SANDBAGGING CONSTITUTIONAL RIGHTS: FEDERAL HABEAS CORPUS AND THE PROCEDURAL DEFAULT PRINCIPLE

GRAHAM HUGHES*

INTRODUCTION

Slowly and painfully crafted over the centuries, the federal writ of habeas corpus emerged in the 1960s as the prime instrument for breathing life into the Bill of Rights. But today the scope of the writ has shrunk again, with its power to call state proceedings before a federal court for review seriously weakened by a powerful counterattack. While there are several aspects to this reaction, a fundamental one, which has always been central to the debate about habeas corpus, concerns the importance of finality in criminal proceedings.

Controversy over the scope of habeas review has focused on two competing concerns. According to one view, our greatest fear should be that there are those in prison who have been improperly convicted. Perhaps they never did the acts for which they were found guilty, or perhaps they were convicted in violation of the procedures and standards that we have declared in the Bill of Rights to be minimally acceptable. According to this model, we should leave no stone unturned to reveal such mistakes, even if it means that we must dig beneath the record of the proceedings and determine the facts de novo. Of course, some colorable claims must be made to initiate such an inquiry, but once they have been asserted, the books must be reopened.

But there is another model which stresses the values of economy, dis-

* Professor of Law, New York University. B.A. 1948, M.A. 1950, Cambridge University; L.L.B. 1950 University of Wales; L.L.M. 1960, New York University. This Article is based on a paper delivered at the Institute of Judicial Administration Colloquium on Federal Habeas Corpus Review of State Criminal Convictions, New York University School of Law, March 4, 1988.

patch and finality of decision. Under this view, it is in the obvious self-interest of prisoners to want to reopen proceedings, and unless they are strongly curbed, they will tie courts up interminably in costly and frivolous inquiries. One salutary policy for curbing this tendency is to deny habeas review to those who failed to raise the matters of which they now complain in full and timely fashion in the state courts, when they earlier had that opportunity. This policy is often referred to as a sanction for procedural default.

This discussion will make some general comments about the development of habeas corpus in American criminal procedure but will focus particularly on the validity of the arguments for procedural default since that doctrine has become the centerpiece of the habeas counterrevolution.

I.
THE COMPARATIVE DEVELOPMENT OF POSTCONVICTION REVIEW IN THE UNITED STATES AND ENGLAND

In the United States, we have come to take for granted the existence of a lengthy process of postconviction review. But, it is important to remind ourselves that this development is rather recent in the common-law world. The English novelist Anthony Trollope, writing of his travels in North America more than a century ago, reported that a system of criminal appeals had just been introduced in Ontario but that the local bench and bar thought the innovation unnecessary — even eccentric — and expected that it would soon be abandoned.[1]

The English did not institute a general system of appeals as of right in criminal cases until 1907.[2] Even now their appellate review is very limited in comparison with American procedure. In England, convictions are reversed only where the reviewing court finds a miscarriage of justice[3] — a very strong version of the harmless error principle. Once the first appeal is rejected (a

1. A. TROLLOPE, NORTH AMERICA 79 (A. Knopf ed. 1951) (1862).

2. The appellate system was introduced by the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23. The current governing statute is the Criminal Appeal Act, 1968, 16 & 17 Eliz. 2, c. 19. Appeal as of right is permitted only on questions of law. Appeals on other grounds require leave. A general survey of the English appellate system in criminal cases can be found in I. MCLEAN, CRIMINAL APPEALS: A PRACTICAL GUIDE (1980).

3. This standard is known in English legal terminology as the "proviso," since the statute declares that, even if an otherwise good ground of appeal exists, the Court of Appeal may dismiss the appeal if it considers that no miscarriage of justice has actually occurred. Criminal Appeal Act, 1968, § 2(1). Many would like to see miscarriage of justice as the standard for habeas corpus review in the United States. The standard for reversal on federal habeas review of a state conviction may, indeed, at present be very close to the English position on appellate review. Tendencies to move towards a standard concerned directly with factual guilt and to disparage constitutional considerations that cannot be so viewed are discernible in the virtual exclusion of the fourth amendment from habeas accomplished in Stone v. Powell, 428 U.S. 465 (1976), in the dissenting opinion of Justice Stevens in Rose v. Lundy, 455 U.S. 509, 538-50 (1982), and in the opinion of Chief Justice Burger dissenting from a denial of certiorari in Spalding v. Aiken, 460 U.S. 1093, 1093-98 (1983). *See* L. YACKLE, POST-CONVICTION REMEDIES § 101 (1981).

swift affair usually conducted without benefit of written briefs), a conviction is almost always unassailably final in the English courts.[4] No direct second-stage appeal is possible unless a rarely granted certificate is procured stating that a point of law of great public importance is involved.[5]

Habeas corpus is not available as a postconviction remedy in England. In fact, there is no way for a convict to instigate review of a conviction by her own motion, even if she alleges significant new evidence or perjury on the part of prosecution witnesses.[6] In such a case, the only procedure is to petition the Home Secretary, who has discretion to refer the case back to the Criminal Division of the Court of Appeal for a fresh review.[7] Not surprisingly, the Home Secretary is very hard to move in such cases.[8]

Why did American jurisdictions, in contrast to England, develop so elaborate a system of postconviction review, including federal habeas review of state convictions? Historically, one reason surely was the American requirement of strict pleading in criminal matters, which required that convictions be reversed for the slightest deviation from technically perfect language in an indictment.[9] This preoccupation with properly couched indictments, which lasted well into the twentieth century in many American jurisdictions, could never have been vindicated without the regular availability of criminal appeals.[10] By comparison, a relatively lax approach to pleading in the criminal process is one reason for the late and feeble blooming of criminal appeals in

4. For general descriptions of the English system of criminal justice, see Hughes, *English Criminal Justice: Is It Better Than Ours?*, 26 ARIZ. L. REV. 507 (1984); M.H. GRAHAM, TIGHTENING THE REINS OF JUSTICE: A COMPARATIVE ANALYSIS OF THE CRIMINAL JURY TRIAL IN ENGLAND AND THE UNITED STATES (1984).

5. The second-stage appeal would be to the House of Lords, but this appeal is conditioned on the grant of leave either by the Criminal Division of the Court of Appeal or by the House of Lords itself. Leave should be granted only where a point of law of general public importance is involved which ought to be considered by the House of Lords. Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 1(2); Criminal Appeal Act, 1968, § 33(1).

6. *See* R.M. JACKSON, THE MACHINERY OF JUSTICE IN ENGLAND 206 (1977).

7. After the posthumous pardon in 1966 of Timothy Evans who, by the admission of the British Home Office, had been executed in 1950 for a murder which he did not commit, Parliament enacted the Criminal Appeal Act, 1968. Under § 17 of this statute, the Home Secretary is empowered, after the usual appellate process has been exhausted, to refer a case for further consideration to the Court of Appeal if she believes that doubts about the propriety of the conviction remain. A critical review of the exercise of this power is contained in Woffinden, *A System of Injustice*, NEW STATESMAN, June 29, 1984, at 8.

8. Such a reference back was recently ordered in the celebrated case of those convicted in the I.R.A. bombings which killed many people in a Birmingham pub in 1974. An account of the Birmingham bombers' case and the lengthy and fruitless efforts to overturn the convictions is given in B. WOFFINDEN, MISCARRIAGES OF JUSTICE 277-320 (1987). Several close analyses of the trial and its background over the years had cast the gravest doubts on the guilt of those convicted. After a further review, the convictions were left standing.

9. *See* 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 435-37 (1984).

10. Later, of course, the introduction of a "harmless error" principle curbed this preoccupation with strict pleadings. *See* Chapman v. California, 386 U.S. 18, 22 (1967). Broader powers to amend indictments and the introduction of "short-form" pleadings, supplemented by bills of particulars, were also employed to relax the strictness of pleadings.

England.[11]

The link between elaborate postconviction review, including the use of habeas corpus in some jurisdictions, and American formalism is still operative. Turning again to England for comparison, we find virtually no pretrial procedures there. The grand jury was abolished long ago; preliminary hearings are rare; formal motions, with attendant hearings, are virtually unknown.[12] The criminal trial itself is markedly less adversarial than in the United States.[13] In England, barristers appear one month for the defense and the next for the prosecution. Disputes are usually settled more or less amicably and informally, often out of the courtroom.[14] The approach to the rules of evidence is lax, and it is rare that evidentiary matters are disputed.[15] In such an environment, there is usually not much to appeal about. Indeed, English criminal appeals turn much more often on questions of the understanding of substantive criminal law rather than on matters of procedure or evidence.[16] Of course, there are those who find all this quite admirable, including a number of American observers.[17]

By contrast, the American elaboration of pretrial and in-trial procedures and the institutionalization of adversarial prosecution and defense bureaucracies has led to constant scrutiny for potential error. The defense will seek to sow the record with objections and exceptions made with an eye already turned to the prospective appeal.

The other great seed in American soil that led to an elaboration of the criminal review system, and thus stimulated federal habeas corpus, was the modern growth of a heightened sensitivity to the rights of suspects and defendants.[18] In retrospect, this development has about it an air of inevitability. Once the right to counsel was stated more generously,[19] and with the gather-

11. *See* R.M. JACKSON, *supra* note 6, at 203-06; P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 74-78, 102-03 (1967).

12. *See* Hughes, *supra* note 4; M.H. GRAHAM, *supra* note 4.

13. *See, e.g.*, M.H. GRAHAM, *supra* note 4, at 236.

14. Hughes, *We Try Harder*, 32 N.Y. REV. OF BOOKS, No. 4, at 17 (March 14, 1985).

15. D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 186 (1967).

16. *Id.* at 209-11 (1967).

17. *See, e.g.*, M.H. GRAHAM, *supra* note 4, at 242. Graham suggests that:

> Elected officials and members of the judiciary must begin to focus their attention on developing a criminal justice system like that of the English: a criminal justice system that effectively convicts the guilty; is simple, speedy, and cost efficient; encourages the jury to decide guilt based upon the evidence and not the advocacy of counsel; is simple enough to be understood by law enforcement personnel, attorneys, and judges; does not greatly encourage law enforcement personnel to lie in order to obtain the conviction of a guilty person, as does our present approach; and is intellectually honest in the sense of not saying that it is doing one thing while really doing another.

Id.

18. *See generally* F. GRAHAM, THE DUE PROCESS REVOLUTION (1970) (hardcover edition entitled THE SELF-INFLICTED WOUND); Rosenn, *The Great Writ — A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 346-48 (1983).

19. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

ing force of the civil rights movement, a richer understanding of the rights of individuals in criminal proceedings and a development of the complex procedures necessary to protect those rights were bound to follow.[20] This new awareness, combined with the American traditions of formalism and strong adversarialism in the criminal process, led naturally to a perception of the need for thorough postconviction review, especially a more energetic invocation of federal review of state convictions.[21]

What accounts for the special role of habeas as compared with other procedures for review of a conviction by way of direct appeal or motion? In the first place, it is worth remembering that with habeas the petitioner requests the issuance of a *writ*.[22] While the practical impact may be small today, there are still lingering connotations which spring from the fact that habeas, by virtue of being a writ and not just a motion, is a special kind of judicial order. It can be more than an order to a party or to a lower court in the same system; it may also be an order to the executive or to another system of courts.[23] In this way, a writ of habeas corpus becomes one of the strongest expressions of judicial sovereignty.[24]

In the criminal justice context, habeas, when used by the federal courts to review a conviction of a state prisoner, has been transformed from a remedy against the executive to a means of relief from the judgment of another system of courts. Even this use of the writ is hardly novel. Centuries ago, the English

20. *See, e.g.*, Bruton v. United States, 391 U.S. 123 (1968) (right to confrontation as restriction on use of one defendant's confession in multi-defendant trial); Katz v. United States, 389 U.S. 347 (1967) (warrantless searches per se unreasonable "subject only to a few specifically established and well-delineated exceptions"); Mempa v. Rhay, 389 U.S. 128 (1967) (right to counsel at sentencing proceeding); Stovall v. Denno, 388 U.S. 293 (1967) (due process protection against use of unreliable identification evidence); Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at postindictment lineup); United States v. Wade, 388 U.S. 218 (1967) (same); Miranda v. Arizona, 384 U.S. 436 (1966) (privilege against self-incrimination and right to counsel at custodial interrogation; suspect must be warned of rights prior to questioning); Jackson v. Denno, 378 U.S. 368 (1964) (clear-cut judicial determination of voluntariness before confession submitted to jury); Massiah v. United States, 377 U.S. 201 (1964) (right to counsel as restriction on postindictment effort to elicit incriminating statements); White v. Maryland, 373 U.S. 59 (1963) (indigent defendant's right to court-appointed counsel at preliminary hearing in capital case); Douglas v. California, 372 U.S. 353 (1963) (indigent defendant's right to court-appointed counsel on first appeal as of right); Hamilton v. Alabama, 368 U.S. 52 (1961) (indigent defendant's right to court-appointed counsel at arraignment).

21. *See* Brennan, *Federal Habeas Corpus for State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423, 426 (1961); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 833 n.174 (1965).

22. 28 U.S.C. § 2241 (1982).

23. *See, e.g.*, Peyton v. Roe, 391 U.S. 54, 58 (1968) ("The writ of habeas corpus is a procedural device for subjecting executive, judicial or private restraints on liberty to judicial scrutiny.") (footnotes omitted).

24. This enduring feature carries us dimly back to the Magna Carta, with all its associations regarding the liberty of the subject and release from wrongful detention. *See generally* W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS (1980); D. MEADOR, HABEAS CORPUS AND MAGNA CARTA (1966); R. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY (1960).

courts used habeas extensively in the battles between the Chancellor and the common-law courts.[25] But the American contest has taken place in a different political setting. The federal courts have never been driven by the competition for a monopoly of criminal jurisdiction that characterized the old battles between courts in England.[26]

Although hunger for judicial control did not power the development of federal habeas, its growth represents a sovereignty battle of a different kind. The vitality of habeas is only explicable in terms of a Civil War legacy of federal distrust and even contempt for the conduct of the states in certain spheres.[27] The habeas statute of 1867, which invested the federal courts with habeas powers as to state prisoners,[28] stands alongside the Act of 1871, which conferred powers on the President to send the army into states where federal laws could not be executed or where the rights of citizens under the Constitution and federal laws were being violated.[29] For a considerable time after the Civil War, the occasional federal interventions through habeas may have been as much assertions of federal power and supremacy as manifestations of concern for the rights of defendants.

This view fits well with modern American themes and images, at least those of the middle and educated classes outside the old South who see federal institutions as elite, magisterial, civilized and relatively efficient, and state operations as rough, inferior and sometimes oppressive, if not barbarous. The shameful incidents that we remember in the history of American criminal justice are for the most part linked with the states, whether it be the South as

25. W. DUKER, *supra* note 24, at 33-35; *see also* R.M. JACKSON, *supra* note 6, at 5.

26. *See, e.g.*, 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 109-11 (4th Ed. 1926); R. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 22-25 (1960). Indeed, until the last few decades federal courts did not spend much of their time on criminal matters and had little expertise or interest in giving lessons to the states in this field. *See, e.g.*, F. GRAHAM, *supra* note 18, at 30-32 (1970) (comparing Slaughterhouse Cases, 83 U.S. 36 (1873), with Powell v. Alabama, 287 U.S. 45 (1932), Brown v. Mississippi, 297 U.S. 278 (1932), and Moore v. Dempsey, 261 U.S. 86 (1923)).

27. *See, e.g.*, Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1008 (1985) ("The establishment of collateral review through habeas did not represent a brazen grab for national power at the expense of the states, but rather an attempt to ensure the enforcement of unpopular substantive principles that the state courts might not respect."); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977); Oliver, *Postconviction Applications Viewed by a Federal Judge — Revisited*, 45 F.R.D. 199, 221-25 (1968) (finding that the development of habeas was necessary in view of the state courts' poor record).

28. Act of February 5, 1867, ch. 28, Section I, 14 Stat. 385 (codified at 28 U.S.C. §§ 2241-55 (1982)). The original Act provided that "[t]he several courts of the United States. . . . within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Id. See generally* Mayers, *The 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*, 64 U. MICH. L. REV. 451 (1966); Paschal, *Habeas Corpus and the Constitution*, 1970 DUKE L.J. 605; Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 619 (1982).

29. Act of April 20, 1871, ch. 22, § 3, 17 Stat. 4 (codified at 10 U.S.C. § 333 (1982)).

with *Frank v. Mangum*[30] or even the Northeast as with the trial of Sacco and Vanzetti.[31] Mob-dominated trials, racial prejudice, and lynchings formed an unhappy motif in the state courts.[32] At the same time, criminal cases in the federal courts, whether federal in origin or in review of state cases, were slowly amassing a Bill of Rights and due process jurisprudence with decisions like *Johnson v. Zerbst*[33] and *Powell v. Alabama*[34] asserting the right to counsel, and *Weeks v. United States*[35] declaring the application of the exclusionary rule in federal cases.

In the first few decades of the century, this mounting evidence of the generally superior quality of federal justice, and of its increasingly necessary role in admonishing and correcting state courts, was accompanied by other resounding aggrandizements of federal power and demonstrations of the unified direction of national effort. The First World War displayed federal might to the nation and the world. The war was soon followed by the Depression and then the New Deal, which established the federal government as the best and last hope for America's salvation. In quick succession came the Second World War, which, if it did not quite relegate the states to the status of English counties, at least made them seem more like constituent republics of the Soviet Union than the grandly sovereign entities of the first confederation. When the civil rights consciousness of the 1960s emerged and the federal government exacted proper responses from recalcitrant states, it was natural that these developments should be accompanied by a corresponding expansion of habeas corpus jurisdiction in the federal district courts,[36] thus bringing the

30. *See* Frank v. Mangum, 237 U.S. 309 (1915); Frank v. State, 142 Georgia 741 (1914), 142 Georgia 617 (1914), 141 Georgia 243 (1914). Leo Frank, a Jewish industrialist from the North, was convicted and sentenced to death for the murder of a thirteen year old girl in Atlanta in 1913. Frank's trial took place in an atmosphere of pervasive and virulent anti-Semitism, and was attended by threats of mob violence. Following unsuccessful motions and appeals in the state courts for a new trial, Frank sought a writ of habeas corpus in the federal courts, alleging that his due process rights had been violated because his trial had been dominated by a mob. The Supreme Court affirmed the district court's denial of the writ, reasoning that Frank could not raise his claim on habeas because the state had provided Frank a fair opportunity to vindicate his claim through its appellate process. 237 U.S. at 335-36. Subsequently, Georgia Governor Nathaniel Harris commuted Frank's sentence to life imprisonment. Two months later, Frank was abducted from the state prison by a mob and was lynched. For a detailed account of the case, see L. DINNERSTEIN, THE LEO FRANK CASE (1968).

31. Commonwealth v. Sacco, 261 Mass. 12, 158 N.E. 167 (1927), *cert. dismissed*, 275 U.S. 574 (1927). There is a large literature on the trial, convictions and executions of Sacco and Vanzetti. One of the best accounts is M. MUSMANNO, AFTER TWELVE YEARS (1939).

32. For accounts of two of the most famous cases of mob-dominated trials see D. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969), and R. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND BROWN V. MISSISSIPPI (1986).

33. 304 U.S. 458 (1938). *Zerbst* held that the waiver of a constitutional right (in this case the federal right to counsel) must be knowing and voluntary.

34. 287 U.S. 45 (1932). The Supreme Court in *Powell* reversed a state murder conviction and capital sentence because the defendants had not been afforded an opportunity to obtain the effective assistance of counsel.

35. 232 U.S. 383 (1914). In *Weeks*, the Court held that the fourth amendment barred the use, in a federal prosecution, of evidence secured through illegal search and seizure.

36. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963);

states into line with the new understandings of the Bill of Rights in the criminal process.[37]

This development was historically inevitable and should be viewed positively. As the dormant Bill of Rights finally began to flower, the gap between federal and state criminal justice would have become increasingly unseemly, especially with the modern development of parallel statutes prohibiting much the same conduct at both the federal and state levels, so that the kind of justice a defendant would receive would depend on the accident of which system prosecuted her. The Supreme Court's jurisdiction was, of course, necessary to broaden the reading of the Bill of Rights and to fashion the doctrine of incorporation,[38] but its impact on the day-to-day realities of the state systems would have been considerably less if the only process of review available was the occasional pecking of certiorari. Loosening the reins to permit more expansive federal district court intervention was eminently necessary.[39] This development succeeded in building a national code of criminal procedure, which established minimum standards of due process throughout the nation.[40]

II.
THE DECLINE OF FEDERAL HABEAS CORPUS JURISPRUDENCE AND THE FETISH OF FINALITY

The federal habeas revolution has been attacked and curbed and is now being turned around. Swings of the pendulum are a natural part of the rhythm of affairs and need not always be viewed with great alarm. However,

---

Sanders v. United States, 373 U.S. 1 (1963). *See also* Cover & Aleinikoff, *supra* note 27, at 1041-44 (positing that the Warren Court expanded the federal writ of habeas corpus "as [a] remedial counterpart to the constitutionalization of criminal procedure").

37. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (protection against double jeopardy); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Washington v. Texas, 388 U.S. 14 (right to compulsory process); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront adverse witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against compulsory self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendant's right to court-appointed counsel in noncapital felonies regardless of special circumstances); Robinson v. California, 370 U.S. 660 (1962) (prohibition against cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence obtained by unreasonable search or seizure).

38. *See supra* note 37. The doctrine of selective incorporation in the due process clause of the fourteenth amendment of most of the Bill of Rights, pertinent to criminal proceedings, was finally stated in full form in Duncan v. Louisiana, 391 U.S. 145 (1968).

39. *See* Meador, *Straightening Out Federal Review of State Criminal Cases*, 44 OHIO ST. L.J. 273, 274 (1983):

> [One circumstance that] provided practical justification for [expansion of federal habeas corpus jurisdiction in the district courts] was the Supreme Court's lack of capacity to afford meaningful review in all the state criminal cases in which that review was necessary to assure observance of the federal constitution. This incapacity resulted from the Supreme Court's swollen docket and the increase of state criminal business involving federal questions.

40. *See supra* notes 37 & 38 and accompanying text. *See also* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

there are aspects of the recent trend that are dangerous and damaging to the constitutional role of federal habeas.

Finality in criminal proceedings is a value once more acclaimed in the highest places.[41] But this may prove to be a sterile and unrewarding emphasis for the opponents of habeas review. Finality, in the bare sense of reaching a terminus, fails to embody legitimate interests of any weight.[42]

Even the more celebrated advocates of finality fail to state a persuasive argument in support of their position. Judge Friendly wrote that "[t]he proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction."[43] One response to this comment is that our system of criminal justice, like every one in every country, *is* terribly bad. Perhaps in an ideal system, for every case involving a serious punishment, review would never end since the mere possibility of keeping a person in prison whose conviction might rest on a "non-harmless" constitutional violation would be repugnant. Even if we lack the resources or the enthusiasm for so perfect a concern with justice, we ought at least to continue the process of review for all those with colorable claims and give prisoners every opportunity to show that a claim is colorable.

A. Procedural Default, Finality and the Death Penalty

In order to take a place among the other legitimate goals of our criminal system, it must be argued that finality serves particular and important values. Champions of finality usually seek to support their claim by a set of arguments which technically seek to uphold the principle of procedural default.[44] Thus, the rival ideologies about federal habeas — and, indeed, about the propriety of prolonged postconviction review altogether — can be defined and examined by reflection on procedural default.

The modern starting point is *Fay v. Noia*,[45] in which the Warren Court

41. *See, e.g.*, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A. J. 290, 292 (1981).

42. For a discussion of justifications for finality, see *infra* text accompanying notes 68-69.

43. Friendly, *supra* note 41, at 145.

44. Procedural default occurs when a district court denies habeas review because the petitioner failed to raise the matter of which she now complains in full and timely fashion in the state courts when she earlier had that opportunity. *See, e.g.*, Bator, *supra* note 41; Friendly, *supra* note 41, at 149-50; Guttenberg, *Federal Habeas Corpus, Constitutional Rights and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 679-85 (1984).

45. 372 U.S. 391 (1963). In *Fay*, a defendant convicted of murder elected not to appeal his conviction because he lacked the financial resources to hire an attorney (an indigent's right to a court-appointed attorney on direct appeal had not yet been established) and because he feared that he might be sentenced to death at a retrial. *Id.* at 397 n.3. However, after his codefendants were successful in overturning their convictions in subsequent legal proceedings, Noia applied to the state court for a writ of *coram nobis* to review his conviction. This application was denied on the ground that Noia's failure to appeal barred state postconviction relief. *Id.* at 396 n.3.

substantially reduced the impact of procedural default by expelling the doctrine of the independent, adequate state ground from the operation of the habeas writ. Under this doctrine, the state's assertion of its own rules of procedural default would generally constitute an independent and adequate state ground that would preclude federal intervention.[46] In its place, the *Fay* court declared that only a "deliberate bypass" of an opportunity to present a claim at the state level would bar a petitioner from federal review of that claim.[47]

Wainwright v. Sykes[48] and subsequent cases[49] have virtually dethroned *Fay v. Noia*. The current doctrine holds that the petitioner should be denied federal relief unless she can clear the intimidating hurdles of showing both a legitimate *cause* for, and *prejudice* resulting from, her failure to raise the issue at the appropriate state level.[50] Not surprisingly, in such a case the state will also invoke its own default rule to deny state relief so that a federal rejection means that the issue is forever lost in all forums.

The emphasis on finality and the new cut-back of the habeas remedy have had a particularly harsh impact in the growing field of death penalty cases.[51] In these cases the logic of the sentence seeks an expression of finality in the most prejudicial sense. All the more reason, one would think, for extraordinary rigor in the review process, for the most intense scrutiny of every claim

---

Noia then filed a federal habeas corpus petition, contending that the confession introduced at his trial had been coerced in violation of the fourteenth amendment. Although conceding that the confession was indeed illegally coerced, the federal court also denied relief on the ground that Noia's failure to appeal constituted a failure to exhaust state remedies, as required by 28 U.S.C. § 2254 (1982). *Id.* at 396. The Court of Appeals for the Second Circuit reversed, *id.* at 397, and the Supreme Court affirmed, holding that a procedural default in state court that would be adequate to bar direct review of a state court judgment did not necessarily bar federal habeas review of the underlying federal question. Rather, the Court held, a federal habeas applicant may raise a federal constitutional challenge to his conviction as long as he has not personally made an understanding and knowing decision, in consultation with counsel, to forego assertion of the claim in state court. *Id.* at 439.

46. *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1957); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

47. *Fay*, 372 U.S. at 438.

48. 433 U.S. 72, *reh'g denied* 434 U.S. 880 (1977).

49. *See, e.g.*, Marshall v. Lonberger, 459 U.S. 422 (1983); Rose v. Lundy, 455 U.S. 509 (1982); United States v. Frady, 456 U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982).

50. Wainwright v. Sykes, 433 U.S. 72, 87 (1977). The concept of "cause" is borrowed from Rule 12(f) of the Federal Rules of Criminal Procedure, which provides that failure by a party to make timely pretrial motions or objections shall constitute waiver, unless the defendant can show cause.

Since deciding *Sykes*, the Court has explained that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986).

51. *See* Catz, *Federal Habeas Corpus and the Death Penalty: Need For a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177, 1180-81, 1196-1210 (1985); Batey, *Federal Habeas Corpus and the Death Penalty: "Finality with a Capital F,"* 36 U. FLA. L. REV. 252 (1984); Note, *The Rush to Execution: Successive Habeas Corpus Petitions in Capital Cases*, 95 YALE L.J. 371, 376 (1985) [hereinafter Note, *The Rush to Execution*]. *See also* Barefoot v. Estelle, 463 U.S. 880 (1983); Zant v. Stephens, 462 U.S. 862 (1983); California v. Ramos, 463 U.S. 992 (1983); Barclay v. Florida, 463 U.S. 939 (1983).

with any conceivable merit, and for the extension to the convict of all means for developing her attack on her conviction or sentence. Yet, it is precisely here that the Supreme Court, and courts following its lead, have begun to call most impatiently for finality. At times, it seems as if the only indecency that the advocates of expeditious closure of capital cases are able to perceive is not the death sentence but tardiness in executing it.[52]

A related question urgently awaiting resolution by the Supreme Court concerns a state's duty to provide attorneys to assist the more than two thousand death-row inmates in the United States to prepare habeas petitions and other postconviction applications for relief. In *Giarratano v. Murray*, a class-action suit that requested the appointment of counsel for indigent prisoners sentenced to death in the Virginia state court system, the federal district court ordered the assignment of counsel to assist with the preparation of *state* postconviction relief applications but not for *federal* habeas petitions.[53] Reversed in part by a divided panel of the United States Court of Appeals for the Fourth Circuit,[54] the district court's order that counsel be provided in state postconviction proceedings only was reinstated by the en banc circuit court.[55]

Welcome as far as it goes, the outcome in *Giarratono* is hardly radical since every court involved in the litigation agreed that there was no right to counsel for death-row inmates with respect to the filing of federal habeas peti-

52. *See, e.g.*, Antone v. Dugger, 465 U.S. 200 (1984) (per curiam); Woodward v. Hutchins, 464 U.S. 377 (1984) (per curiam); Maggio v. Williams, 464 U.S. 46 (1983) (per curiam). *See also* Note, *Summary Processes and the Rule of Law: Expediting Death Penalty Cases in the Federal Courts*, 95 YALE L.J. 349 (1985); Note, *The Rush to Execution*, *supra* note 51; Note, *Habeas Corpus — Expedited Appellate Review of Habeas Corpus Petitions Brought by Death-Sentenced Prisoners*, 74 J. CRIM. L. & CRIMINOLOGY 1404 (1983).

53. 668 F. Supp. 511 (E.D. Va. 1987).

54. Giarratano v. Murray, 836 F.2d 1421 (4th Cir. 1988).

55. Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988) (en banc). Formidable barriers of precedent had to be vaulted to justify even the modest conclusion reached by the circuit court in *Giarratano*. The Supreme Court had held in Ross v. Moffitt, 417 U.S. 600 (1974), that states are not obliged to appoint counsel for those seeking a writ of certiorari and, more recently in Pennsylvania v. Finley, 481 U.S. 551 (1987), that a state prisoner has no federal right to have counsel appointed for state postconviction proceedings. In *Giarratano*, the Fourth Circuit circumvented these holdings by relying instead on the narrower principle contained in another Supreme Court decision, Bounds v. Smith, 430 U.S. 817 (1977), that inmates must be afforded access to the courts. *Giarratano*, 847 F.2d at 1121-22.

The Supreme Court granted certiorari in *Giarratano* on October 31, 1988. Murray v. Giarratano, 109 S. Ct. 303 (1988). It is doubtful that the Court will uphold the Fourth Circuit's reliance on the *Bounds* principle of meaningful access. Since the sixth amendment, as presently expounded by the Court, rather clearly will not serve the purpose either, what is the remedy? It may be more convincing to go back to the seminal decision in Powell v. Alabama, 287 U.S. 45 (1932), and ground the right to counsel in habeas proceedings in due process demands arising from the shock to our conscience of putting people to death when there is the remotest possibility that a meritorious claim has gone unformulated. Due process here requires the fullest continuing representation, which could conveniently be offered by a properly staffed and funded special capital case bureau in public defender and legal aid offices. *See* Mello, *Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row*, 37 AM. U.L. REV. 513, 558-61, 593-606 (1988). Of course, state courts could also find such a requirement in their interpretation of the right to counsel or due process provisions of state constitutions. *See* Bonham, *The Emergence of State Constitutional Law*, 63 TEXAS L. REV. 959 (1985).

tions.[56] In practice, this failure to afford a Virginia death-row inmate the fullest measure of assistance of counsel may well close out consideration of meritorious claims in both the state and federal courts. According to the Virginia rule, all postconviction claims, "the facts of which are known at the time of filing, must be included in that petition" and, if not included, cannot be raised at a subsequent filing.[57] This rule meshes harshly with the present Supreme Court approach in federal habeas corpus, which will generally deny federal consideration to any claim barred by a state's default rules, as happened in the Virginia case of *Smith v. Murray* in 1986.[58]

In *Smith*, the trial court admitted evidence at the sentencing phase that clearly violated the defendant's privilege against self-incrimination.[59] Counsel objected at the trial but did not renew the issue on appeal, taking the view that contemporary state precedent was overwhelmingly hostile to his position.[60] Nevertheless, the point was raised on appeal in an amicus brief for the defendant. But the Virginia appellate practice is to consider amicus arguments only as far as they relate to points raised in the appellant's brief,[61] and the Supreme Court affirmed the dismissal of the defendant's federal habeas petition under the principle of *Wainwright v. Sykes*,[62] that default will apply when the petitioner fails to show legitimate cause for not advancing the point on direct appeal.[63] The Court found that counsel's performance did not amount to ineffective assistance and held that failure to foresee the future strength of what it called the "deliberately abandoned" argument was a sufficient reason for denying review.[64]

This application of procedural default, so callously to slam the door on habeas review, is particularly odious. The issue, after all, was put to the trial court. There was no denial of an opportunity for that court to do the right thing nor any lack of a record for the appellate court. Indeed, the Virginia appellate court had the point thrust before it in the amicus brief and was precluded from considering it only by its own rule of abstention, an indefensible rule in death cases — if defensible in any case.[65]

One of the most striking aspects of the death penalty is the way it can so mercilessly illuminate the often tragic consequences of giving up the search for

56. 847 F.2d at 1122; 836 F.2d at 1427; 668 F. Supp. at 517.

57. *Giarratano*, 668 F. Supp. at 515 (citing Va. Code § 8.01-654(B)(2)).

58. 477 U.S. 527 (1986).

59. The testimony in question was that of a psychiatrist who had been appointed to examine the accused before trial at the request of the defense. Over defense objections, the psychiatrist recounted the accused's admission to him of a previous, serious sexual assault. The accused had received no self-incrimination or *Miranda* warnings before his interview with the psychiatrist. Under the Supreme Court's earlier holding in Estelle v. Smith, 451 U.S. 454 (1981), the introduction of this evidence violated the accused's fifth amendment rights.

60. 477 U.S. at 531.

61. *Id.*; Smith v. Commonwealth, 219 Va. 455 n.1, 248 S.E.2d 135, 139 n.1 (1978).

62. 433 U.S. 72 (1977). See *supra* notes 48-51 and accompanying text.

63. 477 U.S. at 533.

64. *Id.* at 538.

65. See *supra* note 62.

error in criminal convictions. In a constitutional system, putting to death a person whose conviction or sentence rests upon a non-harmless constitutional error should be viewed with as much abhorrence as executing a person who is "factually" innocent. *Smith v. Murray* represents default theory in its most unjust aspects.[66]

B. A Reevaluation of Procedural Default

The renaissance of default is the central and most conspicuously objectionable feature of modern habeas law. It could be argued that *Fay v. Noia*[67] did not go far enough in repudiating default; certainly, the repudiation of *Fay*'s modest reforms appears deplorably retrogressive. To make the application of constitutional rights turn upon the lottery of being assigned a skillful pleader is an atavistic practice which seems even more objectionable where personal liberty or even human life is at stake. The principle of procedural default requires critical reexamination.

The orthodox case for procedural default, which amounts to a justification of the ideal of finality, embodies a number of claims: (1) that counsel is the defendant's agent and may bind the defendant by her choices or even by her omissions; (2) that it is desirable for courts to consider points at the earliest opportunity when a full record can be made; (3) that it is costly and inefficient to allow a point to be raised for the first time late in the judicial process; (4) that appellate courts cannot decide issues which have not been fully developed on the record; (5) that the prosecution may be prejudiced by having to make a record at a late date; (6) that the prosecution may be prejudiced by having to retry a case; and (7) that defense counsel, in the absence of a default doctrine, would indulge in the practice of "sandbagging" — deliberately not raising a point in a timely fashion in order to have a fresh chance, if things go badly, of attacking a conviction later.[68] Initially, these reasons for declining to

66. For examples of other capital cases in which procedural defaults in the state system barred federal habeas relief, see Straight v. Wainwright, 772 F.2d 674, 678 (11th Cir. 1985), *cert. denied*, 475 U.S. 1099 (1986); Francois v. Wainwright, 741 F.2d 1275, 1280-83 (11th Cir. 1984); Palmes v. Wainwright, 725 F.2d 1511, 1524-26 (11th Cir.), *cert. denied*, 469 U.S. 975 (1984); Dobbert v. Strickland, 718 F.2d 1518, 1524-25 (11th Cir. 1983), *cert. denied*, 468 U.S. 1220 (1984); Smith v. Kemp, 715 F.2d 1459 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983), *reh'g denied*, 464 U.S. 1032 (1983); Shriner v. Wainwright, 715 F.2d 1452, 1457 (11th Cir. 1983), *cert. denied*, 465 U.S. 1051 (1984); Antone v. Strickland, 706 F.2d 1534, 1536-38 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983); Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir.), *cert. denied*, 464 U.S. 922 (1983).

Smith and Sullivan were executed in 1983; Antone, Dobbert, Palmes, and Shriner were executed in 1984; Francois was executed in 1985; and Straight was executed in 1986. *See* Mello, *supra* note 55, at 539 n.167.

67. 372 U.S. 391 (1963). For a discussion of the case, see *supra* notes 45-47 and accompanying text.

68. *See* Marcus, *Federal Habeas Corpus After State Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663 (1985). The *Sykes* majority elaborated on several reasons for its deference to the states: improved fact-finding, finality, reduction of wasted court time, and prevention of manipulation by criminal defendants or their counsel. On the question of better fact-finding, the Court came to the unexceptionable conclusion that prompt objection at

explore the possibility of a constitutional error may seem substantial, but on closer examination they are much less persuasive than it would first appear.

The agency theory, for example, is feeble in light of the growth of public defender representation, where few defendants are free to choose their attorneys.[69] While clients do generally entrust most decisions to counsel, it is necessary to make a judgment about the proper consequences of that entrustment. Clearly, this relationship usually entails no waiver by the client in the sense of an intentional abandonment of a known right.[70] Such an abandonment would be as likely as a patient consenting to a surgeon's leaving a surgical instrument inside her after an operation.

With respect to other proffered justifications, the present application of the default principle is at least guilty of overbreadth. The principle is invoked sweepingly without any inquiry into whether the prosecution's case would be prejudiced given the specific consequences of noticing and inquiring into the claimed error in the particular case.[71] Indeed, it is often applied even though the error is visible in the record and could be decided on review without any remand for a hearing. For example, as we have seen, *Smith v. Murray*[72] was such a case; it lacked any sound policy reason for the application of default.

The application of so harsh a legal doctrine, when its underlying policy rests on such uneven ground, calls for a reevaluation. This conclusion is especially evident upon consideration of the simple procedural reforms that might be undertaken to address its advocates' concerns.

1. Procedural Reform Addressing the Problem Directly

Default theory ignores the possibility of procedural reforms that could substantially reduce the number of constitutional issues left unexplored in a criminal trial. A more active role for the trial judge could lead to great improvements in developing a more just system. This change might involve a more general practice of pretrial omnibus hearings for identifying and address-

trial allows correction at a time when witnesses still remember the events and their demeanor is under observation by the judge who decides the constitutional claim. It is interesting to note that little emphasis was placed on the one point which the dissent acknowledged as critical: default followed by issuance of the writ years later may mean that effective fact-finding is precluded. *Id* at 681. For a discussion of the impact of *Wainwright v. Sykes* on habeas jurisprudence, *see supra* notes 48-50 and accompanying text.

69. *See* Cover & Aleinikoff, *supra* note 27, at 1080.

70. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding that a defendant's waiver of a constitutional right must be knowing and voluntary).

71. *See, e.g.*, Estelle v. Williams, 425 U.S. 501 (1976). In *Williams*, defense counsel had failed to object in a pretrial motion to the defendant's being tried wearing prison clothes. The Court held that the issue had been waived. *Id.* at 512-13. Recognizing such an issue at a review stage would put the state in no difficulty with respect to rebutting the claim since it would call for no evidentiary showing on the state's part. Likewise, the question should have been, by its very nature, perfectly evident to the trial judge. Of course, there is a separate question as to whether the prosecution would be prejudiced by having to try the case again. But, when a conviction has been obtained at trial rather than by a plea, retrial should also generally present little difficulty for the prosecution.

72. See *supra* notes 58-67 and accompanying text.

ing the full range of possible constitutional questions and an inquiry by the court into the degree of defense counsel's preparation and investigation.[73] It would also contemplate a greater readiness by judges to intervene at the trial whenever the shadow of a constitutional issue is seen.[74] Under such a conception of the judge's proper role, the failure by the court to make adequate inquiry might present error requiring reversal or remand for a hearing. As stated in the American Bar Association's *Standards for Criminal Justice: Special Function of the Trial Judge*, "The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative . . . matters which may significantly promote a just determination of the trial."[75]

The independence of counsel and the defendant's right to effective assistance of counsel have for too long provided dubious justification for the passivity of the trial court in spite of the looming prospect of constitutional error. To take just one example, in *United States v. Moss*[76] the defendant was charged with bankruptcy fraud. He testified at the trial and was aggressively cross-examined as to inaccuracies in testimony which he had earlier given in a bankruptcy hearing. The former testimony was compelled under immunity, and the cross-examination was thus a blatant violation of the defendant's fifth amendment rights.[77] Defense counsel, however, never objected because he was unaware of the immunity-conferring provision of the statute, and the trial court allowed the cross-examination to proceed.[78] In such a case, the judge ought to exercise what might be called a pastoral role and interfere in order to protect the defendant. Some judges might have done that, either to protect the defendant or to protect the expected conviction.

What is surprising is that, at this late date in the evolution of our system, we have no clear principles as to the scope of the court's duty to intervene sua sponte to prevent the possible violation of a defendant's rights. Astonishingly, we leave this vital question to undirected discretion. The declaration of a principle requiring intervention would eliminate many default situations and would enable us clearly to identify error in the court's failure to intervene. Proponents of the procedural default rule would predictably claim that such

73. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND PROCEDURE BEFORE TRIAL, § 11-5.3 (1982).

74. *See, e.g.*, Schwarzer, *Dealing with Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980). Alternatively, some commentators have suggested that state courts could reduce the number of defaults if judges were kept abreast of recent constitutional rulings and were encouraged to advise counsel of potential constitutional claims. *See* Note, *Federal Habeas Corpus Review of Unintentionally Defaulted Claims*, 130 U. PA. L. REV. 981, 1001 (1982); Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Incompetent Counsel*, 62 MINN. L. REV. 341, 413 (1978); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 514 (1978)).

75. STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTION OF THE TRIAL JUDGE, § 6-1.1(a) (1982).

76. 562 F.2d 155 (2d Cir.), *cert. denied*, 435 U.S. 914 (1977).

77. 562 F.2d at 163.

78. *Id.* at 162.

an approach would encourage defense counsel to intentionally abandon tenable claims, hoping that the court would fail to recognize the omission and unwittingly provide the grounds for reversal or remand. But rarely does reality provide counsel with an incentive to follow such a strategy.

2. *Why Sandbag?*

For many commentators, the fear of deliberate withholding of claims — "sandbagging," as the Supreme Court termed it[79] — is the clinching argument as to the need for a default principle.[80] Critics argue that dilution of the default principle would encourage such attempts to mount a second attack upon a conviction or sentence.[81] Would not defense counsel, they argue, either out of deviousness or even some noble concept of duty, plant a defaulted claim in every case if it seemed that this would give the defendant a second chance?

For reasons stated by the dissent in *Wainwright v. Sykes*,[82] it is unlikely that this scenario would occur frequently. Defense attorneys have already learned the wisdom preached by Justice Rehnquist in *Sykes*: that the trial is the main event.[83] When there is a chance to win early, counsel will go for it; rarely will the defense perceive any advantage in hiding a conceivably meritorious claim.[84] So few cases are won on appeal (and even fewer at some later

79. Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

80. Justice Rehnquist made much of the sandbagging issue in his opinion for the Court in *Sykes*. *See id.*

81. *E.g.*, *id.* at 90.

82. *Id.* at 103 (1977) (Brennan, J., dissenting).

83. *Id.* at 90.

84.

> There are . . . strong countervailing pressures against intentionally withholding a claim for later consideration in a federal habeas proceeding. In many cases the lawyer will have no obligation or financial incentive to continue representation on federal habeas corpus, while the client has no right to counsel and more often than not lacks legal assistance in such proceedings. Hence the defendant is unlikely to have a lawyer's aid in executing any strategic ambush. Morever [sic], because habeas courts consider only erroneous denials of constitutional rights, a strategy of intentionally withholding federal constitutional claims discards the chance that the state court might uphold a claim that a habeas court would reject. To be sure, the likelihood of prevailing at trial or on appeal in state court may not be substantial in absolute terms. Yet it may look sizeable when compared to the small likelihood of prevailing on federal habeas corpus review. The large number of habeas corpus applications, and the frivolous quality of many, also create a serious risk that a meritorious claim will be overlooked; in the words of Justice Jackson, "[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." Finally, even if it materializes, habeas relief may come only after a considerable period of time, during which the petitioner would most likely be confined in prison. For these reasons, commentators, whether or not they are sympathetic to broad habeas corpus review and forgiving standards of procedural default, are nearly unanimous in agreeing that the risk of deliberate withholding of claims — "sandbagging," as the Supreme Court has put it — is very small.

Meltzer, *State Court Forfeiture of Federal Rights*, 99 HARV. L. REV. 1128, 1197-98 (1986) (citations omitted).

postconviction stage) that such a strategy would rarely be prudent.[85]

It must be conceded, however, that sandbagging cannot be entirely ruled out. It is certainly possible that late in a discouraging trial, where hope of acquittal is receding, counsel might be willing to stand mute and let what she thinks might be reversible error creep into the record, gambling that relief at a later stage will offer a chance at a second trial. Yet, even the organized bar seems to have recognized the practical difficulties in guarding against such behavior. Sandbagging is presently not explicitly condemned in the American Bar Association's *Model Rules of Professional Conduct*.[86] No doubt this is because an ethical rule requiring counsel to make an objection whenever she perceives the possibility of a violation of the defendant's rights would itself run into the constitutional objection that it would deny the defendant the effective assistance of counsel in making tactical decisions that might be beneficial. Counsel, for example, might decide to refrain from objecting to the admission of prosecutorial evidence on fourth or fifth amendment grounds because she thinks that, on the whole, the evidence will do the defense case more good than harm.

Here a different approach to the ethical dimension of sandbagging should be tried: one which would direct the sanction against the proper target — the attorney — rather than the defendant. An ethical rule could be drafted that would condemn an omission that had no conceivably valid purpose in terms of trial strategy or tactics, but could be understood only in terms of a strategy aiming at success on appeal. Breach of such a standard would be difficult to prove, but counsel contemplating sandbagging would know that if there were an inquiry into her conduct, she would either have to lie by asserting a purpose consonant with legitimate trial strategy, falsely assert that she failed to perceive the issue, or admit to sandbagging. None of these explanations would present counsel in a favorable light.

Some might argue that this proposal would discourage attorneys from pursuing every available avenue of defense on behalf of their clients, but even this concern can be addressed by a set of simple procedures. Counsel contemplating a bypass for tactical reasons — which ethically could turn only on strategy aimed at success at the trial stage — would consult with the defendant and, wherever possible, obtain a signed waiver to be filed with the court. Such a waiver would raise a presumption that a deliberate bypass occurred in which the defendant intelligently participated. These — and only these —

85. *See, e.g.*, Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 574; Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 897 (1984) *cited in* Meltzer, *supra* note 85, at 1197 n.346.

86. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (Discussion Draft 1983). Rule 2.1 grants the lawyer authority to make decisions concerning the means of defending a case. The AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: THE DEFENSE FUNCTION Standard 4-5.2 (2d ed. 1980) states that, following consultation with her client, the lawyer has exclusive control over all strategic and tactical decisions, with three exceptions: what plea to enter, whether to waive a jury trial, and whether the defendant will testify in her own behalf.

circumstances should serve to trigger default on postconviction review. Even then, ineffective assistance of counsel will be an available argument for relief if counsel's tactics were seriously misconceived.

The modern trial is often a contest between two state-organized and state-salaried bureaucracies. The modern trial court must be as attentive to defense counsel as to the prosecutor, ensuring that neither servant of the state diminishes the rights conferred on the defendant by the Constitution. In fulfilling that duty, the court may occasionally encounter difficulties caused by defense counsel's attempts to manipulate the court through sandbagging. This problem, however, is hardly of sufficient dimension to support the injustice often worked by default theory.

CONCLUSION

This sketch of a brave new world from which default has been expelled may seem fantastic as the tide now flows so strongly in the other direction. However, it is the right path to take and one to which we should turn in the future. It contemplates a truly constitutionalist criminal procedure. Reappraisal of default doctrine is the lever that can set federal habeas, and ultimately the state courts, back on the trail blazed in the 1960s. *Fay v. Noia*, with its curtailment of the default doctrine in federal habeas, indirectly pressured state courts to make similar relaxations in local default principles. Failure to do so would have meant effectively handing over an increasing number of cases for federal disposition. A return to this approach will restore the classic roles of habeas and the federal courts, which now lie semi-dormant, as the guardians and enforcers of constitutional values and standards.

The default principle, devised to cut off postconviction review, amounts to a form of trial by ordeal which is irreconcilable with our constitutional system. It declares that the breach of a right counts for everything when preserved in procedural formaldehyde but counts for nothing when the objection is not timely, even though the untimeliness is in no way attributable to the defendant. It is understandable only in terms of a deep-seated ambivalence about the place of the Bill of Rights in our criminal justice system. In an era of mass representation by public defenders or assigned counsel who are overworked and hard-pressed, this doctrine is a blot on the adversary system.

Default was almost dislodged by *Fay v. Noia* but has since been put back on its pedestal. If it can be knocked off, the result would transform federal habeas and, at the same time, would take a large step towards the final victory of federal constitutionalism in the national criminal justice system. The states will then be confronted with the choice of searching for and dealing with constitutional violations, or handing over the final disposition of the case to the federal courts. Such a choice, or ultimatum if you will, should not dismay anyone, for it embodies only the necessary fulfillment of the due process clause of the fourteenth amendment.