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HABEAS CORPUS—LIMITING THE AVAILABILITY OF HABEAS CORPUS AFTER A PROCEDURAL DEFAULT

**Engle v. Isaac, 102 S. Ct. 1558 (1982);
United States v. Frady, 102 S. Ct. 1584 (1982).**

I. INTRODUCTION

Since *Brown v. Allen*¹ the rule has been well-established that in habeas corpus proceedings federal courts have the independent power to evaluate a prisoner's constitutional claim even if a state court has already ruled on the merits of the claim. A key problem that the Supreme Court has continued to confront after *Brown* is the reviewability of a constitutional claim forfeited in the state courts by a habeas petitioner because defense counsel failed to assert the claim at trial as required by a state procedural rule. The resolution of this problem implicates several important issues, including the proper balance of power between state and federal courts, the need for finality of criminal convictions, and the socially acceptable level of unconstitutional incarcerations.

Whether habeas corpus relief should be readily available to prisoners with constitutional claims forfeited after a procedural default is largely a question of social policy. The Warren and Burger Courts have reached very different conclusions regarding the proper scope of habeas relief, even though the underlying statutory provisions² have remained

¹ 344 U.S. 443 (1953).

² The statutory provisions interpreted by the Court in its decisions on the availability of habeas corpus after a procedural default provide in pertinent part:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1976 & Suppl. III 1979).

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1976 & Suppl. III 1979). Section 2254 applies to state prisoners while § 2255 applies to federal prisoners. For purposes of convenience, "habeas corpus" will refer to actions under both sections.

essentially unchanged.³ The Warren Court established that a federal court could withhold its review of a constitutional claim forfeited in state court only if it found that the habeas petitioner and defense counsel had deliberately bypassed state courts with the claim.⁴ In contrast, the Burger Court has placed the burden on habeas petitioners to show both "cause" for their failure to properly raise an issue in state court and "actual prejudice" from the alleged error before a federal court will consider the issue.⁵

Last term, the Supreme Court in two decisions expanded the class of habeas petitioners who must meet the requirements of cause and prejudice. In *Engle v. Isaac*,⁶ the Court extended the cause-and-prejudice standard to petitioners alleging constitutional errors involving the truthfinding function of the trial. The *Isaac* Court also defined the "cause" prong so restrictively that few habeas petitioners will be able to meet the requirement. Similarly, the Court in *United States v. Frady*⁷ defined the "actual prejudice" prong in a manner which shifts the initial focus of a habeas proceeding to the guilt or innocence of the petitioner and away from the constitutionality of the conviction itself. In *Frady*, the Court also precluded federal courts from noticing "plain error" in collateral proceedings.

This Note examines the two decisions, both written by Justice O'Connor, and outlines how the Burger Court has developed the *Wainwright v. Sykes*⁸ cause-and-prejudice standard into a high procedural barrier which few habeas petitioners can surmount. It will then criticize four of the assumptions relied upon by the Court in its policy of restricting the availability of habeas corpus: (1) habeas petitions place an undue burden on the federal judiciary; (2) the availability of habeas corpus undermines the finality of criminal convictions; (3) the actions of defense counsel should bind habeas petitioners; and (4) habeas corpus undermines federalism.

II. AN OVERVIEW OF *ISAAC* AND *FRADY*

A. *ENGLE V. ISAAC*

The habeas corpus proceeding in *Engle v. Isaac* arose as a result of

³ As Justice Rehnquist observed: "The foregoing discussion . . . is pertinent here only as it illustrates this Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

⁴ *See, e.g.*, *Fay v. Noia*, 372 U.S. 391 (1963).

⁵ *See, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72 (1977).

⁶ 102 S. Ct. 1558 (1982).

⁷ 102 S. Ct. 1584 (1982).

⁸ 433 U.S. 72 (1977).

changes in Ohio criminal law regarding the defendant's burden of proving self-defense. For more than a century, Ohio courts required defendants to carry the burden of proving self-defense by a preponderance of the evidence.⁹ In 1974, a new state criminal code became effective, providing in pertinent part that "[t]he burden of going forward with the evidence of an affirmative defense is upon the accused."¹⁰ A year later, the Ohio Supreme Court stated in dicta that this provision did not change Ohio's traditional allocation of the burden of proving self-defense.¹¹ In 1976, however, the Ohio Supreme Court in *State v. Robinson*¹² reinterpreted the statute as placing the burden of production but not the burden of persuasion on the defendant who claims self-defense. The Ohio Supreme Court later retroactively applied the *Robinson* decision,¹³ but only to those defendants whose attorneys had objected at trial to the erroneous burden of proof instruction.¹⁴

Isaac was convicted of aggravated assault in 1975. His conviction occurred after the adoption of the new criminal code but before the decision in *Robinson*. On appeal, Isaac relied on *Robinson* to challenge the trial court's burden of proof instruction, but the court rejected this claim on the ground that Isaac had forfeited consideration of the issue because his attorney failed to make a timely objection at trial as required by the state contemporaneous objection rule.¹⁵ The Ohio Supreme Court dismissed Isaac's appeal for lack of a substantial constitutional question.¹⁶ A federal district court then rejected Isaac's habeas corpus petition on the ground that Isaac failed to meet the *Wainwright v. Sykes*¹⁷ requirements of showing "cause" and "actual prejudice" for his attorney's fail-

⁹ See, e.g., *State v. Seliskar*, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973) (per curiam); *Silvus v. State*, 22 Ohio St. 90 (1871).

¹⁰ OHIO REV. CODE ANN. § 2901.05(A) (Baldwin 1975). In 1978, the Ohio legislature amended this provision to read "[t]he burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused." OHIO REV. CODE ANN. § 2901.05(A) (Baldwin 1975 & Supp. 1980).

¹¹ *State v. Rogers*, 43 Ohio St. 2d 28, 30, 330 N.E.2d 674, 676 (1975), cert. denied, 423 U.S. 1061 (1976).

¹² 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976) (syllabus by the court). Under the holding in *Robinson*, once the defendant produces some evidence of self-defense, the prosecution must disprove self-defense beyond a reasonable doubt.

¹³ *State v. Humphries*, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).

¹⁴ *State v. Williams*, 51 Ohio St. 2d 112, 346 N.E.2d 1364 (1977), vacated in part and remanded, 438 U.S. 911 (1978).

¹⁵ *State v. Isaac*, No. 346 (Ohio Ct. App. Pickaway County, Feb. 11, 1977). At the time of Isaac's trial, Ohio's contemporaneous objection rule provided: "A party may not assign as error the giving or failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the ground of his objection." OHIO R. CRIM. 30.

¹⁶ *State v. Isaac*, No. 77-412 (Ohio, July 20, 1977).

¹⁷ 433 U.S. 72 (1977).

ure to challenge the burden of proof instruction at trial.¹⁸ The Sixth Circuit Court of Appeals reversed, concluding that the futility of an objection to the jury instruction at trial satisfied the cause requirement, while the critical importance of a correct allocation of the burden of proof met the actual prejudice standard.¹⁹

The Supreme Court reversed on the ground that Isaac had not shown cause for his attorney's failure to object to the trial court's erroneous jury instruction.²⁰ Because Isaac failed to show cause, the Court did not consider whether the erroneous instruction had resulted in actual prejudice.²¹

After establishing that Isaac had raised a colorable constitutional claim,²² Justice O'Connor's majority opinion laid the policy foundation for the decision by tallying the "significant costs" of habeas corpus. First, "[c]ollateral review of a conviction extends the ordeal for both society and the accused."²³ Habeas corpus and other collateral proceedings frustrate the achievement of finality in criminal proceedings.²⁴ Second, "[l]iberal allowance of the writ . . . degrades the prominence of the trial itself."²⁵ Ready availability of collateral remedies creates a disincentive for the parties to adhere to fair procedures at trial.²⁶ Third, "writs of habeas corpus frequently cost society the right to punish admitted offenders."²⁷ After a writ of habeas corpus has been granted, retrial of successful petitioners may be difficult, if not impossible, due to the passage of time, the failure of memory, and the dispersion of the witnesses.²⁸ Fourth, "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights."²⁹ Repeated federal intrusions into state criminal proceedings through habeas corpus undermine the morale of state judges and serve no significant purpose, given both

¹⁸ *Isaac v. Engle*, Civ. Action No. C-2-78-278 (S.D. Ohio, June 26, 1978).

¹⁹ *Isaac v. Engle*, 646 F.2d 1129 (6th Cir. 1980) (en banc).

²⁰ *Engle v. Isaac*, 102 S. Ct. 1558 (1982).

²¹ *Id.* at 1575, n.43.

²² *Id.* at 1567-69. The Court rejected respondents' claim that § 2901.05(A) of the Ohio Criminal Code implicitly required the state to prove the absence of self-defense as an element of the crimes charged against them. *Id.* at 1567-68. While the Court treated respondents' other allegation—that the state could not shift the burden of proving self-defense to the defendants—as a colorable constitutional claim, *id.* at 1568-69, it did not reach the merits of this claim because Isaac and his co-respondents failed to satisfy the cause and prejudice test.

²³ *Id.* at 1571.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* Justice O'Connor provided no support for this assertion. The commentary on the subject does not support her position. See *infra* note 149.

²⁸ 102 S. Ct. at 1571.

²⁹ *Id.*

the commitment and the ability of state courts to preserve constitutional rights.³⁰ Justice O'Connor concluded that these four costs are especially high when prisoners have been barred from having their constitutional claims adjudicated in state courts because of a procedural default.³¹

Relying on its perception of the costs of habeas corpus, the Court first refused to limit the cause-and-prejudice requirement to cases in which the constitutional error did not affect the truthfinding function of trial.³² Justice O'Connor asserted that the costs of habeas corpus are unaffected by the nature of the prisoner's claim.³³ The type of alleged constitutional error, she concluded, affects only the determination of whether the cause-and-prejudice standard has been met.³⁴

The Court then held that Isaac had not shown sufficient cause for his attorney's failure to raise the burden of proof issue at trial. It rejected at the outset his argument that the futility of objecting to the instruction at trial constitutes cause.³⁵ Justice O'Connor reasoned that to equate futility with cause would permit litigants to bypass unsympathetic state courts with their constitutional claims and thus deprive state courts of the opportunity to revise their position on the issue.³⁶ The Court also rejected Isaac's argument that a constitutional challenge to the burden of proof instruction was unknown at the time of trial.³⁷ Pointing to the Court's decisions in *In re Winship*³⁸ and *Mullaney v. Wilbur*,³⁹ as well as to a variety of state and federal cases,⁴⁰ Justice O'Connor concluded that the basis for an attack on the burden of proof

³⁰ *Id.*

³¹ *Id.* at 1572. Justice O'Connor identified four reasons why the costs of habeas corpus are especially high when a procedural default has precluded state court adjudication of a constitutional claim: (1) state courts have no opportunity to correct their errors; (2) the significance of the trial is diminished; (3) state appellate courts are unable to correct misinterpretations of constitutional provisions; and (4) state procedural rules are undermined. *Id.*

³² *Id.* *Isaac* and *Frady* involved challenges to erroneous jury instructions. In previous cases where the Court applied the cause-and-prejudice standard, the alleged constitutional errors did not affect the truthfinding function of the trial. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977) (Miranda violation); *Francis v. Henderson*, 425 U.S. 536 (1976) and *Davis v. United States*, 411 U.S. 233 (1973) (racial discrimination in grand jury selection).

³³ 102 S. Ct. at 1572.

³⁴ *Id.* The nature of the claim would appear to be most relevant to a determination of the prejudice prong of the *Sykes* standard. As discussed below, however, the Court's insistence on the conjunctive application of the cause and prejudice prongs permits serious constitutional errors to go unremedied because the cause requirement is so difficult to meet. See *infra* notes 71-88 and accompanying text.

³⁵ 102 S. Ct. at 1572.

³⁶ *Id.* at 1572-73.

³⁷ *Id.* at 1573. The Court reserved the question "whether the novelty of a constitutional claim ever establishes cause for a failure to object." *Id.*

³⁸ 397 U.S. 358 (1970).

³⁹ 421 U.S. 684 (1975).

⁴⁰ These cases are cited at 102 S. Ct. 1573, n.40. See *infra* note 42.

instruction was "far from unknown."⁴¹ While conceding that Isaac's attorney may have overlooked a challenge to the instruction or omitted the claim in favor of more promising defenses, Justice O'Connor held that "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as cause of a procedural default."⁴²

⁴¹ 102 S. Ct. at 1573.

⁴² *Id.* at 1574-75. The issues of the futility of making an objection at trial and the availability of a constitutional challenge to the trial court's burden of proof instruction are of central importance to understanding just how difficult the Supreme Court intends the cause requirement to be. The sources cited by Justice O'Connor provide only the faintest support for her assertion that a constitutional challenge to Ohio's allocation of the burden of proving self-defense could have been constructed at the time of Isaac's trial.

At the time of Isaac's trial, one reported Ohio case hinted that the burden of proving self-defense had been altered by § 2901.05(A) of the Ohio Criminal Code. In *State v. Slone*, 45 Ohio App. 2d 24, 340 N.E.2d 413 (1974) (dicta), the court of appeals cited to its earlier, unreported decision, *State v. Matthews*, No. 74-AP-428 (Ohio Ct. App. Franklin County, Dec. 24, 1974), where it had stated that defendant no longer had the burden of proving self-defense. *Slone*, 45 Ohio App. 2d at 30-31, 340 N.E.2d at 418. (The Supreme Court notes the *Matthews* decision at 102 S. Ct. at 1563, n.2.) The same court definitively held on August 26, 1975 that the defendant no longer shouldered the burden of proving self-defense. *State v. Robinson*, 48 Ohio App. 2d 197, 356 N.E.2d 725 (1975), *aff'd*, Ohio St. 2d 102, 351 N.E.2d 88 (1976). Isaac's trial, however, was in September, 1975 and the *Robinson* decision was unreported for over a year.

The value of these decisions by a single court of appeals, even if known by Isaac's attorney, would have been slight. The Ohio Supreme Court apparently reaffirmed the traditional burden of proof allocation only two months before Isaac's trial: "Inasmuch as self-defense is an affirmative defense, which must be established by a preponderance of the evidence [it] . . . places the burden of going forward with the evidence upon the accused . . . to prove that issue by a preponderance of the evidence." *State v. Rogers*, 43 Ohio St. 2d 28, 30, 33, 330 N.E.2d 674, 676-77 (1975) (citations omitted). In sum, at the time of Isaac's trial Ohio case law gave only the weakest support for a challenge to the burden of proof instruction.

There was also little or no support in the legislative history of § 2901.05(A) or in Ohio's pattern jury instructions, practice manuals, or legal literature to suggest that the traditional burden of proof rule had changed. See Brief for the Respondent at 7, *Isaac*. But see *Isaac*, 102 S. Ct. 1558, 1563 n.2. Interestingly, the Supreme Court and the respondents cite some of the same materials in reaching opposite conclusions about the availability of the constitutional challenge at the time of trial, suggesting that it was far from well-established.

Justice O'Connor also pointed to Supreme Court decisions in *In re Winship*, 397 U.S. 358 (1970) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975) as providing the basis for an attack on the burden of proof instruction. 102 S. Ct. at 1573-74. She listed twenty-five cases and two dissenting opinions from state and federal courts where burden of proof instructions had been challenged under *Winship* and *Mullaney*. *Id.* at 1573-74 n.40. Only one of these cases, *State v. Robinson*, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976), was from Ohio and it was reported over a year after Isaac's trial. An additional four of the twenty-five were decided in September 1975, when Isaac was tried, or later. None of the cases decided or reported before Isaac's trial involved self-defense and all but four were state cases.

Justice O'Connor also used a well-known treatise, W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 8, at 46-51 (1972), to support her assertion that a challenge to the burden of proof instruction was "available." The thrust of LaFave and Scott's discussion of affirmative defenses, however, leads to the opposite conclusion. They note that the courts are divided on the question of whether the defendant or the state should have the burden of

Although the Court once again failed to give substantive content to the term "cause,"⁴³ *Isaac* clearly demonstrates that a habeas petitioner will not meet the cause requirement merely by showing that an objec-

proving the existence or non-existence of affirmative defenses and argue that after the defendant raises an affirmative defense the state properly bears the burden of proving the non-existence of the affirmative defense beyond a reasonable doubt. *Id.* at 47-48. Noting the impact of *Winship*, the authors identify some affirmative defenses, such as insanity or alibi, "which go directly to negative the existence of one of the essential elements of the crime" and for which it is "clearly a denial of due process" to place the burden of proof on the defendant. *Id.* at 48. They distinguish these affirmative defenses from another category in which they explicitly include self-defense, where "the due process issue could certainly be argued either way." *Id.* at 49.

Thus, the LaFave and Scott *Handbook* undercuts Justice O'Connor's argument in two ways. First, it singles out self-defense as an affirmative defense to which the *Winship* due process principles are much less likely to be applied. Second, by distinguishing self-defense from the category of affirmative defenses that negate one of the elements of the crime, the *Handbook* fails to support Justice O'Connor's heavy reliance on cases raising the latter kind of affirmative defense. Eight of the twenty-five cases cited by Justice O'Connor involved insanity or alibi defenses, and in at least four others defendants raised related affirmative defenses.

The three student notes cited by Justice O'Connor also provide little support for her position. The discussion of *Winship* in the portion of the Harvard Law Review cited to by the Court focuses only on whether *Winship* may require the state to prove the absence of affirmative defenses when establishing guilt beyond a reasonable doubt. *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 159 (1970). Insanity is the only affirmative defense mentioned and the student commentator concludes that courts will be "reluctant" to place this burden on the state. Indeed, the *Isaac* Court rejected respondents' attempt to force the state to prove the absence of self-defense as part of its burden of proof. *Isaac*, 102 S. Ct. 1558, 1567-68 (1982). The Ohio State Law Journal discussion of affirmative defenses focuses only on a precursor bill to § 2901.05(A) and only obliquely implies that Ohio's traditional burden of proof allocation for self-defense might be changed. Student Symposium, *The Proposed Ohio Criminal Code—Reform and Regression*, 33 OHIO ST. L.J. 351, 419-421 (1972). Finally, the student comment in the Maine Law Review focused on *Wilbur v. Mullaney*, 473 F.2d 943 (1st Cir. 1973), *remanded* 414 U.S. 1139 (1974); it did not discuss the Supreme Court opinion, *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which treated the burden of proof issues and upon which Justice O'Connor relied. As the title of the comment suggests, the author believed that the "paramount significance" of *Mullaney* was the failure of the adequate state ground rule to preclude federal court rejection of a state court's interpretation of state substantive law in a habeas proceeding. Comment, *Due Process and Supremacy as Foundations for the Adequacy Rule: The Remains of Federalism After Wilbur v. Mullaney*, 26 ME. L. REV. 37 (1974). The author's discussion of due process issues is cursory and provides little grist for a challenge to Ohio's burden of proof allocation for self-defense.

Moreover, the relevance of any of these authorities to *Isaac*'s attorney is questionable, given the Ohio Supreme Court's apparent affirmation of the traditional burden of proof rules only two months before *Isaac*'s trial. *State v. Rogers*, 43 Ohio St. 2d 28, 30, 330 N.E.2d 674, 676 (1975).

⁴³ Justice Rehnquist had promised in *Sykes* that later cases would provide a "precise definition" of the terms "cause" and "actual prejudice." *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977). The Court did attempt to define "actual prejudice" in *United States v. Frady*, 102 S. Ct. 1584, 1595 (1982).

Justice Brennan described the cause-and-prejudice standard as a "house of cards" and expressed his dissatisfaction with the Court's efforts in *Isaac* and *Frady*: "The Court has now begun to furnish its house of cards—and the furniture is as jerry-built as the house itself." *Isaac*, 102 S. Ct. at 1580 (Brennan, J., dissenting).

tion at trial would have been futile or that defense counsel inadvertently or negligently failed to raise the issue. Rather, the petitioner must show not only that the constitutional claim was not recognized at the time of trial, but also that there existed no "tools" for constructing the claim.⁴⁴

Justice Brennan, joined by Justice Marshall, dissented vigorously, attacking both the policy assumptions relied upon by the majority and the application of the cause-and-prejudice standard to Isaac's petition.⁴⁵ He questioned the Court's assumption that prisoners would consider it an ordeal to test an allegedly unconstitutional conviction in federal court and saw no significant societal interest in ensuring the finality of convictions potentially tainted by constitutional error.⁴⁶ He accused the majority of "sheer demagoguery" in blaming the successful habeas petitioner for the difficulties of retrial⁴⁷ and attacked the notion that Isaac and his co-respondents were "admitted offenders."⁴⁸

Justice Brennan also faulted the majority for its use of the principle of comity to limit federal court consideration of habeas petitions: "It is inimical to the principle of federal constitutional supremacy to defer to state courts' 'frustration' at the requirements of federal constitutional law"⁴⁹ Finally, Justice Brennan dissented from the extension of the cause-and-prejudice standard to errors involving the truthfinding function of trial.⁵⁰ He argued that an unconstitutionally allocated burden of proof renders the entire trial untrustworthy, while unconstitutionally obtained evidence, for example, remains trustworthy.⁵¹ The majority's extension of the standard, Justice Brennan argued, ignored that vital distinction.⁵²

⁴⁴ *Isaac*, 102 S. Ct. at 1574. The Court concluded that Isaac's attorney did not lack "the tools to construct [the] constitutional claim." *Id.* Apparently, the Court is charging defense attorneys with the affirmative duty to raise even the most remote constitutional claims. *See, e.g., id.* at 1580 (Brennan, J., dissenting) (Court is rejecting inchoateness as "cause"). The Court indicates, for example, that judicial *rejection* of a claim is sufficient to put defense attorneys on notice that "the issue had been perceived by other defendants and that it was a live one in the courts at the time." 102 S. Ct. at 1574 n.41.

⁴⁵ Justice Brennan accused the majority of being "result-oriented" by reshaping Isaac's habeas petition in order to extend the cause-and-prejudice standard. He argued that the petition should have been dismissed for failure to exhaust state remedies. *Id.* at 1576-80 (Brennan, J., dissenting). This charge brought an angry rejoinder from Justice O'Connor. *Id.* at 1569 n.25.

⁴⁶ *Id.* at 1581-82 (Brennan, J., dissenting).

⁴⁷ *Id.* at 1582 (Brennan, J., dissenting).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1582-83 (Brennan, J., dissenting).

⁵¹ *Id.*

⁵² *Id.* Justice Blackmun concurred in result without opinion. *Id.* at 1575 (Blackmun, J., concurring). Justice Stevens argued that the majority was unduly preoccupied with "procedural hurdles" and should have reversed on the ground that the alleged errors were insufficiently prejudicial to warrant a habeas remedy. *Id.* at 1576 (Stevens, J., concurring in part

B. *UNITED STATES V. FRADY*

In 1963, Joseph Frady was convicted in federal district court of first degree murder and robbery.⁵³ The trial judge improperly equated intent with malice in his jury instructions, but Frady's attorney made no objection and thus failed to preserve the issue for appeal under Rule 30 of the Federal Rules of Criminal Procedure,⁵⁴ the federal contemporaneous objection rule.⁵⁵ In 1979, Frady collaterally attacked his conviction in a motion to vacate his sentence under 28 U.S.C. § 2255,⁵⁶ alleging that the erroneous jury instruction denied him a fair trial.⁵⁷ The district court denied Frady's motion on the ground that Frady should have challenged the erroneous instruction on appeal or in an earlier collateral attack.⁵⁸ The Court of Appeals for the District of Columbia reversed, concluding that the proper standard to apply was that of "plain error" in Rule 52(b) of the Federal Rules of Criminal Procedure,⁵⁹ rather than the *Wainwright v. Sykes* cause-and-prejudice test.⁶⁰

The Supreme Court reversed, holding that the "plain error" standard is inappropriate in collateral attacks on federal criminal convictions.⁶¹ Justice O'Connor instead concluded that the cause-and-

and dissenting in part). Justice Stevens believes that a habeas corpus inquiry should focus on whether the alleged error involves "fundamental unfairness" rather than on the procedural history of the claim. *Id.* See also, *Rose v. Lundy*, 102 S. Ct. 1198, 1213 (1982) (Stevens, J., dissenting).

⁵³ *United States v. Frady*, 102 S. Ct. 1584, 1587-88 (1982). At that time, the United States District Court for the District of Columbia had exclusive jurisdiction over local felonies. *Id.* at 1590.

⁵⁴ Rule 30 of the Federal Rules of Criminal Procedure provides in pertinent part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . ." FED. R. CRIM. P. 30.

⁵⁵ Between his conviction and the present case, Frady mounted eight collateral attacks on his conviction. *Frady*, 102 S. Ct. at 1589 n.4. Only one of these was successful. *United States v. Frady*, 607 F.2d 383 (D.C. Cir. 1979).

⁵⁶ For the text of § 2255, see *supra* note 2.

⁵⁷ Jury instructions identical to those given at Frady's trial had been found to be reversible error in *United States v. Whatron*, 433 F.2d 451 (D.C. Cir. 1970) and *Green v. United States*, 405 F.2d 1368 (D.C. Cir. 1968). The government argued that even earlier decisions cast doubt on the propriety of the jury instructions. Brief for the Petitioner at 33. See also *Frady*, 102 S. Ct. at 1594 n.16.

⁵⁸ The district court's decision is unreported.

⁵⁹ Rule 52(b) of the Federal Rules of Criminal Procedure provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." FED. R. CRIM. P. 52(b).

⁶⁰ *United States v. Frady*, 636 F.2d 506, 510 (D.C. Cir. 1980). The court of appeals found the jury instruction clearly erroneous and remanded the case for a new trial or entry of a judgment of manslaughter. *Id.* at 514.

⁶¹ *United States v. Frady*, 102 S. Ct. 1584, 1592 (1982). In *Isaac*, the Court noted that federal habeas corpus challenges by state prisoners cause greater problems of finality and comity than do challenges by federal prisoners and held that the "plain error" standard is also inappropriate for collateral challenges by state prisoners. *Engle v. Isaac*, 102 S. Ct. 1558, 1575 (1982).

prejudice requirement was the proper test to apply.⁶² While conceding that comity was not an issue because Frady was a federal prisoner, Justice O'Connor argued that the ruling was justified on the ground that the federal government has a strong interest in the finality of its criminal judgments.⁶³ She also noted that federal prisoners, unlike state prisoners, already have had an opportunity to raise constitutional claims in federal trial and appellate courts.⁶⁴

Justice O'Connor then applied the prejudice prong of the *Sykes* standard to Frady's petition.⁶⁵ Relying upon *Henderson v. Kibbe*⁶⁶ and *Cupp v. Naughten*,⁶⁷ she established the degree of prejudice that habeas petitioners must demonstrate before a federal court will consider their claims: the error must so pervade the entire trial that the defendant's conviction violates due process.⁶⁸ Trial errors are not presumptively prejudicial,⁶⁹ and even the impact of those affecting the truthfinding function of the trial must be viewed in the context of the entire trial.⁷⁰ Justice O'Connor also indicated that "affirmative evidence indicating that [the petitioner] had been convicted wrongfully of a crime of which he was innocent" may be necessary before actual prejudice will be estab-

⁶² *Frady*, 102 S. Ct. at 1594.

⁶³ *Id.* at 1593.

⁶⁴ *Id.* Justice O'Connor reasoned that use of the plain error standard would put federal prisoners in a preferred position vis-à-vis state prisoners. *Id.* Justices Blackmun and Brennan disputed this contention, arguing that many states allow plain error exceptions to contemporaneous objection rules. *Id.* at 1599 (Blackmun, J., concurring); *id.* at 1602-03 (Brennan, J., dissenting).

Justice O'Connor also emphasized the weight which reviewing courts are to give convictions:

Once the defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims in a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect.

Id. at 1593.

⁶⁵ *Id.* at 1594. While never explicitly holding that Frady was unable to show cause for his attorney's failure to object at trial, Justice O'Connor implied that the Court considered a challenge to a jury instruction neither futile nor unknown at the time of trial. *Id.* at 1594 n.16.

⁶⁶ 431 U.S. 145 (1977).

⁶⁷ 414 U.S. 141 (1973).

⁶⁸ 102 S. Ct. at 1595. See also *Rose v. Lundy*, 102 S. Ct. 1198, 1216 (1982) (Stevens, J., dissenting) (similar formulation). Other members of the Court have suggested less stringent definitions of actual prejudice. See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 97-99 (White, J., concurring in judgment) (harmless error).

⁶⁹ "[Frady] must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." 102 S. Ct. at 1596.

⁷⁰ *Id.* at 1595.

lished.⁷¹ Because strong evidence of malice existed in the record and Frady failed to make a showing that he had acted without malice, the Court saw no risk of a "fundamental miscarriage of justice," and held that Frady had not established actual prejudice.⁷²

C. *ISAAC AND FRADY*: ERECTING AN AIRTIGHT SYSTEM OF PROCEDURAL FORFEITURES

Isaac and *Frady* add little to the theoretical underpinnings of the Burger Court's effort to limit the availability of habeas corpus. Justice O'Connor relied almost entirely on principles articulated by Justices Powell⁷³ and Rehnquist⁷⁴ in prior cases. The two decisions are important, however, because they raise the procedural barriers faced by habeas corpus petitioners by restrictively defining "cause" and "actual prejudice," by refusing to limit the application of the cause-and-prejudice standard to errors involving the truthfinding function of trial, and by precluding federal courts from noticing plain error in collateral proceedings.

As applied in the two cases, the cause-and-prejudice standard will make it highly improbable that a prisoner who has fallen victim to a procedural default can obtain a hearing on a habeas petition that raises the forfeited issue. In fact, the cause-and-prejudice requirement perversely makes it more likely that serious constitutional errors will be immune from collateral attack after a procedural default. This effect stems from the Court's insistence on the conjunctive application of the cause and actual prejudice prongs of the *Sykes* test. In a key footnote in *Isaac*, Justice O'Connor rejected the argument that the prejudice arising from the improper allocation of the burden of proving self-defense was so great that the Court should grant relief even in the absence of cause.⁷⁵ She stated that the *Sykes* test is to be applied conjunctively; habeas petitioners must meet both prongs of the test before they can obtain a hearing on the merits of their petition.⁷⁶

⁷¹ *Id.* at 1596. In an influential article often relied upon by the Burger Court in its habeas corpus decisions, Judge Friendly suggested that a "colorable showing of innocence" should be a prerequisite to collateral relief. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). In contrast, the Warren Court focused on the constitutionality of the conviction itself and did not require a showing of innocence as a prerequisite for habeas relief. *See, e.g., Fay v. Noia*, 372 U.S. 391, 394-95 (1963).

⁷² *Frady*, 102 S. Ct. at 1596. Justice Stevens concurred, Justice Blackmun concurred in the judgement, and Justice Brennan dissented. Chief Justice Burger and Justice Marshall took no part in the case.

⁷³ *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring). *See also* *Stone v. Powell*, 421 U.S. 465 (1976).

⁷⁴ *Wainwright v. Sykes*, 433 U.S. 72 (1977).

⁷⁵ *Engle v. Isaac*, 102 S. Ct. 1558, 1575 n.43 (1982).

⁷⁶ *Id.*

Justice O'Connor's confidence that "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard"⁷⁷ is misplaced.⁷⁸ Conjunctive application of the *Sykes* standard creates a predicament from which few habeas petitioners can escape. To show "actual prejudice" petitioners shoulder the heavy burden of demonstrating that the alleged constitutional error so infected their entire trial that their conviction violates due process.⁷⁹ In most cases this will mean that prisoners must make a colorable showing of innocence before actual prejudice can be established.⁸⁰ To show "cause," habeas petitioners must show that the "tools" for constructing a constitutional claim were unavailable at the time of the procedural default.⁸¹

The habeas petitioner's predicament arises because very few errors⁸² will be of sufficient gravity to meet the prejudice prong where the basis of the claim was either non-existent at the time of trial or so speculative that the cause requirement is met. Conversely, a constitutional claim that is sufficiently inchoate at the time of trial to meet the cause requirement is not likely to be sufficiently prejudicial to meet the prejudice standard. Because errors that render trials "fundamentally unfair" are especially susceptible of being recognized at the time of trial, defendants whose counsel fail to make timely objections to these errors will almost invariably be unable to meet the cause requirement. The conjunctive application of the cause-and-prejudice standard creates a Catch-22 for habeas petitioners.

The Court has already closed several escape routes from this predicament. In some cases, the cause-and-prejudice requirement might be met through retroactive application of a constitutional right that was not recognized at the time of trial. In *Hankerson v. North Carolina*,⁸³ however, the Court indicated that states could insulate past convictions from the retroactive application of newly recognized constitutional rights through the use of contemporaneous objection rules. Thus, when a constitutional right is established and applied retroactively, collateral relief can be restricted to those defendants who had asserted the right at trial.⁸⁴

⁷⁷ *Id.* at 1575.

⁷⁸ Justice Stevens noted that the cause-and-prejudice test diverts courts from the issue of the fairness of the trial. *Id.* at 1576 n.1 (Stevens, J., concurring in part and dissenting in part).

⁷⁹ *See, e.g.*, *United States v. Frady*, 102 S. Ct. 1584, 1595 (1982).

⁸⁰ *Id.* at 1596.

⁸¹ *See, e.g.*, *Isaac*, 102 S. Ct. at 1572.

⁸² Two examples are the deliberate withholding of evidence by the prosecution and the use of perjured testimony knowingly offered by the prosecution. *Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 465 (1960).

⁸³ 432 U.S. 233, 244 n.8 (1977).

⁸⁴ This is precisely what happened in *Isaac*. The Ohio Supreme Court retroactively applied a new formulation of the burden of proof allocation for self-defense, *State v. Humphries*,

Ineffective assistance of counsel is another possible escape route from the effect of the conjunctive application of the cause-and-prejudice standard. Some lower courts have concluded that attorney error or negligence, although falling short of that necessary to make out a separate sixth amendment claim, can satisfy the cause requirement.⁸⁵ Justice O'Connor indicated in *Isaac*, however, that defense counsel's non-deliberate failure to raise an issue does not by itself constitute inadequate assistance of counsel sufficient to show cause for a procedural default.⁸⁶

Although the closing of these escape routes adds to the predicament, the plight of those prisoners who are "victims of a fundamental miscarriage of justice" is best illustrated by the Court's application of the cause-and-prejudice standard to errors affecting the determination of guilt itself. By extending the stringent cause-and-prejudice standard to errors involving the truthfinding function of trial, the Court undermines its own emphasis on the question of guilt and innocence in collateral proceedings.⁸⁷ Because of inability to show cause, many innocent petitioners will be barred from presenting their claims of a gross miscarriage of justice to a federal court. The Court compounds this effect by ending the power of the federal courts to notice plain error in collateral

51 Ohio St. 2d 95, 364 N.E.2d 1254 (1977), but limited retroactive application to defendants whose attorneys had objected to the traditional allocation at trial. *State v. Williams*, 51 Ohio St. 2d 112, 364 N.E.2d 1364 (1977), *vacated in part and remanded*, 438 U.S. 91 (1978).

Moreover, new constitutional rights are rarely recognized in a vacuum. *Isaac* charges defense attorneys with the responsibility of discerning emerging constitutional rights, even if only from judicial rejections of claims of such rights. 102 S. Ct. at 1572-75. Thus, it will be extremely difficult for habeas petitioners to show cause for their attorney's failure to recognize a constitutional challenge before the underlying right was judicially recognized and retroactively applied.

⁸⁵ See, e.g., *Runnels v. Hess*, 653 F.2d 1359 (10th Cir. 1981); *Tyler v. Phelps*, 622 F.2d 172 (5th Cir. 1980) *rev'd*, 643 F.2d 1095 (5th Cir. 1981); *Rachel v. Bordenkircher*, 590 F.2d 200 (6th Cir. 1978). See also Note, *Attorney Error as "Cause" Under Wainwright v. Sykes: The Case for a Reasonableness Standard after Washington v. Downes*, 67 VA. L. REV. 415 (1981); Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. PA. L. REV. 981 (1982).

⁸⁶ 102 S. Ct. 1574-75. The first *Tyler* decision focused on the quality of the representation with respect to the particular attorney action or inaction causing the procedural default:

It may well be that although Tyler's trial counsel was sufficiently competent overall to have provided effective assistance of counsel for purposes of the Sixth Amendment, his decision not to object to the [jury instruction] was not a competent decision. If so, then the 'cause' prong of *Sykes* will be satisfied . . .

Tyler, 622 F.2d at 178.

In contrast, Justice O'Connor's statement that criminal defendants are entitled only to a "competent attorney" and her restrictive definition of "cause" suggests that the Court will not focus on the particular action by the defense attorney which led to the procedural default when determining if there was ineffective representation sufficient to meet the cause requirement. *Isaac*, 102 S. Ct. at 1574-75. The Court probably intends that only ineffective assistance of counsel rising to a sixth amendment violation will meet the cause requirement.

⁸⁷ See, e.g., *United States v. Frady*, 102 S. Ct. 1584, 1596 (1982).

proceedings.⁸⁸

By raising the procedural barriers for the habeas petitioner, by insisting on the conjunctive application of the cause-and-prejudice standard, and by ending the use of plain error review in collateral proceedings, *Isaac* and *Frady* signal much greater judicial tolerance for the unconstitutional incarcerations of guilty and innocent alike.

III. THE BURGER COURT'S DRIVE TO LIMIT THE AVAILABILITY OF HABEAS CORPUS AFTER A PROCEDURAL DEFAULT

A. BACKGROUND: THE WARREN COURT POSITION

Modern habeas corpus jurisprudence began in 1953 with *Brown v. Allen*.⁸⁹ In *Brown*, the Court held that federal courts could review constitutional claims raised by state prisoners even if state courts had reached the merits of the claim.⁹⁰ State court rulings on questions of law were not binding on federal judges under the habeas corpus statute, the *Brown* Court concluded, because the congressionally mandated function of habeas corpus is to permit correction of constitutional errors left unremedied by the state courts.⁹¹

Brown marked the final step in the Court's slow expansion of the range of issues cognizable in federal habeas corpus proceedings.⁹² The Court, however, still maintained an important limit on the availability of habeas corpus. In *Daniels v. Allen*, which was one of the cases consolidated with *Brown*, the Court held that a state procedural rule which bars review of a constitutional claim by state courts also precludes federal court examination of the issue in a habeas proceeding.⁹³

A decade later, in the landmark case of *Fay v. Noia*,⁹⁴ the Court again faced the question of the effect to be given a default under state procedural rules. There, Noia and his two co-defendants had been convicted of murder solely on the basis of their confessions. Noia's co-defendants were later released on the ground that their confessions had been coerced, but Noia did not appeal his conviction.⁹⁵ In a lengthy opinion by Justice Brennan, the Supreme Court held that Noia's failure

⁸⁸ See *Frady*, 102 S. Ct. at 1592-94; *Isaac*, 102 S. Ct. at 1575.

⁸⁹ 344 U.S. 443 (1953).

⁹⁰ *Id.* at 458. See also *id.* at 500 (opinion of Justice Frankfurter).

⁹¹ *Id.* at 506 (opinion of Justice Frankfurter). "[T]he state adjudication carries the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues. It is not *res judicata*." *Id.* at 458 (opinion of the Court).

⁹² For a discussion of the various historical interpretations of this development, see *infra* note 111.

⁹³ 344 U.S. 443, 482-87 (1953). Daniels's attorney missed by one day the deadline for filing a statement of the case on appeal. Daniels had been sentenced to death. *Id.* at 484-85.

⁹⁴ 372 U.S. 391 (1963).

⁹⁵ *Id.* at 394-95.

to appeal his conviction in state court did not bar review of his constitutional claim in a federal habeas proceeding.⁹⁶

Fay marks the greatest extension of habeas corpus relief to prisoners whose constitutional claims have been forfeited in state court because of a procedural default. After reviewing the history of the writ of habeas corpus, Justice Brennan concluded that "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings."⁹⁷

The *Fay* Court recognized that the power of federal judges to act on the habeas petitions of prisoners whose state remedies have been foreclosed by a procedural default lessened the finality of some criminal convictions and affected the balance of power between state and federal courts. The Court attacked the finality problem by stressing that habeas corpus is a unique civil remedy for unlawful imprisonments rather than a mere stage in state criminal proceedings. The opinion then identified a "manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."⁹⁸ While conceding that *Fay* might make it somewhat more difficult for states to regulate their criminal procedures, Justice Brennan distinguished the lesser interest of the states in maintaining their procedures from that of preserving the integrity of their substantive law.⁹⁹ Nevertheless, to protect state criminal procedures the Court held that federal judges could deny habeas relief to a prisoner who had "deliberately bypassed" state courts with a constitutional claim and had thereby forfeited state court remedies.¹⁰⁰ The Court stressed that the habeas petitioner must have "understandingly and knowingly" consented to the decision to bypass the state courts.¹⁰¹

In sum, *Fay* and its progeny struck a balance in favor of the ready availability of federal vindication of the rights of unconstitutionally detained prisoners and against the states' interest in both the finality of their criminal convictions and the consistent operation of their criminal procedures. A deliberate decision by the defense to circumvent the state

⁹⁶ *Id.* at 398-99.

⁹⁷ *Id.* at 436.

⁹⁸ *Id.* at 424.

⁹⁹ *Id.* at 431-34. "[T]his state interest in an airtight system of forfeitures is of a different order from that . . . in the autonomy of state law within the proper sphere of its substantive regulation." *Id.* at 432.

¹⁰⁰ *Id.* at 438.

¹⁰¹ *Id.* at 439. The Court adopted as the standard of deliberateness the waiver standard of *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("an intentional relinquishment or abandonment of a known right or privilege").

The Court appeared to retreat from this formulation in *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965), where it suggested that deliberate tactical decisions by defense counsel might bind the defendant in some circumstances.

court was the touchstone for determining whether a procedural default barred federal habeas relief.

B. THE DEVELOPMENT OF THE BURGER COURT'S POSITION AND ITS POLICY RATIONALES

The Burger Court actively began to limit the availability of habeas corpus in *Davis v. United States*.¹⁰² Three years after his conviction, Davis challenged his conviction on the ground that blacks had been systematically excluded from the grand jury which indicted him.¹⁰³ His attorney had not challenged the composition of the grand jury before trial, thus waiving the issue under Rule 12(b)(2) of the Federal Rules of Criminal Procedure.¹⁰⁴ In an opinion by Justice Rehnquist, the Court held that a deliberate bypass standard was inappropriate for determining whether a petitioner could resort to habeas corpus after he had forfeited a challenge to the grand jury composition.¹⁰⁵ The Court instead ruled that Davis had to show "cause" for and "actual prejudice" from his attorney's failure to make a timely objection.¹⁰⁶ The *Davis* Court did not define these two terms, however, nor did it dwell on the policy justifications for its encroachment on *Fay*. The Court simply deemed it "inconceivable" that Congress intended to permit a more liberal waiver standard in habeas corpus proceedings than that applicable in the pre-trial period under Rule 12(b).¹⁰⁷ Justice Rehnquist also suggested that liberal waiver rules encourage defense attorneys to delay challenges until a collateral proceeding because the greater difficulties of retrial after a successful collateral attack make release of the defendant more likely than if a successful challenge was mounted before trial.¹⁰⁸

¹⁰² 411 U.S. 233 (1973).

¹⁰³ *Id.* at 235.

¹⁰⁴ Rule 12(b)(2) of the Federal Rules of Criminal Procedure then provided in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that the failure to do so "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." FED. R. CRIM. P. 12(b)(2). The provisions of Rule 12(b)(2) were later divided into Rules 12(b) and 12(f).

¹⁰⁵ *Davis*, 411 U.S. at 242.

¹⁰⁶ *Id.* at 241-42. The Court derived this requirement from the "for cause shown" language of Rule 12(b) and from *Shotwell Manufacturing Company v. United States*, 371 U.S. 341, 361-64 (1963).

¹⁰⁷ 411 U.S. at 241-242.

¹⁰⁸ *Davis*, 411 U.S. at 241. The alleged propensity of defense attorneys to deliberately withhold a constitutional claim until collateral proceedings ("sandbagging") has been heavily relied upon by the Court in restricting the availability of habeas corpus. *See, e.g.*, *Engle v. Isaac*, 102 S. Ct. 1558, 1572, n.34 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977). The accuracy of this assumption is questionable. *See infra* notes 163-66 and accompanying text.

In an important concurring opinion in *Schneekloth v. Bustamonte*¹⁰⁹ later in the same term, Justice Powell more clearly outlined the rationale for the Burger Court's effort to limit the availability of habeas corpus. Justice Powell first argued that the Warren Court's expansive view of habeas corpus in *Fay* was based on a fundamental misunderstanding of the historical purpose and development of the Great Writ. At common law, he asserted, a court considering a habeas corpus petition could do no more than verify the jurisdiction of the court which had ordered the incarceration of the petitioner.¹¹⁰ He also argued that Congress did not intend the Habeas Corpus Act of 1867 to increase significantly the power of federal courts to review state court judgments in habeas corpus proceedings.¹¹¹ The costs of the expansion of habeas corpus beyond its historic function, according to Justice Powell, included the diversion of judicial resources to collateral proceedings,¹¹² an undermining of the finality of criminal judgment,¹¹³ and an imbalance of power between the state and federal judiciaries.¹¹⁴ In order to minimize these costs, Justice Powell argued, the function of habeas corpus

¹⁰⁹ 412 U.S. 218, 250 (1973) (Powell, J., concurring). Chief Justice Burger and Justice Rehnquist joined in the opinion. Justice Blackmun agreed with "nearly all" of the concurrence. *Id.* at 249 (Blackmun, J., concurring). The thrust of Justice Powell's concurrence was that fourth amendment claims should not be cognizable in habeas proceedings. The Court later adopted this position in *Stone v. Powell*, 428 U.S. 465 (1976).

¹¹⁰ *Schneekloth*, 412 U.S. at 254 (Powell, J., concurring).

¹¹¹ *Id.* at 255. The history and development of habeas corpus is a key issue in the debate over the proper scope of habeas corpus. The major differences concern the nature of the writ at the time it was incorporated into the Constitution (U.S. CONST. art. I, § 9, cl. 2) and the effect of the Habeas Corpus Act of 1867 (The Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385) which provided a federal habeas corpus remedy for state prisoners.

The Warren Court concluded that at the time of its incorporation into the Constitution, "it was settled that the writ lay to rest any restraint contrary to fundamental law, . . . [which] in this country was embodied in the written Constitution." *Fay v. Noia*, 372 U.S. 391, 426 (1963). The Court also established that the jurisdiction to remedy unconstitutional restrictions conferred upon the Federal courts by the Habeas Corpus Act of 1867 was "not defeated by anything that may occur in the state court proceedings." *Id.*

The Burger Court, in contrast, has concluded that at the time it was incorporated into the Constitution habeas corpus could only be used to verify the jurisdiction of the sentencing court. *Schneekloth v. Bustamonte*, 412 U.S. 218, 253-54 (1973) (Powell, J., concurring). The Habeas Corpus Act of 1867, according to the Burger Court, did not "jettison the respect theretofore shown by a reviewing court for prior judgments by a court of proper jurisdiction." *Id.* at 255.

Several commentators have supported the Burger Court's historical analysis. See, e.g., Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466-99 (1963); Mayer, *The Federal Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31 (1965); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451 (1966). But see Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1325-32 (1961); Note, *Developments in the Law—Habeas Corpus*, 83 HARV. L. REV. 1038, 1042-62 (1970) (hereinafter cited as *Developments in the Law*).

¹¹² *Schneekloth*, 412 U.S. at 259-61 (Powell, J., concurring).

¹¹³ *Id.* at 261-62.

¹¹⁴ *Id.* at 263-65.

should be limited to redressing fundamentally unjust incarcerations.¹¹⁵

On the basis of this analytic framework, the Burger Court moved to restrict further the availability of habeas corpus. In *Francis v. Henderson*,¹¹⁶ the Court extended *Davis* to bar collateral challenges by state prisoners to grand jury compositions absent a showing of cause for and prejudice from their attorney's failure to make a timely objection. The Court in *Estelle v. Williams*¹¹⁷ repudiated *Fay*'s requirement that a defendant must knowingly consent to bypassing a state court before he would be barred from later raising the issue in a habeas proceeding. The Court concluded, in a footnote, that the *Fay* waiver standard did not apply to actions of defense counsel that resulted in a forfeiture of constitutional rights unless these rights were "fundamental."¹¹⁸ Thus, the *Estelle* Court effectively bound habeas petitioners not only to the tactical decisions of defense counsel but also to their negligence and inadvertent errors.¹¹⁹

*Wainwright v. Sykes*¹²⁰ expanded the application of the cause-and-prejudice standard and set forth the Burger Court's defense of its use of state procedural rules to preclude federal habeas review. The Court held that a state contemporaneous objection rule was an independent and adequate state ground which barred federal habeas review absent a showing of cause and prejudice.¹²¹

Writing for the majority, Justice Rehnquist noted that contemporaneous objection rules are designed both to enhance the making of the record when the recollection of witnesses are freshest and to permit trial judges to make factual determinations while scrutinizing the demeanor of the witnesses.¹²² By forcing defense attorneys to raise objections, these rules cause the early exclusion of tainted evidence, which sometimes

¹¹⁵ *Id.* at 257-58. Justice Powell limited the concept of "unjust incarceration" to the imprisonment of innocent individuals. *Id.* at 256.

¹¹⁶ 425 U.S. 536 (1976).

¹¹⁷ 425 U.S. 501 (1976).

¹¹⁸ *Id.* at 508 n.3. The Court distinguished the few "fundamental" rights which require personal waiver by the defendant, such as waiving a jury trial, from "strategic and tactical decisions, even those with constitutional implications," which can be forfeited by defense counsel. *Id.* See also *Wainwright v. Sykes*, 433 U.S. 72, 91 n.14 (1977).

¹¹⁹ Williams had been tried in his prison clothes after asking for non-prison garb, but his attorney had failed to object even though the law was clear in the federal circuit that defendants could not be compelled to be tried in their prison uniform. 425 U.S. at 503-04. The Supreme Court found that compelling a defendant to appear in prison clothing was a due process violation, but held that "[Williams's attorney's] failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id.* at 512-13 (emphasis added).

¹²⁰ 433 U.S. 72 (1977).

¹²¹ *Id.* at 86-87.

¹²² *Id.* at 88.

leads to the prompt acquittal of the defendant.¹²³ State court rulings on the objections raised by defense attorneys aid federal judges in later proceedings and compel prosecutors to reexamine the strength of their cases.¹²⁴ Justice Rehnquist also asserted that by undermining the operation of contemporaneous objection rules, *Fay*'s deliberate bypass standard encouraged defense attorneys to withhold constitutional claims from state courts.¹²⁵ Finally, these rules increase the significance of the trial as the "main event" where social resources are concentrated to determine the guilt or innocence of the accused.¹²⁶

IV. FOUR MAJOR ASSUMPTIONS UNDERLYING THE HABEAS CORPUS POLICY OF THE BURGER COURT: A CRITIQUE

The sharp differences in the habeas corpus jurisprudence of the Warren and Burger Courts graphically illustrate that the Court's decision-making in this area is fundamentally one of social policy. Consequently, an evaluation of *Isaac* and *Fradley* is proper only after critically examining the assumptions which underlie the Burger court's habeas corpus decisions. Four key assumptions can be identified: (1) habeas corpus severely burdens the federal judiciary; (2) habeas corpus unduly frustrates the achievement of finality in the criminal justice system; (3) the habeas petitioner is properly bound by defense counsel's nondeliberate failure to raise a constitutional claim; and (4) habeas corpus disrupts the relationship between the federal and state court systems.

A. BURDEN ON THE FEDERAL JUDICIARY

Proponents of the restriction of the availability of habeas corpus argue that the processing of habeas petitions places an intolerable burden on the federal courts. In his concurring opinion in *Brown v. Allen*, Justice Jackson decried the "flood" of habeas petitions which were "inundating" the federal courts.¹²⁷ One thousand eighty-one habeas petitions per year were "flooding" the federal courts in 1952.¹²⁸ The number of habeas petitions rose steadily in the 1950s and rapidly in the 1960s, and by 1970 over 12,000 were filed each year.¹²⁹ The Warren

¹²³ *Id.* at 88-89.

¹²⁴ *Id.* at 89.

¹²⁵ *Id.*

¹²⁶ *Id.* at 90.

¹²⁷ 344 U.S. 443, 536 (1953) (Jackson, J., concurring). Complaints about the burden of habeas corpus on the federal judiciary have continued unabated since *Brown*. Cf. *Rose v. Lundy*, 102 S. Ct. 1198, 1218 (1982) (Stevens, J., dissenting) ("flood of litigation").

¹²⁸ DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 126-27 (1956) [hereinafter cited as ANNUAL REPORT with parenthetical indication of year of report]. Of these petitions, 541 were filed by state prisoners.

Court's extension of constitutional protections to state criminal defendants accounted for much of the rise in the number of petitions;¹³⁰ the easier availability of the writ,¹³¹ the increasing sophistication of prison inmates,¹³² and the decline of prison censorship¹³³ were contributing factors. Since 1970, the number of habeas petitions filed each year has leveled off and by 1980 fewer petitions were being filed than a decade before.¹³⁴

In relative terms, the burden placed upon the federal judiciary by habeas petitions has actually decreased significantly over the last decade. For example, the number of federal district judges has increased by twenty-nine percent, from 400 in 1971 to 516 in 1981.¹³⁵ Similarly, the number of court of appeals judgeships has increased by thirty-six percent, from ninety-seven in 1971 to 132 in 1981.¹³⁶ Even more striking is the near doubling in the number of state and federal prisoners, from 198,061 in 1971¹³⁷ to over 394,000 by mid-1982.¹³⁸ Thus, while the number of habeas petitions has actually dropped during the last decade,

¹²⁹ The trend over four decades in the number of habeas petitions filed in the federal district courts is illustrated below:

YEAR	HABEAS PETITIONS	MOTIONS TO VACATE	TOTAL
1940	538	—	538
1945	1,176	—	1,176
1950	1,254	112	1,366
1955	1,251	279	1,530
1960	1,733	538	2,271
1965	5,872	1,244	7,116
1970	10,663	1,729	12,392
1975	9,525	1,690	11,215
1980	8,444	1,322	9,766

SOURCE: ANNUAL REPORT (1940-80), *supra* note 128.

¹³⁰ Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041-42 (1977); McFeeley, *Habeas Corpus and Due Process: From Warren to Burger*, 28 BAYLOR L. REV. 533, 537-40 (1976); Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 321-22 (1973).

¹³¹ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 21 (1956); Shapiro, *supra* note 130, at 321-22.

¹³² Schaefer, *supra* note 131, at 21.

¹³³ *Id.*

¹³⁴ ANNUAL REPORT (1979-80), *supra* note 128. The number of prisoner petitions as a whole rose sharply from 15,997 in 1970 to 27,711 in 1981, but this increase was entirely attributable to non-habeas actions, especially civil rights petitions. ANNUAL REPORT (1981), *supra* note 128, at 211 (Tables 20-21).

¹³⁵ ANNUAL REPORT (1971, 1981). Even more striking is the increase in the 1960's, when the number of authorized judgeships increased from 245 to 401. *See* ANNUAL REPORT (1981), *supra* note 128, at 205 (Table 15).

¹³⁶ *Id.* at 185 (Table 1).

¹³⁷ DEPT. OF JUSTICE, PRISONERS 1925-81, at 2 (1982).

¹³⁸ DEPT. OF JUSTICE, PRISONERS AT MIDYEAR 1982, at 1 (1982). The prison population growth rate in the first half of 1982 was equivalent to a 14.3% annual increase. *Id.*

both the federal judiciary and the pool of potential habeas petitioners have grown substantially.

The evidence also indicates that the processing of habeas petitions does not unduly burden individual federal judges.¹³⁹ For example, during the twelve month period ending June 30, 1981, 10,171 habeas petitions were terminated in federal district court, or an average of about twenty per judge.¹⁴⁰ The district courts took no action on 697 of these petitions and disposed of the vast majority (9,122) before the pretrial stage.¹⁴¹ An additional 148 were disposed of during or after the pretrial stage, leaving only 204 petitions to be disposed of at an evidentiary hearing.¹⁴² Evidentiary hearings on habeas petitions do not consume a large share of court time. Of the 222 habeas trials held during the year ending June 30, 1981, 171 lasted one day or less and all but eleven were completed in three days or less.¹⁴³

B. THE FRUSTRATION OF FINALITY

In an influential article¹⁴⁴ upon which the Supreme Court heavily relies in its habeas corpus decisions, Professor Bator argued that the finality of convictions is important to the criminal justice system for three reasons. First, finality permits the conservation of the intellectual, moral, political, and economic resources of the legal system.¹⁴⁵ Second, finality is essential to achieve the deterrent, educational, and rehabilitative functions of the criminal justice system.¹⁴⁶ Third, Bator argues that

¹³⁹ See Carroll, *Habeas Corpus Reform: Can Habeas Survive the Flood?*, 6 CUM. L. REV. 363, 371-78 (1975); Chisum, *In Defense of Modern Habeas Corpus for State Prisoners*, 21 DE PAUL L. REV. 682, 697-99 (1972); Wulf, *Limiting Prisoner Access to Habeas Corpus—Assault on the Great Writ*, 40 BROOKLYN L. REV. 253, 269-75 (1973); cf. *Developments in the Law supra* note 111, at 1041 (burden on states is not great because of few evidentiary hearings); Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation?*, 61 GEO. L.J. 1221, 1245-48 1973 [hereinafter cited as Note, *Proposed Modifications*] (citing study showing less than one percent of federal judge time devoted to habeas corpus). But see Note, *Guilt, Innocence, and Federalism in Habeas Corpus*, 65 CORNELL L. REV. 1123, 1138-39 (1980); Note, *Relieving the Habeas Corpus Burden: A Jurisdictional Remedy*, 63 IOWA L. REV. 392, 411-14 (1977).

¹⁴⁰ ANNUAL REPORT (1981), *supra* note 128, at 381 (Table C-4).

¹⁴¹ *Id.*

¹⁴² *Id.* Thus, only 2.06% of the habeas petitions resulted in an evidentiary hearing. An average federal district judge must hold an evidentiary hearing on a habeas petition only once every two and one-half years.

¹⁴³ *Id.* at 402 (Table C-8). All but twelve of the evidentiary hearings were bench trials. *Id.*

¹⁴⁴ Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

¹⁴⁵ *Id.* at 451. Bator assumes that state courts are as capable as federal courts in determining facts and law and argues that habeas corpus review of state convictions is mere "second-guessing." *Id.* This assumption of parity is of questionable validity. See *infra* notes 179-83 and accompanying text.

¹⁴⁶ *Id.* at 452. Justice Powell advanced a similar argument in *Schnecko*:

At some point the law must convey to those in custody that a wrong has been committed,

"repose" is a "psychological necessity in a secure and active society."¹⁴⁷ Underlying Bator's formulation is a notion that "ultimate truth" can never be established in the criminal justice system: "[T]he concept of 'freedom from error' must eventually include a notion that some complex of institutional processes is empowered definitively to *establish* whether or not there was error, even though in the very nature of things no such processes can give us ultimate assurances"¹⁴⁸

Professor Bator and the Burger Court overstate their case that habeas corpus frustrates the goal of finality. Less than 2.5% of all state and federal prisoners file habeas petitions challenging their convictions, and only a small percentage of these petitions ever reach the hearing stage. Extremely few individuals ever obtain release from prison as a result of a habeas proceeding.¹⁴⁹

The importance of finality to achieving the deterrence and rehabilitation goals of the criminal justice system is also exaggerated. Empirical support for the proposition that finality facilitates rehabilitation is lacking.¹⁵⁰ Some commentators have even suggested that the existence of

that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.

412 U.S. at 262 (Powell, J., concurring).

¹⁴⁷ Bator, *supra* note 111, at 452. "What I do seek is a general procedural system which does not cater to a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system." *Id.* at 453.

¹⁴⁸ *Id.* at 447. *But cf.* Cover & Aleinikoff, *supra* note 130, at 1045-46 (redundancy as a safeguard against unjust incarcerations).

The Burger Court has also relied heavily on an important article by Judge Friendly. Friendly, *supra* note 71. Professor Seidman notes that in relying on Professor Bator and Judge Friendly in its effort to limit the availability of habeas corpus, the Burger Court overlooks the fundamental antagonism between their positions. Briefly stated, Professor Bator seeks to limit habeas corpus because to find "ultimate truth" is impossible, while Judge Friendly wants to limit habeas corpus by focusing on the ultimate question of the guilt or innocence of the habeas petitioner. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 456-59 (1980). *See also* Cover & Aleinikoff, *supra* note 130, at 1086-91.

¹⁴⁹ Extremely few habeas petitions are successful, and only a few of the petitions which are granted ever lead to the outright release of a prisoner. *See, e.g.,* Pollack, *Proposals to Curtail Federal Habeas Corpus For State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50, 53 (1956); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 479 (1960); Shapiro, *supra* note 130, at 339-42; Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 899 n.16 (1966). *Cf.* Brown v. Allen, 344 U.S. 443, 510 (1953) (opinion of Justice Frankfurter) ("[These] figures . . . prove beyond peradventure that it is a baseless fear, a bogeyman, to worry lest State convictions be upset by allowing district courts to entertain applications for habeas corpus on behalf of prisoners under State sentence"). *But see* Engle v. Isaac, 102 S. Ct. 1558, 1571 (1982) ("[H]abeas Corpus frequently cost[s] society the right to punish admitted offenders.").

¹⁵⁰ Carroll, *supra* note 139, at 379; Chisum, *supra* note 139, at 695-97; *Developments in the Law, supra* note 111, at 1058. Chisum indicated that one reason that habeas corpus may not foster rehabilitation is that correctional officials often harass habeas petitioners and limit their access to training and privileges. Chisum, *supra* note 139, at 696.

collateral remedies is actually conducive to rehabilitation.¹⁵¹ Certainly, one may question whether prisoners convinced of the injustice of their convictions, yet unable to test alleged constitutional errors in a collateral proceeding, will be amenable to rehabilitation.¹⁵² The notion that finality enhances the deterrent value of the criminal law is similarly suspect.¹⁵³ Habeas corpus has little effect on specific deterrence since almost all habeas petitioners are incarcerated for a period of time before they file their petitions and remain incarcerated during the disposition of their petitions in federal court.¹⁵⁴ Moreover, because courts grant so few habeas petitions, habeas corpus has little or no impact on the general deterrent value of the criminal law.¹⁵⁵

An over-emphasis on finality imposes its own costs. Counterposed to the goal of finality is an interest in ensuring that individuals unjustly incarcerated will have a remedy. As Justice Brennan asked in his dissent in *Isaac*, why should society "be eager to ensure the finality of a conviction arguably tainted by unreviewed constitutional error. . . ."¹⁵⁶ Moreover, the very legitimacy of the criminal law may be undermined to the extent that limits on the availability of habeas corpus increase the number of unconstitutional incarcerations. As the Supreme Court noted in another context, the "moral force" of the criminal law is diluted when it leaves people doubting whether innocent individuals are being punished.¹⁵⁷

C. BINDING HABEAS PETITIONERS TO THE NON-DELIBERATE FAILURE OF DEFENSE COUNSEL TO RAISE A CONSTITUTIONAL CLAIM

Fay v. Noia established that habeas petitioners forfeit federal court review of a constitutional claim if "after consultation with competent counsel or otherwise, [they] understandingly and knowingly forewent the privilege of seeking to vindicate [their] federal claims in the state

¹⁵¹ See, e.g., Freund, *Remarks at Symposium on Federal Habeas Corpus*, 9 UTAH L. REV. 27, 30 (1964). Cf. Schaefer, *supra* note 131, at 22 ("[P]risoners whose energies are directed to getting out of the prison by judicial process are not so likely to be concentrating on other methods of getting out which may be less socially acceptable.").

¹⁵² Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved*, 21 DE PAUL L. REV. 701, 710-12 (1972); *Developments in the Law*, *supra* note 111, at 1058 n.111.

¹⁵³ Carroll, *supra* note 139 at 378.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Engle v. Isaac*, 102 S. Ct. 1558, 1581-82 (1982) (Brennan, J., dissenting). The Warren Court deemphasized the interest of finality and instead favored providing a federal forum for habeas petitioners: "[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Fay v. Noia*, 372 U.S. 391, 424 (1963).

¹⁵⁷ *In re Winship*, 397 U.S. 358, 364 (1970).

courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures"¹⁵⁸ While the Warren Court retreated from this standard shortly thereafter in *Henry v. Mississippi*,¹⁵⁹ the Court retained the requirement that only an intentional tactical decision by the defense to withhold a claim could bar habeas relief. The Burger Court, in contrast, has more closely bound the habeas petitioner to the actions of defense counsel,¹⁶⁰ barring habeas relief if trial counsel has unintentionally failed to raise a constitutional claim.¹⁶¹ According to the Burger Court, defense attorneys will thus be deterred from circumventing state courts with a constitutional claim, a practice commonly known as "sandbagging."¹⁶²

This position is troubling in several respects. First, the Burger Court ignores the fact that most procedural defaults stem from the negligence, inexperience, or incompetence of defense counsel and not from a deliberate decision by defense counsel to avoid the trial court.¹⁶³ Few reasonable defense attorneys will forego constitutional challenges in state courts in order to save them for a subsequent habeas proceeding; sandbagging increases the likelihood of conviction and precludes all state appellate and direct Supreme Court review of the issue.¹⁶⁴ In ad-

¹⁵⁸ 372 U.S. 391, 439 (1963).

¹⁵⁹ 379 U.S. 443 (1965). For a thorough discussion of the Warren Court's position, see Rosenberg, *Jettisoning Fay v. Noia: Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341 (1978).

¹⁶⁰ For an analysis of the Burger Court's position, see Rosenberg, *supra* note 159; Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court has Work to Do*, 31 STAN. L. REV. 1 (1978).

¹⁶¹ According to the Burger Court, the defense attorney will have full responsibility for all trial decisions, including those of a constitutional dimension, except for a few "fundamental" decisions such as jury waiver, which are left to the defendant. Chief Justice Burger outlined this view in *Sykes*:

Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. . . .

Since trial decisions are of necessity entrusted to the accused's attorney, the *Fay-Zerbst* standard of "knowing and intelligent waiver" is simply inapplicable. *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (footnotes omitted).

Isaac illustrates the Court's willingness to bind the habeas petitioner to the non-deliberate action or omission of the defense which leads to a procedural default. 102 S. Ct. at 1572-75. See also Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 504-09 (1978).

¹⁶² See, e.g., *Sykes*, 433 U.S. at 89-90.

¹⁶³ Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 941-97 (1965); Tague, *supra* note 160, at 46; Comment, *supra* note 85, at 996-98. The number of procedural defaults is surprisingly high. See *infra* note 170.

¹⁶⁴ As Justice Brennan noted in *Sykes*:

[The defense attorney] could elect to "sandbag." This presumably means, first, that he would hold back the presentation of his constitutional claim to the trial court, thereby

dition, there are significant costs to pursuing a sandbagging strategy because defendants must remain incarcerated for months, if not years, while their attorneys carry out this scheme.¹⁶⁵ Moreover, the prospects for eventual release in a habeas proceeding are statistically quite dismal.¹⁶⁶ Second, the uneven quality of the criminal defense bar,¹⁶⁷ the institutional realities of representing indigent criminal defendants,¹⁶⁸ and the dynamics of the attorney-client relationship¹⁶⁹ foster a large

increasing the likelihood of a conviction since the prosecution would be able to present evidence that, while arguably constitutionally deficient, may be highly prejudicial to the defense. Second, he would thereby have forfeited all state review and remedies with respect to these claims (subject to whatever "plain error" rule is available). Third, to carry out his scheme he would now be compelled to deceive the federal habeas court and to convince the judge that he did not "deliberately bypass" the state procedures. If he loses on this gamble, all federal review would be barred, and his "sandbagging" would have resulted in nothing but the forfeiture of all judicial review of his client's claims.

Sykes, 433 U.S. at 103 n.5 (Brennan, J., dissenting).

¹⁶⁵ *Tague*, *supra* note 160, at 44-45.

¹⁶⁶ *See supra* note 149.

¹⁶⁷ *See generally* Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); cf. Burger, *The Special Skills of Advocacy*, 42 FORDHAM L. REV. 227 (1973) (estimates that 40% of the trial attorneys do not provide adequate representation). *See also* R. HERMANN, E. SINGLE, J. BOSTON, *COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA* (1973).

¹⁶⁸ A study of the Philadelphia public defender office found that the amount of attorney time which could be allotted to each criminal defense case was extremely limited. Note, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 U. PA. L. REV. 448 (1969). The study found that the average time devoted to pre-trial review and consultation time for defendants accused of violent crimes was 87 minutes, *id.* at 456, and that the total legal time expended from arrest through conviction or acquittal averaged just five hours and thirty-nine minutes. *Id.* at 456. *See also* Benner, *Tokenism and the American Indigent: Some Perspectives on Defense Services*, 12 AM. CRIM. L. REV. 667 (1975). Benner identifies several shortcomings in the provision of criminal defense services to the poor: (1) lack of uniformity in the provision of services; (2) lack of investigatory or other expert assistance; (3) high turnover of underpaid, undertrained, and overworked attorneys; (4) lack of client confidence in public defender system; (5) lack of defense services at arrest stage, with a resulting loss of constitutional rights and evidence; (6) lack of counsel for misdemeanors; and (7) lack of social service support facilities. *Id.* at 671-75.

See also Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis*, 10 CRIM. L. BULL. 161 (1974); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. DeCoster*, 93 HARV. L. REV. 752, 776-780 (1980).

¹⁶⁹ Cover and Aleinikoff identify three reasons why the interests of the defense attorney may differ from those of the client. First, public defenders act within an organizational structure which may limit the vigor of their advocacy. High caseloads and resource limitations may lead to more guilty pleas and longer incarcerations. Poor working conditions and inadequate compensation hinder the development of a corps of well-trained public defense attorneys. Moreover, the public defender's need to maintain a good working relationship with judges and prosecutors may affect the nature and vigor of their defense work. Second, market conditions force privately retained attorneys to maintain a high volume of low-fee cases, which creates an incentive for plea bargaining arrangements. Appointed counsel may not only be poorly compensated but also reap few professional gains from criminal defense work; these factors are strong disincentives for pursuing a vigorous defense. Third, some defense strategies may offend the community as well as the court. For example, defense counsel may be reluctant to charge racial discrimination in jury selection. Cover & Aleinikoff, *supra* note

number of non-deliberate procedural defaults.¹⁷⁰ Third, the deterrent value of punishing defendants for the inadequacies of their attorneys appears to be slight.¹⁷¹ Even assuming the existence of such a deterrent effect, the prisoner's forfeiture of appellate remedies and the loss of the opportunity for early release should be sufficient to deter sandbagging.¹⁷² Finally, the Court ignores the nearly insurmountable obstacles that face prisoners who seek to prove in a collateral proceeding that their attorney rendered ineffective assistance of counsel.¹⁷³

The Burger Court's solution may therefore be worse than the problem. Unable to meet the cause-and-prejudice standard, habeas petitioners will more frequently claim ineffective assistance of counsel.¹⁷⁴ Pressuring habeas petitioners to attack the competence of counsel has a detrimental effect on the attorney-client relationship.¹⁷⁵ This emphasis on ineffective assistance will increase the habeas workload of the federal courts¹⁷⁶ and force the courts to make intrusive inquiries into the adequacy of counsel, state regulation of the criminal defense bar, and judicial behavior at trial.¹⁷⁷

D. THE ASSUMPTION OF STATE COURT PARITY AND THE INTRUSIVENESS OF HABEAS CORPUS

In restricting the scope of federal habeas corpus, the Burger Court assumes that state courts are both willing and able to provide the same

130, at 1079-83. *See also* Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 130-131 (1977).

¹⁷⁰ A study of the representation of assigned counsel, for example, found that over 40% of the criminal appeals before the Virginia Supreme Court were affirmed without consideration of constitutional issues because of the failure of counsel to make proper objections at trial. Bd. of Governors, Crim. L. Section of Virginia State Bar, *A Study of the Defense of Indigents in Virginia* (1971) (report to the Governor and the General Assembly of Virginia), *cited in* Benner, *supra* note 168, at 680 n.52 (1975).

¹⁷¹ As Justice Brennan argued in *Sykes*:

Punishing a lawyer's unintentional errors by closing the federal courthouse door to his client is both a senseless and misdirected method of deterring the slighting of state rules. It is senseless because unplanned and unintentional action of any kind generally is not subject to deterrence; and, to the extent that it is hoped that a threatened sanction addressed to the defense will induce greater care and caution on the part of trial lawyers, thereby forestalling negligent conduct or error, the potential loss of all valuable state remedies would be sufficient to this end. And it is a misdirected sanction because even if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the habeas applicant, as opposed to his lawyer, hardly is the proper recipient of such a penalty.

Wainwright v. Sykes, 433 U.S. 72, 113 (1977) (Brennan, J., dissenting)(footnotes omitted).

¹⁷² Reitz, *supra* note 111, at 1351.

¹⁷³ *See* Tague, *supra* note 169, at 152-161.

¹⁷⁴ *See generally* Tague, *supra* note 160.

¹⁷⁵ Tague, *supra* note 160, at 66.

¹⁷⁶ *Id.*

¹⁷⁷ Cover & Aleinikoff, *supra* note 130, at 1083-86.

degree of protection to the constitutional rights of criminal defendants that federal courts provide. As Justice Powell stated in *Stone v. Powell*: "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."¹⁷⁸

The existence of parity between the state and federal court systems is not, however, self-evident. One commentator has identified three reasons why federal judges are generally better able to vindicate constitutional rights.¹⁷⁹ First, the level of technical competence is generally higher among federal judges because they are selected through a more thorough selection process and have lighter caseloads, better support services, and higher salaries.¹⁸⁰ Second, because the federal judiciary has a strong elite tradition and a closer bureaucratic relationship to the Supreme Court than to state criminal justice systems, federal courts are more sympathetic to constitutional claims.¹⁸¹ Moreover, in collateral proceedings federal judges are better able to focus on constitutional issues and are less concerned with troubling fact situations or the need to make determinations of guilt or innocence.¹⁸² Third, federal judges have lifelong tenure and therefore are more insulated from majoritarian pressure.¹⁸³

Because the Burger Court assumes that parity exists between state and federal courts, it has applied the doctrine of comity to limit the availability of federal habeas corpus review of state criminal convictions. It considers habeas corpus to be unduly intrusive, "frustrat[ing] both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights."¹⁸⁴ According to this view, habeas corpus undermines the confidence of state judges in their decisions and acts as a powerful disincentive for their zealous vindication of constitu-

¹⁷⁸ *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976).

¹⁷⁹ Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

¹⁸⁰ *Id.* at 1121-1124.

¹⁸¹ *Id.* at 1124-1127. See also Flagg, *Stone v. Powell and the New Federalism: A Challenge to Congress*, 14 HARV. J. ON LEGIS. 152, 162-63 (1976); *Developments in the Law*, *supra* note 111, at 1060-61.

¹⁸² Flagg, *supra* note 181, at 162; Schaefer, *supra* note 131, at 7. Cf. *Developments in the Law*, *supra* note 111, at 1057 ("The momentum of the trial process and the trial judge's focus upon the central issue of the accused's guilt or innocence may tend to divert attention from ancillary questions relating to constitutional guarantees.") (footnotes omitted).

¹⁸³ Chisum, *supra* note 139, at 692; Neuborne, *supra* note 179, at 1127; Schaefer, *supra* note 131, at 7. See also *The Bench Meets the Ballot*, NAT'L L.J., Nov. 1, 1982, at 1, col. 1. But see *Developments in the Law*, *supra* note 111, at 1060.

¹⁸⁴ *Engle v. Issac*, 102 S. Ct. 1558, 1571 (1982).

tional rights.¹⁸⁵

The alleged intrusiveness of habeas corpus is exaggerated. First, the number of habeas cases that reach the evidentiary hearing stage is so small that, even if all cases were resolved against the state, an average of four judgments per state per year would be affected.¹⁸⁶ Second, the Court ignores the narrow focus of habeas corpus. Habeas corpus actions are civil proceedings in which only the constitutionality of the confinement of a single person is at issue; the remedy is directed not at the state judiciary but at the penal institution where the petitioner is confined.¹⁸⁷ A ruling in favor of a habeas petitioner leaves states free to enforce their procedural rules.¹⁸⁸ On balance, federal court reversal of a state court judgment on the merits is more intrusive than a habeas corpus decision adverse to the state.¹⁸⁹

The Burger Court also ignores the key role played by habeas corpus in extending federal constitutional protections to state criminal defendants.¹⁹⁰ Because the Supreme Court is unable to correct all unjust incarcerations on direct review, federal district courts in effect have been delegated to use habeas corpus to routinely correct gross constitutional abuses at the state level.¹⁹¹ This function of habeas corpus may stimulate improvements in state criminal justice systems¹⁹² and greater uniformity in state application of constitutional law. Restrictions on the availability of habeas corpus thus limits a constructive dialogue on constitutional issues between the state and federal court systems¹⁹³ and increases the likelihood that the constitutional rights of criminal defendants will not be honored in state criminal justice systems.¹⁹⁴

Finally, there remains the question of whether the Supreme Court should restrict the availability of habeas corpus in the face of Congress's

¹⁸⁵ *Id.* at 1571-72.

¹⁸⁶ See Chisum, *supra* note 139, at 693.

¹⁸⁷ See, e.g., *Fay v. Noia*, 372 U.S. 391, 430-31 (1963). See also Reitz, *supra* note 111, at 1347-48.

¹⁸⁸ Reitz, *supra* note 111, at 1347-49; Note, *Federal Habeas Corpus for State Prisoners: The Isolation Principle*, 39 N.Y.U. L. REV. 78, 131-134 (1964).

¹⁸⁹ Tague, *supra* note 160, at 49.

¹⁹⁰ Cover & Aleinikoff, *supra* note 130, at 1041-42; Mishkin, *Foreword: The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 86-87; Spritzer, *supra* note 161, at 473; Wright and Sofaer, *supra* note 149, at 897-98.

¹⁹¹ Friendly, *supra* note 71, at 155; Wright & Sofaer, *supra* note 149, at 897-98; *Developments in the Law*, *supra* note 111, at 1061.

¹⁹² Cover & Aleinikoff, *supra* note 130, at 1046; Lay, *supra* note 152, at 714; Reitz, *supra* note 111, at 1352-54.

¹⁹³ See, e.g., Cover & Aleinikoff, *supra* note 130, at 1045-48. See also Reitz, *supra* note 111, at 1350; Shapiro, *supra* note 130, at 339-42.

¹⁹⁴ See, e.g., Neuborne, *supra* note 179, at 1105-06.

refusal to change the habeas corpus statute.¹⁹⁵ In the last three decades, at least three major proposals that would have placed severe limits on the availability of habeas corpus¹⁹⁶ have been rejected by Congress. The Burger Court has not provided substantial legislative support for its limits on habeas corpus.¹⁹⁷ Its efforts have been a "conspicuous exercise in judicial activism."¹⁹⁸

V. CONCLUSION

In *Engle v. Isaac* and *United States v. Frady*, the Supreme Court further limited the availability of federal habeas corpus to petitioners raising a constitutional claim that had been forfeited due to a procedural default. The decisions extend the *Wainwright v. Sykes* cause-and-actual prejudice standard to errors involving the truthfinding function of trial and preclude federal courts from noticing "plain error" in collateral proceedings. The Court also made the "cause" and "prejudice" prongs of the *Sykes* standard extremely difficult tests for habeas petitioners to meet.

Isaac, *Frady*, and prior Burger Court decision that have progressively limited access to habeas corpus relief reflect a strong hostility to providing a federal forum for collateral attacks on allegedly unconstitutional convictions. In these decisions, the Court overstates the burden that habeas corpus places on the federal judiciary, the degree to which the availability of habeas corpus undermines the finality of criminal judgments, and the extent to which federal habeas corpus intrudes into state criminal justice systems. Moreover, by binding habeas petitioners with the errors, omissions, or negligence of defense counsel who have failed to object to an alleged error, the Burger Court unfairly punishes habeas petitioners for the inadequacies of defense counsel. Finally, by insisting that habeas petitioners must satisfy both the "cause" and "actual prejudice" prongs of the *Sykes* test, the Burger Court evidences a high tolerance for the unconstitutional incarceration of both the guilty and the innocent.

THOMAS J. BAMONTE

¹⁹⁵ Justice Brennan raised this issue in his dissent in *Sykes*. *Wainwright v. Sykes*, 433 U.S. 72, 105-07 (1977) (Brennan, J., dissenting).

¹⁹⁶ See, e.g., S. 597, 93rd Cong., 1st Sess. (1973); S. 917, 90th Cong., 2d Sess. (1968); H.R. 5649, 84th Cong., 1st Sess. (1955). See also Pollack, *supra* note 149; Note, *Proposed Modifications*, *supra* note 139.

¹⁹⁷ In contrast, the *Brown* Court relied heavily on an analysis of the habeas corpus statute. *Brown v. Allen*, 344 U.S. 443 (1953).

¹⁹⁸ *Engle v. Isaac*, 102 S. Ct. 1558, 1576 (1982) (Brennan, J., dissenting).