -- percentage of favorable rulings (Pfav) -- is not, of course, very meaningful in itself. We use the term simply as a rough benchmark for comparative purposes *within a particular context*. A judge with a high Pfav is not necessarily more "favorable" to leniency for state prisoners, more "favorable" to broad assertions of federal judicial authority or more favorable to anything else. We simply use the figure to measure variation among judges *within the same district* on the assumption, again, that at least within a single district, the mix of cases considered by each judge is likely to be relatively similar. Our working assumption is that large

variations between the Pfav figure for judges in the same district will reflect -- to some degree - - differences in the outlook or tendencies of the individual judges.

To compare the variation among Pfav figures in each district we used a simple variation formula, which shows the average difference between individual Pfav figures within a district and the mean Pfav in that district. For each district, we computed the mean Pfav (or MPfav) by adding each judge's individual Pfav figure and then dividing by the number of judges:

$$MPfav = \sum \frac{(J_1Pfav)}{N} + \frac{(J_2Pfav)}{N} \ldots + \frac{(J_nPfav)}{N}$$

where N = number of judges in that district

J_nPfav = Pfav for judge J_n

We then computed the variation (VPfav) for each district as follows:

$$VPfav = \sum \frac{(J_1Pfav - MPfav)^2}{N} + \frac{(J_2Pfav - MPfav)^2}{N} \ldots + \frac{(J_nPfav - MPfav)^2}{N}$$

The squaring eliminates differences in sign so that a Pfav figure less than MPfav will be counted equally with Pfav figures greater than the district mean, but it also highlights variations, giving greater weight to greater variations. This is a standard statistical technique. Taking the square root of the entire result still reduces the variation to the proper scale for

thinking about percentage variations, that is, between 0 and 100. (In practice, the square root of VPfav does not exceed 50 because it measures average variation from the mean.) For convenience, however, we performed our computations and present results below on the basis of the VPfav figure, as shown above, without taking square roots.

This is, in one sense, a conservative view of variation, because the mean -- against which the variations in individual Pfav are actually computed - is necessarily influenced by those very same Pfav figures. Comparisons with a mean Pfav are probably more reliable, however, than with a district *average* which simply lumped all petitions together and calculated the portion of favorable rulings to decided cases, irrespective of which judges they had been decided by. This average might be unduly influenced by the fact that some judges decide more cases than others. On the other hand, a Pfav is probably more reliable, the larger the number of decisions on which it is based. To see the issue clearly, consider a judge who decided only two petitions and rejected both. He would would have a Pfav of 0, but so would a judge who decided 200 petitions and rejected all of them. The latter figure is obviously more meaningful or reliable than the former.

To take account of this, we recalculated means and variations with a simple statistical weighting formula, giving more weight to those judges

with larger numbers of decided cases by weighting each judge's Pfav in proportion to the number of cases he decided. The weighted district mean (WtMPfav) was thus calculated as follows:

$$\text{WtMPfav} = \sum \frac{w_1 (J_1 \text{Pfav})}{W(N)} + \frac{w_2 (J_2 \text{Pfav})}{W(N)} + \ldots \frac{w_n (J_n \text{Pfav})}{W(N)}$$

where:
w_n=cases decided by judge J_n
W= total cases

The weighted district variation (WtVPfav) was then calculated like this:

$$\text{WtVPfav} = \sum \left(\frac{w_1}{(W/N)} \right) \frac{(J_1 \text{Pfav} - \text{WtMPfav})^2}{(N)} + \left(\frac{w_n}{(W/N)} \right) \frac{(J_n \text{Pfav} - \text{WtMPfav})^2}{(N)}$$

Even weighted in this way, variations in Pfav are considerable in some districts and quite minimal in others, as shown in Table III.1. Why? The Administrative Office was prepared to give us data on individual judges only after concealing the actual identity of each judge behind a code number. This makes it difficult to go behind the data we have. But A.O. statistics do allow us to explore the meaning of these variations in somewhat greater detail. And we have found some ways to get around the limitations inherent in this

data

Assessing the A.O. Data

The data collected by the Administrative Office allow us to consider two additional variables beyond raw dispositions for and against habeas petitioners. First, we can compare "decided" cases for each judge (those classified as judgments "for plaintiff" or "for defendant" or "for both") with total cases for each judge (i.e. - the three classes of cases above as well as those classified as "unknown" in result) to compute a percentage decided (Pdec) for each judge. We can also calculate the portion of each judge's habeas caseload derived from state prisoners (as opposed to the total number of petitions, derived from federal as well as state prisoners), yielding a different percentage figure (Pst). Using the same formulas we used for Pfav, we calculated means (MPdec, MPst, WtMPdec, WtMPst) and variations (VPdec, VPst, WtVPdec, WtVPst) for each district. In most districts, the mean Pdec is rather low, while the mean Pst is rather high, reflecting the fact that most habeas petitions are filed by state prisoners and most of these petitions are disposed of on threshold procedural grounds. Table III.1 shows the initial breakdown of petitions by district and the figures resulting from these computations.

TABLE III.1

ANALYZING HABEAS DECISIONS BY DISTRICT

Federal District	No. of judges	No. of "decided" cases	MPdec	MPst	MPfav	VPdec	VPfav
1st Cir.							
Maine	1	10	14.52	95.83	10.00	*	*
Mass.	11	175	23.60	86.65	1.72	273.06	22.02
N.Hamp.	3	184	38.79	95.73	11.90	416.71	253.85
Rho. Is.	2	28	23.89	87.80	22.22	349.32	22.45
P Rico	9	138	42.21	93.89	17.58	308.05	334.92
2nd Cir.							
Conn.	9	1135	51.74	33.21	7.24	1172.61	8.40
N.N.Y.	3	45	8.82	92.27	13.16	30.25	38.55
E.N.Y.	13	862	49.96	88.51	4.82	124.45	11.58
S.N.Y.	33	1842	63.73	81.36	8.52	237.36	114.76
W.N.Y.	4	354	51.21	93.88	5.02	24.79	12.95
Vrmt.	2	4	8.11	81.08	0.00	17.09	0.00
3rd Cir.							
Del	4	118	36.69	98.81	8.33	121.24	37.49
N.J.	15	633	44.44	96.43	5.52	748.90	26.05
E.Pa.	6	10	01.00	94.82	22.22	3.49	740.74
M.Pa.	6	991	63.55	27.70	9.94	122.55	9.94
W.Pa.	16	371	47.32	15.90	4.88	403.47	45.00
Vir.Is.	3	23	4.50	84.78	33.33	78.19	1066.67
4th Cir.							
Md.	13	684	30.53	98.16	3.60	178.10	14.26
E.N.C.	7	1461	62.98	94.81	7.35	465.59	67.34
M.N.C.	6	33	*	100.00	5.34	*	29.27
W.N.C.	3	319	22.94	0.14	11.93	2456.69	11.93
S.C.	11	266	43.03	98.50	2.86	490.90	16.20
E.Va.	13	1727	41.77	93.19	5.16	429.96	14.82

W.Va.	6	847	42.11	99.16	7.04	126.94	26.54
N.WVa.	3	260	22.60	98.02	6.21	142.49	6.12
S.WVa	4	154	47.92	93.44	10.09	145.70	1.09
5th Cir.							
E.La.	15	678	64.59	97.18	4.80	639.61	23.94
M.La.	3	265	58.67	97.87	3.18	1256.06	2.51
W.La.	7	397	48.29	97.75	4.86	883.98	15.84
N.Miss.	3	48	11.99	8.14	19.35	19.74	193.84
S.Miss.	5	186	62.01	95.65	2.61	278.78	8.17
N.Tex.	13	1640	62.64	89.67	5.44	352.37	11.86
E. Tex.	5	103	9.30	77.07	10.77	183.65	207.95
S.Tex.	18	1695	49.97	94.63	4.28	306.79	24.50
W.Tex	10	433	29.12	78.75	12.23	530.79	101.79
Canal Z.	1	2	50.00	75.00	50.00	*	*
6th Cir.							
E.Ky.	8	641	67.65	33.93	5.54	239.50	7.07
W.Ky.	5	335	43.62	96.39	18.36	479.92	59.07
E.Mich.	17	936	49.27	86.37	5.73	361.13	39.06
W.Mich.	5	237	32.24	97.81	1.85	221.20	6.01
N.Ohio	19	1059	59.30	97.19	6.32	261.85	38.68
S.Ohio	9	467	25.11	97.70	5.52	237.00	4.69
E.Tenn.	4	184	17.54	97.67	11.90	600.76	78.42
M.Tenn.	3	119	24.68	97.46	9.28	235.60	26.18
W.Tenn.	6	698	70.66	35.80	2.70	235.81	1.60
7th Cir.							
N.Ill.	25	827	29.26	26.15	15.08	311.54	133.64
E.Ill.	7	586	10.05	66.01	31.03	60.62	31.03
S.Ill.	4	197	25.00	54.13	28.00	58.27	166.52
N.Ind.	5	746	55.46	98.02	9.42	52.51	14.65
S.Ind.	6	602	66.97	34.66	2.96	107.00	4.61
E.Wis.	5	362	56.36	97.25	7.93	223.35	25.32
W.Wis.	4	560	61.26	61.74	3.23	1197.27	10.19
8th Cir.							
E.Ark.	9	254	23.57	98.95	6.15	550.03	30.71
W.Ark.	3	42	11.76	94.52	36.84	12.40	36.84
N.Iowa	2	84	60.24	92.94	3.27	106.05	12.51
S.Iowa	4	174	51.64	93.75	12.00	368.77	32.66
Minn.	8	234	32.89	44.39	7.32	821.45	123.97
E.Mo.	7	238	26.64	94.00	6.04	868.08	18.84

W.Mo.	7	4139	45.88	41.77	9.69	1713.47	24.64
Nebr	7	460	46.03	96.80	9.32	138.86	178.06
N.Dak.	1	11	19.26	82.93	0.00	54.45	*
S.Dak.	4	46	23.65	93.28	14.29	257.99	432.35
Alaska	3	22	26.53	84.62	6.25	50.82	58.59
Ariz.	10	548	46.33	54.05	3.70	392.64	8.29
N.Cal	17	411	19.31	88.58	9.61	175.22	91.08
E.Cal.	8	251	21.67	96.48	8.33	197.87	168.04
C.Cal.	26	2676	61.12	61.74	3.95	765.37	6.10
S.Cal.	9	179	43.05	60.93	7.69	87.96	28.80
Haw'i.	3	49	38.98	60.00	8.70	783.23	246.99
Idaho	2	7	8.96	89.74	16.67	98.44	1111.11
Mont.	5	83	63.33	99.11	8.70	*	28.75
Nev.	4	101	21.71	88.75	9.86	550.66	184.75
Ore.	8	262	20.51	95.14	0.00	244.07	0.00
E.Wash.	4	50	7.09	91.49	9.37	30.49	91.15
W.Wash.	7	56	9.41	59.69	18.75	154.12	350.06
Guam	2	5	16.67	63.49	25.00	*	416.67
10th Cir.							
Colo.	8	70	6.35	79.21	22.22	42.63	599.65
Kans.	3	369	31.53	35.55	0.88	820.02	0.64
N.Mex.	5	95	15.03	94.03	18.06	416.70	560.72
N.Okla.	3	69	10.22	96.97	9.09	8.39	46.49
E.Okla.	2	150	22.73	95.50	0.41	401.25	0.41
W.Okla.	6	333	36.77	65.53	3.83	135.49	10.33
Utah	2	4	2.27	92.31	66.67	45.63	1111.11
Wyom.	1	4	9.30	89.09	25.00	*	*
11th Cir.							
N.Ala.	4	1698	52.25	88.41	4.98	40.19	12.77
M.Ala.	4	583	46.93	93.99	1.32	460.87	1.01
S.Ala.	3	142	22.80	98.30	5.68	87.23	22.60
N.Fla.	6	631	50.71	82.29	3.63	433.03	1.04
M.Fla.	11	790	26.22	93.85	10.00	426.55	62.48
S.Fla.	15	1189	23.73	89.99	7.67	914.58	139.5
N.Ga.	16	1002	49.60	63.73	5.06	416.69	16.65
M.Ga.	2	93	20.88	98.14	8.89	189.05	69.60
S.Ga.	4	66	14.70	98.28	9.80	94.89	64.33

* = *no meaningful figure*

Note that the number of cases listed in the third column from the left is the number of "decided" cases only. The total number of cases in each district can be quickly estimated by dividing the number of "decided" cases by the MPdec figure in the next column to the right (after converting the percentage figure there to decimal form). MPst figures are calculated on the basis of total case figures rather than the number of "decided" cases listed in the third column. The figures cited for "number of judges" in the second column from the left means all judges to whom cases in our sample can be attributed: the number is sometimes more and sometimes less than the number actually serving in a particular district at any one time, because judges came on and went off the bench during the four year period of our sample and some who were officially on the bench during some part of this period may not have had the opportunity to consider any habeas petitions. For various reasons -- including this same transition phenomenon -- dividing the number of "decided" cases by the number of judges gives only a very rough notion of how many "decided" cases are attributed to each judge. In many districts, the "decided" cases are not at all evenly distributed among the judges, so the average number of cases per judge does not reveal the size of the sample on which Pfav is calculated for most judges. Some Pfav

figures are based on hundreds of cases decided by the same judge, while some are based on fewer than half a dozen. That is the reason for weighting these figures in calculating MPfav and VPfav.

Having calculated these figures for each district, we can observe certain relations among them. Table III.2 summarizes the correlations we found when comparing weighted means and weighted variations across districts. The first figure in each box represents the correlation coefficient and the figure below it represents the probability that the correlation is non-random. Any random probability figure near or below 0.05 is considered to be a very strong confirmation of correlation (since the odds that the correlation involved has appeared merely by chance are near or below 5 per cent). Correlation coefficients can range from just above 0 to 1.0 and they can be conceived--in very rough terms --as describing the portion of one set of variables that is "explained" by the other set of variables in the correlation: generally speaking, the higher the correlation figure, the more important the correlation, with 1.0 indicating perfect identity.

TABLE III.2

CORRELATIONS OF DATA VARIABLES WITHIN A.O. DATA

Variable	MPdec	MPst	MPfav	VPdec	VPst	VPfav
MPdec	1.0000 0.0000	-0.1943 0.0621	-0.4219 0.0001	0.2069 0.0531	0.0553 0.5982	-0.5093 0.0001
MPst	* * * *	1.0000 0.0000	0.0494 0.6363	-0.1963 0.0667	-0.6629 0.0001	0.0740 0.4880
MPfav	* * * *	* * * *	1.0000 0.0000	-0.2390 0.0249	0.1173 0.2600	0.7420 0.0001
VPdec	* * * *	* * * *	* * * *	1.0000 0.0000	0.3206 0.0023	-0.2161 0.0444
VPst	* * * *	* * * *	* * * *	* * * *	1.0000 0.0000	-0.0604 0.5717

The correlations suggest a significant inverse correlation between the mean percentage of cases "decided" (not dismissed, that is, on threshold procedural grounds) and mean percentage of petitions from state prisoners. petitions from federal prisoners, in other words, are more likely to receive extended consideration than petitions from state prisoners. This

correlation is confirmed by the strong correlation between variations in the percentage of cases "decided" and variations in the percentage of cases from state prisoners: this indicates (as one would expect given the mean correlations) that in districts where there are significant variations between judges in the percentage of their cases coming from state prisoners there are also significant variations between judges in the percentage of cases dismissed at the outset on procedural grounds. We are unsure whether this results entirely from objective differences in the quality and worthiness of federal petitions or whether it reflects, to some degree, different judicial attitudes towards habeas jurisdiction over federal as opposed to state prisoners. Most of the state prisoner petitions that are dismissed at the outset are dismissed for failure to exhaust state remedies and it may be that comparable exhaustion doctrines at the federal level do not screen out so many cases because federal prisoners feel less incentive to file federal habeas petitions before attempting other means of appeal or relief at the federal level. Or it may reflect a less scrupulous attitude toward such restrictions on habeas jurisdiction when federal judges are dealing with federal prisoners and cannot therefore be accused of disrespect for a different judicial system. Or it may simply be that federal prisoners

have better counsel and are less likely to be tripped up in their petitions on procedural technicalities.

The table indicates a still stronger inverse correlation between the percentage of cases "decided" and the percentage of cases decided favorably to the petitioner. This means that the more cases judges consider beyond threshold procedural objections, the fewer of these "decided" cases they decide in the petitioner's favor. This correlation is again strongly confirmed by the correlation in variations: the more variation there is between judges in any district on the portion of their cases they dismiss on threshold procedural grounds, the more variation there is in the portion of their cases they decide favorably to the habeas petitioners.

One might think that these two sets of correlations are themselves related: judges "decide" a higher portion of federal petitions and the higher the portion of "decided" petitions, we know, the lower the portion of favorable rulings -- consequently, we might think, the higher the portion of federal petitions, the lower the portion of favorable rulings. Putting this more directly, we might expect to see that districts where judges decide a larger percentage of state petitions are districts where judges also issue a larger percentage of favorable rulings. But this is not so. There is no

significant correlation between the mean percentage of state cases decided by the judges in each district and the mean percentage of favorable rulings by judges in each district. Nor is there any significant correlation between variations in the percentage of state petitions among judges in each district and variations in the percentage of favorable rulings among judges in each district.

In the abstract, it is easy to see why MPdec would be inversely correlated with MPfav and why VPdec would be directly correlated with VPfav. Since we calculated Pfav on the basis of "decided" cases (i.e. - what percentage of "decided" cases was decided favorably to the petitioner), the smaller the portion of "decided" cases (Pdec) for any judge or any district, the smaller is the base on which the percentage of favorable rulings is calculated. And the same (absolute) number of favorable rulings will yield a larger Pfav, as the base of "decided" cases shrinks. To illustrate, consider two judges, each of whom has considered 100 petitions and each of whom has found some merit in 10 of these petitions. If the first judge has dismissed 60 of his cases on threshold procedural grounds, then his 10 favorable rulings will be computed on a base of only 40 (100 - 60) and yield a Pfav of 10/40 or 25%. If the second judge has dismissed only 20 of his cases on threshold procedural

grounds, then his Pfav will be computed on a base of 80 (100 - 20), yielding a Pfav of 12.5% (10/80).

But it is difficult to determine how or whether to take this statistical effect into account. On the one hand, it may be that differences in Pdec from one judge to another are entirely the result of genuine differences in the petitions they receive: judges with higher Pdec figures may just happen to receive a comparably higher proportion of petitions requiring extended consideration. This is certainly a logical possibility but it seems unlikely to explain all the differences, given the very considerable variation in Pdec among judges in the same districts -- variations that quite dwarf variations in Pst. And even if the variations in Pdec are attributed entirely to differences in the mix of petitions each judge receives, it does not follow that there is as much variation in the cases that do receive more extended consideration: it may well be that once clearly frivolous claims are screened out (claims of which some judges just happen to receive more than others), each judge has a roughly comparable mix of worthy and unworthy petitions. In that case, the variations in Pfav (calculated as a percentage of "decided" cases) would be the most appropriate indicator of differences in attitude or disposition among the judges. One can relax the assumptions

somewhat and still regard this as the more revealing base for calculating Pfav (compared with the alternative of calculating Pfav on the basis of all petitions, even those dismissed on threshold grounds): it would still be the more revealing base if one assumes that decisions to dismiss petitions at the outset are more uniform or more reliable than decisions to find in favor of petitions -- a plausible assumption if one thinks it is easier to recognize a plainly frivolous claim than to recognize a truly meritorous claim.

On the other hand, if we do assume that a quite significant portion of the variation in Pdec already reflects differences in the attitude or predisposition of the judges -- some being significantly more inclined than others to dismiss petitions at the outset -- it is still not clear which base is most appropriate for computing Pfav. As noted above, if Pfav is calculated as a percentage of "decided" cases, then a judge who is relatively less inclined to dismiss petitions at the outset will generate a lower Pfav in comparison to a judge who is more inclined to dismiss petitions at the outset, even if each has a comparable propensity to issue (ultimate) favorable rulings. This might seem to argue for computing Pfav on the basis of all cases. But that approach raises the opposite conceptual difficulty, if one does assume that judges vary a good deal in their inclination to dismiss

petitions on threshold procedural grounds. The same judge who is more inclined than most to dismiss petitions on procedural grounds at the outset may also be more inclined to grant favorable rulings for those petitions he does consider at length -- and this difference would be lost if we looked at Pfav calculated on the basis of all cases. In fact, most judges do seem to rely on magistrates or clerks to do this initial screening so it is not at all implausible that many judges may show a restrictive tendency in taking up petitions at the outset but a more generous tendency when ruling on that portion of cases they do consider at length. And even if we assume that a lenient or generous approach to ultimate rulings will more often be associated with a lenient or generous approach to the initial screening (as judges signal clerks and magistrates on their overall attitudes to habeas review) it should be noted that the distorting effect of Pdec on Pfav (where Pfav is computed on the basis of "decided" cases) would then tend to understate variations in Pfav, as judges with more generous inclinations diluted the percentage of their favorable rulings by "deciding" a higher portion of cases overall and vice versa.

Calculating Pfav on the basis of all petitions would understate the variations far more sharply, however. The essential point to keep in mind is

that most judges dismiss the majority of habeas petitions at the threshold so the variations among judges can only show up -- if at all -- at the margins. Calcuating Pfav on the basis of "decided" cases is a way of focusing attention on the margins. Another glance at Table II.2 will indicate the importance of focusing on the margins. For each one of our variables, MP is strongly correlated with VP, indicating that as mean percentages rise, variations also increase. MPfav is very low for most districts if calculated on the basis of all petitions and there is accordingly far less difference in VPfav between districts, making comparisons less revealing.

Finally, we should recall again that the strong inverse correlation we find between MPdec and MPfav (when MPfav is calculated on the basis of "decided" petitions only) does not carry through to any correlation between MPst and MPfav, even though there does seem to be a fairly reliable inverse correlation between MPdec and MPst. This suggests that whatever distorting effect there may be in calculating MPfav on the basis of "decided" cases only, it is not a distortion so large as to overwhelm all other variables. As we will see, there are independent reasons for thinking that VPfav, calculated on this basis, is a genuinely revealing figure. But we will present both below in considering state comparisons.

Comparisons With State Appellate Decisions

If there are a great many conceptual and statistical difficulties in comparing federal habeas decisions in different districts, there are perhaps even more difficulties in comparing federal habeas decisions with state appellate decisions. What follows is no more than a very crude comparison but it is suggestive regarding the range of variations.

We gathered data on state appellate decisions by surveying published decisions on felony appeals in four states: New York, Illinois, Alabama and Texas. We chose these four states partly for ease of sampling but also because the habeas statistics from these states exemplify different levels of variation in Pfav: Aggregating the habeas data from all federal districts in each state, Illinois is considerably above the national mean in VPfav, New York is slightly above, Texas slightly below and Alabama much below.

For most purposes, however, it is better to make comparisons at the district level. The state court systems in New York and Illinois are divided into appellate districts, with a different set of appellate judges operating in each district, so our data from these states is subdivided into separate samples in the same way. Texas and Alabama have special courts of appeal

for criminal cases, so our data for these states covers the entire state. All of the samples are drawn from courts that are in most instances the first court of appeal above the trial level for criminal defendants, which means that they receive a wide variety of appeals, ranging from the most clearly frivolous to the most clearly meritorious. In this regard, they may be appropriate appellate dockets to compare with the habeas filings in U.S. district courts.

These state samples also cover a comparable or greater geographical range than the habeas data from individual U.S. district courts. The Texas and Alabama criminal appeals courts, with their statewide jurisdictions, receive appeals from cases that, if subsequently pursued in federal habeas petitions, could be channelled to any one of four U.S. district courts in Texas or any one of three district courts in Alabama. In New York, there are four state appellate districts and four U.S. district courts with roughly comparable geographical jurisdictions. Illinois, with five state appellate districts and only three U.S. district courts is the only state in our sample, then, where the data we have on habeas petitions is based on districts that are more encompassing than the state data we would compare it with -- and even here the difference is not great.

In each of the states we surveyed all felony appeals cases we could find between 1979 and 1981 (using a computer search with the key word "felony"). In Illinois, our sample covered 62 judges overall and 1531 decisions (counting the published vote or opinion of each judge as a separate "decision," so that in the typical three-judge panel, each case yielded three "decisions"). Excluding judges with less than 6 decisions, the sample covered 47 judges and 1499 decisions. The New York sample covered 68 judges and 2119 decisions: excluding judges with less than six decisions, it covered 62 judges and 2103 decisions. The Texas sample covered 13 judges (15 counting judges with less with than 6 decions each) and 2966 decisions (2969 counting the decisions by the transient judges). The Alabama sample covered 16 judges (41 counting transients) and 4442 decisions (4880 counting decisions by transients). As with the habeas data, we scored decisions on a simple binary basis as either "for" the criminal appellant or not ("for" the state), counting split decisions ("for both") as decisions "for " the appellant. We then calculated Pfav figures for each judge and from these calculated MPfav and VPfav figures for each state district with the same formulas we used wih the habeas data.

The most obvious differences between our state and federal samples

might be expected to introduce more variation in the state appellate decisions than in the federal habeas decisions. Any issue that can be raised in a habeas petition to a federal court can also be raised in state appellate tribunals, but state courts may also consider a range of guarantees under state law which could not be considered in habeas petitions to federal courts. There is another, perhaps even more important difference introduced by our sampling technique. Not all appellate decisions offer opinions and not all opinions are published, so data gathered from published opinions is likely to be biased toward the more interesting or difficult cases -- just those cases where variation in judicial responses may be more pronounced. By contrast, the federal habeas data includes all decisions, whether they received extended justifying opinions or not. Even if cases dismissed on a threshold jurisidictional issue are ignored in computing Pfav, one might expect the habeas data to include a larger number of routine cases where judges of rather different backgrounds or outlooks would still generally agree on the proper decision. This assumption is strengthened by the finding that MPfav is higher for virtually all of the state courts (except in Illinois) than it is for federal habeas filings in the comparable districts -- though this may be an artifact of our sampling process, to some degree, since we

can only count published opinions, meaning more difficult or more serious cases.

The most striking finding of our comparisons, however, is that the state samples do not always or even predominantly display more variation in Pfav. In Illinois, two of the three federal districts show weighted VPfav results that are far higher than the comparable VPfav results in each of the state appellate districts. In Texas, two of the four federal districts again show much larger VPfav figures. In Alabama, the habeas VPfav figures are smaller in every federal district than in the state criminal appeals court but not by much. Only in New York is there much more variation in state results than in federal habeas results.

Table III. 3 shows a comparison of MPfav and VPfav in Illinois, with the federal figures based on all "decided" cases. These figures have not been weighted but the judges with less than six cases have been excluded from the computations to avoid extreme distortion from low frequencies. Table II.4 shows the same results when weighting formulas are used and all judges included. For ease of comparison, the federal districts in both tables are listed in the same order as their geographically corresponding state appellate districts: N.Ill. is more or less continguous with SD #1 and SD #2,

E.Ill. is more or less continguous with SD #3 and SD #4, while S.Ill. is more or less continguous with SD #5.

TABLE II. 4

RAW MPfav and VPfav COMPARISONS IN ILLINOIS

Unweighted Figures (excluding judges with less than 6 cases)

State Dist.	MPfav	VPfav	Fed.Dist.	MPfav	VPfav
SD #1	4.07	80.27			
SD #2	3.72	8.67	N.Ill.	16.78	228.79
SD #3	10.93	78.49			
SD #4	12.04	61.26	S.Ill.	14.17	401.39
SD #5	8.30	56.38	E.Ill.	26.79	48.47
Aggregate	6.75	67.61	Aggregate	17.85	212.54

Weighted Figures (all judges)

State Dist.	MPfav	VPfav	Fed Dist.	MPfav	VPfav
SD #1	2.68	42.45			
SD #2	5.06	77.48	N.Ill.	15.08	133.64
SD #3	8.09	47.98			
SD #4	11.88	59.67	S.Ill.	28.00	161.31

State Dist.	MPfav	VPfav	Fed. Dist.	MPfav	VPfav
SD #9	9.12	49.34	E.Ill.	31.03	39.10
Aggregate	6.26	56.85	Aggregate	20.19	161.31

As this table shows, weighting does sometimes alter results quite significantly by reducing the "influence" of judges with extreme percentages based on a small number of cases. But in most cases weighted figures are not much different from the unweighted figures and in no case does the relative scale of state and federal VPfav alter because of weighting. These results are based on all ("decided") habeas petitions in the Illinois districts but, even while specific figures are altered, the relative order of VPfav between state and federal districts in Illinois does not alter if we look at VPfav based on habeas petitions from state prisoners only. This is shown in Table III.4 below, which presents weighted results, with the comparable state figures reproduced from Table III.3 for ease of comparison.

TABLE III.4
ILL. STATE PRISONER PETITIONS COMPARED WITH STATE APPEALS

State Dist.	MPfav	VPfav	Fed Dist.	MPfav	VPfav
SD #1	2.68	42.45			
SD #2	5.06	77.48	N.Ill.	13.65	145.52

State Dist.	MPfav	VPfav	Fed. Dist.	MPfav	VPfav
SD #3	8.09	47.98			
SD #4	11.88	59.67	S.Ill.	22.50	300.00
SD #5	8.12	59.34	E.Ill.	25.58	177.12

Only when we recompute VPfav for the Illinois habeas data on the basis of all state petitions (i.e. - including those dismissed on threshold grounds) doesthere seem to be more variation in the state appellate results, as Table III.5 shows. The figures are based on weighted computations, using only petitions from state prisoners in the federal habeas data. Again the state appellate data is the same as in the preceding tables and is reproduced here simply for ease of comparison.

TABLE III.5

COMPLETE ILL. STATE HABEAS PETITIONS VS. STATE APPEALS

State Dist.	MPfav	VPfav	Fed. Dist.	MPfav	VPfav
Dist. #1	2.68	42.45			
Dist. #2	5.06	77.48	N.Ill.	5.64	26.06
Dist. #3	8.09	47.98			
Dist. #4	11.88	59.67	S.Ill.	5.42	22.76
Dist. #5	8.12	49.34	E.Ill.	4.41	12.51

The pattern in our New York samples is almost the reverse of the Illinois

pattern: In New York, the state courts show much larger variations, while federal districts have much smaller VPfav figures. The raw MPfav and VPfav comparisons are presented in Table III.6 below, with the habeas figures computed from "decided" petitions only. As with the Illinois data, federal districts are arranged on the same line as the corresponding state appellate districts (i.e. - those covering approximately the same counties in the state).

TABLE III.6

RAW MPfav and VPfav COMPARISONS IN NEW YORK

Unweighted Figures (excluding judges with less than six cases)

State Dist.	MPfav	VPfav	Fed. Dist.	MPfav	VPfav
Dist. #1	32.38	160.28	S.N.Y.	9.71	104.81
Dist #2	37.85	144.21	E.N.Y.	3.81	8.96
Dist. #3	13.76	26.89	N.N.Y.	14.44	45.68
Dist. #4	39.33	300.74	W.N.Y	5.64	37.08
Aggregate	32.28	231.69	Aggregate	8.29	79.31

Weighted Figures (all judges)

Dist. #1	30.90	172.00	S.N.Y.	8.52	114.76
Dist. #2	38.71	120.62	E.N.Y.	4.82	11.58
Dist. #3	15.47	17.09	N.N.Y.	13.16	38.55
Dist. #4	37.67	156.88	W.N.Y.	5.02	12.95
Aggregate	28.72	198.14	Aggregate	7.21	76.77

Compared with Illinois, the New York state appellate courts seem to

overturn many more decisions of lower criminal courts (though the contrast may be exaggerated by a greater tendency to publish unfavorable decisions in Illinois) and the New York State courts also display more variation among judges. One might think that the New York courts would be more often subject to successful challenge in federal courts given these patterns (particularly the greater variation) but the data indicate the reverse. Perhaps it is the low rate of successful appeals in Illinois state courts that invites greater intervention by federal courts there. Despite the (apparently) much larger variation in New York state appellate decisions, successful habeas appeals to federal district courts in New York are much more infrequent than in Illinois, as Table III 6 confirms. The table presents a comparison of the weighted state figures with the habeas data drawn only from state prisoner petitions (but still computed only on the basis of "decided" cases), followed by the corresponding figures for state prisoner petitions when computed on the basis of all petitions.

TABLE III.7

N.Y. STATE HABEAS PETITIONS VS. STATE APPEALS

(based on "decided" petitions only)

State Dist.	MPfav	VPfav	Fed. Dist.	MPfav	VPfav
Dist. #1	30.90	172.00	S.N.Y.	8.00	114.82
Dist. #2	38.71	120.62	E.N.Y.	4.03	15.37
Dist. #3	15.47	17.09	N.N.Y	*	*
Dist. #4	37.67	156.88	W.N.Y.	4.76	14.12

(based on all petitions)

S.N.Y.	6.65	70.77
E.N.Y.	3.02	7.79
N.N.Y.	0.85	0.78
W.N.Y.	3.85	8.14

The corresponding figures for Texas and Alabama can be summarized more quickly. There is only one set of state figures in these states because each has only a single, specialized criminal appeals court. In Texas, as in Illinois, there is sometimes more variation in the habeas results than in the state appellate results, as shown in Table III.8, where weighted figures are placed immediately below the unweighted figures for each federal district (and un-

weighted figures again exclude judges with less than six cases).

TABLE III.8

RAW MPfav and VPfav COMPARISONS FOR TEXAS

State	MPfav	VPfav	Fed. Dist.	MPfav	VPfav
Texas	40.21	40.81	Aggregate	8.21	64.51
	40.86	47.33	(Weighted)	5.99	35.50
			N.Tex.	4.71	13.16
				5.44	11.86
			E.Tex.	10.07	139.58
				10.77	207.95
			S.Tex.	5.71	23.57
				4.28	24.20
			W.Tex.	14.85	107.31
				12.23	101.79

The table below presents, on the left hand side, the Texas habeas data when computed on the basis of state petitions only (but only for "decided" cases), followed, on the right, by the figures for all state petitions. All figures are weighted.

TABLE III. 9

TEXAS STATE PRISONER PETITIONS VS. STATE APPEALS

	(by "decided" cases)		*(by all cases)*		*(as above)*
Fed. Dist.	MPfav	VPfav	MPfav	VPfav	Texas
N.Tex.	5.91	14.31	4.77	12.83	
E.Tex.	6.45	178.39	1.06	1.39	
					MPfav: 40.86
S.Tex.	3.82	22.23	2.77	5.00	
					VPfav: 47.33
W.Tex.	10.79	97.12	499	10.78	

The Alabama figures, like those for New York, show a pattern of consistently greater variation in state appellate results than in the habeas decisions of the U.S. district courts, though the rane here is much closer. In Alabama, federal judges are rather consistently disinclined to find merit in habeas petitions, as the figures in Table III.10 indicate. The table presents the raw habeas data, with unweighted computations (excluding judges with less than six cases) listed first and the weighted computations (including all judges) in the second line for each district.

TABLE III.10

RAW MPfav and VPfav COMPARISONS FOR ALABAMA

State	MPfav	VPfav	Fed.Dist.	MPfav	VPfav
Aggregate	14.20	35.49	Aggregate	2.40	9.87
(Weighted)	14.22	30.40	(Weighted)	3.52	10.93
			N.Ala.	4.85	*
			(Wtd.)	4.48	12.27
			M.Ala.	0.90	1.10
			(Wtd.)	1.32	1.01
			S.Ala.	4.17	34.72
			(Wtd.)	5.68	22.60

There is little significant change in this pattern if we look at habeas data from state prisoners only (but computed on the basis of "decided" cases only) or at habeas data from state prisoners where percentages are computed on the basis of all cases in this category, as shown in the table below.

TABLE III.11

ALA. STATE PRISONER PETITIONS VS. STATE APPEALS

	(by "decided" cases)		*(by all cases)*		*(as above)*
Fed. Dist.	MPfav	VPfav	MPfav	VPfav	Ala.
N.Ala.	3.49	*	*	*	
					MPfav: 14.22
M.Ala.	1.43	1.24	1.15	0.84	

					VPfav: 30.40
S.Ala.	1.17	4.08	2.02	4.25	

Having set out all these figures, what are we to make of them? We certainly do not claim that VPfav -- however computed -- is a clear or direct measure of variation in the attitudes or predispositions of individual judges. It would certainly be unwarranted, that is, to infer simply from the presence of a high VPfav figure that a particular district or court has a larger number of idiosyncratic or self-indulgent judges than a district with a lower VPfav figure. Recall, to begin with, that VPfav is only a very rough indicator of variation and because the formula we use to compute it relies on the squaring of differences, the variations seem much larger than they are. A VPfav figure of 100 means that the average difference between individual judges and the mean percentage is only 10, so that, for example, where MPfav is 40%, any particular judge in that district is as likely to be ruling favorably on less than 30% or more than 50% of his cases as he is to be hitting the mean of 40%. This is certainly a significant degree of variation, much more than could reasonably be attributed to chance over a large number of cases. But where the VPfav is less than 25 -- meaning a range of variation of less than 5 (i.e., the square root of 25) on either side of the

mean -- the variation may well be entirely random. Comparisons between small VPfav figures are extremely dubious as indicators of judicial consistency.

The larger objection to these comparisons is that we do not know whether or to what extent the cases are randomly distributed. Where VPfav is as high as 100, we may be tempted to say that this reflects real differences among the judges. But it may simply reflect differences in their caseloads. These are not mutually exclusive alternatives, of course: some variation in any paricular district may well reflect differences in caseload while some of the variation does stem from differences in outlook or predisposition among the judges. We suspect that this is often the case but have no simple or reliable means for determining how much of the observed variation should be attributed to one cause or the other.

One persistant pattern in our tables is suggestive, however. When MPfav is small, VPfav also tends to be rather small. This is not a mere statistical effect. While it is true that a low mean leaves less room for deviation below the mean (since there can be no Pfav below 0), a low mean also allows for greater deviation above the mean (since no Pfav can be greater than 100 and upside deviations from the mean must accordingly be no greater than 100 -

MPfav). With the squaring technique we have used, it is certainly possible, mathematically, to have a relatively low MPfav and a rather high VPfav in the same district -- as a glance at the Illinois state appellate figures in Table III.3 will confirm. That we rarely see this pattern in the federal habeas data suggests that there is a certain threshold ratio of plausible claims that must be reached within the district as a whole before the variations among individual judges can come into play. This makes intuitive sense for it seems reasonable that where habeas petitions are only very rarely found to have merit, this knowledge -- or this experience -- overwhelms the differences in judicial disposition that might otherwise emerge. Thus, as we recall from Table III.2, there is a strong correlation between MPfav and VPfav in federal districts as a whole.

It is notable, however, that this does not seem to be true in state appellate districts. In Texas and Alabama, the state appellate figures are relatively low in VPfav despite rather substantial MPfav figures: in most appellate districts of Illinois and New York, the VPfav figures are very much higher even though the MPfav figures are not. We suspect that the greater uniformity in outcome in Alabama and Texas reflects the socializing effect of judges on the same court focusing on the same sorts of issues, over and

over again with the same colleagues, thus promoting greater uniformity of approach. Both the Alabama and the Texas criminal appeals court relegate most cases to three-judge panels, just like the appellate courts in New York and Illinois. But where judges in New York and Illinois share cases with their colleagues on a wide range of claims -- civil and criminal -- the exclusive focus on criminal appeals in the Alabama and Texas courts may be more conducive to consenus. By contrast, U.S. district judges decide habeas petitions, like most other cases, on a solo basis in isolation from each other. It may well be that this accounts for the greater variation we have found among U.S. district court in the handling of habeas decisions -- where any significan number of habeas decisions are found meritorious, to begin with.

At all events, there often is a good deal of variation among judges within the same district in their proportion of favorable rulings on habeas petitions. And on the basis of our limited comparisons with state courts, we can say that these variations do not appear to be significantly less -- and are sometimes much larger -- than the variations among state appellate judges. We cannot be sure how much of this variation stems from actual differences in the petitions considered by the various judges. But we do think we have uncovered rather suggestive evidence that some of this variation, at least,

does reflect differences in the attitudes or predispostions of the individual judges, as the next section of this report will explain.

ACCOUNTING FOR VARIATIONS IN HABEAS RULINGS

The VPfav figures we generated from the A.O. data could be attributed -- at least in some part -- to differences in the attitudes or predispositions of the judges, if these variations in decisional results were found to correlate with actual variations in the backgrounds of the judges. We faced two difficulties in attempting to check for such correlations, however. First, as we noted at the outset, the A.O. would not identify the federal district judges in our samples except by code. It seems to be policy in the judiciary to conceal as much information as possible about individual judges. The second difficulty is related: not much systematic and comprehensive data has been collected on the backgrounds and attitudes of federal district judges.

We coped with the second difficulty as best we could. It is easy enough to find out who was serving as a district judge in each federal district during the period covered by our sample. We then consulted standard reference works to obtain basic biographical data on each of these judges --

though we were limited to a few basic facts about each judge. We sought to get around the first difficulty by using this biographical data to construct a numerical background index for each judge and then computing mean scores on this index and variations around the mean for each district, so that we had MP and VP background figures for each district which could be compared with the MPfav and VPfav figures for each district. At the district level, we could still search for correlations without having to relate the backgrounds of individual judges to the decisional patterns of individual judges.

In theory, the district correlations ought to be quite as revealing as individual correlations: if a particular background trait does correlate with a clear decisional tendency, then districts where judges vary a good deal in regard to this background trait should be expected to show a good deal of variation in decisional results (that is, display a high VPfav figure). In practice, the difficulty with this approach is that it does not permit us to assign any weight to individual background indicators. We assume that the decisional ratios for individual judges (Pfav) are not equally reliable, because some are based on a large number of cases and some are based on only a few cases. We can weight these figures accordingly in constructing MPfav and VPfav but we have no way of determining which judge is which in

order to make comparable weightings of the background data. So we we can only compare actual variations in the backgrounds of judges with probabilistic projections of what the variations in decisional results might be if each judge were to decide the same number of cases. Or else we can compare actual background variations with actual variations in Pfav figures based on samplings of widely varying size and reliability. We feared that these difficulties might obscure almost any correlation which could be observed with fuller data. The fact that some correlations were still discernable is in itself a tribute to the persistance of these relations.

We first attempted to relate variations in MPfav and VPfav from district to district with variations in an index based on the political context of individual judicial appointments. We assigned a score of 1 to each judge appointed by a Republican president and a score of 2 to each judge appointead by a Democratic president but found no correlations using this simple rating system. We then tried adding to this score the ADA rating of the senator from each judge's state at the time of his appointment, if one of the senators was from the same party as the appointing president (taking the average of the two senators ADA ratings if both were of the same party as the president and where no senator was from that party, adding another .25 for judges

appointed by Republican presidents and another .75 for judges appointed by Democratic presidents). We tried for correlations using several different versions of our habeas decision data base but continued to find no meaningful correlations. This failure may reflect the limitations of our data but we suspect it tells more about the difficulty of projecting a judge's professional outlook from the partisan affiliations of the politicians who appoint him. Presidents and senators are usually distracted by too many other considerations to pick judges who neatly mirror their own views. Views on the array of issues entering into decisions on habeas petitions may, in any case, be quite peripheral to the concerns of appointing politicians and even to the professed concerns of judicial candidates.[12]

We did better when seeking correlations with the individual background characteristics of the judges, themselves. We assembled data on five background characteristics or rather, biographical facts, regarding each judge. We assigned a score of 0 to judges who had previously held elected office and a score of 1 to those who had not; we assigned a score of 0 to judges who had previously served in some capacity in the criminal justice system (as prosecutor, police official,etc.) and a score of 1 to those who had not; we assigned a score of 0 to judges who attended an average law school

and a score of 1 to those who attended one of the top 12 national lawschools identified in recent surveys; we assigned a score of 0 to judges who were registered Republicans, 1 to independents, 2 to registered Democrats; and we assigned a score of 0 to judges with some past involvement in a conventionally conservative advocacy group (such as the National Rifle Association), a 1 to judges with no past involvement in a political advocay group (or rather, no such involvement mentioned in the biographical reference works we consulted) and a score of 2 to judges who had been involved in a conventionally liberal advocacy group (such as the American Civil Liberties Union). These are, of course, very crude indicators, arranged according to rather crude stereotypes of how these backgrounds might affect a judge's outlook on habeas jurisdiction or criminal rights (former politicians, former law enforcement officials, Republicans and former conservative political activists: unfavorable; Democrats, graduates of prestige law schools and former liberal political activists: favorable).[13] Crude as these indicators may be, they are not distributed randomly.

To get around the weighting problem (or the problem of unreliable Pfav figures for judges with small numbers of cases) we combed out all judges in our sample with less than ten cases. We then tossed out those districts

where the number of judges remaining was less than .83 (7/8) the number of judges serving in that district between 1979 and 1982. Because, as we have noted, district judges are continually coming on and going off the bench, many districts had enough late appointees or early retirees to be eliminated from this selected sample. We were left with barely half of the districts in our original sample. But the correlations here were suggestive. Table III.10 shows correlations with VPfav and MPfav based on the complete habeas data for these districts (with percentages calculated on "decided" cases only).

TABLE III.12

COMPLETE HABEAS VARIATIONS vs. BACKGROUND VARIATIONS

CORRELATIONS

Background variable	VPfav x VPback.	MPfav x MPback
Held elective office	0.1536 0.4094	0.1156 0.4835
Previous law enforcement experience	0.2282 0.2168	-0.1111 0.5006
Prestige law school	0.3145 0.0849	0.2304 0.1582
Party affiliation	-0.1658 0.3726	-0.0760 0.6452

Affiliation with political advocacy group	-0.0698 0.7087	-0.0895 0.5878
Index (sum of previous indicators)	0.3772 0.0364	0.0972 0.5560

The lower figure in each listing is again the significance figure, representing the probability that the correlation described in the upper figure (the correlation coefficient) is purely random. Significance figures below .05 are usually regarded as indicating a very reliable correlation (meaning the odds such a correlation appearing by chance are less that 5%). By this standard, only one figure in the table is worth taking seriously: the correlation between the Index (which treats the some of all other background variables as an independent variable) and VPfav. This tells us that as the combination of background variables increases from district to district, so does the variation in habeas results. In other words, as we expected, more heterogeneous districts (in terms of judicial backgrounds) have more diverse habeas decisional patterns.

How can the sum of several indicators prove a good correlation when no one of the component indicators does so on its own? In fact, it is not so uncommon in statistical research to find this pattern, because independent variables may interact, reenforcing or negating each other, in ways not

immediately apparent. Table III.12 already offers some clues, however, regarding the independent force of some of the component variables. The significance figure for the correlation between law school and VPfav is only 0.0859 -- which is only a bit above 0.05 and therefore suggests that this correlation should be taken seriously, all the more so as the correlation coefficient here (0.3145) is respectably large and comes very close to the correlation coefficient for the Index. The next largest coefficient is the figure stating the correlation between VPfav and variations in previous law enforcement experience. The significance figure here (0.2168) is too far above 0.05 to place much reliance on the correlation -- but perhaps not so far above that it can be dismissed out of hand.

These correlations come into sharper focus when we use the habeas results based solely on state prisoner petitions and weighted as before -- without excluding judges with low number of cases. The results are in Table III.13, below.

TABLE III.13

STATE HABEAS VARIATIONS vs. BACKGROUND VARIATIONS

CORRELATIONS FROM WEIGHTED HABEAS DATA (ALL DISTRICTS)

Background variable	VPfav x VPback	MPfav x MPback.
Held elective office	-0.0896	0.1178

	0.4183	0.3218
Previous law enforcement experience	0.2098 0.0961	0.0085 0.9423
Prestige law school	0.2389 0.0572	0.1993 0.0909
Party affiliation	-0.1179 0.3532	-0.1106 0.3514
Affiliation with political advocacy group	-0.1184 0.3515	-0.1286 0.2783
Index (sum of previous indicators)	0.2322 0.0648	0.1395 0.2391

These figures offer rather compelling evidence that variations in the quality of law school attended by judges in a district are associated with variations in decisional patterns on habeas petitions. They certainly go some way, too, in strengthening the suggestion in the preceding table that variations among judges in their prior experience with criminal law enforcement are also associated with variations in decisional patterns on habeas patterns. What makes the law school variable seem particularly compelling -- apart from the low significance figure (0.0572) in the correlation with VPfav -- is the indication in the right hand column of a correlation between MPfav and the mean law school indicator for each district. The correlation coefficient is low at just under 2.0 and the significance figure (0.09) is a bit

too high to place great confidence in this correlation. But even this much indication of a correlation bolsters one's confidence in the correlation between the variations. What about the apparent correlation between variation in previous law enforcement experience and VPfav? Why is there no similar correlation between district means on this variable and MPfav? It may be that the correlation of variations is, itself, spurious. But it also may be that this variable means something different in districts where most judges have previous law enforcement experience than in districts where only a few do. It may be, for example, that where few judges have had previous experience in criminal law enforcement, a candidate who does have such a background will strike the eye of a senator or a president who wants judges with a somewhat tougher outlook on criminal procedure -- whereas a candidate with this background would not stand out at all in a district where many judges had served as local prosecutors or U.S. attorneys.

At all events, we are impressed at finding any correlations given the awkwardness of the data we have had to work with. The correlations are clearest with VPfav figures drawn from weighted samples from all districts (and using only "decided" state cases) as above. But they also appear when using unweighted samples drawn from state petitions for those dis-

tricts (less than half) where most judges have more than ten cases. This is shown in Table III.15, below.

TABLE III.15

HABEAS VARIATIONS vs. BACKGROUND VARIATIONS

CORRELATIONS FROM UNWEIGHTED HABEAS DATA (SELECTED DISTs)

Background Variable	VPfav x VPback	MPfav x MPback
Held elective office	-0.1738 0.3672	0.1384 0.4140
Previous law enforcement experience	0.2789 0.1429	-0.0543 0.7494
Prestige law school	0.3470 0.0651	0.1937 0.2506
Party affiliation	-0.1369 0.4788	-0.1381 0.4150
Affiliation with political advocacy group	-0.0762 0.6941	-0.1586 0.3485
Index (sum of previous indicators)	0.4502 0.0143	0.0860 0.6127

This table gives the strongest correlation between the Index variation and VPfav, while still confirming the significance of the law school variable. The correlation between the mean for this variable and MPfav has nearly disappeared, however, and the suggested correlation between previous law enforcement experience and VPfav is also obscured. Still, in broad terms,

this table confirms our sense that variations in habeas decisional patterns are indeed associated in some way with variations in the backgrounds of the judges.

In the previous section we offered VPfav figures calculated on the basis of all state habeas petitions (that is, including "undecided" cases), though in the previous section we offered several reasons why we do not regard these figures as being equally reliable or equally revealing as indicators of variation. For the sake of completeness, we offer correlations with this "inclusive" version of VPfav in Table III.15. The figures are unweighted and restricted to districts where most judges more than 10 cases. If this were our only data, we might be tempted to look more carefully at the Index, which has a high significance figure (0.1199) but perhaps not so high as to dismiss altogether and we would be struck by the low significance figure for the correlation between VPfav and variation in elective office.

TABLE III.16

HABEAS VARIATIONS vs. BACKGROUND VARIATIONS

CORRELATIONS WITH HABEAS DATA FROM ALL STATE PETITIONS

Background variable	VPfav x VPback	MPfav x MPback
Elective office	0.2452	-0.0868

	0.0894	0.5208
Previous law enforcement experience	0.1080 0.4599	-0.0107 0.9369
Prestige law school	0.0833 0.5444	-0.0741 0.5835
Party affiliation	-0.0538 0.7135	-0.1396 0.3004
Affiliation with political advocacy group	0.2251 0.5692	-0.1175 0.3840
Index (sum of previous indicators)	0.2251 0.1199	-0.1453 0.2806

Having explained before why we do not think VPfav should be calculated on the basis of all petitions (including "undecided") we do not think there is much more to be said about the correlations -- or non-correlations -- in this table. We do not take this results as any serious disconfirmation of the results in the previous two tables using different (and we think, more reliable) VPfav figures.

If we are correct in discerning a definite correlation between VPfav and variations in the quality of law school attended by judges and if we are correct in our more tentative conclusion that VPfav is correlated with variations in the prior law enforcement experience of judges -- what do

these correlations really prove? They certainly do not prove that an elite legal education or a background in law enforcement "causes" judges to have a particular attitude toward habeas petitions. We assume that these objective background characteristics are strongly associated with the subjective dispositions that make judges more likely to treat habeas petitions sympathetically in the one case and unsympathetically in the other. But we cannot prove this and the correlations we observe may have a more arcane or indirect explanation. Districts with a high VPfav, for example, may be districts where federal district judges are known for their aggressive individualism and this reputation attracts some graduates of prestige law schools to seek appointment to the bench in these districts. Or it may be that districts where the judges have varied backgrounds also happen to be quite politically and socially heterogeneous, so that there are more perplexing or close cases coming before the judges for habeas review. The statistical correlations we have discovered do not indeed exclude the possibility that most of the variation in decisional results has nothing at all to do with differences between judges and derives instead from differences in the petitions they receive.

On balance, however, we think the most plausible reading of all the data

is that some of the variation does actually reflect differences in the attitudes of the judges. But the data do not tell us how much of the variation can be explained by this or how important a factor attitudinal differences may be in explaining habeas results. These correlations do not prove, then, that personal attitudes have more of an effect on habeas results than on decisions in state appellate courts. They do seem to confirm, however, that the large variations in habeas corpus decisions by federal judges -- variations sometimes larger than the variations among individual judges in state appellate courts -- are indeed connected with variations in the personal backgrounds of the federal judges.

CONCLUSIONS

We believe we have demonstrated -- or at least provided strong evidence for -- three distinct claims in this report. First, there are very considerable variations in the decisional patterns of U.S. district court judges on habeas corpus petitions, even when comparing judges in the same

districts. Second, these variations are as large and sometimes larger than variations among state appellate judges in the same geographic regions (who presumably review a similar mix of state trial convictions). Third, at least some part of this variation in the habeas decisional patterns of federal judges can be attributed to differences in the personal backgrounds of the judges.

This does not prove that federal judges are less disciplined, less conscientious or less professional about habeas review than are state judges in their appellate decisions. Nor, for that matter, would a demonstration of this fact -- supposing it is a fact (which we do not ourselves suppose) -- compell the conclusion that the habeas jurisdiction of federal district courts ought to be cut back. We do think it is fair to say, however, that much of the contemporary debate on the proper scope of federal habeas jurisdiction deals in broad stereotypes. In particular, those who urge the preservation or the extension of a broad habeas jurisdiction in the federal courts for state prisoners tend to assume that federal judges will be more detached or more reliable in upholding federal procedural guarantees. If this study does not refute that assumption, we think it should stir some doubt. And we hope it

is not a negligible contribution to have stirred some doubt in a debate that has relied too much on dogmatic assertion.[14]

NOTES

1. See William F. Duker, *A Constitutional History of Habeas Corpus* (Westwood, Conn. Greenwood Press, 1980), esp. pp. 189-208, explaining how even the relatively broad Reconstruction era statute on federal habeas jurisdiction was given narrow effect by the Supreme Court in the late Nineteenth Century and continued to be of minor significance until the innovations of the Warren Court in the early 1950s.

2. The key decision was *Brown v. Allen*, 344 U.S. 443 (1953), allowing federal habeas jurisdiction to redetermine the merits of constitutional questions actually considered and decided in state criminal proceedings. The availability of the writ was further expanded in a trilogy of cases in 1963: *Sanders v. U.S.*, 373 U.S. 1; *Fay v. Noia*, 372 U.S. 391; *Townsend v. Sain*, 372 U.S. 293.

3. These and other figures are drawn from the *Annual Reports of the Director, Administrative Office of the United States Courts*, usefully summarized in a Bureau of Justice Statistics, Special Report entitled, *Federal Review of State Prisoner Petitions, Habeas Corpus*, March 1984.

4. Complaints of this kind are elaborated in the testimony of state attorneys general in a 1983 hearing before the Senate Subcommittee on Separation of Powers, Committee on the Judiciary, entitled *Federalism and the Federal Judiciary* (No. J98-19), pp. 5-13, 291-329.

5. See K.M. Allen, N.A. Schachtman, D.R. Wilson, "Federal Habeas Corpus and Its Reform: An Empirical Analysis," 13 RUTGERS L.J. 675 (1982).

6. See Table 4 in BJS Special Report, *Habeas Corpus*.

7. For early statements of this position, see Desmond, "Federal Habeas Corpus Review of State Court Convictions," 50 GEO. L.J. 755 (1962) and other sources cited in Shapiro, "Federal Habeas Corpus," 87 HARV. L. REV. 321 (1973) at 322-23. The Supreme Court somewhat cut back on access to habeas corpus review of state convictions by federal courts in *Stone v. Powell*, 428 U.S. 465 (1976) and *Francis v. Henderson*, 425 U.S. 536 (1976).

For critical commentary, see Michael, "The 'New' Federalism and the Burger Court's Deference to the States in Federal Habeas Corpus," 64 IOWA L.REV 233 (1979) and Flagg, "*Stone v. Powell* and the New Federalism," 14 HARV. J. LEGIS 152 (1976); The BJS study found that *Stone* did not have quite the impact that some critics of the decision had feared, however. See, "Federal Habeas Corpus and Its Reform: An Emprirical Analysis," 13 RUT. L.J. at 763.

9 See S.1763, passed by the Senate on February 6, 1984 (but subsequently buried in the House) and the recommendations of the Attorney General's Task Force on Violent Crime on reform of habeas corpus procedure.

10 See, e.g., Neuborne, "The Myth of Parity," 90 HARV. L. REV. 1105 (1977)

11. These and other critical responses to the Neuborne position (see N. 10) are elaborated in Fischer, "Institutional Competency: Some Reflections on Judicial Activism in the Realm of Forum Allocation Between State and Federal Courts," 34 U.MIAMI L.REV 175 (1980)

12. Efforts of other researchers to find correlations between party background and judicial behavior have been mixed, at best. See, e.g., S.Goldman, "Voting Behavior on U.S. Courts of Appeals, 1961-64," 60 APSR 374 (1966), discounting the significance of party and Goldman, "Voting Behavior on U.S. Courts of Appeals Revisited," 69 APSR 491 (1975), finding some meaningful relation. Another negative finding, this time concerning district court judges, is Walker, "A Note Concerning Partisan Influence on Trial Judge Decisionmaking," 6 LAW & SOC. REV. 645 (1972)

13. Some of these "crude" indicators have been found to predict judicial voting behavior in other studies, too, however. On the significance of prosecutorial experience, see Nagel, "Judicial Backgrounds and Criminal Cases," 53 J. CRIM. LAW. 333 (1962) and H. Sheldon, "Judicial Roles: Background and Norms," 9 CAL. W. L.REV. 497 (1973); on the significance of party, Nagel, "Testing Relationships Between Judicial Characteristics and Judicial Decisionmaking," 15 W.POL.QUAR. 423 (1962); on the difficulties of establishing any clear connection with legal education, see Mecone, "Legal Education and Judicial Decisions: Some Negative Findings," 26 J. LEGAL ED 566 (1974)

14. We are certainly not the first researchers to have attempted this, however, and it is worth noting that most other empirical studies attempting to compare state and federal performance have come to similar conclusions about the dubiousness of any broad claims for federal superiority See Solimine and Walker, "Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity," 10 HASTINGS CONST'L. L. Q. 213 (1983) and Gruhl, "State Supreme Courts and the U.S. Supreme Court's post-Miranda Rulings," 72 J. CRIM.LAW 866 (1981)