

**WILL THE DEATH PENALTY REMAIN ALIVE
IN THE TWENTY-FIRST CENTURY?:
INTERNATIONAL NORMS, DISCRIMINATION,
ARBITRARINESS AND THE RISK OF
EXECUTING THE INNOCENT**

STEPHEN B. BRIGHT*

The Twelfth Thomas E. Fairchild Lecture,
University of Wisconsin Law School, October 27, 2000
Wisconsin Law Review Volume 2001, No. 1, Page 1

Supreme Court Justice Arthur Goldberg once said that the deliberate institutionalized taking of human life by the state is the greatest degradation of the human personality imaginable. Although most developed nations in the world have abandoned the death penalty, the United States, which purports to be a leader in the protection of human rights, retains capital punishment. Thirty-eight states, the federal government and the military provide for death as a punishment for certain crimes. Over 3,600 people are on death rows across the country. Executions have become "routine" in Texas and the pace of executions is increasing throughout the country.

The death penalty is a relic of another era, before the federal government and the states developed the vast prison industrial complex that exists today. In a frontier society, when many communities did not have prisons or jails, the methods of punishment were limited to such things as whipping, branding, cutting off fingers, placing people in stocks, and hanging or shooting them. But today those punishments are no longer necessary because communities can be protected and offenders punished by prison sentences—even, in some cases, sentences of life imprisonment without any possibility of parole—in institutions such as the "super maximum" prisons where inmates never come in contact with another human being.

Of all the primitive punishments of a frontier society, the only one that has survived is the death penalty. It seems out of character for a society as generally conservative as ours, which is wary of too much government power and skeptical of the ability of government to do anything well, to trust the courts to decide

* Director, Southern Center for Human Rights, Atlanta, Georgia; Senior Lecturer, Emory Law School; Visiting Lecturer, Yale and Harvard Law Schools; B.A. 1971, J.D. 1974, University of Kentucky.

whether a person lives or dies.¹ It seems equally out of character for a decent society, which places some practices off limits because a civilized society simply does not engage in them. For example, most people in the United States would oppose running an electric shock through a person to extract information, even if that information was urgently needed. They would be equally opposed to the notion of punishing people by giving them doses of electricity which hurt, but did not kill them. And yet the same society accepts running a sufficient amount of electricity or lethal drugs through people to extinguish their lives.

If people were asked thirty years ago which one of the following three countries—Russia, South Africa, and the United States—would be most likely to have the death penalty at the turn of the century, few people would have answered the United States. And yet, South Africa's Constitutional Court declared the death penalty unconstitutional in 1995 and Russia abolished the death penalty in 1999 in hope of eventually joining the Council of Europe.²

However, an increasing number of voices are expressing concern about the use of the death penalty in this country. Many people—including many supporters of capital punishment—have become alarmed about the danger of executing the innocent, and appalled by the way in which people are processed in assembly-line fashion to the death chambers in states like Texas and Virginia. Upon closer examination of the criminal justice system, many have been shocked by the poor quality of legal representation provided for poor people facing the death penalty, the extent to which race influences who is sentenced to death, and improper police and prosecution practices, such as obtaining favorable testimony from criminals against those facing death by giving them lenient treatment. Some are troubled by the execution of people who are mentally retarded, mentally ill or children at the times of their crimes. In short, people are concerned about how capital punishment works in practice.

1. See George F. Will, *Innocent on Death Row*, WASH. POST, Apr. 6, 2000, at A23 (observing that "Capital punishment . . . is a government program, so skepticism is in order.").

2. AMNESTY INT'L, THE DEATH PENALTY WORLDWIDE: DEVELOPMENTS IN 1999, at 11 (May 12, 2000), available at <http://web.amnesty.org>.

The Future of the Death Penalty

I would like to discuss these concerns and practices in addressing whether the United States will continue to use this extreme, enormous, and irrevocable form of punishment throughout the twenty-first century or join the trend in the rest of the world in abandoning it.

I. THE TREND TOWARD ABOLITION IN THE REST OF THE WORLD

The federal government and many states have expanded the use of the death penalty in the last twenty-five years, while the rest of the world has been abandoning it. In this country, the federal government adopted the death penalty in 1988,³ expanded it to over forty crimes in 1994,⁴ and restricted federal review of capital cases in 1996.⁵ Many states expanded the crimes punishable by death and curtailed and expedited the review process.

In the rest of the world, thirty-five countries have abandoned capital punishment since 1985.⁶ During that time, only four countries that did not have capital punishment adopted it.⁷ One of those, Nepal, has since abolished it.⁸ Only one other member of NATO, Turkey, has the death penalty. However, Turkey has not executed anyone since 1984, and is expected to follow Russia, Poland and other former Soviet-bloc countries and abolish capital punishment in order to join the Council of Europe.

Four countries accounted for eighty percent of all the executions that took place in the world last year.⁹ They were China, Iran, the Congo, and the United States.¹⁰ Since 1990, only six countries have executed people who were under eighteen at the time of the crime: Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, and the United States.¹¹ In that rather undistinguished company, the United States leads by far in the number

3. Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848 (1994).

4. The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

5. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254 (West Supp. 1996)).

6. Amnesty International, *Facts and Figures on the Death Penalty* (Apr. 1999), <http://www.amnestyusa.org/abolish/act500299.html>.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

executed.¹² The United States is one of only two countries that have not ratified the International Covenant on the Rights of the Child, which among other things, would prohibit the execution of people who were children at the time of their crimes. The other country is Somalia.

Our neighbors to the north and south as well as other countries have repeatedly protested when their nationals are executed in this country. Neither Canada nor Mexico has the death penalty. Those protests have been even louder—and have raised serious international issues—when states have executed foreign nationals who were sentenced to death in violation of the Vienna Convention on Inter Consular Affairs.¹³ Under the Vienna Convention, foreign nationals—whether it be someone from Mexico arrested in the United States or someone from the United States arrested in Mexico—are to be advised of their right to call their country's consul and given the opportunity to do so. But this obligation is repeatedly violated in the United States. For example, none of the seventeen Mexican nationals on death row in Texas were advised of their rights under the Convention.

As the United States Ambassador to France, Felix Rohatyn, has observed, capital punishment is hurting the image of the United States in Europe.¹⁴ It is compromising our ability to be a leader on human rights issues. It is difficult for the United States to lecture China on human rights when we lead the world in the execution of children. And one question that we will increasingly be asked to answer is whether the scorn of the rest of the world is a price we are willing to pay to continue this outdated form of punishment.

II. THE GROWING RECOGNITION OF THE LACK OF FAIRNESS IN CAPITAL CASES

As the number of executions has increased in the United States, there has been growing realization that it is not being imposed fairly.

12. *Id.*

13. Vienna Convention on Consular Relations and Optimal Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 262 [hereinafter Vienna Convention].

14. Felix Rohatyn, *The Shadow Over America: How Our Use of the Death Penalty Hurts Our Image Abroad*, NEWSWEEK, May 29, 2000, at 27.

The Future of the Death Penalty

In 1977, the American Bar Association called for a moratorium on capital punishment. The ABA does not oppose the death penalty, but year after year, it has called upon the states to improve the quality of counsel assigned the poor, to respond to racial discrimination in the criminal justice system, and to stop executing the mentally ill, the mentally retarded, and children. It has urged Congress and the courts to preserve full habeas corpus review.¹⁵

Not only were most of its recommendations ignored, but things worsened considerably in several areas. Many states still do not provide capable lawyers to defend those facing death at trial and some do not provide counsel at all for the later stages of review.¹⁶ Congress eliminated funding for programs which had provided lawyers at the later stages of review.¹⁷ For the first time since the reinstatement of the death penalty in 1976,¹⁸ some people stood in court without lawyers. The Supreme Court held that states could carry out executions despite severe racial

15. Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POV. 3, 5-6 (1996) (describing the failure to address these problems and the ABA's call for a moratorium); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990) (reporting conclusions of an ABA task force that "the inadequacy and inadequate compensation of counsel at trial" was one of the "principal failings of the capital punishment review process today" and recommending measures to improve counsel and to maintain habeas corpus review by federal courts).

16. Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 N.Y.U. ANNUAL SURVEY OF AMERICAN LAW 783 (1997) (describing quality of counsel at trial and on post-conviction review and the failure of some states to provide counsel in post-conviction review); Sara Rimer, *Questions of Death Row Justice For Poor People in Alabama*, N.Y. TIMES, Mar. 1, 2000, at A1 (describing the poor quality of counsel in capital cases in Alabama); Max B. Baker & Linda P. Campbell, *Unequal Justice*, FT. WORTH STAR-TELEGRAM, Oct. 15, 2000, at 1 (describing the poor representation of indigent defendants in Texas); Paul Duggan, *George W. Bush: The Record in Texas; Attorneys' Ineptitude Doesn't Halt Executions*, WASH. POST, May 12, 2000, at A1 (describing the poor quality of representation in Texas); Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts*, CHI. TRIB., Nov. 15, 1999, at 1 (describing the poor quality of counsel in capital cases in Illinois).

17. Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 912-15 (1996).

18. See *infra* notes 108-15 and accompanying text.

disparities¹⁹ and Congress refused to adopt a Racial Justice Act to provide a remedy for racial discrimination in capital sentencing.²⁰ While some states prohibit executions of the mentally retarded²¹ and children,²² many others do not and no state prohibits execution of the mentally ill. Congress drastically curtailed federal habeas corpus review, adopting a statute of limitations, severely limiting the ability of federal courts to conduct evidentiary hearings, and requiring deference to legal conclusions by state courts.²³ Concerned about all of these problems and the resulting lack of fairness of the system by which people were being sentenced to death, the ABA called for a moratorium.

A. *Innocent People Sentenced to Death*

Another reality, closely related to the problems long identified by the ABA, soon emerged—innocent people were being sentenced to death. Over ninety people have been released from death rows since 1976 because they were innocent. Others had their death sentences commuted to life in prison without possibility of parole because of questions about their innocence. For example, in 1994, the governor of Virginia, Douglas Wilder, commuted the sentence of a mentally retarded man, Earl Washington, to life imprisonment without parole because of questions regarding his guilt.²⁴ Six years later,

19. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

20. The Racial Justice Act was adopted in a version of a crime bill that passed the House of Representatives in April, 1994. David Cole, *A Fear of Too Much Justice*, *LEGAL TIMES*, May 9, 1994, at 41. However, due to opposition in the Senate, it was not included in the final bill reported by the conference committee and adopted by both the Senate and the House later in the summer. See *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 108 Stat. 1796.

21. Thirteen of the thirty-eight states that have the death penalty and the federal government prohibit execution of the mentally retarded. *Death Penalty Info. Ctr., Mentally Retarded and the Death Penalty*, at <http://www.deathpenaltyinfo.org/dpicmr.html> (last visited Jan. 26, 2001).

22. Fifteen states and the federal government prohibit the execution of those under 18 at the time of their crimes. *Death Penalty Info. Ctr., Juveniles and the Death Penalty*, at <http://www.deathpenaltyinfo.org/juvchar.html> (last visited Jan. 26, 2001).

23. *Antiterrorism and Effective Death Penalty Act of 1996*, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254 (West Supp. 1996)).

24. Brooke A. Masters, *Missteps On Road To Injustice: In*

The Future of the Death Penalty

DNA evidence—not available at the time of Washington's trial or the commutation—established that Earl Washington was innocent.²⁵ And some people have been executed despite questions of innocence.

In early 2000, George Ryan, the Republican Governor of Illinois, declared a moratorium on capital punishment. Governor Ryan had supported the death penalty and other "tough on crime" measures as a member of the Illinois legislature. But when, as governor, he had to make decisions about whether to grant clemency to those being executed, he saw that the system did not work as well as he assumed it did.

One of those almost executed during Ryan's tenure was Anthony Porter. Porter had been convicted by a jury. He had been sentenced to death. His case had been reviewed and affirmed on appeal by the Illinois Supreme Court. He had gone through the state and federal post-conviction processes and every court had upheld his conviction and sentence. He was scheduled to be executed.

However, a question arose as to whether Porter was mentally competent to be executed; that is, whether he understood that he was being put to death as punishment for the crime of which he had been convicted. A person who lacks the mental ability to understand this relationship cannot be executed, but is instead treated until he is "restored to competency." When he has improved to the point that he can understand why he is being executed, he is put to death. Anthony Porter was a person of limited intellectual functioning and mental impairments. Because there was a question about whether he could understand why he was being executed, a court stayed his execution in order to determine his competency to be executed.²⁶

After the stay was granted, the journalism class at Northwestern University and a private investigator examined the case and proved that Anthony Porter was innocent.²⁷ They obtained a confession from the person who committed the crime.²⁸ Anthony Porter was released from death

Va., *Innocent Man Was Nearly Executed*, WASH. POST, Dec. 1, 2000, at A1.

25. *Id.*

26. Pam Belluck, *Class of Sleuths to Rescue on Death Row*, N.Y. TIMES, Feb. 5, 1999, at A14.

27. *Id.*

28. *Id.*

row.²⁹ He was the third person released from Illinois's death row after being proven innocent by the journalism class at Northwestern.³⁰ Since Illinois adopted its present death penalty statute in 1977, thirteen people sentenced to death have been exonerated and twelve have been executed.³¹

Some have said that the fact that Porter and others have been released shows that the system works. However, someone spending sixteen years on death row for a crime he did not commit is not an example of the system working. When journalism students prove that police, prosecutors, judges, defense lawyers, and the entire legal system did not discover a man's innocence and instead condemned him to die, the system is not working. Recognizing this—that the system was not working—Governor Ryan called a halt to executions in Illinois until he is convinced that the system will not send innocent people to death row.³² As he later explained:

I called a moratorium because I have grave concerns about our state's shameful record of convicting innocent people and putting them on Death Row. How do you prevent another Anthony Porter, another innocent man or woman from paying the ultimate penalty for a crime he or she did not commit? As I said when I announced the moratorium and many times since, I cannot support a system which in its administration has proven to be so fraught with error and has come so close to the ultimate nightmare, the taking of an innocent life.³³

Looking at this record, Justice Moses Harrison of the Illinois Supreme Court observed:

29. Jon Jeter, *A New Ending to an Old Story*, WASH. POST, Feb. 17, 1999, at C1.

30. Don Terry, *DNA Tests and a Confession Set Three on a Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, at A6.

31. Steve Mills & Ken Armstrong, *Governor to Halt Executions*, CHI. TRIB., Jan. 30, 2000, at 1.

32. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty: Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at 1.

33. Hearing on the *Innocence Protection Act Before the Crime Subcommittee of the House Judiciary Committee*, 106th Cong. 76, 80 (2000) (statement of Governor George Ryan).

The Future of the Death Penalty

When there have been so many mistakes in such a short span of time . . . the only conclusion I can draw is that the system does not work as the Constitution requires it to.

If these men dodged the executioner, it was only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release. They survived despite the criminal justice system, not because of it. The truth is that left to the devices of the court system, they would probably have all ended up dead at the hands of the state for crimes they did not commit. One must wonder how many others have not been so fortunate.³⁴

While there has been considerable attention paid to the moratorium in Illinois, what has gone unnoticed is that Illinois has a much better system of providing representation to the poor than Alabama, Arkansas, Georgia, Mississippi, Texas and other states that send many people to their death rows. Illinois has a public defender office in Chicago with an excellent homicide unit. None of the innocent people condemned to die were represented by that office. But Illinois also relies upon court-appointed lawyers, as do most states. The *Chicago Tribune* found that one-third of the lawyers who had represented people sentenced to death in Illinois, had been disbarred or suspended.³⁵ One lawyer who had been suspended from practice was assigned to defend a capital case only ten days after his law license was reinstated.³⁶

The *Tribune* found other causes of innocent people being convicted that exist in any criminal justice system in the country: the use of informants, police and prosecutorial misconduct, and unreliable forensic evidence.³⁷ At least

34. *People v. Bull*, 705 N.E.2d 824, 847 (Ill. 1998) (Harrison, J., dissenting).

35. Ken Armstrong & Steve Mills, *Inept Defense Cloud Verdicts*, CHI. TRIB., Nov. 15, 1999, at 1.

36. *Id.*

37. Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment Into its Least Credible*, CHI. TRIB., Nov. 14, 1999, at 1; Steve Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at 1; Steve Mills & Ken Armstrong, *A Tortured Path to Death Row*, CHI. TRIB., Nov. 17, 1999, at 1; Steve Mills & Ken Armstrong, *Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, at

forty-six people were convicted and sentenced to death on the basis of the testimony of jailhouse snitches—people who testify in order to win their freedom or lenient treatment from prosecutors.³⁸

Governor Ryan is one of a growing number of people who, upon viewing the death penalty up close, have concluded that the system is not working. Supreme Court Justices Lewis Powell and Harry Blackmun voted to uphold death sentences in numerous cases, but eventually came to the conclusion that capital punishment should be abandoned. Justice Blackmun, reviewing his efforts to assure the fairness of the death penalty during his career as a circuit and Supreme Court judges, found "the death penalty experiment has failed" and announced that he no longer would "tinker with the machinery of death."³⁹ Justice Powell said after his retirement from the Court that the death penalty "reflect discredit on the law."⁴⁰

Gerald Kogan, formerly the head of the homicide unit of the prosecutor's office in Miami, Dade County, Florida, asked for the death penalty as a prosecutor, and supervised other prosecutors asking for and obtaining the death penalty. He presided over capital cases as a trial judge, later became a justice of the Florida Supreme Court and, finally, became the Chief Justice of Florida. Upon retiring, he stated that capital punishment "does not work at this time and has not worked in the State of Florida for many, many, many years."⁴¹ Judge Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit announced:

My thirty years' experience on this court have compelled me to conclude that the imposition of the death penalty is arbitrary and capricious. At every stage, I believe the decision of who shall live and who shall die for his crime turns less on the nature of the offense and the

1.

38. Steve Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at 1.

39. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting), denying cert. to 998 F.2d 269 (5th Cir. 1993).

40. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (1994).

41. Mark D. Killian, *Chief Justice Shares Parting Thoughts with Judges*, FLA. BAR NEWS, July 15, 1996, at 6.

The Future of the Death Penalty

incorrigibility of the offender and more on inappropriate and indefensible considerations: the political and personal inclinations of prosecutors; the defendant's wealth, race, and intellect; the race and economic status of the victim; the quality of the defendant's counsel; and the resources allocated to defense lawyers.⁴²

Some officials have responded to these problems. The New Hampshire legislature repealed its death penalty law in 2000, but the repeal was vetoed by the governor. On the federal level, Senator Russell Feingold of Wisconsin has introduced legislation providing for a moratorium on executions nationwide⁴³ and repeal of the death penalty for federal crimes.⁴⁴ Senator Patrick Leahy and Representatives William Delahunt and Ray LeHood have introduced the Innocence Protection Act that would provide for DNA testing and, more importantly, improve the legal representation for people facing the death penalty.⁴⁵

B. Caution Thrown to the Wind-The Accelerating Pace of Executions in Some States

Despite the recognition that innocent people are being sentenced to death in a system that is seriously flawed, and the irrevocability of a death sentence once carried out, the calls for caution and study have gone totally unheeded in many parts of the country. As Justice Moses Harrison of the Illinois Supreme Court observed:

The prognosis for wrongly accused defendants facing capital charges is not improving. To the contrary, legislatures and the courts appear to have abandoned any genuine concern with insuring the fairness

42. Singleton v. Norris, 108 F.3d 872, 874-75 (8th Cir. 1997) (Heaney, J., concurring).

43. National Death Penalty Moratorium Act of 2001, S. 233, 107th Cong. (2001); National Death Penalty Moratorium Act of 2000, H.R. 5237, S. 2463, 106th Cong. (2000); Federal Death Penalty Moratorium Act of 2000, H.R. 5236, S. 3048, 106th Cong. (2000).

44. Federal Death Penalty Abolition Act of 1999, S. 1917, 106th Cong. (1999).

45. Innocence Protection Act of 2000, S. 2073, H.R. 4167, 107th Cong. (2000).

and reliability of the system. Achieving "finality" in death cases, and doing so as expeditiously as possible, have become the dominant goals in death penalty jurisprudence.⁴⁶

Texas is the indisputable leader in abandoning fairness for expedition. The Texas courts dispatch people to its busy execution chamber with no regard for circumstances that might call for a less severe sentence.⁴⁷ Children are executed. The mentally retarded are executed. The mentally ill are executed. A grandmother was executed. A born-again Christian, Carla Faye Tucker, was executed.

Even questions of innocence do not slow the machinery of death in Texas.⁴⁸ Gary Graham was sentenced to death based upon the identification of a witness who said she saw the perpetrator for a second from forty feet away.⁴⁹ Graham was assigned a notoriously bad court-appointed lawyer, Ron Mock, who has had so many clients sentenced to death that some refer to the "Mock Wing" of death row.⁵⁰ Mock failed to investigate the case and interview six other witnesses at the scene who later said that Graham was not the person who committed the crime, that the perpetrator was much shorter than Graham.⁵¹ Even if this evidence does not prove Graham is innocent, it certainly proves he did not receive a fair trial. It is not possible to say that Graham is guilty beyond reasonable doubt. Yet, he was executed anyway.

In just six years, then-Governor Bush presided over 152 executions. While no other state executed more than 80 people between the resumption of capital punishment in 1976 and the

46. *People v. Bull*, 705 N.E.2d 834, 847 (Ill. 1998) (Harrison, J., dissenting).

47. Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808-10 (2000).

48. Sara Rimer & Raymond Bonner, *Bush Presidency Puts Focus on Executions*, N.Y. TIMES, May 14, 2000, at 1 (describing several cases in which executions were carried out despite questions of innocence).

49. Susan Blaustein, *The Executioner's Wrong*, WASH. POST, Aug. 1, 1993, at C1.

50. Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at A1.

51. Blaustein, *supra* note 49, at C1.

The Future of the Death Penalty

end of 2000, the Lone Star State executed 236 during that period.⁵²

The Florida legislature, in a frantic three-day special session in early January 2000, brushed aside concerns about the dangers of execution of the innocent and the mentally retarded, racial discrimination, and legal representation for poor people condemned to die, and passed laws imposing deadlines and timetables for the speedy processing of capital cases.⁵³ (The Florida Supreme Court later unanimously declared some provisions of the law unconstitutional.)⁵⁴ Brad Thomas, Florida Governor Jeb Bush's top policy advisor on the issue, expressed his enthusiasm for the new laws by saying "[b]ring in the witnesses, put [the defendants] on a gurney, and let's rock and roll."⁵⁵ Because Florida had botched numerous electrocutions, the legislature changed the method of execution to lethal injection. By the end of February, Florida had its new execution

52. Death Penalty Info. Ctr., Texas, at <http://www.deathpenaltyinfo.org/texas.html>.

53. Steve Bousquet et al., *Fla. Speeds up Death Row Appeals*, PITTSBURGH POST-GAZETTE, Jan. 8, 2000, at A4, available at 2000 WL 10872386 (reporting that Republican legislators at the special session criticized judges who "discover 'technicalities' to delay death sentences and deny justice to victims"); Marcia Gelbart, *Limits Set on Appeals to Speed Executions*, PALM BEACH Post, Jan. 8, 2000, at 1A (reporting that Gov. Jeb Bush's bill requires inmates to meet strict deadlines for filing claims and limits the number of appeals they can file "with the goal of putting [inmates] to death within five years of conviction"); Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13 (describing defeat of a proposed amendment to Gov. Jeb Bush's bill that would have allowed inmates to show that racial bias played a role in their sentencing); Larry P. Spalding, *The High Price of Killing Killers*, PALM BEACH Post, Jan. 4, 2000, at A1, available at 2000 WL 7592885 (quoting the bill's primary sponsor, Republican Victor Crist, as saying that Florida "should be executing more people a year than [it] send[s] to Death Row, in order to catch up"); Jim Yardley, *A Role Model for Executions*, N.Y. TIMES, Jan. 9, 2000, § 4, at 5 (reporting widespread criticism of Gov. Jeb Bush's bill as a "hurried proposal" that is "possibly unconstitutional" and "might result in executing wrongly convicted inmates").

54. *Allen v. Butterworth*, 756 So. 2d 52, 54 (Fla. 2000).

55. See Yardley, *supra* note 53, at 5 (reporting Mr. Thomas's comments and quoting Democratic State Representative Chris Smith, who stated that Texas should be "our role model for killing people"); William Yardley, *Bush's Adviser Key in Push for Quicker Death Row Appeals*, ST. PETERSBURG TIMES, Jan. 6, 2000, at 5B (describing Thomas's role in prompting Florida's overhaul of the death row appeals process).

machinery up and running and was lethally injecting people.

The number of executions is rising not only in Texas but throughout the United States. Ninety-eight people were executed in 1999, the most since 1951.⁵⁶ In 2000, eighty-five were executed.⁵⁷ Over 3,700 men, women and children are waiting to be injected, electrocuted, shot or gassed in the United States.⁵⁸ And yet, the reasons for caution grow stronger with the accelerating pace of executions. For the infliction of the death penalty remains, as it has been throughout our history, a matter of race and place, a matter of inequity and iniquity.

C. Race

The legal system is the institution in our society that has been least affected by the civil rights movement. In many communities that once would not let black people drink out of the same water fountains as whites, African-Americans now have representation on school boards, on county commissions, state legislatures and even the Congress of the United States—often as a result of federal court orders. People of color are superintendents, principals and teachers in the schools. They run businesses. But in many courthouses in those same communities, everything looks the same as it did during the period of Jim Crow justice.⁵⁹ The judges are white, the prosecutors are white, the lawyers are white and, even in communities with substantial African-American populations, the jury may be all-white. In many cases, the only person of color who sits in front of the bar in the courtroom is the person on trial.

From arrest to sentencing, the criminal justice system treats people differently based on their race. A person of color is more likely

56. Death Penalty Info. Ctr., *Executions in the U.S. 1999*, at <http://www.deathpenaltyinfo.org/dpicexec99.html> (last visited Jan. 26, 2001).

57. Death Penalty Info. Ctr., *Executions in the U.S. 2000*, at <http://www.deathpenaltyinfo.org/dpicexec00.html> (last visited Jan. 26, 2001).

58. Death Penalty Info. Ctr., *Death Row USA*, at <http://www.deathpenaltyinfo.org/DRUSA-Stats.html> (last modified Jan. 1, 2001).

59. For an excellent history of the role of the criminal justice system in maintaining the legalized oppression of African-Americans after emancipation, see DAVID M. OSHINSKY, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* (1996).

The Future of the Death Penalty

than a white person to be stopped by the police, to be abused by the police during that stop,⁶⁰ to be arrested,⁶¹ to be denied bail,⁶² to be charged with a serious crime, to be convicted, and to receive a harsher sentence.⁶³ For example, in Georgia, a white person is three to six times more likely to be put on probation than a person of color.⁶⁴ Why? One answer is overt racism— which, unfortunately, despite bald assertions that it is a thing of the past, is still alive and an invidious factor in our society. But another answer is the unconscious racism of those who make every effort to be fair. Without knowing it, conscientious judges who have had no experience with people of other races may be influenced in their decision making by racial stereotypes and attitudes they have developed over their lives. Without realizing it, a white judge may see a young white man who is before the

60. See *City of L.A. v. Lyons*, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting) (noting that although only nine percent of residents of Los Angeles are black males, they have accounted for seventy-five percent of deaths resulting from chokeholds by police).

61. See Charles J. Ogletree, *Does Race Matter in Criminal Prosecutions?*, CHAMPION, July 1991, at 7, 10-12 (describing discriminatory practices by police against racial minorities); Mary Maxwell Thomas, *The African American Male: Communication Gap Converts Justice Into "Just Us" System*, 13 HARV. BLACKLETTER L. J. 1, 5 (1997).

62. See Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (documenting discrimination in the setting of bail rates for African-Americans); Thomas, *supra* note 61, at 5.

63. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 165 (1991) (arguing that “[t]he most disturbing systemic disparity is the apparent disparate treatment of young, black males, who on the average receive guidelines sentences significantly longer than those received by their white counterparts for similar offenses”); see also THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 99-129 (Stephen R. Donziger ed., 1996); JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781 (1993).

64. Bill Rankin, *Unequal Justice: Whites More Apt to Get Probation*, ATLANTA J. & CONST., Feb. 8, 1998, at A1 (reporting that since 1990 white people convicted in Georgia were thirty to sixty percent more likely than blacks to get probation for various crimes even though prior criminal records were about same among blacks and whites); Keith W. Watters, *Law Without Justice*, NAT'L B. ASS'N MAG., Mar.-Apr. 1996 at 1, 23 (reporting that whites are more likely to be placed on probation than African-Americans, and that African-Americans make up only twelve percent of population and thirteen percent of drug users, but comprise fifty-five percent of drug convictions).

court for sentencing as a youth with potential in need of help, but see a young black man as a thug who is to be feared.

The same biases, whether conscious or unconscious, influence the decisions of prosecutors, jurors and other actors in the system. The two most important decisions in every death penalty case are made not by the judge, but by the prosecutor. First, the prosecutor decides whether to seek the death penalty. The prosecutor always has discretion to seek or not to seek the death penalty. She is never required to seek death. Second, the prosecutor has complete discretion in deciding whether to offer a sentence less than death in exchange for the defendant's guilty plea. The overwhelming majority of all criminal cases, including capital cases, are resolved not by trials, but by plea bargains. In the thirty-eight states that have the death penalty,⁶⁵ 97.5 percent of the chief prosecutors are white.⁶⁶ In eighteen of the states, all of the prosecutors are white.⁶⁷

Study after study has confirmed that race plays a role in capital sentencing.⁶⁸ Most recently, the U.S. Department of Justice examined its own record on the use of the death penalty and found that over three-fourths of the people given the death penalty were members of racial minorities.⁶⁹ Over half were African-Americans.⁷⁰

Although African Americans constitute only twelve percent of the national population, they are victims of half the murders that are committed in this country. Yet eighty percent of those on death row are there for crimes against white people. The discrepancy is even greater in the death belt states of the South. In Georgia and Alabama, for example, African-Americans are the victims of sixty-five percent of the homicides, yet eighty percent of those sentenced

65. Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1817 (1998).

66. *Id.* at 1817-18

67. See, e.g., David C. Baldus, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998); U.S. GEN. ACCT. OFF., REP. NO. GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

68. U.S. DEP'T OF JUST., THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html> (Sept. 12, 2000).

69. *Id.*

The Future of the Death Penalty

to death are there for crimes against white persons. In Georgia, twenty-one of the twenty-three people executed since 1976, when the death penalty was reinstated, have been executed for crimes against white victims.

For those practicing in the South, the reason for these disparities soon becomes apparent. For example, an investigation of all murder cases prosecuted in Georgia's Chattahoochee Judicial Circuit from 1973 to 1990 revealed that in cases involving the murder of a white person, prosecutors often met with the victim's family and discussed whether to seek the death penalty.⁷⁰ In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty.⁷¹ When the contractor replied in the affirmative, the prosecutor said that was all he needed to know.⁷² The prosecutor obtained the death penalty at trial.⁷³ He was rewarded with a contribution of \$5,000 from the contractor when he successfully ran for judge in the next election.⁷⁴ The contribution was the largest received by the District Attorney.⁷⁵ There were other cases in which the District Attorney issued press releases announcing that he was seeking the death penalty after meeting with the family of a white victim.⁷⁶

But the story was very different with regard to the thirty percent of the community that was African-American. The prosecutors did not meet with African-Americans whose family members had been murdered and ask what sentence they wanted.

70. Transcript of Hearing on Racial Discrimination held on Sep. 1-14, 1991, at 67-69, State v. Brooks, (Super. Ct. of Muscogee Co., Ga., Sep. 12, 1991) (Indictment Nos. 3888, 54606), on appeal 415 S.E.2d 903 [hereinafter Hearing on Racial Discrimination]. The evidence is described in David Margolick, *In Land of Death Penalty, Accusations of Racial Bias*, N.Y. TIMES, July 10, 1991, at A1 and Michael Kroll, Death Penalty Info. Ctr., *Chattahoochee Judicial District: The Buckle of the Death Belt* 10, available at <http://www.deathpenaltyinfo.org/dpic.r11.html> (1999).

71. Transcript of Hearing at 38, Davis v. Kemp (Super. Ct. of Butts Co., Ga., 1988) (No. 86-V-865) (testimony of James Isham, father of the victim).

72. Clint Claybrook, *Slain Girl's Father Tops Campaign Contributor*, COLUMBUS LEDGER-ENQUIRER (Ga.), Aug. 7, 1988, at B1.

73. Davis v. State, 340 S.E.2d 869, 872, cert. denied, 479 U.S. 871 (1986).

74. Claybrook, *supra* note 72, at B1.

75. *Id.*

76. See, e.g., Phil Gast, *District Attorney Criticizes Court for Rejecting Sentence*, COLUMBUS ENQUIRER (Ga.), Sept. 17, 1983, at A1.

Most families were not even notified that the case in which their loved one had been a victim had been resolved.⁷⁷ As a result of these practices, although African-Americans were the victims of sixty-five percent of the homicides in the Chattahoochee Judicial Circuit, eighty-five percent of the capital cases in that circuit were white victim cases.⁷⁸

The racial discrimination in this circuit is stark and undeniable. In other places it is more subtle and less apparent. But the death penalty remains, as it always has throughout our history, a matter of race.

D. Place

As a result of the enormous discretion given prosecutors, the death penalty is also a matter of place. Within the same state, there are places where the death penalty is imposed frequently; other places where it is imposed infrequently, and still other places where it is not imposed at all.

Houston, Texas, is the capital of capital punishment. Houston sends more people to death row than most states. It has had more people executed in the last twenty-five years than any state except for Texas itself and Virginia. Harris County, which includes Houston, accounts for nearly one-third of the people on Texas' death row, while Dallas, which has a higher murder rate, has only about one-quarter of Houston's total.⁷⁹ The death penalty is imposed for some crimes in Houston that are not punished with death if they are committed in Dallas, Fort Worth, San Antonio or almost anywhere else in Texas. The reason is Johnny Holmes, who just ended a twenty-year tenure as district attorney in Houston.⁸⁰

Similarly, the death penalty is imposed for some crimes in Philadelphia that would not be punished with death if they were committed in Pittsburgh or other parts of Pennsylvania because

77. Hearing on Racial Discrimination, *supra* note 70, at 178, 184-85, 192-93, 197, 199-200 (Sep. 12, 1991).

78. See Defense Exhibit 1A, admitted in Hearing on Racial Discrimination, *supra* note 70.

79. Richard Willing, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at 1A.

80. Mike Tolson, A Deadly Distinction, HOUSTON CHRON., Feb. 23, 2001, at 1A (reporting that when Holmes left office, 61 people sentenced to death in Harris County had been executed and 150 were on death row).

The Future of the Death Penalty

the district attorney in Philadelphia, Lynn Abraham, seeks the death penalty whenever she can.⁸¹ Baldwin County, Georgia, which averages only two murders a year, has five people on Georgia's death row, while Fulton County, which includes Atlanta and averages 230 murders per year, has only four people under a death sentence.⁸² The death penalty is imposed in the white-flight suburban communities around Atlanta, Baltimore, St. Louis and other cities much more often than it is imposed in those cities. The death penalty is sought in some parts of New York, but not in the Bronx or Manhattan.

Even though every federal capital prosecution must be approved by the Attorney General, there have also been remarkable geographical disparities in the federal death penalty cases. The Justice Department's study found that forty-two percent of the cases submitted to the attorney general for review came from five districts.⁸³

The Supreme Court has said, and most fair-minded people would agree, that the death penalty should be imposed "with reasonable consistency, or not at all."⁸⁴ But the death penalty is imposed arbitrarily and capriciously in some places but not in others.

E. Inequity

The inequity in capital punishment is not just racial. Poverty increases the likelihood of being sentenced to death. Throughout history, the death penalty has been reserved almost exclusively for those who are poor. The major consequence of poverty is being represented by a court-appointed lawyer who may lack the skill, resources, and, in some cases, even the inclination to provide a competent defense.

At one time, the Supreme Court recognized the relation between poverty and justice. Justice Hugo Black—who once described the courts as "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are . . . victims of

81. Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 21.

82. Willing, *supra* note 79, at 1A.

83. U.S. DEP'T OF JUST., SURVEY OF THE FEDERAL DEATH PENALTY SYSTEM at T14, tbl.5A (2000), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>.

84. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

prejudice and public excitement,"⁸⁵—wrote for the Court in *Griffin v. Illinois*,⁸⁶ that "[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has."⁸⁷ In that case, decided in 1956, the Court, in a five-to-four decision, held that poor people have a constitutional right to a transcript of their trial for purposes of appeal. Seven years later, in *Gideon v. Wainwright*,⁸⁸ the Supreme Court, recognizing that lawyers are "necessities, not luxuries," and that a poor person "cannot be assured a fair trial unless counsel is provided for him,"⁸⁹ held that the Constitution requires the states to provide lawyers to the accused in felony cases.⁹⁰

Nevertheless, almost forty years after *Gideon*, the criminal justice system falls far short of the goals of fairness, equal protection, and due process for all, regardless of income status. The kind of trial, and the kind of justice, a person receives depends very much upon the amount of money he or she has. Judge Alvin B. Rubin of the United States Court of Appeals for Fifth Circuit put it bluntly in one capital case:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence.⁹¹

That is a remarkable statement: "The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel." It is a much different sentiment than Justice Black's declaration that there can be no

85. *Chambers v. Florida*, 309 U.S. 227, 241 (1940).

86. 351 U.S. 12 (1956).

87. *Id.* at 19.

88. 372 U.S. 335 (1963).

89. *Id.* at 344.

90. *Id.* In 1972, the Court held that the Constitution also requires counsel for poor people jailed for minor offenses. *Argensinger v. Hamlin*, 407 U.S. 25, 37 (1972).

91. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

The Future of the Death Penalty

justice when the kind of trial a people get depends upon the amount of money they have.

And yet, Judge Rubin's statement is undeniably true. The courts have held that the lawyer assigned to defend a poor person, even in a capital case,⁹² need not be aware of the governing law,⁹³ sober,⁹⁴ or even awake.⁹⁵ The trial of a woman facing the death penalty in Alabama had to be suspended for a day because the lawyer appointed to defend her was too drunk to go forward.⁹⁵ The judge sent him to jail for a day to dry out and then produced both the client and lawyer from jail and resumed the trial. She was sentenced to death. The woman, Judy Haney, and her children had testified that the victim, her husband, had abused her and her children for fifteen years, but the prosecutor pointed out to

92. See, e.g., *Frey v. Fulcomer*, 974 F.2d 348, 359 (3d Cir. 1992) (allowing a lawyer in a Pennsylvania case to tailor his presentation of evidence and argument around a death penalty statute that had been declared unconstitutional three years earlier); Trial Record at 1875-76, *State v. Smith*, 581 So. 2d 497 (Ala. Crim. App. 1990) (No. 5 Div. 458) (allowing a defense lawyer to ask for time between the guilt and penalty phases so he could read the state's death penalty statute); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1839 (1994) (describing a criminal defense attorney who, when asked to name the criminal law decisions with which he was familiar, could name only "Miranda and Dred Scott;" *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), was not a criminal case); Transcript of Habeas Corpus Hearing of Jan. 10-11, 1996, at 396-97, *Fugate v. Thomas*, (Super. Ct. Butts Co., Ga.) (Civ. No. 94-V-195) (parts of which are reprinted in *A Lawyer Without Precedent*, HARPER'S, June 1997, at 24) (lawyer unaware of any case).

93. See, e.g., Jeffrey L. Kirshmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455-60 (1996) (citing cases in which convictions were upheld even though defense lawyers were intoxicated, abusing drugs, or mentally ill); *People v. Garrison*, 765 P.2d 419, 440-41 (1989) (upholding conviction even though counsel, an alcoholic, was arrested en route to court one morning and found to have a blood alcohol level of 0.27).

94. See, e.g., *McFarland v. Texas*, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996) (upholding death sentence even though lead defense counsel slept during trial); *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995) (Maloney, J., dissenting) (upholding death sentence even though defense counsel slept during trial); David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95, 711 (1996) (describing the case of Carl Johnson, who was executed even though his defense counsel slept during portions of the trial).

95. *Haney v. State*, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925 (1993).

the jury that her testimony was not corroborated by any medical evidence. However, the reason was not because such evidence did not exist, but because the drunk lawyer never obtained hospital records that confirmed the abuse.

Juries receive only the evidence presented by the lawyers. And, as the Supreme Court pointed out in 1932, lawyers can present evidence and conduct meaningful cross-examination of the prosecution's witnesses only if they have conducted "thoroughgoing investigation and preparation."⁹⁶

The jurors who condemned Horace Dunkins to die were never presented evidence that he was mentally retarded. Before Dunkins was executed by Alabama in 1989, a juror, upon learning that Dunkins was mentally retarded, said she would not have voted for the death sentence if she had known of his condition.⁹⁷ She and other members of the jury had not been informed of this compelling mitigating circumstance because the lawyer assigned to defend Dunkins did not present school records and other evidence of his retardation. Dunkins was executed.

John Young met his attorney at the yard at the county jail just a few weeks after he had been sentenced to death. The lawyer was not there for a legal visit. He had been sent there after pleading guilty to state and federal drug charges. The lawyer later admitted that during Young's trial he had been dependent on amphetamines and other drugs, was physically exhausted, suffering severe emotional strain, and distracted from his law practice because of marital problems, child custody arrangements, difficulties in a relationship with a lover, and the pressures of a family business.⁹⁸ As a result, the lawyer made little preparation for Young's trial, where his performance was inept. Young was executed.

Another reason that so many people have been sentenced to death in Houston, besides the prosecutor's practice of frequently asking for the death penalty, is that many people have been poorly defended. The *Houston Chronicle* described one cases as follows:

96. Powell v. Alabama, 287 U.S. 45, 57 (1932).

97. Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6.

98. Affidavit of Charles Marchman, Jr. at 1-5, Young v. Kemp, (M.D. Ga. 1985) (No. 85-98-2-MAC).

The Future of the Death Penalty

Seated beside his client—a convicted capital murderer—defense attorney John Benn spent much of Thursday afternoon's trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

"It's boring," the 72-year-old longtime Houston lawyer explained . . .

Court observers said Benn seems to have slept his way through virtually the entire trial.⁹⁹

This sleeping did not offend the Sixth Amendment, the trial judge explained, because, "[t]he Constitution doesn't say the lawyer has to be awake."¹⁰⁰ On appeal, the Texas Court of Criminal Appeals rejected McFarland's claim that he was denied his right to counsel over the dissent of two judges who pointed out that "[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense."¹⁰¹

George McFarland is only one of three people sentenced to death in Houston at a trial where his lawyer slept. The Texas Court of Criminal Appeals upheld the conviction and death sentence imposed upon Calvin Burdine, even though the one lawyer appointed to defend him slept through substantial portions of the trial.¹⁰² A United States District Court, making the unremarkable observation that "sleeping counsel is the equivalent of no counsel at all," granted

99. John Makeig, *Asleep on the Job: Slaying Trial Boring, Lawyer Says*, HOUSTON CHRON., Aug. 14, 1992, at A35.

100. *Id.*

101. *McFarland*, 928 S.W.2d at 527 (Baird, J., dissenting).

102. *Ex parte Burdine*, 901 S.W.2d at 456.

Burdine habeas corpus relief,¹⁰³ but Texas appealed.

The Texas Attorney General's office argued to the appellate court that a sleeping lawyer is no different from a lawyer who is intoxicated, under the influence of drugs, suffering from Alzheimer's disease or mental illness. While this would seem to be an argument for upholding the district court's decision, it was not. Death sentences have been upheld in cases in which lawyers were drunk, drug impaired, and suffering from Alzheimer's and severe from mental illness. The judges even engaged counsel for Texas on the point, asking if there was not some difference between a lawyer who was under the influence of alcohol and one who was completely unconscious. The lawyer for Texas argued that while Burdine had received "shoddy" representation, it was not so bad that he was entitled to a new trial.

A panel of the Fifth Circuit reversed the grant of habeas corpus relief over a dissent that said the representation in Burdine's case "shocks the conscience."¹⁰⁴ Judges Rhesa Barksdale and Edith Jones agreed that sleeping was just as acceptable as being drunk at a capital trial.¹⁰⁵ Creating a cruel Catch-22, the two judges denied relief because the trial record did not show during which portions of the trial Cannon was sleeping. Of course the person responsible for making the record was Cannon himself, who was asleep. The full Court has voted to rehear the case *en banc*.¹⁰⁶ But regardless of how the case is ultimately decided, the spectacle of fourteen judges of a United States Court of Appeals seriously entertaining an argument that a lawyer sleeping through trial does not violate the right to counsel is a disgrace to the legal profession.

Calvin Burdine did not choose to be represented by a lawyer who could not stay awake during his trial. Houston's trial judges appointed Cannon to represent Burdine and nine others who ended up on Texas' death row.¹⁰⁷ Most

¹⁰³.Burdine v. Johnson, 66 F. Supp. 2d 854, 866 (S. D. Tex. 1999).

¹⁰⁴.Burdine v. Johnson, 231 F.3d 950, 965 (5th Cir. 2000) (Benavides, J., dissenting).

¹⁰⁵.*Id.* at 950.

¹⁰⁶.Burdine v. Johnson, 234 F.3d 1339 (5th Cir. 2000).

¹⁰⁷.Paul M. Barrett, *On the Defense: Lawyer's Fast Work on Death Cases Raises Doubts About System*, WALL ST. J., Sept. 7, 1994, at A1 (reporting that Cannon is known for hurrying through capital trials like "greased lightening" and had

The Future of the Death Penalty

people caught sleeping on the job in any line of work are fired. But Houston judges continued to appoint Cannon to capital and other criminal cases. Cannon also slept during the capital trial of Carl Johnson. But there will be no relief for Johnson. He was put to death by Texas in 1996.¹⁰⁸

During the critical post-conviction review of capital cases, those condemned to die are not even entitled to a sleeping lawyer. Exzavious Gibson, whose I.Q. was found on different tests to be between 76 and 82, stood, totally bewildered, in front of a judge at his first state post-conviction hearing in Georgia without a lawyer. The case proceeded as follows:

THE COURT: OK, Mr. Gibson are you ready to proceed?
MR. GIBSON: I don't have an attorney.
THE COURT: I understand that.
MR. GIBSON: I am not waiving my rights.
THE COURT: I understand that. Do you have any evidence to put up?
MR. GIBSON: I don't know what to plead.
THE COURT: Huh?
MR. GIBSON: I don't know what to plead.¹⁰⁹

The state of Georgia, which sought to bring about Gibson's execution, was represented by a lawyer who specializes in capital habeas corpus cases. After the state's lawyer presented testimony, the judge turned again to Mr. Gibson:

THE COURT: Mr. Gibson, would you like to ask Mr. Mullis any questions?
MR. GIBSON: I don't have counsel.
THE COURT: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?
MR. GIBSON: I'm not my own counsel.
THE COURT: I'm sorry, sir, I didn't understand you.
MR. GIBSON: I'm not my own counsel.
THE COURT: I understand, but do you want . . . to ask him anything?
MR. GIBSON: I don't know.

ten clients sentenced to death).

108. David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 711 (1996).

109. Transcript of Hearing of Sept. 12, at 2-3, Gibson v. Turpin, (Super. Ct. of Butts Co., Ga.) (No. 95-V-648).

THE COURT: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.¹¹⁰

This was a hearing which determined whether Exzavious Gibson would be put to death.

In Texas, Andrew Cantu resorted to representing himself after the first two lawyers assigned by the court withdrew and a third failed even to show up to interview him.¹¹¹ The first lawyer assigned to represent him had represented his co-defendant. The second had represented the state as an assistant attorney general in capital habeas corpus cases. At a hearing held five months after the third lawyer was assigned to represent Cantu, the lawyer admitted he had not visited Cantu, claiming that he did not know Cantu's location.¹¹² (Texas had only one death row at that time, which was located near Huntsville.)¹¹³ The lawyer also admitted that he had made no effort to contact an investigator or an expert and was not familiar with the Antiterrorism and Effective Death Penalty Act of 1996,¹¹⁴ which established a one-year statute of limitations for filing a federal habeas corpus petition.¹¹⁵ Cantu was executed on February 16, 1999, without any state or federal review of the issues in his case.¹¹⁶

In Alabama there are thirty people currently condemned to die that have the right to ask the courts to review their cases, but do not have lawyers. Like Cantu, they face a one-year statute of limitations, but have no lawyer to enable them to comply with it.

At a time of unprecedented prosperity in the nation and the legal profession, there is no

110. *Id.*

111. Paul Duggan, *On Death Row, Not Even Dying Is Certain*, WASH. POST, Dec. 20, 1998, at A22, available at 1998 WL 22542235.

112. Transcript of Hearing of Aug. 15, 1997, at 26, State v. Cantu (104th Dist. Ct. of Taylor County, Tex.) (No. 10,172-B) [hereinafter Cantu Transcript].

113. Bruce Tomaso, *Change of Address: Death Row's New Home Offers Fewer Amenities for its Tenants*, DALLAS MORNING NEWS, June 9, 1999, at 25A, available at 1999 WL 4127009.

114. Pub. L. No. 104-132, 110 Stat. 1217 (codified in scattered titles of U.S.C.).

115. *Id.* §§ 101, 105 (amending 28 U.S.C. § 2244(d)(1)); Cantu Transcript, *supra* note 112, at 27-28 (testimony of the lawyer).

116. *Cantu-Tzin v. Johnson*, 162 F.3d 295 (5th Cir. 1998) stay denied, 525 U.S. 1132 (1999) (holding that because the habeas petition was time-barred, the district court was not required to appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B)).

The Future of the Death Penalty

excuse for the poor quality of lawyers and the complete absence of lawyers in the most serious cases.

F. Iniquity

The death penalty is a matter of iniquity. It does not spare the mentally ill, the mentally retarded, or children. States put to death the delusional, the paranoid, the brain-damaged, the chemically imbalanced, the abused and the neglected. They execute people who were sent to Viet Nam and subjected to the most awful trauma imaginable, who came back with post-traumatic stress syndrome, addicted to drugs, with various mental and emotional problems.

Every expert who evaluated Varnall Weeks, who was sentenced to death in Alabama, concluded that he was a paranoid schizophrenic who suffered delusions and hallucinations. Weeks believed he was God in various manifestations, such as God the Father, Jesus Christ, and Allah. In court proceedings shortly before he was executed, Weeks appeared with a domino tied by a string to his head. In response to the judge's questions, he gave a rambling discourse on serpents, "cybernetics," albinos, Egyptians, the Bible, and reproduction. Weeks believed that his execution was part of a millennial religious scheme to destroy a sinful mankind, and that he would not die but would be transformed into a tortoise to reign in heaven. Prison records revealed that, on occasion, he would stand in his cell naked smeared with feces while mouthing sounds which appeared to have no meaning. Nevertheless, the judge held the execution could proceed because Weeks could answer questions about the date and purpose of his execution. Weeks was executed by Alabama in 1995.¹¹⁷

Charles Rumbaugh, who was only seventeen at the time of his crime, suffered from schizophrenia and depression to the point that he mutilated himself and provoked a marshal to shoot him in open court.¹¹⁸ He was allowed to withdraw his appeals and be executed by Texas.¹¹⁹

Pernell Ford was allowed to discharge his lawyers and represent himself at his capital

117. Rick Bragg, *Killer Racked by Delusions is Put to Death in Alabama*, N.Y. TIMES, May 13, 1995, at A7.

118. *Rumbaugh v. Procurier*, 753 F.2d 395, 397, 405-07 (5th Cir. 1985), cert. denied, 473 U.S. 919 (1985).

119. *Id.* at 403.

trial in Alabama in 1984. During the guilt portion of the trial, Ford made no opening statement, made no objections or motions, and presented no witnesses. Ford wore only a sheet to the penalty phase of the trial. Ford's lawyers appealed his conviction in federal court, but Ford wrote to the court and asked that the petition be dismissed. The court held a hearing to determine whether Ford was competent to waive his right to appeals. During this hearing, Ford said that he wanted to die because he was a member of the Holy Trinity. He said that when he died, his 400 thousand wives would receive the millions of dollars he had put in Swiss bank accounts. He said that he had supernatural powers that would be enhanced when he died, and he would be able to transfer his soul to people outside the prison. One psychiatrist who evaluated Ford said that these statements were Ford's wishes, or reflective of his religious beliefs—not evidence of mental illness. Another psychiatrist found that Ford suffered from depression and personality disorder, but was still capable of making rational choices. A third psychiatrist found that Ford was incompetent. The court concluded that Ford was competent to waive his appeals because he understood the "bottom line" of his legal situation. Like Charles Rumbaugh, he was allowed to withdraw his appeals and be executed.

The execution of these and other profoundly limited and impaired individuals demonstrates that existing law is wholly inadequate to prevent execution of the mentally retarded and the mentally ill.

III. THE CORRUPTING EFFECT OF THE DEATH PENALTY ON THE CRIMINAL JUSTICE SYSTEM

Capital punishment is corrupting our courts and impeding the quest for an independent judiciary. The Governor of California announced in 1986 that he would campaign against justices of that state's supreme court unless they changed their votes on the death penalty.¹²⁰ They did not, and he made good on his promise. He was successful in his campaign to have Chief Justice Rose Bird and two of her colleagues voted off the court.¹²¹

120. Steve Wiegand, *Governor's Warning to 2 Justices*, S.F. CHRON., Mar. 14, 1986, at 1.

121. Stephen B. Bright & Patrick J. Keenan, *Judges and*

The Future of the Death Penalty

In Texas, Stephen W. Mansfield challenged a conservative judge who had written the opinion reversing the conviction in a particularly notorious capital case, campaigning on promises of greater use of the death penalty, greater use of the harmless-error doctrine, and sanctions for attorneys who file "frivolous appeals especially in death penalty cases."¹²² Before the election, it came to light that Mansfield had misrepresented his prior background, experience, and record.¹²³ Mansfield admitted lying about his birthplace (he claimed to have been born in Texas, but was born in Massachusetts), his prior political experience (he portrayed himself as a political novice despite having twice unsuccessfully run for Congress),¹²⁴ and the amount of time he had spent in Texas.¹²⁵ It was also disclosed that he had been fined for practicing law without a license in Florida,¹²⁶ and contrary to his assertions that he had experience in criminal cases and had "written extensively on criminal and civil justice issues," he had virtually no such experience.¹²⁶

the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759. 760-61 (1995) (describing campaigns against judges in California and other states).

122. Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32 (reprinting a campaign advertisement of a Texas Court of Criminal Appeals candidate that lists a series of pro-death penalty positions).

123. See *Do It Now*, FT. WORTH STAR-TELEGRAM, Nov. 12, 1994, at 32, available at 1994 WL 4033647 (calling for the reform of the judicial election system in Texas and for an immediate challenge to Mansfield's election because he had "shaded the truth of virtually every aspect of his career"); Q & A with Stephen Mansfield: "The Greatest Challenge of My Life," TEX. LAW., Nov. 21, 1994, at 8 (printing a post-election interview with Mansfield in which he retracts a number of statements made before and during the election).

124. Janet Elliott, *Unqualified Success: Mansfield's Mandate; Vote Makes a Case for Merit Selection*, TEX. LAW., Nov. 14, 1994, at 1 (stating that Mansfield's suspect past and poor qualifications make him a "poster boy" for advocates of nonpartisan judicial elections); Q & A with Stephen Mansfield, *supra* note 123, at 8.

125. John Williams, *Election '94: GOP Gains Majority in State Supreme Court*, HOUSTON CHRON., Nov. 10, 1994, at A29, available at 1994 WL 4602404.

126. See Elliott & Connelly, *supra* note 122, at 32 (reporting that Mansfield's writings consisted of a guest column in a local paper regarding a capital murder conviction, and two articles that appeared in a journal for charter life underwriters); Elliott, *supra* note 124 (reporting that Mansfield was unable to verify campaign claims regarding the number of criminal cases he had

Nevertheless, Mansfield received fifty-four percent of the votes in the general election.¹²⁷ Texas Lawyer declared him an "unqualified success."¹²⁸ It was later discovered that Mansfield had failed to report ten thousand dollars in past-due child support when he applied for his Texas law license in 1992.¹²⁹ One indication of Judge Mansfield's fitness for the bench was his arrest on the University of Texas campus on Thanksgiving Day, 1998, on charges that he was scalping the complimentary football tickets that judges receive.¹³⁰ He was reprimanded by the state's judicial conduct commission.¹³¹

Justice Penny White was voted off the Tennessee Supreme Court after five members of that court voted to order a resentencing in a death penalty case.¹³² Justice White's opponents told the voters that she had overturned the conviction and set free the condemned man.¹³³ Actually, the conviction was affirmed. The defendant was not released, but held for resentencing, where he was again subject to the death penalty. Justice White did not write the opinion. All five members of the Court agreed that there was at least one error requiring a new sentencing.

handled).

127. Elliott, *supra* note 124.

128. *Id.*

129. *Child Support Allegations Threaten Judge Seat*, FT. WORTH STAR-TELEGRAM, Dec. 10, 1994, at 29, available at 1994 WL 4037619 (outlining the allegations of back child support by Mansfield's ex-wife and his subsequent denial of the allegations).

130. Janet Elliott & John Council, *Scalping Allegation Lands Mansfield in Hairy Situation*, TEX. LAW., Dec. 14, 1998, at 1 (outlining the controversies that have plagued Judge Mansfield); Claire Osborn, *Judge Charged with Trespassing at UT*, AUSTIN AM.-STATESMAN, Dec. 5, 1998, at B2, available at 1998 WL 3633981 (outlining the circumstances surrounding Judge Mansfield's arrest at the University of Texas).

131. Pete Slover, *Judge Reprimanded Over Ticket-Selling Incident*, DALLAS MORNING NEWS, May 14, 1999, at A31, available at 1999 WL 4120830 (reporting Judge Mansfield's reprimand by the Texas Conduct Commission).

132. State v. Odom, 928 S.W.2d 18, 33 (Tenn. 1996).

133. For a detailed discussion of the campaign against Justice White see Stephen B. Bright, *Can Judicial Independence be Attained in the South? Overcoming History, Elections and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 847-49 (1998) and Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 313-15 (1997).

The Future of the Death Penalty

The courts in California, Texas, Tennessee and other states are paying an enormous price to carry out death sentences. The rule of law and the independence of the judiciary have been sacrificed to bring about executions.

Some are willing to sacrifice even more—the lives of innocent people. They argue that we are fighting a "war on crime," and, as in any war, there are going to be some innocent casualties. Once our notion of justice was that it was better for ten guilty people to go free than for an innocent person to be convicted. Now, it is acceptable to some to sacrifice a few innocent people to wage a war on crime.

We must reexamine this "war" and what we are willing to spend to wage it. Our commitment to fairness, our commitment to racial equality, our commitment to the rule of law and our commitment to decency are being spent to wage this "war on crime"—a war that we are fighting against our own people, against our own children, against the mentally ill and the mentally retarded. The death penalty has become the ultimate weapon in class warfare that is being fought top down against the poorest and the most powerless people in our society.

IV. CONCLUSION

For now, despite all its problems, the death penalty remains part of the legal system. What can you do about the injustices we have discussed?

You can refrain—particularly those of you who go into politics—from engaging in demagoguery on the issue of crime. You can refrain from denigrating the Bill of Rights as nothing more than a collection of technicalities and instead help educate lay people about the importance of constitutional and legal protections and the rule of law. You can refrain from taking cheap shots at judges who abide by the law and uphold the Constitution even in controversial cases. You can remind each other and your fellow citizens that the Bill of Rights does not request, but mandates that judges protect the rights of the poor, the unpopular, and the despised.

You can remind each other and your fellow members of the bar that the right to counsel should mean much more than a warm body with a bar card. You can help build indigent defense programs in places that do not have them, like

Alabama, Georgia, Mississippi and Texas. You can staff them. You can respond individually by representing people who most desperately need your services.

You can also ask questions that build upon the momentum created by Governor Ryan and others who are questioning the death penalty. Do we have the humility to recognize the fallibility of our court system? Do we have the honesty to admit that our society is unwilling to pay the price of providing every poor person with competent legal representation, even in capital cases? Do we have the courage to acknowledge the role that race plays in the criminal justice system? Do we have the commitment to do something about it besides pretend that racial prejudice no longer exists?

We must remember that every human being is more than the worst thing he or she ever did—that there is such a thing as redemption. In 1988, I had the privilege of arguing the case of Tony Amadeo before the Supreme Court of the United States. He was not innocent. At age eighteen, he and two other people left the Marines, traveled across the country, stopped in a small town in Georgia and robbed and killed a man for his wallet. He was tried exactly two months after the day of the crime and was sentenced to death. Much later, we learned that the prosecutor had rigged the jury pools by directing the jury commissioners to underrepresent African-Americans. On that basis, the Supreme Court ordered a new trial,¹³⁴ and, ultimately, after a lot of hard work, Tony was sentenced to life imprisonment. Tony called me a few of years ago and asked me to come to the Hancock Correctional Facility to attend his graduation from Mercer University. He had taken courses in prison and earned a college degree.

In 1977, when he was just eighteen years of age, Georgia's rickety legal machinery had found Tony Amadeo to be so beyond redemption that he should be eliminated from the human community. In 1995, he graduated *summa cum laude* from Mercer University.

You can also address some of the larger questions presented by the death penalty: What kind of people do we want to be? What kind of society do we want to have? Are we willing to recognize the dignity of every person, even those

134. *Amadeo v. Zant*, 486 U.S. 214 (1988).

The Future of the Death Penalty

who have offended us most grievously? Do we want a hateful, vengeful society, one that turns its back on its children and then executes them, that denies its mentally ill the treatment and the medicine they need and then puts them to death when demons are no longer kept at bay, that gives nothing to the survivors of the victims of the crime except a chance to ask for the maximum sentence and watch an execution?

The Constitutional Court of South Africa addressed many of these questions in deciding whether the death penalty violated that country's constitution. Despite a staggering crime rate and a long history of racial violence and oppression, the Court unanimously concluded that in a society in transition from hatred to understanding, from vengeance to reconciliation,¹³⁵ there was no place for the death penalty.

If we here in the United States examine our own system, face its flaws, and think about what kind of society we want to have, we will ultimately conclude that, like slavery and segregation, the death penalty is a relic of another era, that it represents the dark side of the human spirit, and that we are capable of more constructive approaches to the problem of crime in our society. And we will then join the rest of the civilized world in making permanent, absolute and unequivocal the injunction "Thou Shall Not Kill."

135. *State v. Makwanyane*, 1995 (3) SALR 391 (CC), reprinted in 16 HUM. RTS. L.J. 154, 190 (1995) (Langa, J., concurring).