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Commentary

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I. Purpose in Organizing the Panel Discussion

When the American Bar Association's Section on Individual Rights and Responsibilities decided to organize a panel discussion on Politics and the Death Penalty (a program which several other ABA entities agreed to co-sponsor), our purpose was to illuminate the variety of effects of a widespread perception: the belief of legislators, governors, prosecutors, judges, clemency boards, political candidates and others that the public is overwhelmingly in support of capital punishment.[80] In the wake of Governor Dukakis' inept response to the opening question in 1988's crucial third presidential debate,[81] the political community has evidently concluded that it is

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80. Although public opinion surveys support the contention that Americans are in favor of the death penalty, these statistics may be misleading elected officials and others into believing that the public overwhelmingly prefers the death penalty over any alternative. Many polls suggest that when presented with the option of life imprisonment with no chance of parole, many people prefer life imprisonment over the death penalty. *See* William J. Bowers, *The Death Penalty's Shaky Support*, N.Y. TIMES, May 28, 1990, at A21 ("The recent political stampede on execution could be the product of pollsters failing to ask the right questions or misreading the results. In truth, the public's desire for capital punishment is far weaker than opinion polls suggest."); WILLIAM J. BOWERS & MARGARET VANDIVER, NEW YORKERS WANT AN ALTERNATIVE TO THE DEATH PENALTY, EXECUTIVE SUMMARY OF A NEW YORK STATE SURVEY CONDUCTED MAR. 1-4, at 3 (1991) (54.6% of New Yorkers prefer life without parole to the death penalty, and 72% prefer life without parole if the prisoner is forced to pay restitution to the victim's family); Susan Gilmore, *Strong Support in State for Death Penalty—But 1 in 3 Prefer Prison For Murderers*, SEATTLE TIMES, Dec. 30, 1992 (national Gallup poll discovered that although 76% of those polled said they favored the death penalty, only 53% chose death over life in prison without parole); *World Politics and Current Affairs; American Survey*, ECONOMIST, Mar. 24, 1990, at 25 (finding that 80% of Americans are in favor of the death penalty, although the proportion drops when the alternative of life imprisonment is offered); RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY (Apr. 1993) (demonstrating that more Americans would choose life without parole plus restitution to their victim's families over the death penalty for first degree murder). *But see* George Skelton, *The Times Poll; Voters Favor Execution By Nearly 4 to 1*, L.A. TIMES, Apr. 2, 1990, at 1 (60% of Californians favored the death penalty over life imprisonment without parole, 32% favored life imprisonment, and 8% did not know).

81. Governor Dukakis was presented with a hypothetical situation in which his wife was raped and murdered, and then was asked how he would feel about imposing

politically fatal to come out against the death penalty and its speedy implementation.[82]

In several large states' 1990 gubernatorial elections, candidates vied to outdo each other in asserting how many executions they would secure.[83] Meanwhile, in a growing number of state judicial elections, incumbent state supreme court justices have been attacked for sometimes ruling in favor of the constitutional claims of particular death row inmates; and in some such campaigns, such as the 1992 campaign in which Mississippi Supreme Court Justice James Robertson was defeated,[84] these attacks have succeeded. Yet, at the same time, the United States Supreme Court has continued to drastically cut back on the federal courts' ability to adjudicate fairly the habeas corpus petitions of death row inmates who seek to challenge the constitutionality of their convictions and sentences.[85] In deciding on these issues, the Supreme Court has asserted that the very state court judiciaries which have been attacked for their occasional granting of relief to death row inmates can be counted on to enforce the Constitution in these highly controversial cases.

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the death penalty on such a person. Glenn L. Pierce & Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 711 (1991). His response was devoid of emotion and simply restated his doctrinal position on the death penalty.

82. *See id.*

83. *See, e.g.*, Brian E. Crowley, THE GAINESVILLE SUN, Mar. 11, 1990 (Florida Governor Bob Martinez ran commercials in his re-election campaign bragging, "I now have signed some 90 death warrants in the state of Florida."); BRIAN LANE, MURDER UPDATE 244 (1991) ("In Texas, Attorney General Jim Mattox, a Democratic candidate for governor, advertised himself on television as the man who has 'carried out 32 death penalties' not personally, you understand, but through a proxy.").

84. James Robertson, a Mississippi Supreme Court Justice who sometimes voted to overturn death sentences, was voted out following aggressive campaigning against him, which included attacks on him by local prosecutors and victims rights groups. Phil Noble & Associates, Feinstein and the 1990 Gubernatorial Campaign 176-77 (July 1992) (unpublished manuscript on file with the *Fordham Urban Law Journal*). For example, one advertisement urged the populace to "vote against Robertson because he's opposed to the death penalty and he wants to let all these people go." *Id.*

85. Four areas in which the Supreme Court has cut back on death row inmates' access to federal habeas corpus are: procedural default, retroactivity, evidentiary hearings, and abuse of the writ. *See, e.g.*, Wainright v. Sykes, 433 U.S. 72 (1977) (procedural default); Teague v. Lane, 489 U.S. 288 (1989) (retroactivity); Keeney v. Tamayo-Reyes, 112 S.Ct 1715 (1992) (evidentiary hearings); Sawyer v. Whitley, 112 S.Ct. 2514 (1992) (abuse of writ); *see also* Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 35-55 (1991).

Legislation based on that same premise, under which it would be virtually impossible for death row inmates' constitutional claims to be considered by the federal courts, was supported by the Bush Administration, was passed by the Senate, and came within a few votes of being passed by the House of Representatives in 1991.[86] And while Congress has engaged in spirited debates about the future of habeas corpus, the death penalty itself no longer generates a serious debate in Congress. There was no such debate in the 1992 presidential election either. Governor Clinton, as part of his effort to portray himself as a "new Democrat", advocated the death penalty and even interrupted his primary campaign to return to Arkansas so that he could deny clemency to a brain-damaged death row inmate, Ricky Rector.[87]

In view of these events, we thought it would be useful to bring together knowledgeable people from a variety of perspectives to discuss (a) how the capital punishment system and the political process have been affected by the perceived overwhelming popular support for the death penalty, (b) the role that reportage — or the lack thereof — has had on public attitudes about the death penalty and (c) whether opponents of capital punishment can survive politically.

II. Highlights of the Program

A. Racial Discrimination in Capital Punishment

Professor James Coleman of Duke University School of Law discussed the Supreme Court's handling of the death penalty, starting with its 1972 holding in *Furman v. Georgia*[88] declaring all then-existing death sentences unconstitutional. While there was no majority opinion for the Court in *Furman*, a major factor underlying the Court's holding was the belief that juries had had unbridled discretion in deciding whether or not to impose the death penalty,

86. *See* Tabak & Lane, *supra* note 85, at 56-62, 93 (discussing the legislation which was defeated by 10 votes).

87. *See Lawyer: Execution a Disgrace*, N.Y. NEWSDAY, May 4, 1992, at 3 ("After Ricky Rector was executed by lethal injection, guards on death row found the slice of pecan pie from his final meal untouched on a saucer in his cell. In a decade behind bars, Rector always saved his dessert until bedtime. His lawyers say Rector left the slice of pecan pie because he believed he would return to his cell and did not understand his life was about to end"). Rector also believed that he would have a chance to vote for Clinton's presidential candidacy. *Id.* ("An hour before the execution, Rector was watching a network newscast about Clinton's alleged affair with Gennifer Flowers, . . . Rector [said] that he was going to vote for Clinton."). *Id.*

88. 408 U.S. 238 (1972).

and that this discretion had, among other things, led to race being a major factor in the imposition of capital punishment.[89] Professor Coleman concluded that there is *still* unguided discretion under the capital punishment regimes which the Supreme Court has approved as constitutional in the years since *Furman*. Indeed, in the 1987 *McCleskey* case,[90] the Court held that substantial racial discrimination in the imposition of the death penalty based on the victim's race would be constitutionally acceptable.[91]

Bryan Stevenson discussed how an Alabama state court judge, immediately after bemoaning in private the demagogic pro-death penalty arguments of a gubernatorial candidate, took the bench and rejected "with gusto" clear evidence of racial discrimination in the selection of an all-white jury for the capital trial of an African-American man. This evidence included the facts that the prosecutor had four lists of prospective jurors: one marked "strong", one marked "medium", one marked "weak" and one, covering all black jurors, marked "black", and that the prosecutor had peremptorily challenged twenty-four of the twenty-six black prospective jurors in securing an all-white jury.

B. Ineffective Counsel in Capital Trials

Several of the panelists stated that the lawyers whom state court judges have appointed to represent defendants in capital trials have frequently lacked the requisite experience, knowledge, resources, and commitment to represent these clients effectively. Shabaka Sundiata Waglini, who came within hours of being executed by the State of Florida, discussed his experience of being convicted and sentenced to death for a crime he did not commit, an experience he believes might not have occurred if his lawyer had not been only three years out of law school. Bryan Stevenson said that many states, particularly several Southern states with large death rows, provide no funding whatsoever for criminal defense work. This leaves local governments in states such as Texas with the responsibility of paying for defense counsel for the poor. Many local governments consider this a politically unpalatable burden and do not undertake it properly.[92]

89. *Id.*

90. McCleskey v. Kemp, 481 U.S. 279 (1987).

91. *Id.*

92. *See, e.g.*, Spangenberg Group, A Study of Representation of Capital Cases in Texas (Mar. 1993).

Pennsylvania Attorney General Ernest Preate stated, based on his extensive experience as a prosecutor, that in too many cases there is ineffective assistance of counsel on both sides. He said there is therefore a need for (a) counsel standards and (b) state and federal funding for counsel and for litigation support centers, since the effective assistance of counsel is "the foundation of our entire system."[93] He stressed that "these kinds of cases ought to be tried by our best lawyers, then appealed by the best lawyers, on both sides, and be argued before juries and before courts by people of experience and knowledge and competency."

C. Judicial Overrides of Juries' Life Verdicts

Shabaka and Bryan Stevenson discussed a relatively new way in which discretion is being exercised arbitrarily in a few states, including Florida, Indiana, and Alabama. In these states, statutes enacted after *Furman* permit elected state judges, with their eyes on the next election, to override juries which have decided that defendants should not receive the death penalty.[94] Mr. Stevenson noted that in Alabama, about twenty five percent of death row inmates are people for whom their juries recommended life sentences, and that such judicial overrides occur with far greater frequency during judicial election years.

D. Procedural Obstacles to Reaching the Merits of Meritorious Constitutional Claims

At many capital trials, the Constitution is violated in a manner which can affect the outcome. However, in a growing percentage of cases, death row inmates are no longer able to secure federal court rulings on whether their federal constitutional rights have been violated. Professor Coleman explained the reason why: the Supreme Court has in recent years created a series of procedural obstacles which prevent federal courts from adjudicating the merits of federal constitutional claims. Thus, whether one lives or dies often depends on such things as (a) whether one's trial lawyer knew enough to object to actions by the prosecution or the judge which violated the Constitution, (b) whether by early on in the death row inmate's appeal process, rather than a little later, the

93. I believe that federal funding should be limited to the defense side, since the states should pay for their own prosecutions.

94. *See* Schiro v. Farley, 114 S. Ct. 783 (1994) (upholding Indiana death sentence where jury returned a verdict of life imprisonment and judge overrode jury's decision and imposed death penalty).

Supreme Court has found a constitutional violation in a context so similar to the death row inmate's case that all reasonable jurists would thereafter necessarily rule in the death row inmate's favor and (c) whether the volunteer counsel who represented the death row inmate during his first federal court proceeding had the knowledge and the resources to develop evidence of constitutional violations (or whether such violations were not uncovered until *after* the first federal court proceedings).

There have even been situations in which one co-defendant has lived and another co-defendant in the same case has died solely because of such factors.[95] Moreover, the Supreme Court has in its last two completed terms (a) curtailed the ability of prisoners to have the federal courts conduct evidentiary hearings with respect to constitutional claims where crucial facts were not developed in the state courts,[96] (b) changed the traditional standard for harmless error, so that from now on in habeas cases, there will be situations in which relief will be denied even though the constitutional violation is not harmless beyond a reasonable doubt,[97] and (c) held that the federal courts will not consider evidence that a death row inmate is actually innocent, even when there is no way to bring that evidence to bear in the state courts, unless the evidence of innocence is so overwhelming that *every* reasonable person would believe the defendant to be innocent.[98]

E. Legislative Efforts That Would Further Curtail Habeas Corpus

One might hope that, as the American Bar Association has advocated, legislative efforts to "reform" habeas corpus would eliminate some or all of these procedural obstacles to granting relief on meritorious constitutional claims. However, the legislation on habeas corpus introduced in early August 1993 by Senate Judiciary Committee Chairman Joseph Biden (and later endorsed by President Clinton and Attorney General Reno) would not accomplish that task. The Biden bill resulted from negotiations with prosecutors, according to Attorney General Preate. Bryan Stevenson said that the defense bar was excluded from these negotiations, and he

95. *See, e.g.*, Tabak & Lane, *supra* note 21, at 39-40 (discussing the executed John Eldon Smith and his co-defendant Rebecca Machetti).

96. Keeney v. Tamayo-Reyes, 112 S.Ct 1715 (1992).

97. Brecht v. Abrahamson, 113 S.Ct 1710 (1993).

98. Herrera v. Collins, 113 S.Ct 853 (1993).

expressed skepticism about what he had heard about the Biden bill (which he had not yet had the opportunity to review).

Stevenson's skepticism seems justified, since the Biden bill would further curtail habeas corpus. For example, the Biden bill would impose a very short statute of limitations on habeas petitions, and would preclude second and subsequent habeas petitions in virtually all circumstances, even where unconstitutional State misconduct or the complete unavailability of crucial facts made the presentation of particular claims impossible previously. Moreover, the Biden bill would not (a) clearly reject any of the recently imposed procedural obstacles to rulings on the merits of the case or (b) require that trial and postconviction counsel be appointed by authorities which are independent of the state judiciary (whose appointments of trial counsel have often led to inadequate representation.)[99] The crime bill approved by the House-Senate conference committee in the previous Congress (but which was not enacted) was superior to the 1993 Biden bill in these respects.[100]

F. Political Threats to Judges' Principled Consideration of Capital Cases

The Supreme Court has justified some of its decisions which deprive death row inmates of meaningful access to the federal courts by asserting that capital cases can be, and are, fairly decided by the state courts. While that is often true, Chief Justice James Exum of North Carolina discussed a growing threat to the state courts' ability to do their job properly in such cases. He explained that state judges face increasing obstacles in seeking to retain their judgeships if they have sometimes overturned death sentences due to constitutional errors. Chief Justice Exum said that judicial election campaigns have become increasingly strident and have frequently focused on assertions about how judges have voted and would vote in capital punishment cases. He also stated that it has become more perilous for state judges to decide capital cases properly, in view of oversimplistic and sometimes inaccurate press accounts of their decisions — such as press attacks on the North Carolina Supreme Court for not finding harmless error in a circumstance in which binding precedent precluded a harmless error inquiry.

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99. *See supra* note 39.

100. The very different crime bills passed in 1993 by the Senate and the House have no provisions on habeas corpus. Various habeas corpus provisions will likely be considered by Congress in 1994.

Subsequent to the program, there has been a new development which threatens the independence of both the state judiciary and the federal judiciary. On October 15, 1993, the New York Times reported that "Senate Republicans have given notice that they will challenge any of President Clinton's judicial nominees they consider insufficiently committed to the death penalty."[101] "[Key] Republican staff members said the death penalty is a politically potent issue and worth raising . . . ."[102]

Two state supreme court justices whom President Clinton nominated to federal appeals courts have already come under attack from conservatives for their supposed insufficient support for capital punishment. One of them, Justice Martha Craig Daughtrey of the Tennessee Supreme Court, has nevertheless been confirmed by the Senate. The other nominee, Chief Justice Rosemary Barkett of Florida, has not yet been voted on by the Senate Judiciary Committee as of February 1994,[103] despite widespread support for her nomination from members of the Florida bar, Florida elected officials, and newspapers.[104] Chief Justice Barkett was retained in her state judicial position with sixty-one percent of the vote in 1992, after a campaign in which she fended off attacks that she was soft on crime by stressing "that she has voted to uphold death sentences more than two hundred times."[105]

Even if judges like Chief Justice Exum and Chief Justice Barkett win re-election, and even if judges like Justice Daughtrey win confirmation to the federal courts, these kinds of campaigns and litmus tests for confirmation have pernicious effects. How can anyone have confidence that such judges are not affected, in ruling on capital punishment cases, by their perceived political needs, either in seeking retention in office or in securing confirmation to a federal office? There is every reason to believe that, at least in some close cases, certain state judges and some federal judges who hope to be appointed someday to higher courts will decide against death row inmates in order to increase their death penalty affirmance statis-

101. Neil A. Lewis, *G.O.P. To Challenge Judicial Nominees Who Oppose Death Penalty*, N.Y. TIMES, Oct. 15, 1993, at A26.

102. *Id.*

103. Joan Biskupic, *Nominee Defends Death Penalty Stance*, WASH. POST, Feb. 4, 1994, at A20 (committee vote on Barkett's nomination not yet been scheduled).

104. *See, e.g., U.S. Court Nominee Barkett Says She Isn't Soft on Crime*, MIAMI HERALD, Nov. 17, 1993, at 5B.

105. Paul Anderson, *Barkett Set To Go Before Senate Panel*, MIAMI HERALD, Jan. 31, 1994, at 5B.

tics. Thus, the Senate Republicans' recent pronouncements will likely exacerbate an already outrageous situation.

G. Systemic Reasons Why Many Innocent People Are Sentenced to Death

Under the highly politicized system in which (a) many prosecutors build their careers by securing death sentences, (b) many state judges perceive their futures as dependent on their imposing and upholding death sentences, (c) defense counsel are ineffectual, and (d) the federal courts are increasingly precluded from rectifying serious constitutional violations, it is not surprising that, as Shabaka and Bryan Stevenson stated, many innocent people are being sentenced to death. Indeed, Mr. Stevenson's innocent client, Walter MacMillian, was put on death row *before his case even went to trial.* Journalist Nat Hentoff noted that the fact that numerous innocent people are receiving the death sentence, and the reasons underlying that fact, are woefully underreported.[106]

New York University Law School Dean Emeritus Norman Redlich pointed out that clemency proceedings, which in the past were often the last safeguard against arbitrary and capricious executions, have in recent years also been affected by politics. One such example has already been mentioned—presidential candidate Bill Clinton's return to Arkansas in time to deny clemency for Ricky Rector. Dean Redlich also referred to the extraordinary number of executions taking place in Texas. Clemency has been regularly and often perfunctorily denied in Texas, even when both the victim's family and the trial prosecutor have supported clemency.[107]

Shabaka pointed out that even after the Florida Assistant Attorney General handling Shabaka's case expressed doubts to the Governor about Shabaka's guilt, the Governor still denied clemency.[108] Professor Coleman stated that one Governor of Florida had accelerated the issuance of execution warrants during his election year,

106. This fact can be laboriously pieced together from numerous *ad hoc* reports on particular cases. *See* Tabak & Lane, *supra* note 21.

107. *See, e.g.*, Tabak, *supra* note 9 at 845 (execution of Kenneth Albert Brock); Robert Davis, *Unlikely Execution-Eve Plea*, USA TODAY, Dec. 10, 1992, at 4A (discussing the impending execution of convicted killer Timothy Dale Bunch despite pleas by the *victim's* family to let him live).

108. Shabaka was eventually released, but only through federal habeas corpus proceedings.

and another Florida Governor tried to claim credit for a well-publicized execution as part of his re-election campaign.[109]

In view of many Governors' strenuous efforts to gain political support through executions, it is not surprising that they (or the pardons boards they appoint) frequently deny clemency even when there is strong evidence of a miscarriage of justice. Indeed, the granting of clemency continues to be virtually non-existent in most states, and is far less available than in earlier decades in which there were executions.[110]

Ironically, as part of the "passing the buck" syndrome which permeates our capital punishment system today, some governors have contended that the existence of "super due process" in the adjudication of capital cases means that clemency need not receive serious consideration.[111] So, at the very time that (a) state judicial independence has been badly tarnished by judicial campaigns and federal judicial nomination proceedings in which the death penalty is a major issue, (b) the federal courts' ability to grant relief when meritorious constitutional claims are presented has been drastically curtailed, and (c) the Supreme Court has announced that executions can be carried out without any judicial consideration of substantial evidence of innocence, clemency is being denied on the pretext that the courts are ensuring that justice is being done in capital cases.

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109. *See* Brian Crowley, *Bob Martinez is Singing the Executioner's Song*, GAINSVILLE SUN, Mar. 11, 1990.

110. A death row inmate "has the right to seek clemency from the executive branch of the state government: either the governor or the pardons board." Tabak, *supra* note 9, at 844. Critics, however, note that the chance of receiving clemency in a death penalty case has become extremely poor. *Id.* For example, between 1981 and 1986, no southern state, with the exception of Florida and Texas, granted clemency to a death row inmate. *Id.*

Thus, state governors have abdicated their authority to decide whether or not inmates should actually be executed. *Id.* Several governors have justified their refusals to grant clemency by asserting that sentencing should be determined by juries and the courts. *Id.* Such refusals to execute this responsibility for clemency decisions are evidently due to the political climate and will continue until it once again becomes "acceptable" to grant clemency. *Id.* (citing J. Mattox, comments on ABC News Nightline, Show #1439, Transcript at 5-6 (Nov. 27, 1986)).

For a more recent discussion of the arbitrary nature of clemency, and how difficult and rare it is today for governors to pardon death row prisoners, see Tamar Lewin, *Vast Discretion for Governors In Decisions on Death Penalty*, N.Y. TIMES, May 20, 1992, at A14; Jason Berry, *Governors Shy Away From Death Row Pardons*, DALLAS MORNING NEWS, Aug. 15, 1993.

111. *See* Tabak, *supra* note 9, at 845.

H. Irrational Political Discourse And Inadequate Reportage About the Death Penalty

The perpetuation and expansion of the death penalty, the increase in executions, and the curtailment of the enforcement of the Constitution seems to have occurred without a substantial public outcry. This is due largely to irrational political discourse, failures of reportage, and the failure of many public officials and candidates to realize that opposition to the death penalty and support of habeas corpus need not be politically fatal. Several of the panelists spoke about these points.

Bryan Stevenson pointed out that the continued assertions by politicians that the death penalty will do something about crime has had "an irrational effect on the way we think about crime." New York Assemblywoman Susan John noted that in reality, the murder rate remains extremely high in Texas, a state which is executing people with a frequency unprecedented in recent decades.[112] This holds true for other states which have executed large numbers of people.

Bryan Stevenson further commented that our society is being irrational in continuing to rely on the death penalty as a solution for crime, instead of dealing with people in trouble (i.e. victims of physical or sexual abuse, drug addicts, the homeless, the mentally ill) *before* such people commit capital crimes. Moreover, he said, society's reliance on such a discriminatorily imposed sanction has crushed the hopes and aspirations of many people, particularly those living on the margins of society. It has also promoted disrespect for the law.

Society might act more rationally if all the facts about capital punishment were more widely reported, as Nat Hentoff advocated. Such underreported facts include the numerous due process violations associated with the death penalty, the frequency with which innocent people are sentenced to death, and the courts' typical failure to grant any relief when defense counsel has been incompetent.[113] Mr. Hentoff also criticized the press' failure to correct disinformation disseminated in political campaigns, such as the

112. *See* David Margolick, *As Texas Death Row Grows, Fewer Lawyers Help Inmates*, N.Y. TIMES, Dec. 31, 1993, at A1.

113. In one such example, defense counsel failed to give the jury readily available mitigating information about the defendant's honorable military record, his cooperation with the police, and his lack of any prior criminal record. It is quite likely that awareness of these factors might have led the jury to spare the defendant's life. Messer v. Kemp, 760 F.2d 1080, 1096 (11th Cir. 1985) (Johnson, J., dissenting), *cert denied*, 474 U.S. 1088 (1986).

false assertion that if a defendant convicted of a capital crime is not executed, he will be released from prison in a few years and commit more murders. In reality, most states now have some version of life without parole under which a defendant convicted of capital murder — the only type of murder for which the defendant could receive the death penalty — cannot be *considered* for parole ever, or depending on the state, for at least twenty five years.[114]

The public needs to understand that although convicted murderers are sometimes released on parole, that is totally *irrelevant* to the debate over capital punishment. It is irrelevant because persons convicted of *capital* murder, if not sentenced to death, are sentenced in virtually all states to some form of life imprisonment without parole. Thus, the frequently made argument that only capital punishment could prevent convicted murderers from being released in a few years and committing further murders is fallacious on two counts: capital punishment cannot prevent their release if their convictions are not for *capital* murder; and the alternative to capital punishment *does* prevent their release if their convictions *are* for capital murder.

Public misconception on this subject has been a serious problem in death penalty trials because jurors are typically not allowed to have their questions about the parole consequences of a life sentence answered.[115] Generally, jurors who ask for but are denied such information proceed to return verdicts of death. In October 1993, the Supreme Court granted *certiorari* in a South Carolina case which raises the issue of whether the Constitution requires that jurors be provided with accurate information about life without parole.[116] If the Court decides that the Constitution does require that jurors understand the consequences of life without parole, this could lead to better informed juries. Unfortunately, however, this will not have the same effect on a still uninformed electorate.

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114. *See* Dieter, *supra* note 80, at 1 ("Forty-five states and the federal government now employ sentences in which no parole is possible for at least 25 years for their more serious murder cases. In two-thirds of the states, those who are not given the death penalty face life imprisonment with *no possibility of parole ever.* Yet only 4% of Americans believe that those convicted of first degree murder would spend the rest of their lives in prison . . . .").

115. *See id.* ("Jurors serving in capital cases . . . frequently assume that their choice is between a meaningless life sentence and death. Judges are often forbidden by law from explaining to the jury that inmates must now serve 25, 35 or more years before even becoming eligible for parole.").

116. State v. Simmons, 427 S.E.2d 175 (Sup. Ct. S.C.), *cert. granted,* 114 S. Ct. 57 (Oct. 4, 1993). The Supreme Court heard oral argument on this case in January 1994.

Assemblywoman John raised another death penalty "misnomer" when she discussed the widespread misconception that it is cheaper to kill a criminal than to keep him alive in prison for the rest of his life. In fact, the death penalty system in the United States is more expensive than the alternative of life imprisonment without parole.[117] Capital murder trials are more expensive for many reasons, such as: greater costs for expert testimony, more intense juror *voir dire*, and two phase trials.[118] For example, in Florida each death sentence costs approximately 3.18 million dollars, while life imprisonment (based on forty years in prison) is estimated to cost $516,000.[119]

I. Misconceptions About the Inevitability of Political Death for Death Penalty Opponents

While recognizing the public's misconceptions about the death penalty, Dean Redlich and Assemblywoman John contended that public officials and political candidates may still be misperceiving the intensity of people's views on capital punishment. To support this assertion, Dean Redlich cited the experience of a political action committee in New York which supports anti-death penalty candidates for the state legislature. Dean Redlich noted that this PAC has had substantial success, including the defeats of several incumbents who had switched from opposing to supporting the death penalty during their re-election campaigns.

One of those incumbents was defeated by Assemblywoman John, even though the election occurred just four days before the highly publicized trial of a serial murderer. Because the incumbents who switched their positions on the death penalty were defeated, an Albany newspaper ran the headline "Support for death penalty fatal for assemblymen."[120] Assemblywoman John believes that the electorate perceives the candidates' views on the death penalty as a matter of character and principle, and will react

117. *See* Philip J. Cook & Donna B. Slawson, Terry Sanford Institute of Public Policy, Duke Univ., The Costs of Processing Murder Cases in North Carolina 1 (1993) ("All told, the extra cost *per death penalty imposed* is over a quarter million dollars, and *per execution* exceeds $2 million"). *See generally* Robert L. Spangenberg & Elizabeth R. Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A. L. REV. 45 (1989) for a more in depth analysis of the costs associated with the death penalty; Tabak & Lane, *supra* note 35, at 133-38.

118. *See* Pierce & Radelet, *supra* note 81, at 719.

119. *Id.*

120. Robert Borsellino, *Support for death penalty fatal for assemblymen*, TIMES UNION, Sept. 12, 1990, at 1.

harshly to candidates who appear to support the death penalty for purely political reasons.[121]

As Dean Redlich suggested, it is quite possible that New York's experience may not be typical of the entire country. Indeed, Chief Justice Exum of North Carolina stated that strident political campaign attacks on judges who sometimes rule in favor of death row inmates are increasing, and are threatening the integrity of judicial campaigns. However, in light of numerous public opinion polls indicating that more people may prefer some form of life without parole over the death penalty,[122] it appears likely that many political candidates and public officials who privately oppose capital punishment and support the strengthening of habeas corpus would survive politically if they took those same positions publicly.

Most politicians and political advisors never look past the first (and usually the only) death penalty question in public opinion polls: Do you favor the death penalty? Yet such a simplistic question, asked in isolation, without any alternative mentioned, is deceptive. When a tough alternative to death is provided, support for capital punishment drops dramatically, generally below fifty percent.[123] Because pollsters usually do not ask about that alternative and because most people do not know that that alternative actually exists, the public's responses to the usual simplistic poll questions may be misleading political candidates. Accordingly, it is crucial that the press, or anti-death penalty candidates, correct the misinformation on this subject.

III. A Perspective

The enactment, expansion, upholding and implementation of capital punishment in the United States since the mid-1970's has been characterized by the failure to exercise moral leadership or even to engage in rational discourse. A greatly increased percentage of the executive branch officials, legislators, judges and political candidates who believe that the death penalty accomplishes nothing and is carried out in an arbitrary, discriminatory, and even "freakish" manner are still unwilling to vote or advocate against capital punishment because they fear committing political suicide.

121. Indeed, in 1990, the gubernatorial candidates in Texas, Florida and California who supported the death penalty most stridently, *i.e.*, Mark White, Jim Mattox and Clayton Williams in Texas, Governor Martinez in Florida, and Diane Feinstein in California, were all defeated.

122. *See supra* note 80.

123. *Id.*

Some of these people are also afraid to support the availability of habeas corpus relief for death row inmates who have been convicted or sentenced unconstitutionally because they fear that doing so would leave them fatally vulnerable to attacks that they are soft on crime. Elected state judges are often influenced by these same factors.

As for the United States Supreme Court, how does one explain the votes upholding the constitutionality of the death penalty cast by such justices as Lewis Powell who, following his retirement, said that the death penalty is not, and probably could not ever be, effective as a deterrent,[124] and that he has moral objections to it? I believe that Justice Powell and some of his colleagues who (unlike Justice Powell) voted in 1972 in *Furman v. Georgia* to vacate all existing death sentences, had concluded by 1976 that the Court had gotten too far out in front of public opinion in *Furman*. Some of these justices were apparently surprised and taken aback when dozens of state legislatures enacted new capital punishment statutes in the years immediately following *Furman*.

These developments, when combined with public opinion polls purporting to show overwhelming support for the death penalty, made it appear that the public's respect for the Court might be jeopardized if it held all of the newly enacted death penalty laws unconstitutional. This may be why, in contrast to its handling of abortion (on which public opinion was reportedly more evenly divided), the Court took only four years, from 1972 until 1976, to substantially retreat from its holding in *Furman*. Thereafter, as numerous political candidates and elected officials began to blame the federal courts for the amount of time between homicides and executions, the Supreme Court began to curtail the ability of death row inmates to get rulings on the merits of their meritorious constitutional claims. In the numerous instances since 1976 when it has done so, the Court has failed to point out that much of the delay in capital cases typically occurs in the state courts, and that by imposing new procedural obstacles the Court was inevitably causing the executions of (a) innocent people and (b) people whose fundamental rights under the Bill of Rights had been violated in egregious, highly prejudicial ways.[125] The arbitrary and capricious effects of such decisions have become so apparent to Justice Harry Blackmun over the years that he has recently concluded that this

124. Tabak & Lane, *supra* note 35.
125. Tabak & Lane, *supra* note 21.

country's capital punishment system — whose constitutionality he had voted to uphold in *Furman* — violates the Constitution.[126]

Unfortunately, it is unlikely that the Supreme Court will find the capital punishment system unconstitutional any time in the near future, or retreat from its assaults on habeas corpus. This means that for the foreseeable future, attacks on capital punishment must be made principally in the political arena. But in order for there to be a real political debate about the death penalty, it is necessary that more political candidates and elected officials who oppose the death penalty, or who wish to put some teeth back into habeas corpus, say so publicly and effectively.

The reason this has not happened in recent years is largely due to the political community's misunderstanding of why Governor Dukakis' debate answer on the capital punishment question was so devastating. Governor Dukakis' answer was disastrous because he did not seem to care about heinous crimes on any emotional level; he did not even seem troubled by the thought of his wife being horrendously raped and murdered. Instead, he presented, in robotic fashion, certain policy arguments about the death penalty. If he had instead expressed real rage about crime and had passionately attacked his opponent for defrauding the public with phony arguments about the supposed virtues of the death penalty, crucial swing voters would likely have respected him, even if they supported the death penalty. Many of them would have voted for him, much as so many pro-death penalty New York voters have repeatedly voted for Governor Cuomo. Thus, it was not Governor Dukakis' position on the death penalty that was so harmful to his candidacy; it was the manner in which he expressed that position.

However, the conventional political wisdom is that it was Governor Dukakis' position on the death penalty that did him in. As a result, the typical moderate or progressive candidate in the years since 1988, even if he previously opposed the death penalty, has stated that he now favors the death penalty, or that if he still personally opposes it, he will nevertheless be a leader in its enforcement.[127] Even Andrew Young abandoned his lifelong total

126. *See* Collins v. Collins, 1993 WL 530954 (Feb. 22, 1994) (Blackmun, J. dissenting)

127. For example, Kathleen Brown, who intends to run for Governor of California in 1994, takes the position that she opposes the death penalty but would nevertheless enforce it. *See* William Hamilton, *California, Here I Gun*, WASH. POST., Jan.17-23, 1994, at 16. She is nonetheless being attacked by political opponents, who contend that she would, like her father, former Governor Edmund G. Brown, commute many death sentences and that she lacks the "courage of her convictions." *Id.*

opposition to the death penalty when running for Governor of Georgia in 1990, stating that he now favored it in certain circumstances.[128]

As for President Clinton, he has exercised a steely determination to never again be labeled as "soft on crime"[129] following his defeat for re-election as Governor of Arkansas in 1980, when his pardons of several criminals were said to be a major factor in his loss.[130] In his first two-year term, Clinton "was widely viewed as opposed to capital punishment for declining to set execution dates for two dozen death-row inmates",[131] and he commuted life without parole sentences of forty-four convicted murderers and twenty-two other criminals.[132] But in his near-decade in the governor's chair following his 1980 defeat and his 1982 victory, Clinton "moved swiftly to set execution dates,"[133] granted clemency to murderers with life without parole sentences only seven times, never granted elemency to stop an execution, and permitted several executions to be carried out.[134] Indeed, in January 1992, Clinton interrupted his campaigning in the crucial New Hampshire primary in order to return to Arkansas and deny clemency to the brain-damaged Ricky Rector.[135]

As President, Clinton is pushing for passage of a crime bill that would expand the availability of the federal death penalty — despite having an Attorney General who opposes the death penalty. Clinton's eagerness to gain support for his crime bill from associations of district attorneys, state attorneys general, and police officials prompted him to agree, along with Senator Biden, to diminish

128. *See The Politics of Death*, ECONOMIST, Mar. 24, 1990, at 26.

129. See, *e.g.*, George E. Jordan, *Clinton and Crime: Supports Capital Punishment as a Sign of Toughness*, N.Y. NEWSDAY, May 4, 1992, at 3 ("He [Clinton] has said his support of capital punishment would pre-empt the type of Republican attacks that weighed down the 1988 campaign of former Massachusetts Gov. Michael Dukakis." Clinton is fond of saying that Democrats "should no longer feel guilty about protecting the innocent."); *id.* at 19 ("Supporters and critics cite one of two reasons for Clinton's swing on crime and punishment: political survival in a southern state, where support for capital punishment is strong, or the political expediency of building a conservative record with sights on seeking the presidency.").

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Thomas B. Edsall, III, *Democrats Now Willing to Support Death Penalty*, WASH. POST, Jan. 23, 1992, at A14.

further the availability of habeas corpus relief for people convicted or sentenced to death.[136]

To turn this situation around, it is vital that opponents of the death penalty and supporters of habeas corpus provide assistance to those political candidates and public officials who agree with them on these issues. This support should include (a) advice on how best to articulate these positions, (b) targeted campaign contributions and (c) public education efforts designed to show the factual misconceptions underlying much of the public's support for the death penalty.

Moreover, the organized bar, whatever its members' views may be about the death penalty, should rise in support of state judges whose re-election or judicial nominations are opposed because of their having voted on some occasions to reverse death sentences. Ultimately, judicial campaigns should be replaced by lifetime merit appointments if such appointments can be made in the same fashion in which New York's Governor Mario Cuomo has appointed judges to New York's highest court: in a non-partisan manner based on merit, without litmus tests or partisan attacks. Unfortunately, the use of litmus tests by recent Presidents in appointing federal judges and the threatened injection of death penalty politics into the Senate's judicial confirmation process illustrate potential dangers in the appointment process. Ultimately, the public must demand that judges be selected on the basis of merit, not demagoguery, whether it be by election or by appointment.

It is equally vital that death penalty opponents endeavor to persuade political strategists and consultants that opposition to the death penalty need not be politically fatal, and that changing one's position to come out in favor of the death penalty can be politically harmful. Moreover, death penalty opponents and habeas corpus supporters should allocate their time, money, and endorsements in a way that will create real political costs for otherwise moderate or progressive candidates who come out for the death penalty or for effectively abolishing habeas corpus. This does not necessarily mean withholding all support from such people. It does mean calling such people to account for your positions and refusing to be as vigorous in their support.

In short, the best way to fight capital punishment and to restore habeas corpus in this country is to try to inject some accountability and responsibility into the process. At this juncture, no one really

136. *See supra* note 39.

takes responsibility for the implementation of the death penalty. Politicians and legislators hide behind their perceptions of political reality and public opinion, believing that it is politically incorrect to oppose the death penalty or to support habeas corpus. Judges purport to simply carry out legislation. Governors and pardon boards say there is no reason to consider clemency because the courts have provided "super due process", even though the procedural obstacles the Supreme Court has enacted often lead instead to *no* process at all.

Those who understand how the death penalty is really functioning in this country must expose these fallacies and provide responsible members of the press with the tools to bring this critical information to their audiences. If this happens, and if our public officials are persuaded to act in a more principled manner on this issue, the death penalty can be abolished in this country, as it has already been in most of the democratic world.[137]

137. The United States and South Africa were the only two large countries in the western world that continue to implement the death penalty, Amnesty International, When the State Kills (1989), until South Africa imposed a moratorium on executions in February 1990. Nelson Mandella has vowed to abolish the death penalty completely if he is elected president. Reverend Cyril Pillay, *in* HANDS OFF CAIN 27 (1994).