

BOOK REVIEW

HABEAS CORPUS AND THE PENALTY OF DEATH

FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE. By James S. Liebman. Charlottesville, Va.: The Michie Company, 1988. 2 vols., pp. xxiv, 884. \$130.00.

*Reviewed by Michael E. Tigar**

Scholars, advocates and law students should buy this book. Ronald Sokol's earlier excellent treatise, *Federal Habeas Corpus*,¹ written in the wake of *Fay v. Noia*,² has fallen out of date. Death case habeas corpus litigation has become prolific and controversial. New habeas jurisprudence, and the principles of federal law carried along by it, wash like waves against the shores of criminal justice. Sometimes the wave erodes the beach, sometimes it deposits a little more firm ground; the process shows no sign of ending.

Before writing this review, I asked habeas litigators and knowing law teachers about the usefulness of Liebman's treatise. Their universal reply was that they had a copy and that it was an invaluable and daily guide. However, there is more to say about Professor Liebman's work than a brief paean to its utility. The treatise is valuable because Liebman has uncanny insight into the nature of advocacy and of the judicial process. He has contributed to scholarship because he tells us about the state of habeas corpus law today, and puts this understanding firmly in its historical, statutory and decisional context.

I should warn the reader that the issues discussed in Liebman's treatise and this review cannot be approached with icy detachment. Men and women are being condemned to death in quite some number by judges and juries whose decisions are based upon the principles of which we speak. One may think these decisions wise or foolish, just or iniquitous, but I have not met anyone unmoved by the process they address.

I. LIEBMAN: INSIGHT INTO ADVOCACY

To begin with, Professor Liebman understands the idea of the tree as a metaphor for legal advocacy. That is, he has done more than assemble legal principles and citations in logical form. He has armed his

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1. R. Sokol, *Federal Habeas Corpus* (1969).
2. 372 U.S. 391 (1963).

readers with a vision of habeas litigation strategy and tactics. To illustrate, let me first describe the "tree" as metaphor, and account for the metaphor having been lost by many advocates. I will then use Liebman's analysis of procedural default and the *Wainwright* doctrine³ as an example of how his mastery of structure and process make his book so valuable a resource to litigators.

A. *The Tree as Rationalizing Idea*

I know a lawyer named Michael Kennedy. He plans cross-examination by making a decision tree. His notes mark a beginning point. If the witness zigs in a certain way, Kennedy will follow with a certain form of counterattack. His notes are not a means of self-confinement: He is always alert to gifts the witness gives in the form of unguarded answers. He is always conscious of his goals.

With this meticulously-prepared plan of action, Kennedy can afford to let the witness wander a bit. The onlooker may believe, especially in the early stages of cross-examination, that the witness has been turned loose to browse. The witness may settle down in the chair. Only later—too late—does the witness realize that the answers freely given and the concessions smilingly made are in fact a series of points from which one cannot turn back.

The decision tree is the advocate's most useful metaphor. Seldom do lawsuits march in and declare themselves soluble by the invocation of a single theorem and undisputed facts. Most lawsuits are filed because two people—or two lawyers, which is often the same thing—have different views of a more or less complex past event. So the lawyer must "game it out." I tell young lawyers that the first thing to do when they take a case is figure out a closing argument, persuasively marshaling facts and legal principles. When the goals are defined, then we can talk about moves and strategy: If the other side responds in a certain way, what will be our reply? What if they try a different tack? How will we meet them? And so on. At every stage, we remember the mutability of facts and the flexibility of legal rules.

Facts are mutable because we never see them in litigation. We see instead their remnants, traces, evidences, fossils—their shadows on the courthouse wall. The witnesses recount: They have perceived, do now remember, can express and want to tell the truth, more or less. Things—paper, hair, bones, pictures, bullets—parade by, each attached to a testifier who alone can give them meaning. At proceeding's end, the advocate will try to impose some order on all of this, and convince the trier that it makes a certain kind of picture.

Legal ideology, in the form of statements called rules, is more or less flexible depending upon the legal issue at stake and the fineness with which lawgivers have woven. An advocate must appreciate how

3. For a discussion of the doctrine see *infra* notes 11–18 and accompanying text.

large are the open spaces in the rules at issue, and have at hand alternative formulations to match the adversary's—and the judge's—moves.⁴

This view of litigation has fallen out of fashion, partly in reaction to an excessively cramped vision of it at common law. The decision tree confronting a 17th Century advocate began with the selection of a writ. He (and they were almost all “he”) then embarked on a merry dance of demurrers, pleas in bar and abatement, answers, demurrers to the answer and so on to a single point of decision on which the case might turn. If the writ were inaptly, even though plausibly, chosen, all the other steps would prove unavailing.⁵

This is all familiar history. First code pleading,⁶ then the federal rules,⁷ changed matters. One pleaded facts, not conclusions. Inconsistent pleadings were permitted. Discovery became the device for finding out the precise basis of the plaintiff's claim. One was not, in short, required to chain oneself to a theory of the case until a procedural hour at which it was fair to expect such a commitment.⁸

Many lawyers did not hear these signals correctly, and in my experience, some have not heard them yet. Lawsuits are filed on the sketchiest allegations; the parties conduct extensive, expensive and unfocused discovery; summary judgment motions are heard and denied. The case slouches toward trial like an ungainly beast, grown seemingly beyond advocate or judicial control. Commentators have inveighed against this discontrol.⁹ Judges have begun to curb it, by means apt and inapt.¹⁰ Lawyers are realizing that their failure to think about conclusions and to “game out” the case makes litigation more expensive and seriously alters the cost/benefit ratio of lawsuits.

Most law schools do not devote much time to judicial administra-

4. I have explored the issues of openness in legal ideology in a book, *Law and the Rise of Capitalism* (1977) [hereinafter *Capitalism*]; a long essay, *Crime Talk, Rights Talk, and Double-Talk: Thoughts on Reading *Encyclopedia of Crime and Justice**, 65 *Tex. L. Rev.* 101 (1986) [hereinafter *Crime Talk*]; and three plays, *Haymarket: Whose Name the Few Still Say With Tears* (1987), *The Trial of John Peter Zenger* (1986), and *Warrior Bards* (1989) (co-authored with Kevin McCarthy).

5. A clear statement of the purpose and operation of pleading at common law appears in J. Koffler & A. Reppy, *Common Law Pleading* (1969). For a discussion of reducing claims to a single decisive issue, see § 3.

6. See generally C. Clark, *Handbook of the Law of Code Pleading* §§ 1–12 (2d ed. 1947) (discussing the impact on common-law pleading of the New York Code of 1848 and subsequent code pleading enactments by other states).

7. See generally C. Wright, *Handbook of the Law of Federal Courts* § 62 (3d ed. 1976) (discussing the impact of the Federal Rules of Civil Procedure).

8. See generally *Cook & Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971) (Brown, C.J.) (refusing to dismiss complaint for failure to state claim upon which relief can be granted unless there is no state of facts upon which plaintiff could recover).

9. For a thoughtful discussion of the changing climate, see the majority opinion of Judge Brown and the concurring opinion of Judge Higginbotham, in *Elliott v. Perez*, 751 F.2d 1472, 1480–83 (5th Cir. 1985).

10. Inapt means include excessive and uncontrolled use of sanctions against lawyers under 28 U.S.C. § 1927 (1982) and *Fed. R. Civ. P.* 11.

tion problems, even though these problems are going to dictate the form of access to justice for the next decade. Many large law firm litigation departments do not think in terms of narrowing issues and focusing efforts. Their methods of staffing litigation often tend to perpetuate rather than solve the problem of discontrol. Therefore, many lawyers approach habeas litigation unfamiliar with the procedural precision and factual clarity that is the hallmark of every successful petition.

The image of the tree is evocative for another reason. Professor Amsterdam reminds us in his Foreword to Liebman's book that the judicial temperament is changing, and that the large-scale forceful arguments of a generation ago find less favor today (pp. vi-vii). We must carefully craft arguments of more limited scope. So the "tree" is changing. Once we conjured with mighty redwoods. Today, we are the gardeners of a forest of bonsai trees, carefully encouraging, trimming, nurturing. The image still serves, perhaps even better.

B. *Habeas Corpus and Procedural Default*

Professor Liebman's treatise is not an introduction to theories of procedure. However, his mastery of structure and process provides readers with superb tactical insights, and shows us his worth both as scholar and teacher. Let us see how he understands the idea of the tree.

Professor Liebman's approach is exemplified in his discussion of waiver, or "procedural default" (pp. 127-28). In *Fay v. Noia*,¹¹ decided in 1963, the Court revisited English history and federal statutes and decisions. It held that federal courts have the power to hear a state prisoner's constitutional claim even if she has not timely asserted the claim in a state proceeding, and even if access to that proceeding is now barred by state rules on timing.¹² The Court held that the statutory exhaustion requirement of 28 U.S.C. § 2254 refers only to those remedies available to the petitioner when seeking the federal writ.¹³ The Court underscored that only the petitioner's "deliberate bypass" of fair state procedures would bar the way to federal relief.¹⁴

Fay made real world sense. Criminal defendants must rely to an extraordinary degree upon decisions their lawyers make. Most defendants are either indigent or without funds to pay for enough lawyer time to assert every conceivable procedural right. The quality of criminal defense is, in my view, lamentably low. The overwhelming majority of criminal cases are disposed of by plea bargain.¹⁵

11. 372 U.S. 391 (1963).

12. *Id.* at 426-27, 435.

13. *Id.* at 435.

14. *Id.* at 438-40.

15. See generally Tigar, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1, 19-24 (1970).

The system depends, in short, upon waivers. *Fay* provided a mechanism for ensuring that waivers of federal rights would be tested for voluntariness. Since *Fay*, the Court has periodically re-examined and reshaped the deliberate bypass standard. Today, waiver is governed by *Wainwright v. Sykes*,¹⁶ holding that failure by the defendant or counsel to comply with a state procedural rule may preclude federal habeas corpus review unless the defendant can show cause for failure to comply with the rule and actual prejudice occasioned by any default.¹⁷

Professor Liebman's analysis of the *Fay-Wainwright* tension is masterful. After briefly analyzing the central holding of both cases, he concludes that *Wainwright* will preclude relief "in certain circumstances" (p. 127). He then categorizes the exceptions to preclusion, organizing them from fundamental constitutional error to the residuum of equitable doctrine at the core of habeas corpus. Liebman also cites a chapter or section of the treatise where one may find a full discussion of each exception (p. 128, nn.10-11).

Let me illustrate the range and subtlety of Liebman's preclusion analysis. Suppose, for example, that you are appointed to file a writ of federal habeas corpus for a death-sentenced prisoner. You would, of course, make sure that a stay was in place, and consult Liebman's chapter 13. You would ensure that state remedies had been exhausted, hearkening to the able discussion in chapters 5, 6, and 7. These chapters themselves warrant fuller discussion than space permits, because Professor Liebman has unravelled complex procedural problems in each of them.

Turning to the merits, you might consult appendices C and D for well-crafted though incomplete checklists of potential issues. ("Incomplete" is Professor Liebman's word, wisely-chosen so that you will use this book as a guide and not a crutch; these lists contain several hundred potential issues, with valuable citations of authority.) If you identified a potentially case-winning issue, based on reading the record and talking with your client and other witnesses, you would then be required to think of the tree. Prevailing on that issue is your goal. If the state should argue against a stay, or that the claim has not been exhausted in state courts, you will turn to the chapters mentioned earlier.

But suppose you are met with a claim that the issue was not raised in the trial court as required by state practice, and thus your client is barred from relief under *Wainwright*. Let me show you some branches on Liebman's tree, for this sort of analysis must now be done in almost every case.

16. 433 U.S. 72 (1977).

17. *Id.* at 87. See also Comment, Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis, 56 U. Chi. L. Rev. 263 (1989) (criticizing *Wainwright*'s bar to federal habeas corpus review based on noncompliance with state procedural rules as an "unwarranted form of abstention," given the paramount role of federal courts in the enforcement of civil rights).

First, Professor Liebman asks whether the claim is so fundamental that it cannot be waived by silence (p. 127). He does not proceed, as expected, to a discussion of *Wainwright's* "cause" and "prejudice" rules. Liebman knows that cause and prejudice are elusive concepts that pose special problems for the habeas advocate. Thus Liebman's strategy tree is constructed differently.

Liebman directs the advocate first to whether the state procedural bar is "*actually and reasonably required by established and evenhandedly administered state procedural rules*" (p. 128 (emphasis added)). There are at least four separate branches in that construction. The advocate must explore each of them. Liebman devotes chapters 23 and 24 to guiding her in that process.

There is more. Liebman asserts that the state must have actually and reasonably relied on the procedural bar in order to invoke it on federal habeas corpus (*id.*). Again, further guidance awaits the reader in later chapters. The advocate is thus invited to step back from the complex and intractable *Wainwright* issue, and to consider more carefully crafted and limited answers to prosecutors' preclusion claims.

By framing the issues in this way, Professor Liebman demonstrates his tactical genius. *Wainwright* is a prosecutor's case; it aims federalism and comity concerns directly at the petitioner. Liebman invites the advocate to interrogate the state procedural default rule, and demand an answer to whether it really serves an important state interest. He counsels us to put the prosecutor on the defensive by making her justify the existence and application of her purported rule. Professor Liebman's discussion thus imposes a discipline upon the claim selection process that is valuable for experienced lawyers and comforting to the novice, by providing a scholarly taxonomy of the often-confusing law of default and waiver.

The exercise is all the more important because lawyers are taught in the ordinary case to sift claims carefully, and not to make a good case seem weak by including weak claims. Good lawyers do not usually raise claims that permit the opponent to argue waiver and default because such arguments tend to weaken the entire case at which they are levelled. But lawyers engaged in the grim minuet of death must bow to every partner. The risk of waiver, of "abuse of the writ," of death by lawyer improvidence, weighs upon them. They need to learn new skills of triage. They must learn how to identify all potential claims, and to raise them clearly and quickly, preferably in a single proceeding. For reasons discussed in more detail below, lawyer as well as client may be at risk in the event of missteps. Professor Liebman provides a plan for identifying worthwhile claims and the means of putting them in a procedural context.¹⁸

18. In two useful appendices, Professor Liebman provides checklists of issues relating to a criminal conviction, and a death sentence (pp. 709-36). In another appendix, HeinOnline -- 90 Colum. L. Rev. 260 1990

Some will fault Liebman for the adversarial style of his book. For example, in section 7.2, he lists many arguments that an indigent may make to obtain counsel and other services in a habeas case. He does not tell the advocate that impatient federal judges may well deny such assistance out of hand.

Professor Liebman's discussion was written before the Supreme Court held, in *Murray v. Giarratano*,¹⁹ that Virginia's post-conviction counsel procedures did not violate the Constitution, even though they fail to guarantee individual counsel in state post-conviction proceedings.²⁰ There was no opinion for the Court, and some Justices's positions keep alive the notion that there is some constitutional right to legal assistance in the post-conviction process.

Liebman's pre-*Giarratano* treatment of this issue is designed to arm the advocate with arguments for appointing counsel. He assesses and cites all the relevant cases, including the court of appeals decision in *Giarratano* that was reversed by the Supreme Court.²¹ In this book designed for advocates, he could not be expected to do more.

One might ask, however, whether he has been too optimistic in offering up so fulsome a list of arguments. I think not. I have already argued that no issue can be ignored in capital cases because the stakes are so high. Furthermore, the increasing death row population and the pressure of habeas litigation may generate cases that cause the courts to reconsider and refine positions formerly taken. A clear example emerged this past Term. In *Jurek v. Texas*,²² the Court had upheld Texas's death penalty statutes against a broad-based challenge. In *Franklin v. Lynaugh*,²³ the Court had rejected a challenge to the mitigating instructions provisions of the statute. After these two cases, it would have been easy to resignedly abandon challenges to Texas's procedures.

Then *Penry v. Lynaugh* was decided.²⁴ The Court held that a trial judge must go beyond the words of Texas's statute and give meaningful instructions about the defendant's mitigating evidence. *Penry*, I am

he lists "potential sources of factual information revealing meritorious federal habeas corpus claims" (pp. 737-49). These materials will prove invaluable to the initiate and yet are so thoughtful and innovative that the most experienced lawyer will find them worthwhile reading.

I have one quibble about this book, which must infuriate Professor Liebman as well. The publisher has done him a disservice with sloppy proofreading. For example, p. 341 n.31 cites "*Perry v. Lynaugh*." In the Table of Cases at p. 814, this case is rendered as "*Penny v. Lynaugh*." The correct name is *Penry v. Lynaugh*, and the error must be particularly galling to Professor Liebman because the case eventually became *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989).

19. 109 S. Ct. 2765 (1989) (plurality opinion).

20. *Id.* at 2769-70.

21. 847 F.2d 1118 (4th Cir. 1988) (en banc), rev'd, 109 S. Ct. 2765 (1989).

22. 428 U.S. 262 (1976).

23. 108 S. Ct. 2320 (1988).

24. 109 S. Ct. 2934 (1989).

told, puts more than 100 death sentences up for reconsideration, and gives trial lawyers a new defensive tool. Persistent advocacy has wrought change.

C. *Advocacy and the Role of the Client*

Professor Liebman also understands that advocacy is about clients. Clients can provide helpful and often unique insights into the events that led to their arrest. Equally important, they may have perceptions about the pretrial and trial process that will not appear from the transcript of record, and may not have been noticed by predecessor counsel.

Unfortunately this point often goes unheeded. In large firms, civil litigation is divided up into tasks performed by associates and partners. Each participant risks losing sight of the whole. In the criminal process, the daily grind of plea bargains and justice at wholesale tends to distance lawyer and judge from the human values at stake. Lawyers get to be like surgeons. They scrub up outside the operating theater, and enter to do their work only when the client is asleep and uncommunicative. Not only does valuable information remain untapped, but this sort of approach intensifies the sense of alienation felt by people caught up in the criminal justice system (pp. 25–27). I once wrote that “the law’s customary rigor and customary inhumanity can be crueler than deliberate vengeance.”²⁵ I still believe that to be so.²⁶

Professor Liebman wisely admonishes lawyers who take on habeas cases to leave their offices and go find their clients, and he provides a detailed outline of what to discuss (*id.* & appendix E). His outline is integrated with the taxonomy of legal and factual issues on counsel’s own checklist of possible habeas arguments.

For lawyers who come to habeas litigation from small-firm practice, public service or the public interest bar, talking to a client will not seem daunting. Those who have labored in the library of a large law firm, distant from client contact, may have more trepidation. For both kinds of lawyers, however, death cases are different. Professor Liebman argues persuasively for a special bond of trust in a capital case (pp. 27–28). He recognizes that even experienced lawyers may find the world of death penalty habeas foreign. But some habeas issues—such

25. Tigar, Book Review, 86 Harv. L. Rev. 785, 785 (1973) (reviewing *Psychoanalytic Jurisprudence: On Ethics, Aesthetics, and “Law”—On Crime, Tort, and Procedure*).

26. Twenty years ago, I represented a gentle young man named Louis who had torn up his draft card in front of a CBS television news camera. The prosecutor would not offer any reasonable sort of deal, so I tried the case to a jury. The young man’s significant other was an artist. She sketched a courtroom picture of Louis, large in the foreground at counsel’s table. Far away, made much smaller in perspective, the two lawyers were huddled in front of the judge at a bench conference, debating a legal issue vital to Louis’s freedom. That picture sticks in my mind.

as ineffective assistance of counsel—can only be developed with the client's help and insight. Litigating a habeas claim will often require interviewing witnesses, unearthing old records, searching relevant places. Again, Liebman's checklist of information sources, in an appendix (pp. 737–49), will be a valuable guide.

Most importantly, Professor Liebman's work addresses, even if indirectly, the sense of responsibility, even terror, that weighs upon lawyers in death cases (pp. 25–29). There is something chilling about walking into a jail where a capital defendant is being held. The jail administrators understand and often willingly shoulder their role in handing on the accused through a series of processes that may end in the execution chamber. Their attitudes toward the accused and those trying to be her lawyers are often dominated by a sense of impatience, a sense that the process of dying has already begun and should not be interfered with.

I concede that this is simply my own perception of the capital cases in which I have been involved and of which I know, but some variation of these feelings have been expressed by too many lawyers for me to regard this as happenstance. You are holding in your hands the interests of someone who may be put to death if you lose the case. That is terrifying enough. It is all the more terrifying because it is unfamiliar. The procedural steps are complex, requiring many different kinds of proceedings and intricate legal arguments in federal and state trial and appellate courts. Liebman's work, which divides the lawyer's tasks into measurable, understandable segments, can therefore make a significant contribution to the administration of justice.

II. LEGAL HISTORY AND FEDERALISM: WATCHWORDS OF THE WRIT

As lawyers tread new paths, their practice and Professor Liebman's book will invite them to consider the basic purpose of the writ of habeas corpus. Professor Liebman's first chapter rehearses the debate over the writ's function in a federal system. Arraying historical evidence, mostly secondary, he asserts that federal habeas has generally been and was designed to be a powerful means to redress constitutional error in the state criminal justice process (pp. 5–24). Professor Liebman's book will not stand as an innovative contribution to our study of habeas history, and he does not intend it to. Instead, he does us the valuable service of citing the work of authors who support and oppose his own expansive view of the writ's proper role. He gives us the comfort that this role has a venerable past. His most critical insight is to see habeas as a form susceptible of carrying different content (pp. 11–12). We are reminded that the history of habeas is bound up more with views about the substantive rights it might protect than with procedural issues about the nature of the writ itself (*id.*).

After reading Liebman's first chapter I sat and reread Ronald

Sokol's 1969 discussion of habeas corpus history.²⁷ Sokol's work, whose first edition I reviewed in 1965,²⁸ focused upon the English antecedents to the American writ of habeas corpus. What follows owes a debt to Sokol as well as Professor Liebman.

A. *The Modern Debate*

Both English and American history shed light on the proper role of habeas. I begin by noting that today's debate is not, at its core, waged in new terms or over new issues. The ferocity and sense of urgency that one sees are the product of the stakes being raised, not of the issues being recast. The spate of death sentences reaching the federal courts from the states puts docket pressures on trial and appellate judges. The records in these cases are long. Fearful of waiving anything and knowing the harsh glance given successor petitions for the writ, good counsel raise every conceivable argument. Courts have devised special accelerated procedures for death penalty habeas cases, yet these cases take judicial time that some judges actively resent giving.²⁹

Add to this the ideological debate that is a subtext of all death penalty litigation. In most litigation, lawyers and parties agree at some level of generality about the legal rule at stake. They argue about details of application and the procedures for finding the facts. Federal habeas death litigation is also argued in this framework because the Supreme Court has determined that the death penalty may constitutionally be imposed.³⁰ Yet many petitioners' lawyers are unabashedly veterans of the abolition movement. Their clients share these sentiments.³¹ On the other hand, death penalty proponents disapprove of

27. R. Sokol, *supra* note 1, at 1-27.

28. Book Review, 53 Calif. L. Rev. 914 (1965) (with I.M. Heyman).

29. See Tigar, *Judges, Lawyers and the Penalty of Death*, 23 Loy. L.A.L. Rev. 147 (1989). Those who do not resent the burden nonetheless comment upon it with weary resignation. An example: In the spring of each year of late, as the Texas Court of Criminal Appeals clears its docket, it may affirm six death cases a week. Each one of these is bound for federal habeas corpus after state remedies are exhausted. In the Fifth Circuit, with Louisiana, Texas and Mississippi each doing its share, the federal judicial burden has greatly increased.

30. *Gregg v. Georgia*, 428 U.S. 153, 168-87 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976).

31. I know that capital defendants are not disinterested critics. But many people sentenced to death have become articulate opponents of the penalty. See *Caryl Chessman, Cell 2455, Death Row* (1954). Chessman was executed in 1960. Then-Governor Edmund (Pat) Brown has revisited the decision not to commute Chessman's sentence in a moving book, *Public Justice, Private Mercy: A Governor's Education on Death Row* (1989) (with Dick Adler). Other commentators have included Charles Culhane and Gary McGivern, sentenced for their alleged role in shooting law enforcement officers. Their death sentences were reversed. McGivern is now free on parole. Culhane is seeking commutation of his sentence. See *N.Y. Times*, Mar. 16, 1989, at B1, col. 5. Angela Davis was charged with capital murder in California. See *A. Davis, If They Come in the Morning: Voices of Resistance* (1971). I still recall visiting her in her cell, and appearing in court alongside her. Arthur Koestler was under a death sentence

procedural delay in part because they believe that lack of celerity robs the penalty of whatever deterrent effect it may have.³²

The passion generated by these opposing views sometimes bubbles up from unspoken attitude into public print. A judge of the Fifth Circuit, in a 1988 habeas case, wrote: "The veil of civility that must protect us in society has been twice torn here. It was rent wantonly when [the defendant] robbed, raped and murdered [his victims]. It has again been torn by [defendant's] counsel's conduct, inexcusable according to ordinary standards of law practice."³³ The lawyer's misconduct consisted of failing to get some papers filed on time. Judges hostile to the writ are eager to recount such tales, and the 1989 Fifth Circuit Judicial Conference featured a full-scale debate on the issue of lawyer tactics in death cases.³⁴

Such criticism is hyperbolic and ill-directed. The majority of lawyers in these habeas cases are volunteers who commit untold, uncompensated hours and unreimbursed dollars to the task. These cases call for extraordinary effort.³⁵ More prosaically, however, I have in twenty-five years of law practice learned not to be surprised when a lawyer engages in a little tactical delay. The lawyer who was attacked was blameless, but judges ought to cut habeas lawyers at least as much slack as, say, civil litigants.

Out of this judicial frustration come proposals to recast the federal writ.³⁶ Justice Scalia and others have been heard to say that legislation is necessary to deal with uncertainties in the contours of federal power in habeas cases.³⁷ In fact, Liebman presents evidence of the historically constant role of federal habeas corpus as protector of constitutional

during the Spanish Civil War. He wrote a most eloquent discussion of capital punishment, *Reflections on Hanging* (1957). This book played a central role in the English abolition debate.

32. See Chief Judge Clark's eloquent plea in *Brogdon v. Butler*, 824 F.2d 338, 343-44 (5th Cir.) (concurring opinion), cert. denied, 483 U.S. 1040 (1987); see also Justice Stevens in *Schiro v. Indiana*, 110 S. Ct. 268, 268-70 (1989) (separate opinion) (dissenting from denial of cert.).

33. *Bell v. Lynaugh*, 858 F.2d 978, 985-86 (5th Cir. 1988) (Jones, J., specially concurring), cert. denied, 109 S. Ct. 3262 (1989).

34. I was present at the debate. No formal record was kept, although the upshot has been a committee appointed by Chief Judge Clark.

35. See *supra* note 29.

36. Chief Justice Rehnquist appointed a five-member commission chaired by Justice Lewis Powell, to recommend changes in federal habeas corpus, which issued its report in October 1989. There is also an ABA Criminal Justice Section Task Force, chaired by Judge Alvin Rubin and Chief Justice Malcolm Lucas, that reported its views at about the same time. The Task Force's work has been aided by an extremely thoughtful "background and issues paper" by its Reporter, Professor Ira Robbins. I. Robbins, *Rationalizing Federal Habeas Corpus Review of State Court Criminal Convictions in Capital Cases* (1989) (issue paper available from the American Bar Association, 1800 M St., N.W., Washington D.C.). As this Review goes to press, Congress is considering significant amendments to habeas procedure.

37. Personal conversation with Justice Scalia, Honolulu, Hawaii (Aug. 7, 1989).

rights. He argues that the court has only once retreated from its interpretation of the habeas remedy as being as broad as the rights conferred by the federal constitution³⁸ and this lapse was swiftly corrected (pp. 9–10).

Liebman also notes that the basic design of the writ is fairly simple, and has been hammered out in centuries of litigation on both sides of the Atlantic (pp. 6–9, 11–12). The procedures set out by statute and rule are likewise straightforward, dating to the 1867 statute that put the federal courts in the business of reviewing state court criminal judgments.³⁹ Many, if not most, of the complexities that plague habeas litigation today are the product of procedural rules crafted by those hostile to the basic purpose and design of the writ. A person waggishly disposed might say that the conservative jurists have succeeded in devising problems that only they can solve. They now seek to renounce any role in creating the problems while telling litigants that they must make concessions in order to solve them.

B. *Unraveling the Two Strands of Legal History*

Lest one think this view uncharitable, I hasten to add that we are seeing two quite distinct views of judicial style in the debate about the writ, and each has an identifiable lineage in the common-law tradition. There are, after all, two ways to read the words of old cases and old oracles.

There is Lord Coke's way, to insist that unless old legal forms are constantly invested with new and progressive content, legal ideology becomes an artifact—or worse, a fetter that will require to be struck off. This was, I have argued, a dominant theme of Coke's most cogent work, setting out the principles that were to triumph in the English Revolution.⁴⁰ Indeed, if we look to *Dr. Bonham's Case*,⁴¹ perhaps Coke's finest achievement, we see this historical methodology yielding up still-vital principles of judicial independence and judicial review.

Another way is to search in the precedents for ritualistic impedimenta, and cast them down as stumbling stones in the claimant's path. Jonathan Swift wrote of this judicial style:

It is a maxim among these lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of *precedents*, they produce as authori-

38. *Frank v. Mangum*, 237 U.S. 309 (1915).

39. See R. Sokol, *supra* note 1, §§ C–D.

40. See M. Tigar, *Capitalism*, *supra* note 4, at 218–27; Tigar, *Original Understanding and the Constitution* [hereinafter *Original Understanding*], 22 *Akron L. Rev.* 1, 7–10 (1988); see also J. Dawson, *The Oracles of the Law* 68–75 (1968).

41. 8 Co. Rep. 114a, 77 Eng. Rep. 646 (C.P. 1610); see Plucknett, *Bonham's Case and Judicial Review*, 40 *Harv. L. Rev.* 30 (1926).

ties to justify the most iniquitous opinions; and the judges never fail of directing accordingly.⁴²

Both methods plausibly lay claim to authenticity, in part because many of legal ideology's formal rules may plausibly contain different content at different times without changing the basic form of the rule's statement. The tension between ritualistic and expansive readings has been a particularly visible technique in the common law, and especially at times of crisis and change.⁴³

The debate over the historic function and modern role of habeas cannot be understood without reference to these antithetical models of judging. When the Court decided *Fay*, it began by putting habeas in a transatlantic historical context. Critics quickly denounced this "magisterial historiography"⁴⁴ and supporters defended it,⁴⁵ (pp. 5-24) with both sides sometimes forgetting that history written in judicial opinions is bound to be instrumental and teleological. Both sides found parts of the common-law tradition to which they could cling.

The root difficulty of arguing about the history of any writ is that the writ system was on its face so inflexible, and yet as put to political use had great suppleness. This could be seen, in the late 1500s and early 1600s, in every field of law touching upon the political and economic interests of the ascendant bourgeoisie. The procedural world of this time had two other aspects that made habeas corpus, in all its many forms, both controversial and crucial. First, the debate over jurisdiction among common law, prerogative, equity, fair and market, town and manor courts—to name a few—was fierce. The debate was fueled by the disputes between royal and local interests, between common lawyers and royal power, and between bourgeoisie and gentry. Second, no court could act unless it could compel the parties to appear. Habeas corpus in its various forms became the judicial weapon to achieve that end. Other remedies, such as the injunction or writ, might precede the order to bring the body to court, but there was usually habeas as a last resort.⁴⁶

Thus, weighty issues central to the English Revolution were being played out in the context of habeas corpus. It trivializes both this history and the writ itself to characterize these disputes as relatively petty matters about division of judicial business or jurisdictional covetousness. For me, therefore, the lesson of history is that habeas corpus was to the Framers of our Constitution a procedural device suited to the

42. J. Swift, *Gulliver's Travels* 266 (Everyman's Edition 1946).

43. See Tigar, *Original Understanding*, supra note 40, at 7-10.

44. The phrase was borrowed by Professor Oaks in an early attack on *Fay v. Noia*. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 451 (1966).

45. See Sokol, supra note 1, §§ D-E.

46. This is familiar history, recounted in, e.g., R. Sokol, supra note 1, § B; T. Plucknett, *A Concise History of Common Law* 176-98, 353-418 (5th ed. 1956).

task of enforcing basic rights. After the Civil War, using habeas to police state justice systems did not seem a federalism-destroying extension of habeas's reach.

C. *Federalism: The Door Opens and Closes*

In addition to the historical differences in judicial style, a second major tension in the debate since *Fay* has been expressed in terms of federalism. To use Gary Peller's apt metaphor, which Liebman adopts (pp. 11–12), the Court was in 1963 increasing the cargo of federal rights.⁴⁷ *Fay* looked to the vessel in which federal courts would bear them to safe harbor.

Fay in 1963 was, in one sense, of a piece with *Dombrowski v. Pfister*⁴⁸ in 1965. In *Dombrowski*, the Court held that a federal injunction would issue to restrain state prosecution under an overbroad state sedition statute. The first amendment trumped the Anti-Injunction Act prohibitions on federal judges enjoining state courts and concerns of comity. The reader will recall that when the Court recoiled from broader readings of *Dombrowski*, it did so in the name of Our Federalism,⁴⁹ with initial capitals in the original. Able commentators questioned *Fay* on the same principle. Daniel Meador argued that "the writ is operating to redistribute governmental power in the United States and to alter substantially the federal system as originally designed."⁵⁰

The rhetoric of comity and federalism also adorns Court opinions that have narrowed access to habeas corpus.⁵¹ At bottom, one dividing line between those who favor limits on federal habeas and those who do not is provided by answering the question, how important is it for state prisoners to have a federal forum in which to litigate federal issues? Some, taking heart from Professor Bator's thoughtful work,⁵² reply, not

47. Peller, In Defense of Federal Habeas Corpus Relitigation, 16 Harv. C.R.-C.L. L. Rev. 579 (1982).

48. 380 U.S. 479 (1965).

49. See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971); see also Tigar, *Whose Rights? What Danger?* (Book Review), 94 Yale L.J. 970, 973–84 (1985).

50. D. Meador, *Habeas Corpus and Magna Carta: Dualism of Power and Liberty* 4 (1966), quoted in Sokol, *supra* note 1, at 5.

51. See, e.g., *Harris v. Reed*, 109 S. Ct. 1038, 1043–44 (1989) (applying *Michigan v. Long*, 463 U.S. 1032 (1983), to habeas proceedings. Under *Long* a state court decision must rest on a "plain statement" of separate and independent state law grounds to bar federal review thus avoiding the "intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court," *Long*, 463 U.S. at 1040–42 & n.7; see *Cabana v. Bullock*, 474 U.S. 376, 384–91 (1986) (state court must determine factual predicate for death penalty); see also *Wainwright v. Sykes*, 433 U.S. 72, 86–91 (1977) (holding that a state contemporaneous objection rule was an adequate state ground to bar federal habeas review); *Stone v. Powell*, 428 U.S. 465, 478 n.11 (1976) (precluding federal habeas relief for fourth amendment claims fully litigated in state proceedings).

52. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 526–27 (1963).

very. Others, for reasons so ably presented by Professors Peller⁵³ and Liebman (pp. 5–24), say the contrary.

The argument continues over whether the limitations of such cases as *Wainwright v. Sykes*⁵⁴ are immanent within the federal writ as defined in the 1867 statute. Professor Liebman makes the case, and I agree with him, that those limitations contradict the statutory and constitutional function of federal habeas corpus (pp. 7–9). At the most elementary level, a statute passed in 1867 that expands federal jurisdiction over the state criminal justice system is not hard to read. The agenda of Congress in 1867 was clear, and deference to state criminal courts was not on it.⁵⁵ Nor should we be surprised to find decisions in the ensuing 100 years hostile to Congress's evident purposes. That has been the history of civil rights legislation and constitutional provisions at the hands of the federal judiciary.⁵⁶

Turning specifically to *Wainwright*, the language of comity and federalism seems misplaced. At a practical level, *Wainwright* leads to satellite procedural litigation that obscures the path to deciding the federal issue. Those looking to rationalize the federal habeas process should examine the procedural quagmire into which *Wainwright* thrusts many petitions. In my discussions with petitioners' attorneys, they have estimated that 80% of the Fifth Circuit writ cases involve waiver issues. Moreover, the adventitious circumstance of counsel's interjection hardly seems a sensible hinge on which to turn life and death decisions. There are cases in which one coparticipant in the same alleged criminal episode has been put to death, while the other has the sentence vacated, based on which of their trial lawyers was inattentive at a critical procedural moment.⁵⁷

Second, *Wainwright* turns the sixth amendment on its head. When the Bill of Rights was ratified in 1791, the sixth amendment right to counsel put the former colonies ahead of England. England did not

53. See *supra* note 47.

54. 433 U.S. 72 (1977).

55. See Amicus Curiae Brief for the United States, *Bell v. Maryland*, 378 U.S. 226 (1964) (quoted 378 U.S. at 290 (Goldberg, J., concurring)). Kinoy, *The Constitutional Right of Negro Freedom*, 21 Rutgers L. Rev. 387, 394 (1967).

56. *Jones v. A.H. Mayer Co.*, 392 U.S. 409, 422–36 (1968) (§ 1982 held to bar all discrimination, not merely state action), is a dramatic example. But see *Moses v. Kennedy*, 219 F. Supp. 762, 765–66 (D.D.C. 1963) (§ 1987 construed narrowly to preclude judiciary from interfering with prosecutorial discretion of Justice Department).

57. Compare, e.g., *Smith v. Kemp*, 715 F.2d 1459 (11th Cir.), cert. denied, 464 U.S. 1003 (1983) with *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982), cert. denied, 459 U.S. 1127 (1983). *Machetti* got a new trial because the state jury selection procedure was discriminatory. *Smith*, her codefendant, was executed. The court of appeals held that his trial counsel had waived the jury composition point by failure to object at trial or, as *Machetti* had, in his initial state habeas action. One might ask, as did the dissent in *Smith*, 715 F.2d at 1476 (Hatchett, C.J., dissenting), what valid procedural objective of the state is served by not permitting an objection raised by one defendant to inure to a codefendant.

provide a right to counsel in cases of felony until 1836.⁵⁸ One argument against providing counsel was that the judge would look out for the accused's interests. *Wainwright* permits—indeed encourages—the state judge to say nothing even if the accused's counsel is obviously and improvidently foregoing a procedural right or failing to raise an obvious defense.⁵⁹ It then permits attributing counsel's failure to the accused by invoking an agency theory reminiscent of nineteenth century contract law.⁶⁰ The presence of counsel thus becomes a potential snare for the accused rather than a real benefit. This circumstance is aggravated by the problem of incompetent counsel endemic in capital cases.⁶¹

What is the remedy? If federal courts take seriously the burden thrust upon them by the 1867 habeas statute, by article III, and by constitutional provisions directly and indirectly binding on the states, they will return to the basic teaching of *Fay*. They will understand that the best way for a state to insulate its criminal judgments from collateral review is to build records in criminal cases that show the accused has been offered his or her full measure of federal rights.

The best analogy to this is the guilty plea. A defendant pleading guilty is catechized about certain rights being foregone by the plea. This exchange is embodied in a record, the making of which is essential to the validity of the plea against direct or collateral attack. While the list of rights set out in the plea proceeding may be argued over, the principle is clear.

In a criminal trial, the state can without great effort mandate that all accused are informed of a set of basic rights they possess in the system. Judges should let defendants know their rights, and that their lawyer is expected to consult with them before waiving any of these rights. We might disagree about what is on the list as "basic," but this enumeration would afford some minimal assurance that foregoing a right represents an intelligent and knowing choice. To make such a guarantee the precondition of upholding state procedural bars makes the process somewhat less of a game—the sort of game that one wise State

58. F. Heller, *The Sixth Amendment* 9–10 (1951).

59. Justice Jimmy Robertson of the Mississippi Supreme Court, dissenting with two other Justices in *Evans v. State*, criticized his colleagues for having such an attitude, saying: "Our eye must be affixed to justice, not slanted toward *Wainwright v. Sykes*. . . . Today we announce an abdication of our responsibilities to administer justice to persons within our jurisdiction. We turn our back on responsible federalism." 441 So. 2d 520, 532–34 (Miss. 1983), cert. denied, 467 U.S. 1264 (1984).

60. Cf. Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 Wisc. L. Rev. 677. Professor Holt notes that an objective theory of contract was used to enforce unitary contracts of labor that workers did not understand. *Id.* at 681.

61. See Robbins, *supra* note 36, at 15–58, and authorities there cited.

Supreme Court Justice has already criticized.⁶²

There will be some who argue that such a notion presupposes that indigent defendants can understand their rights well enough to participate in intelligent decisions about them. There are two answers. First, two decades of law practice convince me that defendants can and must be intelligent participants in their cases.⁶³ Second, our entire system of substantive criminal law is premised upon defendants knowing, intending and desiring circumstances and results. We do not permit punishment of people who are unable to appreciate the wrongfulness of their conduct. We make prosecutors prove that the defendant knew something or intended something. Yet when assessing procedural default, courts come perilously close to making the defendant the unwitting accomplice of his own state-sponsored death. To say that this is inconsistent is a macabre understatement.

Permitting state judges the "easy out" of waiver also poses serious structural dangers to the federal system. If there is any validity to a theory that state courts can be counted on to guarantee federal rights, the theory must rest on the proposition that their actions are at some point reviewable under some standard. The rationale of *Wainwright*, as Professor Peller has noted,⁶⁴ encourages state judges to sweep federal error under the rug. It does so by making it easy to imagine and apply procedural bars that bear no relation to the accused's understanding.⁶⁵

D. *The Death Penalty*

One is led by the federalism concerns discussed above to address the death penalty itself. To refer again to Professors Liebman and Peller, habeas is only a vessel, and its contents are poured differently at different times. The United States is the only developed Western nation to impose the death penalty. As Professor Liebman notes, and as is obvious to everyone, one's attitudes about the penalty inevitably

62. *Evans*, 441 So. 2d at 524-34 (Robertson, J., dissenting). I do not wish to be mistaken for saying that present guilty-plea litanies are adequate, even in their defined role of recording waiver of the right to be tried. I inveighed against such a view nearly twenty years ago, and while I may be wrong I am at least consistent. My view then as now was that guilty plea interrogations fail to inform the defendant of the entire range of rights that she is giving up by pleading. I said that judges ought to explain these rights to defendants, on the record, and ensure that counsel and the defendant had conferred and decided to forego them. This was, it seemed to me, a way to make real the promise of *Fay*. Tigar, *supra* note 15 at 1.

63. See *supra* notes 25-26 and accompanying text.

64. See Peller, *supra* note 47, at 679.

65. These procedural arguments are aside from the Court's sharp contest over the meaning of "cruel and unusual." Justice Scalia would hold nothing to violate that clause that a majority of states thought wise. See *Stanford v. Kentucky*, 109 S. Ct. 2969, 2975-80 (1989) (separate opinion for four justices). This view is ostensibly rooted in deference. And while deference to state decisions is plausible when dealing with substantive due process concerns, it is an inappropriate measure when the Court is doing its article III duty toward counter-majoritarian values.

color one's views about the procedures used to review death sentences (pp. 22-24).

I am disturbed that the procedural devices discussed in this review and analyzed by Professor Liebman have become more or less overt means of getting federal courts out of the death penalty review business. We are seeing death cases in which limits on the writ are hastily cobbled together to bar entire groups of cases. We are also seeing inappropriate and misguided deference to state decision-makers. For example, the most expansive view of federal power—and one that I share—would hold that a death sentence could only be carried out if the standards of justice that led to it were fair as measured at the time of the proposed execution, and not at the time of the crime or at some point during the review process.

The Supreme Court has taken a different view. In *Penry v. Lynaugh*,⁶⁶ applying its decision in *Teague v. Lane*,⁶⁷ the Court held that a death-sentenced habeas petitioner is not entitled to the benefit of a "new" rule unless he demonstrates (1) factual innocence or (2) that the new rule is of a fundamental character. These exceptions have yet to be clearly defined in Supreme Court cases.

In *Sawyer v. Butler*,⁶⁸ the Fifth Circuit, sitting en banc, expanded on *Teague* and *Penry*. The petitioner, Sawyer, was sentenced to death based upon a prosecutor's jury argument that violated *Caldwell v. Mississippi*.⁶⁹ The prosecutor misled the jury by telling them that they could impose the death penalty secure in the knowledge that reviewing courts would set matters right if the jurors erred. In sum, the prosecutor argued that Sawyer should be held responsible for killing somebody, but that the jury did not need to feel any such responsibility when it decided the defendant should die. The majority found that Sawyer's *Caldwell* claim was "new," and held it to be barred on federal habeas corpus because it did not fit either of the *Teague* exceptions. Judge Higginbotham's reasoning encapsulates the unwisdom of habeas limitations crafted out of hostility to the writ.

The Fifth Circuit had earlier held that a *Caldwell* claim of improper jury argument should have been known and anticipated by habeas counsel, so that a successor petition raising it was "abuse of the writ."⁷⁰ How, Sawyer's counsel argued, could such a claim be "old" enough for abuse of writ purposes, but so "new" that it was barred by *Penry* and

66. 109 S. Ct. 2934, 2944 (1989).

67. 109 S. Ct. 1060, 1072-77 (1989).

68. 881 F.2d 1273, 1279, 1288-89 (5th Cir. 1989) (en banc). Judge Higginbotham wrote for the majority of nine judges. Judge King wrote for five judges in dissent. But see *Hopkinson v. Shillinger*, 888 F.2d 1286, 1292 (10th Cir. 1989) (en banc) (holding that the *Caldwell* rule satisfies *Teague's* ordered liberty exception and can therefore be applied retroactively).

69. 472 U.S. 320 (1985).

70. *Moore v. Blackburn*, 774 F.2d 97, 98 (5th Cir. 1985), cert. denied, 476 U.S. 1176 (1986).

Teague? The opinion simply says that “newness” does not mean the same thing in these two habeas settings.⁷¹ Judge Higginbotham cites no authority for this proposition, which does have a “thin air” quality to it, giving words different meanings in the same procedural environment without a clear anchor in precedent or reason.

At the root of the majority opinion, however, is a view of the state jury system. Judge Higginbotham speaks of “blackbox decisions” of juries, involving “inarticulable judgment and common sense intuition.”⁷² Sounding themes of “individual autonomy, federalism, and populism,”⁷³ he argues that respect for the jury’s function counsels caution in overturning its decision to sentence somebody to death.

For more than a decade, I have known and respected Patrick Higginbotham as trial lawyer, trial judge, appellate judge and legal scholar. But I take strong issue with his view of the jury system as a means of permissibly abandoning our justice system to “anger” and “retribution.” I also think he has decided to ignore some harsh realities about the jury system in the southern states that make up the Fifth Circuit.

I yield to no one, even Judge Higginbotham, in my regard for juries. I count most of the cases I have won and lost as fairly tried. But I know this: Jurors in criminal cases bring their fears and prejudices to court.⁷⁴ Prosecutors who appeal to those feelings can often strike a responsive chord. Death cases stem from disturbing events in the community. Most defendants are of a different color or different station in life than most jurors. As Professor Liebman warns us, it is precisely the “typical” capital case—an outsider, often poor, urban, and black, killing a respected member of a small community—that calls out for federal appellate review of a prosecution fueled by local outrage (pp. 22–23). Decades of concern over jury selection,⁷⁵ and a few years experience with directing that peremptory challenges be race-neutral,⁷⁶ have not resulted in juries composed of cross-sections of their communities or of people who have cleansed prejudice from their souls.

The decision in *Sawyer* represents acceptance of an invitation to atavism. Justice Frankfurter counselled his colleagues long ago not to

71. 881 F.2d at 1291.

72. *Id.* at 1278.

73. *Id.*

74. In *Tigar & McCarthy, Warrior Bards*, *supra* note 4, at scene 1, we have gathered from trial records some notable examples of the lawyer’s art being practiced before hostile judges and biased juries. For example, as the play demonstrates Irish barristers in the 1800s were pleading for Irish patriots to juries made up exclusively of Protestants. Catholics were ineligible to serve. There are many tales of jurors keeping to their oaths and acquitting despite their prejudices. There were many more of jurors sending men and women unjustly to their deaths. *Id.* Still, I would not lightly counsel a client to waive a jury. I would rather argue the case to twelve biased people than to one.

75. The process began in *Strauder v. West Virginia*, 100 U.S. 303 (1880).

76. *Batson v. Kentucky*, 476 U.S. 79 (1986).

be ignorant as judges of what they knew as men.⁷⁷ The message bears repeating. It also illustrates another major problem with judicial abdication in death penalty cases. It is true that the Court held in *Furman v. Georgia*⁷⁸ that uncontrolled jury discretion is wrong. On the other hand, some recent decisions suggest that a residuum of jury discretion is at the heart of a constitutionally-permissible death penalty scheme.⁷⁹ But weaving together these strands of doctrine is not all that difficult, if one understands the sixth amendment jury and what it was designed to do.

Our ancestors fought hard for jury discretion in criminal cases. Their struggle led to two distinct criminal trial jury guarantees in the Constitution.⁸⁰ However, the colonists and the Framers understood perfectly well that juries could be stacked by the prosecution. Our history as a nation bears tragic witness to that reality.⁸¹ So judges are to police the process to ensure that discretionary does not become a softer word for arbitrary. The idea that judicial enforcement of a constitutional guarantee is a kind of one-way ratchet for the accused should be neither controversial nor surprising, given the textual and historic commitment of many Bill of Rights provisions to that proposition.

Judge Higginbotham's view, shared by many conservatives, turns the idea of "populism" on its head. Here is not the popular will checking the power of government, but vengeful jury responses to demagoguery receiving judicial blessing. I keep hearing the echo of Herman Melville's words: "But the People in their weeping/ Bare the iron hand:/ Beware the People weeping/ When they bare the iron hand."⁸² The surer, better path for federal courts is to confront death verdicts obtained by improper means and write large that state courts must develop means to prevent them.

CONCLUSION

Cases like *Sawyer* tell us just how valuable Liebman's book can be. *Sawyer* teaches that even a great decision like *Caldwell* will be snipped

77. *Watts v. Indiana*, 338 U.S. 49, 52 (1949). He would have added "and women" were he to write today. Or perhaps not.

78. 408 U.S. 238 (1972).

79. This argument is forcefully made in *Sawyer*, 881 F.2d at 1277-79; see also *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989) (age discrepancies in capital sentences might lead juries to impose death penalty on juveniles unjustly but do not compel conclusion that it is categorically unacceptable); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2951-52 (1989) (jury's consideration of mitigating factors ensures reliability of death sentence).

80. U.S. Const. art. III, § 2, cl. 3 (right to jury in criminal trials); *id.* amend. VI (right to an impartial jury in all criminal prosecutions).

81. The *Haymarket* trial, chronicled in the play cited *supra* note 4, is a dramatic example. The abuses that led to *Batson v. Kentucky*, 476 U.S. 79 (1986), provide further example.

82. H. Melville, *The Martyr*, in *Battle Pieces* 142 (S. Kaplan ed. 1960).

back to have limited impact by invoking court-invented procedural limits on the power of habeas corpus. Liebman guides the advocate patiently through the procedural thicket. His treatise contains enough analysis of broad-gauge issues to fuel the most complex petition or most taxing scholarly debate. But he also helps the advocate to identify and use narrower, well-crafted arguments to meet the increasing number of broadly-stated limitations on the writ.

Professor Liebman's book far surpasses anything that has come before. He moves ably through the most difficult historical and constitutional doctrine, and shows us the path to applying it. He joins a small band of distinguished law teachers whose scholarship enlightens the academic community while helping the practicing bar fulfill the noblest and best of its aspirations. There is, in my view, no higher praise.

