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"PLAIN ERROR" AND "FUNDAMENTAL FAIRNESS": TOWARD A DEFINITION OF EXCEPTIONS TO THE RULES OF PROCEDURAL DEFAULT

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Historically, criminal defense counsel have been required to make timely procedural motions and contemporaneous objections to trial or pretrial errors or lose forever the right to raise those errors on appeal. In recent years, exceptions to this general rule favoring finality of litigation have proliferated. Mr. Wangerin suggests a theory underlying these previously undefined exceptions and outlines a method for identifying errors that justify appellate review despite procedural default.

Three general types of situations exist in which criminal defense counsel fail to make timely procedural motions or contemporaneous objections to errors during trials. These three situations involve ignorance, strategy decisions, and "sandbagging." All three must be examined briefly.

Ignorance in this context needs little elucidation. Ignorance of a procedural rule that requires defense counsel to raise certain defenses before trial[1] may result, for example, in an objection or motion being made too late to be effective. Or, during the trial itself, counsel may either fail to notice an error made by opposing counsel or may be unaware of the ramifications of the error. Consequently, counsel may fail to make a timely objection to the error.

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1. For example, FED. R. CRIM. P. 12.1 requires the alibi defense to be raised before trial. *See, e.g.*, United States v. Hutton, 558 F.2d 1265, 1266 (6th Cir. 1977) (no abuse of discretion for trial judge to allow government to serve a demand for notice of alibi on the defense on second day of three-day trial; even if allowing this belated notice was erroneous, it was harmless error); United States v. Myers, 550 F.2d 1036, 1042 (5th Cir. 1977) (trial court abused discretion in allowing undisclosed alibi rebuttal witnesses to testify; only "for good cause shown" should undisclosed alibi rebuttal witnesses be allowed to testify); United States v. Smith, 524 F.2d 1288, 1289 (D.C. Cir. 1975) (alibi notice rule had not been complied with, so trial judge was required to exclude alibi testimony other than that of defendant). FED. R. CRIM. P. 12.2 requires the insanity defense to be similarly raised. *See, e.g.*, United States v. Hearst, 412 F. Supp. 871, 873 (N.D. Cal. 1976) (defendant ordered to submit to psychiatric interviews by government's expert at earliest convenience so as to afford government opportunity to prepare expert testimony of its own); United States v. Smith, 425 F. Supp. 1038, 1051 (E.D.N.Y. 1976) (defendant's constitutional rights are not violated by allowing prosecution to call as a witness a psychiatrist who had interviewed defendant prior to trial at defense's request; defendant had offered his own testimony on the insanity issue). *See generally* 8 MOORE'S FEDERAL PRACTICE ¶¶ 12.1 to .2 (2d ed. 1979).

Strategy decisions in this area of criminal practice involve completely different considerations. Defense counsel often make carefully calculated decisions not to object at trial or not to make a particular motion because they perceive that the disadvantages of making such a motion or objection outweigh the advantages of making it. These decisions occur primarily in two situations: when defense counsel seeks to avoid annoying the judge or jury with minor, though sustainable, objections, and when counsel feels that the benefits potentially arising from the other lawyer's errors are substantial. Illustrative of this second type of decision is the frequent situation in which counsel makes no objection to objectionable direct examination questions because those questions will potentially open up fertile ground for cross-examination.

Finally, "sandbagging" involves the deliberate attempt by defense counsel to allow reversible error into a criminal trial as an insurance policy against an adverse verdict. Sandbagging occurs most often in the context of jury instructions. One example of it suffices. Occasionally prosecutors inadvertently omit from their requested instructions an instruction on an essential element of a charged criminal offense or on a particularly important aspect of the jury's responsibility. Defense counsel may be aware of this omission but may consciously decide not to call the error to the attention of the court. Then, if the jury convicts the defendant, that conviction will have been rendered in a trial containing a serious and possibly reversible error.[2]

Traditionally, rules requiring contemporaneous objections[3] and timely mo-

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An Illinois Supreme Court Rule, ILL. SUP. CT. R. 413(d), requires defense counsel to inform the state of any defenses to be made at trial, particularly the alibi defense. *See, e.g.*, People v. Ramshaw, 75 Ill. App. 3d 123, 125, 394 N.E.2d 21, 22 (5th Dist. 1979) (rule 413 does not apply to misdemeanor cases; state's motion for disclosure denied because the unlawful sale of alcoholic beverages is a misdemeanor); People v. Daniels, 75 Ill. App. 3d 35, 41, 393 N.E.2d 668, 673 (1st Dist. 1979) (although rule 413 requires defense counsel to disclose names and addresses of intended witnesses upon State's written motion, exclusion of an exculpatory witness revealed for the first time on the last day of trial may be too harsh a sanction because the basic purpose of trial is the determination of truth); People v. Fowler, 72 Ill. App. 3d 491, 497, 390 N.E.2d 1377, 1380-81 (4th Dist. 1979) (because the report of defendant's expert witness concerning signature exemplars would be discoverable by the prosecution under rule 413, the report is not the subject of the attorney-client privilege).

2. *E.g.*, Francis v. Henderson, 425 U.S. 536, 540-41 (1976) (defendant failed to make a timely objection to the exclusion of blacks from the grand jury that indicted him; however, conviction was upheld because defendant failed to show "cause" for his failure to challenge at the appropriate time and actual prejudice); Davis v. United States, 411 U.S. 233, 241 (1973) (defendant failed to make timely objection to the composition of the grand jury; conviction affirmed because no cause shown why waiver of objection should not apply under FED. R. CRIM. P. 12(b)(2)); Jones v. United States, 362 U.S. 257, 272 (1960) (defendant objected for the first time on appeal that a search was not conducted in conformity with 18 U.S.C. § 3109 (1958); issue was considered on appeal and remanded).

3. FED. R. CIV. P. 46; ILL. SUP. CT. R. 451. *See generally* 5A MOORE'S FEDERAL PRACTICE ¶¶ 46.01 to .02 (2d ed. 1979); 6 C. NICHOLS, ILLINOIS CIVIL PRACTICE § 6182 (rev. ed. 1975); 4 F. WHARTON, CRIMINAL PROCEDURE § 640 (12th ed. 1976).

tions[4] limited the likelihood that an appellate court would order a new trial on the basis of unobjected trial errors. These rules prohibited defense counsel from raising issues on appeal that had not been brought to the attention of the trial court. Increased exceptions to the rules today, however, allow appellate counsel to raise many issues for the first time on appeal.

Two factors have contributed to less stringent enforcement of rules requiring contemporaneous objections and timely motions and to creation of increasingly comprehensive exceptions to these rules. First, modern developments in legal specialization have led to the common circumstance of different lawyers dealing with appeals than those dealing with actual trials. Appellate counsel, of course, have substantial ability to notice trial errors and have few misgivings about raising on appeal the errors and inadequacies of trial counsel. (And, not surprisingly, errors and inadequacies emerge with remarkable clarity from criminal trial records when those records can be subjected to hours of careful post-trial scrutiny.) The second factor contributing to the demise of procedural rules occurred simultaneously with the increased participation of non-trial counsel in appeals. This factor arises from the view that criminal defendants should not suffer because of errors of counsel.

Because of those two factors, beginning in the early 1960's, the United States Supreme Court and many state appellate courts began dismantling procedural rules requiring timely motions and contemporaneous objections.[5] The fact that errors were not called to trial judges' attention became increasingly unimportant. In fact, it can be argued that appellate courts in that period began moving toward a requirement of error-free trials. Together, the two factors just discussed—non-trial counsel's appearance on appeal and less rigid procedural rules—precipitated a flood of cases in the federal and state appellate courts raising points and errors never considered by trial judges. Because the appellate courts increasingly reviewed those errors, many defendants obtained new trials.[6]

Though the United States Supreme Court and the various state courts increasingly reviewed trial errors despite noncompliance with traditional procedural rules, these courts were notoriously reluctant to define the exceptions to general procedural rules that justified review. Thus, although the courts examined the errors, those courts could not say why some errors survived the failure to object and others did not. Widespread confusion resulted.

This Article suggests an overall theory for defining the previously undefined exceptions. A method will be outlined herein for determining what errors justify appellate review and reversal despite procedural defaults. The Article will show that two criteria must be met. First, the adversary system itself must have broken down during the trial or pre-trial proceedings. Such

4. FED. R. CIV. P. 12(b) (pretrial motions); *id.* 22 (time of motion to transfer); *id.* 47 (motions); ILL. REV. STAT. ch. 38, §§ 114-1 to -12 (1977). *See generally* 8 MOORE'S FEDERAL PRACTICE ¶¶ 12.01, .02, .04 (2d ed. 1979).

5. *See* notes 31-38 and accompanying text *infra*.

6. *Id.*

breakdowns occur when the integrity of the judicial process has been impugned by errors. Second, review and reversal will be shown to be necessary only when evidence against criminal defendants is closely balanced. Thus, review and reversal are appropriate only when defendants can establish two things: that certain types of errors occurred and that those errors actually prejudiced the outcomes of the proceedings.

THE FINALITY RULE

Because an appeal is not a trial de novo, but rather a process for the correction of errors, traditional rules of trial procedure require counsel to make timely motions or contemporaneous objections to perceived errors in order to preserve those errors for review.[7] These rules give trial judges the first opportunity to consider their own rulings and to correct them, if necessary, before the jury has withdrawn.[8] New trials thus often can be avoided despite trial errors.

A legitimate state interest in procedural finality supports these timely motions and contemporaneous objection rules.[9] Simply stated, the interest in

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7. *See* Youakim v. Miller, 425 U.S. 231, 234 (1975); Moore v. Illinois, 408 U.S. 786, 799 (1972); United States v. Bass, 535 F.2d 110, 116 (D.C. Cir. 1976); United States v. Springer, 460 F.2d 1344, 1354 (7th Cir.), *cert. denied*, 409 U.S. 873 (1972); People v. Stark, 59 Ill. App. 3d 676, 678, 375 N.E.2d 826, 827 (1978); People v. Dukett, 56 Ill.2d 432, 442, 308 N.E.2d 590, 596 (1974); People v. Neville, 42 Ill. App. 3d 9, 13, 355 N.E.2d 179, 182 (4th Dist. 1976).

FED. R. CIV. P. 46 provides:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Id. See also ILL. SUP. CT. R. 451; 5 ILLINOIS CRIMINAL PROCEDURE § 3962 (Callaghan 1971).

8. "[T]he purpose of the rule requiring objections is to prevent reversals and consequent new trials because of errors the trial judge might well have corrected if the point had been brought to his attention." Steinhauser v. Hertz Corp., 421 F.2d 1169, 1173 (2d Cir. 1970). *See also* Stone v. Morris, 546 F.2d 730 (7th Cir. 1976); Browzin v. Catholic Univ., 527 F.2d 843 (D.C. Cir. 1975). *See generally* 5A MOORE'S FEDERAL PRACTICE ¶¶ 46.01-.02 (2d ed. 1979); 6 C. NICHOLS, ILLINOIS CIVIL PRACTICE § 6182 (rev. ed. 1975); 4 F. WHARTON, CRIMINAL PROCEDURE § 640 (12th ed. 1976).

9. For the most recent articles dealing with procedural defaults, *see* note 11 *infra*. Background material can be found in the following older articles: Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pts. 1-2), 7 WIS. L. REV. 91 (1932), 8 WIS. L. REV. 147 (1933); Ladd, *Objections, Motions, and Foundation Testimony*, 43 CORNELL L.Q. 543 (1958); Tate, *Sua Sponte Consideration on Appeal*, 9 TRIAL JUDGES J. 68 (1970); Vestal, *Sua Sponte Consideration in Appellate Review*, 27 FORDHAM L. REV. 477 (1959); Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966) [hereinafter cited as

finality allows appellate courts to conclude that the failure of criminal defendants or defense counsel to follow established trial procedure for preserving error forecloses the defendant from ever raising those errors on appeal. Such failures to act constitute "procedural defaults," or "forfeitures" of certain rights. This rule of law may be called the "finality rule."

Courts often state inaccurately that defendants who have failed to comply with procedural rules for preserving errors have "waived" their rights to raise the issues on appeal.[10] Such inaccurate terminology, though understandable, is not helpful. More precise definitions are needed.[11] In particular, "waiver" must be sharply distinguished from "forfeiture."

Failure to comply with procedural rules creates a forfeiture by procedural default. Forfeiture acts by omission. It occurs either inadvertently or intentionally and, therefore, does not necessarily involve conscious decisions made by criminal defendants.[12] Forfeiture acts by operation of the state law of judgments. This is because the principle of forfeiture arises from the need to balance defendants' interests in asserting certain rights against states' interests in orderly proceedings and final judgments. In addition, forfeiture

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Criminal Waiver]; Comment, *Appeal of Errors in the Absence of Objection—Pennsylvania's "Fundamental Error" Doctrine*, 73 DICK. L. REV. 496 (1969); Comment, *Waiver of Constitutional Rights by Counsel in a Criminal Proceeding*, 1 J. MAR. J. PRAC. & PROC. 93 (1967); Comment, *The Contemporaneous Objection Rule: Time for a Re-Examination*, 67 KY. L.J. 212 (1978); Comment, *Basic and Fundamental Error: The Right Result for the Wrong Reason*, 43 TEMP. L.Q. 228 (1970) [hereinafter cited as *Basic and Fundamental Error*]; Note, *Raising New Issues on Appeal*, 64 HARV. L. REV. 652 (1951).

10. This lack of accuracy is not limited to the courts. As a commentator has pointed out in reference to FED. R. CRIM. P. 12(b)(2), "[t]he use of the term 'waiver' in the rule is an example of the indiscriminate mixing of the concepts of procedural default and waiver." Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 505 n.160 (1978). [hereinafter cited as Spritzer].

11. Much of the analysis in the following paragraphs of the text has been drawn from several long and comprehensive articles on procedural defaults. No less than eight articles have appeared on the subject of federal habeas corpus since 1977. The condensation of hundreds of pages of research by these authors into a few paragraphs has been necessary to establish a base for the study of the relationship between the Illinois cases and the United States Supreme Court cases. *See generally* Dix, *Waiver in Criminal Procedure: A Brief For More Careful Analysis*, 55 TEX. L. REV. 193 (1977); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978) [hereinafter cited as Hill]; Rosenberg, *Jettisoning* Fay v. Noia: *Procedural Defaults by Reasonably Competent Counsel*, 62 MINN. L. REV. 341 (1978) [hereinafter cited as Rosenberg]; Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Cost of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978); Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297 (1978) [hereinafter cited as Soloff]; Spritzer, *supra* note 10; Western, *Forfeiture by Guilty Plea—A Reply*, 76 MICH. L. REV. 1308 (1978) [hereinafter cited as *Forfeiture*]; Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977) [hereinafter cited as *Away From Waiver*].

12. "[T]he ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel." Wainwright v. Sykes, 443 U.S. 72, 104 (1977) (Brennan, J., dissenting). *See also* Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 997 (1965).

arises from the judgment rule that states may rely, at least to some extent, on defendants' failures to assert their rights.[13]

"Waiver," on the other hand, is an intentional relinquishment of a known right or privilege.[14] Consequently, waiver must be viewed as a particular and carefully limited type of forfeiture. Only defendants themselves can waive rights, and then only if decisions to do so are made in a fully informed manner.[15] In a sense, therefore, it can be said that waiver extinguishes a right itself whereas forfeiture merely eliminates the method for asserting the right.[16]

A basic conflict facing courts as they have grappled with the need for finality in the context of procedural defaults arises because those courts often juxtapose two ideas. Obviously the state must be allowed to eliminate endless relitigation of criminal matters. Conversely, however, a fair system of justice must be prepared to deal with situations in which criminal defendants were convicted in trials with now obvious errors. The finality rule attempts to deal with those competing concerns.

Many scholars and judges dismiss procedural rules of finality as an oppressive fixation with the problems of crowded dockets and harassed trial judges. These writers reason that fairness and justice to the individual defendant must be the only consideration.[17] The point seems, at first glance, compelling; however, a number of important factors, some theoretical and others more practical, favor a certain degree of finality.[18]

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13. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 454 (1963) [hereinafter cited as Bator].

14. Schneckloth v. Bustamonte, 412 U.S. 218, 235, 237 (1972); Miranda v. Arizona, 384 U.S. 436, 475 (1965); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Lujan-Castro, 602 F.2d 877, 879 (9th Cir. 1979); U.S. v. Pressley, 602 F.2d 709, 711 (5th Cir. 1979). *See also* Spritzer, *supra* note 10, at 474-75; *Away From Waiver*, *supra* note 11, at 1214 n.4.

15. Brewer v. Williams, 430 U.S. 387, 404 (1977); Schneckloth v. Bustamonte, 412 U.S. at 240; Miranda v. Arizona, 384 U.S. at 475; Brookhart v. Janis, 384 U.S. 1, 4 (1966); Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964); Fay v. Noia, 372 U.S. 391, 399, 439 (1963); Green v. United States, 355 U.S. 184, 191-92 (1957); Smith v. United States, 337 U.S. 137, 140-50 (1949); Adams v. United States, 317 U.S. 269, 275 (1942). *See generally Criminal Waiver*, *supra* note 9.

16. Presumably some rights are too valuable to be waived. *See Away From Waiver*, *supra* note 11, at 1214.

17. *See, e.g.*, Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956). The author states:

> [C]oncepts [of finality], like stare decisis, stem from the principle that in most matters it is more important that the applicable . . . rule . . . be settled than that it be settled right. But where personal liberty is involved, a democratic society employs a different arithmetic and insists that it is less important to reach an unshakable decision than to do justice.

Id. at 65.

18. Two prominent articles on the overall concept of finality conveniently take opposite positions. One commentator, Bator, sets out the best argument favoring a goal of finality.

> I . . . reason from the very real claims which the need for finality . . . make on the criminal process, claims particularly strong in view of what I consider to be philosophically faulty premises about justice which are often at the heart of the

Perhaps the most important factor favoring finality involves the realization that many legal philosophers have theorized that something other than the search for individual fairness or justice produces the correct result in a given case.[19] This theory suggests that correct results will be obtained by systematically implementing carefully considered rules and not by searching for individual fairness. It is thought that the rules themselves produce a better result than that which can be achieved by implementing individual judges' notions of fairness. One commentator summarized the point:

> If all decisions involving justice to individual parties were lined up on a scale, with those governed by precise rules at the extreme left, those involving unfettered discretion at the extreme right, and those based on various mixes of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and most frequent injustice?. . . I think the greatest and the most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.[20]

The rule-oriented theory of law described above becomes particularly cogent in the context of the finality rule. The right of appellate courts to set aside trial judges' rulings, even though trial counsel did not point out to trial judges the errors of the rulings, places an extraordinary degree of authority in appellate judges to search a dead record for individual fairness—a search conducted, it must be noted, in the quiet sanctuary of law libraries and not in the electric tension of trial courtrooms.

The rule of finality also has a number of practical values for society. Unquestionably, abandonment of the finality rule decreases the public's respect for the judicial system itself. In fact, perhaps the public's greatest and most justifiable misgivings about the modern legal system have been generated by a perception of endless litigation in which both defendants and courts resort to mere technicalities. Another practical reason for the finality rule involves

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> demand that we repeat inquiry endlessly to make sure that no mistake has been made.

Bator, *supra* note 13, at 525. Bator specifically argues that finality is essential if a system of criminal law is to serve any educational or deterrent function or to encourage and support state procedural reform.

Another commentator, Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970), advances the strongest case against finality. Tigar argues that the furtherance of the procedural protection of guaranteed rights must not be subordinated to goals of deterrence, procedural finality, or pressures created by the criminal process itself. *See also* Friendly, *Is Innocence Irrelevant: Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) [hereinafter cited as Friendly].

19. Justice Holmes, commenting on the desire to achieve individual fairness, made the classic statement: "I hate Justice!" R. ALDISERT, THE JUDICIAL PROCESS 184-85 (1976).

20. K. DAVIS, DISCRETIONARY JUSTICE at v (1976).

the certainty of punishment for criminal defendants. Punishment, or the threat thereof, must be viewed as swift and certain if it is to serve any purpose whatsoever as an effective deterrent for potential criminals. Finally, society itself must have a certain degree of repose. The finality rule, and its elimination of relitigation, provides such repose.

The finality rule also serves the interests of the individual criminal defendant. Abandonment of the rule actually increases trial error. Absent the finality rule, judges, prosecutors, and defense counsel need not carefully watch for errors during trials because errors can be corrected on appeal even though not preserved for review.[21] More serious than the problem of inadvertence, however, is the likelihood that increased "sandbagging" will occur at trials when the finality rule does not deter such conduct.[22] Sandbagging invariably hurts criminal defendants more than it helps them. Finally, decreased use of the finality rule by appellate courts forces trial judges to participate in trials as associate defense counsel in order to protect themselves from reversal. Such participation often interferes with defense counsel's well-considered strategy decisions.

Other factors support the statement that the finality rule may help individual defendants. Presumably, defendants wish to have their status resolved as quickly as possible. (And even if they do not so wish, delay cannot be considered a legitimate tactic.) Abandonment of the rule of finality has greatly increased delay. Decreased reliance on rules of procedural default also has been a major factor contributing to the congestion of the courts. Finally, whatever value punishment might have as a rehabilitative mechanism for an individual defendant is lost when that defendant can maintain an endless hope that his or her conviction will be set aside.

Another benefit to the individual defendant provided by the finality rule is, without question, the most important one. Abrogation of the finality rule has generated a massive increase in the number of appeals that reach the federal and state appellate courts raising issues not considered at trial.[23] Anyone even slightly familiar with state appellate criminal practice or federal

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21. One could ask at this point whether the much-discussed issue of trial counsel's inadequacy, *see* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L. REV. 811 (1976); Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1060-64 (1977); Sines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927 (1973), should be evaluated at least in part in connection with the relaxation of technical rules.

22. *See* note 2 and accompanying text *supra*.

23. In 1969, state prisoners filed 7,359 petitions for habeas corpus in federal district courts. This represented a 100% increase over those filed in 1964. In addition, there was a 50% increase in the number of petitions filed by federal prisoners challenging convictions or sentences. 1969 ANNOTATED REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 144. Furthermore, the figures for the third quarter of fiscal 1970 showed an increase of 19% over the same quarter of 1969. *Id.* fig. D. *See generally Friendly*, *supra* note 18.

habeas corpus will attest to the fact that the vast majority of criminal appeals present no substantive legal questions.[24] In addition, in very few of these appeals does any doubt exist about the defendant's guilt.[25] The problem posed by the massive number of appeals and petitions thus becomes clear at once. It is entirely possible that rare instances of a genuine injustice will simply be overlooked because of the presence of so many trivial claims.[26]

EXCEPTIONS TO THE FINALITY RULE

Although many strong arguments can be advanced favoring the finality rule, no one argues that the rule should be applied without exceptions. An early Supreme Court opinion, *Hormel v. Helvering*,[27] best presents the rationale for the exceptions:

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.[28]

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24. Such appeals are commonly referred to as "frivolous" appeals. "Compared to civil cases criminal appeals present a larger percentage of such cases and issues. This statement is difficult to support with statistics or firm evidence, but support is abundant in the opinions of judges and lawyers who work regularly with criminal appeals." P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 60 (1976) [hereinafter cited as CARRINGTON]. *See also* Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. REV. 701 (1972) [hereinafter cited as Hermann].

25. *See generally* Hermann, *supra* note 24.

26. On the hopelessness and frivolity of many appeals, *see* CARRINGTON, *supra* note 24, at 90-96. *See generally* Hermann, *supra* note 24. "Anders' motions," often filed by appellate counsel, and named for Anders v. California, 386 U.S. 738 (1967), have stemmed the tide of appeals somewhat because these "Anders' motions" provide an otherwise unavailable opportunity for an appointed defense attorney to withdraw from an appeal which appears to the appellate court to be "wholly frivolous." *Id.* at 744. Such motions do not, however, deal with two factors: (1) the enthusiasm of appellate defense lawyers, particularly appointed counsel who need not consider the cost of appeals normally borne by the accused; and (2) the fact that Anders' motions speak primarily to legal issues involved in a case and do not evaluate the weight of evidence arrayed against the defendant. This writer's experience as a clerk to a justice of the Illinois Supreme Court has indicated the depth of both of these problems. Virtually all of the criminal appeals presently reaching that court are brought by some branch of the Public Defender's Office. Thus, the United States Supreme Court's concern for adequate representation of the indigent on appeal has created the result that indigents are almost the only defendants who relentlessly pursue appellate review. In addition, the lack of fiscal constraints on decisions to appeal has generated a large increase in the number of cases ultimately disposed of by resort to a "harmless error" analysis. Finally, the actual weight of the evidence against the defendant, and the concomitant likelihood or unlikelihood of conviction on re-trial, appears to play little part in the decision by many criminal defendants to appeal convictions because of trial errors.

27. 312 U.S. 552 (1940).

28. *Id.* at 557.

Unfortunately, though the rationale for the exceptions may be clear, the specific exceptions are not so easily understood. This Article attempts to define an adequate rationale. But before a discussion of the exceptions themselves can be undertaken, two introductory points, one theoretical and one historical, must be considered.

The finality rule of procedural default evolved out of the adversary system of justice, and must be considered, at least from a theoretical point of view, a logical and inevitable element of that system. America's criminal law system assumes that the clash of adversaries generates the correct result. Primary responsibility for the defendant's well-being thus rests on defense counsel and not on the judge.

It is indisputable that the Warren Court's decisions requiring counsel in all serious criminal cases[29] represent a tremendous increase in the protections afforded criminal defendants. Many of the commentators who support those decisions do not acknowledge, however, that the presence of counsel at trial requires consideration of the correlative finality rule.[30] It is quite clear that the right to counsel and defendants' assertion of that right produce the justification for the finality rule. The reasoning is straightforward. If the obligation to control trials and to assert substantive rights rests on respective adversaries, as it does in an adversary system, the blame for counsels' failure to so act falls squarely on defendants. In short, acceptance of the right to counsel necessitates acceptance of the finality rule and the binding nature of procedural defaults.

Until the early 1960's, the federal courts readily accepted the rule that failure to comply with state procedural finality rules barred defendants from raising certain defenses in subsequent federal habeas corpus actions.[31] Ab-

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29. Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); White v. Maryland, 373 U.S. 59 (1963); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

30. *See generally* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979); Reeves, *Right to Counsel in Louisiana* (pts. 1-2), 25 LA. B.J. 303, 26 LA. B.J. 28 (1978); Comment, *Criminal Law—Hybrid Representation—Defendant's Constitutional Rights Were Not Violated by Denial of His Request to Act as His Own Co-Counsel*, 6 AM. J. CRIM. L. 230 (1978); Comment, *Presence of Counsel in the Grand Jury Room*, 47 FORDHAM L. REV. 1138 (1979); Comment, *Constitutional Criminal Procedure—The Standards for the Sixth Amendment Right to Effective Assistance of Counsel*, 14 LAND & WATER L. REV. 551 (1979); Comment, *Pro Se Defendants and Advisory Counsel*, 14 LAND & WATER L. REV. 227 (1979); Comment, *Criminal Law: Effective Assistance of Kansas Counsel*, 18 WASHBURN L.J. 635 (1979); Comment, *Criminal Procedure—Washington's Standard for Determining Ineffectiveness of Counsel*, 54 WASH. L. REV. 857 (1979); Note, *Constitutional Law—Criminal Procedure—Where Suspect has not Waived His Right to an Attorney's Assistance, Confession Prompted by Detective's Statements when Counsel was Absent is Inadmissible*—Brewer v. Williams, *430 U.S. 387 (1977)*, 11 CREIGHTON L. REV. 997 (1978); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look after* United States v. Decoster, 93 HARV. L. REV. 752 (1979).

31. *See, e.g.*, Irvin v. Dowd, 359 U.S. 394 (1959); Daniels v. Allen, *reported with* Brown v. Allen, 344 U.S. 443 (1953); Herb v. Pitcairn, 324 U.S. 117 (1945); Fox Film Corp. v. Muller,

sent a "vital flaw"[32] or an "unusual circumstance"[33] the rule of procedural finality controlled. Claims of both constitutional deprivations and mere trial irregularities had to be raised according to state procedures. Thus, defendants who failed to act on issues or errors in an appropriate and timely fashion forever lost the right to raise those issues or errors. The federal courts called this rule of "forfeiture" the "adequate state-ground" doctrine.[34]

In 1963, in *Fay v. Noia*,[35] the Supreme Court abruptly changed the adequate state-ground doctrine. In *Fay*, the Court found that failure to file a timely appeal, clearly an adequate state ground for denial of review, did not bar habeas corpus relief in the federal courts. The Court formulated a new test in *Fay*: the prosecutor must establish that the defendant had committed a "deliberate bypass" of the procedural issue in order to bar consideration of the issue in a federal habeas corpus proceeding.[36] Deliberate bypasses, of course, involve conscious decisions, *i.e.* waivers. Thus, in effect, *Fay's* deliberate bypass standard substituted the rule of "waiver" for the rule of "forfeiture" by default.

Numerous cases quickly followed *Fay*. In a notable case, *Henry v. Mississippi*,[37] the Court applied a similarly relaxed procedural default standard to a case that had come to it on direct appeal.[38] Thus, with *Fay*, *Henry*, and similar cases, the Warren Court eviscerated the finality rule and thereby at least implicitly suggested that nothing short of error-free criminal trials would be acceptable.

The Warren Court's expansion of federal habeas corpus and direct relief rights despite procedural defaults precipitated immediate and dramatic action by state courts and legislatures. Most states quickly expanded state law exceptions to procedural default rules. That occurred either because of increased

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296 U.S. 207 (1935); Smith v. Hixon, 249 F.2d 41 (5th Cir. 1957), *cert. denied*, 355 U.S. 967 (1958); Pearson v. Gray, 243 F.2d 23 (6th Cir.), *cert. denied*, 354 U.S. 913 (1957); Dusseldorf v. Teets, 209 F.2d 754 (9th Cir.), *cert. denied*, 347 U.S. 969 (1954); United States v. Martin, 172 F.2d 519 (2d Cir. 1949).

32. Brown v. Allen, 344 U.S. at 506.

33. *Id.* at 463. *Brown* established a test for determining the appropriate circumstances in which a federal district court should exercise its discretion to hold an evidentiary hearing in a habeas corpus proceeding. It held that such discretion should only be exercised where a "vital flaw" occurred in the state procedure or where "unusual circumstances" were present. *Id.*

34. Orr v. Orr, 440 U.S. 268, 275-76 (1979); Fay v. Noia, 372 U.S. 391, 428-31 (1963); NAACP v. Alabama, 357 U.S. 449, 454-58 (1958); Herb v. Pitcairn, 324 U.S. at 128; Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). An excellent starting point for study of the "adequate state ground" doctrine is Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961). *See also* Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Comment, *Supreme Court Treatment of State Procedural Grounds Relied on in State Courts to Preclude Decision of Federal Questions*, 61 COLO. L. REV. 255 (1961).

35. 372 U.S. 391 (1963).

36. *Id.* at 438.

37. 379 U.S. 443 (1965).

38. The issue in *Henry* involved a failure to make a contemporaneous objection.

state sensitivity to federal due process rights or because of an understandable desire to avoid extensive federal court interference in state criminal proceedings. By the mid-1970's, therefore, virtually every state recognized extensive common law and statutory exceptions to the finality rule.[39]

Perhaps by mere coincidence, but possibly by design, at about the same time that the various states completed the process of providing new state procedural default exceptions, the United States Supreme Court—now the Burger Court—began moving away from its earlier denigration of the finality rule. In a series of cases, the Court once again emphasized the value of procedural requirements.[40] Cognizant of the fact that the dramatically increased number of substantive defense rights afforded criminal defendants necessitated a tool for the orderly presentation of those rights, the Court turned back to the previously abandoned finality rule.

In 1977, the Court overruled *Fay* in *Wainright v. Sykes*.[41] Under the *Wainright* standard, the prosecutor need not show a deliberate bypass. Now, the criminal defendant must show both a "cause" for his or her procedural default and "prejudice" produced by it. This is the "cause and prejudice" test, which has generated much comment.[42] Because the cause and prejudice test is quite stringent, criminal defendants must once again generally rely on state law exceptions to procedural default rules, though these exceptions have been broadened substantially since the pre-*Fay* era.[43]

Undoubtedly, the alternating positions taken by the United States Supreme Court on the finality rule have dramatically influenced the Illinois Supreme Court in its attempts to formulate a workable definition of Illinois state procedural default exceptions. Unfortunately, however, the Illinois court has decided the majority of its finality rule cases, even the most recent ones, without reference to the federal cases.[44] Despite that lack of refer-

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39. For a recent analysis of state procedural default laws and their relationship to federal habeas corpus, *see* Comment, *Protecting Fundamental Rights in State Courts: Fitting a State Peg to a Federal Hole*, 12 HARV. C.R.-C.L. L. REV. 63 (1977) [hereinafter cited as *Protecting Fundamental Rights*].

40. *See* Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973).

41. 433 U.S. 72 (1977).

42. *See* Hill, *supra* note 11; Rosenberg, *supra* note 11; Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 STAN. L. REV. 1 (1978); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 215 (1977); *Twenty-Third Annual Survey of Developments in Virginia Law, 1977-1978*, 64 VA. L. REV. 1348, 1426 (1978).

This test emerged and was developed originally in three earlier cases. *See* Francis v. Henderson, 425 U.S. 536 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973).

43. *See generally Protecting Fundamental Rights*, *supra* note 39.

44. *See* People v. Burns, 75 Ill. 2d 282, 388 N.E.2d 394 (1979); People v. Precup, 73 Ill. 2d 7, 382 N.E.2d 227 (1978); People v. Harris, 72 Ill. 2d 16, 337 N.E.2d 28 (1978); People v. Sullivan, 72 Ill. 2d 36, 377 N.E.2d 17 (1978); People v. Smith, 71 Ill. 2d 95, 374 N.E.2d 472 (1978); People v. Partin, 69 Ill. 2d 80, 370 N.E.2d 545 (1977); People v. Marchian, 64 Ill. 2d 257, 356 N.E.2d 71 (1976); People v. Rose, 43 Ill. 2d 273, 253 N.E.2d 456 (1967); People v. Hamby, 32 Ill. 2d 291, 205 N.E.2d 456 (1965). *But see* People v. Rehbein, 74 Ill. 2d 435, 386 N.E.2d 39 (1978).

ence to parallel federal cases, the Illinois cases provide a useful model for examining procedural default rules and exceptions. Thus, this Article soon turns to those cases.

One preliminary matter should be noted at this point. The overwhelming majority of cases decided in Illinois on the finality rule deny relief to procedural defaulters.[45] A conservative estimate would indicate that every case granting relief from the finality rule has been matched by perhaps ten cases denying relief.[46] However, because of the disproportionate impact of the few cases granting relief, and because of the confusion they have produced, only these cases will be discussed in this article. An immediate cautionary note must therefore be added. Many of the cases granting relief cited herein have factual patterns virtually identical to uncited cases denying relief. Thus, the cases discussed herein should not be read to suggest that the courts would be bound to grant relief today on similar facts. Rather, the cases discussed should be read only as a group, a group demonstrating that a pattern emerges from all the cases.

ILLINOIS EXCEPTIONS TO THE FINALITY RULE

Illinois recognizes three basic exceptions to the finality rule. A common law exception involves application of the retroactivity doctrine.[47] Two statutory exceptions are "plain error"[48] and relaxation of post-conviction res judicata principles.[49] As these three Illinois exceptions are examined, they should be compared carefully with the single federal habeas corpus exception to the finality rule—the cause and prejudice rule.[50]

All three Illinois finality rule exceptions revolve around an elusive standard of "fundamental fairness."[51] Although this fundamental fairness standard is immediately appealing, conjuring up as it does images of the great

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45. *See, e.g.*, People v. Partin, 69 Ill. 2d 80, 83, 370 N.E.2d 545, 547 (1977); People v. Barto, 63 Ill. 2d 17, 22, 344 N.E.2d 433, 436 (1976); People v. French, 46 Ill. 2d 104, 107, 262 N.E.2d 901, 903-04 (1970); People v. James, 46 Ill. 2d 71, 74, 263 N.E.2d 5, 6-7 (1970); People v. Weaver, 45 Ill. 2d 136, 138, 256 N.E.2d 816, 138-39 (1970); People v. Derengowski, 44 Ill. 2d 476, 479, 256 N.E.2d 455, 457-58 (1970); People v. Doherty, 36 Ill. 2d 286, 291, 222 N.E.2d 501, 504 (1966).

46. Although no statistics are available on this point, a reading of the advance sheets for any period would provide a representative sample of this ratio.

47. *See* notes 58-66 and accompanying text *infra*.

48. *See* notes 88-164 and accompanying text *infra*.

49. *See* notes 67-87 and accompanying text *infra*.

50. *See* note 42 and accompanying text *supra*.

51. The Illinois position was expressed in People v. Hamby, 32 Ill. 2d 291, 205 N.E.2d 456 (1965): "We consider the waiver principle a salutary one, . . . but we have not hesitated to relax its application where fundamental fairness so requires." *Id.* at 294, 205 N.E.2d at 4. *See, e.g.*, People v. Foster, 76 Ill. 2d 365, 392 N.E.2d 6 (1979) (motion to suppress illegally obtained evidence must be made in writing before trial unless fundamental fairness requires otherwise); People v. Green, 74 Ill. 2d 444, 450, 386 N.E.2d 272, 275 (1979) (fundamental fairness prevents waiver of objection to use of defendant's post-arrest silence to impeach trial testimony).

principles of American criminal law, the standard is nearly impossible to define with any precision.[52] Only vague phrases such as "patently prejudicial"[53] and "shocking to the conscience"[54] describe the alliterative but obtuse phrase. Infinite elasticity of definition thus seems to be the most pervasive trait of the standard. Courts and writers appear unable to explain what fundamental fairness is; they only instinctively know what it is not. As a result, at least in the area of the finality rule, fundamental fairness consists of whatever a majority of an appellate court thinks it is in a specific case.[55]

The lack of a concrete definition of fundamental fairness thus immediately suggests the spectre of unbridled discretion discussed earlier.[56] Indeed, the problem posed by judicial discretion in determining whether fundamental fairness exists has been summarized with particular cogency by a student commentator:

> The approach now followed by the courts to determine the existence of "basic and fundamental error" must not be continued. It creates more problems than it solves, for it grants to the judge the discretion to apply his own "criteria" without requiring him to follow precedent. . . . [S]uch an approach must of necessity result in inconsistent decisions which penalize the defendant solely for the acts of his counsel. This clearly is inimical to our stated goals. The courts must not be permitted or required to decide the severity of an alleged error by the severity of the crime, the publicity

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52. Often, fundamental fairness is equated with an equally ambiguous term, due process. For example, in *In re* D.M.D., 54 Wis. 2d 313, 195 N.W.2d 594 (1972), the court asserted that due process is an exact synonym for fundamental fairness. . . ." *Id.* at 318. A definition of fundamental fairness may be sought, therefore, in a detailed description of due process. Due process has been described as "a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such government. . . ." Twining v. New Jersey, 211 U.S. 78, 106 (1908). Although the definition is nebulous, due process has been given some contour by decisions holding certain practices to be denials of due process. *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478 (1978) (improper comments by prosecutor); Chambers v. Mississippi, 410 U.S. 284 (1973) (denial of right to present evidence); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1970) (denial of rights to notice, counsel, confrontation, and standard of proof); Powell v. Alabama, 287 U.S. 45 (1932) (failure to appoint effective trial counsel).

53. *See, e.g.*, United States v. Pariente, 558 F.2d 1186, 1191 (5th Cir. 1977) (attempt to impeach defendant on critical issue with statements not in evidence is patently prejudicial); French v. City of Springfield, 5 Ill. App. 3d 368, 379, 283 N.E.2d 18, 26 (4th Dist. 1972) (prosecutor's patently prejudicial statements are those which, standing alone, require reversal).

54. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (pumping defendant's stomach to obtain narcotics evidence was shocking to the conscience).

55. Justice Black criticized the equation of due process with fundamental fairness because he thought a fundamental fairness test

> depends entirely on the particular judge's idea of ethics and morals instead of requiring him to depend on the boundaries fixed by the written words of the Constitution. Nothing in the history of the phrase "due process of law" suggests that constitutional controls are to depend on any particular judge's sense of values.

Duncan v. Louisiana, 391 U.S. 145, 169 (Black, J., concurring).

56. *See* text accompanying note 20 *supra*.

> involved, the possibility of conviction after a new trial, and the personality of the persons involved. In order to restrict the courts to a consideration of the severity of the error, and to concurrently eliminate the controlling influence of subjective factors, there must be definite guidelines for the court to follow.[57]

An analysis of the Illinois cases discussed below, an analysis that focuses on the facts of the cases in which relief was granted rather than on the courts' language in the cases, should yield a workable definition of fundamental fairness. That definition should lead, in turn, to an understanding of the exceptions to the procedural default rules.

A. *Retroactivity*

Retroactivity is the principal common law exception to the finality rule. Retroactivity is of concern in this Article because the unusual standard articulated by the Supreme Court for determining the proper application of the retroactivity doctrine is closely related to the "fundamental fairness" standard employed in procedural default cases. At common law, a decision that overruled previously accepted law was given full retroactive effect; that is, the overruling decision was applied to all similar cases regardless of whether the controversies arose before or after the overruling decision and, obviously, regardless of whether the issue was raised at a particular earlier trial.[58] The United States Supreme Court, however, has not applied all of its criminal procedure decisions retroactively.[59] In *Linkletter v. Walker*,[60] the Court held that the Constitution neither prohibits nor requires retroactivity in criminal procedure cases.[61] Thus, to determine whether a decision should be applied retroactively, the Court stated, a court should consider the purpose, history, and effect of the new decision.[62] On this basis, the

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57. *Basic and Fundamental Error*, *supra* note 9, at 233.

58. Currier, *Time and Change in Judge Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 205-06 (1965). The common law rule was grounded in the belief that courts do not create law but merely apply it. Blackstone set forth the position of the common law jurist when he declared that an overruled decision was not "bad law, . . . it was not law." 1 BLACKSTONE, COMMENTARIES 68-71 (emphasis in original). On this basis, courts applied the overruling decisions retroactively to ensure that all decisions conformed to the pre-existing law. *Id.* at 69-71. For a discussion of the retroactivity doctrine in modern cases, see Ostreger, *Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations*, 19 N.Y.U.L.F. 289 (1973); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

59. *See* notes 60-64 *infra*.

60. 381 U.S. 618 (1965).

61. *Id.* at 640.

62. *Id.* Generally, the *Linkletter* criteria are promulgated as a three-factor test composed of the purpose of the new rule, the reliance placed upon the previous rule by state officials, and the effect a retroactive application would have on the administration of justice. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (prospectively applying United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), which set forth the right to counsel at

Linkletter court prospectively applied the exclusionary rule set forth in *Mapp v. Ohio.*[63]

The Court recently summarized the retroactivity rule:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of the material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner.[64]

As will be demonstrated below, the common law concept of the "imperative of judicial integrity" also forms the theoretical basis for both Illinois statutory exceptions to the finality rule.[65]

Ironically, while courts have implemented the retroactivity doctrine quite restrictively, they have, at the same time, expanded exceptions to the procedural default rules.[66] That discrepancy is illogical. Decisions applying criminal procedure decisions retroactively produce the same result as determinations that convictions will be set aside despite procedural defaults. In both instances courts have forsaken procedural rules requiring issues to be raised at certain times. The only practical difference between the two situations is this: in retroactivity cases, all criminal defendants in similar circumstances obtain relief; in procedural default exception cases, only individual defendants benefit. In short, though fundamental fairness may dictate that an individual defendant obtain relief, practical realities often requires denial of exactly the same kind of relief to large and unknown groups of defendants.

B. Post-Conviction Relief

The first of the two major statutory exceptions to the finality rule is created by Illinois' post-conviction relief statute. The statute provides that

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line-ups). *See generally* Note, Daniel v. Louisiana *and the Doctrine of Nonretroactivity*, 9 SW. U.L. REV. 801 (1977).

63. 367 U.S. 643 (1967). The Court's prospective application of exclusionary rule decisions must be contrasted with the retroactive application of rules designed to ensure the accuracy of criminal convictions. *See, e.g.*, Ivan v. New York, 407 U.S. 203, 205 (1972) (retroactively applied *In re* Winship, 397 U.S. 358 (1970), which held proof beyond a reasonable doubt standard applicable in all criminal cases). *See generally* Note, *Retroactivity*, 4 MEM. ST. U.L. REV. 521 (1974).

64. Unites States v. Peltier, 422 U.S. 531, 536-37 (1975). The common law concept of the "imperative of judicial integrity" also forms the theoretical basis of both Illinois statutory exceptions to the finality rule. *See* notes 71-120 and accompanying text *infra*.

65. *See* notes 71-120 and accompanying text *infra*.

66. The relationship between retroactivity and procedural default exceptions is analyzed briefly in Soloff, *supra* note 11, at 297; *Away From Waiver*, *supra* note 11, at 1245. *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, POST CONVICTION REMEDIES 35-37 (Appr. Draft 1968). For an example of the relationship in action, *see* O'Connor v. Ohio,

any imprisoned person who asserts that his or her constitutional rights were substantially denied during the trial may have his or her claim heard in a later proceeding. Any claim not raised in the original petition for subsequent relief is, however, forever forfeited.[67] Illinois courts have consistently construed this statutory provision to require application of the rule of procedural defaults.[68] Issues not raised on direct appeal, either constitutional or non-constitutional ones, are forfeited for the purpose of post-conviction proceedings.[69] In addition, if issues could have been raised earlier but were not, they are forever lost.[70]

The Illinois Supreme Court most recently considered the forfeiture principle in the context of post-conviction relief in *People v. Partin*.[71] In *Partin*, the court applied the default rule, but suggested the existence of exceptions to the rule. The court stated that "those issues which could have been raised but were not are considered waived [forfeited] . . . , unless fundamental fairness requirements dictate a relaxation of the waiver rule."[72] Unfortunately, the Illinois court in *Partin*, of course, failed to define fundamental fairness.

The fundamental fairness exception to the finality rule in the context of post-conviction relief can be understood, however, by examining cases in which such relief was granted. Virtually all of these cases involve either errors of defendants' counsel[73] or seriously improper conduct on the part of judges or participating lawyers.[74] The remaining cases can be classified as examples of the "identical defendant" problem.[75]

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385 U.S. 92 (1962) (failure to object to prosecutorial comment later held invalid in separate case was not waived).

67. ILL. REV. STAT. ch. 38, § 122-1 (1977).

68. *See, e.g.*, People v. Hubbard, 50 Ill. 2d 134, 277 N.E.2d 863 (1971) (failure at trial to raise issue of public defender's refusal to consider possibility of defendant's innocence is waiver of issue in post-conviction proceedings); People v. LeMay, 44 Ill. 2d 58, 254 N.E.2d 476 (1969) (constitutional claims not made in prior post-conviction petition held waived); People v. Houck, 50 Ill. App. 3d 274, 365 N.E.2d 576 (1st. Dist. 1977) (specific evidentiary objections waive all grounds not specified).

69. *See, e.g.*, People v. Summers, 50 Ill. App. 3d 33, 365 N.E.2d 241 (4th Dist. 1977) (rule of waiver bars consideration in post-conviction proceeding of matters that could have been argued on appeal); People v. Doherty, 36 Ill. 2d 286, 222 N.E.2d 501 (1967) (issues that could have been presented on appeal held waived).

70. *See, e.g.*, People v. Collins, 39 Ill. 2d 286, 235 N.E.2d 570 (1968) (issues once raised in post-conviction hearing cannot be raised again); People v. Evans, 37 Ill. 2d 27, 224 N.E.2d 778 (1967) (defects and irregularities waived by guilty plea may not be raised in post-conviction proceeding). A complete discussion of the waiver issue appears in 5 ILLINOIS CRIMINAL PROCEDURE § 39.62 (Callaghan 1971).

71. 69 Ill. 2d 80, 370 N.E.2d 545 (1977).

72. *Id.* at 83, 370 N.E.2d at 547.

73. *See* notes 76-79 and accompanying text *infra*.

74. *See* notes 80-84 and accompanying text *infra*.

75. *See* text accompanying note 85 *infra*.

Defective counsel cases generally involve either incompetent counsel or the defendants' pro se appearance at some stage in the proceedings.[76] In *People v. Hamby*,[77] a leading case, the court explained:

> We consider the waiver principle a salutary one, conducive to the effective enforcement of the rules which society has established for its protection, but we have not hesitated to relax its application where fundamental fairness so requires. . . . Defendant here sought to raise on the original writ of error the claims presented in the amended post-conviction petition. His counsel, apparently considering some of them without merit or unavailable on the record then before the court, did not do so. Defendant then sought leave to proceed *pro se*, which was denied. Defendant, having been denied leave to proceed *pro se* and secure review of the questions which he now seeks to raise, cannot fairly be said to have waived such questions.[78]

The remainder of the defective counsel cases involve defendants who could not afford attorneys.[79]

The second group of cases containing exceptions to procedural default rules in the post-conviction relief context involve seriously improper conduct by judges or participating lawyers. *People v. Evans*[80] is the principal case of this group. In *Evans*, the defendant alleged that the trial judge improperly admonished him of the consequences of his guilty plea and sentenced him to a jail term exceeding the statutory maximum. Trial counsel had not objected to these points.[81] The court found Evans' claim to be a substantial allegation of a constitutional violation. Consequently, the court required an answer from the state and an evidentiary hearing.[82] (Although only a few improper conduct cases appear in the context of the fundamental fairness exception to

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76. People v. Goerger, 52 Ill. 2d 403, 288 N.E.2d 416 (1972) (matters that could have been raised on appeal reviewed in post-conviction hearing because defendant had proceeded without counsel); People v. Nicholls, 51 Ill. 2d 244, 281 N.E.2d 873 (1972) (since first petition was dismissed without providing requested counsel, matter was not res judicata); People v. Raymond, 42 Ill. 2d 564, 248 N.E.2d 663 (1969) (inadequate representation of defendant by appointed counsel precluded operation of dismissal as res judicata); People v. Polansky, 39 Ill. 2d 84, 233 N.E.2d 374 (1968) (failure to invoke appellate procedures was not a default when right to counsel had been denied); People v. Kleagle, 37 Ill. 2d 96, 224 N.E.2d 834 (1967) (double jeopardy claim required exception to res judicata rule).

77. 32 Ill. 2d 291, 205 N.E.2d 456 (1965).

78. *Id.* at 294, 205 N.E.2d 458. *Hamby* is frequently cited, incorrectly it is suggested, in cases not involving *pro se* issues.

79. *See, e.g.*, People v. La Franca, 4 Ill. 2d 261, 122 N.E.2d 583 (1954) (where failure to appeal resulted from defendant's indigence, appealable issues will not be deemed waived in post-conviction hearings); People v. Joyce, 1 Ill. 2d 225, 115 N.E.2d 262 (1953) (where indigence prevented direct appeal, defendant may still argue in post-conviction hearing that confession was obtained through physical abuse); People v. Jennings, 411 Ill. 21, 102 N.E.2d 824 (1954) (constitutional claims not raised on appeal are waived in post-conviction proceedings unless indigence prevented appeal).

80. 37 Ill. 2d 27, 224 N.E.2d 778 (1967).

81. *Id.* at 31, 224 N.E.2d at 781.

82. *Id.*

Illinois' interpretation of its post-conviction relief statute,[83] as will be noted below improper conduct cases appear with great frequency in the context of the "plain error" exception.[84])

The "identical defendants" problem need be mentioned only briefly. The problem occurs when two defendants are tried for the same crime, are both convicted, and one then obtains a reversal on appeal by raising a certain issue. The other defendant, if he or she has procedurally defaulted, is apparently precluded from raising the same issue. Under these circumstances, however, Illinois courts have determined that fundamental fairness requires that the procedural default be set aside.[85] Common sense dictates that result.

The foregoing analysis indicates that defects in counsel—either pro se appearances, incompetence, or improper conduct—serve as the basic tools for avoiding the res judicata effect of Illinois' interpretation of its post-conviction relief statute.[86] Clearly, however, the facts of the cases define the exceptions, and not the vague invocation of fundamental fairness language.

In the vast majority of cases, the factual situations, like those outlined above, indicate that the adversary system of justice itself has broken down.[87] That breakdown constitutes justification for an exception to the finality rule. Trials must proceed as balanced procedures for dealing with adversary positions. If trials become circuses, or if lawyers fail to serve as adversaries, juries will not be able to decide guilt or innocence properly. Thus, in such situations, the actual integrity of the judicial process has itself been implicated.

C. *Plain Error*

"Plain error" constitutes the second Illinois statutory exception to the finality rule for procedural defaults. Unlike the res judicata rule of Illinois' post-conviction relief statute,[88] which is comparable to federal habeas corpus

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83. *E.g.*, People v. Rose, 43 Ill. 2d 273, 253 N.E.2d 456 (1967).

84. *See* notes 108-115 and accompanying text *infra*.

85. *E.g.*, People v. Burns, 75 Ill. 2d 282, 388 N.E.2d 394 (1979).

86. ILL. REV. STAT. ch. 38, §§ 122-1 to -7 (1977). For a general discussion of the effect of incompetent counsel, see generally, Schwarzer, *Dealing with Incompetent Counsel–The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752 (1980).

87. The phrase "breakdown in the adversary system" is taken from the Advisory Committee Note accompanying Federal Rule of Evidence 103(d) (plain error). *See generally* 10 MOORE'S FEDERAL PRACTICE § 103.01 [3.-4]-(d) (1979). Recently, the United States Supreme Court employed similar language in a case in which a defendant sought to raise on collateral attack a point he had not advanced on direct appeal. The Court refused to consider the point because it concluded that the defect was not "a fundamental defect which inherently results in a miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 783 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

88. *See* notes 67-87 and accompanying text *supra*.

law only by analogy,[89] plain error concepts and definitions pervade both Illinois[90] and federal law.[91] Illinois codifies the concept in two statutes:

> Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.[92]

> Instructions in criminal cases shall be tendered, settled and given in accordance with section 67 of the Civil Practice Act, but substantial defects are not waived by failure to make timely objections thereto if the interests of justice require.[93]

The subject of plain error can be best understood by initially analyzing the United States Supreme Court's attempts to formulate a definition for the term. According to the Court, plain errors are errors of such a grievous nature that a new trial or other relief must be granted even though the defendant did not object to the trial judge's action at the appropriate time.[94] In *United States v. Atkinson*[95] the Court stated: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."[96] Although during the Warren Court years the Court gradually expanded the plain error standard,[97] the Burger Court has returned to the rigid approach set out

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89. *See generally* R. SOKOL, FEDERAL HABEAS CORPUS 156-59 (2d ed. 1969); Note, *The Unpredictable Writ—The Evolution of Habeas Corpus*, 4 PEPPERDINE L. REV. 313 (1977).

90. See notes 92 & 93 and accompanying text *infra*.

91. Federal procedural rules provide that plain errors affecting substantial rights may be noticed even though they were not called to the trial court's attention. FED. R. CRIM. P. 52 (b); FED. R. EVID. 103(d); Sup. Ct. R. 40 (1)(d)(2). Additionally, FED. R. CIV. P. 61 (harmless error) has been interpreted as including a plain error standard in civil cases. *See* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2883 (1973).

92. ILL. REV. STAT. ch. 110A, § 615(a) (1977).

93. *Id.* § 451(c) (plain errors referred to as "substantial defects").

94. Boykin v. Alabama, 395 U.S. 238, 241 (1969). Virtually all relevant Supreme Court cases are contained in Annot., 42 L. Ed. 2d 946, § 17 (1976). *See generally* 8B MOORE'S FEDERAL PRACTICE §§ 52.01-.03 (1979); 6 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 52.1-.62 (1967); 3 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 851-856 (1973).

95. 297 U.S. 157 (1936).

96. *Id.* at 160. An earlier case phrased the rule with equal rigidity: "[A]lthough this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it." Wiborg v. United States, 163 U.S. 632, 658 (1896).

97. The plain error rule initially was restricted to errors occurring at trial; the Warren Court expanded the rule to include non-trial errors as well. *See, e.g.*, Bartone v. United States, 375 U.S. 52 (1963) (probation revocation and enlargement of sentence); Sibler v. United States, 370 U.S. 717 (1962) (faulty indictment).

above.[98] This rigidity is consistent, of course, with the Burger Court's resurrection of the finality rule in habeas corpus cases.[99]

Unfortunately, however, despite both the Warren and Burger Courts' descriptions of plain error, the term has not been adequately defined. To better understand plain error, therefore, Illinois plain error cases may be examined. An analysis of Illinois cases involving plain error reveals recurring fact patterns in decisions that grant plain error relief. Most[100] of the cases involve, not surprisingly, defects in counsel[101] or seriously improper conduct.[102]

People v. Nowak[103] is a typical plain error case involving a defect in counsel.[104] The court in *Nowak* stated that the forfeiture rule was inapplicable if the trial court clearly permits the prosecutor to take advantage of a poorly represented defendant.[105] *Nowak* and its companion defective counsel cases,[106] suggest that a demonstration of ineffective counsel virtually guarantees plain error relief.[107]

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98. In Estelle v. Williams, 425 U.S. 501, 510-11 (1963), the Court determined that an error at voir dire was outside the plain error rule because the pretrial error was not subsequently raised at trial. In a separate opinion, Justice Powell concluded that plain error constituted "inexcusable procedural default." *Id.* at 513 (Powell, J., concurring) (quoting Hart, *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 118 (1959)).

99. *See* notes 31-43 and accompanying text *supra*.

100. The qualification "most" reflects the Illinois court's inconsistent application of the plain error rule. Some cases simply were reasoned incorrectly. *See* notes 116-128 and accompanying text *infra*. In other instances, the rule was involved even though plain error had nothing to do with the court's decision to review the particular issues involved. *See* notes 121-134 *infra*.

101. *See* notes 103-107 *infra*.

102. *See* notes 108-115 *infra*.

103. 372 Ill. 381, 24 N.E.2d 50 (1939).

104. One defendant in *Nowak* was accused of rape, but maintained that he was innocent. The court summarized his defense attorney's failures:

> In disregard of Nowak's steadfast denial of guilt and of his plea of not guilty, his counsel stipulated the People's case against [Nowak] and cut [him] off from any benefit of diligent cross-examination of the prosecutrix, her husband and the officer. He failed to protest against the ruling out of competent testimony and failed to assist his client by questions designed to bring out fully the facts and circumstances surrounding the alleged crime, when the defendants were on the stand.

Id. at 385, 24 N.E.2d at 52.

105. *Id.* at 382, 24 N.E.2d at 50.

106. *See, e.g.*, People v. Gardiner, 303 Ill. 204, 135 N.E. 422 (1922) (prosecutor took unfair advantage of inexperienced defense counsel); People v. Schulman, 299 Ill. 125, 135 N.E. 530 (1921) (defense counsel's ignorance deprived accused of important impeachment evidence).

107. Professor Wright has argued that the original basis of the plain error rule, or at least the concept of plain error, was the need to protect indigent defendants from the errors of appointed counsel. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5043 (1977). This seems incorrect. Courts allowed procedural default exceptions long before the onset of frequent representation by appointed counsel. *See* articles cited in note 9 *supra*. Recently, Pennsylvania adopted a system whereby procedural defaults are analyzed in the context of incompetence of counsel. Only if the default implicates the lawyer's ability beyond a satisfactory degree will the default be ignored. Comment, *Pennsylvania Waiver Doctrine in Criminal Proceedings: Its Application and Relationship to the Ineffective Assistance of Counsel Claim*, 15 DUQ. L. REV. 217 (1976).

Plain error cases in the second group, those involving seriously improper conduct, fall into two categories—severely prejudicial summations by prosecutors[108] and improper judicial conduct.[109] The overwhelming majority of improper conduct cases involve summations. In *People v. Fort*,[110] the court quoted the prosecutor's rather colorful closing argument and concluded that failure to object to it had not forfeited the issue for the defendant.[111] The prosecutor had argued:

> That man is a rapist now. He was a rapist before and he will always be a rapist. I ask you ladies and gentlemen, who could have a bigger interest in this particular case than this defendant's wife. She's got two children to support. She will move heaven and earth to get him home to support

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A recent case, however, suggests that the mere allegation of ineffective assistance of counsel will not always afford an exception to the procedural default rule. In United States v. Decoster, 48 U.S.L.W. 2070 (D.C. Cir. 1979) (en banc), the court established a two-part test for determining whether a claim of incompetence will be considered. Under the *Decoster* test, a defendant must demonstrate: (1) that the lawyer's performance fell measurably below the performance ordinarily expected of fallible counsel; and (2) that the substandard performance affected the outcome of the trial. *Id.* at 2071. This standard, requiring the defendant to show both the existence of a problem and an effect arising from it, is similar to the one suggested for dealing with all procedural default exceptions. *See* text accompanying notes 165-175 *infra*. Moreover, recent Illinois decisions also cast doubt upon the contention that allegations of defense counsel's conflict of interest ensure appellate review despite procedural default. *See* note 155 *infra*.

108. *See, e.g.*, People v. Sullivan, 72 Ill. 2d 36, 377 N.E.2d 17 (1978) (prosecutor suggested defendant should be found guilty because two accomplices had been convicted); People v. Duckett, 56 Ill. 2d 432, 308 N.E.2d 590 (1974) (prosecutor's remarks appealed to racial prejudice); People v. Romero, 36 Ill. 2d 315, 223 N.E.2d 121 (1967) (summation depicted defendant as cause of girlfriend's drug addiction); People v. Weinstein, 35 Ill. 2d 467, 220 N.E.2d 432 (1966) (prosecutor asserted defendant had burden to introduce evidence of innocence); People v. Morgan, 20 Ill. 2d 437, 170 N.E.2d 529 (1960) (reference to defendant's failure to testify); People v. Fort, 14 Ill. 2d 491, 153 N.E.2d 26 (1958) (implied defendant had tendency toward rape); People v. Moore, 9 Ill. 2d 224, 137 N.E.2d 246 (1956) (characterized defendant as waging war on society). Civil cases dealing with the same issue include Underwood v. Pennsylvania R.R., 34 Ill. 2d 367, 215 N.E.2d 236 (1966) (plaintiff's attorney referred to correspondence not in evidence); Muscarello v. Peterson, 20 Ill. 2d 548, 170 N.E.2d 564 (1960) (material information detrimental to party offering was deleted from document in evidence); Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956) (defendants characterized as thieves, usurpers and defrauders).

109. People v. Sprinkle, 27 Ill. 2d 398, 189 N.E.2d 295 (1963) (judge bolstered elderly witness's credibility with favorable comments); People v. Finn, 17 Ill. 2d 614, 162 N.E.2d 354 (1959) (judge's statement indicated belief that insanity claim was a sham). One of the extremely rare instances in which the Burger Court has reviewed unpreserved error involved seriously improper judicial conduct. *See* United States v. Rogers, 422 U.S. 35 (1975) (judge told jury he would accept verdict of guilty with extreme mercy of court but did not notify defendant or defense counsel).

110. 14 Ill. 2d 491, 153 N.E.2d 26 (1958).

111. The court reasoned that the prosecutor's remarks were likely to leave the jury with the impression that defendant was a habitual criminal. *Id.* at 501, 153 N.E.2d at 32. On this ground, the court concluded that the remarks were so prejudicial to the defense that the accused did not receive a fair trial. *Id.* at 502, 153 N.E.2d at 32.

> those two children. Ladies and gentlemen, this defendant deserves no mercy. Let your verdict show these rapists, and I mean this sincerely from the bottom of my heart, let your verdicts show these rapists that they cannot go about the streets of Chicago.[112]

Only two Illinois plain error cases involving improper judicial conduct have been found.[113] In these the Illinois Supreme Court again concluded that certain actions necessitate reversal despite defendants' failures to make contemporaneous objections. The Court's remarks in *People v. Sprinkle*,[114] exemplify the type of conduct that the Illinois Supreme Court will not tolerate:

> The record in this case contains questions and comments which have no place in the conduct of a trial before a jury. They commence with the complaining witness, an elderly woman somewhat rambling and unresponsive in her testimony, apparently due to her advanced years, who was asked by the presiding judge, at the conclusion of her testimony, how old she was. Upon her response that she was eighty-five, the court commented, "God bless you." Later the trial court commented to the witness: "I think you are marvelous," and then proceeded to question the witness as to whether she remembered anything about the man "who beat you at your house." The court was informed by the State's Attorney that the witness had been unable to identify the defendant, following which the court asked the witness: "The first time you have seen this man, since that time, was today?"[115]

People v. Bradley[116] presents the Illinois plain error rule's single identical defendant case.[117] In *Bradley*, the trial judge severed the trial of two men who originally were co-defendants. Bradley's counsel made no objection to the severance.[118] The co-defendant was subsequently acquitted by the judge due to certain evidence that the judge would not admit in Bradley's jury trial.[119] After the jury found Bradley guilty, he appealed, claiming that he had not forfeited his right to raise the severance issue. The court agreed.[120] As in the post-conviction relief cases, common sense controlled.

Apart from the above decisions, the Illinois Supreme Court has often invoked the plain error rule in cases where the rule, in fact, played no part in its overall decision to review an issue on appeal. In these cases, involving

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112. *Id.* at 500, 153 N.E.2d at 31.
113. *See* note 109 *supra*.
114. 27 Ill. 2d 398, 189 N.E.2d 295 (1963).
115. *Id.* at 401, 189 N.E.2d at 297-98.
116. 30 Ill. 2d 597, 198 N.E.2d 809 (1964).
117. *See* text accompanying note 85 *supra*.
118. *Id.* at 601, 189 N.E.2d at 811.
119. *Id.* at 600, 189 N.E.2d at 811.
120. *Id.* at 601, 189 N.E.2d at 811.

the death penalty,[121] important questions of law,[122] and mere technical defaults,[123] the court has improvidently used the plain error concept only because it wanted to focus on a completely appropriate substantive issue, but apparently lacked justification for reaching that substantive issue. In these cases, however, instead of invoking plain error, the court should have announced straightforwardly the reason for its decision to review an issue apparently foreclosed by the procedural default rules.

Brief examination of two plain error decisions reveals the confusion that could be avoided with a straightforward approach.[124] In *People v. Harris*,[125] a recent homicide case, the Illinois Supreme Court devoted several pages of a lengthy opinion to a determination of the proper mental element to be specified in an attempted murder jury instruction.[126] Defense counsel had objected to the instruction given at trial, but had failed to preserve the

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121. Although no case holds that default rules are inapplicable in death penalty cases per se, in capital cases courts have recognized unpreserved errors for reasons that appear strained. *See* People v. Manzella, 56 Ill. 2d 187, 306 N.E.2d 16 (1973) (error neither influenced jury nor prejudiced defendant to the extent of denying fair trial); People v. Winchester, 352 Ill. 237, 185 N.E. 580 (1933) (proof of guilt clear despite prejudicial error); People v. Carter, 327 Ill. 233, 158 N.E. 436 (1927) (introduction of incompetent evidence discredited defendant's testimony); People v. Dempsey, 47 Ill. 323 (1868) (unsworn testimony went to jury). For discussion of the Warren Court's decisions in the area of procedural default, see notes 35-39 and accompanying text *supra*.

122. *See, e.g.*, People v. Smith, 71 Ill. 2d 95, 374 N.E.2d 472 (1978) (defendant's appeal based on instructions tendered by defense); People v. Caesarez, 44 Ill. 2d 180, 255 N.E.2d 1 (1969) (plain error review based on failure to request instruction).

123. A technical default occurs when trial counsel, whose objection was overruled, fails to preserve the point properly in a post-trial motion or appellate brief. *See, e.g.*, People v. Morchian, 64 Ill. 2d 257, 356 N.E.2d 71 (1976) (failure to file formal motion to suppress); People v. Mayberry, 63 Ill. 2d 1, 345 N.E.2d 97 (1976) (state failed to raise question of standing); People v. Joyner, 50 Ill. 2d 302, 278 N.E.2d 756 (1972) (failure to instruct jury); People v. Holiday, 47 Ill. 2d 300, 265 N.E.2d 634 (1971) (failure to move to suppress). Two recent United States Supreme Court cases employ similar technical default reasoning. Anderson v. United States, 417 U.S. 211 (1974) (jury instructions lacked specificity); Pipefitters Local Union v. United States, 407 U.S. 385 (1972) (erroneous jury instruction).

124. No attempt will be made to analyze death penalty cases and the procedural default exceptions contained therein. The inapplicability of default rules in this context is obvious. In fact, Justice White recently suggested that normal rules of trial practice and criminal procedure might not apply in capital cases. Gardner v. Florida, 430 U.S. 349, 362-64 (1977) (White, J., concurring). One point must be made in that context, however. In death penalty cases where bifurcated guilt/penalty trials take place, procedural default rules may be applied regarding the guilt trial though not regarding the penalty trial. See an example of this process in People v. Carlson, 79 Ill. 2d 564, 404 N.E.2d 233 (1980).

125. 72 Ill. 2d 16, 377 N.E.2d 28 (1978).

126. *Id.* at 18-28, 377 N.E.2d at 29-34. Jury instructions in an attempted murder prosecution are problematic because of the various mental elements in the crime of murder, which are: (1) intent to kill; (2) intent to do great bodily harm; or (3) knowledge that acts create a strong probability of death or great bodily harm. ILL. REV. STAT. ch. 38, § 9-1 (1977). The Illinois Supreme Court's previous decisions conflicted as to the appropriate mental element in the crime of attempted murder. *Compare* People v. Trinkle, 68 Ill. 2d 198, 369 N.E.2d 888 (1977) (knowledge of probability of great bodily harm insufficient to satisfy mental element of at-

objection in a post-trial motion.[127] Despite that technical default, the supreme court reviewed the issue presented by the instruction, characterizing the error as plain error.[128] Clearly the court should not have employed the plain error rule. The court reviewed the error in order to resolve an apparent conflict in its prior decisions.[129] It should have simply stated such. Moreover, the fundamental purpose of the finality rule—affording trial judges an opportunity to correct errors—would not have been served by denying review in *Harris* for the error there was called to the judge's attention.

Use of the plain error rule in a case such as *Harris* should be rejected in favor of a straightforward statement of the court's motives. In *People v. Rehbein*,[130] for example, the court was again faced with an important issue of law, review of which was apparently foreclosed by a procedural default.[131] The court in *Rehbein*, however, simply admitted that it would review the error as an exercise of its supervisory power.[132] It is suggested that clarity in the procedural default context demands such an approach. Furthermore,

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tempted murder) *with* People v. Muir, 67 Ill. 2d 86, 365 N.E.2d 332 (1977) (upheld propriety of attempted murder instructions containing knowledge of probability of death or great bodily harm as mental element). *See generally* Note, *Specific Intent Made More Specific: A Clarification of the Law of Attempted Murder in Illinois–People v. Harris*, 28 DEPAUL L. REV. 157 (1978). The instruction in People v. Harris, 72 Ill. 2d 16, 377 N.E.2d 28 (1978), permitted the jury to convict the accused of attempted murder without an intent to kill. *Id.* at 27, 377 N.E.2d at 33. The court overruled *Muir* and held that intent to kill is the only acceptable mental state in attempted murder instructions. *Id.* at 23, 377 N.E.2d at 31.

127. 72 Ill. 2d at 28, 377 N.E.2d at 33-34.

128. *Id.*

129. *See* note 126 *supra*.

130. 74 Ill. 2d 435, 386 N.E.2d 39 (1978).

131. The prosecution at trial made several references to the defendant's silence during interrogation; however, defense counsel failed to object to the cross-examination. *Id.* at 439, 386 N.E.2d at 41.

132. The court stated;

> We note that the defendant's failure to object at trial to the prosecutor's remark in this case might well have waived the issue for purposes of appeal. However, because of the importance of the substantive issue of law involved here and the great number of cases reaching the appellate courts on this issue we have elected to decide the question of the prosecutor's remarks.

Id. at 435, 386 N.E.2d at 39. Another example of this straightforward approach can be found in People v. Gilbert, 68 Ill. 2d 252, 258, 369 N.E.2d 849, 852 (1977) (reviewed unpreserved issue regarding judge's examination of evidence because the issue was the "focal point" of much recent litigation).

Almost immediately after rendering its *Harris* opinion, the Illinois court changed its mind about the plain error aspects of that case. In People v. Roberts, 75 Ill. 2d 1, 387 N.E.2d 331 (1978), the court acknowledged that the substantive portion of the *Harris* opinion constituted the law of the case; the plain error holding had been improvident. *Id.* at 8, 387 N.E.2d at 334. The court explicitly stated in *Roberts* that *Harris* had been decided despite the procedural default, simply because an important question of law had to be resolved. *Id.* at 15, 387 N.E.2d at 338.

the benefits of clarity clearly outweigh any problems attendant to the creation of new methods for reaching issues on appeal.[133]

From the plain error cases discussed above, a pattern of facts emerges that helps define the elusive concept of "fundamental fairness." Whether the errors in the noted cases involve defects in counsel, seriously improper judicial and prosecutorial conduct, or even identical defendants, the errors suggest more than typical trial mistakes. The errors reveal breakdowns in the adversary system.[134] The errors impugn the fairness, integrity, or public reputation of judicial proceedings. Thus, in short, "fundamental fairness" in the context of plain errors, just as in the context of post-conviction relief statutes and retroactivity, indicates something other than that the individual defendant has forfeited his or her rights by procedurally defaulting. The judicial system itself retains its own right to be free of certain particularly egregious errors.[135]

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133. Objections, however, can be raised to the *Rehbein* court's approach, not the least of these being that this approach may once again allow excessive discretion into the process of deciding which errors will be reviewed and which will not. What one judge may consider important, another might view as relatively minor. Again personal feelings and personal judicial philosophies may control. A second objection to this approach is that by reaching an issue that has not been preserved properly, the court may be issuing an advisory opinion or stating mere dicta.

Similar objections can be raised regarding the technical defaults method of review discussed earlier. *See* note 123 *supra*. Rules of procedure are necessarily of a technical nature. Often a procedural line is drawn at some specific point simply because a line has to be drawn somewhere and that somewhere was a relatively sensible place to draw one. When technical rules of procedure are abandoned or avoided by appellate courts, the line between permissible and impermissible conduct becomes vague. Neither lawyers nor judges can then tell what rules will be enforced. Discretion and its concomitant problems enter the picture. A recent case illustrates the point. In People v. Lott, 66 Ill. 2d 290, 362 N.E.2d 312 (1977), five judges thought that a mere technical defect occurred, *id.* at 296, 362 N.E.2d at 314; two judges thought that the default posed a fatal problem for review, *id.* at 302-03, 362 N.E.2d at 317. Regardless of which opinion seems more convincing in that particular case, the ambiguity arising from it bodes only ill.

134. *See* note 87 *supra*.

135. Several situations not discussed in the text also should be noted. First, presumably a defendant can raise a question of a void indictment at any time. This appears to be a procedural default exception based on the jurisdiction of the court. *See, e.g.*, People v. Gregory, 59 Ill. 2d 111, 319 N.E.2d 483 (1974); People v. Borgeson, 335 Ill. 136, 166 N.E. 451 (1929). The second situation involves unfit defendants. Older cases implied that a question of unfitness could be raised at any time. *E.g.*, People v. Thompson, 36 Ill. 2d 332, 223 N.E.2d 97 (1967); People v. McKinstray, 30 Ill. 2d 611, 198 N.E.2d 829 (1964); People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957). The results of these cases have been called into question, however, by more recent cases. *See, e.g.*, People v. Foster, 76 Ill. 2d 365, 392 N.E.2d 6 (1979) (facts did not establish bona fide doubt of competency required by code of corrections). The discrepancy arises because ILL. REV. STAT. ch. 38, § 1005-2-1(c) requires that a bona fide doubt of defendant's competency be established before a court must order that a competency determination be made.

D. *The Closely Balanced Evidence Rule*

The foregoing analysis has traveled only half the road to a definition of "fundamental fairness" and to an outline of the contours of procedural default exceptions. Though a breakdown in the adversary system must be a prerequisite to procedural default relief, it is not always easy to recognize such a breakdown. Thus, mere substitution of the "breakdown" standard for the more elastic "fundamental fairness" standard adds little clarity. In short, because the breakdown standard potentially presents as many pitfalls as does the unworkable fairness standard, attention must now be directed toward a second element referred to in several Illinois procedural default cases—the "closely balanced evidence" rule.

Under the closely balanced evidence rule, unobjected errors or untimely motions will be recognized on appeal only in cases where the evidence at trial was closely balanced.[136] The rule enables courts to review errors that arguably might have contributed to an unjust conviction. However, as will be demonstrated below, although the purpose of the closely balanced evidence rule is certainly valid, use of that rule could very well defeat the purposes underlying the basic rules of procedural default.

The origin of the closely balanced evidence rule is found in plain error decisions involving inadequate trial counsel. In 1922, the Illinois Supreme Court explained, in *People v. Gardiner*,[137] that defense counsel's poor performance would not justify the reversal of a conviction reasonably supported by the evidence.[138] The court went on to explain, however, that in cases in which the evidence is close and in which the trial court allowed the pros-

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136. People v. Pickett, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). *See, e.g.*, People v. Roberts, 75 Ill. 2d 1, 387 N.E.2d 331 (1978) (evidence in attempted murder case held not closely balanced). The best overall statement of the rule appears in a significant concurring opinion by Judge Ryan, the Illinois Supreme Court's most careful student of the procedural default problem.

> [A] significant purpose of the plain error rule is to afford certain protections to the defendant. If a serious injustice has been done to a defendant, it should be corrected. To this end the strength or the weakness of the evidence against him is relevant. . . . Thus, this court has held that in a criminal case *where the evidence is closely balanced* a court of review may consider errors that have not been properly preserved for review. . . . When the evidence is closely balanced, there is the possibility that an innocent person may have been convicted because of some error which is obvious in the record, but which was not properly preserved for review. In order to prevent such a serious miscarriage of justice, a court of review may consider the error. However, in doing so the court will look at the record only to see if the evidence is "closely balanced." If it is not, the reason for considering the error in the absence of its preservation is not present. There is no need to apply the harmless error test or, if the error involves a constitutional right . . . the harmless-beyond-a-reasonable-doubt test.

People v. Green, 74 Ill. 2d 444, 454, 386 N.E.2d 272, 277 (1979) (emphasis in original) (Ryan, J., concurring).

137. 303 Ill. 204, 135 N.E. 422 (1922).

138. *Id.* at 206-07, 135 N.E. at 423.

ecutor to take advantage of a poorly represented defendant, the court would consider even errors not properly preserved for review.[139] The use of the close evidence requirement to consider an ineffective assistance claim was also espoused by the court in *People v. Nowak*.[140]

In subsequent plain error cases, the Illinois Supreme Court has unfortunately relied on the *Gardiner* and *Nowak* decisions not for the proposition that close evidence is a prerequisite for plain error relief on ineffective assistance grounds but for the much broader assertion that a court may consider unpreserved errors in criminal cases whenever the evidence is closely balanced.[141] In many modern cases, therefore, the standard that began as a restriction upon relief from errors stemming from incompetent counsel has been used at least implicitly as a vehicle for review of any error in any close case.[142]

Expansion of the plain error exception through excessive use of the closely balanced evidence rule jeopardizes the policies underlying the forfeiture rule. If appellate courts can review errors whenever the evidence at trials is close, the forfeiture principle will have been completely replaced by the harmless error rule.[143] If the harmless error rule becomes the norm, trial

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139. *Id.*

140. 372 Ill. 381, 24 N.E.2d 50 (1940). *See* notes 103-107 and accompanying text *supra*.

141. The first case to expand the close evidence standard was People v. Bradley, 30 Ill. 2d 597, 198 N.E.2d 809 (1964). In *Bradley*, the court relied upon a determination that the evidence was closely balanced to justify review of an improper trial severance to which objection had not been made. *See* notes 116-120 and accompanying text *supra*. *Bradley*, *Nowak* and *Gardiner* are routinely cited for the proposition that a close case justifies appellate review of unpreserved trial errors. *See, e.g.*, People v. Green, 74 Ill. 2d at 454, 386 N.E.2d at 277 (Ryan, J., concurring); People v. Pickett, 54 Ill. 2d at 283, 296 N.E.2d at 858. Occasionally, People v. Schulman, 299 Ill. 125, 132 N.E. 530 (1921), is cited as well. But in that case, which also involved ineffective counsel, the court did not articulate a close evidence standard. Justice Ryan of the Illinois Supreme Court, the court's most forceful advocate of the rule, recently articulated the necessity of close evidence as a prerequisite to procedural default exception review in People v. Carlson, 79 Ill. 2d 564, 404 N.E.2d 233 (1980). Judge Ryan views the rule quite restrictively, however, usually using it as justification for not reviewing errors.

142. *See, e.g.*, People v. Ortiz, 65 Ill. App. 3d 525, 382 N.E.2d 303 (1st Dist. 1978) (because genuine evidentiary conflict existed, court reviewed unpreserved errors involving admissibility of evidence and propriety of jury instructions); People v. Terranova, 49 Ill. App. 3d 360, 364 N.E.2d 357 (1st Dist. 1977) (unpreserved errors affecting credibility of identification witness reviewable because testimony of two witnesses for prosecution balanced that of two defendants denying guilt); People v. Torres, 47 Ill. App. 3d 101, 361 N.E.2d 803 (1st Dist. 1977) (denial of motion for new trial on ground of newly discovered evidence held plain error because case was close); People v. Bell, 61 Ill. App. 2d 224, 209 N.E.2d 366 (4th Dist. 1965) (unpreserved error in witness' attack on defendant's credibility and improper denial of motion to recall court's witness held reviewable because evidence was closely balanced).

143. Properly preserving an error for appellate review does not ensure reversal because the guarantee of a fair trial does not require an error-free trial. People v. Ashley, 18 Ill. 2d 272, 164 N.E.2d 70, *cert. denied*, 363 U.S. 815 (1960). When the error reasonably could not have affected the outcome of the trial, the error is deemed harmless and the conviction is affirmed. People v. Cardinelli, 297 Ill. 116, 130 N.E. 355 (1921). When the error involves a federal constitutional right, the standard to be employed is one of harmlessness beyond a reasonable doubt. *See* Chapman v. California, 386 U.S. 18 (1961).

counsel will have little incentive to make contemporaneous objections or timely motions.[144] Thus, expansion of the plain error concept through the closely balanced evidence rule robs convictions of finality and deprives trial judges of the opportunity to correct errors at trial.

Notwithstanding the shortcomings of the closely balanced evidence rule, however, that rule has some value. In fact, disregard of it has led to poorly reasoned conclusions in a group of recent plain error cases.[145] Three of those cases will be examined.

In *People v. Jenkins*,[146] the court clearly stated the correct rule of law when it stated that the presence of diametrically opposed jury instructions

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144. When an unpreserved error may have contributed to a conviction, the court is likely to determine that the evidence was close. When a trial error does not contribute to a conviction, nothing is lost by failing to preserve it, because, even if preserved, it must be deemed harmless. One commentator has asserted that the Illinois plain error exception may have rendered the preservation of errors in new trial motions unnecessary. *See* Aspen, *New Illinois Appellate Procedure in Criminal Cases*; 53 ILL. B.J. 52, 56 (1964). *But see* Leighton, *Post Conviction Remedies in Illinois Criminal Procedure*, 1966 U. ILL. L.F. 540, 543 (no lawyer should rely on plain error rule as substitute for timely new trial motion).

145. Also, it should be noted that the following cases in the text did not mention the United States Supreme Court's recent change of position in the area of procedural default. *See* notes 40-43 and accompanying text *supra*.

146. 69 Ill. 2d 61, 370 N.E.2d 532 (1977). *Jenkins* involved a challenge to jury instructions typical of cases that plagued courts in the Warren era. In one of the Warren Court cases, Screws v. United States, 325 U.S. 91 (1944), the court reviewed an unpreserved error in jury instructions that incorrectly stated the mental element involved in the violation of another's civil rights under color of state law. No exception had been taken at trial, but the Court stated that it would review the error because it was "so fundamental as not to submit to the jury the essential ingredients" of the offense. *Id.* at 107. Following the *Screws* decision, many federal and state appellate courts concluded that certain types of instruction errors had to be reviewed regardless of the absence of trial objections. Defects that had to be reviewed often were classified as those failing to contain an essential element of the offense charged and those in which the element of knowledge or burden of proof were defined inaccurately or not at all. *See, e.g.*, Findley v. United States, 362 F.2d 922, 923 (10th Cir. 1966) (plain error not to instruct on necessary intent element of larceny); United States v. Byrd, 352 F.2d 570, 575 (2d Cir. 1965) (failure to explain relevance of criminal intent reviewable error because it involved essential element); Beardon v. United States, 320 F.2d 99, 103 (5th Cir. 1963) (failure to instruct on meaning of "transport" in prosecution for transporting stolen goods in interstate commerce held reviewable); Jones v. United States, 308 F.2d 307, 311 (D.C. Cir. 1962) (failure to instruct that jury must find beyond reasonable doubt that defendant had duty to provide necessities for infant to convict for manslaughter held reviewable); People v. Joyner, 50 Ill. 2d 302, 278 N.E.2d 756 (1972) (failure to instruct on elements of lesser included offense held substantial error); People v. Cesarez, 44 Ill. 2d 180, 255 N.E.2d 1 (1969) (failure to instruct that defendant had to be shown guilty beyond reasonable doubt was substantial error); State v. Walsh, 81 N.M. 65, 463 P.2d 41 (1969) (failure to instruct that "use of force or violence" was essential element of armed robbery); Commonwealth v. Williams, 432 Pa. 557, 248 A.2d 301 (1968) (instructions allowing conviction when jury had a reasonable doubt of guilt held reviewable). *See generally* 5 & 6 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 30:56 & 52:47 (1967). Ultimately these categorizations of instruction error were formulated as required exceptions to procedural default rules. *ABA Standards, Trial By Jury* § 4.6(c), (Commentary) (Appr. Draft 1968). The ABA draft is based on the Illinois Supreme Court's Rule 451, ILL. REV. STAT. ch.110A, § 451 (1977). It is suggested that these exceptions have been all but eliminated by recent United States Supreme

could generate appellate reversal despite a procedural default.[147] The adversary system surely cannot be said to be functioning adequately when judges instruct juries to accept both adversaries' theories, even though contradictory.[148] However, even if the instructions in *Jenkins* were erroneous, the court should not have reversed because there was little indication that the discrepancy affected the case's overall result.[149]

Court cases, notably, Henderson v. Kibbe, 431 U.S. 145 (1977), in which the court stated: "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Id.* at 154. In *Henderson*, reversal was not granted where an error was not preserved despite the absence of an instruction on an essential element of causation. *See also* Estelle v. Williams, 425 U.S. 501 (1976) (non-instruction error involving presumption of innocence forfeited); United States v. Park, 421 U.S. 658 (1975) (essential element of offense allegedly omitted from instructions). In two very recent cases the Illinois Supreme Court has stated that it follows the ABA's essential elements test, but at the same time has determined that major elements of definitions of crimes were not "essential." People v. Roberts, 75 Ill. 2d 1, 387 N.E.2d 331 (1978) (not substantial error where instructions allowed attempted murder conviction with lesser intent than intent to kill); People v. Underwood, 72 Ill. 2d 124, 378 N.E.2d 513 (1978) (failure to instruct on "reasonably believes" in connection with self-defense issue not substantial error in armed robbery case).

147. *See* Polarsky v. United States, 332 F.2d 233 (1st Cir. 1964) (repeated reference in instructions to statute which defendant was not charged with conspiracy to violate required reversal); People v. Miller, 403 Ill. 561, 87 N.E.2d 649 (1949) (contradictory instructions are never harmless error); People v. Wright, 24 Ill. App. 3d 536, 321 N.E.2d 52 (2d Dist. 1974) (conflicting self-defense instructions). *See generally* 5 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 30:56 (1967).

148. *Jenkins* was a homicide prosecution in which self-defense was at issue. The court gave both of the following instructions:

> The crime attempted need not have been committed, to sustain the charge of attempt the State must prove the following propositions: first that the defendant performed an act which constituted a substantial step towards the commission of the crime of murder and second that the defendant did so with intent to commit the crime of murder.

Submitted by prosecution, based on Illinois Pattern Jury Instructions 2d § 6.07 (1971). 69 Ill. 2d at 64-65, 370 N.E.2d at 533.

> To prove the charge of attempted murder, the State must prove the following: proposition first, that the defendant performed an act which constitutes a substantial step towards actually committing the crime of murder and second, that the defendant did so with intent to commit the crime of murder. And third, that the defendant was not justified in using the force which he used.

Submitted by defendant, based on Illinois Pattern Jury Instructions 2d § 25.05 (1975). 69 Ill. 2d at 64-65, 370 N.E.2d at 533.

As the appellate court stated, the instructions "were not in direct conflict. . . . The state's instruction was an incomplete statement of the law, not an incorrect one. The defendant's instruction supplemented the state's, it did not contradict it." People v. Jenkins, 43 Ill. App. 3d 831, 834, 357 N.E.2d 192, 194 (1st Dist. 1976), *rev'd*, 69 Ill. 2d 61, 370 N.E.2d 532 (1977). *See* People v. Robinson, 21 Ill. App. 3d 343, 315 N.E.2d 95 (1st Dist. 1974) (objection waived in self-defense case where one set of instructions included defense but other did not).

149. The court did not review the evidence, but still asserted that "[a]s far as can be known, defendant might well have been convicted on the erroneous instruction." 69 Ill. 2d at 67, 370 N.E.2d at 534.

The court strayed even further from employing the closely balanced evidence rule as a restriction on plain error review in *People v. Green*.[150] The court in *Green* held that a trial error was both plain error and harmless.[151] That result seems intrinsically contradictory. Errors cannot be so basic that they impugn the integrity of the judicial system, so serious that fundamental fairness requires them to be considered, and yet still harmless.[152]

Finally, in *People v. Precup*,[153] Justice Ryan, the major advocate of the closely balanced evidence rule, was faced with allegations of a *per se* conflict of interest arising out of an attorney's representation of co-defendants.[154] The conflict issue was not raised at trial.[155] Justice Ryan and the court saw

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150. 74 Ill. 2d 444, 386 N.E.2d 272 (1979). The case is noteworthy because of Justice Ryan's detailed examination of the plain error exception in his concurring opinion. *See* note 136 *supra*.

151. *Id.* at 450-53, 386 N.E.2d at 275-76.

152. The court did, in effect, apply the closely balanced evidence rule by determining that the evidence against the defendant was too strong to permit retrial. If, instead, it would have applied the close evidence rule as a restriction on the plain error exception, the court could have resolved the question much earlier by simply denying review. The position that error can be both plain error and harmless is not without precedent. *See* United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978) (prosecutorial reference to defendant's post-arrest silence held plain error but harmless beyond reasonable doubt). This position may, however, be restricted to the Ninth Circuit. *See e.g.*, United States v. Miranda, 593 F.2d 590, 596 (5th Cir. 1978) (tautological that when plain error is uncovered, state cannot hide behind harmless error rule). Illinois cases have referred to automatically reversible errors as "plain error." *E.g.*, People v. Burton, 44 Ill. 2d 53, 254 N.E.2d 527 (1969) (prosecutor's reference termed "plain error" and ground for reversal said to be not directly related to guilt); People v. Wollenberg, 37 Ill. 2d 480, 229 N.E.2d 490 (1967) (reference to silence termed plain error, "accordingly" conviction reversed).

153. 73 Ill. 2d 7, 382 N.E.2d 227 (1978).

154. Illinois has a per se conflict of interest rule that presumes prejudice when conflicts of interest are discovered in criminal defense counsel. People v. Coslet, 67 Ill. 2d 127, 133, 364 N.E.2d 67, 70 (1977). *See generally* Ehrmann, *The Per Se Conflict of Interest Rule in Illinois*, 66 ILL. B.J. 578 (1978).

155. The defendant in *Precup* argued that the trial judge had erred by not ordering severance sua sponte when counsel, representing co-defendants, permitted a police officer to testify to defendant's partially inconsistent pre-trial statements. The court held this was not error. It reasoned that defense counsel may have elected to allow the officer to testify in order to get the statements into evidence because they set up an alibi defense. Because it saw no error involving substantial rights on the face of the record, it would not entertain unpreserved issues regarding the effect the defendants' adverse positions might have had upon their rights to effective assistance of counsel. People v. Precup, 73 Ill. 2d at 18-19, 382 N.E.2d at 232. The *Precup* decision implies that allegations of a conflict of interest of defense counsel will not automatically trigger plain error review. It seems equitable that a defendant ought to establish that the alleged conflict could have in fact affected the outcome of his trial in order to merit exception to the default rule. In People v. Fife, 76 Ill. 2d 418, 392 N.E.2d 1345 (1979), the court found a per se conflict because defense counsel was a special assistant attorney general. The court reversed Fife's conviction without examining the weight of the evidence against him. *Id.* at 425-26, 392 N.E.2d at 1348-49. This reversal seems pointless if the evidence against the defendant was strong enough to convict him on retrial. *Fife* also contradicts the relationship between procedural default exceptions and retroactivity established earlier. *See* notes 58-66 and accompanying text *supra*. The court reviewed the error even though the defendant had made no contemporaneous trial objection; yet, it determined that the rule would not be given full retroactive

no error on the face of the record and, consequently, refused to consider whether the multiple representation deprived the defendants of their right to effective assistance of counsel. Although the refusal to grant plain error review in this case indicates at least an implicit determination that the evidence in the case was not closely balanced, the absence of explicit discussion of the evidence undermines the decision's reasoning. Furthermore, because the case involved alleged defects in counsel, it probably should have gained procedural default exception review but for the evidence issue.

The fact that these few cases have been singled out as incorrectly reasoned should not be read to indicate that the remainder of the Illinois courts' modern plain error decisions reached the right result for the right reason. In fact, the opposite is true. Many modern cases are implicitly or explicitly contradictory, exemplifying a basic conflict among the various justices of the Illinois court regarding interpretation of the plain error exception.[156] This conflict among the justices has led to the problems predicted by writers[157] who, with great prescience, asserted that discretion in the context of procedural defaults is a sure road to unfair and arbitrary results. Indeed, factual support exists for an argument that imprecision in default rules and differences of opinion among the various justices, combined with the Illinois courts' method of assigning appellate opinions to justices by a strict rotation system, has produced some judgments that may well be based merely upon the luck of the draw.[158]

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effect. 76 Ill. 2d at 425-26, 392 N.E.2d at 1348-49. *See generally* Note, *The Per Se Conflict of Interest Rule Applied to Special Assistant Attorneys General Serving as Defense Counsel: People v. Fife*, 29 DEPAUL L. REV. 585 (1980). Despite the broad holding in *Fife*, subsequent decisions have not held that allegations of a per se conflict guarantee plain error review. In People v. Eddington, 77 Ill. 2d 41, 394 N.E.2d 1185 (1979), and People v. Lykins, 77 Ill. 2d 35, 394 N.E.2d 1182 (1979), the defendants were represented by trial counsel who worked as special assistant attorneys general. Nevertheless, the court denied review of their claims of ineffective assistance because of their failure to raise the conflict of interest question in the trial court.

156. *See* note 158 *infra*.

157. *See* notes 19 & 20 and accompanying text *supra*.

158. *Compare* People v. Roberts, 75 Ill. 2d 1, 387 N.E.2d 331 (1978) (attempted murder instruction error not plain error) *with* People v. Harris, 72 Ill. 2d 16, 377 N.E.2d 28 (1978) (same instruction error held plain error). *Compare* People v. Godsey, 74 Ill. 2d 64, 383 N.E.2d 988 (1978) (reference to refusal to testify at grand jury hearing held plain error) *with* People v. Rehbein, 74 Ill. 2d 435, 386 N.E.2d 39 (1978) (reference to silence apparently not plain error). The following cases denying plain error relief cannot be distinguished from cases cited earlier granting such relief: People v. Knight, 75 Ill. 2d 291, 388 N.E.2d 414 (1979) (because no objection to sufficiency of evidence was made at probation revocation hearing, objection held waived in court review); People v. Beller, 74 Ill. 2d 514, 386 N.E.2d 857 (1979) (challenge to propriety of prosecutor's comments waived for failure to object at trial); People v. Coles, 74 Ill. 2d 393, 385 N.E.2d 94 (1979) (failure to raise issue at trial waived objection to improper restriction on cross-examination of prosecution witness); People v. Vriner, 74 Ill. 2d 329, 385 N.E.2d 671 (1978) (defect in armed violence instruction held not plain error); People v. Edwards, 74 Ill. 2d 1, 383 N.E.2d 944 (1978) (waiver of closing arguments transcript and mere partial preservation of record precluded plain error review of prosecutor's remarks); People v. Underwood, 72 Ill. 2d 124, 378 N.E.2d 513 (1978) (failure to instruct on "reasonably believes" in regard to self-defense issue held not plain error); People v. Grant, 71 Ill. 2d 551, 377 N.E.2d 4 (1978) (failure

Although such untoward consequences have been produced both by misuse of the closely balanced evidence rule (expansion of plain error review to allow review of all errors in close cases) and by disregard of it (incorrectly reasoned decisions), the value of the rule as a restriction on plain error review should not be obscured. The rule makes eminent sense. It seems facetious to suggest that an error constitutes an affront to the dignity of the legal system if that error did not even arguably contribute to a wrong result.

The value of the closely balanced evidence rule does not stop at that point, however. The closely balanced evidence rule dramatically echoes modern developments in the law of federal habeas corpus.[159] Under the standard espoused by the United States Supreme Court in *Wainwright v. Sykes*,[160] procedural defaults will be disregarded only if the defendant shows both a cause for a default and prejudice produced by it. That "prejudice" element, of course, like the closely balanced evidence restriction, is designed to afford review only when defaults might have contributed to unjust convictions.[161]

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to instruct on defense of involuntary conduct held not plain error where epileptic defendant relied solely upon insanity defense); People v. Gilbert, 68 Ill. 2d 252, 359 N.E.2d 849 (1977) (ordinarily, issue of judge's improper examination of evidence is waived by failure to raise issue at trial); People v. Waller, 67 Ill. 2d 381, 367 N.E.2d 1283 (1977) (improper admission of rebuttal testimony waived for failure to insist on subsequent ruling after court had reserved ruling on matter); People v. Frey, 67 Ill. 2d 77, 364 N.E.2d 46 (1977) (proper to dismiss appeals of defendants who failed to make timely motions to withdraw guilty pleas and vacate judgements).

159. At the close of the Warren era, under Fay v. Noia, 372 U.S. 391 (1963), federal district courts could review constitutional claims of state prisoners as long as they did not deliberately bypass state procedures for adjudication of the issues. Beginning in 1973, a series of Burger court cases changed the standard. In Davis v. United States, 411 U.S. 233 (1973), the Court held that an applicant under the federal conviction habeas corpus statute, who, for the first time, objected to the composition of the grand jury that indicted him, must show cause why the issue was not raised before trial and actual prejudice. Three years later, in Francis v. Henderson, 425 U.S. 536 (1976), a state prisoner sought post-conviction relief on the ground that the grand jury that indicted him was unconstitutionally selected. Because the state courts had held that the defendant's claim was waived for failure to raise it in the lower courts, the Supreme Court, as a matter of comity, held that the cause and prejudice standard enunciated in *Davis* applied. The Supreme Court soon imposed the cause and prejudice requirement outside the grand jury area. In Wainwright v. Sykes, 433 U.S. 72 (1977), the Court held that habeas corpus review of a challenge to the admissibility of a confession, which was waived under state procedural default rules, was barred unless the cause and prejudice standard was met. *See generally* Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978); Soloff, *Litigation and Relitigation: The Uncertain Status of Federal Habeas Corpus for State Prisoners*, 6 HOFSTRA L. REV. 297 (1978); Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473 (1978).

160. 433 U.S. 72 (1977).

161. Language in the *Wainwright* opinion demonstrates how similar the cause and prejudice standard is to a closely balanced evidence restriction on plain error. The Supreme Court concluded:

> The "cause-and-prejudice" exception of the [default] rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice.

A CONJUNCTIVE TEST

Analysis of Illinois case law has shown that fundamental fairness in the context of procedural defaults is composed of two separate elements. Some cases demonstrate that default rules do not control if breakdowns in the adversary system have occurred.[162] Other decisions show that relief will be granted in cases where the evidence is closely balanced.[163] Traditionally, those two elements have been kept separate in the cases. Thus, for example, courts and writers take it almost as an article of faith that some errors are so basic, so fundamental, that they require reversal regardless of the evidence arrayed against the defendant.[164] When such errors occur, closely balanced evidence need not be shown.

Procedural default exceptions can be defined by resort to either a disjunctive or a conjunctive test. The traditional separation of the elements discussed above presents the disjunctive test. Either closely balanced evidence or extremely severe trial errors may generate reversal despite defaults. Under the conjunctive test, both serious error and closely balanced evidence must be established.

The disjunctive approach simply does not work. The two elements of serious errors and closely balanced evidence cannot be separated if a workable definition of procedural default exceptions is sought. No definition of fundamental fairness[165] has ever succeeded in distinguishing fundamental fairness from fundamental unfairness. Furthermore, no definition has ever been able to pinpoint what errors are so grievous that they require reversal regardless of evidence against a defendant. Thus, only judges' personal feelings control and unbridled discretion reigns.

> Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial, and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.

Id. at 90-91.

162. *See* notes 73-84, 100-115, and accompanying text *supra*. *Cf.* People v. Moore, 9 Ill. 2d 224, 232, 137 N.E.2d 246, 250 (1956) (prejudicial arguments permissible if judicial process stands without deterioration).

163. *See* notes 136-158 and accompanying text *supra*.

164. People v. Green, 74 Ill. 2d 444, 454-57, 386 N.E.2d 277-78 (1979) (Ryan, J., concurring). *See, e.g.*, Screws v. United States, 325 U.S. 91 (1941) (instruction defect held fundamental error); United States v. Arnold, 425 F.2d 204, 205 (10th Cir. 1970) (reversal despite more than ample evidence supporting conviction). *See generally* 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 856 (1969); Kiely, *Criminal Law: Justice After Trial*, 23 DEPAUL L. REV. 249 (1973).

165. *See* notes 51-57 and accompanying text *supra*.

Inability to define fundamental fairness or to identify particularly grievous errors does not pose the only problem for the disjunctive test. Use of the closely balanced evidence element of the disjunctive test by itself produces an equally severe problem. A criminal defendant who can establish both closely balanced evidence and any type of trial error may obtain a reversal on appeal despite the absence of a timely motion or contemporaneous objection to the error.[166] That fact, in turn, eliminates any differences between the standard used to judge errors that have been preserved at trial and the one used to judge errors that escaped notice at trial.[167]

These problems have generated a distinct change in the case law in recent years. When the United States Supreme Court adopted the cause and prejudice test[168] for habeas corpus relief in the mid-1970's, it abandoned the previously accepted disjunctive approach to procedural defaults.[169] By replacing that disjunctive approach with the two-part conjunctive "cause and prejudice" test, the court recognized the intrinsic weakness of any attempt to define fundamental fairness in a vacuum of facts.

Conversely, however, the conjunctive test—under which both serious error and closely balanced evidence are required to generate review and reversal—accepts the vagueness of the fundamental fairness terminology, and, in fact, builds on it. In the conjunctive test the concept of fundamental fairness is made concrete by first carefully defining the concept's constituent parts and then by consciously leaving the interrelationship between those parts undefined.

The conjunctive approach accomplishes the desired objective by providing criteria for determining which errors are particularly grievous and which grievous errors require new trials. Errors can be deemed particularly grievous in cases where the facts indicate that the adversary system has broken down. They occur when the integrity of the judicial process itself has been impugned by the error. Grievous errors should generate review and reversal, however, only in situations where the evidence is closely balanced. Reversal is appropriate only in cases where defendants can establish that they were actually prejudiced by the errors.[170] In short, if errors did not contribute to arguably wrong results they need not generate reversal.

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166. *See* notes 141-142 and accompanying text *supra*.

167. *See* note 143 and accompanying text *supra*. Recognizing the difficulties presented by using the closely balanced evidence rule alone, many courts simply ignore it and rely solely on attempts to define fundamental fairness. *E.g.*, People v. Green, 74 Ill. 2d 444, 386 N.E.2d 272 (1979); People v. Burrows, 64 Ill. App. 3d 764, 381 N.E.2d 1040 (4th Dist. 1978) (majority saw no plain error but dissent claimed evidence was closely balanced).

168. *See* notes 41-43 and accompanying text *supra*.

169. *See* notes 159-161 and accompanying text *supra*.

170. A significant school of thought refers to this as the "colorable showing of innocence standard." *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 160 (1970). The language Judge Friendly uses to describe this standard is remarkably similar to both the cause and prejudice standard and the closely balanced evidence rule:

> Before going further I should clarify what I mean by a colorable showing of innocence. I can begin with a negative. A defendant would not bring himself within this

Although the two elements described above have been defined with some precision, the interplay between them remains intentionally vague. For example, in cases in which trial errors were particularly outrageous (such as in the cases discussed herein in which judges made the statements: " That man is a rapist now" [171] and "I think you are marvelous"[172]), the evidence need not be as closely balanced to justify reversal as it must be in cases involving errors barely qualifying as evidence of breakdowns in the adversary system.[173] Moreover, if the evidence in a case is such that no conviction could have been obtained absent the error, the court would certainly be justified in overturning a conviction even absent a breakdown in the system.[174] Conversely, if evidence against defendants presents clear proof of guilt, and the errors themselves clearly did not contribute to wrongful convictions, perhaps only the most blatantly shocking error would require reversal.

This analysis leaves only one question remaining. What is a blatantly shocking error? Such an error must be defined by looking to the overall

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> criterion by showing that he might not, or even would not, have been convicted in the absence of evidence claimed to have been unconstitutionally obtained. Many offenders, for example, could not be convicted without the introduction of property seized from their persons, homes or offices. On the other hand, except for the unusual case where there is an issue with respect to the defendant's connection with the property, such evidence is the clearest proof of guilt, and a defendant would not come within the criterion simply because the jury might not, or even probably would not, have convicted without the seized property being in evidence. Perhaps as good a formulation of the criterion as any is that the petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.

Id.

Some courts and commentators have extensively discussed the issue of burden of proof in the context of proof of prejudice. The issue is whether defendants must show that prejudice exists, or whether the state must show that it does not exist. *See* United States v. Decoster, 48 U.S.L.W. 2070 (D.C. Cir. 1979) (en banc); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 HARV. L. REV. 752 (1980). Concentration on the issue of burden of proof in the context of plain error seems unnecessary. It is suggested that appellate judges will, in fact, evaluate evidence in a criminal trial in the same manner regardless of technical rules concerning burden of proof.

171. *See* note 112 and accompanying text *supra*.

172. *See* note 115 and accompanying text *supra*.

173. Serious instruction errors would fall into the latter category, because they only affect the adversary system tangentially. See the discussion of instruction error at note 146 *supra*.

174. *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (evidence insufficient to establish element of contributing to delinquency of a minor); People v. Harrison, 25 Ill. 2d 407, 185 N.E.2d 244 (1962) (identification evidence insufficient to establish guilt beyond reasonable doubt). Recently, the Supreme Court may have broadly expanded the number of situations in which a federal habeas corpus court can assess the quantity of evidence presented against state criminal defendants. *See* Jackson v. Virginia, 443 U.S. 307 (1979) (habeas court must find evidence establishing guilt beyond reasonable doubt, some evidence is insufficient).

integrity of the adversary system. Such errors occur only if the system itself would be held in higher esteem following remand for a virtually pointless second trial, a "show trial" for all practical purposes, than it would be following appellate court acknowledgment of the fact that a very, very serious error had occurred, accompanied by a conclusion that that error had not contributed to an unjust result. Perhaps a circus trial would qualify as a blatantly shocking error. Or a situation where some overall social policy, independent of the process for finding guilt or innocence, controlled. Racial discrimination at trial might work.[175] Little else would do. Expansion of this exception must not occur. Common sense indicates that criminal trials serve the purpose of establishing guilt or innocence. The existence of guilt or innocence should thus be, almost always, the controlling factor in determining whether new trials should occur.

CONCLUSION

Much confusion has been generated by the United States and Illinois Supreme Courts in cases dealing with procedural defaults. The United States Court has flip-flopped on the issue; the Illinois court has simply never made up its mind one way or the other. Both courts talk about "fundamental fairness," but neither defines it. Despite the confusion in the language of the cases, it has been suggested herein that a pattern emerges from the actual facts of the cases that grant procedural default relief. This pattern has been found by examining primarily the Illinois cases. The Illinois pattern in turn suggests a method by which other state and federal courts can resolve their own procedural default questions. What is more, the Illinois pattern provides an alternative formulation to that of the United States Supreme Court's "cause and prejudice" test.

The Illinois cases, read as a group, articulate a two-step, conjunctive test for establishing exceptions to the procedural default rule. First, the criminal

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175. A recent case in which the Court refused to consider guilt or innocence presents a perfect example of a situation in which a policy independent of that involved in the criminal trial and appeal process takes precedence. In Rose v. Mitchell, 443 U.S. 545 (1979), the Court emphatically stated that racial discrimination in the selection or composition of a grand jury would not be tolerated. The policy against racial descrimination is so strong that it must take precedence over the policy favoring trials as simply a method for determining guilt or innocence.

The Burger Court's commitment to the trial process as first and foremost a process for determining guilt or innocence should not be called into question by the existence of such occassional exceptions. The Court at the present time does not view the criminal trial or appellate process as a means to promulgate broader social views. A sharp contrast appears between the Burger and Warren Courts in this respect. The Warren Court's abandonment of the finality rule, *see* notes 35-38 and accompanying text *supra*, was based on the same ground as its enthusiastic embrace of the exclusionary rule—a view of the trial and appellate process as, at least in part, a prophylactic method for dealing with certain types of official misconduct. The Burger Court, unconvinced of the deterrent value of the exclusionary rule, has sought ways to limit the impact of the rule. *See* Stone v. Powell, 428 U.S. 465 (1976). It stands to reason that the Burger Court should downplay the deterrent value of abandoning the finality rule in procedural defaults as well.

defendant must show that the unpreserved error impugned the integrity of the judicial system itself. The error must evidence a breakdown in the adversary system of justice. Such a breakdown in the system virtually always occurs in circumstances involving a defect in counsel or seriously improper conduct. Second, the defendant must show that the evidence introduced at his or her trial is closely balanced. To do this the defendant must establish that he or she was prejudiced by the error and that a new trial might well result in an acquittal. These two elements of the conjunctive test are then brought together and balanced against each other in order to determine if the defendant's forfeiture of his or her right to raise the issue on appeal will be binding.

The two-step approach outlined above conforms with both the underlying theoretical rationale of the finality rule and the practical reasons for implementing that rule. The theoretical basis for the finality rule arises out of the very essence of the adversary system. The two-step method of defining exceptions to the rule responds to that theoretical basis with its breakdown of the adversary system element. The finality rule only applies in a fully-functioning adversary system. The practical reasons for the finality rule revolve around a method for balancing the interest a defendant has in a trial free from errors against the interest the state has in preventing endless relitigation. The closely balanced evidence test answers these concerns. A defendant has no legitimate interest in a new trial if that trial will merely generate another conviction. The state, in turn, has no legitimate interest in imprisoning an innocent person.

The two different approaches to defining procedural defaults outlined in this Article, the conjunctive and disjunctive tests, underscore the difference in judicial philosophy between those judges who seek justice and fairness by examining cases on an individual basis and those judges who seek the same results but think they can be achieved only by the application of carefully considered general rules. Judges who reverse convictions simply because of basic and fundamental errors, for example, and who thus apply the disjunctive test, seek to protect the reputation and integrity of the judicial system by providing defendants with trials free of any serious error. Such trials, in their minds, produce an image of justice more convincing than that provided by a consideration of actual guilt or innocence. In addition, these judges seek to protect possibly innocent criminal defendants by providing that virtually any error that may have occurred at a trial in which the evidence was closely balanced will justify reversal regardless of the failure to preserve the error for appeal. Conversely, those judges who implement the conjunctive test, and who thus conclude that new trials need not be granted even in the face of very serious unpreserved error if the evidence in the trial was not closely balanced, also seek to protect the integrity and reputation of the judicial system. They do so, however, by attempting to eliminate pointless relitigation and by re-emphasizing the adversary nature of the American judicial system.

The ultimate rationale of the finality rule and the reasons for its implementation cannot be summarized easily. Perhaps all that can be said is

that the rule rests on a realization that no process can assure ultimate truth. Procedural rules do not assure legality because they guarantee that ultimate truth will prevail. Rather, they assure legality because they contribute to a process whereby the judicial system itself creates a reasoned and acceptable probability that truth will emerge.[176] They seek to do no more and can do no more. Thus, to the extent that the finality rule contributes to that overall process it aids in the establishment of legality. Furthermore, to the extent that the conjunctive approach to defining exceptions to the finality rule suggested in this Article clarifies the implementation of those exceptions and reduces arbitrariness in their application, it too contributes a worthwhile element to the process of establishing truth.

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176. Bator, *supra* note 13, at 450-53.