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## Litigating Against the Death Penalty: The Strategy Behind *Furman*

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*In Furman v. Georgia the Supreme Court, by a vote of five to four, declared capital punishment as administered under discretionary death penalty statutes cruel and unusual and thus in violation of the Eighth and Fourteenth Amendments. In confronting the issues in Furman, the Court was put in the position of either finding some formulation for holding the death penalty unconstitutional or sending hundreds to their deaths. The Court was put in this impossible position largely because in previous years only a small portion of those convicted of capital crimes had actually been executed. The understandable reluctance of prosecutors, jurors, trial and appellate judges, and governors to administer the death penalty had been exploited by the cadre of lawyers associated with the NAACP Legal Defense Fund and the American Civil Liberties Union. From 1963 onward, they planned and argued a series of cases designed to eliminate capital punishment in an artfully coordinated litigation campaign.*

*In Cruel and Unusual: The Supreme Court and Capital Punishment,<sup>1</sup> Professor Michael Meltsner of Columbia University,<sup>2</sup> one of these lawyers, relates the history of the recent abolitionist movement—a history which is relevant not only for those who must consider the present efforts to restore the death penalty, but especially for those lawyers and judges planning or facing concerted litigative strategies in constitutional, civil rights, or poverty law cases. In this edited excerpt from his book, Professor Meltsner describes the birth of the*

1. To be released this fall by Random House. © by Michael Meltsner.

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*moratorium strategy and one of the more unusual episodes in the abolitionist campaign—the defeat of efforts by the governors of Florida and California to renew the executions by the use of novel class action habeas corpus petitions.*

## I

In 1966, the NAACP Legal Defense and Educational Fund (LDF) war council of capital case lawyers made a decision which was to determine the path of their efforts for the next six years: Henceforth they would attempt to block all executions. They would defend murderers as well as rapists, whites as well as blacks, Northerners as well as Southerners.

It is not easy to trace the evolution of this change in policy, for it came about only after a number of complex, interrelated, tactical and moral considerations coalesced, but of its importance there can be no doubt. One factor prompting the decision was the unpleasant lesson taught by the reaction of the courts to attempts to prove racial discrimination in the death sentencing of Southern black rapists: notwithstanding that the evidence was as convincing as men with finite resources could produce, judges resisted an argument that on the basis of statistics asked them to brand hundreds of juries as prejudiced. Proof of racial discrimination in rape sentencing might ultimately influence judges to require tighter procedure in capital cases; and if the lawyers unearthed more facts, judges might even come to accept the statistical argument itself. But such results were unlikely for several years, and they would never be possible unless the fact that such a high proportion of blacks were subject to execution emerged as but one distasteful aspect of a far greater evil. For this to occur, the courts had to take a fresh look at the venerable institution of capital punishment. In turn, to catch the conscience of the courts, the death penalty had to be a "problem"—one that was discussed, attracted attention and, in a more immediate way than in the past, affected the lives of the judges and prison officials who administered it. Abolition needed a symbol, a threat of crisis, to overcome inertia and win favor from a reluctant judiciary.

One way to promote this end was to raise the entire range of capital punishment arguments in every case where execution was imminent, thereby stopping the killing and eventually presenting any resumption of it as likely to lead to a blood bath. The politics of abolition boiled down to this: For each year the United States went without executions, the more hollow would ring claims that the American

people could not do without them; the longer death-row inmates waited and the greater their numbers, the more difficult it would be for the courts to permit the first execution. A successful moratorium strategy would create a death-row logjam. Regardless of political stripe, there were very few governors who wished to preside over mass executions. Even if the state legislatures did not abolish the death penalty despite the threat of numerous gasings and electrocutions, many chief executives might readily acquiesce in any judicial action that would permit them to avoid scores of clemency decisions.

But there were dangers, not to mention difficulties, in agreeing to represent every death-row inmate who sought LDF assistance. It was a close question whether a particular Fund client would be helped by tying his fate to a general campaign against the death penalty. Test cases have a way of scaring off judges because their implications are so enormous. Thus, if the strategy worked and capital punishment was abolished or severely restricted, the racially discriminatory sentences complained of by LDF clients would be eliminated. But if the strategy failed, Southern black rapists as a class might actually be far worse off than before because, to cite one consideration that troubled the lawyers, a general challenge to capital punishment tended to lump together men who had killed with men who had not, creating a situation in which the fate of the nonkillers would be likely to hinge on the fate of the whole.

In fact, had there not been other forces at work, LDF lawyers might have stuck to representing Southern black rapists and only taken on cases of blacks convicted of murder when they believed that justice had miscarried or that racial discrimination was involved. But once the lawyers knew the legal theories that could win stays of execution, they felt morally obliged to use them. "We could no more let men die that we had the power to save," Professor Anthony Amsterdam commented, "than we could have passed by a dying accident victim sprawled bloody and writhing on the road without stopping to render such aid as we could." Indeed, the lawyers confronted a choice as immediate as if they had stumbled on a highway smash-up. Calls for help were coming in from all parts of the nation: the governors of California, Florida, Louisiana, and Texas had signed death warrants.

For the moratorium strategy to work, Fund lawyers would have to intervene directly in hundreds of cases in over thirty of the forty-two jurisdictions whose law still provided the death penalty. Even if LDF declined to enter a case until after a defendant lost at trial and com-

pleted his first state court appeal, the undertaking was massive and without precedent. Legal papers that could be used in each capital punishment state were a necessity. The Fund required men and money it simply did not have. It was essential to develop relationships of confidence and trust with scores of lawyers and other professionals.

Amsterdam began to forge a strategy by circulating elaborately documented drafts of legal arguments designed to show that standardless jury sentencing, the single-verdict procedure (only California, Connecticut, New York, Pennsylvania, and Texas had split trials), and the exclusion of scrupled jurors violated the Fourteenth Amendment.

The money became available in 1967 when the Ford Foundation granted the Fund a million dollars to create a National Office for the Rights of the Indigent (NORI) program—conceived by Fund staff attorney Leroy Clark—to bring test cases to improve treatment of the poor by the legal system. Although the Ford Foundation probably did not have capital punishment in mind when it made the grant, it had authorized NORI to go to court to upgrade the quality of criminal justice. And it was undeniable that the elaborate trials and numerous appeals involved in capital cases swallowed up large amounts of money which the states could have used to supply desperately needed services for indigent defendants; many also thought discrimination against the poor in the application of capital punishment more blatant than discrimination against blacks. For these reasons, Jack Greenberg, director-counsel of the Fund, decided to use the Ford money to finance abolition cases.

Soon after the moratorium strategy was announced, criminal lawyers invited the Fund to defend murder cases, involving both blacks and whites in California, New Jersey, and Colorado—states where LDF activity had been slight. Overburdened public defender agencies and death-row inmates themselves sought LDF assistance. By March 1967, the Fund was responsible for over fifty men subject to execution, and the number climbed each month. With no shortage of potential clients, it was soon apparent that a staff lawyer had to be given full responsibility to manage the growing docket of death cases and to coordinate the efforts of those attorneys who sought LDF assistance. A national moratorium strategy demanded that each cooperating lawyer quickly learn the latest developments and, when necessary, receive fresh pleadings and briefs.

The small group of staff attorneys who had worked on capital cases was familiar with the pressures of applying for last-minute stays of

execution and gerry building legal arguments overnight. Now there was need for a theoretician and planner—a managing attorney who would collect evidence demonstrating the barbarity of death-row incarceration, and the character of death case juries; engage psychiatrists to study the deterioration of men awaiting execution; induce pollsters and statisticians to measure the bias of the jurors who remained after those with scruples against capital punishment had been removed; and find churchmen, wardens, and correctional officials to lend their prestige.

Further, the managing attorney had to interest law professors in generating imaginative constitutional theories based on evolving doctrine, and interest law students in documenting the varied forms taken by capital case procedure in different states. He had to cultivate journalists in order to persuade them that something newsworthy was happening in a field in which they had rarely shown sustained interest. Most importantly, he had to stand a death watch: On learning of an imminent execution, he had to find a lawyer willing to take the case and place the proper papers in his hands.

I recommended that Greenberg offer the job to Jack Himmelstein, a twenty-six-year-old Harvard Law School graduate, who some years earlier when he was still a student had held a summer research job with the Fund. During law school, Himmelstein had attended several Harvard Medical School classes to obtain clinical experience in psychiatry, but only after winning a battle with a fussy law school administrator who thought he should register for more commercial law courses. After graduation, with a Knox Fellowship in psychiatry and law, he went to England to study civil commitment of the mentally ill. In London he spent most of his time at the Anna Freud Clinic at Hampstead, an experience which later helped him see beyond the legalisms to the tortured psychic reality of each death case.

Shortly after Himmelstein officially started work, Amsterdam drove him to Philadelphia from a Fund Conference in Virginia. In the four-hour trip he learned, issue by issue and step by step, the nature of the legal challenge to capital punishment and where it might lead. For the next five years hardly a week passed, and for long periods not a day, when these two men did not speak together. Their first joint project was to draft a set of petitions for habeas corpus, applications for stay of execution, and legal briefs that articulated every significant constitutional argument against the death penalty. The collection, dubbed the "Last Aid Kit," was bound and distributed to hundreds of lawyers. The papers in the "Kit" were arranged so

that even an attorney totally unfamiliar with the Fund's legal strategy found himself able, upon minimum inspection, to present a court with substantial legal reasons for postponing an execution.

With circulation of the "Last Aid Kit," requests for LDF intervention in capital cases grew steadily; Himmelstein opened a file for every man on death row. He prepared a list of lawyers in every capital punishment state willing to participate in capital cases and coaxed several of the attorneys into serving as state reporters, committed to keeping him informed of scheduled executions and changes in local law.

Next, Himmelstein and Amsterdam expanded the latter's already prodigious correspondence with interested lawyers to include scholars Hugo Bedau, Leslie Wilkins, Hans Mattick, Hans Ziesel and Harry Kalven, and psychiatrists Dr. Bernard Diamond and Dr. Louis J. West. They talked to prison wardens and psychologists who had studied the deleterious effects of death-row incarceration; abolitionists like Ruth Kitchen of the New York Committee to Abolish Capital Punishment, Sol Rubin of the National Council on Crime and Delinquency, Donald E. J. MacNamara of the American League to Abolish Capital Punishment, and Douglas Lyons, who as a college student had formed Citizens Against Legalized Murder (CALM).

In 1967 Lyons had held a vigil at San Quentin to protest the execution of Aaron Mitchell; in 1968, he helped arrange hearings on a federal abolition bill for a Senate Judiciary Subcommittee chaired by Senator Philip Hart. Later, while a law student and a part-time Fund staff member, he continually checked with prison wardens, governors' offices, and interested lawyers to learn whether there were executions scheduled. Most of the time, he was told "None this month." Every so often, however, Lyons learned of a previously unknown execution date. Working in this manner, he provided Himmelstein with information which led to last-minute stays of execution for over thirty men.

By May of 1968, almost twelve months had elapsed without a legal killing. Due largely to Himmelstein's spadework, LDF felt confident enough to assemble over a hundred lawyers and abolitionists for a National Conference on Capital Punishment in New York. At the opening of the meeting, Greenberg gave a moving speech which alluded to the years not so long before when every Southern capital trial was a potential lynching, and described the background of the Fund's involvement. In staccato style, Amsterdam then gave an overview of the legal strategy. Finally each of the major legal constitutional

claims was analyzed in some detail by speakers from various law schools: Caleb Foote of the University of California at Berkeley; Donald MacDonald of the University of Colorado; John Griffiths and Stephen Duke of Yale.

The purpose of the 1968 conference, however, was not technical; its aim was to bring the participants together for a face-to-face encounter, and at this it succeeded handsomely. This first confrontation of numerous professionals who had previously worked alone gave the movement a cohesion that it had lacked. Largely because of this conference, those who were present came to accept the Fund's role as overseer and clearinghouse. As a result, in the years that followed, no execution date went unchallenged.

In 1968 Martin Luther King and Robert F. Kennedy, two men who carried the hopes of many for a reconstructed America, were assassinated. Both murders took place in death penalty states, committed by men who were obviously undeterred. For many who attended the 1968 conference, especially Fund lawyers who had worked closely with Dr. King for years, his assassination dramatized as could nothing else the senselessness of killing, unofficial or official. If some dreamed of revenge, the impotence of such feelings to bring back men who were loved for their presence or the hopes they evoked reinforced the disgust with which the lawyers contemplated the prospect of more legal death. Ironically, this most miserable year in that "slum of a decade," to use John Updike's oft-quoted phrase, strengthened abolitionist resolve; it was also the year that brought the first two Supreme Court decisions which significantly limited state power to impose the death penalty. In both cases, the Court acted in a way which opened up the prospect of endless litigation, if not ultimate success.

## II

In 1932 an increasing number of professional kidnappings (the most notorious that of Charles Lindbergh's child) and the limited ability of local authorities to cope with interstate flight led Congress to enact a federal kidnaping statute<sup>3</sup>—better known as the Lindbergh law—which made the crime punishable by death *only* if the defendant charged with harming the kidnaped person chose to plead not guilty *and* to go to trial before a jury rather than a judge. In other words, if a defendant pled guilty, or waived his right to trial by jury, a judge could sentence him to no more than life imprisonment.

3. 18 U.S.C. §§ 1201, 1202 (1970).

In 1966 a Connecticut federal grand jury had charged three men, Charles "Batman" Jackson, Glenn LaMotte and John Albert Walsh, with the kidnaping of John Joseph Grant, a truck driver whose load of razor blades had been hijacked and taken from Connecticut to New Jersey. Because Grant had suffered rope burns while freeing himself, he had been harmed sufficiently to invoke the death penalty provisions of the law.

Before Jackson and his codefendants pleaded to the indictment, the federal district court in New Haven appointed Stephen Duke to serve as one of his lawyers. Professor Duke, a former clerk to Justice Douglas, had joined the faculty of the Yale Law School in 1961 as a tax professor but soon became interested in criminal law. After receiving word of his appointment, Duke examined the Lindbergh law and noticed a potential defect in the statute which apparently had never been challenged in the more than thirty years it had been on the books—that it coerced defendants to plead guilty and to waive trial by jury by making them risk their lives only if they contested their guilt before a jury. On this basis, Duke filed a motion to dismiss Jackson's indictment.

United States District Judge William Timbers agreed and dismissed the charge.<sup>4</sup> He thought the entire kidnaping statute unconstitutional because it had an inherent tendency to impair the right to trial by jury guaranteed by the Sixth Amendment. The government appealed directly to the Supreme Court, which in 1968 upheld Duke's contention that the kidnaping statute wrongly encouraged an accused to plead guilty and to waive his right to a jury trial.<sup>5</sup>

The government's argument that trial judges police pleas of guilty and waivers of jury trials is no answer to the statute's invitation to avoid death only at the price of waiving rights, wrote Justice Potter Stewart for the Court.<sup>6</sup> "[T]he evil" of the Lindbergh law is not "that it necessarily *coerces* guilty pleas and jury waivers," but "that it needlessly *encourages* them."<sup>7</sup> The statute sets up a system which discourages and deters defendants from "insisting upon their innocence and demanding trial by jury" because death is threatened only when they do so.<sup>8</sup>

Justice Stewart did not, however, agree with Judge Timbers that the entire kidnaping statute was void. Rather he decided to excise

4. *United States v. Jackson*, 262 F. Supp. 716 (D. Conn. 1967).

5. *United States v. Jackson*, 390 U.S. 570 (1968).

6. *Id.* at 583.

7. *Id.* (emphasis in original).

8. *Id.*



merely that portion of the law which authorized the death penalty. Capital punishment, he reasoned, was added in 1934 simply to increase the penalty for kidnaping, rather than to change the nature of the offense. As the Court read the legislative record of the statute's enactment, it was clear that, with or without the death penalty, Congress wished to make kidnaping a federal crime.<sup>9</sup>

The government had also defended the statute's authorization of the death penalty *only* after trial by jury on the ground that it benefited defendants by permitting them to avoid totally the risk of capital punishment. Justice Stewart replied that the Constitution plainly empowered Congress to mitigate the severity of the death penalty, but that it could not accomplish this end by penalizing defendants who wished to demand a jury trial.<sup>10</sup>

Seven of the sixteen federal death penalty statutes arguably contained the same defect as the Lindbergh law. Additionally, ten states had adopted one form or another of the Lindbergh procedure as a device to both limit application of the death penalty and induce guilty pleas from recalcitrant defendants. New Jersey, for example, simply provided that a plea of guilty assured a defendant's escape from a death sentence. LDF prepared to argue that all such laws illegally induced pleas of guilty motivated by a desire to avoid capital punishment.

As Himmelstein revised the "Last Aid Kit" to reflect *United States v. Jackson*, Fund lawyers felt that they had turned a corner. The Supreme Court had not merely demonstrated a willingness to tackle a murky question of capital case procedure, but had answered the question in a way which permitted abolitionists to challenge the practices of states with similar laws. Additionally, the Court had acted shrewdly by striking down the death penalty provision, but saving the kidnaping statute. No one could claim that *Jackson* freed dangerous criminals.

The second and even more significant 1968 Supreme Court decision raised further hopes. This one involved William Witherspoon, a man who had spent eight years on death row in Illinois for murdering a Chicago police officer. Witherspoon had fifteen dates with the executioner postponed. While fellow convicts took their last steps past his cell, he had written two successful books. At the time of his 1960 trial, an Illinois law, similar to statutes in almost every other capital punishment state, provided that "[i]n trials of murder it shall be a

9. *Id.* at 586-89.

10. *Id.* at 582.

cause for challenging of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."<sup>11</sup>

At Witherspoon's trial, the statute was invoked to eliminate nearly half the prospective jurors. The trial judge announced: "Let's get these conscientious objectors out of the way, without wasting any time on them."<sup>12</sup> In rapid succession, the prosecution successfully challenged forty-seven jurors on the basis of their attitudes toward the death penalty. Only five of the forty-seven explicitly stated that under no circumstances could they vote to impose capital punishment. Six said they "did not believe in the death penalty" and were excused without any attempt to determine whether their scruples would invariably compel them to vote against capital punishment. One juror admitted that she disliked "to be responsible [for] deciding somebody should be put to death." Without more ado she was also excused. Thus the state had been able to exclude those with a range of potential objections to capital punishment from total rejection of the penalty to mild opposition. It was the constitutionality of this practice the Supreme Court agreed to consider in *Witherspoon v. Illinois*.

The circumstances leading up to *Witherspoon* illustrate the complicated intellectual jockeying that makes the practice of constitutional law adventurous. Witherspoon, represented by Albert E. Jenner, a prominent Chicago attorney with a national reputation, wanted the Court to decide his appeal on the question of bias—*i.e.*, that a jury without those who have scruples against the death penalty is likely to be more "prosecution prone" than a jury from which such persons are not excluded. Jenner relied primarily upon two unpublished opinion surveys, by psychologists Faye Goldberg and W. Cody Wilson: Both measured the attitudes of college students, rather than potential jurors, and neither had been prepared with a view toward legal proceedings, but both tentatively concluded that jurors without scruples against capital punishment were more likely to vote for guilt than jurors with such misgivings.

LDF lawyers feared that this evidence was too slender to hold up the weight of a major constitutional ruling. The danger was that in the absence of more reliable research demonstrating that, as a group, persons in favor of capital punishment were more likely to accept the prosecution's version of the facts and less likely to credit the accused's defense, the Court might well reach an adverse decision. Such

11. See *Witherspoon v. Illinois*, 391 U.S. 510, 512 n.1 (1968).

12. *Id.* at 514.

a defeat would knock out a chief prop of the moratorium strategy. As Witherspoon's counsel, Jenner was obliged to raise every legal claim which might possibly win a new trial. If the Fund intervened in the case as *amicus curiae*, it might represent the interests of other death-row inmates and urge the Court to avoid the bias question.

Amsterdam's response to the threat posed by the bias issue was a ninety-four page *amicus* brief urging that the sort of factual information necessary for a wise decision of the question was not yet available. Rather Witherspoon's conviction should be reversed on other grounds: that the jury which convicted and sentenced after exclusion of scrupled jurors did not reflect a cross-section of the community, as proved by the fact that several years earlier roughly half of the adult population questioned had told the Gallup Poll that they entertained some doubts about capital punishment. Under no circumstances, the brief argued, should the "prosecution-proneness" issue be decided on such scanty evidence. Rather than do this, the case should be sent back to the lower courts for an evidentiary hearing. This would allow time for facts showing bias to be brought to light.

The Fund, the brief announced, had commissioned the Louis Harris polling organization to conduct a study of a random sample of potential capital case jurors. People with the legal qualifications to serve on capital juries were to be questioned by simulation of the attitudinal examination employed in actual death cases. Inquiries would probe whether or not each respondent had any particular objection to capital punishment.

Other questions measured demographic factors and the attitudes of potential jurors toward "punitiveness, alienation, prejudice, authoritarianism," in order to determine whether scrupled and non-scrupled jurors represented different subgroups and personality types. The study also would test the respondents' perceptions of the "role and reliability of . . . the judge, prosecutor, defense counsel, jury and witnesses"<sup>13</sup> and their reaction to common defense and prosecution trial tactics. Ability to decide a criminal case on the basis of the evidence would then be measured by questions based on simulated trial records. Respondents would also be asked to rate the difficulty they encountered in reaching a decision about the defendant's guilt.

LDF told the Court that it was necessary to wait for the results of the study, which would serve as a basis for an informed consideration of the "prosecution-proneness" issue. This position was dictated

13. Edison, *The Empirical Assault on Capital Punishment*, 23 J. LEGAL ED. 2, 13 (1971).

by a wretched fear that someone would be killed by a premature decision on the bias question: If the Court were to decide the issue before a fuller development of the evidence, its decision would most likely be adverse. But this strategy placed LDF lawyers in the awkward position of arguing that Witherspoon might not be entitled to an entire new trial, but only to a new hearing on his sentence. Witherspoon's lawyers, however, believed that "prosecution-proneness" was a winning issue which not only affected their client's death sentence, but also entitled him to a new trial. Several of Jenner's younger associates were furious and dashed off angry letters after they read the Fund's brief. From Witherspoon's personal point of view, they may have been justifiably upset, but concern for the five hundred other men on death row forced the Fund to take a contrary position.

Ultimately the Court declined to consider the bias question: It agreed with the LDF that the available evidence was too "tentative and fragmentary."<sup>14</sup> In deciding the case, however, Justice Stewart, writing for the Court as he had in *Jackson*, took a route treated only summarily by both Jenner and the Fund and narrowly defined the issue the Court would decide. It did not involve whether Witherspoon's jury was lawfully chosen from a random cross-section of the community, or deal with the bias question; these issues were reserved for the future. In this case the Court treated the question of whether a jury chosen by excluding scrupled jurors could be impartial in determining *punishment*, not guilt. It held that Witherspoon's jury had not been impartial because everyone with any objection to the death penalty had been excluded. The Constitution did not permit the challenging of jurors with conscientious or religious scruples against the death penalty so as to produce a "hanging jury."<sup>15</sup> Justice Stewart conceded that judges might exclude jurors who would "automatically vote against the imposition of capital punishment no matter what the trial might reveal" or who made it "unmistakably clear" that their opposition to the death penalty would prevent them from even convicting a man who might later receive a death sentence.<sup>16</sup> But more ambiguous opposition to capital punishment would not be sufficient to disqualify. Consequently, a full inquiry into each juror's disposition was necessary before a valid exclusion. As this had not been done in Witherspoon's case, his *death sentence* was unlawful.

In the same shrewd way the *Jackson* Court voided the death penalty

14. *Witherspoon v. Illinois*, 391 U.S. 510, 517 (1968).

15. *Id.* at 523.

16. *Id.* at 522 n.21 (emphasis in original).

provision but not the entire federal kidnaping statute, the *Witherspoon* Court acted in a manner which diminished the likelihood of an adverse public reaction. When a case ran afoul of the *Witherspoon* rule, the death penalty was unconstitutional and had to be vacated, but it was not necessary to set aside the conviction. (In *Bumper v. North Carolina*,<sup>17</sup> decided the same day, the Court qualified *Witherspoon* by making it clear that those who had received non-capital sentences from "death-qualified" juries could not complain.)

Initially, *Witherspoon* gave abolitionist lawyers reason to believe that no one would ever be executed again, for the decision plainly added many opponents of capital punishment to the pool of eligible jurors. Because the rule was retroactive, most death-row inmates, LDF lawyers thought, had winning claims that their juries had been wrongly constituted, and were thus entitled to a fresh determination of their penalty. Others had been sentenced to die by judges, but it might be possible to argue successfully that these men had waived their rights to jury trials because they feared trial by the sort of "hanging jury" the Court had disapproved. *Witherspoon* seemed to place the burden on the state to prove that the jury selection process had worked properly. If the state could not do so, the death sentence must be quashed.

At the least, then, LDF lawyers expected that there would be hundreds of resentencings before juries which might decline to reimpose the death penalty. Even defendants who had been condemned by fairly chosen juries might be saved in the wake of a widespread movement to reduce death sentences. If these predictions were overly sanguine, there still remained other capital punishment issues to present to the Court.

### III

It is, in fact, doubtful that anyone, friend or foe, accurately estimated the extent of the reaction to this first hard evidence that abolition was on the Supreme Court's agenda. To be sure, there was no public outcry similar to the outraged criticism which often greeted the Warren Court decisions restricting the police. Numerous death sentences were vacated by state and federal courts because of violations of the *Witherspoon* rule, though many were quickly reinstated after new penalty hearings. But the general response of courts that were asked to apply *Witherspoon* to other cases, especially state courts, was

17. *Bumper v. North Carolina*, 391 U.S. 543 (1968).

hostility all out of proportion to the narrowness of the *Witherspoon* rule and the precision of the Supreme Court's opinion.

The lower courts did not, of course, openly defy the Court. That is not the way the system works. Rather, *Witherspoon* was, in Amsterdam's phrase, "cut to ribbons" in the name of assorted legal and factual differences said by the lower courts to distinguish it from other cases. Some of these distinctions were obvious makeweights; others were contorted readings of the Court's opinion. Nevertheless, men could die on the basis of them. One federal court decided that *Witherspoon* applied to systematic exclusion of scrupled jurors; wrongful removal of a small number of jurors did not count heavily enough to vacate a death sentence.<sup>18</sup> The New Jersey Supreme Court stood *Witherspoon* on its head by ruling that there was no violation where an excluded juror's attitude toward capital punishment was ambiguous.<sup>19</sup> Illinois even enacted a law which proponents thought would totally avoid the impact of *Witherspoon* by providing that any man whose death sentence had been vacated by reason of the decision would be resentenced by a judge rather than by a jury.<sup>20</sup>

*Jackson* and *Witherspoon* thus did not directly threaten the government's power to kill; once the states adjusted their criminal procedure to conform to the new rules, they could continue to impose the death penalty. But the two decisions did prove that at least some Supreme Court Justices were prepared to take a hard look at the way men were condemned. As a result, it became somewhat easier to win postponements of impending executions.

Nevertheless, obtaining a stay of execution was still a tense, uncertain business. Trial judges had the habit of holding stay applications in abeyance until shortly before a scheduled execution in the hope that their governor would postpone it. The result was a series of almost monthly, mad cross-country scrambles, with secretaries typing legal papers long into the night and lawyers hurrying them to faraway appellate judges.

Until the two 1968 decisions increased LDF's leverage, obtaining a stay of execution also demanded a great deal of coolness under stress. Although the pressures were great, they were manageable (especially after the "Last Aid Kit" had been distributed) in states where scheduled executions were infrequent. But a year before *Jackson* and *Witherspoon* a more certain method had to be found if executions

18. *Bell v. Patterson*, 402 F.2d 394 (10th Cir. 1968).

19. *New Jersey v. Mathis*, 52 N.J. 238, 245 A.2d 20 (1968).

20. ILL. ANN. STAT. ch. 38, § 1-7(o) (Smith-Hurd 1972).

were to be stopped in California and Florida, the states with by far the largest death-row populations (roughly fifty in Florida, seventy in California). Each had elected new governors in 1965, and both Ronald Reagan and Claude Kirk had campaigned on “law and order” platforms, making a minor campaign issue out of the failure of their predecessors to use the death penalty as a deterrent to crime.

During his election campaign Kirk made his intentions known dramatically by visiting the Florida State Penitentiary at Raiford. He shook hands with the inmates of death row, and with a courteous smile told them, “If I’m elected, I may have to sign your death warrant.” After the election he made his campaign promise good by signing a handful of death warrants which had gathered dust on the desk of the previous governor, Farris Bryant.

For many years the opponents of capital punishment in Florida had been led by Tobias Simon, a puckish, free-wheeling Miami lawyer who was both an LDF cooperating attorney and chairman of the state chapter of the American Civil Liberties Union. While ostensibly in private practice, Simon was a maverick, temperamentally unable to accept the quiet life of a commercial lawyer. Whenever there was a civil rights skirmish, a teacher strike, or an antiwar protest in Florida, Simon surfaced on the side of the insurgents. He had the reputation of being a man who would try anything once—and sometimes twice.

When Kirk threatened to resume executions, Simon and Alfred Feinberg, his young associate and a former Legal Defense Fund staff member, devised a novel lawsuit to stop him. After the smoke had cleared, it was apparent that they had tapped a new willingness on the part of the judiciary to hear arguments against capital punishment.

Simon and his ACLU colleagues represented several of the men in grave danger of electrocution. Hence, they were able to initiate individual lawsuits asserting that each man’s death sentence was unconstitutional because of the deficiencies which Fund legal papers had identified, as well as raising issues particular to each inmate’s case. Simon and Feinberg felt that the most pressing concern was the inmates who were not represented by lawyers. Angered by Kirk’s posturing, they feared that he would execute one of the many men on death row who had no lawyer, no concerned friends, and no pending lawsuit. There were men on death row who risked execution simply because they did not know how to file a suit to block it. The lawyers’ anxiety grew after state officials refused to divulge the name and status of every death-row inmate. If there was anything unconstitutional in the state’s administration of the death penalty, Simon and Feinberg

reasoned, all Florida death penalties suffered from identical defects of procedure.

On this premise, Simon decided that death-row inmates represented a class which could be joined in one proceeding. If such a suit was proper, the courts would have to postpone all executions until they finally decided whether the legal rights of the inmates had been infringed.

But though the class action device is a common lawyer's tool in civil cases, it had never been used successfully to challenge the convictions or sentences of all the criminals who might benefit from a particular decision. It had always been assumed that each convicted criminal had to present a claim that he was entitled to release, a new trial, or a different sentence individually, in a separate proceeding.

It was thus with considerable skepticism that I heard Feinberg's hurried telephone description of the proposed law-suit. I tried to be polite, but privately I thought, "Another Toby Simon frolic." At my suggestion, Feinberg added language to the draft petition asking the court to grant a declaratory judgment, and to declare the constitutional rights of all death-row inmates to sentencing standards and other procedural practices if it could not actually decide their cases together.

Several days later surprise replaced skepticism when United States District Judge William A. McRae ruled that there was enough substance to the class action idea to justify a temporary stay. Judge McRae prohibited Florida from executing anyone until he had had an opportunity to decide what to do with the unusual suit, and called for legal memoranda. Simon's daring had paid off.

Amsterdam, Greenberg, and Simon immediately flew to Boston to discuss the class action question with Harvard law professor Albert M. Sachs. As a consultant to the committee that revised the federal rules of civil procedure, Sachs knew a great deal about class actions. He also had access to Benjamin Kaplan, the Harvard professor who had drafted the pertinent rule—Rule 23.<sup>21</sup> Sachs thought the suit was a long shot, but said there was no solid doctrinal reason why an argument under Rule 23 could not be sustained.

Amsterdam agreed to try to put the argument on paper. After returning to New York he worked out the theory that habeas was merely a form of procedure for the protection of human liberty, but one which had greatly and consistently evolved to respond to new

21. FED. R. CIV. P. 23.



threats to liberty. Habeas ought to be sufficiently flexible to meet the needs of this case if it was the only vehicle by which the unrepresented man on death row could obtain access to a court.

This argument thus required a factual investigation of the legal situation, financial condition, and literacy of the men on death row. This pleased Amsterdam, for it avoided forcing Judge McRae to decide a difficult procedural issue until he had seen the hard facts depicting the hopeless legal plight of the unrepresented men. It also postponed decision on the class action issue until a time when the initial adverse public reaction to the Judge's order had subsided. Finally, if Judge McRae refused to permit the investigation, Amsterdam could go to the Fifth Circuit Court of Appeals on a record showing that the district judge had refused to let the lawyers gather facts showing that the class action device was the only method of procedure whereby Raiford's unrepresented condemned men could be heard in court.

Four months later Judge McRae agreed that the use of a class action depended on whether or not death-row inmates had effective access to the courts. Were they without lawyers? Were they poor, ignorant, or illiterate, and thereby unable to protect themselves by retaining an attorney or filing their own habeas corpus petitions in court? If the answer to these questions was yes, a class suit might be the only way they could assert their legal claims.

In order to find out the answers, Judge McRae accepted an ACLU-LDF offer to interview each consenting death-row inmate and report back to the court. Amsterdam prepared a questionnaire, Simon scheduled the interviews, and they both put together a task force of ACLU volunteers, LDF cooperating lawyers, and law students who went to Raiford to inquire into the background, employment, education, prior criminal record, financial status, and legal representation of each inmate who agreed to talk to them.

When the job was done Simon had a profile of forty of the fifty-two men on death row to present to Judge McRae. Of these, thirty-four had already lost their appeals to the Florida Supreme Court and were subject to electrocution at Governor Kirk's whim unless new legal proceedings were brought on their behalf. As Simon had feared, half of these thirty-four had no lawyers or means to hire them; all but six of the other half were represented by the small group of ACLU-LDF lawyers. Fourteen of the men were unskilled laborers; seven were farm laborers; thirty-seven of the forty were entirely destitute, and the remaining three reported having less than a hundred dollars.

At the time of the interviews, death-row inmates were also given the Beta test, a nonverbal IQ test commonly used to test prisoners in order to measure their likely understanding of legal proceedings. If sufficient numbers were of subnormal intelligence, it would be strong evidence that they could not have taken even the initial steps necessary to bring their cases to court and that therefore a class action was necessary to protect their interests. Here again, Simon's position was vindicated. The mean IQ for the group of forty men was 88.35 (80 to 89 is considered "low average"), and the mean number of years of school attendance was 8.62. Further, when the inmates were divided into three groups, those with non-ACLU-LDF counsel had had the highest IQ—almost normal; those without counsel had lower IQ's—distinctly subnormal; and those with ACLU-LDF counsel had the lowest IQ's of all. The lawyers later argued that the results demonstrated that helpless men were without help—though the private joke was that any death-row inmate with any brains was too smart to want ACLU-LDF counsel.

The results of the interviews and tests were forwarded to Judge McRae and a hearing was scheduled. Amsterdam flew to Jacksonville to tell the Judge that the unrepresented, ignorant, and indigent men of Raiford's death row must be heard in one case for want of the ability to institute and maintain individual legal proceedings designed to secure their rights. The climax of his plea was: "They will be heard together or they will be electrocuted individually. There is no third possibility." Months later Judge McRae decided that the class action was proper.<sup>22</sup> He continued the prohibition on execution and told the lawyers that he would consider their arguments about Florida capital punishment laws.

As soon as Simon's unusual lawsuit and its unexpected result had become generally known, civil rights lawyers in several other capital punishment states implored the Fund to assist them in bringing their own class actions. With the exception of California, where a class suit was brought, Amsterdam, Himmelstein, and I actively discouraged duplication of the Florida case. This was a difficult decision to communicate to the harassed lawyers, many of whom saw a single lawsuit directed from New York as relieving the endless rounds of litigation in scores of death cases. Although there were compelling reasons to avoid presenting the courts with a series of death-row class actions, it was only because judicial abolition had become a national

22. *Adderly v. Wainwright*, 46 F.R.D. 97 (M.D. Fla. 1968). See also *Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967).

movement, of which the Fund was acknowledged leader, that these reasons were generally accepted by the interested lawyers. Nevertheless, it took great powers of persuasion to restrain them. Take Amsterdam's 1967 letter to a Louisiana lawyer:

I have discussed the question of a Louisiana class action to invalidate the death penalty with [a Louisiana civil rights lawyer] . . . .

The short of the matter is that I have urged him strenuously not to begin any such suit . . . .

The Florida and California cases originated in intense necessity. The governors of those States had begun signing death warrants wholesale, and literally dozens of men were going to die if something was not done. The state and federal judges in the areas were not bold enough to keep stepping into the whirlwind and snatching out individual condemned men. A class action was necessary to save life, and we filed one in each state.

The legal problems with such class lawsuits are staggering. Quite apart from substantive problems, the procedural questions involved in class action habeas, exhaustion of state remedies, federal injunction of state court judgments, *res judicata*, etc. are limitless, vexing and extremely difficult. Take it from me. I have spent the past couple of months on virtually nothing else.

Now, in the Florida and California actions, we have just about gotten our toes on the beach. We have won the most limited, provisional and precarious kind of interlocutory victories . . . .

What we do *not* need—what would be a disaster in these two cases involving one hundred and ten human lives—is the backwash of some third lawsuit which, if it fortuitously lands before an unsympathetic district judge in a third State, could result in a decisive dismissal with an opinion saying we are all wet. We would then have to go prematurely and precipitously to some Court of Appeals which—on hastily prepared briefs and an inadequate record—could well make a ruling that kills not merely the third lawsuit, but the Florida and California ones as well.

I myself am involved in the representation of condemned men in at least eight States other than Florida and California. I would not for one moment consider a class action suit in any of those States . . . . So long as individual habeas corpus petitions and like traditional remedies on traditional legal grounds will suffice to keep these men out of the chair, we are using them. It is in their best interest that we do so. It is in the best interest of one hundred and ten men in Florida and California. It is in the best interest of hundreds of other condemned men, in other States, whose fortunes ride on the outcome of the Florida and California suits.

In the last few weeks, I have spoken to a number of attorneys in a number of States who contacted me because they were in-

terested in bringing suits of this character. I have explained to each why I thought they should not, and they have universally agreed. The plain fact is that death cases are not occasions for venturesomeness in litigation. They are not cases in which making litigation is desirable. Test litigation is well and good, but not with human life at stake. There are enough occasions when one has to go to court to save life that is in immediate jeopardy, and it is these cases . . . that must be made the test cases.

As I understand the Louisiana situation, it presents no such case. No death warrants have been signed for three years. There are no men who are in immediate jeopardy of dying; and, if one or two should come close, they have plenty of traditional remedies to hold the fort. Under these circumstances, I cannot see a class action as anything but a gratuitous gamble with many, many lives . . . .

While Judge McRae pondered the legal issues involved in the Florida death-row case, Ronald Reagan began to make good on *his* election promises. California's first execution in four years took place on April 12, 1967, the day before Judge McRae stayed all Florida executions. Aaron Mitchell, the thirty-eight-year-old black killer of a white Sacramento policeman, went to his death in the San Quentin gas chamber. While he bled from an unsuccessful suicide attempt with a razor blade, Mitchell chanted to Byron E. Eshelman, the prison chaplain, "I am the second coming of Jesus Christ."<sup>23</sup> Hours after the execution the Judiciary Committee of the California State Senate voted down an abolition bill. After Mitchell died the California way—by suffocation from the fumes of a mixture of cyanide and sulphuric acid—with Reagan's men scheduling new death dates, a class suit similar to Simon's Florida case was desperately needed.

Leroy Clark and Charles Stephen Ralston, soon to be appointed Director of the Fund's San Francisco office, were in California at the time. They set up a conference call with Jack Greenberg in New York and after discussion decided to find a group of California attorneys willing to put the case together. Ralston got in touch with Gerald Marcus, a San Francisco attorney who headed an organization called Californians Against Capital Punishment. The next day Marcus agreed to arrange a meeting of interested attorneys, most of whom were volunteer lawyers for the American Civil Liberties Union of Northern California (ACLUNC).

One of the members of the group was Paul Halvonik, who had

23. Eshelman, *San Quentin's Last Execution*, Sunday Examiner and Chronicle (San Francisco), May 7, 1972, at 40.

joined the staff of ACLUNC in November of 1966. Since by that year both the National ACLU and the Southern California ACLU affiliate had decided that abolition of the death penalty raised a civil liberties issue, Halvonik had been under the mistaken impression that ACLUNC would support pending legislation to abolish the California death penalty. His mistake quickly turned into a source of acute embarrassment when he was forced to inform Senator Moscone, author of the principal California death penalty repeal bill, that ACLUNC would not formally support his legislation. Embarrassment turned to horror when Reagan let Mitchell die.

Before Mitchell's execution Halvonik had decided to do what he could to change the Northern California affiliate's policy. He approached Marshall Krause, who was then ACLUNC's Staff Counsel, with the idea of gathering a few death-row inmates for the purpose of a class action death-row suit. Krause agreed to put the matter to the Board of Directors once Halvonik represented a death-row client. Halvonik immediately contacted several lawyers representing men on the row. Before they could agree how to proceed, Halvonik found himself staring at a headline story in the *Berkeley Gazette*: A Florida judge had issued a class action stay for that state's death row. "Imagine," he thought, "some hotshot lawyer has come up with *my* idea."

Spurred by Judge McRae's action, Halvonik entered serious negotiation with Gary Berger, Roy Eisenhardt, Jerome Falk, and Harry Kreamer, all of whom represented death-row inmates. When Marcus invited the group to meet with Amsterdam, Clark, and Ralston, they accepted readily. After several meetings there was general agreement that a California class action modeled on Simon's suit should be quickly filed in federal court and, if possible, timed so that it might be assigned to a sympathetic judge. The one problem that emerged was a Civil Liberties Union policy against joining other organizations in bringing lawsuits. No one doubted that the ACLUNC Board would waive the noncooperation policy when it was brought to their attention, but the Board did not meet again for a month. The affiliate's executive director could waive the rule, but he was not inclined to do so.

The individual volunteer lawyers, however, made it clear that they were ready to work with the Fund even if ACLUNC did not participate. Halvonik decided that if necessary he would moonlight. With their help, Clark adapted the papers from the Florida case to fit California's somewhat different laws governing capital trials and hurriedly presented them to a San Francisco federal court, where they

were assigned to Judge Robert E. Peckham, a forty-seven-year-old ex-state judge whom Lyndon Johnson had appointed the previous year.

Jerome Falk explained the case and argued for a class stay. The fledgling lawyer, who had clerked for Justice Douglas, was to become one of the most highly respected attorneys in the state, but in 1967 he had practiced law for less than a year. By the time the brief hearing was concluded, Falk's stomach was in knots.

"Whatever anyone else may remember in retrospect," Halvonik recalls, "I remember quite vividly that none of us were sanguine about our prospects for success. On the day prior to the filing of the suit, I took some papers over to Leroy Clark who was working in Marcus' office. I handed the research to Leroy, he looked at me, smiled painfully and said, 'If nothing else comes of this, you have to admire my sheer nerve in going down and filing this thing.' I did."

On the day the suit was filed Clark felt compelled to tell the press that he was not "show boating" and that he was quite "serious" about the suit. So was Judge Peckham. On July 5, 1967, with Judge McRae's example before him and a dozen California inmates scheduled for execution, he prohibited California from killing anyone until he decided whether a class action was proper.<sup>24</sup>

In Florida, lawyers from the state attorney general's office had accepted, although begrudgingly, Judge McRae's stay of all executions until he determined whether death-row inmates were permitted to maintain a class action. But the Democratic attorney general of California, Thomas Lynch, was not going to let Reagan, a Republican, stand alone as the defender of capital punishment. Two days after Judge Peckham issued his order, Lynch's office applied to the Ninth Circuit for a writ that would set aside the stay.

A hearing was set for the following Monday. One of the lawyers immediately called a circuit judge to request additional time to prepare a brief, but the judge refused. "You fellows are always filing these things at the last moment," he commented. The judge obviously thought this was another case of a death-row inmate seeking a late-hour postponement. He remained unconvinced when the lawyer patiently explained that "he" had not filed "this thing" at all—the attorney general had—much less at the last minute. "After all," the judge added, "there's an execution set for Tuesday."

While an attempt such as Attorney General Lynch's to persuade federal appellate courts to interfere with ongoing proceedings in trial

24. *Hill v. Nelson*, 271 F. Supp. 439, 444 (N.D. Cal. 1967).

courts is rarely successful, the Ninth Circuit did not have a favorable track record on the issues which made up the Fund's challenge and it might well have been tempted to overrule Judge Peckham. If Lynch succeeded, several unrepresented men would die almost immediately, and the effect on Judge McRae's resolve might be literally fatal. With but three days remaining to meet the attorney general's challenge, Amsterdam flew from Philadelphia to San Francisco. With the assistance of the volunteer lawyers, he produced a heavily documented seventy-two page brief in defense of the stay. Halvonik also pitched in and helped. He had persuaded his superiors that the Board of Directors would be upset if the ACLUNC received no credit for the work that was being done. (Later, the board approved participation in the case.)

On Monday as scheduled, Amsterdam told three circuit judges that while death-row inmates had a "vital" interest in remaining alive to assert any rights they might have, California had no such weighty interest in killing them before a final decision in their case. The hearing was short; the judges were anxious to be off for a judicial conference in Seattle. Within an hour after the argument, while an exhausted Amsterdam stood before television cameras that had been set up at the courthouse, the court turned down the attorney general's plea.

Judge Peckham's authority to hear the case now had been established, but a month later he decided not to take Judge McRae's route. Uncertain of his authority, he would not consider the case as a class action. Nevertheless, he thought that he did have the power to give the lawyers access to San Quentin's death row and to require the state to notify them of scheduled executions so that individual habeas petitions could be filed for every death-sentenced California prisoner. Once such petitions were filed, stays of execution would be granted automatically: "Justice requires that no condemned man who has standing to raise any federal constitutional issue . . . should be executed until such question is finally adjudicated."<sup>25</sup>

Leroy Clark was bitterly disappointed that Judge Peckham had not agreed to hear the case as a class action and correctly predicted that other California federal judges would not easily agree to grant automatic stays of execution. Halvonik and Falk would make many "last moment" runs to court to get them. But Judge Peckham had set in motion events which tied the hands of the California execu-

25. *Hill v. Nelson*, 272 F. Supp. 790, 795 (N.D. Cal. 1967).

tioner. In the course of considering whether to entertain the class action, he had ruled that several of the constitutional questions raised in the case had never been presented to the California state courts, and that before a federal judge decided them, state judicial remedies had to be exhausted.

The lawyers were delighted to comply. A set of habeas petitions was soon presented to the California Supreme Court in the names of Robert Page Anderson and Frederick Saterfield, two murderers whose executions had been scheduled. The court was asked to refer the cases to an impartial fact-finder and to order him to hear testimony from expert witnesses regarding several of the constitutional claims, such as the physical and psychological cruelty of the death penalty. If given the opportunity to make a factual demonstration of the cruelty of execution, Amsterdam and Himmelstein were prepared to put on the witness stand the social and behavioral scientists, criminologists, and wardens whom they had cultivated over the months.

But a lengthy factual inquiry into capital punishment was not on the agenda of the California Supreme Court. The judges would consider legal arguments against the death penalty but would not receive oral testimony. Nevertheless, on November 14, 1967, the day before a man named Robert Lee Massie was to be executed, the court on its own initiative entered a stay of all executions in the state. Six months later the court convened in a crowded San Francisco courtroom to hear the arguments of counsel. Amsterdam represented Anderson and Saterfield; a veteran attorney, Albert W. Harris, represented the state, and civil libertarians Abraham Lincoln Wirin and Gerald Gottlieb appeared for the ACLU as amicus. Several of the judges seemed interested and sympathetic to the abolitionist position, and as Amsterdam left the courtroom, after having fielded friendly questions from four of them—a majority of the court—he felt relieved. California seemed safe, at least until the court reached a decision.

It took almost eight months for the seven members of the California Supreme Court to decide the case brought on behalf of Anderson and Saterfield. When the result was announced,<sup>26</sup> the abolitionist position had failed by an eyelash.

In a lengthy opinion by Justice Louis H. Burke, the court held by a vote of 4 to 3 (with Justice Mathew Trobiner, Chief Justice Roger C. Traynor, and Justice Raymond Peters dissenting) that capi-

26. *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968).



tal punishment as administered by California was not cruel and unusual punishment, and that the Constitution did not require legal standards for the guidance of the jury. The court did, however, order new penalty trials for Anderson and Saterfield, on the ground that several persons had been excluded from their juries in violation of the Supreme Court's *Witherspoon* decision.<sup>27</sup>

Of the seven justices on the court, four wrote opinions. As the losers, LDF lawyers were disappointed with Justice Burke's reasoning, but welcomed Justice Trobiner's dissent because it contributed an approach which could be used to advantage in other courts: the notion that *Witherspoon* required a total reexamination by lower courts of capital sentencing procedures.<sup>28</sup> In a concurring opinion, Justice Marshall McComb added that he did not even agree that Anderson and Saterfield should have an opportunity to be resentenced (to death or to a possibly lighter sentence).<sup>29</sup>

The lawyers were surprised that they had come within one vote of success, even though the California Supreme Court had been long reputed the most progressive state supreme court, because no court had ever come close to ruling that a jury could not sentence a man to death without some legal principles governing its decisions. But if the margin of defeat was unexpectedly slim, the manner of defeat was totally unpredictable. The crucial vote that swung the court against Anderson and Saterfield was that of Justice Stanley Mosk, a former attorney general of California and an outspoken opponent of the death penalty for many years prior to his judicial appointment.

Mosk's brief explanation of his decisive vote could only harden the opposition to abolition of those judges who disliked the death penalty but lacked confidence in their authority to end it:

In my years as Attorney General of California (1959-1964), I frequently repeated a personal belief in the social invalidity of the death penalty, notably in testimony before California legislative committees in March 1959, July 1960, and April 1963.

Naturally, therefore, I am tempted by the invitation of petitioners to join in judicially terminating this anachronistic penalty. However, to yield to my predilections would be to act willfully "in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled. . . ." (Frankfurter, *The Supreme Court*

27. *Id.* at 617, 447 P.2d at 120, 73 Cal. Rptr. at 24.

28. *Id.* at 636, 447 P.2d at 133, 73 Cal. Rptr. at 37.

29. *Id.* at 669, 447 P.2d at 155, 73 Cal. Rptr. at 59.

*in the Mirror of the Justices* (1957), 105 U. PA. L. REV. 781, 794.)

As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be.<sup>30</sup>

Coming from a known abolitionist like Justice Mosk, such reasoning struck like a blow to the midsection. LDF lawyers thought the death penalty was irrational as well as inhumane, but unwise and immoral laws are not necessarily unconstitutional. By invoking Felix Frankfurter's philosophy that judges must exercise enormous restraint in construing constitutional provisions to invalidate legislation, Justice Mosk stood on what many regarded as hallowed ground.

In the months that followed the decision, Anderson, Saterfield, and other California death-row inmates joined a parade of appeals to the Supreme Court of the United States, totally disarranging Jerome Falk's previously untroubled practice of real estate and tax law. Falk, along with Amsterdam, Himmelstein, Halvonik, and Ralston, spent hundreds of hours either preparing the necessary petitions or finding volunteers to do the job. Many were written half in New York, half in California and put together by cross-country phone. One of these cases illustrates the care and tact they brought to this work and, not incidentally, the range of problems that had been taken on when the Fund decided that death row was part of its constituency.

In 1965, Robert Lee Massie had been convicted of robbery, assault with intent to commit murder, and murder, and sentenced to death. An appeal to the California Supreme Court proved unsuccessful. An execution date was set for October 10, 1967, and later postponed first to November 2 and then to November 15. Massie wrote to his attorney, Roger S. Hanson, requesting that Hanson take no further action in his behalf: He wished to die. Massie also wrote to Justice Douglas, Chief Justice Traynor, and Judge Peckham, informing them that he desired no interference with his execution.

Thirty-six hours before Massie was due to die in the gas chamber, Judge Peckham asked Hanson and Falk to find out if he might change his mind. By the time the two lawyers drove across the Golden Gate Bridge to San Quentin, normal visitor facilities were closed for the night. Hanson and Falk were escorted through the darkened prison onto death row, admitted to a cell, and permitted to speak to the condemned man. A guard stood by the door with a shotgun. Massie was adamant about his wish to be executed, and he treated Falk as an interloper. Falk suddenly realized that he was in a tiny room with a

30. *Id.* at 634-35, 447 P.2d at 131-32, 73 Cal. Rptr. at 35-36.

man who said he wanted to die, and that all that Massie need do to have his wish would be to force the guard to shoot. "I continued to listen to Massie," Falk reported, "but his words kept mingling with thoughts of ricocheting shotgun pellets."

The next morning, despite Massie's stubborn wish to die, Falk pressed Judge Peckham to halt the execution until he could determine whether Massie was sane. Falk pointed to an affidavit obtained from Dr. Bernard Diamond, an experienced psychiatrist on the Berkeley faculty. Although Diamond had not examined Massie, he had concluded on the basis of Massie's background and public statements that there was a reasonable probability that he was suffering from serious mental illness and was therefore incapable of exercising normal judgment as to what was in his best interest.

While the lawyers waited for Judge Peckham to decide whether to stay the execution, a reporter burst through the courtroom door and announced that the California Supreme Court had stayed all executions in the state. Hanson and Falk subsequently filed a habeas petition in the California Supreme Court asking for a determination of Massie's sanity. After its November 1968 decision in *Anderson and Saterfield*, the court denied the petition and an appeal was taken on Massie's behalf to the United States Supreme Court. But Massie again attempted to thwart efforts to save him by filing his own motion to dismiss the petition for review, arguing that as a party to the petition he no longer had any interest in the issue being litigated—*i.e.*, his own life. Under the Supreme Court rules, dismissal appeared to be his right.

Massie was not unusual in employing the death penalty to realize a death wish. An amicus curiae brief filed by the American Psychiatric Association in a Supreme Court capital case identified three groups for whom capital punishment served as an incitement to kill rather than a deterrent: those who felt that the death penalty was a just punishment for their wrongdoing, and so might murder to bring it about; those to whom the risk of danger had an attraction; and those lured by the prospect of a spectacular trial and public attention.<sup>31</sup>

Massie's request that the Supreme Court dismiss his case squarely presented the question of whether he had the right to be executed by the state notwithstanding that litigation might eliminate his death sentence. On December 2, 1969, Falk and Amsterdam took the only route consistent with legal ethics that might thwart Massie's wish

31. Brief for American Psychiatric Association as Amicus Curiae at 5-6, *Maxwell v. Bishop*, 398 U.S. 262 (1970).

to die. They drafted a letter informing the United States Supreme Court of the case and urged that "if Massie is to be the first man to be executed in California in thirty-one months, and the first man in the nation since June 1967," surely that should only happen after "a fair determination . . . that his conviction and death sentence are constitutionally valid" or that he is legally competent to waive any constitutional claims that he might have.

Massie's case also raised questions which went to the heart of the lawyer-client relationship. It is, of course, generally the client who defines his interests, while the advocate serves only to accomplish them. But does a man have a right to demand that the state kill him—by killing by the state is unconstitutional—by dismissing his attorney, by failing to pursue legal proceedings? If there is any truth to the assertion of the Joint Conference on Professional Responsibility that the lawyer's "highest loyalty" is to "those fundamental processes of government and self-government upon which the successful functioning of our society depends,"<sup>32</sup> then the attorney's course is *not* dictated solely by his client's death wish.

For Amsterdam and Falk the matter was complicated by the fact that Massie's death would have affected every other death-row inmate by breaking the moratorium, which was by then over two years old. They took grateful refuge from the agonizing dilemma in the possibility of Massie's insanity, which, if established, would destroy his capacity, legal as well as moral, to choose between life and death.

In the April 1971 issue of *Esquire* magazine, Massie publicly aired his position by publishing a blistering condemnation of "NAACP lawyers" who alleged in numerous courts without "supporting evidence" that he was insane. He could sympathize with men on death row who claimed that they had been convicted without sentencing standards, but he could not see how their cases applied to him. "I pled guilty to first degree murder and was tried by a judge, not a jury." Massie did not advocate capital punishment; indeed, he thought it the utmost hypocrisy in a Christian. But now that he was sentenced to death, he found that death was far preferable to life imprisonment, "a fate worse than death." His plea for a speedy end is worth quoting at length:

[I]t is only fitting that my life should culminate in the gas chamber. From the time I was seven years old I have been a ward of the State. From the years of seven to ten I was placed

32. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1162 (1958).

in a number of foster homes; from eleven to fourteen I lived in the state reformatory (euphemistically called a "Training School for Boys"); and from fifteen to twenty-three, I was in jails and penitentiaries. Finally, at the age of twenty-three I was delivered to the Warden at San Quentin, where it is hoped that I will shortly graduate to the merciful oblivion called *death*. It is readily apparent that my years of penal servitude have not helped me, nor has it helped society. Therefore, what would be gained by spending the rest of my natural life in prison? I have never contributed anything worthwhile to society and never will.

For what reason should I strive to have my judgment of death reduced to life in prison? If life on earth such a blessing or so precious that I should be desirous of spending it in a dehumanized hellhole of steel and concrete where the law of the jungle and degeneracy reign supreme, where all human and moral values are considered a weakness? . . . Rotting away in prison for the rest of my days and deteriorating mentally, perhaps even going completely insane is not a very pleasing incentive for continuing to cling to this life.<sup>33</sup>

Brave, moving words, and certainly not written by a madman. Several years later, however, when subsequent events had dramatically changed his legal situation, Massie had mellowed enough to ask Jerry Falk to be his lawyer.

*The events that changed Massie's legal status were, of course, first the decision of the California Supreme Court that capital punishment violated the "cruel or unusual punishment" Clause of the California Constitution,<sup>34</sup> and second the decision of the Supreme Court in Furman.<sup>35</sup> In both cases, the LDF-AGLU lawyers served as counsel and today, amidst a growing national controversy over the wisdom and constitutionality of mandatory capital punishment laws, they continue to be active in efforts to insure that the machinery of legal death is never restored.*

33. Massie, *Death by Degrees*, *ESQUIRE*, Apr. 1971, at 179.

34. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

35. 408 U.S. 238 (1972).