"Fundamental Miscarriage of Justice": The Supreme Court's Version of the "Truly Needy" in Section 2254 Habeas Corpus Proceedings

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The circumstances under which a state prisoner may challenge his or her conviction in a habeas corpus proceeding when there has been procedural default at trial have been hotly contested since the Warren Court’s landmark decision in Fay v. Noia two decades ago. In Engle v. Isaac, however, the Supreme Court laid the Fay v. Noia test to rest and established a strict burden for state prison inmates seeking federal habeas review of their convictions. This Comment examines the issues surrounding this debate, focusing on the decision in Engle v. Isaac.

INTRODUCTION

Suppose the cases of Smith and Jones. Each man is charged with aggravated assault and each claims self-defense. Smith, an indigent, is assigned an attorney from the public defender’s office whose caseload averages between thirty-five to forty cases. Jones is considerably better off and so employs the services of a well-known criminal lawyer who handles few cases, but all for a rather substantial fee.

1. This figure is hardly atypical for public defender organizations. See, e.g., L. Benner and B. Neary, The Other Face of Justice (1973); Benner, Tokenism and the American Indigent: Some Perspectives on Defense Services, 12 Am. Cr. L. Rev. 667 (1975); Wice & Suwak, Current Realities of Public Defender Programs: A National Survey and Analysis, 10 Crime L. Bull. 161 (1974).
The state in which the two defendants are tried has for over a century placed the burden of establishing affirmative defenses on the accused. This has entailed both the burden of producing evidence, and the burden of persuasion measured by a preponderance of the evidence standard. There have been recent changes in the state's criminal code, but the courts of this state, including the state supreme court, have held that these changes have not altered the traditional rules concerning affirmative defenses. When the jury is instructed regarding the burdens of proving affirmative defenses, no objection is raised by Smith's counsel, for in counsel's opinion objection would be futile. Jones' counsel, however, renowned for his incessant constitutional assaults, objects to the instructions on the grounds that due process of law requires the prosecution to disprove affirmative defenses beyond a reasonable doubt once the defendant meets the burden of producing evidence on the issue. Although the objection is overruled because it appears contrary to state law, the objection is preserved on the record.

Both Smith and Jones are convicted. On appeal the convictions are affirmed, Jones again raising his constitutional claim to no avail. One year after the final appeals have taken place and the defendants have been sentenced to state prison, the supreme court of the state decides that it has misconstrued its own statute. The court now concludes that once a defendant produces some evidence in support of his claim of affirmative defense, the prosecution must indeed refute the claim beyond a reasonable doubt.

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2. For an excellent analysis distinguishing the burden of persuasion from the burden of producing evidence, see Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953); J. Thayer, A Preliminary Treatise on Evidence at Common Law (1898).

3. See Engle v. Isaac, 102 S. Ct. 1558, 1573-74 (1982), in which the Court intimates that because In re Winship, 397 U.S. 358 (1970), would support such a claim, that is, that due process of law prohibits the states from ever assigning the burden of persuasion to criminal defendants raising affirmative defenses, that counsel for defendants such as Smith cannot justify their failure to raise the very objection asserted by Jones' counsel. This exact claim was raised in Patterson v. New York, 432 U.S. 197 (1977), in which the Court stated: "We thus decline to adopt as a constitutional imperative, operative country-wide, that a State must disprove beyond a reasonable doubt... all affirmative defenses related to the culpability of an accused... Proof of the nonexistence of all affirmative defenses has never been constitutionally required, and we perceived no reason to fashion such a rule here... Furthermore, [this was not the problem to which Winship was addressed]." Id. at 210, 211 (emphasis added).

In light of this language it is difficult to understand how the Court could insist that counsel's failure to raise precisely the same claim as that presented in Patterson constituted an inexcusable procedural default. See also Underwood, The Thumb On the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977); Note, The Constitutionality of Affirmative Defenses After Patterson v. New York, 78 Colum. L. Rev. 665 (1978).
Both men petition for relief under the federal habeas corpus statute, alleging that they have been denied due process of law and thus are in custody in violation of the United States Constitution.

Jones' petition is granted, and at his new trial with the state rather than the defendant bearing the burden of proof, Jones is acquitted. Smith's petition, citing as authority the ruling in Jones' case, is denied, the court holding that Smith's failure to abide by the state's contemporaneous objection rule to jury instructions precludes his right to obtain federal habeas review unless he can meet the "cause" and "prejudice" standards enunciated in Wainwright v. Sykes. Smith argues that he has met the cause requirement in that he cannot be charged with "inexcusable procedural default" for a claim which did not even exist at the time of his trial and for which an objection would obviously have been futile even if he had perceived the claim. He further contends that his case was prejudiced because, as the United States Supreme Court recognized in Speiser v. Randall, the allocation of the burden of proof is often outcome determinative. The district court rejects these arguments, however, and issuance of the writ is denied.

Smith's case reaches the United States Supreme Court which affirms the denial of his writ. Although the Court accepts Smith's claim that he was prejudiced by the wrongful allocation of the burden of proof, the Court nevertheless rejects his offer of proof on the issue of cause. The Court decides that although the claim might not have been raised in Smith's state prior to Jones' case, it had been raised in other states, albeit unsuccessfully. Smith's attorney could not, therefore, argue that he lacked the "tools to construct" such a claim. Smith, guilty of procedural default, is thus barred from habeas review of his admittedly "colorable" claim.

5. U.S. Const. amend. XIV. Federal habeas corpus is available for state prisoners only if they are in custody in violation of the federal constitution, federal laws, or federal treaties. In practice it is generally restricted to custody in violation of the federal constitution.
6. 453 U.S. 72 (1977) (defendant barred from habeas review of his Miranda claim unless able to demonstrate "cause" for the failure to object to the introduction of a confession, and actual "prejudice" resulting thereby).
7. Id. at 69 n.13 (quoting Estelle v. Williams, 425 U.S. 501, 513 (1976) (Powell, J., concurring)).
8. 357 U.S. 513 (1958). "In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." Id. at 523.
9. 102 S. Ct. at 1574.
10. Id. at 1575.
Compounding Smith’s problems, the Court also states that while it does not require criminal counsel to possess “extraordinary vision,”11 Smith has not been denied effective assistance of counsel, for “[not] every astute counsel”12 would necessarily have raised the objection. Thus, based on identical evidence and identical circumstances, Smith goes back to prison while Jones is a free man.

Before the April 5, 1982 Supreme Court decision in *Engle v. Isaac*,13 such a result would have offended the traditional principles upon which the Great Writ rests. That the writ of habeas corpus would ever be ruled by an absolutist doctrine of form over substance would have been unthinkable as little as ten years ago. Although procedural default might bar federal review of certain claims,14 an allegation of wrongful allocation of the burden of proof, which goes to the heart of the determination of guilt or innocence, was precisely the sort of claim that habeas corpus was designed to remedy.15 In *Engle v. Isaac*, however, the Supreme Court per Justice O’Connor swept aside any distinctions between procedural defaults not affecting the ultimate question of guilt or innocence, and the failure to object to defects in trial procedure inextricably related to the truthfinding function. The Court held that a claim once forfeited through default not only bars review of the claim on direct appeal, but also bars it from federal habeas review unless the petitioner can demonstrate cause for the failure to object, and prejudice resulting thereby.16

Just as in *Wainwright v. Sykes*,17 however, the Court refused to give “precise content” to the terms “cause” and “prejudice.” Although the Court failed to breathe any meaning into its new standard, the Court did imply that prejudice is met only by showing that a different verdict would have obtained had counsel’s objection been raised and sustained. As for the cause standard, the Court’s only guidance was to state what cause was not. Cause is not met by demonstrating the inadvertence, ignorance or inattention of counsel.18 Nor is cause met by demonstrating that an objection would have been futile, or that the claim did not exist at the time of trial.19 In fact, cause is not met so long as the Court

11. *Id.* at 1573.
12. *Id.* at 1574.
15. See, e.g., 102 S. Ct. at 1582-83 (Brennan, J., dissenting).
18. 102 S. Ct. at 1572 n.34.
19. *Id.* at 1573 n.36.
"cannot say that [the petitioner] lacked the tools to construct his constitutional claim," however primitive the tools and however inchoate the claim. As Justice Brennan retorted in dissent, "I predict that on the Court's present view it will prove easier for a camel to go through the eye of a needle than for a state prisoner to show 'cause.'"

This Comment examines how the Great Writ came to occupy such an insignificant role in the protection of federal constitutional rights, and the practical as well as theoretical ramifications of the decision in Engle v. Isaac. The first section of the Comment canvasses the arguments for and against an expanded writ. The second section examines the case law following the Warren Court's landmark decision in Fay v. Noia, in which the cause and prejudice standard evolved. The final section examines the decision in Engle v. Isaac itself, and its effect on the law of habeas corpus.

DRAWING THE BATTLE LINES: ARGUMENTS FOR AND AGAINST AN EXPANDED WRIT

"No aspect of the jurisdiction of the lower federal courts has been as controversial as habeas corpus jurisdiction, [particularly] habeas jurisdiction for inmates of state prisons." The question of whether and when a federal district court should upset a state conviction because of the failure to enforce the petitioner's constitutional rights is an issue that has sharply divided the legal community since 1867 when federal habeas corpus was first held applicable to state prisoners. However, if one examines the literature on habeas corpus, both case law and commentary, one can distill a distinct number of arguments for and against an expanded writ.

The arguments against an expansive writ fall into five main categories: 1) federalism; 2) comity; 3) finality/judicial efficiency;
4) the "flood" argument; and 5) the intent of the framers. The arguments in favor of an expansive writ, on the other hand, include: 1) the supremacy argument; 2) the "correct" determination of federal constitutional rights in an absolute sense; 3) continuing availability of a mechanism for relief; 4) the expanded due process argument; and 5) federal rights are best determined in a federal forum. The following is a brief summary of these arguments.

**Federalism**

The federalism argument, which underlies all of the Burger Court's decisions on habeas corpus, has as its basic tenet the notion that the federal government should rarely intervene in the states' administration of their own criminal justice systems. To be sure, notions of federalism are not restricted to matters affecting criminal justice. Federalism, rather, pervades the entire American governmental structure. This arrangement creates a tension between the two competing systems, the states' system and the federal system, each claiming the right to have the last word on matters of importance.

This argument, best typified by the 1976 decision in *Stone v. Powell*, is that so long as the states have provided an opportunity for "full and fair litigation" of an issue, there is no reason to assume that a state court will not enforce federal constitutional claims to the same extent as would a federal district court.

The first counterargument to this doctrine is that the Constitution is the supreme law of the land. Any intrusion that takes place when a federal habeas court finds that a particular state tribunal has misperceived federal rights takes place only because that state has failed to give federal constitutional rights the respect they are due.

The second counterargument is that federal rights are best determined in a federal forum. History refutes the notion that state court judges are as zealously concerned about the protection of federal constitutional rights as are federal district court judges.

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27. *Id.* at 482.
29. The attempt by lawyers to use an ostensibly outcome-neutral federalism analysis to influence indirectly the merits of constitutional litigation is hardly new. During the past century, litigators have consistently advanced ostensibly outcome-neutral arguments, ostensibly unrelated to the merits, to channel constitutional adjudication into forums calculated to advance the substantive interests of their clients. Although the political per-
A number of factors lead to significant institutional differences between state court judges as a class, and federal district court judges as a class. It is here argued that these class distinctions manifest themselves in the relative degree of receptivity to vigorous enforcement of constitutional rights which the two benches are likely to bring to bear on any particular case.

First and foremost among the factors which distinguish the two benches is the federal judiciary’s insulation from the majoritarian pressures which plague a state trial judge. Federal judges enjoy life tenure and hence need not concern themselves with pleasing constituents as do state court judges who face regular intervals at the polls. Especially in times like these when the public is beating the drums of law and order, a federal judge is more likely to uphold a valid constitutional claim irrespective of how unpopular the decision may be than his or her state counterpart.

Second, “the level of technical competence which the federal district court is likely to bring to the legal issues involved will generally be superior to that of a given state trial forum.” Several factors contribute to this. Federal district judges are paid almost double the salary of state superior court judges. Although at first blush this may appear to be a trivial point, some incentive other than prestige is required to draw qualified members of the bar away from lucrative law practices to the bench. Moreover, because of its relative size, the federal trial bench is able to maintain a level of competence in its pool of potential appointees.

Suzen and economic status of the constitutional litigants have varied with the changing nature of the rights invoked, one factor has remained constant: interests and groups seeking expansive definition and vigorous application of federal constitutional rights have sought a federal judicial forum while their opponents, attempting to narrow federal rights and weaken their implementation, have emphasized the facially neutral federalism concerns which argue in favor of state judicial enforcement of federal constitutional rights.

30. The significance of the federal judiciary’s independence has been noted. See, e.g., Kurland, The Constitution and the Tenure of Federal Judges: Some Notes From History, 36 U. Chi. L. Rev. 665, 667 (1969) (“without their independence, the federal judges will have lost all that separates them from total subordination to the political processes from which they ought to be aloof”).
32. Id. at 1120.
33. As of 1977, federal district court judges were earning $54,500 a year for life, 35 Cong. Q. Weekly Rep. 268, 334 (1977), while the average state superior court judge was making $33,823 per year. National Center for State Courts, Survey of Judicial Salaries in the State Court Systems 4 (1976).
which simply cannot be matched by the states which must staff enormous judicial departments.\footnote{Neuborne, \textit{supra} note 29, at 1121.} For example, the State of California alone has almost twice as many trial judges as does the entire federal system.\footnote{In California there are 1,108 trial judges: 503 superior court judges, 406 municipal court judges, and 199 justices of the peace. \textit{JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT OF THE ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS} 98, 125, 133 (1976). The federal bench, in contrast, consists of 399 authorized judgeships and 109 senior district judges who continue to render service at the trial level. \textit{ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS} 2 (1976).} In addition, federal district court judges are provided with law clerks who are generally recruited from the cream of the law school graduating crop to work for periods of one to two years. State superior court judges, on the other hand, generally rely on clerks of the court who are permanent members of that vast body of civil servants who perform support services for the court.

Third is the factor which Professor Neuborne refers to as “psychological set.”\footnote{Neuborne, \textit{supra} note 29, at 1124.} Neuborne argues that:

\begin{quote}
[\textit{A}n elite tradition animates the federal judiciary, instilling elan and a sense of mission in federal judges, and exerting, as Judge Friendly has noted, a palpable influence on the quality of the judicial product. As heirs of a tradition of constitutional enforcement, federal judges feel subtle, yet nonetheless real pressures to uphold that tradition. State trial judges, on the other hand, generally seem to lack a comparable sense of tradition or institutional mission.}\footnote{\textit{Id.} at 1125-26.}
\end{quote}

Finally, a federal judge may lack the cynicism that so often marks the state trial judge who has been present throughout the proceedings. Removed from the drama of the trial whose main emphasis was the question of guilt or innocence, the federal district judge can apply controlling constitutional principles in a much more dispassionate manner.\footnote{\textit{See, e.g., Stone v. Powell, 428 U.S. 465 (1976).}}

The third counterargument is that conflict between state and federal courts need not be viewed as dysfunctional. Rather, such conflict can be viewed as engendering a dialogue between state courts and their federal counterparts in which the Constitution is further refined and interpreted. The doctrine of dialectical federalism, first put forward by Professor Cover of Yale University, is premised on the notion that conflict between state and federal courts is a positive, not negative, feature of our system. To avoid state/federal conflict by eliminating certain issues from habeas review,\footnote{\textit{Id.} at 1125-26.} or by erecting procedural hurdles whose effect is to re-
strict the availability of habeas corpus,⁴⁰ is to infringe on this dialogue and thus to stunt development and articulation of constitutional rights.⁴¹

**Comity**

The comity argument is essentially a subset of the federalism argument in that its main concern is still the relationship between federal and state courts. However, the comity argument adds a new twist to the federalism argument. The gist of this doctrine is that it is "unseemly"⁴² for a federal district court to intervene and tell a state court that it has committed error of constitutional dimensions, that is, that state court determinations deserve more respect.

Those who argue for an expansive writ give little weight to comity concerns for two reasons. The first is that comity is adequately served by the exhaustion requirement of section 2254.⁴³ This requirement allows states the opportunity to employ their full corrective processes to the petitioner's claim. But ultimately, if the states fail to vindicate federal constitutional rights, they no longer have any valid interest in preventing a federal court from stepping in and ensuring that defendants receive the rights due them under the Constitution.

The second argument asks whose interests should prevail? Should it be the interests of the state judiciaries concerned with an affront to dignity, or the interests of defendants jailed because they were denied constitutional rights? In fact, advocates of an expansive writ point out that the comity argument is really a red herring, in that less than one percent of all habeas petitions are successful, and thus the chances of a state trial judge actually being overruled on habeas corpus are miniscule.⁴⁴

The arguments for and against finality as a factor in determining the scope of habeas corpus traditionally reflect deeply held value considerations. The primary argument in favor of finality is that for practical reasons a line must be drawn somewhere. The petitioner had his chance to be heard at trial, he or she has been afforded at least one appeal, and unless one is inherently suspicious of the judicial system there is no reason to believe that the determination of the defendant’s claim has not been correctly decided within the limits of human fallibility.

The first counterargument to this proposition is that it is not merely the opportunity to be heard that is important; what is paramount is the correct resolution of the federal constitutional right at issue. Case law is replete with instances in which the petitioner was unable to vindicate constitutional rights until a federal habeas proceeding intervened on his behalf. Furthermore, as long as the petitioner is being held in custody in violation of his or her constitutional rights, not only does the state lack a valid interest in keeping the petitioner there, but it would be in direct conflict with congressional intent as manifested by the language of the habeas corpus statute to restrict the availability of habeas corpus in the name of finality.

The second argument in favor of restricting the scope of habeas corpus under the doctrine of finality revolves around the question of rehabilitation. Justice O'Connor raises this argument in Engle v. Isaac, in which, relying on two law review articles written by Judge Friendly and Professor Paul Bator respectively, she states that the "absence of finality also frustrates deterrence and rehabilitation." It frustrates deterrence because "[d]eterrence

45. See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972) (indigent's right to appointed counsel as made applicable to the states in Gideon v. Wainwright not governed by classification of offense as felony or misdemeanor, nor is it governed by whether or not a jury trial is required); Jackson v. Denno, 378 U.S. 368 (1964) (voluntariness of confession must be determined outside presence of the jury); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege held applicable to the states); Douglas v. California, 372 U.S. 353 (1963) (indigents entitled to appointed counsel for appeals of right); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent's right to counsel in criminal cases applied to the states); Jones v. Cunningham, 371 U.S. 293 (1963) (requirement of "in custody" for 28 U.S.C. § 2241 not defeated when state prisoner is placed on parole); Griffin v. Illinois, 351 U.S. 12 (1956) (indigents entitled to transcript of trial for appeals of right); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel must be knowing and intelligent).

47. 102 S. Ct. 1558, 1571 n.32.
49. Bator, supra note 42, at 441.
50. 102 S. Ct. 1558, 1571 n.32.
depends on the expectation that ‘one violating the law will swiftly and certainly be subject to punishment.’”51 Rehabilitation is similarly undermined because “[r]ehabilitation demands that the convicted defendant realize ‘that he is justly subject to sanction, that he stands in need of rehabilitation.’”52 Whatever might be the merits of these two arguments, neither is supported by empirical evidence. On the contrary, the current data strongly suggests that the availability of a continuing mechanism for relief is in itself rehabilitative.53 For many state prisoners, pursuing federal habeas corpus represents the first attempt to stay within the confines of “the system.”54 In fact, 82.4 percent of correctional personnel nationwide believe that prison legal services contribute to the rehabilitative prospects of an inmate by providing positive experiences with the law and the legal system.55 Eighty-five percent of this same group believed that the pursuit of legal avenues of relief tends to decrease inmate hostility toward the institution.56 Over ninety percent believed that legal services help in reducing inmate tensions caused by unresolved legal problems.57

**Flood**

At first blush it would appear that the flood argument represents the key issue in this controversy. For, the argument runs, were it not for the tremendous number of prisoner petitions inundating the federal courts, it is at least conceivable that none of the other issues (federalism, finality, comity) would arise. In examining this particular argument, however, it is essential to keep in mind the need to rely on empirical data. One cannot simply argue that the federal courts must do something to stem the tide of habeas petitions crashing on the shores of the federal courts without first looking at the statistics which should naturally form the basis of that argument.

In 1970, approximately 149,677 actions were commenced in the

51. *Id.*
52. *Id.*
55. *See United States Dep’t of Justice, supra note 53, at 10.*
56. *Id.* at 14.
57. *Id.*
federal courts. Of these, seven percent (10,663) were petitions for habeas corpus filed by prisoners throughout the United States. In the ten years following 1970, however, while the business of the federal courts has almost doubled, the number of petitions for habeas corpus has decreased by twenty-one percent. Thus, in 1980, approximately 273,950 actions were commenced in the federal courts, of which only three percent, or 8,444 actions, represented petitions for habeas corpus. In light of these statistics it is hardly tenable to argue that the federal courts are in desperate straits due to the number of prisoners’ petitions "inundating" the federal docket; a fortiori when one considers that some ninety-eight percent of these petitions are summarily dismissed without an evidentiary hearing.

Moreover, in a separate line of cases, notably never cited in any of the Court’s habeas decisions regarding procedural default, the Supreme Court has established that an inmate has a constitutionally enforceable right of access to the courts. Given this right of access to the courts, advocates of the flood argument are like the proverbial man shouting against the storm: no matter how much of a chore these petitions may represent, there is no way to stem the tide, at least at the federal district court level, without overruling all of the right of access cases.

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59. Id.
61. Id.
62. Id.
63. Id.
64. Of 1,785 section 2254 petitions filed in the first six months of 1982, only 42 received an evidentiary hearing. Of 1,109 section 2255 petitions filed in the same period, only 8 received evidentiary hearings. Telephone interview with J. McCafferty of the Administrative Office of the United States Courts (Oct. 18, 1982). Similar figures are reported for previous years in table C5B of the 1970 through 1980 versions of the Annual Report of the Director of the Administrative Office of the United States Courts.
66. In Bounds v. Smith, 430 U.S. 817 (1977), the Court held that "'meaningful access' to the courts is the touchstone of this right which is founded in the due process clause of the fourteenth amendment." Id. at 823.
67. The arguments for and against the "flood" doctrine are best summed up in two quotes. The first is from Justice Jackson's concurring opinion in Brown v. Allen: "'He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." 344 U.S. 449, 537 (1953). The second is from an article on pro se writs written by Allen Krause. "As hard and unrewarding as screening these petitions may be, each deserves attention; the sensitivity which we apply to the task will be a measure of our own devotion to due
Intent of the Framers

Those who favor a restrictive form of the writ have often raised the argument that at the time habeas corpus was written into the Constitution its only function was to determine whether the sentencing court had jurisdiction over both the offense and the defendant. Although this point of history has been contested, the mere raising of the argument obfuscates the real issue. There are a number of reasons why the state of habeas law in 1789 is irrelevant to an inquiry of how broad its scope should be nearly two hundred years later in 1982. Foremost among these is the fact that the fourteenth amendment's due process clause was not written until some seventy-five years after the ratification of the Constitution. If the number of rights available to an accused are significantly increased (as they have been under the due process clause) and yet habeas is forced to remain confined to its form of two centuries ago, the result is that the relationship between rights and remedies becomes seriously skewed. The mere existence of rights means nothing if there is no mechanism for enforcing them.

Moreover, the “intent of the framers” argument is dangerously misleading. The Constitution was enacted at a time when the practices of slavery and male supremacy existed almost unquestioned. As a society, this country has progressed far beyond what was even imaginable in 1789. The nation's legal institutions and practices must necessarily reflect some of that progress.

Evolution of the Cause and Prejudice Standard

In 1963 the Warren Court decided the landmark case of Fay v. Noia. Noia had been convicted with two codefendants of felony murder. Their convictions were obtained solely on the basis of their uncorroborated confessions. Noia’s two confederates appealed their convictions, but because of certain remarks made by...
the sentencing judge, Noia did not appeal his conviction. Ultimately, the two codefendants were set free after it was determined that their confessions had been unlawfully coerced. After Noia had been sentenced to life imprisonment, and after the statutory time for appeal had lapsed, Noia initiated habeas corpus proceedings. His petition alleged that his conviction could not stand for the same reason that his confederates’ cases were overturned, namely that his confession had been improperly obtained. Reversing the dismissal of his petition by the lower courts, the Supreme Court per Justice Brennan held that Noia was entitled to relief under federal habeas corpus. The Court held that the exhaustion of remedies requirement of section 2241 referred only to remedies still available to the petitioner. More importantly, the Court held that persons cannot be deemed to have waived their rights because of procedural default unless it clearly appears that for tactical or other reasons they have “deliberately bypassed” available state procedures. Furthermore, the Court held that “the classic definition of waiver enunciated in Johnson v. Zerbst...‘an intentional relinquishment or abandonment of a known right or privilege’—furnishes the controlling standard.” To emphasize that it would not tolerate the forfeiture of fundamental constitutional rights without the accused even being aware of the loss, the Court stated, “[a]t all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.” Thus the deliberate bypass standard was created.

Several issues should be noted concerning Noia. First, its underlying premise is that an accused should not suffer the fate of forfeiting important constitutional rights simply because of the inadvertence or negligence of counsel. Unlike the Burger Court’s recent decisions concerning habeas corpus and procedural default, the Noia Court required that the waiver of constitutional rights be a personal decision based upon an understanding of the possible consequences. Second, the Court held that whatever deference notions of federalism and comity require, they were adequately served by the statutory requirement of exhaustion of remedies. The Noia Court believed that federal constitutional

73. The judge all but assured Noia that if he appealed he would receive the death penalty, id. at 396 n.3, a situation which Justice Brennan referred to as a “grisly choice.” Id. at 440.
74. Id. at 399.
75. Id. at 438.
76. Id. at 439 (citations omitted).
77. Id.
rights could never be subverted by state procedural law. The Constitution, after all, is the supreme law of the land. Finally, the Court noted that its decision would not cause undue friction between the state and federal judiciaries, for “[t]hose few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation.”79

Ten years after the Warren Court decided *Fay v. Noia*, the Burger Court decided the first of four cases that would ultimately lead to the evisceration of the deliberate bypass standard, and its replacement with the very restrictive cause and prejudice standard. All four of these cases deal with the notion of procedural default and its effect on a federal habeas court’s power80 to review state prisoners’ claims. Before reviewing these four decisions, it should be noted that central to the Warren Court’s approach to habeas corpus was the notion that form should rarely rule substance.81 A procedural default would not bar a state prisoner’s opportunity for federal review unless he had deliberately bypassed the procedure.

In contrast, the Burger Court’s outlook has shifted to one of absolute reverence of form over substance. A failure to object at trial will be fatal, and only where the Court is convinced that a “fundamental miscarriage of justice”82 has occurred will it intervene.

In *Davis v. United States*,83 the Court held that a federal prisoner challenging, by means of habeas corpus, the composition of the grand jury that indicted him, must establish “cause” for his failure to have raised that objection before trial as required under Federal Rule of Criminal Procedure 12(b)(2). A federal prisoner who is unable to establish cause will be barred from obtaining federal review of his habeas petition.84

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79. 372 U.S. at 440-41.
80. Although even in *Isaac* the Court states that its decision does not affect a federal court’s power to review state habeas petitions, but rather, merely restricts the appropriate exercise of that power, the term is used here for want of a better word.
Although *Davis* appears to be a radical departure from the deliberate bypass standard of *Fay*, *Davis* was actually decided on very narrow grounds. Federal Rule of Criminal Procedure 12(b)(2) required that all objections to the composition of the grand jury be raised before trial. However, for "cause shown" a federal court could still entertain an untimely claim of illegal make-up of the grand jury.

The Court based the decision in *Davis* on "the normal rules of statutory construction," which "clearly" indicated that when faced with a conflict between a general statute (section 2255) and a specific statute (Federal Rule of Criminal Procedure 12(b)(2)), the specific statute controls. Because Congress had not dealt with waiver under the federal habeas statute, but had expressly provided that a defendant establish "cause" for the failure to object to the grand jury in the Federal Rules of Criminal Procedure, "no more lenient standard of waiver should apply to a claim raised three years after conviction simply because the claim is asserted by way of collateral attack rather than in the criminal proceeding itself."

Although *Davis* represents the first inroad on *Fay*’s deliberate bypass standard, the decision is understandable if confined to the justification given it by the Court. Unfortunately, as will be seen in *Francis v. Henderson*, the Court did not limit the cause requirement of *Davis* to cases involving congressional intent as manifested by express statutory provisions.

On May 3, 1976, the Court decided *Estelle v. Williams* and *Francis v. Henderson*. In *Williams* the Court held that the waiver of certain due process rights does not require a knowing and intelligent relinquishment of a known right or privilege as mandated by *Zerbst*. Rather, as long as the trial court does not compel a defendant to give up his rights, he will be deemed to have waived them if he failed to assert them. Compulsion, then, became the focal point in determining waiver.

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Rule 12(b)(2) provides in pertinent part that "defenses 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 failure to present such defenses or objecting "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver."

411 U.S. at 236 (emphasis added).

85. *Id.* at 240-41.
86. *Id.* at 240.
87. *Id.* at 241.
89. 425 U.S. 512 (1976).
Williams involved a pretrial detainee who was unable to post bond and hence was tried in his jail clothes, even though he had asked his jailers to allow him to wear his civilian clothes at trial. Neither Williams nor his appointed counsel objected to the trial judge when the request was denied. Both thought such an objection would have been futile in light of the regular practice in Texas of trying indigents in prison garb.\(^9\)

On certiorari the Supreme Court held that while compelling an accused to stand trial in jail clothes violated due process, absent compulsion by the court\(^9\) no due process violation occurs. This holding is particularly enigmatic in that the Court expounded at length on the prejudicial effect of an accused being tried in clothing distinctly marked as prison issue,\(^9\) yet still rejected Williams' argument that he had been denied due process.

Even more disturbing is the way in which the Court avoided all reference to Zerbst or Fay in establishing compulsion as the key to determining waiver. The Court could just as easily have established a prophylactic procedure in the form of "Williams warnings" whereby a trial judge could readily determine whether an accused wished to stand trial in his jail clothing. By focusing on compulsion, however, the Court not only supplanted the established inquiry into whether the accused had voluntarily relinquished known rights, but also transferred the burden of proof to the defendant. Whereas before Williams the state bore the burden of proving knowing and voluntary waiver, after Williams, the accused bears the burden of establishing compulsion.

In Francis v. Henderson,\(^9\) the Court extended the cause requirement of Davis to state prisoners challenging the composition of the grand jury on habeas corpus, and further added the requirement that the petitioner also demonstrate actual prejudice resulting thereby.\(^9\)

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\(^9\) Id. at 510-11.

\(^9\) The Court rejected the argument that Williams was compelled to wear jail clothing by state correctional officials and hence that the state action requirement for the fourteenth amendment due process violation had been met. Id. at 501.

\(^9\) Id. at 503-06. For example, the Court stated that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that... an unacceptable risk is presented of impermissible factors coming into play." Id. at 504-05.

\(^9\) Id. at 536 (1976).

\(^9\) Id. at 542.
Francis, a seventeen-year-old black youth, was convicted of felony murder through extremely unusual circumstances. Francis and three confederates, all considerably older than he, had attempted to rob a small store, and in an ensuing gun battle with the owners one of the robbers was shot and killed. Francis had not been armed, yet he was charged with felony murder for the death of his confederate. This was the first time such a charge had been leveled against anyone in the state's history.97

Francis, an indigent, was assigned a court-appointed attorney who had not practiced criminal law in fifteen years, had never handled a capital case and who received no compensation for his meager effort.98 For some reason counsel did not plea Francis to a lesser charge as had the other defendants, nor did counsel consider challenging the composition of the grand jury which allegedly excluded all blacks. Francis received a life sentence following conviction. His confederates received only eight-year terms.

In reversing the Fifth Circuit Court of Appeals which had granted Francis' writ, the Supreme Court held that it could perceive no reason why state prisoners challenging the composition of the grand jury on habeas corpus should be entitled to any more lenient standard than federal prisoners making the same challenge and whose claims were controlled by Davis. In an extraordinary example of juristic revisionism, the Court then held that since Davis required a federal prisoner to demonstrate both cause and prejudice before a federal court could entertain claims of unconstitutional composition of the grand jury on habeas corpus, the doctrines of federalism and comity demanded no less of state prisoners.99

In reaching this result the Court in Francis avoided any reference to the rationale underlying the decision in Davis. The Davis Court had based its decision on express congressional intent as manifested by specific statutory language. These factors were altogether missing in Francis, a case which should have been controlled by Fay's deliberate bypass standard. The failure to even acknowledge this departure from Fay is staggering. As Justice Brennan noted in dissent, if the Court is no longer going to adhere to the holding of Fay "it has an 'institutional duty' to say so forthrightly and to explain why some other standard is to be applied."100

97. Id. at 554 (Brennan, J., dissenting).
98. Id. at 554-57 (Brennan, J., dissenting).
99. Id. at 541.
100. Id. at 547 (Brennan, J., dissenting).
In the Term following Williams and Francis, the Court in Wainwright v. Sykes101 made clear that the substitution of the “cause and prejudice” standard for the “deliberate bypass” test would not be confined to claims addressed to the make-up of the grand jury. Petitioner Sykes was arrested for murder. Although he was given Miranda warnings102 there was evidence that he was so intoxicated that he did not knowingly and intelligently waive his fifth amendment rights when he subsequently confessed to the police. For unknown reasons, Sykes’ attorney did not attempt to suppress the confession. Following his conviction for third degree murder, Sykes filed a petition for habeas corpus alleging that he had been denied his Miranda rights.103

Both the district court and the Court of Appeals for the Fifth Circuit ordered the case remanded to determine the question of voluntariness. The Supreme Court reversed, holding that Sykes’ failure to raise the Miranda claim at trial precluded him from obtaining review before a federal habeas court absent a showing of cause and actual prejudice. Because Sykes did not offer any evidence on the cause requirement, his petition was dismissed.104

In enunciating an expanded cause and prejudice standard, the Court studiously avoided any attempt to give guidance as to the meaning of those terms. The Court per Justice Rehnquist merely stated that “whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here.”105 As one commentator noted shortly after the decision in Sykes, the only “precise content” discernible from this case “would unquestionably have to include the element of harshness.”106

The decisions in Davis, Williams, Francis and Sykes left the law of habeas corpus in the following state. Compliance with state procedural law was to be given “more respect” than was af-

104. The Court in Engle v. Isaac noted, moreover, that the type of claims raised by the petitioner in Sykes, that is, a claim for suppression of evidence, does not affect the truthfinding function at trial. Hence, procedural defects in the Sykes context would presumably not result in miscarriages of justice. 102 S. Ct. 1558, 1572 (1982).
105. 433 U.S. 72, 91 (1977). The Court did not elaborate as to what factors inspired this confidence.
forded by *Fay v. Noia.* The states' interest in finality and the dual concerns of federalism and comity were at least on equal footing, if not preferred over the interest in the correct resolution of federal constitutional rights. The failure to object at trial would preclude federal habeas review on procedures not affecting the determination of guilt or innocence by the trier of fact unless the petitioner could meet the requirement of establishing both cause and prejudice—whatever those nebulous terms meant. The waiver standard enunciated in *Johnson v. Zerbst* would now only apply to such non-“trial type” decisions as whether to plead guilty, and whether to request counsel which, obviously, only the defendant can make.

**THE DELIBERATE BYPASS STANDARD IS DEAD: LONG LIVE ISAAC**

Following the 1977 decision in *Wainwright v. Sykes,* the Court remained silent for five years on the issue of procedural default and the precise content of the newly enunciated cause and prejudice standards. Then in April 1982 the newest member of the Court, Justice O'Connor, announced the decision in *Engle v. Isaac,* in which the deliberate bypass doctrine of *Fay v. Noia* was finally put to rest.

*Engle v. Isaac* represented a consolidation of three Ohio cases, all involving the affirmative defense of self-defense. For “over a century” the state of Ohio had required the defendant in a criminal case to bear the burden of establishing affirmative defenses by a preponderance of the evidence. In 1973 the Ohio Legislature enacted section 2901.05(A) of the Ohio Revised Code Annotated which became effective on January 1, 1974. That section provided that “[e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is on the prosecution. The burden of going forward with the evidence of an affirmative defense is on the accused.”

For two years following the enactment of section 2901.05(A), the courts of Ohio presumed that the statute had worked no change in Ohio's traditional rule of requiring the accused to bear both the burden of producing evidence, and the burden of persuasion when raising affirmative defenses. In fact, as late as July 2, 1975, the Ohio Supreme Court, in construing section 2901.05(A), held

108. 102 S. Ct. 1558 (1982).
109. Id. at 1562.
110. Ohio Rev. Code Ann. § 2901.05(A) (Baldwin 1982).
111. 102 S. Ct. at 1562-63.
that "self-defense is an affirmative defense, which must be established by a preponderance of the evidence." One year later, however, the Ohio Supreme Court reversed itself, and in State v. Robinson held that "[t]he obvious meaning of R.C. 2901.05(A) is that the state bears the burden of proof beyond a reasonable doubt through the trial, and that this burden does not shift to the defendant." Thus, once the defendant produces "evidence of a nature and quality sufficient to raise the issue" of an affirmative defense, the prosecution bears the burden of disproving such a defense beyond a reasonable doubt.

All three respondents in Engle v. Isaac were convicted after the enactment of section 2901.05(A), but before the decision in Robinson. At their trials none of them objected to the jury instructions regarding burden of proof. Following the decision in Robinson all three brought habeas petitions to a federal district court alleging that they had been denied due process of law. The gist of their argument was that although a state may shift the burden of persuasion on affirmative defenses to the defendant in a criminal case without violating due process, once the state assumes the burden of disproving affirmative defenses beyond a reasonable doubt, it cannot arbitrarily assign the burden of persuasion to particular defendants without violating that fundamental fairness which the due process clause guarantees.

The district court dismissed the petitions without reaching the merits on the grounds that Sykes' cause and prejudice standard

112. State v. Rogers, 43 Ohio St. 2d 28, 30, 330 N.E.2d 674, 676 (1975). In support of the argument that it was indeed futile to object to the jury instructions regarding burdens of proof on affirmative defenses, note that respondent Isaac's trial took place in September 1975, only two months after the high court in Ohio decided Rogers. Note further that while respondents Hughes and Bell were tried before the decision in Rogers (January and April 1975 respectively), the Ohio Supreme Court had only two years earlier rejected a constitutional attack on Ohio's affirmative defense rule in State v. Seliskar, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973).

113. 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).
114. Id. at 110, 351 N.E.2d at 93.
115. Id. at 111-12, 351 N.E.2d at 94.
116. Id. at 110, 351 N.E.2d at 93.
118. See, e.g., Drape v. Missouri, 420 U.S. 162, 172 (1975) ("[t]he right to a fair trial is a fundamental liberty secured by the fourteenth amendment").

119. See, e.g., Drape v. Missouri, 420 U.S. 162, 172 (1975) ("[t]he right to a fair trial is a fundamental liberty secured by the fourteenth amendment").
barred respondents from obtaining federal review of their claims.\textsuperscript{120} The Sixth Circuit Court of Appeals reversed.\textsuperscript{121} That court found that even if the \textit{Sykes} cause and prejudice standard should control, a fact which the court was not willing to concede, the respondents had satisfied both requirements. The futility of objecting to such an established procedure supplied adequate cause, and prejudice was "clear"\textsuperscript{122} because the burden of proof is a critical element of fact-finding and the respondents had made a substantial issue of self-defense.

The Supreme Court reversed the decision of the Court of Appeals and dismissed the petitions.\textsuperscript{123} The Court held first that the cause and prejudice standard enunciated in \textit{Sykes} and up to that time restricted to errors not affecting the fact-finding process would now apply to all cases involving procedural default, even where the error complained of goes to the heart of the ultimate question of guilt or innocence. The Court then applied the \textit{Sykes} standard to the cases before it. Although the Court conceded that respondents had indeed been prejudiced by the erroneous shifting of the burden of persuasion on the issue of self-defense,\textsuperscript{124} the Court rejected respondents' arguments regarding cause.\textsuperscript{125} This is particularly disturbing in light of the fact that, as in \textit{Sykes}, the Court again refrained from shedding any light on the meaning of the terms "cause" and "prejudice." Although the Court went to some lengths to say what cause was not,\textsuperscript{126} this failure to define its own standard cannot be justified. It allows the court to play cat-and-mouse with state prisoners whose counsel failed to raise necessary objections at their trials. For even after \textit{Engle v. Isaac} the only thing that can be predicted concerning the meaning of those terms is that whatever justification a state prisoner proffers will not suffice.

Finally, the Court held that while procedural default will bar federal habeas review of state prisoners' claims absent a showing of cause and prejudice, there still exists a safety valve for those inmates whose incarcerations are "fundamentally unjust."\textsuperscript{127} Although the court did not explain how this safety valve would

\textsuperscript{120} 102 S. Ct. at 1565.
\textsuperscript{121} Isaac v. Engle, 646 F.2d 1129 (6th Cir. 1980), rev'd, 102 S. Ct. 1558 (1982).
\textsuperscript{122} Id. at 1134.
\textsuperscript{123} 102 S. Ct. at 1575.
\textsuperscript{124} Id. at 1567 n.19, 1575.
\textsuperscript{125} See supra text accompanying footnotes 17-21 for a discussion of "cause."
\textsuperscript{126} See, e.g., 102 S. Ct. at 1573, where the Court states, "[w]e need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object." It would appear, however, that this is precisely the sort of problem which the Court should have reached in \textit{Engle v. Isaac}.
\textsuperscript{127} Id. at 1575.
function, or what standard of review it would be governed by, or even what the term meant, the Court stated that it was “confident that victims of a fundamental miscarriage of justice”128 would be afforded relief.

The decision in Isaac thus culminated the process begun in 1973 with Davis v. United States of eliminating the requirement that the accused be aware of and consent to the loss of fundamental constitutional rights as required under Fay v. Noia. Concerns over the inadvertent loss of constitutional rights were subjugated to the paramount concerns of judicial efficiency, finality, federalism and comity. In less than ten years the Court has thus come full circle from a position of substance over form, to one of form over substance; from a system requiring knowing and intelligent waivers, to a virtually airtight system of forfeitures.

The Court proffered a number of reasons129 in support of its decision to extend the cause and prejudice standard across the board to all cases involving procedural default, but the primary justifications were those of judicial efficiency and finality. The Court stated that the “costs”130 of the Great Writ were simply far too high under the old (pre-Isaac) system in terms of extending litigation over issues that should have been settled at trial into the already overcrowded federal docket. By “frustrating” the interests in putting “an end to litigation’ . . . the writ undermines the usual principles of finality.”131

The irony of Isaac, however, is that not only will it fail to achieve its goals of reducing the number of collateral issues subject to litigation and furthering the cause of finality, but it will actually increase the number of collateral issues subject to appeal. It does so in a number of ways. First, under the rule in Isaac, the Court, inadvertently or otherwise, has established a duplicative procedure for federal courts reviewing habeas petitions in which the petitioner has been guilty of procedural default. Federal courts must now first conduct a hearing on the issues of cause and prejudice. Only if the court is satisfied that both prongs of this standard have been met can it then consider the merits of the

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128. Id.
129. The dissent referred to these as “sentiments in reasons' clothing.” Id. at 1581 (Brennan, J., dissenting).
130. The Court uses the word “costs” no fewer than five times in two pages while making its case against “the Great Writ.” See id. at 1571-72.
131. Id. at 1571.
underlying claim. Note, however, that an inquiry into the issue of prejudice necessarily involves an examination into the merits of the petition: prejudice cannot be determined in a vacuum. Should the court reject the petitioners' offer of proof on cause and prejudice, the second prong of the procedure is triggered—the fundamental miscarriage of justice prong. For even if the petitioner is unable to establish cause and prejudice, a federal habeas court must grant relief where a fundamental miscarriage of justice would otherwise occur.

This procedure is grossly inefficient, and increases by a factor of four the number of issues subject to appeal irrespective of how the district court resolves the claim.\(^1\) First, either the state or the petitioner will appeal the determination regarding whether the latter has met the threshold requirements of establishing cause and prejudice. The same would be true regarding the fundamental miscarriage of justice issue. Also, petitioners whose claims are precluded from federal review for failure to satisfy the cause and prejudice standard will now file claims of ineffective assistance of counsel.\(^2\) After all, it was counsel's failure to object that is responsible for their predicament. Finally, if the district court decides that both cause and prejudice have been demonstrated, any ruling on the merits will be subject to appeal and thus, further litigation.

Not only are the goals of judicial efficiency and finality frustrated by this duplicative procedure, they are further undermined by Isaac's implicit command to the defense bar to object to every aspect of the trial no matter how futile or inchoate the claim, no matter how established the procedure of the court. While such a practice obviously places defense counsel in an untenable position tactically, worse yet, for purposes of finality and efficiency, this practice will result in increasing the workload of the state courts on appeal as well as the federal courts on habeas. For under this system, counsel will never be guilty of procedural default, and thus his client will be eligible for plenary federal review.

The decision in Isaac, however, does not rest solely on the doctrines of finality and judicial efficiency. The Court also supports its decision with arguments regarding federalism and comity.

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1. The Court could have avoided a great deal of this by attempting to give "content" to the meaning of the terms "cause," "prejudice," and "fundamental miscarriage of justice," even if the content was not so "precise."
Justice O'Connor states that "the Great Writ imposes special costs on our federal system,"134 especially in that issuance of the writ "exact an extra charge by undercutting the State's ability to enforce its procedural rules."135

Although the initial response to this argument is that the Constitution is the supreme law of the land136 and hence the concern over the states' ability to enforce their procedural rules is de minimis, the real problem with the Court's arguments concerning federalism and comity in the context of procedural default is that they are misdirected. If the underlying policy of these two doctrines is that federal intrusions into state court determinations provide an unnecessary source of friction, a system of forfeiture, such as that on which Isaac is premised, aggravates this friction. Under Isaac, a federal court may review the federal claims of a state prisoner only if they have been properly preserved on the record. This means that a federal court can review a claim on habeas only after two or three tiers of state courts have rendered a decision on the merits. Thus, where there has been no procedural default, a decision by a federal habeas court that a claim is meritorious is arguably much more intrusive, for such a finding necessarily tells at least two, and generally three state courts that their resolution of the issue was erroneous. But if petitioner's counsel failed to object to an aspect of the trial in which fundamental federal rights were violated, a decision by a federal court on habeas that the petitioner was indeed denied such federal rights is a decision written on a clean slate, that is, it involves no such overruling of state court determinations in that the state courts have declined to even hear the issue.

Finally, the Court attempts to bolster its opinion with the "sententious"137 repetition of the "sandbagging" argument first raised by Justice Rehnquist in Wainwright v. Sykes.138 The gist of this argument is that there is somehow an advantage to be gained by withholding a valid defense from the trier of fact, that is, that sly defense counsel will "deliberately choose to withhold a claim [at trial] in order to 'sandbag'—to gamble on acquittal while saving

134. 102 S. Ct. at 1571.
135. Id. at 1572.
136. See supra notes 28-40 and accompanying text.
137. Id. at 1581 (Brennan, J., dissenting).
a dispositive claim in case the gamble doesn't pay off.” 139 Therefore, the argument goes, only by enforcing a strict system of forfeitures will the Court be able to eliminate this type of underhanded defense strategy.

There are a number of serious objections to the argument that the imposition of an airtight system of forfeitures is justified on the grounds that it will help prevent “sandbagging.” The first is that such an argument offends notions of common sense. It presupposes not only crafty and calculating defense counsel, but also a defendant who is willing to gamble on incredible stakes. The sandbagging argument suggests that there are numbers of defendants who are willing to go to prison in order to pull out their ace in the hole on habeas corpus. Lest it be forgotten, section 2254 requires state prisoners to exhaust all available remedies before being eligible to even petition for habeas relief. This is a time-consuming task. Take the example of respondent Isaac in the case at bar. Isaac's trial took place in September 1975. Final disposition of his habeas petition took place in April 1982, nearly seven years later. To suggest that many persons exist who are willing to take such a “gamble” is incredulous.

In addition, a defendant whose attorney deliberately withheld a valid constitutional claim at trial in order to bring it out on habeas corpus would be barred from obtaining federal review even under Fay v. Noia. Such a calculating maneuver would constitute the sort of deliberate bypass for strategic or tactical reasons addressed in Fay. 140

Finally, “no rational lawyer would risk the ‘sandbagging’ feared by the Court.” 141 The primary goal at trial, from the defendant's point of view, is to obtain an acquittal. Sandbagging can do nothing but hurt a client's case. First, withholding a valid constitutional claim at trial increases the likelihood of conviction. This is true whether the claim relates to evidence that would otherwise be excluded, or whether it relates to an erroneous allocation of the burden of proof. Further, by sandbagging, counsel for the defense would thus have forfeited all opportunities for state appellate review as well as all opportunities for federal habeas review unless he or she could deceive a federal habeas court by convincing the judge that he or she had not deliberately bypassed the state procedures. In short, the sandbagging argument raised by the Court is without merit. 142

139. 102 S. Ct. at 1572 n.34.
141. 102 S. Ct. at 1581 n.13 (Brennan, J., dissenting).
142. Actually the Court raises two minor arguments in addition to those of
CONCLUSION

Resolution of the conflicting interests involved when a state prisoner challenges his conviction by means of federal habeas corpus presents no easy task. Valid arguments exist both for and against an expanded writ. In the balance, however, the arguments in support of a restrictive writ, which the Burger Court has wholeheartedly embraced as evidenced by the decisions from Davis to Isaac, represent outcome determinative rather than philosophical or doctrinal concerns. It has here been argued that continued reliance on such factors as finality, judicial efficiency, federalism, and comity will ultimately undermine the significance of the Constitution as a symbol for the embodiment of the ideal society. It has further been contended that the flood argument, raised by courts and commentators alike, is a sham used to justify judicial alienation of a class of persons, namely prisoners, who lack the political clout to remedy their plight. It is only hoped that the Court in Isaac has gone as far as it will in eviscerating the Great Writ of Habeas Corpus.

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